ETHICS IN LAND USE HEARINGS[1]

Whether a developer, a neighborhood leader, a public official or an employee, we all have a serious role to play to assure that fair and equitable decisions are being made.

Avoid Conflict

I.C. 59-704 states that a public official shall not take any official action or make a formal decision concerning any matter where he has a conflict of interest. (Ethics in Government Act)

Idaho Code 59-702 states the policy and purpose behind the ethics in government act. This section states that it is hereby declared that the position of a public official at all levels of government is a public trust and it is in the public interest to:

(1) Protect the integrity of government throughout the state of Idaho while at the same time facilitating recruitment and retention of personnel needed within government;

(2) Assure independence, impartiality and honesty of public officials in governmental functions;

(3) Inform citizens of the existence of personal interests which may present a conflict of interest between an official's public trust and private concerns;

(4) Prevent public office from being used for personal gain contrary to the public interest;

(5) Prevent special interests from unduly influencing governmental action; and

(6) Assure that governmental functions and policies reflect, to the maximum

Idaho Code 59-703 defines the terms for this act. The definitions are significant. For purposes of this chapter:

(1) "Official action" means any decision on, or proposal, consideration, enactment, defeat, or making of any rule, regulation, rate-making proceeding or policy action or nonaction by a governmental body or any other policy matter which is within the official jurisdiction of the governmental body.

(2) "Business" means any undertaking operated for economic gain, including, but not limited to, a corporation, partnership, trust, proprietorship, firm, association or joint venture.

(3) "Business with which a public official is associated" means any business of which the public official or member of his household is a director, officer, owner, partner, employee or holder of stock over five thousand dollars ($5,000) or more at fair market value.

(4) "Conflict of interest" means any official action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit of the person or a member of the person's household, or a business with which the person or a member of the person's household is associated, unless the pecuniary benefit

[1] Provided by City of Boise Employee noting permission

arises out of the following:

(a) An interest or membership in a particular business, industry, occupation or class required by law as a prerequisite to the holding by the person of the office or position;

(b) Any action in the person's official capacity which would affect to the same degree a class consisting of an industry or occupation group in which the person, or a member of the person's household or business with which the person is associated, is a member or is engaged;

(c) Any interest which the person has by virtue of his profession, trade or occupation where his interest would be affected to the same degree as that of a substantial group or class of others similarly engaged in the profession, trade or occupation;

(d) Any action by a public official upon any revenue measure, any appropriation measure or any measure imposing a tax, when similarly situated members of the general public are affected by the outcome of the action in a substantially similar manner and degree.

(5) "Economic gain" means increase in pecuniary value from sources other than lawful compensation as a public official.

(6) "Governmental entity" means:

(a) The state of Idaho and all agencies, commissions and other governmental bodies of the state; and

(b) Counties and municipalities of the state of Idaho, all other political subdivisions including, but not limited to, highway districts, planning and zoning commissions or governmental bodies not specifically mentioned in this chapter.

(7) "Members of a household" means the spouse and dependent children of the public official and/or persons whom the public official is legally obligated to support.

(8) "Person" means an individual, proprietorship, partnership, association, trust, estate, business trust, group or corporation, whether operated for profit or not, and any other legal entity, or agent or servant thereof, or a governmental entity.

(9) "Public office" means any position in which the normal and usual duties are conducted on behalf of a governmental entity.

(10) "Public official" means any person holding public office in the following capacity:

(a) As an elected public official meaning any person holding public office of a governmental entity by virtue of an elected process, including persons appointed to a vacant elected office of a governmental entity, excluding members of the judiciary; or

(b) As an elected legislative public official meaning any person holding public office as a legislator; or

(c) As an appointed public official meaning any person holding public office of a governmental entity by virtue of formal appointment as required by law; or

(d) As an employed public official meaning any person holding public

office of a governmental entity by virtue of employment, or a person employed by a governmental entity on a consultive basis.

Idaho Code 59-704 details what an elected or non-elected official should do when they are in conflict. Note that this act applies to all levels of government. A public official shall not take any official action or make a formal decision or formal recommendation concerning any matter where he has a conflict of interest and has failed to disclose such conflict as provided in this section. Disclosure of a conflict does not affect an elected public official's authority to be counted for purposes of determining a quorum and to debate and to vote on the matter, unless the public official requests to be excused from debate and voting at his or her discretion. In order to determine whether a conflict of interest exists relative to any matter within the scope of the official functions of a public official, a public official may seek legal advice from the attorney representing that governmental entity or from the attorney general or from independent counsel. If the legal advice is that no real or potential conflict of interest exists, the public official may proceed and shall not be subject to the prohibitions of this chapter. If the legal advice is that a real or potential conflict may exist, the public official:

(1) If he is an elected legislative public official, he shall disclose the nature of the potential conflict of interest and/or be subject to the rules of the body of which he/she is a member and shall take all action required under such rules prior to acting on the matter. If a member requests to be excused from voting on an issue which involves a conflict or a potential conflict, and the body of which he is a member does not excuse him, such failure to excuse shall exempt that member from any civil or criminal liability related to that particular issue.

(2) If he is an elected state public official, he shall prepare a written statement describing the matter required to be acted upon and the nature of the potential conflict, and shall file such statement with the secretary of state prior to acting on the matter. A public official may seek legal advice from the attorney representing that agency or from the attorney general or from independent counsel. The elected public official may then act on the advice of the agency's attorney, the attorney general or independent counsel.

(3) If he is an appointed or employed state public official, he shall prepare a written statement describing the matter to be acted upon and the nature of the potential conflict, and shall deliver the statement to his appointing authority. The appointing authority may obtain an advisory opinion from the attorney general or from the attorney representing that agency. The public official may then act on the advice of the attorney general, the agency's attorney or independent counsel.

(4) If he is an elected public official of a county or municipality, he shall disclose the nature of a potential conflict of interest prior to acting on a matter and shall be subject to the rules of the body of which he/she is a member and take all action required by the rules prior to acting on the matter. If a member requests to be excused from voting on an issue which involves a conflict or a potential conflict, and the body of which he is a member does not excuse him, such failure to excuse shall exempt that member from any civil or criminal liability related to that particular issue. The public official may obtain an advisory opinion from the attorney general or the attorney for the county or municipality or from independent counsel. The public official may then act on the advice of the attorney general or attorney for the county or municipality or his independent counsel.

(5) If he is an appointed or employed public official of a county or municipality, he shall prepare a written statement describing the matter required to be acted upon and the nature of the

potential conflict, and shall deliver the statement to his appointing authority. The appointing authority may obtain an advisory opinion from the attorney for the appointing authority, or, if none, the attorney general. The public official may then act on the advice of the attorney general or attorney for the appointing authority or independent counsel.

(6) Nothing contained herein shall preclude the executive branch of state government or a political subdivision from establishing an ethics board or commission to perform the duties and responsibilities provided for in this chapter. Any ethics board or commission so established shall have specifically stated powers and duties including the power to:

(a) Issue advisory opinions upon the request of a public official within its jurisdiction;

(b) Investigate possible unethical conduct of public officials within its jurisdiction and conduct hearings, issue findings, and make recommendations for disciplinary action to a public official's appointing authority;

(c) Accept complaints of unethical conduct from the public and take appropriate action.

I.C. 59-704A. NONCOMPENSATED PUBLIC OFFICIAL -- EXCEPTION. When a person is a public official by reason of his appointment or election to a governing board of a governmental entity for which the person receives no salary or fee as compensation for his service on said board, he shall not be prohibited from having an interest in any contract made or entered into by the board of which he is a member, if he strictly observes the procedure set out in section 18-1361A, Idaho Code.

18-1361A. NONCOMPENSATED APPOINTED PUBLIC SERVANT -- RELATIVES OF PUBLIC SERVANT – EXCEPTION states that When a person is a public servant by reason of his appointment to a governmental entity board for which the person receives no salary or fees for his service on said board, it shall not constitute a violation of the provisions of subsection (1)(d) or (e) of section 18-1359, Idaho Code, for a public servant or for his relative to contract with the public body of which the public servant is a member if the procedures listed below are strictly observed. For purposes of this section, "relative" shall mean any person related to the public servant by blood or marriage within the second degree.

(1) The contract is competitively bid and the public servant or his relative submits the low bid; and

(2) Neither the public servant nor his relative takes any part in the preparation of the contract or bid specifications, and the public servant takes no part in voting on or approving the contract or bid specifications;
and

(3) The public servant makes full disclosure, in writing, to all members of the governing body, council or board of said public body of his interest or that of his relative and of his or his relative's intention to bid on the contract; and

(4) Neither the public servant nor his relative has violated any provision of Idaho law pertaining to competitive bidding or improper solicitation of business.

59-705. CIVIL PENALTY. (1) Any public official who intentionally fails to disclose a conflict of interest as provided for in section 59-704, Idaho Code, shall be guilty of a civil offense, the penalty for which may be a fine not to exceed five hundred dollars ($500), provided that the provisions of this subsection shall not apply to any public official where the governmental

entity on which said official serves has put into operation an ethics commission or board described in section 59-704(6), Idaho Code.

(2) The penalty prescribed in subsection (1) of this section does not limit the power of either house of the legislature to discipline its own members, nor limit the power of governmental entities, including occupational or professional licensing bodies, to discipline their members or personnel. A violation of the provisions of this chapter shall not preclude prosecution and conviction for any criminal violation that may have been committed.

Separate and apart from the general ethics statute, the local land use planning act has its own ethics statute (I.C. 67-6506). This section states: A governing board creating a planning, zoning, or planning and zoning commission, or joint commission shall provide that the area and interests within its jurisdiction are broadly represented on the commission. A member or employee of a governing board, commission, or joint commission shall not participate in any proceeding or action when the member or employee or his employer, business partner, business associate, or any person related to him by affinity or consanguinity within the second degree has an economic interest in the procedure or action. Any actual or potential interest in any proceeding shall be disclosed at or before any meeting at which the action is being heard or considered. For purposes of this section the term "participation" means engaging in activities which constitute deliberations pursuant to the open meeting act. No member of a governing board or a planning and zoning commission with a conflict of interest shall participate in any aspect of the decision-making process concerning a matter involving the conflict of interest. A member with a conflict of interest shall not be prohibited from testifying at, or presenting evidence to, a public hearing or similar public process after acknowledging nonparticipation in the matter due to a conflict of interest. A knowing violation of this section shall be a misdemeanor.

According to case law, there is no way to cure a conflict under the local land use planning act. A governing board member with a conflict cannot participate in a decision. Any decision made by a conflicted member, and not re-made by a majority of the board thereafter is null and void. (See Gooding County v Wybenga 137 Idaho 201 (2002)).

In 2006, Idaho Code 67-6506 was amended by removing this language from the statute:

A member with a conflict of interest shall not be prohibited from testifying at, or presenting evidence to, a public hearing or similar public process after acknowledging nonparticipation in the matter due to a conflict of interest.

The code now reads as follows:

67-6506. CONFLICT OF INTEREST PROHIBITED. A governing board creating a planning, zoning, or planning and zoning commission, or joint commission shall provide that the area and interests within its jurisdiction are broadly represented on the commission. A member or employee of a governing board, commission, or joint commission shall not participate in any proceeding or action when the member or employee or his employer, business partner, business associate, or any person related to him by affinity or consanguinity within the second degree has an economic interest in the procedure or action. Any

actual or potential interest in any proceeding shall be disclosed at or before any meeting at which the action is being heard or considered. For purposes of this section the term "participation" means engaging in activities which constitute deliberations pursuant to the open meeting act. No member of a governing board or a planning and zoning commission with a conflict of interest shall participate in any aspect of the decision-making process concerning a matter involving the conflict of interest. A knowing violation of this section shall be a misdemeanor.

This change seems to be a double edged sword. On the one hand, this change saves other commissioners from undue influence by their fellow commissioners. Also, it is difficult for the public to watch a commissioner go from a neutral position to that of an advocate. On the other hand, a city or county wants dynamic members of the community to serve on the commission. This prohibition causes commissioners to choose between representing their clients and sitting on a commission. While this is difficult to work around in larger cities, it may make it difficult to get the required number of commissioners to serve. Also, why does this prohibition apply only to planning and zoning commissions and not all commissions (historic preservation, etc.).

Regardless of the issues, from an ethics point of view, this change illustrates how important it is to remain objective – and avoid undue influence.

Avoid Bias

Land Use hearings are divided into broad categories, quasi-legislative and quasi-judicial. Generally, quasi-legislative matters have broad application to all or a group of people. When a governing board is sitting in its legislative capacity, all views are important to consider, wherever and however obtained. It is believed that a decision maker sitting in this capacity needs to absorb as much information as possible. Thus, there are few rules for receiving information in this setting.

When a governing body sits in a quasi-judicial capacity, they must confine themselves to the record produced at the public hearing. Failing to do so violates due process. When a general rule is applied to a specific individual, group or parcel, then the governing body sits in a quasi-judicial capacity. It is in this situation where corruption of the process is easy to occur. The developer and the neighbor are simply looking for a certain outcome. The decision maker is trying to be responsive to the electorate. The employee is trying to keep the process moving. Few of the players are adequately trained and the system does not have built in checks and balances.

What suffers in the intense battle is procedural due process. That is notice and opportunity for a hearing. Not just any hearing, but a fair hearing. A tainted hearing not only causes people to lose faith in the system, but the acts that caused the taint can backfire and cause a decision to be overturned. The Due Process Clause entitles a person to an impartial and disinterested tribunal. This requirement applies not only to courts, but also to quasi- judicial hearings. Eacret v Bonner County, 139 Idaho 780, 86 P.3d 494 (2004) Bias of a board member renders his participation in the due process hearing constitutionally unacceptable. Johnson v Bonner County School District No. 82, 126 Idaho 490, 887 P.2d 35 (1994) The reviewing court must determine the effect of the conflicted vote in order to assure impartial decision making and to **avoid the appearance of impropriety**. Floyd v Board of Commissioners of Bonneville County, 137 Idaho 718, 52 P.3d 863 (2002)

A decision maker is not disqualified simply because he has taken a position, even in public, on **a policy issue** related to the dispute. Pre- hearing statements by a decision maker become fatal to the validity of the decision if one of three circumstances is shown: (1) the decision maker has made up his or her mind regarding the facts and will not listen to the evidence with an open mind; or (2) the decision maker will not apply the existing law; or (3) the decision maker has already made up their mind regarding what the outcome of the hearing should be. Eacret, supra.

Refrain from Ex parte Comments and Impermissible Viewing

A record at a public hearing does not limit the body from only listening to those who physically testify at the hearing. However, if they receive phone calls etc. outside the hearing they must disclose at the hearing the name of the person they communicated with, whom the person is associated with and the nature of the communication. Thus allowing persons at the hearing to respond to the comments they were not privy to. Idaho Historic Preservation Council v City Council of the City of Boise 8 P3d 646 (2000). If the governing board is sitting as an appellate body, it must confine itself to the record made below. On appeal, the governing body cannot go to the site to view the evidence. And, if it does so it must give notice so that all parties can be there Comer v County of Twin Falls 942 P.2d 557 (1997). However, if a lower body chooses to view a site they may do so as long as any information received at the site was not the basis for the decision. The lower body is not acting as an appellate body. Further, no error will be found as long as the hearing yielded substantially the same evidence that would be garnered from a visit to the site. *Evans v Board of Cassia County Commissioners and Watterson,* 137 Idaho 428, 50 P3d 443 (2000)– Note – there were three decisions made and substituted in this case.

Procedural due process is an integral part of the hearing process. A governing board is required to adopt procedures for the conduct of the public hearings. The procedures must include a process whereby affected persons may present and rebut evidence. See Idaho Code 67-6535(b). The purposes of the disclosure requirements are to afford opposing parties the opportunity to rebut the substance of any ex-parte communication. In a similar vein, the opportunity to be present at a view provides opposing parties the opportunity to be present at a view provides opposing parties the opportunity to rebut facts derived from the visit that may come to bear on the ultimate decision and create an appearance of bias. A view of the subject property without notice to the interested parties may be a violation of due process. Eacret, supra. Best practice is to avoid ex - parte contacts or viewing the property. In this way a decision maker remains impartial and a fair hearing may be had by all. If a decision maker receives ex-parte communications or views the property, they should disclose such on the record so that the matter may be dealt with. Ex - parte contacts not only create an appearance of impropriety, but increase the likelihood that a decision will be overturned as it creates an atmosphere where the decision maker had knowledge that denied the opportunity for all to have a fair hearing. . Eacret, supra. Due to the broad discretion of the decision maker and due to limited judicial review in land use hearings, procedural due process is critical and the Courts will assure that procedural due process is preserved.

A finding is erroneous if there is no testimony or written evidence to support it. Conclusions based on the erroneous findings cannot be supported and will lead to a substantial right of the appellant being prejudiced. *Sanders Orchard v Gem County Board of Commissioners,* 137 Idaho 695, 52 P.3d 840 (2002)

Idaho Code 67-5253 is quoted in Eacret, supra, even though the land use Planning Act only relies on certain aspects of the APA. Idaho Code 67-5253 states that "unless required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in a contested case shall not communicate, directly or indirectly, regarding any substantive issue in the proceeding, with any party, except upon notice and opportunity for all parties to participate in the communication". An applicant does not have to exhaust all administrative remedies before filing suit when the decision maker's pre hearing statements or biased actions make it impossible for a fair and impartial hearing. *Owsley v Idaho Industrial Commission,* Idaho Supreme Court 2005 Opinion No. 15.

LITIGATING THE LAND USE CASE

A. Local Governments power to zone

- Local governments derive their power from the legislature. Title 67, chapter 65 of the Idaho Code allows cities and counties to preside over zoning issues within their jurisdiction. The Local Land Use Planning Act was promulgated to ensure the orderly and effective development of land to the benefit of Idaho citizens. *Friends of Farm to Market v. Valley County and John Carey* supra

1. Planning Board Jurisdiction

A city council or board of county commissioners may exercise all of the powers set forth in the Local Land Use Planning Act or it may confer such powers on a planning commission, zoning commission or combined planning and zoning commission. See Idaho Code 67-6504

If a city council or board of county commissioners institutes a planning commission, zoning commission or combined planning and zoning commission, there are a number of requirements that must be met. If these requirements are not met, then there may be grounds to challenge their decisions.

PRACTICE TIP: Once a year staff should assure that the commission is organized, re-appointed and functioning pursuant to the requirements of Idaho Code 67-6504 and local ordinance.

The requirements for a Commission shall include:

1. Each Commission shall have not less than 3 nor more than 12 voting members.
2. The Commission members shall be appointed by the Mayor or Board Chairman.
3. Prior to appointment, the Commission member must have resided in the County for at least two years. The Commissioner must remain a resident of the County during his term.
4. The term of office for members shall be not less than 3 years, nor more than 6 years.
5. No person shall serve more than 2 full consecutive terms without specific concurrence by two-thirds (2/3) of the governing board adopted by motion and recorded in the minutes.
NOTE: In 2003, House Bill 151 amended Idaho Code 67-6504 (a) to extend the appointed positions of planning and zoning commissioners beyond two terms as long as two-thirds of the governing board (city council or county commissioners) concurred to extend the appointment.
6. A Commission has the authority to appoint sub committees, advisory

committees/neighborhood groups and non-voting ex officio advisors.
7. The Commission must adopt written organization papers or by-laws.

8. All meetings shall be recorded, and the record shall be maintained.
9. The Commission must hold at least 1 regular meeting a month, for not less than 9 months of the year.
10. A majority of the currently appointed voting members shall constitute a quorum.
11. Pursuant to Idaho Code 67-6519, each Commission or Governing Board must establish a reasonable time period within which a recommendation or decision regarding a permit must be made.
12. Whenever a permit is granted or denied, the Commission or Governing Board shall specify the ordinance and standards used in evaluating the application; the reasons for approval or denial; the actions, if any, that the applicant could take to obtain a permit.
13. Pursuant to Idaho Code 67-6520, a hearing examiner may be appointed to hear applications for subdivision, special use and variance permits and requests for zoning district boundary changes.

2. Scope of Planning and Zoning Commissions Authority

1. Establish one or more zones or zoning districts in accordance with the comprehensive plan;
2. Make recommendations to the governing board to grant or deny requests to amend the zoning ordinance. A determination shall be made as to whether the request is in accordance with the comprehensive plan;
3. May require or permit, as a condition of re-zoning, that the applicant bind himself with a development agreement;
4. May process applications for special or conditional use permits;
5. Provide a procedure for processing subdivision applications;
6. May provide for processing applications for Planned Unit Developments;
7. May establish a procedure for the transfer of development rights;
8. **Shall** provide a procedure for processing variance applications;
9. **Shall** conduct a comprehensive planning process designed to prepare, implement, review and update a comprehensive plan;
10. Upon recommendation of the Planning Commission, the governing board may adopt, amend or repeal a future acquisitions map. The map shall designate land proposed for acquisition by a public agency for a maximum 20 year period.
11. Each governing board may adopt standards for such things as: building design; blocks, lots, and tracts of land; yards, courts, green belts, planting strips, parks, and other open spaces; trees; signs; parking spaces; roadways, streets, lanes, bicycle ways, pedestrian walk ways, rights - of - way, grades, alignments, and intersections; lighting; easements for public utilities; access to streams, lakes and viewpoints; water systems; sewer systems; storm drainage systems; street number and names; schools, hospitals and other public and private development.
12. May adopt emergency or interim ordinances or moratoriums, if imminent peril to the public health, safety or welfare requires the adoption of such.
13. **Shall** specifically review public school facility applications for the effect the school will have on increased vehicular, bicycle and pedestrian volumes of traffic on the streets and highways. The Commission shall request the assistance of the Department of transportation or the local

highway district in making this determination.

- NOTE: I.C. 67-6519 (3) is a new section added to the Land Use Planning Act in 2003 pursuant to House Bill No. 229.

14. A member of a governing board or p and z commission member shall not deliberate towards a decision if they have an **economic interest** in a decision. Further, if a member with an economic interest does deliberate in a decision and the matter is set over and finalized when the member with the conflict is not present, then the decision shall be valid. A member of a governing board or commission with an economic interest is free to present evidence or testify after acknowledging that they cannot participate in the decision. See I.C. 67-6506 and Gooding County, Idaho v Wybenga, 2002 Idaho Supreme Court Opinion No. 51 (April 2002).

- 15. In 2006, Idaho Code 67-6506 was amended by removing this language from the statute:

A member with a conflict of interest shall not be prohibited from testifying at, or presenting evidence to, a public hearing or similar public process after acknowledging nonparticipation in the matter due to a conflict of interest.

The code now reads as follows:

67-6507. CONFLICT OF INTEREST PROHIBITED. A governing board creating a planning, zoning, or planning and zoning commission, or joint commission shall provide that the area and interests within its jurisdiction are broadly represented on the commission. A member or employee of a governing board, commission, or joint commission shall not participate in any proceeding or action when the member or employee or his employer, business partner, business associate, or any person related to him by affinity or consanguinity within the second degree has an economic interest in the procedure or action. Any actual or potential interest in any proceeding shall be disclosed at or before any meeting at which the action is being heard or considered. For purposes of this section the term "participation" means engaging in activities which constitute deliberations pursuant to the open meeting act. No member of a governing board or a planning and zoning commission with a conflict of interest shall participate in any aspect of the decision-making process concerning a matter involving the conflict of interest. A knowing violation of this section shall be a misdemeanor.

- This change seems to be a double edged sword. On the one hand, this change saves other commissioners from undue influence by their fellow commissioners. Also, it is difficult for the public to watch a commissioner go from a neutral position to that of an advocate. On the other hand, a city or county wants dynamic members of the community to serve on the commission. This prohibition causes commissioners to choose between representing their clients and sitting on a commission. While this is difficult to work around in larger cities, it may make it difficult to get the required number of commissioners to serve. Also, why does this prohibition apply only to planning and zoning commissions and not all commissions (historic preservation, etc.)

B. Property Rights vs. Police Power/Zoning Authority

- Finding and maintaining the balance between an individuals property right, the local governments police powers over health, safety and welfare and zoning powers is a constant challenge. The legislature, courts and local jurisdictions are constantly putting checks and balances in place to maintain equilibrium between these groups. A number of examples illustrate the tug back and forth between these issues.

1. 67-6523. EMERGENCY ORDINANCES AND MORATORIUMS. If a governing board finds that an **imminent peril to the public health, safety, or welfare** requires adoption of ordinances as required or authorized under this chapter, or adoption of a moratorium upon the issuance of selected classes of permits, or both, it shall state in writing its reasons for that finding. The governing board may then proceed without recommendation of a commission, upon any abbreviated notice of hearing that it finds practical, to adopt the ordinance or moratorium. **An emergency ordinance or moratorium may be effective for a period of not longer than one hundred eighty-two (182) days. Restrictions established by an emergency ordinance or moratorium may not be imposed for consecutive periods. Further, an intervening period of not less than one (1) year shall exist between an emergency ordinance or moratorium and reinstatement of the same. To sustain restrictions established by an emergency ordinance or moratorium beyond the one hundred eighty-two (182) day period, a governing board must adopt an interim or regular ordinance**, following the notice and hearing procedures provided in section 67-6509, Idaho Code.

- Note, that while a local government may impose a moratorium if an emergency occurs, the standard for what constitutes an emergency is a high threshold. Also, there are restrictions on how long a moratorium can be in effect. There is a further restriction on how often the local government may declare an emergency moratorium. Emergency moratoriums are now limited to one, 182 day period. A period of one year must run before another emergency moratorium may be imposed. This can be problematic as emergencies are unforeseen and may occur during the prohibited time.

67-6524. INTERIM ORDINANCES AND MORATORIUMS. If a governing board finds that a plan, a plan component, or an amendment to a plan is being prepared for its jurisdiction, it may adopt interim ordinances as required or authorized under this chapter, following the notice and hearing procedures provided in section 67-6509, Idaho Code. The governing board may also adopt an interim moratorium upon the issuance of selected classes of permits if, in addition to the foregoing, **the governing board finds and states in writing that an imminent peril to the public health, safety, or welfare requires the adoption of an interim moratorium. An interim ordinance or moratorium shall state a definite period of time, not to exceed one (1) calendar year, when it shall be in full force and effect. To sustain restrictions established by an interim ordinance or moratorium, a governing board must adopt a regular ordinance**, following the notice and hearing procedures provided in section 67-6509, Idaho Code.

An interim ordinance is a tool that slows or stops development while a plan is being developed. As an example, Ada County is looking at alternatives to preserve open space. While an interim ordinance could be a powerful tool for the local governments, the standard for when an interim

ordinance may be enacted is a high threshold. Again, there are restrictions on how long an emergency ordinance can be in effect. Thus, with the open space example, not only would the local jurisdiction have to find that imminent peril exists, but also the government would only have 1 year to resolve the problem and get new ordinances in place. Developing a plan with input from all that would be affected and going through the hearing process could easily exceed the year limitation.

- The struggle between the property owner being able to preserve his bundle of property rights and the community's desire to shape the physical and social character of the community continues in Idaho and throughout the nation. Compare Idaho's interim ordinance statute with the U.S. Supreme Court's ruling in *Sierra Tahoe* 535 U.S. 302 (2002). The U.S. Supreme Court in *Tahoe Sierra Preservation Council v Tahoe Regional Planning Agency* found that a 32 month moratorium that allowed time for a plan to be developed to protect the famous lake from algae and run off was not a taking.

- Another example of the balancing between property rights and police powers or zoning authority is found in the legislature's enactment of takings law. In 2003, the Idaho legislature tightened the State's regulatory taking laws. The statute governing takings is set forth in Idaho Code 67-8003. This code section states:

  (1) The attorney general shall establish, by October 1, 1994, an orderly, consistent process, including a checklist that better enables a state agency or local government to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property. The attorney general shall review and update the process at least on an annual basis to maintain consistency with changes in law. All state agencies and local governments shall follow the guidelines of the attorney general.

- While the moratorium and takings legislation try to protect property owners, a line of cases have established that a city's appearance is a substantial interest, and cities may enact zoning laws to preserve aesthetics. These cases acknowledge that aesthetics that are necessarily subjective, but the local ordinances and decisions are upheld. These cases protect the rights of the citizens to protect the look of their cities and counties. In *Lamar Corp. v City of Twin Falls,* 133 Idaho 36, 981 P.2d 1146 (1999), the City was allowed to enact ordinances that limited the construction and placement of billboards. In *Williamson v. City of McCall,* 135 Idaho 452, 19 P.3d 766 (2001), the Idaho Supreme Court upheld a local decision that de-annexing property would materially mar the symmetry of the City. Also, a city council was entitled to consider aesthetics when determining if a special use permit should be given for a 120' lattice transmission/receiving tower. See *Turner v Twin Falls,* 144 Idaho 203, 159 P.3d 840 (2007)

C. <u>Solutions to the Various Types of Land Use Disputes</u>

- A local government processes cases in a variety of ways: (1) some types of cases are handled administratively (with no hearing); (2) many types of cases are required to go through a formal hearing process; (3) a few disputes need to be addressed immediately

through an emergency ordinance or an interim ordinance as set forth in Idaho Coe 67-6523 and 67-6524; (4) another solution is through mediation as set forth in Idaho Code 67-6510.

The code section governing mediation states:

(1) The procedure established for the processing of applications by this chapter or by local ordinance shall include the option of mediation upon the written request of the applicant, an affected person, the zoning or planning and zoning commission or the governing board. Mediation may occur at any point during the decision-making process or after a final decision has been made. If mediation occurs after a final decision, any resolution of differences through mediation must be the subject of another public hearing before the decision-making body.

(2) The applicant and any other affected persons objecting to the application shall participate in at least one (1) mediation session if mediation is requested by the commission or the governing board. The governing board shall select and pay the expense of the mediator for the first meeting among the interested parties. Compensation of the mediator shall be determined among the parties at the outset of any mediation undertaking. An applicant may decline to participate in mediation requested by an affected person, and an affected person may decline to participate in mediation requested by the applicant, except that the parties shall participate in at least one (1) mediation session if directed to do so by the governing board.

(3) During mediation, any time limitation relevant to the application shall be tolled. Such tolling shall cease when the applicant or any other affected person, after having participated in at least one (1) mediation session, states in writing that no further participation is desired and notifies the other parties, or upon notice of a request to mediate wherein no mediation session is scheduled for twenty-eight (28) days from the date of such request.

(4) The mediation process may be undertaken pursuant to the general limitations established by this section or pursuant to local ordinance provisions not in conflict herewith.

(5) The mediation process shall not be part of the official record regarding the application.

- Note that mediation can occur at any time during the process. The City of Boise has ordered mediations prior to a hearing and mid hearing. Mediations have also occurred after an appeal is filed. This statute presents some challenges. For instance, the local government cannot be bound to a mediation outcome as any proposed resolution will have to go through the hearing process. Further, the statute states that the board may order one mediation session. However, if a party refuses to participate, there is no guidance as to what to do next.

- Idaho Code 67-6521 provides due process guarantees for persons affected by a zoning decision. This section states:

(1) (a) As used herein, an affected person shall mean one having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development.

(b) Any affected person may at any time prior to final action on a permit required or authorized under this chapter, if no hearing has been held on the application, petition the commission or governing board in writing to hold a hearing pursuant to section 67-6512, Idaho Code; provided, however, that if twenty (20) affected persons petition for a hearing, the hearing shall be held.

(c) After a hearing, the commission or governing board may:

(i) Grant or deny a permit; or

(ii) Delay such a decision for a definite period of time for further study or hearing. Each commission or governing board shall establish by rule and regulation a time period within which a recommendation or decision must be made.

(d) An affected person aggrieved by a decision may within twenty-eight (28) days after all remedies have been exhausted under local ordinances seek judicial review as provided by chapter 52, title 67, Idaho Code.

(2) (a) Authority to exercise the regulatory power of zoning in land use planning shall not simultaneously displace coexisting eminent domain authority granted under section 14, article I, of the constitution of the state of Idaho and chapter 7, title 7, Idaho Code.

(b) An affected person claiming "just compensation" for a perceived "taking," the basis of the claim being that a specific zoning action or permitting action restricting private property development is actually a regulatory action by local government deemed "necessary to complete the development of the material resources of the state," or necessary for other public uses, may seek a judicial determination of whether the claim comes within defined provisions of section 14, article I, of the constitution of the state of Idaho relating to eminent domain. Under these circumstances, the affected person is exempt from the provisions of subsection (1) of this section and may seek judicial review through an inverse condemnation action specifying neglect by local government to provide "just compensation" under the provisions of section 14, article I, of the constitution of the state of Idaho and chapter 7, title 7, Idaho Code.

- As stated above, there are a variety of zoning issues that are handled outside the hearing process. I.C. 67-65219 (1) (b) allows for someone who disagrees with a decision to file a petition requesting a hearing. If twenty people sign the petition, a hearing must be held. If less then twenty sign, it is discretionary.

- I.C. 67-65219 (1) (b) allows for a person affected by a decision to file for a judicial review before a district court. The Idaho Supreme Court found the Gooding Cheese factory's reclaimed water project could adversely affect property 3.5 miles away. The property owner that was objecting to the cheese factories application could only smell the production if the wind was blowing just right, the cheese factory was not being utilized as designed and the cheese factory failed to adhere to conditions of Conditional Use permit. The minority opinion stated that the court's opinion was too broad of an interpretation, arguing that adverse impacts should be limited to adjacent property. *Davisco Foods v Gooding County* 141 Idaho 784, 118 P3d 116 (2005).

- In 2003, the Idaho legislature tightened the State's regulatory taking laws. The statute governing takings is set forth in Idaho Code 67-8003. This code section states:

(1) The attorney general shall establish, by October 1, 1994, an orderly, consistent process, including a checklist that better enables a state agency or local government to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property. The attorney general shall review and update the process at least on an annual basis to maintain consistency with changes in law. All state agencies and local governments shall follow the guidelines of the attorney general.

(2) Upon the written request of an owner of real property that is the subject of such action, such request being filed with the clerk or the agency or entity undertaking the regulatory or

administrative action not more than twenty-eight (28) days after the final decision concerning the matter at issue, a state agency or local governmental entity shall prepare a written taking analysis concerning the action. Any regulatory taking analysis prepared hereto shall comply with the process set forth in this chapter, including use of the checklist developed by the attorney general pursuant to subsection (1) of this section and shall be provided to the real property owner no longer than forty-two (42) days after the date of filing the request with the clerk or secretary of the agency whose action is questioned. A regulatory taking analysis prepared pursuant to this section shall be considered public information.

(3) A governmental action is voidable if a written taking analysis is not prepared after a request has been made pursuant to this chapter. A private real property owner, whose property is the subject of governmental action, affected by a governmental action without the preparation of a requested taking analysis as required by this section may seek judicial determination of the validity of the governmental action by initiating a declaratory judgment action or other appropriate legal procedure. A suit seeking to invalidate a governmental action for noncompliance with subsection (2) of this section must be filed in a district court in the county in which the private property owner's affected real property is located. If the affected property is located in more than one (1) county, the private property owner may file suit in any county in which the affected real property is located.

(4) During the preparation of the taking analysis, any time limitation relevant to the regulatory or administrative actions shall be tolled. Such tolling shall cease when the taking analysis has been provided to the property owner. Both the request for a taking analysis and the taking analysis shall be part of the official record regarding the regulatory or administrative action.

- This statute requires municipalities to notify permit applicants that they can request a taking analysis after each hearing if they feel that a regulatory taking may have occurred. The property owner may request the analysis within 28 days of a final decision. A regulatory taking is defined as a regulatory or administrative action resulting in deprivation of a property right. The deprivation may be total or partial, permanent or temporary.

The municipality shall have 42 days from the date of the request to complete the analysis by utilizing the attorney general's checklist. Failures to complete the analysis within the 42 days are grounds for the property owner to request a Court to void the governing body's action and/or file a suit for a declaratory judgment that a regulatory taking has occurred. This takings analysis specifically applies to re-zones, special use permits, subdivision permits, planned unit development permits and variances.

The Attorney General's web site is an excellent resource. It has questions that should be considered in analyzing if the local government action resulted in a taking of private property without compensation. The web site also has a synopsis of all of the U.S. Supreme Court as well as all of the Idaho opinions that deal with the takings issue.

- Finally, the Local Land Use Planning Act requires decision makers to state what it would take to get the project approved. At times, this is an easy or obvious task. At other times, it is difficult to explain what the issues are in great enough detail for a developer to understand what would be required for him to gain approval of his project. In the case of

denial of permits, Idaho Code 67-6519(c) requires that the decision state the actions, if any, that the applicant could take to obtain a permit.

D. Facing Administrative Zoning Disputes

1. Procedural Due Process is of utmost importance to decisions made by a local government. The easiest way for a decision to be overturned and remanded back is if there was not adequate notice and opportunity for a hearing.

- Procedural due process is an integral part of the hearing process. The core requirements of procedural due process include: written notice of the hearings date, time and place, the right to present and rebut evidence, the keeping of a transcribable verbatim record, and a written reasoned statement of the decision.

- If a hearing is continued, it must be continued to a date certain, or it must be re-noticed for hearing. *Gay v County Commissioners of Bonneville County* 651 P.2d 560 (1982)

- A governing board is required to adopt procedures for the conduct of the public hearings. The procedures must include a process whereby affected persons may present and rebut evidence. See Idaho Code 67-6535(b).

- The approval or denial of an application shall be in writing and shall be accompanied by a reasoned statement that states the relevant contested facts relied upon and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record. See Idaho Code 67-6535(b). In the case of denial of permits, Idaho Code 67-6519(c) also requires that the decision state the actions, if any, that the applicant could take to obtain a permit.

- If a party to a hearing would like to present additional evidence in response to evidence provided by another party, they must ask to present the evidence at the initial hearing. They cannot raise the issue for the first time during a judicial review, that they were denied the opportunity to rebut evidence at the public hearing. *Whitted v Canyon County Board of Commissioners and Proesch*, Idaho Supreme Court 2002 Opinion No. 44 (March 27, 2002).

- *Cowan v. Board of Commissioners of Freemont County*, 143 Idaho 501, 148 P.3d 1247 (2006) is an excellent primer on all of the due process requirements associated with administrative hearings. Since decisions by zoning boards apply general rules to "specific individuals, interests or situations," and are "quasi-judicial in nature" they are subject to due process constraints. *Chambers v. Kootenai County Bd. of Comm'rs*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1994).

- "Procedural due process requires that there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions." *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999)

- "Due process is not a concept to be applied rigidly in every matter. Rather, it is a flexible concept calling for such procedural protections as are warranted by the particular situation." *Aberdeen-Springfield Canal Co.*, 133 Idaho at 91, 982 P.2d at 926. *Cowan, supra.*

- For "effective judicial review of the quasi-judicial actions of zoning boards, there must be adequate findings of fact and conclusions of law." Conclusory statements are not sufficient; instead "[w]hat is needed for adequate judicial review is a clear statement of what, specifically, decision making body believes, after hearing and considering all of the evidence, to be the relevant and important facts upon which its decision is based." *Workman Family P'ship v. City of Twin Falls*, 104 Idaho 32, 36, 655 P.2d 926, 930 (1982). However, a board of commissioners may adopt a planning and zoning commission's findings and conclusions because I.C. § 67-6535 requires only that findings and conclusions be made. *Evans*, 139 Idaho at 80, 73 P.3d at 93. *Cowan, supra*

- Due process "entitles a person to an impartial and disinterested tribunal[,]" but we require a showing of actual bias before disqualifying a decision maker even when a litigant maintains a decision maker has deprived the proceedings of the appearance of fairness. *Davisco Foods Int'l, Inc.*, 141 Idaho at 791, 118 P.3d at 123; *Cowan, supra*

- Procedural due process requires some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. This requirement is met when the defendant is provided with notice and an opportunity to be heard. The opportunity to be heard must occur at a meaningful time and in a meaningful manner in order to satisfy the due process requirement. *Cowan, supra.*

- The *Cowan* decision states that the Court does not believe that giving a party two minutes to speak meets the procedural due process requirements. However, if a party gets to speak longer at another time, submit written materials, etc., the Court is likely to consider that due process was met. Likewise, if notices were defective, but the affected party attended the hearing and testified, than notice was adequate.

- Decisions by a zoning board applying general rules or specific policies to specific individuals, interests or situations, are quasi-judicial in nature and

subject to due process constraints." *Eacret v. Bonner County*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004) "When acting upon a quasi-judicial zoning matter the governing board is neither a proponent nor an opponent of the proposal at issue, but sits instead in the seat of a judge." *Lowery v. Bd. Of County Comm'rs for Ada County*, 115 Idaho 64, 71, 764 P.2d 431, 438 (1988).

- The U.S. Supreme Court has provided much guidance in how the Due Process Clause would apply to judges. The same standards, thus, are applicable to decision makers in quasi judicial settings. In *Republican Party of Minn. v. White*, 536 U.S. 765 (2002), the United States Supreme Court addressed the meaning of "impartiality" as it is used in the context of applying the Due Process Clause to judges. It means "the lack of bias for or against either party to the proceeding.

- The Court in *Republican Party of Minn. v. White* continues by stating that impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. In the context of due process, it does not mean "lack of preconception in favor of or against a particular legal view. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. It also does not mean having "no preconceptions on legal issues, but being willing to consider views that oppose his preconceptions, and remaining open to persuasion, when the issues arise in a pending case." Impartiality under the Due Process Clause does not guarantee each litigant a chance of changing the judge's preconceived view of the law.

- "A decision maker is not disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that the decision maker is 'not capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Eacret v. Bonner County*, 139 Idaho780, 86 P.3d 494, (2004) Turner cite

2. <u>Quasi Judicial v Legislative</u>

1. All participants and decision makers must be clear as to whether the local government is operating in a legislative or quasi-judicial capacity. The governing rules vary greatly depending on the type of hearing.
    - When a governing body sits in a quasi-judicial capacity, they must confine themselves to the record produced at the public hearing. Failing to do so violates due process. When a general rule is applied to a specific individual or group, then the governing body sits in a quasi-judicial capacity. When the governing body

produces a general rule which is applicable to all within a class, then the governing body is sitting as a legislative body. A record at a public hearing does not limit the body from only listening to those who physically testify at the hearing. However, if they receive phone calls etc. outside the hearing they must disclose at the hearing the name of the person they communicated with, whom the person is associated with and the nature of the communication. Thus allowing persons at the hearing to respond to the comments they were not privy too. Idaho Historic Preservation Council v City Council of the City of Boise 8 P3d 646 (2000).

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- *Turner v City of Twin Falls*, 144 Idaho 203, 159 P.3d 840 (2007) has an excellent example of the relationship between legislative and quasi judicial. In this case, Turner applied for a special use permit to locate a transmission tower at a certain location. The Planning and Zoning Commission heard the application and approved it. City Council received an e-mail from someone who disapproved of the decision. Pursuant to the Twin Falls Code, the City Council voted to hear the matter at another time. The Court in *Turner* analyzed as follows: the requirements of due process did not apply to the City Council's decision on July 21, 2003, to review and hear the P&Z Commission's approval of Turner's special use permit. The Council was not acting in a quasi-judicial capacity when it decided to review the Commission's action. That decision was not required to be made after an evidentiary hearing, nor was it required to be based upon evidence in the record. It did not involve applying "general rules or policies to specific individuals, interests, or situations." The Council was not making any determination regarding the merits of Turner's application for a special use permit. It was merely deciding to exercise its power to hear that application. Therefore, there was no due process violation in connection with the Council's decision to review Turner's application for a special use permit.

3. Relationship of Comprehensive Plan to Zoning Ordinance

- A Comprehensive Plan does not operate as legally controlling zoning law, but rather serves to guide and advise the various governing bodies

responsible for making zoning decisions. However, governing bodies are to zone in accordance with the Comprehensive Plan. A requested re-zone must reflect the goals of, and take into account the factors as stated in the Comprehensive Plan. Bone v City of Lewiston, 693 P.2d 1046 (1984).

- A zoning decision may be overturned if the underlying Comprehensive Plan fails to have one of the components required by State law. Idaho Code 67-6508 states that the Plan shall be based on the following components, unless the plan specifies why a particular component is not needed. Thus, every component should be considered by a governing board in adoption of a comprehensive plan.

- The components of a comprehensive plan, as stated in Idaho Code 67-6508 are: property rights, population, school facilities and transportation, economic development, land use, natural resources, hazardous areas, public services, facilities and utilities, transportation, recreation, special areas or sites, housing, community design and implementation. The Idaho Supreme Court in Sprenger, Grubb & Associates, Inc., v City of Hailey 986 P.2d 343 (1999), held that the City=s Comprehensive Plan was invalid where the plan did not contain a land use map and a property rights component. The Court further stated that a valid comprehensive plan is a precondition to the validity of zoning ordinances.

- In Bone v City of Lewiston, 693 P.2d 1046 (1984), the Supreme Court stated that a city=s land use map does not require a particular piece of property to be zoned exactly as it appears on the land use map. A zoning ordinance, in contrast, lists the specific things that an applicant must do and the specific criteria upon which his application must be judged.

- In Urrutia v Blaine County, 2 P.3rd 738 (2000), the Idaho Supreme Court stated that a comprehensive plan reflects the desirable goals and objectives or desirable future situations. Therefore, the comprehensive plan serves as a general guide, while a zoning ordinance reflects the permitted uses allowed for various parcels within the jurisdiction. An application cannot be denied solely because it is in non-compliance with a comprehensive plan.

- In contrast, *Allred v Board of Commissioners of Cassia County and Watterson*, cite2001was recently decided by the Idaho Supreme Court. The Court found a special use permit to be valid where it balanced evidence presented at the hearing with the requirements of the special use permit ordinance and specific requirements set forth in the comprehensive plan.

Practice Tips: (1) check the comprehensive plan to make sure that it addresses each component as required by State law; (2) The applicable components of the

Comprehensive Plan should be specific. Best practice would be to put the specific components into a zoning ordinance; (3) however, if an ordinance requires a balancing of the zoning ordinance and specific comprehensive plan requirements, it might survive a challenge.

- A comprehensive plan is not a legally controlling zoning law. It serves as a guide to local governmental agencies charged with making zoning decisions. The governing board should make a factual inquiry as to whether the zoning ordinance reflects the goals and takes into account the comprehensive plan in light of the present factual circumstances surrounding the request. *Evans v. Teton County* 139 Idaho 71, 73 P.3d 84 (2003)

- When reviewing conditional use permits, zoning certificates, variances, and individual parcel re-zones, the governing boards findings must be supported by substantial evidence, and the conclusions should properly apply the zoning ordinance to the facts as found. On the other hand, a comprehensive plan reflects the desirable goals and objectives, or desirable future situations for the land within the jurisdiction. *Friends of Farm to Market v. Valley County and John Carey* 37 Idaho 192, 46 P.3d 9 (2002)

- Spot zoning is a claim that zoning is not in accord with the comprehensive plan. Type one spot zoning refers to re-zoning of a use originally prohibited in the zone. A re-zone is appropriate as long as the new zone complies with the comprehensive plan. Type two spot zoning refers to a re-zone that singles out a parcel of land for use inconsistent with the permitted use in the rest of the zone. This type of re-zone is prohibited as the spot zoning is for the benefit of an individual property owner. Evans v. Teton County 139 Idaho 71, 73 P.3d 84 (2003)

4. HEARING PROCESS - A bag of tricks

The land use hearing process has evolved into a complicated process involving far more then simply taking testimony and making a decision as to the best use of the property. Listed in this section are a variety of hearing process related considerations.

- Requests for re-zoning property are common. If a re-zone request does not comport with the Comprehensive Plan, Council should first consider an amendment to the Comprehensive Plan. Then the Council may consider a request for an amendment to the zoning ordinance. Findings for the proposed Comprehensive Plan amendment should be made independently of findings to support a re-zone. However, the decisions can be contained within one

document and can be made in tandem. *Price v Payette County* 958 P.2d 583 (1998).

- No man is an island. As land becomes more densely populated, this saying becomes more and more true. The person who believes that it is his land and he can do with it as he pleases, is seldom supported by Council or the Courts. The Courts have repeatedly held that a zoning ordinance is valid even though it deprives the owner of the highest and best use of the land *Dawson Enterprises v Blaine County* 567 P.2d 1257 (1977). However, neighborhoods need to remember that the land owner still possesses property rights. This was driven home with the 2003 "takings legislation".

- In 1999, Idaho Code 67-6509 (a) and (b) were amended. One public hearing is required for every comprehensive plan and zone amendment. Additional hearings may be held if the governing body feels that the magnitude and degree of controversy associated with an issue requires such. A governing body may establish by ordinance any number of public hearings beyond the one required by statute. If a Planning and Zoning Commission recommends a material change, then the Commission shall conduct a second hearing if the governing body does not conduct a hearing.

- In 1999, Idaho Code 67-6509 (c) and (d) were also amended. A Comprehensive Plan amendment shall be enacted or amended by resolution. This amendment was made because the ordinance process is much more expensive and complex than the resolution process. Amendments to the text of the Comprehensive Plan can be made at any time, while changes in the land use map may be made once every six months. Amendments to the text of the Comprehensive Plan can now be made at any time, freeing decision makers from having to find errors in the original plan or substantial changes in the conditions in the area before an amendment can be made.

- An applicant=s rights are to be measured pursuant to the ordinance in effect at the time of the original filing of the application. The legislature=s rationale is that to hold otherwise would give the governing body the ability to withhold action on an application for a permit while they enact a new ordinance that would defeat a particular application. *Cooper v Board of County Commissioners*, 614 P.2d 947 (1980).

- As long as there is substantial compliance with ordinance requirements and there is no showing of prejudice by the governing boards actions, the reviewing court will not overturn the decision. *Taylor v. Board of County Commissioners* 124 Idaho 393, 860 P.2d 8 (Ct. App. 1993*), Friends*, supra.

- A reviewing court may not reverse the findings of an administrative agency where findings are clear, dispositive and supported by evidence in the record. Agency findings are dispositive even when there conflicting evidence

exists. *Knight v Dept.of Ins.* 862 P.2d 337, 124 Idaho 645 (1993)

- A finding is erroneous if there is no testimony or written evidence to support it. Conclusions based on the erroneous findings cannot be supported and will lead to a substantial right of the appellant being prejudiced. *Sanders Orchard v Gem County Board of Commissioners*, cite (2002)

- If the governing board is sitting as an appellate body, it must confine itself to the record made below. On appeal, the governing body cannot go to the site to view the evidence. And, if it does so it must give notice so that all parties can be there *Comer v County of Twin Falls* 942 P.2d 557 (1997). However, if a lower body chooses to view a site they may do so as long as any information received at the site was not the basis for the decision. The lower body is not acting as an appellate body. Further, no error will be found as long as the hearing yielded substantially the same evidence that would be garnered from a visit to the site. *Evans v Board of Cassia County Commissioners and Watterson*, 139 Idaho 71, 73 P.3d 84 (2002) – Note – there were three decisions made and substituted in this case.

  PRACTICE TIP: The differences in these decisions could easily go the other way with a different set of facts. Further, it is difficult to meet the other hearing requirements at the site. It is far safer to conduct the hearing solely with the confines of the hearing chambers. This is especially so with modern technology where the scene can easily be brought to the Commission or governing body.

  - A local land use ordinance is not a statutory provision enacted by the legislature. Therefore, the zoning agency's interpretation of its ordinances, even if questionable, without more, does not necessarily amount to a violation of an Idaho statutory provision. *Evans v Board of Cassia County Commissioners and Watterson*, supra

  - Evidence at a land use hearing does not have to comply with the rules of evidence. Such a requirement would not be feasible where the governing board is frequently not trained in the law. Evidence should be presented in a format in which the credibility of the witnesses and the evidence could be assessed first hand. *Evans v Board of Cassia County Commissioners and Watterson,* supra

  - While billboard advertising is a form of commercial free speech protected under the first amendment, a governmental body may regulate commercial speech to implement a substantial government interest if the regulation directly advances the interest and reaches no further than necessary to accomplish the given objective. A city=s appearance is a substantial government interest. Cities may enact zoning ordinances to preserve the city=s aesthetics. A governmental

body may require conditional/special use approval as long as the governing zoning ordinance contains sufficiently objective and definite standards to guide zoning officials in making zoning decisions. *Lamar Corporation v City of Twin Falls* 981 P.2d 1146 (1999)

- The Court will look to the requirements as set forth in the local ordinance to determine compliance. If the ordinance is not ambiguous in allowing for various criteria in a given setting, the Court will uphold the governing board's decision in applying the ordinance. *Evans v Teton County Board of Commissioners*, supra

- When a permit approval contains a number of conditions, and when the conditions address the concerns of those testifying, the conditions are evidence that the board balanced competing interests and that the decision was supported by substantial and competing interests. *Evans v Cassia County Board of Commissioners*, supra

E. CHALLENGES TO CONSTITUTIONAL VALIDITY

There are a number of areas in land use law where the constitutional validity is challenged. All of these areas are very involved. Some of the major areas regularly faced in land use will be referenced here, but an attorney will need to look at the specifics of each case. While local governments **may** regulate these uses, care must be taken to not over-regulate. These subjects include such things as:

1- Religious Land Use and Institutionalized Persons Act (RLUIPA) and Free Exercise of Religion.

- The State and Federal statutes restrict municipalities from imposing land use restrictions that will implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, religious assembly or institution. The State act is found in Idaho Code 73-401 through 73- 403. It is called Free Exercise of Religion Protected. The Federal act is called the Religious Land Use and Institutionalized Persons Act (RLUIPA).

- These statutes apply to local governments imposing restrictions on use of religious institutions such as chapels/sanctuaries, homes for bible study, any and all religions, and buildings that house religious missions (soup kitchens, housing for the poor, homeless or domestic violence centers).

- These statutes require a city to treat religious institutions like other assemblies. Assemblies include theatres, motels, gyms, etc. Thus, religious institutions must be allowed in zones where other assemblies are allowed. The acts also protect small, unorthodox, unusual religions, allowing them to freely congregate.

- Both statutes apply to the use, building or conversion of real property for the exercise of religious practices and activities.

- **The statutes discourage individualized assessment. While compatibility is the normally the strongest criteria in most land use decisions, it is felt that it is too subjective. Compatibility <u>alone,</u> as a reason for denial, will likely not withstand court scrutiny.**

<u>The Intent of the State and Federal Statutes</u>

- **Neither the State nor the Federal Statute serves to pre-empt a City's right to review an application and impose conditions where the municipality has a compelling interest.**

<u>Procedure for Handling a Free Exercise of Religion Claim</u>

- The religious entity must show that the action that the City is considering **substantially burdens** the free exercise of religion.

- If a religious entity is able to show that the action that the City is considering will substantially burden the entity's free exercise of religion, the City may still impose the burdensome decision if:

    1) the City has a compelling interest for its land use decision; and
    2) there is not a less restrictive means available for the City to accomplish its goal.

- Compelling governmental interests in land use **<u>are</u>** those where the city's actions prevent a clear and present, grave and immediate danger to public health, peace and welfare. Examples include decisions involving health and safety concerns, preventing acts or threats against neighbors, compliance with fire codes and preventing serious electrical problems in a building.

Compelling interests, generally, **do not** include traffic, parking, noise, decreased property values, aesthetic interests, historic preservation, neighborhood diversity and preserving character of the community.

<u>Analyzing a Free Exercise of Religion Claim</u>

- It is crucial that City Council develop a thorough record when faced with a claim that a potential decision will restrict religious freedom. In analyzing these cases, be sure to determine:

    1) what rights of the religious entity will be restricted by the proposed action;
    2) how great of a restriction the City's proposed action will be;
    3) why the City needs to impose the restriction;
    4) why the restriction is a "compelling governmental interest";
    5) why the proposed action will cause less restrictions on the religious entity then any other way that the City has available to protect the City's compelling interest.

- The decision makers should analyze a restriction of free exercise of religion challenge as follows:

    1) Was the religious entity specific as to how imposing certain conditions would restrict its free exercise of religion?
    2) Would ordering certain conditions be a significant restriction on the free exercise of religion?
    3) Does the City have a reason that rises to the level of a compelling governmental interest for imposing the condition on the religious entity?
    4) Is there another way the City could accomplish its compelling interest that would impose a lesser restriction on the religious entity?

- Developing a record that includes the above analysis will help protect the City in a legal action.

- RLUIPA follows a similar, although more involved analysis as the State statue.

Potential Ramifications of violating the State or Federal Statute

- RLUIPA, as well as the State statute, allows the prevailing party to recover attorney's fees and litigation costs.

2- **Persons with disabilities protected pursuant the Fair Housing Act.** From a zoning perspective, disabled persons should enjoy the same protections as single family residents. The issue becomes more challenging when the disabled are in a recovery program or can only get out of prison if they are living in a home in the community. Also, it is difficult to draw the line between group homes for the disabled and half way houses.

- **Process for the Disabled to Sue under the FHA:**

Under the FHA a (disabled) plaintiff can sue for discrimination under three theories:

(1) Disparate impact- greater adverse impact on a protected class,
(2) Disparate treatment- show intent to discriminate by showing prejudice causing denial of zoning exemption, and
(3) Reasonable modification theory- Modification or exception to an ordinance, statute, or law.

- If a statute is facially neutral the disparate impact theory is typically used. Under this claim a plaintiff must establish that the defendant's actions had a discriminatory effect. *Gamble v. City of Escondido*, 104 f3d 300, 306 (9th 1997). The 9th Circuit has analogized to its age discrimination law to identify the elements of an FHA prima facie disparate impact theory: (1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices. *Id.* Furthermore, demonstration of discriminatory intent is not required under disparate impact theory. *Id*.

- If a statute is facially discriminatory the disparate treatment theory is used. Under this theory a plaintiff must make a prima facie claim showing that the defendant expressly treats members of a protected group differently than others who are similarly situated. *Children's Alliance v. City of Bellevue*, 950 F.Supp. 1491, 1496 (W.D.Wash. 1997). To rebut a finding of facial discrimination under this standard, the burden shifts to the defendant to show that its actions furthered a legitimate governmental interest and that no alternative would serve that interest with less discriminatory effect. *Id.* Furthermore, the burden shifting approach of the disparate treatment theory is also the approach the 9th Circuit follows for the disparate impact theory.

- The reasonable accommodation theory is the third type of suit the disabled may sue for under the FHA. The FHA makes it unlawful to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling. 42 USC 3604(f)(3)(B)(1988). What constitutes a reasonable accommodation is determined on a case-by-case basis and if the requested accommodation imposes an undue burden or expense on a local government or creates a fundamental alteration to the basic purpose of an ordinance it will be considered unreasonable. Generally, a reasonable accommodation is considered to be the equal opportunity to live in a community of one's choice. The zoning process and public hearing process makes determining reasonable

accommodations on an individualized basis a challenge.

3. Sexually Oriented Businesses and sign ordinances

Sexually Oriented Businesses and Sign Ordinances contain protected speech and thus have limitations on what can be regulated. While time, place and manner can be regulated, content cannot be regulated. Further, care must be taken to assure that businesses can locate within a certain area. Again this is a sophisticated area that takes much research on a case by case basis.

G. ISSUES AT THE FOREFRONT

There are a variety of loosely related issues that will likely dominate the next few years.

- A world-wide green revolution is taking place and land use is at the heart of it. Design, location, building requirements, transportation are all critical to sustainability and marketability in the future. It is likely that requirements to get projects approved will change considerably in the near future. Cities are researching a multitude of avenues to create more sustainable cities. There are numerous resources to assist and there is even an emphasis on what low cost things can be done.

- On the one hand, Idaho has experienced significant growth and is projected to continue to do so. All the issues surrounding rapid growth and trying to maintain a healthy environment dictate a critical need for planning. On the other hand, the planning aspects of land use have become very challenging in recent years. A number of issues leave each local government to act independently rather then through a coordinated effort. The Supreme Court has recognized constitutional limits on a City's Authority in the Area of Impact:

  Article XII, Section 2 of the Idaho Constitution allows any county or incorporated city or town to make and enforce, **within its limits**, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws. A city's exercise of jurisdiction in an impact area lying beyond a city's limits is inconsistent with the constitutional limitations placed on a city's powers by Article XII, Section 2 of the Idaho Constitution. *Blaha v Bd. of Ada County Commissioners*, 134 Idaho 770, 9 P. 3d 1236 (2000).

  Thus, while areas of impact were created to ensure good planning for the future, acceptable city standards in the area of impact (county) can only be enforced through agreement of the entities. A county, by ordinance, can adopt the terms of a city's ordinance or the city and county can renegotiate new standards. This may be accomplished only by following the explicit and express procedures as set forth in Idaho Code 67-6526. This code section allows a city and county to renegotiate the area

of impact boundaries, comprehensive plan and ordinance requirements applicable in the county. *Reardon and Magic Valley Sand and Gravel, Inc., v City of Burley and County of Cassia* 140 Idaho 115, 90 P.3d 340 (2004). In *Reardon* it was made clear that a county can be held liable if they allow the city code to be enforced without formally adopting portions of the city code.

- A logical way for a city to plan for the future then is to annex the land within the area of impact. However, annexation laws (see Idaho Code 50-222) are cumbersome and require significant agreement by property owners prior to annexation.

- *In State ex rel. Kempthorne v Blaine County,* 139 Idaho 348, 79 P.3d 707 (2003), the District Court held that the use of state public endowment lands leased for private commercial mining purposes did not have to comply with County zoning. Thereafter, in 2004, I.C. 58-307 was modified. This code section now states that (2) Notwithstanding any other provisions of law, all state lands may be leased for a period of up to twenty-five (25) years to the federal government, to federal agencies, state agencies, counties, or cities, school districts or political subdivisions when leased for public purposes. Such leases for public purposes may be entered into by negotiation and shall secure a rental amount based on the fair market value of the state land.
  (3) Notwithstanding any other provisions of law, all state endowment lands may be leased for a period of up to forty-nine (49) years for commercial purposes, or for lands eligible for the federal conservation reserve enhancement program (CREP), under such terms and conditions as may be set by the board, provided that, for such leases in excess of ten (10) years, the board consults with the county commissioners of the county in which the lands are located before leasing the lands, and the use for which the land is leased shall be consistent with the local planning and zoning ordinances insofar as is reasonable and practicable. For each lease in excess of ten (10) years, the department shall hold a hearing in the county in which the parcel is located.

- In *Fenwick v Dept. of Lands*, 144 Idaho 318, 160 P.3d 757 (2007), the Supreme Court held that I.C. 58-307 exempted commercial leases of state public endowment lands from complying with Idaho Code 67-6528.

Idaho Code 67-6528 states: The state of Idaho, and all its agencies, boards, departments, institutions, and local special purpose districts, shall comply with all plans and ordinances adopted under this chapter unless otherwise provided by law. In adoption and implementation of the plan and ordinances, the governing board or commission shall take into account the plans and needs of the state of Idaho and all agencies, boards, departments, institutions, and local special purpose districts. The provisions of plans and ordinances enacted pursuant to this chapter shall not apply to transportation systems of statewide

importance as may be determined by the Idaho transportation board. The Idaho transportation board shall consult with the local agencies affected specifically on site plans and design of transportation systems within local jurisdictions. If a public utility has been ordered or permitted by specific order, pursuant to title 61, Idaho Code, to do or refrain from doing an act by the public utilities commission, any action or order of a governmental agency pursuant to titles 31, 50 or 67, Idaho Code, in conflict with said public utilities commission order, shall be insofar as it is in conflict, null and void if prior to entering said order, the public utilities commission has given the affected governmental agency an opportunity to appear before or consult with the public utilities commission with respect to such conflict.

- Also, note while I. C. 58-307 does require the State to coordinate with Counties, but there is no parallel requirement to coordinate with cities.

- Case law and legislation have created similar hurdles in Historic Preservation and with highway districts. While coordination is possible, it is often difficult.

- Finally, remember that the Courts do enforce the open meetings law. Also, I.C.67-2345(1) (f)was amended in 2007 to clarify when the litigation exception. This code section states: (f) to communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. The mere presence of legal counsel at an executive session does not satisfy this requirement. Chief Justice Shroeder does an excellent job explaining the importance of the open meeting act and what all is required for a successful executive session.

H. JUDICIAL REVIEW

- Idaho Code 67-6521(1)(d) allows an affected person aggrieved by a decision to seek judicial review within 28 days after all remedies have been exhausted. An affected person shall mean one having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing development.

- Idaho Code 67-6521(2)(b) allows an affected party to file for judicial review through an inverse condemnation action when he believes that a specific zoning action or permitting action restricting private property development is actually a regulatory taking by local government deemed necessary to complete the development of the material resources of the state or necessary for other public uses. In these circumstances, the affected person may request judicial review by specifying neglect by the local government to provide just compensation pursuant to Idaho Constitution and statute.

- Idaho Code 67-6521(2)(a) states that the authority to regulate through the zoning process shall not simultaneously displace co-existing eminent domain authority granted pursuant to Idaho Constitution and statute.

- A city has standing to appeal an adverse decision of it=s zoning board. This is allowed as the city has an interest in the maintenance and development of the city. A wrongful decision by a board may impede the city=s ability to properly administer the provisions of the zoning ordinance. *City of Burley v McCaslin Lumber* 693 P.2d 1108 (1984)

- In order to have standing, plaintiff must show that its members have a personal stake in the outcome of the controversy. Simply owning property near the proposed subdivision alone does not confer standing as to due process issues. *Rural Kootenai Organization, Inc. v Kootenai County* 993 P.2d 596 (1999)

- Plaintiff objected to the issuance of a building permit for their neighbor to construct an accessory dwelling. The objection was made by a letter of protest delivered to the city manager and the city attorney. City ordinance allowed an appeal within 15 days of a ruling. Since ruling is not defined, the issuance of the permit was deemed by the court to be a ruling. The failure of the community development director to forward the protest to the planning and zoning commission prevented the plaintiff from exhausting all administrative remedies. The Court specifically ruled that the fact that the letter does not indicate that it was an appeal would exalt form over substance. A reading of the letter clearly indicated that the neighbors were not happy with the issuance of the permit. *McVicker v City of Lewiston* 995 P.2d 804 (2000)

- A request for a judicial review of a governing body's decision does not give the Court the authority to invalidate the municipality's ordinance. Further, the Court shall not infer that the appealing party is actually requesting a declaratory judgment when a judicial review is filed. *Scott v. Gooding County v. Bettencourt,*137 Idaho 206, 46 P.3d 23 (2002)

- I.C. 67-6521(a) gives standing to file a judicial review to an affected person. An affected person is one having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing development. However, the possibility of harm or prejudice is insufficient to cause a court to reverse a governing body's decision. See I.C. 67-6535(c). Actual Harm or prejudice is relevant only where it is shown that the governing board acted in an arbitrary or capricious manner. Whitted, supra

- Although the Land Use Planning Act requires that notice be given to properties within a certain distance of the applicant's property, standing

status depends on whether the property may be adversely affected by the governing bodies decision. The Court will not look to a predetermined distance in deciding whether a property owner has standing to seek judicial review. *Evans v Teton County*, supra

- C. 67-6535 (c) requires a demonstration of actual harm or a violation of a fundamental right and not a mere possibility thereof, in order to be entitled to a remedy in a LLUPA decision. *Evans v Teton County et al., supra*

- The Supreme Court will not consider arguments raised for the first time in the appellant's reply brief.' A reviewing court looks only to the initial brief on appeal for the issues presented because those are the arguments and authority to which the respondent has an opportunity to respond in the respondent's brief." *Turner* 144 Idaho 203,159 P.3d 840 (2007)

- A judicial review is a distinct form of proceeding and cannot be brought as a pleading or motion within an underlying civil matter. Nor, can an action for a declaratory judgment be brought. *Cobbly v City of Challis* 143 Idaho 130, 139 P.3d 732 (2006)

- The Board's actions may be reversed if this Court finds the Board acted arbitrarily, capriciously or abused its discretion. *Eacret*, supra. However, planning and zoning decisions are entitled to a strong presumption of validity, including the board's application and interpretation of their own zoning ordinances. *Sanders Orchard*, 137 Idaho at 698, 52 P.3d at 843. *Cowan, 143 Idaho 501, 148 P.3d 1247(2006)*

- The Local Land Use Planning Act (LLUPA) allows an affected person to seek judicial review of an approval or denial of a land use application, as provided for in the Idaho Administrative Procedural Act (IDAPA). Idaho Code § 67-6521(1)(d); *Evans v. Teton County*, 139 Idaho 71, 73 P.3d 84, (2003). For purposes of judicial review of LLUPA decisions, a local agency making a land use decision, such as the Board of Commissioners, is treated as a government agency under IDAPA. *Urrutia v. Blaine County*, 134 Idaho 353, 357, 2 P.3d 738, (2000).

- In a subsequent appeal from a district court's decision in which the district court was acting in its appellate capacity under the Administrative Procedure Act.. . , the Supreme Court reviews the agency record independently of the district court's decision. As to the weight of the evidence on questions of fact, this Court will not substitute its judgment for that of the zoning agency. The Court shall affirm the zoning agency's action unless the Court finds that the agency's findings, inferences, conclusions or decisions are: "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory

authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; and (e) arbitrary, capricious, or an abuse of discretion." The party attacking a zoning board's action must first illustrate that the board erred in a manner specified therein and must then show that a substantial right of the party has been prejudiced. *Eacret v. Bonner County*, 139 Idaho 780, 86 P.3d 494, (2004).

- Finally, planning and zoning decisions are entitled to a strong presumption of validity; this includes the board's application and interpretation of their own zoning ordinances. *Sanders Orchard v. Gem County*, 137 Idaho 695, 52 P.3d 840, (2002). *Cowan*, supra.

- The Idaho Administrative Procedures Act (I.A.P.A.) governs judicial review of local zoning decisions. The I.A.P.A. applies to judicial review of "an agency," which it defines as a "state board, commission, department or officer authorized by law to make rules or to determine contested cases…." I.C. § 67-5201(2); *Petersen v. Franklin County*, 130 Idaho 176, 182, 938 P.2d 1214, 1220 (1997).

- As the Court explained in *Friends of Farm to Market*, 137 Idaho at 196, 46 P.3d 9(2002) , the party attacking an agency decision must first show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and then it must show that a substantial right has been prejudiced..

- In reviewing an agency's findings of fact, the court does not substitute its judgment for that of the agency as to the weight of the evidence presented. *Friends of Farm to Market*, 137 Idaho at 196, 46 P.3d at 13. Even where there is conflicting evidence before the agency, an agency's factual determinations are binding on the reviewing court so long as the determinations are supported by substantial competent evidence in the record. *Id.* The Board's zoning decision may be overturned only where its findings: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. *Id.*, citing I.C. § 67-5279(3). 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, 981 P.2d 1146, (1999).

Procedure for Judicial Review

The procedure for judicial reviews of the administrative actions of local governments is set forth in Rule 83 of the Idaho Rules of Civil Procedure. There are a number of steps within a time line that must be met. The table below is one example for keeping track of all of the required steps and dead lines.

Due Dates	Petition for Judicial Review (Land Use Cases)	
	Petition for Judicial Review filed	42 days to prepare administrative record and hearing transcripts
	City Clerk lodges Record and Transcripts of Hearings	Within 14 days of date Petition is filed
	Parties file Objections to lodged record	14 days after date record was lodged
	Decision by City Clerk if objections filed	14 days after objections filed
	City Clerk files Record and Transcripts of Hearing	42 days after date Petition is filed
	Motion to Supplement Record	21 days after record filed w/ District Court
	Response to Supplementation	14 days after service of motion
	Initial Brief on Judicial Review	35 days from filing of record or Order of Court
	Response Brief on Judicial Review	28 days from service of Initial Brief
	Reply Brief on Judicial Review	21 days from service of Response Brief

Judicial Review – What to Expect

- The Court's want to assure that the hearings are conducted fairly. If there are material procedural errors which can be demonstrated to have caused harm to the appellant, the Courts will remand for additional hearings. In *Friends of Farm to Market*, this Court noted that "due process applies to quasi judicial proceedings like those conducted by zoning boards, and such due process requires notice of the proceedings, specific written findings of fact, and an opportunity to be present and rebut evidence." 137 Idaho at 198, 46 P.3d at 15; *see also* I.C. §§ 67-6534 – 6535. Lane Ranch Partnership v City of Sun Valley, --- P.3d --- , 2007 WL 1488812 (Idaho)

- Idaho Code section 67-5279 (4) requires that, "[n]otwithstanding the provisions of subsections (2) and (3) of this section, agency action shall be affirmed unless substantial rights of the appellant have been prejudiced."

- In some cases, the Courts will assess attorney's fees against the losing

party.

- Since no new evidence should be submitted during the judicial review process, it is critical that an adequate record that gives a clear view of all that occurred at the administrative hearings is available to the Court.

- In the absence of a showing of irregularities in procedure before the agency or of good reason for failure to present evidence to an agency, the court's review of disputed issues of fact must be confined to the agency record for judicial review. I.C. §§ 67-5276 – 5277; *Urrutia v. Blaine County*, 134 Idaho 353, 361, 2 P.3d 738, 746 (2000) (stating that district judge erred in permitting additional evidence on judicial review in the absence of a demonstrated procedural irregularity before the agency). *Lane, supra*