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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

SBAR RANCH, an Idaho limited liability company, Petitioner, vs. ELMORE COUNTY, IDAHO, a political subdivision of the State of Idaho, Respondent. CAT CREEK ENERGY, LLC, an Idaho limited liability company, Intervenor.	Case No. CV20-18-00525 PETITIONER'S OPENING BRIEF IN SUPPORT OF ITS PETITION FOR JUDICIAL REVIEW

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This case is a Petition for Judicial Review from the Elmore County Board of Commissioner's (the "Board") decision to grant Conditional Use Permits and a Development Agreement to allow Cat Creek Energy, LLC (the "Developer" or "Cat Creek") to construct wind towers and other electrical generating facilities that will adversely affect Petitioner and violate substantial rights of the Petitioner.

The Petitioner is SBar Ranch, LLC ("SBar Ranch" or "Petitioner").[1] SBar Ranch is a single purpose entity that is solely owned by 5B Investments, Inc., which is owned and controlled by Chris and Michelle Stephens' family trusts. Petitioner brings this action to protect its right to quiet enjoyment and use of its real property in Elmore County, Idaho and to protect the value of such property from the injury that will directly result from the construction and operation of the Project that is authorized by the Conditional Use Permits and Development Agreement (the "Project"). SBar Ranch is located within one mile of the Project site. [R. 009905-10] The issuance of the permits and the adoption of the Development Agreement violates the civil rights of Petitioner, conflicts with the Elmore County Comprehensive Plan in violation of I.C. § 67-6512(a),[2] violates other provisions of the Local Land Use Planning Act ("LLUPA"), and violates relevant Elmore County Zoning Ordinances ("Zoning Ordinances"). The attempted modification of the Conditional Use Permits by or through the adoption of the Development Agreement violates the LLUPA. The issuance of the permits and the Development Agreement creates a conflict of interest for the Board of Commissioners and for the Commissioners personally that prevents the Board and the Commissioners from serving as neutral Commissioners in violation of I.C. § 67-6505 and other law. Moreover, the construction of the Project will adversely affect the value of the real property that comprises the SBar Ranch.

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[1] Throughout much of the proceedings before the Board of Commissioners and in the District Court, the Petitioner has been referred to as S Bar Ranch, LLC. The correct spelling is SBar Ranch, LLC.

[2] Idaho Code § 67-6512(a), a provision of the Local Land Use Planning Act ("LLUPA"), requires that special or conditional use permits shall be issued only when "not in conflict with the [comprehensive] plan."

[R. 010986, Appraisal letter; R. 011378-011472, Appraisal Report] The Petition for Judicial Review is authorized by I.C. §§ 67-6519(4) and 67-6521. The only rational solution is to declare the Conditional Use Permits and the Development Agreement invalid and return the matter to the Director of the Elmore County Land Use & Building Department and the Planning and Zoning Commission.

B. Course of Proceedings Before the Board and Factual Background.

On February 26, 2015, the Developer submitted to the Elmore County Land Use & Building Department five (5) applications for Conditional Use Permits: CUP-2015-03 for transmission lines, CUP-2015-04 for hydro electrical generating facility, CUP-2015-05 for wind turbine electrical generating facility, CUP-2015-06 for solar electrical generating facility, and CUP-2015-07 for an electrical substation (collectively the "CUPs"). [R. 000001-000524, Applications] The permits are sought to allow the Developer to construct a pump-storage hydroelectric generating facility on and adjacent to Anderson Ranch Reservoir, a solar electrical generating facility and a wind turbine electrical generating facility that will be located on the Camas Prairie in Elmore County, Idaho (the "Project Site"). [*Id.*]

Petitioner owns a two thousand eight hundred ninety (2,890) acre ranch (the "Ranch") that is located less than one mile of the proposed wind farm and is an affected party in accordance with I.C. § 67-6521(1)(a)(i). [R. 009905-10] The Petitioner purchased the Ranch in 2015 for recreational use. [R. 011379] The land fronts two creeks for recreational pursuits and is also designated as a Unit 45 hunting area. Unit 45 is renowned for big game hunting and the subject property is designated as an Idaho Shooting Preserve. [*Id.*] The property is improved with a 4,519-square foot airplane hangar/apartment and an airplane runway. [*Id.*] A map of the Ranch showing its location in relation to Anderson Ranch Dam and reservoir is attached hereto, marked Exhibit No. 1 [R. 011384] and a photo of the Ranch showing the hangar/apartment building and airplane runway is attached hereto, marked Exhibit No. 2. [R. 011385] A copy of the Master Site Plan for the Project and a map showing the proximity of the wind turbines and

photovoltaic solar electrical generating facility to the Ranch, is attached hereto, marked Exhibit No. 3. [R. 011448]

On June 15, 2016, the Elmore County Planning and Zoning Commission ("P&Z Commission") met to consider the applications. [R. 007257-7274, P&Z Minutes, June 15, 2016] The P&Z Commission heard testimony from the Developer, representatives of the Developer, and others individuals who supported the Project, some individuals who were neutral and several individuals who opposed the Project. [*Id.*; Tr. 012603-012729] On July 13, 2016, the Elmore P&Z Commission conducted deliberations of the applications for the CUPs. [R. 007275-007292 - P&Z Minutes, July 13, 2016); Tr. 012730-012821] On August 17, 2016, the P&Z Commission unanimously, on a 6-0 vote with one member absent, voted to deny the applications. [R. 007293-007311 - P&Z Findings, Conclusions & Order ("P&Z Order")] A copy of the P&Z Order is attached hereto, marked Exhibit No. 4.

The P&Z Commission found that "five (5) separate applications, each for a conditional use permit are required." The P&Z Commission further found that "based on testimony from the Applicant, all five (5) applications are dependent upon each other and cannot exist separately." Therefore the Commission conducted only one (1) public hearing and issued only one (1) decision on the Applications." [*See* Exh. 4 at R. 007295] The Commission found that the "Owners" of the Site are Sawtooth Grazing Association and Wood Creek Ranch, both at 1989 South 1875 East, Gooding, ID 83330 and that the Applicant's property right in the Site is based on lease agreements. The property size is approximately 23,000 acres, all of which is owned or controlled by John Faulkner. [*Id.* at R. 007296]

The Commission found that the applicable law for consideration of the Applications was: A) the Elmore County 2014 Comprehensive Plan, adopted as Resolution 562-15 on January 20, 2014 (the "Comprehensive Plan"); B) Zoning Ordinance, adopted March 21, 2012, as Ordinance 2012-01; which was subsequently amended on September 19, 2012, as Ordinance 2012-03 and on July 14, 2014, As Ordinance 2014-01; and C) the Local Land Use Planning Act, I.C. § 67-6501 *et seq*. [Exh. 4 at R. 007297-007298]

The Commission made several findings that the proposed project conflicts with the Comprehensive Plan with regard to Private Property Rights Objectives, Land Use Objectives, Scenic Area Objectives, Hazardous Area Objectives, and Areas of Critical Concern Objectives. [Exh. 4 at R. 007304-007307] The Commission further found that the Project failed to comply with the applicable Zoning Ordinances, including Title 6, and the applicable State and Federal regulations. [*Id.*at R. 007307-7308]. The Commission concluded that the Applications do not comply with the required findings set forth in Section 6-27-7 of the Zoning Ordinances. [*Id.* at R. 007310]

The P&Z Commission made findings and a conclusion that "the public hearing notice requirements of Zoning Ordinance Chapter 4 had been met" and that "the notice requirements of Idaho Code § 67-6512 had been met." [Exh. 4 at R. 007310] The P&Z Commission, however, was not aware that the notice requirements in I.C. § 67-6512 and Zoning Ordinance Section 6-4-5 had not been satisfied. The Public Notices of the P&Z Commission's public hearings on June 15, 2016 and July 13, 2016, did not comply with Zoning Ordinance Section 6-4-5, because they were required to be mailed to all property owners within one (1) mile of the Project Site and they were not mailed to Petitioner, whose property is located within one (1) mile of the Project Site, nor to Mr. and Mrs. Allen R. Thompson who also own property within one (1) mile of the Project Site. This failure also violated I.C. § 67-6512. [R. 009904-009970, Request for Reconsideration with County Mailing List] The failure to provide proper notice of the public hearings violated the Petitioner's and other affected parties' due process rights because these parties were not afforded the opportunity to make a record of their opposition to the Project as required by Zoning Ordinance 6-4-5 and I.C. § 67-6512. Had Petitioner received notice as required by law, Petitioner would have known about the Project and could have taken timely action to protect Petitioner's civil rights and property interest from encroachment by wind towers that will be up to five hundred (500) feet tall. Moreover, the notices that were mailed, published and posted failed to comply with I.C. § 67-6512(b), which requires that a notice for hearings on applications to construct a tower that is more than four hundred (400) feet tall, must describe the

proposed location and height of the proposed tower. [R. 10754-10766, Five (5) CUP Notices of Public Hearing] The notices for the P&Z hearings did not describe the proposed location and height of the proposed towers. [*Id.*] The towers are approved up to five hundred (500) feet tall. [R. 009902, Development Agreement]

On August 26, 2016, the Developer submitted an appeal from the P&Z Order to the Board of County Commissioners of Elmore County (the "Board") [R. 007312-007316], and Supplement Appeal on October 25, 2016. [R. 007709-007732] The Board heard the matter in public hearings on November 16, 2016 [Tr. 008106-008153] and 17, 2016 [Tr. 008154-008205] and December 16, 2016 [Tr. 013771-137783]. At the hearing on November 16, 2016, the Developer presented evidence that had not previously been presented, which materially changed the applications for the CUPs, including a new master site plan. [R. 008106-008153] Although Petitioner was included in the mailing for the Notice of Public Hearing on November 16, [R. 012467], this new evidence was not properly noticed as part of the hearing [R. 007758-60] and Petitioner did not have a proper opportunity to respond to this new evidence. For example, in violation of I.C. § 67-6512(b), the Notice of Appeal Hearing for the public hearings on November 16 and 17, 2016, contains no reference to the construction of wind turbines that will be up to 500' tall and be located within one mile of Petitioner's property. [R. 007758-60] As a consequence, Petitioner was not alerted to the fact the Ranch would be adversely affected by the construction of wind towers within one mile of the Ranch and the adjoining area.

During the appeal hearing on November 16, 2016, the subject of a partnership between the County and Cat Creek for the diversion and delivery of water by Cat Creek to the County was discussed and Elmore County Commissioner Corbus questioned Cat Creek about putting in writing that Cat Creek would be willing to partner with Elmore County to provide water to the County. [Tr. 008116, p. 40. ll. 1-20] Mr. Jones, a representative of Cat Creek responded that Cat Creek would work with the County to get water to Little Camas Reservoir or somewhere down to the County's canal system. He stated, "this would provide all of the infrastructure. Yes, we will work with you. I'll give you that assurance a hundred percent. If you get a water right we'll

be more than happy to partner with you in how to get that water where you need it to go. … And you're right. It needs to be in writing. And I am sure we can work something out to give you a letter of assurance." [Tr. 008117, p. 41, l. 14 –p. 42, l. 15]

Later in the deliberations, Commissioner Corbus stated: "One of our concerns is that this county has to have water. We have to come up with a way to get water here or our future can look very bleak. And so that is utmost importance to us. And that is one of the reasons that we are currently working on trying to be a partner with Idaho Department of Water Resources and build something that will bring some water into this area. And so that is a concern for the citizens of this county. And the water is very, very critical issue for us. That is a huge reason for our interest in that." [Tr. 008119, p. 50, l. 17 – p. 51, l. 4]

During the November 16, 2016 appeal hearing, the Commissioners discussed the issue of noise from the wind mills with Cat Creek representative, James Carkulis. In response to a question, Mr. Carkulis stated: "Noise from equipment. Yes, undoubtedly. Something moves there is going to be noise. The fact of the matter is though that where the wind turbines is [sp] located, there are no residences around. It is almost a moot point. It is just not going to be a concern." [Tr. 008120, p. 54, ll.19-23]

During the appeal hearing on November 17, 2016, Mr. Carkulis presented a new master site plan, which was different than the one presented by Cat Creek at the June 15, 2016 hearing. He explained they had moved the powerhouse location to a different cove, changed the solar park to the east side of wind area two, which resulted in the loss of six wind turbines, moved other wind turbines, reduced the number of turbines from 61 to 30 or 31 turbines, and moved the substation and O&M building. [Tr. 008155, p. 100, l. 20 – 008156, p. 104, l. 10]

Others spoke during the hearing on the subject. Mr. Joe Cottrell, a realty specialist for Bonneville Power Administration, Department of Energy, informed the Commissioners that the lines in the property description of the proposed project, which state: "Located above Anderson Ranch Reservoir in Idaho, power produced shall be transmitted alongside an existing BPA transmission line" and "[t]he sentence where it says, 'Transmission shall be provided from a dual

circuit 230 kV system to a facility-owned substation via right-of-way on the BPA corridor' are erroneous because BPA has not given any permissions to the applicant for their proposal and BPA is not open to a use of the existing corridor." [Tr. 008161, p. 122, l. 7 – p. 123, l. 20]

Harry Taggart, a resident of Mountain Home spoke and informed the Commissioners that he hunts and fishes throughout the South Fork of the Boise River basin, that he opposes the Project "because it would destroy the scenic beauty and environmental diversity of the area known as Wood Creek, which is right at the very doorstep of our splendid Boise and Sawtooth National Forests." [Tr. 008162, p. 127, ll. 10 – 19] Mr. Taggart also informed the Commissioners that he has "read and understood the Elmore County Comprehensive Plan, as well as Title 6, Chapter 14 of the Elmore County zoning and development ordinance defining areas of critical concern, which the Elmore County Planning and Zoning Commission is lawfully charged with protecting" and that he had read the minutes of the Planning and Zoning Commission meeting to deliberate Cat Creek Energy's applications and he "agree[s] with the Commissions unanimous rejection of multiple Cat Creek Energy permit applications because they fall short of compliance with a minimum of 12 different Comprehensive Plan standards." [*Id.* at p. 127, l. 20 – p. 128, l. 8] Mr. Taggart further pointed out that the U.S. Forest Service had said the Cat Creek Energy project "has the potential to affect resources and is potentially incompatible or in direct conflict with the existing management standards for this area" and that Idaho Fish and Game "declared this project will have a negative impact on wildlife." He added that Idaho Fish and Game also stated the Cat Creek Wildlife Mitigation Plan "is less of a mitigation plan and a general series of intended development actions. The lack of detail made a realistic determination of resource impacts infeasible. Discussions of mitigation are premature and impractical." [*Id.* at p. 129, l. 13 – p. 130, l. 10] Mr. Taggart also quoted from the independent review of the Wildlife Mitigation Plan by Power Engineers on behalf of Elmore County that "[a]s presented, the Wildlife Mitigation Plan is inadequate to address impacts to wildlife that may result from the Cat Creek Energy generation facility." [*Id.,* at p. 130, ll. 4-10]

Among several others who provided negative comments about the Project, Nancy Thompson, a resident of Mountain Home and the owner of a vacation home in the Featherville area, testified that she sits on the travel tourism committee, and is manager of the visitor's center in Mountain Home. She told the Commissioners that they get over 8,000 visitors every year, many from other countries, and they come to Idaho to see what the nature and the meaning of Idaho is about. Tourism brings about $7 million a year into Elmore County. They are sent on a scenic drive that is called the "Boise, Sun Valley Historic Loop Tour" that goes through Lowman, Idaho City, Stanley, Hailey, Fairfield, across the Camas Prairie, into Mountain Home and back to Boise. They return to the center and comment on what a beautiful drive it is. She added: "I can't imagine that I'm going to get the same kind of comments from these visitors when they come back to tell us what they've done when they cross up over the top of Cat Creek Summit and see wind turbines and solar panels. Ugly is as ugly does. You can't make them beautiful. You can't make them blend in." [*Id.*, 008165, p. 138, l. 25 – p. 140, l. 22]

Another opponent of the Project, Wendi Combs, a resident of Pine, Idaho, testified that the Project does not belong on Anderson Ranch Reservoir. She stated that "[a]ccording to Fish and Game, the proposed site does lie within a major migration corridor for mule deer, elk, pronghorn, raptors, and fish and other animals like bats, whatever. The area is an important sage grouse habitat. Sage grouse do not like tall structures, such as wind turbines, power lines, and towers. Displacement, avoidance and reduced nesting success are well documented. Fish and Game are concerned about water quality impacts, entrainment of fish, particularly the bull trout, and endangered species. We're not talking about one, but six silos pumping water up and down the reservoir 24/7, 365 days a year, their words in quotes. Then there is the noise pollution that will affect all the surrounding neighbors and campsites rendering them practically useless for solace and enjoyment." [Tr. 008168, p. 148, l. 9 – p. 149, l. 10]

Deliberations for the matter were conducted by the Board on January 13, 2017 [Tr. 13785-13793], February 3, 2017 [Tr. 13794-13810] and February 10, 2017 [Tr. 14459-14500], when the Board issued its Findings of Fact, Conclusions of Law and Order (the "Board 2017

Order"). [R. 008261-008314] A copy of the Board 2017 Order is attached hereto, marked Exhibit No. 5. During the deliberations among the Commissioners on February 3, 2017, it was obvious the Commissioners were contemplating a partnership with Cat Creek for the diversion and delivery of water by Cat Creek to Elmore County, because one of the Commissioners[3] stated: "Well, I think, and Bud may have a different impression, but for myself, if, you know, win [sp] this project is alive and well, and there, the conveyance of water from them to Little Camas [phonetic] is fairly easy, and that water comes down to Mountain Home Irrigation District, and so it's a matter of a partnership there." [Tr. 13796]

The Board reversed the findings of the P&Z Commission and approved the issuance of the CUPs, subject to several Conditions of Approval of the Applications. [*See Exh. 5,* R. 008261-008314] One of the conditions, Condition 2, requires the Applicant to return to the Board for further action, to negotiate with the Board and the landowners to enter into a Development Agreement, "which shall be recorded against the Property on or before November 15, 2017, which date may be extended by the Board for one additional six month period, and shall, following ongoing discussions and draft reviews with County staff, be presented to the Board in a public hearing subject to the Zoning Ordinance[4] and the LLUPA[5], and shall include, among other things, the following terms and conditions:

(a) clear definition of the project based upon the site plan presented to the Board at the November 16 and 17, 2016 hearings and such site plan and project description shall be added to and included into the Application;

(b) develop methods of furthering water delivery in the county for the transfer of county water to Little Camas Reservoir or other county water diversion or storage areas based upon county needs and the county's water rights,

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[3] This illustrates the problem with the failure of the county to maintain a transcribable verbatim record because we cannot identify the commissioner that is the speaker. We know it was a commissioner because the statement is made during their deliberations.

[4] Development Agreements are subject to compliance with Elmore County Ordinance Title 6, Ch. 29. [R. 009909-009910]

[5] The County and Intervenor have asserted that the adoption of the Development Agreement as required by Condition 2, does not require compliance with the LLUPA notwithstanding this provision in the Order approving the CUPs.

which may include the storage of water for the county until such time as the county water may be needed;

(c) in conjunction with IDWR approval, construct necessary water development projects in the Boise River drainage system in order to transfer water into arid portions of Elmore County;

(d) – (o) [describes additional terms and conditions of Condition No. 2.]

The failure to complete this Condition on or before the date set forth herein shall result in the termination of the approval to which this Condition is attached."

[*Id.* at 008308-9] Additional Conditions Nos. 3 – 42 are specified in the Board 2017 Order. [*Exh. 5,* at 008310-008314]

In the Board 2017 Order, the Board reaffirmed the finding of the P&Z Commission that, "based upon the testimony from the Applicant, that all five (5) applications are dependent on each other and cannot exist separately." [R. 008266, ¶ 5.B.]

Over the course of the next several months, Cat Creek and the County proceeded to negotiate the terms of a Development Agreement that resulted in several material changes in the conditions imposed in the Conditional Use Permits. The County and the Intervenor have contended that the County and the Intervenor can negotiate and enter into a Development Agreement that results in material changes to the conditions in the CUPs without complying with the applicable provisions in the LLUPA or the Zoning Ordinances. In a letter dated August 22, 2017, from Terri Pickens Manweiler, the lead attorney for Cat Creek, to L. W. Buzz Grant, one of the civil attorneys for the County, Mrs. Manweiler wrote that she was enclosing a copy of a draft development agreement. [R. 008315] In the letter she stated: "we would like the Development Agreement to be the sole guiding document for construction and operation." [*Id.*] Her letter also states that Cat Creek has "issues" with the CUPs and she describes several of the conditions of approval appended to the CUPs as being unacceptable to Cat Creek. [R. 008315-008335] She requested a public hearing with the Commissioners to "go through the Development Agreement with them ... ." [*Id.* at 008315]

The demands of the County that Cat Creek use its infrastructure to divert and deliver the county's water[6] from the South Fork of the Boise River to the Developer's reservoir and then to Little Camas Reservoir for the use of the County as a condition for issuance of the CUPs was a concern raised by the Developer's attorney. In a letter dated July 10, 2017, Gary Slette, attorney for Cat Creek, expressed concern that the County was demanding extractions from the Developer that may be unconstitutional conditions, as described in *Dolan v. City of Tigard,* 512 U.S. 374 (1994), because the County was demanding, among other things, that the Developer agree to divert and deliver water to the County using the Developer's infrastructure, in return for the right to develop the Project. [R. 008385-008387] Specifically, Mr. Slette identified four distinct items in the proposed Development Agreement, which in his opinion contradicted the *Dolan* decision: (1) provision of water infrastructure and improvements for delivery of water to the County; (2) payment of $330,000; (3) a scholarship fund; and (4) Senior Contribution. [*Id.*] These extractions are described in the draft Development Agreement referred to in Mrs. Manweiler's letter described above at R. 008336-8383.

The draft Development Agreement contains Section 2.2, which is subtitled "Water Delivery and Storage." [R. 008597] Subsection 2.2.2, states:

> 2.2.2. County Water Request. The County desires to divert water from the South Fork of the Boise river and deliver that diverted water to Little Camas Reservoir for subsequent delivery to locations designated by the County. Developer may under certain terms and conditions provided for in this Section, designate and store up to 10,000 acre feet of water in the expanded capacity of CCR above 50,000 acre feet in each available year, at a cost to the County for the conveyance and for the storage of that water separately at a rate mutually agreed upon by the Developer and the County.

[R. 008598]. Other subsections further describe the terms relating to the County Water Delivery System and costs relating thereto. [*Id.*]

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[6] The county had applied for a permit to take water from the South Fork of the Boise River, which was pending. R. 13961-14277, deposition testimony of Commissioners in support of application for water right Permit No. 63-34348.

On October 20, 2017, a public hearing was held by the Board to consider the adoption of a development agreement. At the hearing, the attorney for Cat Creek explained that their financier had substantial changes that needed to be made in the draft development agreement; that the representatives for the County and Cat Creek planned to meet on November 1, 2017, to discuss the changes; and, requested a six-month extension of the deadline to agree upon a development agreement. The Board granted the extension. [Tr. 12822-12838]

On December 22, 2017, a public hearing was held by the Board to consider the adoption of a development agreement. [Tr. 12839-12978] At the hearing it was noted that comparing the County's draft of a proposed development agreement with Cat Creek's version revealed over 1,000 differences, and according to the attorney for the county many were material changes, including a new "third site plan" that the County had not previously seen [Tr. 12845-47], and of course neither had the public. Another of the changes, identified by Commissioner Corbus was an increase in the size of the Cat Creek reservoir from 20,000 acre feet to 100,000 acre feet. He further commented that these were "huge changes" and that "we're changing the dynamics of all of this so its extremely difficult to … make changes like that and not involve the public in the process in time." [Tr. 12851-52]

During the December 22, 2017 public hearing, when discussing the diversion and delivery of water to the county by Cat Creek, Cat Creek's attorney, Mr. Slette, said to the Board:

> "The applicant says we'll be more than happy, happy to partner with you in how to get that water where you need it to go. There were, I've read through that transcript, and I think that it states is that the applicant would be more than pleased to work with the county in order to make, to help you get your water where you want it to go, if you get your water. And that's every time I have spoken with John [Faulkner] and James [Carkulis], that sentiment has echoed. We're more than happy to cooperate with you guys to try and put a deal together that works for you as well as us. We recognize that you have a water shortfall. We'll work with you. That's the bottom line.

[Tr. 12870-12871] In response, Commissioner Wootan stated:

> We're already to that point. We've already communicated among ourselves that we're workable, that we want to make their project work, and we want to make our intent happen.

[*Id.*] Later in the public hearing, when discussing a provision in the draft development agreement that provides the Board "shall make all reasonable efforts to assist the developer to build and complete the project," Mr. Grant, cautioned the Board: "You need to be objective and unbiased, and you're a regulatory authority in connection with this project. It's their project, and they're asking you to do everything in your power to help them." [Tr. 12895-12896]

Also, during this public hearing, attorney Scott Campbell, who was retained by the County to provide legal advice relating to the County's water rights and water rights applications, advised the Board that they could not agree to conditions in the proposed development agreement that did not conform with the conditions of the conditional use permits, and that the conditions being proposed in the development agreement were contrary to the conditions in the conditional use permits. [Tr. 12896-97] The Board disregarded his advice. [R. 011712-17]

It was also discussed at this public hearing that the Developer was presenting a new site plan, which was the third version of the site plan. The first site plan, which was previously submitted with the five (5) CUP applications, had been changed to a second site plan that was presented during the November 16 and 17, 2016 public hearings, and finally was changed again to the third version that was presented during this public hearing, which the pubic had not previously seen. [Tr. 12927] The original site plan had wind towers on one side (East) of Highway 20, but they were moved because they were in a deer and elk migration pathway and the solar panels were moved away from the RV Park. [Tr. 12928] Mr. Grant pointed out that moving the wind towers was a material modification that would need a public hearing and Board approval. [Tr. 12938-39] In response to Mr. Grant's comments, Mr. Carkulis, a representative of the Developer, stated that they "needed the latitude to put the towers wherever they wanted as the final design comes into play." [Tr. 12907-12960 at 12940] In response to Mr. Carkulis' remarks, Commissioner Corbus said the towers had to be located in accordance with their site plan which was submitted to the County and the citizens. [Tr. 12940-41]

Near the close of the hearing, Mrs. Manweiler complained that the negotiations of the terms of the proposed development agreement that had been conducted between the representatives of the County and the representatives of Cat Creek had not been very productive and she requested the Board designate a member of the Board to meet with Cat Creek representatives to negotiate the Development Agreement going forward. The Board designated Commissioner Hofer to be the negotiator for the County. [Tr. 12962-75] The public was not invited to participate in these private negotiations. [*Id.*]

The Board held a public hearing on January 26, 2018, to consider the Development Agreement. [Tr. 12979-13159] Commissioner Hofer disclosed he had participated in more than twenty (20) hours of meetings with the Cat Creek representatives to negotiate a development agreement, but he did not disclose the content of these *ex parte* communications. [Tr. 12981-12985] He recused himself from participating in the public hearing. [*Id.*] Commissioner Wooten disclosed he had talked with John Faulkner about "the Cat Creek thing" but did not disclose the content of those *ex parte* communications. [Tr. 12979-13040 at pg. 12983]

The Notice of Public Hearing for the January 26, 2018 hearing did not disclose the proposed location or height of the proposed wind towers. [R. 009053] During the public hearing, Mrs. Manweiler stated that Cat Creek could not lock themselves into exact locations for the wind towers because they did not know where they would be located. [Tr. 13004-13006] Commissioner Corbus observed that the locations of the wind towers had been changed. [Tr. 13008] The enlarged 100,000 acre feet reservoir was also discussed. [Tr. 13015-13030] The development of the Project in phases was also discussed for the first time in a public hearing and the draft development agreement proposed to extend the time for development from 4 years with a two-year extension to five years with a two-year extension. [Tr. 13031] Other material changes in the Project as described in the proposed development agreement were also discussed. [Tr. 13032-13038] The Board and the Developer also discussed Section 2.2 relating to the water agreement, but were unable to reach an agreement. [Tr. 13038-13116]

On February 9, 2018, without a public notice, the Board held a public hearing that purportedly was a continuation of the hearings on December 22, 2017 and January 26, 2018 to consider the Development Agreement. [Tr. 13160-13226] At this hearing, Mrs. Manweiler stated that the only issue that remained unresolved in the Development Agreement was the water issue at section 2.2. Mrs. Manweilier handed out a draft development agreement that included Cat Creek's version of section 2.2. This version provided that Cat Creek would deliver water to the County under terms stated in the draft. [Tr. 13167-68]. The County and Cat Creek could not agree on the terms of Section 2.2. Nevertheless, at the request of Cat Creek, the Board voted to approve the Development Agreement without Section 2.2. All three Commissioners, including Commissioner Hofer, who had participated in the *ex parte* communications with the Cat Creek representatives, voted in favor of approving the Development Agreement without the water delivery provisions in Section 2.2. [Tr. 13219-13220] A copy of the executed and recorded Development Agreement is attached hereto, marked Exhibit No. 6. [R. 009867-009903] This is contrary to the Board's previously adopted finding that the five (5) CUPs are dependent upon each other and cannot exist separately. [*See* Exh. 5, p. 6, ¶ 5.B; R. 008266]

The Development Agreement contains many material changes from the conditions in the CUPs, including a revised (third edition) version of the master site plan that moved the pump storage hydro powerhouse to a new location, moved the PV solar site, and eliminated wind area #1. [R. 008280] It removed the water diversion and delivery provision at Section 2.2, which was deferred for future negotiations. [R. 009871] It also revised the Stakeholder Advisory Board and funding for the Board and provisions relating to fish stocking, sage grouse mitigation, erosion control measures, communication with wildlife agencies, noise control, water transmission lines, scholarship fund, and senior contribution *all without prior notice* to the public and opportunity to be heard on these material revisions before they were adopted by the Board. [Exh. 6 at R. 009871-009873]

On February 16, 2018, SBar Ranch submitted its first Request for Reconsideration to the Board. [R. 009905-009979]. The Request was made in accordance with I.C. § 67-6535(2)(6) and

Elmore County Code 6-3-2:J. The Request states it is timely because it was submitted within the state and county deadlines of the final agency action of the Board, which was the Board's approval of the Development Agreement on February 9, 2018. [R. 009905] The Request asserts due process violations in the conditional use permit granting process under I.C. §§ 67-6512 and 67-6509. [R. 009906-08] The Request asserts that the County failed to provide proper notice of the June 15, 2016 and July 13, 2016 public hearings before the P&Z Commission on the five (5) CUP applications, in violation of the due process rights of the SBar Ranch. The Request included a copy of the mailing lists used by the County for the public notices of the P&Z Commission public hearings which exclude the SBar Ranch. [R. 009911-009970]

The Request also asserts that the Board violated the due process rights of the SBar Ranch when the Board held public hearings on November 16 and 17, 2016, to consider the CUPs and failed to provide public notice in advance of the hearings that the Board would be considering a new master site plan, which moved the pump storage hydro powerhouse to a new location, moved the PV solar site and eliminated wind area #1. [R. 009907] The Request further asserts that the removal of the water diversion and delivery provision from the Development Agreement was improper because that condition was required in the Board 2017 Order and removing it materially changes the Application, which required that all five (5) CUPs either be approved or denied *in totum* because the five (5) CUPs are dependent upon each other and cannot exist separately. [R. 009908]

The Request further asserted that there were due process violations in the Development Agreement because the Board 2017 Order is not complete without the Development Agreement, as provided in Exh. A, General Conditions, No. 2, to the Board 2017 Order. [*See* Exh. 5] The Development Agreement is an integral part of the Board 2017 Order and required public notice and hearing before it was approved by the Board. [R. 009909] The Request pointed out that the terms of the Development Agreement had not been finalized prior to the February 9, 2018 public hearing and could not have been available for the public to review in advance of the February 9, 2018 hearing. [*Id.*] Consequently, the notice of public hearing was inadequate and deprived

interested parties, including Petitioner, of their due process right to notice and an opportunity to be heard. [*Id.*]

The Request also asserted that the requirements of Zoning Ordinances Code 6-29-1, *et seq.,* for a development agreement had not been complied with, and that as provided in the Zoning Ordinances, the matter needed to be remanded to the Director as defined in Elmore County Code Title 6 ("Director") to begin the process of adopting a development agreement in compliance with the Zoning Ordinances. Elmore County Code 6-29-3 requires that the Director forward the draft development agreement to the Prosecuting Attorney of Elmore County for review, which was not done. Further in Section 6-29-3:C, it is stated that the Planning and Zoning Commission is required to review the development agreement and make a recommendation upon the draft development agreement, which was not done. Also, in Section 6-29-3:D, it states that the applicant shall sign the development agreement prior to the Board action on the final development agreement, which was not done. Further, the Development Agreement does not comply with the requirement in Section 6-29-5, that the Development Agreement contain findings that there has been compliance with the Zoning Ordinances. [R. 009909-9910] A copy of the First Request for Reconsideration is attached hereto, marked Exhibit No. 7. [R. 009905-009979]

On March 16, 2018, before ruling on SBar Ranch's Request for Reconsideration, the Board issued additional Findings of Fact, Conclusions of Law and Order—CUP Amendments ("Modified Findings"). [R. 009993-10008] These Modified Findings materially altered the Board 2017 Order. In particular, and among other things, the Board specifically found in the Modified Findings that "as a result in approving the Development Agreement, the Board approved changes to the [CUPs] and Conditions;" that the Development Agreement was not subject to LLUPA; and that the five (5) CUPs were no longer dependent on each other and instead found that the CUPs could be approved separately. [R. 009993] The Board fails to make findings or explain how the wind towers that generate electricity can be separated from the substation and transmission lines that are necessary to transmit that electricity to the place of use.

On March 26, 2018, SBar Ranch filed a Second Request for Reconsideration of the approval of the CUPs and the Development Agreement. [R. 10173-10241] The Second Request for Reconsideration claimed violations of due process; violations of the Local Land Use Planning Act, I.C. §§ 67-6501 through 6538 ("LLUPA"); and violations of the County Code and Ordinances. Specifically, the Second Request asserted among other violations, that the Development Agreement provides for an improper extension period; an improper adoption of a modified Master Site Plan in the Development Agreement; improper removal of the water diversion and delivery provisions of the CUPs from the Development Agreement; due process violations in the making of the Development Agreement; and failure, in violation of I.C. § 67-6512(b), to give notice of the height and locations of the proposed wind towers. [R. 10173-10241] A copy of the Second Request for Reconsideration is attached hereto, marked Exhibit No. 8.

On April 6, 2018, the Board denied SBar Ranch's First Request for Reconsideration. [R. 10243-10260] In doing so, the Board found, among other things, that (1) the CUPs were no longer dependent on each other and therefore, SBar Ranch was only an affected party under I.C. § 67-6521 as pertaining to the CUP for the wind turbines but not the other four CUPs; (2) that SBar Ranch did not timely seek reconsideration of the Board 2017 Order; (3) that changes made to the CUPs during the November 16, 2017 hearing did not violate I.C. § 67-6509 or § 67-6512(e); (4) that the Development Agreement was not governed by LLUPA; (5) that SBar Ranch's due process rights were not violated; and (6) the CUPs and Development Agreement did not violate the applicable County Code or Ordinances. [R. 10243-10260] On May 1, 2018, SBar Ranch filed its initial Petition for Judicial Review,[7] seeking review of the Board's denial of SBar Ranch's First Request for Reconsideration.

On May 18, 2018, the Board denied SBar Ranch's Second Request for Reconsideration. [R. 11030-11043] On June 13, 2018, Petitioner filed its First Amended Petition for Judicial

[7] The first Petition for Judicial Review was followed by an Amended Petition for Judicial Review on June 13, 2018 and by a Second Amended Petition for Judicial Review on February 11, 2019.

Review, seeking review of the Board's denial of SBar Ranch's Second Request for Reconsideration.

On June 19, 2018, Intervenor filed a Motion to Dismiss Part of Count I of Petitioner's Petition for Judicial Review. Elmore County joined the Motion. It was argued on September 18, 2018 and is pending before the Court.

On July 26, 2018, following notice, the Board *sua sponte* conducted a public hearing ("Reconsideration Hearing") on twenty (20) subject matters: "(1) an extension of the time the Applicant has to satisfy Conditions No. 2(b) and (c) of the Initial Findings with respect to CUP-2015-04 (hydro project); (2) the site plan and project description; (3) the Stakeholder Board (as defined in Condition No. 2(d) of the Initial Findings); (4) annual fish stocking in Anderson Ranch Reservoir; (5) conservation efforts affecting areas of sage-grouse habitat surrounding wind turbine areas 2 and 3 in the eastern part of Wood Creek Ranch; (6) erosion control measures; (7) the Applicant's erosion control plan; (8) visual mitigation measures; (9) communication with governmental agencies regarding fish and wildlife habitats and other matters; (10) noise standards; (11) the Scholarship Fund (as defined in Condition No. 30 of the Initial Findings); (12) the term of approval of the CUPs, including any option to extend the approval within the possible period of approval of the CUPs; (13) the Senior Fund (as defined in Condition No. 31 of the Initial Findings); (14) an updated Wildlife Mitigation Plan/Environmental Impact Statement; (15) a power sale agreement between the Applicant and Idaho Power; (16) the Interconnection Application; (17) the annual report requirement; (18) the County's right to terminate the CUPs); (19) separation of the Board's approvals of the CUPs to allow phasing of the Applicant's project; and (20) any other matter raised in the Development Agreement to the extent that it amends the Initial Findings, the Approval or the Conditions." [R. 11105-1112; 11810-11851; Tr. 11639-11689]

SBar Ranch submitted to the Board a Notice of Objections to the July 26, 2018 hearing. [R. 11281-11309] The Notice of Objections asserts, among other things, that SBar Ranch objected to: (1) the limited scope of the hearing; (2) the attempt by the Board to cure its prior

errors including its failure in all prior notices and the notice of the July 26, 2018 hearing, to comply with I.C. § 67-6512(b); and (3) the Amended Findings, Conclusions and Orders dated March 16, 2018. [R. 11281-11309] A copy of the Notice of Objections is attached hereto, marked Exhibit No. 9.

During the public hearing on July 26, 2018, Mrs. Manweiler described the twenty subject matters in the Development Agreement that resulted in changes in the Conditions, which are attached to the CUPs that were being reconsidered by the Board. She testified that the first change involved an extension of the time applicant has to satisfy conditions No. 2-B and C of the initial findings with respect to CUP 2015-04 hydro project. Another change was the site plan, the project description, which was now different than the site plan that was proposed in the application. The changes included moving the entire solar CUP across the highway. The reservoir was increased to 100,000 acre feet. She stated the Development Agreement with the water contemplates that the Elmore County water is going to come through Cat Creek's reservoir. The wind CUP changes involved elimination of 30 of the towers because they were in a wildlife migration plain. However, the wind towers that are close to the SBar Ranch property have not changed. She added: "Now there's been some concern about the height of the towers and the location of the towers. We don't know, and we've never known. We know generally where we want to put the wind towers within that CUP. We know the general height of wind towers as they exist today in construction industry, but we don't now because we haven't completed feasibility studies, we haven't completed wind studies, we haven't complied with all of the FAA feasibility studies. So we don't know. We could have a 200-foot wind tower, we could have a 499-foot wind tower. None of that, however, is outside of the zoning ordinance. That's all allowed under our CUP. So nothing has changed with respect to what the public would have seen if we would have built under the CUP that was granted in 2017 versus the modifications and clarifications that we added in 2017." [Tr. 011643, p. 12, l. 4 –p. 17, l. 2]

Mrs. Manweiler also testified that the electrical transmission lines under the original CUP were moved and the substation site was moved. Also, the solar panels were moved. She also

described changes in the provisions relating to the stakeholder advisor board, the annual fish stocking in Anderson Ranch Reservoir, conservation efforts affecting areas of sage-grouse habitat surrounding wind turbine areas 2 and 3 in the eastern part of Wood Creek Ranch, erosion control measures, visual mitigation measures, communications with governmental agencies regarding fish and wildlife habitats and other matters, noise standards, the scholarship fund, the senior fund, the wildlife mitigation plan, a power sale agreement between Cat Creek and Idaho Power, the interconnection application with BPA, the annual report requirement, and the County's right to terminate the CUPs. [Tr. 011643, p. 17, l. 3 – p. 29, l. 6]

When asked by Commissioner Corbus about her statement that Cat Creek does not have size and elevation for the wind towers, Mrs. Manweiler reiterated that they will not have height or location until the experts come out and tell them where the towers are going to be. She said they could be as high as 500 feet or as low as 200 feet. [Tr. 011648, p. 35, l. 14 – p. 36, l. 23]

Chris Stephens, the principal of SBar Ranch, testified that the reason SBar Ranch has objected to the CUPs being separated administratively during the Development Agreement negotiations, is because it allows the developer to develop the wind towers part of the Project and none of the rest of the Project; "that the public was never notified that a stand-alone wind project was being considered, let alone approved." [Tr., 011650, p. 44, ll. 5-15] Mr. Stephens also pointed out that the address given on the public posting has nothing to do with the wind and solar sites. The notice states the center of the Project is approximately 3.2 miles north on Wood Creek Road from its intersection at US 20 North, but the wind and solar farms are actually down that road 3 miles and down the highway 7 miles to the intersection of Pine-Featherville Road. "That's the area where these things are going to be considered, not near Anderson Ranch Reservoir." He added: "My question is: Why didn't we change—or why didn't you change the project location in your public notices when you separated these so that the location was where this project is, not 11 or 12 miles away where you can't see the two. That's huge. That's why a lot of people you might think are late to the game, they didn't know it was going to be on the Pine-Featherville Road." [*Id.* p. 45, ll. 2-17]

Mr. Stephens testified: "Ms. Pickens made a comment about, 'We moved the transmission lines because it had to be closer to the deal, no big deal.' It's a huge deal. Where it was before in the original site plan, I couldn't see it. Now that's all I'll see. So it's a big deal to do that just administratively." [*Id.,* p. 45, ll. 18-23] He continued: "Almost lastly, sticking to the 20-point item, as it stands now, that they can build just the wind farm plus a 20,000 square foot building and a 5,000 square foot building anywhere on those thousands of acres that are part of the CUP. Those buildings can be 70 feet in height and placed on the hilltops next to the scenic turnouts, wetlands, anywhere." … "They said that moving that substation over on the other side of the highway is no big deal. It's a huge deal to me. I get choked up, and I'm a pretty tough guy, and its just amazing to think that it can just be flipped over." [*Id.,* p. 48, l. 24 – p. 49, l. 5]

During his testimony, Mr. Stephens showed a video that illustrates the enormous size of the proposed wind towers and the negative visual impact they will have on the view from the Ranch, on the lands adjacent to the ranch, and the Camas Prairie. [Tr. 011650, p. 44, l. 4] The video also includes testimony from neighbors of the Ranch about the negative effects the towers will have on the neighboring lands and the Camas Prairie. The video has been submitted to the attorney for the County with the understanding it is now part of the record in this proceeding. A copy of the Video is attached hereto, marked Exhibit No. 10. The Court is urged to view the video. It clearly illustrates the adverse impact the wind towers will have on the Petitioner's property.

Allen R. Thompson, who also owns property within one mile of the Project site, testified that his property will suffer a loss of value as a result of the construction of the Project. [Tr. 0011661]. He also testified about the loss of the scenic value of the area as a result of the construction of the Project and he expressed his concerns about the environmental impacts and the fact there were too many unknowns about the Project. [*Id.*]

Merlyn Clark testified as the attorney for SBar Ranch. He informed the Commissioners that SBar had submitted a Written Notice of Objections to the subject matters of the hearing and he would not orally repeat all of them. He informed the Commissioners that they have a conflict

of interest that prevents them from acting as neutral decision makers in this matter because the County has an economic interest in the project based on the fact the County is going to receive water from the project using Cat Creek's infrastructure. He stated: "You made that very clear in your Development Agreement. You state that the project may be a benefit to the County, and that it was an essential inducement to the Board for its approval of the project. You've clearly stated you're reliant on getting that water for approval of this project. You've also stated that in the conditions of approval, that the CUPs were approved in reliance on the *quid pro quo* that the County will receive water from the project. That's a conflict you can't avoid. You can be neutral, you can be unbiased, you can try to do what's right, but you have a conflict of interest that conflicts, violates an Idaho statute. Idaho Code § 67-6506 prohibits conflicts of interest by decision makers in land use matters. The statute says: 'A member or employee of a governing board … shall not participate in any proceeding or action when the member or employee or his employer, business partner, business associate… has an economic interest' in the proceeding or action. The Idaho Supreme Court has ruled that a conflict of interest can arise if a person participated in the proceeding is employed by an entity that is economically interested in the proceeding. You're employees of the County. The County has an economic interest. It expects to get water out of this project. You've become partners with Cat Creek in this project because the County will receive water. So that's why I said, I don't think you can avoid the conflict, and it may be that we'll have to wait and let the court resolve that." [Tr. 011652, p. 51, l. 11 – p. 53, l. 17]

Mr. Clark also responded to a question that was raised by Mrs. Manweiler during her testimony; why are we here or why did SBar Ranch not participate in the November and December 2017 public hearings? Mr. Clark explained that it was because the notices of the hearings were defective. "The notices that went out for those hearings, November and December, did not comply with the Idaho statute, [I.C. § 67-6512(b)]. The Idaho statute expressly states that a notice of a public hearing for a tower or a structure to exceed four hundred (400) feet high must include a location and the height of the towers. You heard her tell you tonight, they don't know,

they don't even know now. They did not comply with those statutes. Why is that significant? Because if those notices – and that's where I got the notices, they don't deny that. If they had included in that notice the proposed location and the height, then SBar would have been alerted that it was going to have an adverse impact on its property, on the use of the property, and on the value of the property. That's why they didn't participate in those hearings. They weren't properly informed. The notices did not comply with the Idaho statute." [Tr. 011653, p. 53, l. 18 – p. 54, l. 15]

Deliberations were held on September 7, 2018, when the Board approved and issued Findings of Fact, Conclusions of Law and Order, July 26, 2018 – Rehearing ("Reconsideration Findings"). [R. 11868-11907] Because SBar Ranch had already appealed the Board's denials of the First and Second Requests for Reconsideration, the Board was deprived of jurisdiction to issue the Reconsideration Findings in an attempt to correct or fix the Board's prior and already appealed decisions. [R. 009905-009979; 10173-10241]

On September 11, 2018, SBar Ranch submitted its Third Request for Reconsideration to the Elmore County Board of Commissioners seeking reconsideration of the Reconsideration Findings. [R. 11981-11989] On September 21, 2018, the Board denied the Third Request for Reconsideration. [R. 12005-12009] A copy of the Third Request for Reconsideration is attached hereto, marked Exhibit No. 11. On February 11, 2019, with consent of the Court, Petitioner filed its Second Amended Petition for Judicial Review.

On December 11, 2018, Petitioner filed a Motion for Preliminary Injunction vs Elmore County Board of Commissioners. The Motion was heard on February 19, 2019 and is pending before the Court.

C. Additional Facts Re Conflicts of Interest

The Board of Commissioners have a conflict of interest that violates I.C. § 67-6506 and other law, and prevents them from serving as a neutral quasi-judicial body in this contested matter that is pending before the Board. The conflict arises from the fact that the County is requiring, as a condition for issuance of CUP-2015-04 and the other CUPs, that the Developer

agree to divert and deliver water from Anderson Ranch Dam to the County using the Developer's infrastructure. [*See* e.g., Tr. 008116, p. 40, ll. 1-20; 008117, p. 44, l. 14-p. 42, l. 15; 008119, p. 50, l. 17 – p.51, l4; *Exh. 5* R. 008261-008314] In other words, the County has a vested beneficial interest in approving the granting of hydro CUP and the other CUPs, which prevents the Board from serving as a neutral decision maker as required by law.

A further conflict of interest is created by the fact that Commissioner Hofer purportedly stepped away from his duties as a Commissioner and acted as a negotiator representing the County in negotiations with the Cat Creek representatives to reach agreement on the terms of the Development Agreement. Those *ex parte* communications were not disclosed to the Petitioner or the public. The Development Agreement, negotiated by Commissioner Hofer, was then submitted to Commissioner Hofer's fellow Commissioners for their approval. Knowing that the terms of the Development Agreement submitted to Commissioners Wooten and Corbus had been negotiated and approved by Commissioner Hofer, there was no way that Commissioners Wooten and Corbus could remain neutral and perform their duties as neutral decision makers regarding the terms of the Development Agreement.

Additionally, the individual members of the Board of Commissioners have a conflict of interest that violates I.C. § 67-6506 and other law and prevents each of them from serving as a neutral decision maker in this contested matter that is pending before the Board. The conflict arises from the fact that the County is requiring, as a condition for issuance of CUP-2015-04, and the other CUPs, that the Developer agree to divert and deliver water from Anderson Ranch Reservoir to the Mountain Home Irrigation District ("District") and Mountain Home area, using the Developer's infrastructure. Commissioners Hofer and Corbus each own land that is located within the Mountain Home Irrigation District and will personally benefit from the diversion and delivery of water to the District by Cat Creek. Mr. Hofer has testified that he owns 360 acres in the District and that water that is diverted and delivered to the District by Cat Creek from Anderson Ranch Reservoir will directly benefit his farm. [Tr. 142031, p. 195, ll. 2-22] Mr. Corbus testified that he owns four (4) acres in the District and that water that is diverted and

delivered by Cat Creek from Anderson Ranch Reservoir will directly benefit his four acres. [Tr. 14032, p. 81, ll. 3-12] Mr. Wooten testified that he is concerned about the delivery of water and the pricing of irrigation water across the county because he rents farm ground and has rented ground in the Mountain Home area and in Basin 61. [Tr. 14171, p. 236, l. 17-14172, p. 237, l. 2]

The Board's actions have deprived SBar Ranch of substantial rights as its actions have deprived SBar Ranch of property without the payment of just compensation and has deprived SBar Ranch of due process and equal protection of the law. The only rational solution to the problem of their conflict of interest and inability to serve as neutral decision makers as required by law, is to return the matter to the Director of the Elmore County Land Use and Building Department and the Planning & Zoning Board.

II. STANDARD OF REVIEW

"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); *Cowan v. Bd. of Comm'rs of Fremont Cty.*, 143 Idaho 501, 508, 148 P.3d 1247, 1254 (2006) (citing *Evans v. Teton County*, 139 Idaho 71, 74, 73 P.3d 84, 87 (2003)). For purposes of LLUPA, a local agency making a land use decision, such as the Board made here, is treated as a government agency under IDAPA. *Urrutia v. Blaine County*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000).

A governing board's "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." *Cowan*, 143 Idaho at 508, 148 P.3d at 1254 (citing *Sanders Orchard v. Gem County*, 137 Idaho 695, 698, 52 P.3d 840, 843 (2002)). The Board's actions shall be affirmed unless the Court finds the Board's findings, inferences, conclusions or decisions are in violation of constitutional or statutory provisions; the Board exceeded its statutory authority; the decision was made based on unlawful procedure; the decisions of the Board are not supported by

substantial evidence in the record; or the Board's decisions were arbitrary, capricious or an abuse of discretion. *See Cowan*, 143 Idaho at 508, 148 P.3d at 1254.

The Petitioners challenging the agency 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." *[Id].* (citations omitted.)

III. ISSUES PRESENTED ON APPEAL

1. Whether SBar Ranch is an affected party as provided in I.C. § 67-6521(1)(a)(1) and has standing to object to the issuance of the CUPs and the Development Agreement.

2. Whether the Board erred in finding that SBar Ranch's Requests for Reconsideration and objections to the actions were not timely filed with the Board under I.C. § 67-6535(2) and the applicable Zoning Ordinances.

3. Whether the Board's decision to approve the CUPs and Development Agreement was in violation of constitutional and statuary provisions or was based on unlawful procedure.

4. Whether the conflicts of interest of the Board and the Commissioners prevented the Board and the Commissioners from performing their duties as neutral decision makers regarding the terms of the CUPs and the Development Agreement and violated the due process rights of SBar Ranch.

5. Whether the filing of the initial Petition for Judicial Review deprived the Board of jurisdiction to issue orders in this matter from and after the date of filing of the Petition.

6. Whether the substantial rights of SBar Ranch have been violated by the actions of the Board.

7. Whether Petitioner is entitled to an award of attorney fees and costs pursuant to I.C. §§ 12-117 and/or 12-121.

IV. ATTORNEY FEES

Petitioner, as the prevailing party, requests an award of costs against Elmore County and Intervenor Cat Creek pursuant to I.A.R. 40(a). Petitioner requests an award of attorney fees,

including paralegal fees and reasonable expenses against Elmore County pursuant to I.C. § 12-117(1), because the county is acting without a reasonable basis in fact or law. *Smith v. Washington Cty., Idaho,* 150 Idaho 388, 391, 247 P.3d 615, 618 (2010) (Under I.C. § 12-117(1), the Court shall award "reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law"); *Sanders v. Board of Trustees of Mountain Home School Dist. No. 193,* 156 Idaho 269, 322 P.3d 1002 (2014) (attorney fees, witness fees and other reasonable expenses can be awarded on petitions for judicial review which is an appeal of a final agency action). *See also Knight v. Department of Ins.,* 119 Idaho 591, 808 P.2d 1336 (Ct. App. 1991) (court upheld award of fees to a successful party in an administrative appeal).

Petitioner also requests an award of attorney fees pursuant to Idaho Code § 12-121 against the Intervenor Cat Creek because the Intervenor is defending this action frivolously, unreasonably or without foundation. Both Elmore County and the Intervenor have throughout these proceedings disregarded the obligation of Elmore County to comply with the LLUPA, the Zoning Ordinances, and the Elmore County Comprehensive Plan. Both Elmore County and the Intervenor have known that the Elmore County Board and the Elmore County Commissioners have conflicts of interest that prevent them from serving as neutral decision makers and have disregarded those conflicts. Both Elmore County and the Intervenor have known that awarding the Conditional Use Permits and Development Agreement to allow the construction and operation of the Project conflicts with the Comprehensive Plan in violation of Idaho Code § 67-6512(a). Both Elmore County and the Intervenor have known that the issuance of the permits and the Development Agreement violates the civil rights of Petitioner. Notwithstanding the objections of Petitioner and the advice of the County's attorney, Scott Campbell, Elmore County and the Intervenor persisted and continued to agree upon terms in the Development Agreement that materially change the terms of the CUPs, violate the rights of Petitioner in a manner that does not comply with the governing law, are unsupported by facts on the record and law, and are arbitrary, capricious, or an abuse of discretion.

V. ARGUMENT

A. Petitioner has standing to challenge the actions of the Board relating to the CUPs.

Because "[t]he doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated," a court must first determine whether Petitioner has standing to challenge the actions of the Board. *Miles v. Idaho Power Co.,* 116 Idaho 635, 641, 778 P.2d 757, 763 (1989) (*citing Valley Forge Christian College v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464 (1982) (*abrogated on other grounds by Bowen v. Kendrick,* 487 U.S. 589, 618-19 (1988)). Because the CUPs are appealable permits under LLUPA, I.C. § 67-6519(4), the question of standing turns on whether SBar Ranch has "a bona fide interest in real property which may be adversely affected" by the Board's approval of the CUPs. I.C. § 67-6521; *Hawkins v. Bonneville Cty. Bd. of Comm'rs*, 151 Idaho 228, 231, 254 P.3d 1224, 1227 (2011) (noting that because the permits were appealable under LLUPA the question of standing turned on whether the petitioner had "an interest in real estate that 'may be adversely affected' by the Board's decision"). In short, "in land use decisions, a party's standing depends on whether his or her property will be adversely affected by the land use decision." *Cowan v. Bd. of Comm'rs of Fremont Cty.*, 143 Idaho 501, 509, 148 P.3d 1247, 1255 (2006) (citing *Evans v. Teton County*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003))

While, a court is more likely to find standing where the landowner's property is "adjoining the proposed development" or "adjacent to" it, *see Evans*, 139 Idaho at 75, 73 P.3d at 88, a court may "not look to a predetermined distance in deciding whether a property owner has, or does not have, standing to seek judicial review of a LLUPA decision." *Id.* Rather, the focus in determining standing is on "[t]he existence of real *or potential harm*" to the landowner's property. *Id.* at 76, 73 P.3d at 89 (emphasis added). If there is evidence showing that the land use decision "would inconvenience the [challenging party] in some manner, limit its use and enjoyment of the property, or cause economic harm" then standing may be established, regardless of the parcel's distance from the proposed development. *Ciszek v. Kootenai Cty. Bd. Of Comm'rs,* 151 Idaho 123, 128, 254 P.3d 24, 29 (2011) (citing *Student Loan Fund of Idaho,*

Inc. v. Payette Cty., 125 Idaho 824, 827, 875 P2d 236, 239 (Ct. App. 1994)). Nevertheless, while a showing of a particular or peculiar injury is required, "the petitioner needs to **allege, not prove**, only that the development could potentially harm his or her real estate interests." *Hawkins*, 151 Idaho at 231, 254 P.3d at 1227 (emphasis added).

Finally, even if a potential, particularized harm or injury is alleged, standing may only be established where it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision" by the court. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks and citations removed); *accord Employers Res. Mgmt. Co. v. Ronk*, 162 Idaho 774, 777, 405 P.3d 33, 36 (2017).

As discussed below, Petitioner clearly has standing to contest the wind farm CUP and also has standing to contest the other four CUPs.

1. **Petitioner's property is adjacent to the proposed wind farm and Petitioner has shown particular or peculiar injuries resulting from the Board's decision to approve the wind farm.**

a. Petitioner's property is adjacent to the proposed wind farm.

A property is "adjacent" if it is not widely separated from the proposed development. *See Adjacent*, BLACK'S LAW DICTIONARY (10th Ed. 2014) (A property is 'adjacent' to another when it "[lies] near or close to, but not necessarily touching"). Elmore County's Zoning Ordinance (the "Zoning Ordinance") requires that all property owners within one (1) mile of property with a proposed conditional use permit are notified. Zoning Ordinance § 6-4-5. It is undisputed that SBar Ranch is located within one (1) mile of the proposed wind farm. [R. 009905-09910] Being located within one (1) mile of the proposed wind farm, is sufficient proximity for SBar to establish standing. *See Davisco Foods Int'l, Inc. v. Gooding Cty.*, 141 Idaho 784, 787, 118 P.3d 116, 119 (2005) (holding that a property owner that was three (3) miles from a project could establish standing).

b. Petitioner has shown a particular injury resulting from the Board's approval of the wind farm CUP.

Chris Stephens, the principal of SBar Ranch, has alleged that the construction of the Cat Creek Project, and in particular the wind farm, will damage the value of the ranch by at least ten (10) percent. [R. 010986] In support of this allegation, SBar Ranch has provided an appraisal. [R. 010987-011005] The appraisal shows that the ranch is valued at $3,300,000.00 and that the construction of the wind farm will reduce the value of the ranch by at least $330,000.00. Diminution in the value of property is an injury sufficient to support a finding of standing. *See, e.g.*, *Cowan v. Bd. of Comm'rs of Fremont Cty.*, 143 Idaho 501, 509, 148 P.3d 1247, 1255 (2006) (finding standing where petitioner alleged diminution in the value of his property due to the proposed development); *Ciszek v. Kootenai Cty. Bd. of Comm'rs*, 151 Idaho 123, 129, 254 P.3d 24, 30 (2011) (same).

Further, Mr. Stephens testified on July 26, 2018, that when he decided to invest heavily in the SBar Ranch and retire in the area, he expected protection from developments like the Project through the Comprehensive Plan. [R. 011589-011591] The granting of the CUPs and the Development Agreement have negatively impacted the visual and aesthetic properties of the Ranch and will significantly reduce Mr. Stephens' and his family's enjoyment of the property. Mr. Stephens presented a video to the Board to illustrate the harm that the wind towers will inflict on SBar Ranch and the surrounding area. [Tr. 011650, p. 44, l. 4] The video makes clear the extent of the visual and aesthetic damage the wind farm will cause SBar Ranch. [*See* Exh. 10, Video] The same concerns exist with the construction of the transmission lines that will connect the wind towers to the substation and the high-voltage transmission lines that will transmit the power to Bonneville Power or others.

Ultimately, it is clear that potential loss of economic value to SBar Ranch's property and the interference with the enjoyment of the property are sufficient to demonstrate a particularized harm. *Ciszek*, 151 Idaho at 128, 254 P.3d at 29 ("[Petitioner's] allegations of interference with the use and enjoyment of her property, as well as decreased property values, are sufficient to demonstrate a particularized harm."); *Price v. Payette Cnty. Bd. of Cnty. Comm'rs,* 131 Idaho

426, 431, 958 P.2d 583, 588 (1998) (vacating a board decision because it could impact property value or the petitioners' use and enjoyment of their land).

Further, given that a ruling in Petitioner's favor would invalidate the wind farm CUP, there is a "substantial likelihood" a favorable decision will likely remedy the harms alleged by Petitioner. *See Tucker v. State*, 162 Idaho 11, 24, 394 P.3d 54, 67 (2017) (the redressability element of standing is met where a "favorable decision is likely to redress [the] injury[.]").

Accordingly, because Petitioner is within a mile of the proposed wind farm and has alleged quantifiable allegations of a diminution in the value of Petitioner's property as well as interference with the use and enjoyment of Petitioner's property due to the construction of the proposed wind farm, and because a favorable decision is likely to redress the alleged injuries, it is clear that Petitioner is an affected party under Idaho Code § 67-6521(1)(a)(1) and has standing to contest the Board's decision approving the wind farm CUP.

c. Petitioner has standing to contest the other CUPs as well.

The Idaho Supreme Court has held that although "[p]roximity is a very important factor. . . ." the "Court will not look to a predetermined distance in deciding whether a property owner has, or does not have, standing to seek judicial review of a LLUPA decision." *Evans v. Teton County,* 139 Idaho 71, 75, 73 P.3d 84, 88 (2003). In *Davisco Foods Int'l, Incl. v. Gooding County,* 141 Idaho 784, 786-87, 118 P.3d 116, 118-19 (2005), the Court ruled that potential odor impacts from a wastewater treatment facility on a homeowner three and a half miles from the site could give rise to standing.

Petitioner acknowledges that proximity alone is insufficient to establish standing. In *Student Loan Fund of Idaho, Inc. v. Payette County,* 125 Idaho 824, 827, 875 P.2d 236, 239 (Ct. App. 1994), the Court of Appeals noted that a complainant must demonstrate a " 'distinct and palpable injury' traceable to the challenged governmental conduct. It is the quality or magnitude of the injury suffered which must differentiate a plaintiff from the citizenry at large in order to confer standing. The situs of owned property in relationship to an area touched by an ordinance

is relevant to a standing inquiry only insofar as the property's location exposes the landowner to peculiarized harm." *Id.* 827, 875 P.2d at 239.

In *Ciszek v. Kootenai County Bd. Of Comm'rs,* 151 Idaho 123, 129, 254 P. 3d 24, 30 (2011), the Court found that property owners suffered particularized harm consisting of loss of property value and therefore had standing to challenge a zoning change allowing additional mining adjacent to their property. Similar to the situation in *Ciszek,* Petitioner has established in these proceedings that Petitioner will suffer particularized harm consisting of loss of property value and loss of enjoyment of use of its property from the construction and operation of the transmission lines, substation, solar facilities, and hydro facilities of the Project on property that is adjacent to the SBar Ranch.

As described in the Supplemental Memorandum In Support of Request for Reconsideration filed with the Board on March 26, 2018, [R. 010261-010350], the Ranch property is located in what has been designated as Idaho Fish and Game Unit 45, which is renown for its big game. Because of its location on the Camas Prairie and the adjacent area, the Ranch property has been designated as an Idaho Shooting Preserve pursuant to Title 36, Ch. 22, Idaho Code. The construction and operation of the Project will have an adverse impact on hunting in the area adjacent to the Ranch and may result in the loss of designation as an Idaho Shooting Preserve. The loss of the Preserve status will result in loss of the value of the Ranch.

Also, the value and enjoyment of the Ranch property will be adversely affected by the impact of the construction and operation of the hydro facilities, solar facilities, transmission lines, and substation, as well as the wind tower facilities in the area adjacent to the Ranch. As found by the Planning & Zoning Commission, the facilities will be disturbing and have negative impacts on the surrounding neighbors and neighborhoods in conflict with the Comprehensive Plan that provides that property owners shall not use their property in a manner that negatively impacts upon the surrounding neighbors or neighborhoods. [*See Exh. 4* at R. 007304].

In the May 11, 2018 public hearing, SBar Ranch presented evidence that it is an affected party and has standing to challenge all five (5) CUPs. It is an affected party with respect to all

CUPs because the Project will adversely affect recreation resources on the Prairie as outlined in the P&Z Findings. [*Exh. 4,* R. 007293-007311 at 007304]. It is an affected party with respect to all CUPs because the Project will adversely affect the scenic and aesthetic character of the recreation experience in this setting as described in the P&Z Findings. [R. 007304-007305] It is an affected party with respect to all CUPs because the Project facilities are in conflict with the Elmore County Comprehensive Plan as described in the P&Z Findings. [R. 007304] It is an affected party with respect to all CUPs because the creation of a 100,000 acre foot reservoir physically changes the landscape and the character of the general vicinity that is currently high desert area as described in the P&Z Findings. [*Id.* at 007308] It is an affected party with respect to all CUPs because the proposed applications are not harmonious in appearance with the existing character of the general vicinity as described in the P & Z Findings. [R. 007308]

B. The Board erred by finding and concluding that SBar Ranch's motion to reconsider the Board 2017 Order was untimely.

Despite the fact that the Board 2017 Order clearly required further Board action (in the form of holding a public hearing and approving the Development Agreement) the Board found and concluded that SBar Ranch did not timely seek reconsideration of the Board 2017 Order because SBar Ranch did not seek reconsideration of the Board 2017 Order until after the Development Agreement was approved on February 9, 2018. [*See Exh. 5 at* R. 010173-010241]. As discussed below, this finding and conclusion by the Board was in error.

The Idaho Supreme Court has clearly held that final agency action does not occur until the decision of the agency authorizes "the applicant to take steps to permanently alter the land without further approval of the governing board." *Canal/Norcrest/Columbus Action Committee v. City of Boise*, 136 Idaho 666, 670, 39 P.3d 606, 610 (2001); *accord Stevenson v. Blaine County*, 134 Idaho 756, 759-60, 9 P.3d 1222, 1225-26 (2000); *Rural Kootenai Organization, Inc. v. Board of Comm'rs*, 133 Idaho 833, 838, 993 P.2d 596, 601 (1999); *Payette River Prop. Owners Ass'n v. Bd. of Comm'rs of Valley Cnty.*, 132 Idaho 551, 555, 976 P.2d 477, 481 (1999).

In *South Fork Coal. v. Bd. of Comm'rs of Bonneville Cty.*, 112 Idaho 89, 730 P.2d 1009 (1986), the county board of commissioners issued an approval of a planned unit development however they retained "jurisdiction to either approve or deny the final plan after [the board] ha[d] reviewed it[.]" *[Id.* at 90, 730 P.2d at 1010.*]* In *Bothwell v. City of Eagle*, 130 Idaho 174, 938 P.2d 1212 (1997), the city council approved a preliminary plat but "included in its approval . . . conditions that [the applicant] must fulfill . . . and stated that there "will be a review before final plat approval in a public hearing format." *Bothwell*, 130 Idaho at 175, 730 P.2d at 1213.

The same things that happened in *South Fork Coal* and *Bothwell* happened here. On February 10, 2017, the Board entered an approval of the CUPs by way of the Board 2017 Order. However, the Board 2017 Order, as in *Bothwell*, "included conditions that [Cat Creek] must fulfill." Indeed, the Board 2017 Order includes references *ad nauseam* that make it unmistakably clear that it is only *with the conditions*, i.e., with the approval of the Development Agreement, that the Board is approving the CUPs. [*See Exh. 5, Board 2017 Order, e.g.*, R. 008278-79, 008281-82, 008289, 008296, 008301 (providing examples of where the Board made it clear that it was only "with the Conditions" that certain findings were supported)]. Importantly, the Board makes it explicit that the Board's approval of the CUPs is wholly reliant on the fulfillment of the Conditions: "[T]he Board hereby . . . approves the Applications ***subject to the Conditions***." [*Id. at* R. 008306 (emphasis added).]

Condition No. 2 of the Board 2017 Order explicitly required that a "Development Agreement" be reached between "the Applicant, the landowner of the Property and Elmore County" and that such agreement "shall be presented to the Board ***in a public hearing*** subject to the Zoning Ordinance and the LLUPA . . . ." [*See Exh. 5, Board 2017 Order* at R. 008308 (emphasis added)]. Thus, like in the city council's approval in *Bothwell*, the Board 2017 Order included conditions that required a final review, in public hearing format, before the approval was final. *Bothwell*, 130 Idaho at 175, 730 P.2d at 1213 (noting in its approval that there would "will be a review before final [ ] approval in a public hearing format.").

Also like in *Bothwell*, which required a flood plain permit before construction could begin, the Board 2017 Order includes as Condition 15 a requirement that "***[p]rior to any construction*** an updated Wildlife Mitigation Plan/Environmental Impact Statement shall be submitted to Elmore County[, which] shall be reviewed and will be subject to approval by the Commission for compliance with the Elmore County Ordinances . . . ." [*See Exh. 5, Board 2017 Order* at R. 008310 (emphasis added)]. The Board 2017 Order also includes as Condition 9 a requirement that "**Prior to the issuance of building permit**, Applicant must hold two (2) public meetings . . . and **an overall site plan**, stamped and signed by Applicant's engineer must be approved by the County Engineer[.] *Id.* (emphasis added). The site plan, however, was to be finalized as part of the Development Agreement. [*See Exh. 5* at 008308, ¶ 2(a).]

Thus, it is clear that the Board 2017 Order did not give Cat Creek the authority to alter the land. Indeed, Cat Creek acknowledged as much in the January 26, 2018 hearing. [*See* Tr. 13017, II. 19-21 ("These aren't' the County saying absolutely 100 per cent we say you can do this. Go ahead and start building it today.") Rather, just as in *Bothwell* and *South Fork*, further action by the Board was required before Cat Creek could alter the land including, but not limited to the Board's approval of the site plan, which was to be done in connection with the approval of the Development Agreement. Consequently, until the Development Agreement was approved, which would include approval of the finalized site plan, Cat Creek was not authorized to begin alteration of the land.

In sum, the ultimate effect of the Conditions, especially the requirement of the approval of the Development Agreement, which required a public hearing, was that the Board 2017 Order was a "conceptual approval" as provided in Elmore County Code § 6-27-5(6)[8] or a delayed

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[8] Elmore County Code § 6-27-5(6) provides that the Board may issue a "conceptual approval" which requires the submission of an application for final approval or permit. It reads:

> The term of approval of a Conditional Use Permit shall not exceed (12) months unless some other period of time is specified in the permit. Within this period, the holder of the permits shall: …
> 6. For conceptual approvals, submit an application for final approval or permit.

This is exactly what the 2/10/2017 Approval required. Condition 2 required that by November 15, 2017, the Applicant complete the Development Agreement and present it along with the application to the Board for approval "in a public hearing subject to the Zoning Ordinance and the LLUPA[.]" 2/10/2017 Approval, Ex. A, p. 48, ¶ 2.

decision under I.C. § 67-6521(1)(c)[9] but, as in *South Fork Coal*, where the county provided an "approval in principal," the Board still retained "jurisdiction to either approve or deny the final plan after they have reviewed it[.]" 112 Idaho at 90, 730 P.2d at 1010.

Thus, just as in *South Fork Coal* and *Bothwell*, the Board 2017 Order was not final, *i.e.*, action by the Board was still required (including a public meeting, hearing, and approval of the Development Agreement) before Cat Creek could "take steps to permanently alter the land." Accordingly, because Cat Creek was not authorized to take steps to permanently alter the land until the Development Agreement was approved, the Board's approval of the CUPs was not a "final decision" until the Board approved the Development Agreement on February 9, 2018. As such, the fourteen (14) day clock, under I.C. § 67-6535(2)(b), and the ten (10) day clock, under Zoning Ordinance 6-3-2:J&K, to seek reconsideration of the Board's approval of the CUPs did not start to run until February 9, 2018. Thus, SBar Ranch's filing of its first Request for Reconsideration, on February 16, 2018, seven (7) days after the Board 2017 Order became final, was timely and the Board's finding otherwise should be overturned and the matter should be remanded to the Board for consideration of SBar Ranch's *entire* request for reconsideration, not just the parts dealing with the Development Agreement.

Similarly, because its first Request for Reconsideration as to the approval of the CUPs was timely, SBar Ranch's filing of its petition for judicial review was also timely, not just for review of the approval of the Development Agreement and the modification to the CUPs, but to the CUPs approval in the first instance.

C. The Board's Decisions Are Illegal and Without Force and Effect Because of the Conflicts of Interest that Prevented the Board from Being Impartial and Objective.

The Board, and two of its individual members, have an "economic interest in the procedure or action" at issue here, which created conflicts of interest in violation of LLUPA's conflict of interest statute. *See* I.C. § 67-6506. Because the Board's findings and decision-

[9] Idaho Code § 67-6521(1)(c)(ii) provides that the Board may "Delay such a decision for a definite period of time for further study or hearing."

making have been tainted by the existence of multiple conflicts of interest, the Board's decisions are "illegal and without force and effect." *See Manookian v. Blaine County*, 112 Idaho 697, 701, 735 P.2d 1008, 1012 (1987) (upholding district court's conclusion that a violation of LLUPA's conflict of interests provision renders the decision "illegal and without force and effect.").

For over 40 years, LLUPA has prohibited conflicts of interest of the type presented here. *See* I.C. § 67-6506. Specifically, where a commissioner has an economic interest in a matter before the commission, said commissioner "shall not participate in any proceeding or action," and must disclose "[a]ny actual or potential interest . . . before any meeting at which the action is being heard or considered." *Id.* Moreover, "[n]o member of a governing board . . . with a conflict of interest shall participate in any aspect of the decision-making process concerning a matter involving the conflict of interest." *Id.* Participation is defined as "engaging in activities which constitute deliberations pursuant to the open meeting act." *Id.* "[I]t is imperative that biased or potentially biased commissioners be barred from participating in the zoning procedure." *Manookian*, 112 Idaho at 701, 735 P.2d at 1012.

The LLUPA conflict of interest provision casts a wide net, as it applies not only to the commissioners themselves, but also to their "employer[s], business partner[s], business associate[s], and any person related to him by affinity or consanguinity," i.e., family members. *See* I.C. § 67-6506. The case law interpreting LLUPA is equally expansive. A conflict of interest can arise if the person participating in the proceeding is employed by an entity that is economically interested in the proceeding. *Gooding Cnty. v. Wybenga*, 137 Idaho 201, 205, 46 P.3d 18, 22 (2002). The Idaho Supreme Court has held that "[t]he statute is not ambiguous. The legislature intended to prohibit economic conflicts of interest." *Manookian*, 112 Idaho at 701, 735 P.2d at 1012. The purpose of LLUPA's prohibition against conflicts of interest is to "assure that, consistent with our democratic principles, only impartial and objective persons make decisions affective other persons' liberty and property." *Id.* This is especially true where the actions of a zoning body under these circumstances are considered to be quasi-judicial acts that

require procedural due process. *Cooper v. Bd. of Cty. Comm'rs of Ada Cty.*, 101 Idaho 407, 410, 614 P.2d 947, 950 (1980).

An economic interest may be direct or indirect. *Martin v. Smith*, No. 2008 WL 4727843 (Idaho Dist. Apr. 2, 2008) (granting preliminary injunction based on existence of an economic interest in the proceeding). A party challenging a conflict of interest need not show that conflicted members actually reaped a pecuniary benefit; instead, the challenging party need only show that the conflicted members had an economic interest in the proceedings in which they participated. *Id.*, *citing Manookian*, 112 Idaho at 697, 735 P.2d at 1008. Notably, in *Manookian*, the Idaho Supreme Court did not require a showing that the conflicted members lobbied or received any direct pecuniary benefit from the proceedings, only that they had an economic interest. *Manookian*, 112 Idaho at 697, 735 P.2d at 1008. Moreover, even where conflicted members do not vote on the ultimate decision, their participation alone is sufficient to taint the proceedings and invalidate them. *Id.*

In this matter, the process has not been fair and impartial, as demonstrated by the findings of the Board, because they have an economic interest in securing water for the County from the project that will be constructed under the CUPs they are approving. There exist at least five conflicts of interest in the record before the Court.

First, the Board itself has an irreconcilable conflict of interest because the County is requiring the developer, as a condition for the issuance of the CUPs, to use the developer's infrastructure to deliver water to benefit the County. "A member . . . of a governing board [or] commission . . . shall not participate in any proceeding when . . . his employer . . . has an economic interest in the procedure or action." *See* I.C. § 67-6506. The County has a vested beneficial interest in approving the granting of the CUPs, which prevents the Board, as the governing board of the County, from serving as a neutral decision maker as required by law.

Second, this condition imposed by the County to receive water as part of approving the CUPs creates a conflict of interest for Commissioners Hofer and Corbus who own property in the Mountain Home Irrigation District. The conflict arises from the fact that the County is

requiring, as a condition for issuance of CUP-2015-04, and the other CUPs, that the Developer agree to divert and deliver water from Anderson Ranch Reservoir to the Mountain Home Irrigation District and Mountain Home area, using the Developer's infrastructure. "A member . . . of a governing board [or] commission, . . . shall not participate in any proceeding . . . when the member . . . has an economic interest in the procedure or action." *See* I.C. § 67-6506. Commissioners Hofer and Corbus own land that is located within the District and will personally benefit from the diversion and delivery of water to the District by Cat Creek. [Tr. 142031, p. 195, ll. 2-22; Tr. 14032, p. 81, ll. 3-12; Tr. 14171, p. 236, l. 17-14172, p. 237, l. 2].

Third, Commissioner Hofer engaged in undisclosed *ex parte* communications with Cat Creek representatives to negotiate the terms of the Development Agreement, which agreement was then submitted to County for approval. Commissioner Hofer recognized the conflict of interest in negotiating the Development Agreement by attempting to recuse—but not actually recusing—himself from the vote on the Development Agreement. Knowing that the terms of the Development Agreement that was then submitted to Commissioners Wooten and Corbus had been negotiated and approved by Commissioner Hofer, there was no way that Commissioners Wooten and Corbus could remain neutral and perform their duties as neutral decision makers regarding the terms of the Development Agreement. *See* I.C. § 67-6506 ("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.").

Fourth, even though Commissioner Hofer purported to recuse himself from participating in the public hearing on the Development Agreement, he ultimately cast an "aye" vote in favor of approving the same in violation of LLUPA's conflict of interest statute. LLUPA's conflict of interest statute makes clear that a conflicted commissioner "shall not participate in any proceeding or action" involving the conflict. *See* I.C. § 67-6506. In addition, the Idaho Supreme Court recognizes that, where conflicted members do not vote on the ultimate decision, their participation alone is sufficient to taint the proceedings and invalidate them. *Manookian*,

112 Idaho at 701, 735 P.2d at 1012; *Martin*, No. 2008 WL 4727843 at *14 (5th Judicial Dist. Ct. Idaho April 2, 2008, No. CV-2007-24) (finding remedy of disregarding conflicted member's vote to be insufficient to cure the tainted proceedings).

Fifth, the record does not contain a verbatim transcript that contains the identities of the speakers so SBar Ranch may be in a position to identify those who participated in proceedings in violation of LLUPA's conflict of interest statute. *See* I.C. § 67-6506 (stating that a "member or employee of a governing board . . . shall not ***participate*** in any proceeding" if that member has an economic interest in the procedure or action) (emphasis added).

In light of these multiple conflicts of interest, the Board's decisions are "illegal and without force and effect." *Manookian*, 112 Idaho at 701, 735 P.2d at 1012.

D. The Board's Decision was in Violation of Constitutional and Statutory Provisions and was Based on Unlawful Procedure.

The Board's decision to approve the CUPs and Development Agreement was a violation of constitutional and statutory provisions and based on unlawful procedure in primarily two ways: (1) the County violated Petitioner's right to due process; and (2) the Board acted in violation of the applicable Idaho Code sections and Zoning Ordinance sections governing the approval of conditional use permits and development agreements.

1. Petitioner's right to due process was violated.

Petitioner's right to due process was violated in two ways. First, because Petitioner was not provided adequate notice of, and an opportunity to be heard in, the hearings conducted by the P&Z Commission and by the Board. And second, because the Commissioners did not confine themselves to the record in arriving at their decision but engaged in multiple *ex parte* communications in violation of Petitioner's right to due process

a. The County failed to provide adequate notice of the hearings held by both the Planning and Zoning Commission and by the Board.

"[A] decision 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." *Chambers v. Kootenai Cty. Bd. of Comm'rs*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1994). The granting of a conditional use permit is such a decision. *Id.* Accordingly, the County was obligated to follow the safeguards of due process. *Id.* The due process 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." *Neighbors for Pres. of Big & Little Creek Cmty. v. Bd. of Cty. Comm'rs of Payette Cty.*, 159 Idaho 182, 190, 358 P.3d 67, 75 (2015) (quoting *Neighbors for a Healthy Gold Fork v. Valley Cnty.,* 145 Idaho 121, 127, 176 P.3d 126, 132 (2007)).

Here, Petitioner's right to notice and an opportunity to be heard was violated in at least five ways: (1) Petitioner was never provided notice, at all, of the P&Z Commission hearings; (2) the notice issued by the Board for its November 16 and 17, 2016, hearings did not contain the height and location requirements set out in I.C. § 67-6512(b), and failed to contain an adequate description of what would be discussed at the hearing; (3) the notices issued by the Board regarding the Development Agreement did not indicate that the Board would consider and potentially modify the CUPs; (4) the notices regarding the Development Agreement contained inaccurate descriptions of location of the project; and (5) the Board failed to provide copies of the final Development Agreement before it was approved at the February 9, 2018, hearing.

First, the P&Z Commission held hearings on the approval of the CUPs on June 15, 2016, and July 13, 2016. [R. 007257-7274; 007275-007292] As reflected in the County's mailing lists, Petitioner, as well as Mr. and Mrs. Allen R. Thompson, were not mailed the required notice of the public hearings as required by I.C. § 67-6512(b) or Zoning Ordinance Section 6-4-5. [R. 009904-009970] Consequently, Petitioner had no notice and no opportunity to be heard at any of the P&Z Commission hearings.

Second, although Petitioner was included on the mailing list for the Board's November 16 and 17, 2016, appeal hearings regarding the CUPs, the notice failed to include any reference whatsoever to the construction of wind turbines, let alone the proposed height or location of the wind turbines as required under I.C. § 67-6512(b). [R. 007758-007760] As a consequence, even

though Petitioner received a notice of the November 16 and 17, 2016, hearings, the notice was insufficient to advise Petitioner that its Ranch would be adversely affected by the proposed development.

Moreover, during the November 16 and 17, 2016 appeal hearings, the Board heard evidence that was never presented to the P&Z Commission and was not properly noticed. Specifically, the Developer presented a new master site plan that was different than the one presented to the P&Z Commission. [R. 008106-008153] The new master site plan materially altered the CUPs by moving the powerhouse location to a different cove, moving the location of the substation and O&M building and moving the location of the solar park, among other things. [Tr. 008155, p. 100, l. 20 – Tr. 008156, p. 104, l. 10] However, none of those things, or even the existence of the new master site plan, was disclosed in the notice that was mailed to Petitioner. [R. 007758-007760] Without notice of the fact that new evidence was to be presented during the November 16 and 17, 2016 appeal hearings, Petitioner was deprived of a meaningful opportunity to be heard. *See, e.g.*, *Gay v. Cnty. Comm'rs of Bonneville Cnty.*, 103 Idaho 626, 629 (Ct. App. 1982) (the right to be heard includes "a reasonable opportunity to present and to rebut evidence").

Third, the notices provided for the October 20, 2017 hearing, the December 22, 2017 hearing, and the January 26, 2018 hearing all failed to indicate that the Board would be considering the modification of the CUPs. [R. 008630-32, R. 010410-11, R. 008797, R. 009053] Here again, without notice of the specific action to be taken by the Board at the referenced hearings, Petitioner was deprived of the opportunity to be heard because he did not have a meaningful opportunity to rebut any of the modifications or changes that were proposed. Critically, no notice at all was provided for the February 9, 2018 hearing, which is when the Development Agreement (which modified the CUPs) was approved.

Fourth, as testified to by Mr. Stephens, the notices for the hearings regarding the Development Agreement inaccurately described the location of the Project. Specifically, the address on the notices had nothing to do with the wind and solar sites and there was no mention

that the wind project had been severed from the rest of the project. [Tr. 011650, p. 44. l. 5 – p. 45, l. 17] Without knowing where the wind turbines would be located or that they could be constructed independently of the rest of the Project, Petitioner again was deprived of his right to notice and his right to rebut the proposed modifications.

Fifth, the Board never provided Petitioner, or anyone else, a copy of the final Development Agreement before it was approved on February 9, 2018. The minutes from the October 20, 2017 hearing, reflect that, as represented by the Applicant, the public "will have access to the agreement before the public hearing so they will have a chance to review and compile any questions they may have." [R. 010382-90, at 010389] Nevertheless, at the next hearing on December 22, 2017, two different drafts of the Development Agreement were handed out at meeting with over 1,000 differences between them [R. 011712-17] including a new "third site plan" that neither the County nor the public had previously seen [Tr. 12845-12847]. These two versions were not reconciled before the February 9, 2018 hearing. At a hearing on January 26, 2018, further changes to the Development Agreement were discussed including the fact that Cat Creek still could not provide an exact location for the wind towers and that the size of the reservoir would be increased. [Tr. 13004-13006; 13015-13030][10]

Incredibly, even at the February 9, 2018 hearing (which was held without any public notice) changes to the Development Agreement were still being discussed including whether the entire hydro part of the Project would be included. [Tr. 13160-13226] Although yet another draft of the Development Agreement was handed out *at* the February 9, 2018 hearing, it was not the version that was ultimately approved by the Board. In short, a final version of the Development Agreement was never provided to Petitioner or the public before the Development Agreement was approved by the Board. [R. 010400-09, at 010403-05] Without access to a final version of the Development Agreement prior to its approval, Petitioner was deprived of his right to meaningfully review and comment on the Development Agreement.

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[10] The original application for the reservoir included a request for a 50,000 acre-foot reservoir, the Development Agreement increased this to 100,000 acre-feet. [R. 000003; R. 009902]

In *Johnson v. City of Homedale,* 118 Idaho 285, 796 P.2d 162 (Ct. App. 1990) the Idaho Court of Appeals held that the requirement that interested persons be given adequate notice of a request to change the authorized use for a particular parcel of property, includes the requirement that all materials required to be submitted with an application for such a change of use be made available for review in advance of the hearing, otherwise "citizens are left with a dearth of information on whether - and in what regard - to object to the proposal." 118 Idaho at 287, 796 P.2d at 164. The Court concluded that the purpose of the requirement is to put the public on notice of the important details of the proposal and give interested persons a meaningful opportunity to review and comment on that proposal. Making any such materials available only at the hearing prevents an opportunity for meaningful review and comment. *Id.* ("Citizens should not be forced to attend a public hearing to find out what a developer proposes to do. That information must be available in advance.").

This concept was also applied in *Fischer v. City of Ketchum,* 141 Idaho 349, 109 P.3d 1091 (2005). There, the applicant for a conditional use permit failed to submit the required engineer's report addressing certain avalanche safety issues, yet the city approved the permit subject to the condition that the required report would be submitted before a building permit could be issued. Finding that approval to be improper, the Court noted:

> Without the certification of the licensed engineer at the public hearings leading to the issuance of the conditional use permit, the interested public has no meaningful chance to comment on the CUP's impact on community or other facts affecting surrounding property. The commission's two-step process of 'approval with conditions' prior to granting the CUP, nullifies the importance of the statutory public hearing required under I.C. § 67-6512(b).

141 Idaho at 355, 109 P.3d at 1097. The Court further noted that under the system utilized by the City of Ketchum, "interested parties [sic] right to a public hearing is weakened or possibly nullified if those studies are not completed prior to the public hearing." *Id.*

The same problem arises in this case. Here, the Board approved the CUPs "with conditions" but expressly made the final grant of the CUPs conditioned on the completion of

certain activities. One of those conditions was the completion of the Development Agreement. However, the County and Cat Creek effectively prevented any meaningful opportunity for Petitioner and other interested persons to review and comment on the proposed Development Agreement by failing to ever provide a revised or final version of the Development Agreement prior to its approval at the February 9, 2018 hearing. Instead, Cat Creek handed out drafts of the Development Agreement at the hearings; but never handed out the final version that was ultimately approved by the Board. As such, Petitioner had no meaningful chance to carefully review and provide informed comment on the content of the Development Agreement and whether it adequately addressed the issues which were important to it. See *Johnson*, 118 Idaho at 287, 796 P. 2d at 164 ("Citizens should not be forced to attend a public hearing to find out what a developer proposes to do. That information must be available in advance.") Just as in *Fischer* and *Johnson*, without being provided a copy of the final Development Agreement in the hearings leading up to the final approval, Petitioner's right to a public hearing was effectively nullified.

b. The Board's Decisions Violate Due Process Because Two of Its Members Had *Ex Parte* Communications with Cat Creek and the Board Failed to Make Meaningful Disclosures on the Record.

When a governing body sits in a quasi-judicial capacity—as the Board does here—Idaho law is clear that the Board "must confine its decision to the record produced at the public hearing." *Idaho Historic Preservation Council v. City Council of Boise*, 134 Idaho 651, 654, 8 P.3d 646, 649 (2000). "[F]ailing to do so violates procedural due process of law." *Id.* (citations omitted). Accordingly, making decisions that go beyond the public record and that are based on *ex parte* communications is of a constitutional dimension. The rationale behind this rule is simple and straight-forward. When a governing body makes decisions that impact the public, those decisions should be based on the public record, not *ex parte* communications where the public is deprived of the ability to rebut the substance of those communications. *Eacret v. Bonner Cty.*, 139 Idaho 780,786, 86 P.3d 494, 500 (2003) ("The purpose of the disclosure requirement is to afford opposing parties with an opportunity to rebut the substance of any *ex*

parte communications."). The opportunity to present and rebut evidence are elements of a "common core" of procedural due process requirements. *Idaho Historic*, 134 Idaho at 654, 8 P.3d at 649. "[W]hen a governing body deviates from the public record, it essentially conducts a second fact-gathering session without proper notice, a clear violation of due process." *Id.* ("By considering the input received in the *ex parte* telephone conversations, the City Council improperly extended its inquiry beyond the limits of the public record.").

During the December 22, 2017 public hearing, Commissioner Wootan acknowledged the Commissioners had been communicating among themselves regarding the project and decided they wanted to make the project work. In response to comments from a representative of Cat Creek that they would work with the Board to put a deal together that works for Cat Creek and the County, Commissioner Wootan stated: "We're already to that point. We've already communicated among ourselves that we're workable, that we want to make their project work, and we want to make our intent happen." [Tr. 12870-12873] Obviously, the Board had decided to approve the project, regardless of the public's input in the decision, in violation of due process.

To comport with due process, the Idaho Supreme Court has required, at a minimum, disclosure of the "general description of the communication," including "the name and identifying information" of the parties with whom *ex parte* communications have occurred, together with "the nature of the conversations" that occurred. This basic content is necessary to "effectively respond" to information received *ex parte*. *Idaho Historic*, 134 Idaho at 655-56, 8 P.3d at 650-51. Where the record does not contain such adequate description, it becomes impossible to determine whether such information influenced a decision-maker. *Id.* For this reason, "[w]hen *ex parte* contacts are present in the context of quasi-judicial zoning decisions, such as variances and special use permits, courts will be more receptive to challenges to decisions on grounds of zoning bias." *Eacret*, 139 Idaho at 786, 86 P.3d at 500.

The Idaho Supreme Court has also observed that pre-hearing *ex parte* contacts with the applicant "reveal a lack of impartiality and denial of an opportunity for opponents of the variance

to challenge or answer the *ex parte* evidence." *Id.* at 787, 86 P.3d at 501 (observing that *ex parte* contact allowed one Board member to have evidence that "was not available to the entire Board or equally to the parties."). In addition, the Idaho Supreme Court has found due process violations when a Board member has *ex parte* contact and thereafter comments at a public hearing on the matter under consideration. *Id.* Such comments at public hearing create an appearance of impropriety and underscore the likelihood that the Board member cannot fairly decide the issue in the case. *Id.*

The fact that two Board members had *ex parte* communications with the applicant, Cat Creek, is not disputed. The issue presented is the adequacy of the disclosure of the subject matter of those *ex parte* communications. The adequacy of disclosure rests on the record produced at the public hearing to be forthcoming about the *ex parte* communications. To comport with due process, Idaho law requires a description of the *ex parte* communications to be made part of the public record. *Idaho Historic*, 134 Idaho at 655-56, 8 P.3d at 650-51. Such description includes the names and identities of those with whom *ex parte* communications are made, as well as the nature of the conversations. *Id.* The Board failed to make adequate disclosures and thereby failed to equip the public with the opportunity to rebut the substance of the communications, which rests at the common core of procedural due process requirements. *Id.*

At the beginning of the public hearing on January 26, 2018, set for the purpose of considering the Development Agreement, Commissioners Hofer and Wootan each acknowledged that they had *ex parte* communications [Tr. 12980, l.3 – 12986, l.20]. Commissioner Hofer disclosed he had participated in more than twenty (20) hours of meetings with the Cat Creek representatives to negotiate a development agreement, but he did not disclose the content of these *ex parte* communications. [Tr. 12981-12985]. Based on the volume and nature of Commissioner Hofer's *ex parte* communications, the County's attorney advised that "Mr. Hofer recuse himself in this matter." [Tr. 12980, l.19–12981, l.17]. That discussion led Commissioner Corbus to acknowledge that he was aware Commissioner Wootan also had *ex parte*

communications with John Faulkner. [Tr. 12981, l.19 – 12982, l.9]. Commissioner Wootan then disclosed he had talked with John Faulkner about "the Cat Creek thing" but did not disclose the content of those ex parte communications. [Tr. 12982, l. 15 – 12981, l.10].

Commissioner Hofer disclosed the discussion, but he never made a complete and meaningful disclosure of the subject matter of the *ex parte* communications. Specifically, Commissioner Hofer acknowledged, "I have spent 20 hours or whatever with Cat Creek and not 20 hours with the public going through this development agreement and that's to me is a little bit unfair to the public." [Tr. 12985, ll.11-16]. After acknowledging the fundamental lack of fairness, instead of disclosing the subject matter of the 20 hours' worth of communications, Commissioner Hofer failed to disclose anything meaningful. He took the opposite approach, keeping the information out of public view, stating "They [the public] didn't get to hear all of the things that were said and argued about. I did." [Tr. 12985, l.16-20]. Upon failing this second opportunity to make a meaningful disclosure, Commissioner Hofer tainted the other Board members by stating, "I'm voting for what I did." [Tr. 12985, l. 18]. And, after purporting to recuse himself, Commissioner Hofer held true to his word and ultimately cast an "aye" vote to approve the Development Agreement. [R. 13220; Tr. 13219-13220].

While the disclosure of the fact that Commissioners Hofer and Wootan engaged in *ex parte* communications is laudable, it is not enough to comport with due process. As a matter of due process, it was incumbent upon Commissioners Hofer and Wootan to actually describe the communications, with specific information such as the identities of the parties and the nature of those communications. Oblique references to "the Cat Creek thing" are insufficient and leave the public without an opportunity to rebut the specific *ex parte* information communicated to a Board member. Commissioner Hofer recognized the unfair disadvantage his twenty-plus hours' worth of *ex parte* communications posed to the public, but he did not cure that disadvantage by making a general disclosure of "all of the things that were said and argued about." [Tr. 12985, l.16-20]. Moreover, Commissioner Hofer's decision to comment on how he would vote, i.e., "I'm voting for what I did," also creates an appearance of impropriety and certainly demonstrates

why he should not have voted or been allowed to deliberate in the proceedings. *Eacret*, 139 at 787, 86 P.3d at 501 ("Mueller's comments not only created an appearance of impropriety but also underscored the likelihood that he could not fairly decide the issue in the case."). By failing to make an adequate disclosure of the *ex parte* communications, the Board violated due process and should be reversed.

2. **The Board acted in violation of the applicable sections of the Idaho Code and Elmore County Code.**

a. The conditions placed on the CUPs were not in accordance with Idaho Code § 67-6512(d) or Elmore County Code.

Idaho Code § 67-6512(d) provides that certain conditions may be attached to a special use permit or CUP. While the statute is not exhaustive, it is clear that the conditions are to be minimal in nature and are to be tailored to minimize the impact of the Project. Notably, however, there is no mention that a condition of the CUP may materially modify or alter the CUPs. Yet, that is exactly what happened here.

The Board "approved" the CUPs with the Board 2017 Order, however, that approval was subject to certain conditions. [*See Exh. 5*, R. 008261-008314] One of those conditions was the approval of the Development Agreement. It is undisputed that the Development Agreement materially amended and modified the CUPs. [R. 009993, noting that by approving the Development Agreement, the Board "approved changes" to the CUPs and conditions.] Under Zoning Code § 6-27-3(G) (now 7-9-3(G)), modifications to a site plan may only be approved if certain standards are met. There is no indication in the record that the standards set out in § 6-27-3(G) were met. Thus, the Board's approval of the Development Agreement, which materially modified and altered the CUPs, was a violation of I.C. § 67-6512(d) and Elmore County Code.

b. The Board's findings that the CUPs and Development Agreement, and specifically the wind turbines, were not in conflict with the Elmore County Comprehensive Plan was not supported by substantial evidence and violated Idaho Code § 67-6512 and Zoning Ordinance Section 6-27-7.

Idaho Code § 67-6512(a) states in relevant part that a special use permit "may be granted . . . when it is not in conflict with the [comprehensive] plan." Zoning Ordinance Section 6-27-

7(2) requires that before a special use permit may be granted there must be a finding that the "proposed use shall be in harmony with and in accordance with the Comprehensive Plan and this Ordinance (Title 6)." [R. 009909-9910]

The P&Z Commission found on multiple occasions that the Project was not in harmony or accordance with, among others, the Elmore County's Comprehensive Plan. [*See Exh. 4* at R. 7304-06]. Specifically, the P&Z Commission found that the Project was not in harmony with the "Private Property Rights Objectives," the "Land Use Objectives," and the "Scenic Area Goals 1" portions of the Comprehensive Plan. [*Id.* at R. 7304-05.] Specific to the Commission's findings was that the lighting on the wind towers "would be disturbing to neighbors as testified by Steve Sellman, Magdalena Morris, Wendi Combs, Peter Livers, Sean Knutz, Nancy Thompson, Fredrick Thompson, and Mike Grimmett." [*Id.* at 7304] The Commission also found that the Project would have negative economic impacts "to existing businesses and tourism in the area due to visual impacts of the proposed transmission lines, solar panels and wind towers." [*Id.* at R. 7304.] The Commission further found "that the wind turbines would have a negative effect on the scenic characteristics and visual aspects of the area." [*Id.* at R. 7305.]

Despite the multiple findings by the Commission that the Project, and specifically the wind turbines, were not in harmony with the Comprehensive Plan, the Board found otherwise. In doing so, however, the Board failed to address the wind turbines. Notably, in discussing the "Private Property Rights Objective" the Board specifically addresses the "solar array, substation, and transmission lines" but makes no mention of the wind turbines. [*See Exh. 5* at R. 8278] Similarly, in the Board's findings regarding the "Land Use Objectives," no mention is made regarding how the inclusion of wind turbines comports with the Comprehensive Plan. [*Id.* at R. 8280-8281] Likewise, in its findings regarding the "Scenic Area Goals 1," which is to "promote the preservation of natural scenic areas for the use and benefit of both present and future generations" the Board does not address the Commission's findings that the wind turbines would have a negative effect on the scenic area for the present generations but simply finds that the

"decommissioning of the facilities at the completion it [sic] their use" will preserve the "future scenic beauty." There is no mention of the "present" scenic beauty. [*Id.* at R. 8284]

The reason why the Board did not address the wind turbines is clear. The vast majority of the testimony and evidence regarding the wind turbines was that they conflict with the Comprehensive Plan. [Tr. 12603-12729, Tr. 008106-8153 and 008154-008205, Testimony from P&Z; R.008106-008153]. The Board failed to point to or identify any evidence to rebut or challenge the findings of the P&Z Commission that the wind turbines did not comply with the Comprehensive Plan. Indeed, all evidence presented made it clear that the wind turbines did not comply with the Comprehensive Plan. To put it simply, the Board's finding that the wind turbines did not conflict with the Comprehensive Plan was not supported by any evidence, let alone substantial evidence, in the record.

Accordingly, because the only evidence was that the wind turbines violated the Comprehensive Plan, the Board's approval of the CUPs, including the wind turbines, was in violation of I.C. § 67-6512(a) and Zoning Ordinance Section 6-27-7(2) and therefore was in violation of the applicable statutory provisions. *See Butters v. Hauser*, 125 Idaho 79, 81-82, 867 P.2d 953, 955-56 (1993) (affirming district court's reversal of a board's findings and conclusions that a proposed facility would comply with the local county's zoning ordinance where the evidence in the record was to the contrary).

c. The approval of the CUPs and Development Agreement violated other applicable provisions of the Elmore County Code.

Additionally, the Board's approval of the CUPs and the Development Agreement violated other provisions of the Zoning Ordinances. First, the approval of the CUPs and Development Agreement violated the provisions of Zoning Ordinance 6-27-3 (now 7-9-3). Second, the approval of the Development Agreement violated Title 6, Chapter 29 (now Title 7, Chapter 10) of the Zoning Ordinances.

First, Zoning Ordinance 6-27-3(D) states that "prior to issuance of zoning approval, the applicant shall provide written documentation indication the facility has been approved by all

applicable public agencies." This is similar to Elmore County Ordinance 6-27-7 that states that the "proposed use shall comply with all applicable State and Federal laws, rules and/or regulations." It is clear that prior to the approval of the CUPs and the Development Agreement, Cat Creek did not possess the required approval from "the applicable public agencies" because the Board 2017 Order explicitly stated that Board found that the federal permitting for various agencies may be involved and that "the Applicant must obtain all necessary and required approvals from such federal agencies," [*Exh. 5,* Condition 20 at R. 008311; *Id. at* R. 008296], thereby indicating that the appropriate approvals had not yet been obtained. Further, the Development Agreement, as approved by the Board on February 9, 2018, states that "prior to the issuance of any building permit for each CUP, Developer shall obtain: (i) any federal or state licenses and approval . . . ." Thereby also indicating that the required approval from "the applicable public agencies" was not obtained prior to the approval of the CUPs or the Development Agreement in the Board 2017 Order. Moreover, Mrs. Manweiler, at the July 26, 2018 hearing, explicitly stated that Cat Creek had not "complied with all of the FAA feasibility studies." [Tr. 011643, p. 16, ll. 19-20]

Failure to obtain the required certifications or approvals prior to approving the CUPs not only violated Elmore County Ordinance 6-27-3(D), but also violated Petitioner's due process rights. *See Fischer*, 141 Idaho at 355, 109 P.3d at 1097 (holding that where approval is given before required certifications or studies are complete "interested parties [sic] right to a public hearing is weakened or possibly nullified if those studies are not completed prior to the public hearing.").

Second, Zoning Ordinance Title 6, Chapter 29 specifically governs development agreements. [R. 009909-9910] Multiple provisions of Title 6, Chapter 29 were not followed, including but not limited to section 6-29-3(5), which requires that the draft development agreement be submitted with the application to the P&Z Commission, and section 6-29-3:C, which requires the Commission to review the Development Agreement. Neither of those things was done. Indeed, a draft of the Development Agreement was not submitted until after the

Applications were denied by the P&Z Commission and the Commission never even saw the Development Agreement, let alone reviewed it. Failing to include the Development Agreement with the application was not only a violation of Zoning Ordinance Title 6, Chapter 29 but was a violation of the Petitioner's due process rights. *See Johnson v. City of Homedale*, 118 Idaho 285, 287, 796 P.2d 162, 164 (Ct. App. 1990) (holding that failure to provide materials required by local ordinance to be included with the application is a violation of the right to notice).

Section 6-29-3:B requires that the Prosecuting Attorney of Elmore County review a draft of the Development Agreement, which also was not done. Further, the Development Agreement does not comply with the requirement in Section 6-29-5 that before approving the application, the Board find that the Development Agreement complies with the regulations "of this Chapter." Indeed, no such finding was ever made, let alone *before* the applications for the CUPs were approved. [R. 009909-9910]

E. The Board's decisions after the filing of SBar Ranch's first petition for judicial review were based on unlawful procedure because the Board lacked jurisdiction to decide the same.

Idaho Rule of Civil Procedure 84(m) provides that "the filing of a petition for judicial review with the district court does not automatically stay the proceedings and enforcement of the action of an agency that is subject to the petition." The Idaho Administrative Procedure Act similarly provides: "The filing of the petition for review does not itself stay the effectiveness or enforcement of the agency action." I.C. § 67-5274. Thus, in absence of a specific stay from the district court, Cat Creek is free to move forward with the parts of the Project that have *already* been approved. However, being free from a stay of enforcement does not mean that the Board is free to take *future* or *further* action to alter or amend its decision once the decision has been appealed. Indeed, the opposite is true and once a petition for review is filed, the Board, just as a trial court following the filing of a notice of appeal, is limited in the functions it may perform regarding the appealed matter.

In *Lowery v. Bd. of Cty. Comm'rs for Ada Cty.*, the Ada County Board of Commissioners ("Ada County") issued a conditional use permit and a zoning certificate to Respondent to operate a veterinarian clinic. 115 Idaho 64, 764 P.2d 431 (Ct. App. 1988). The district court noted that once it became apparent that there was no easement of record, Ada County should have reversed its decision to grant the conditional use permit, even though the appeal was already underway. *Id.* at 70 ("There was no reason, once the appellate process was sufficiently underway, for the lack of foundation of the easement argument not to be manifestly apparent and for appropriate action to be taken.").

The Idaho Court of Appeals disagreed. In reviewing the district court's finding that Ada County could have corrected its error after the petition for review had been filed and during the appeal process, the Court of Appeals stated: "Ordinarily, once an appeal has been filed or a petition for review granted, the lower tribunal is deprived of the jurisdiction necessary to correct its decision." *Id.* at 71 (citing *First Security Bank v. Neibaur,* 98 Idaho 598, 570 P.2d 276 (1977); *Dolbeer v. Harten,* 91 Idaho 141, 417 P.2d 407 (1965); *Richardson v. Bohney,* 18 Idaho 328, 109 P. 727 (1910)).

Further, I.R.C.P. 84(r) provides that any procedure not covered by Rule 84 "must be in accordance with the appropriate rule of the Idaho Appellate Rules." What a Board or agency is allowed to do regarding a matter once a petition for review has been filed is not covered by Rule 84. Thus, Idaho Appellate Rule 13 applies.

Idaho Appellate Rule 13 lists the specific actions that the lower tribunal may take once an appeal has been filed. Notably, holding a hearing and issuing new findings of fact and conclusions of law is not among the actions listed. *See State v. Youmans*, 161 Idaho 4, 13 (Ct. App. 2016) ("A trial court may not reconsider or make post hoc rationalizations of previous rulings once a notice of appeal is filed." (quoting *State v. Wade*, 125 Idaho 522, 524 (1994))). It then held that "all legal filings, evidence offered, and findings made by the district court in regard to the prosecutorial misconduct allegation, subsequent to the date the notice of appeal was filed, shall be stricken from the record." *Id.*; *see also Syth v. Parke*, 121 Idaho 156, 158, on reh'g,

121 Idaho 162 (1991) ("There is no exception in Rule 13(b) granting the district court power to entertain its own motion to reconsider an order[.]"); *State v. Umphenour*, 160 Idaho 503, 508, 376 P.3d 707, 712 (2016) ("Upon the filing of Mr. Umphenour's notice of appeal, the district court had no jurisdiction to take any action in the case except as permitted in Idaho Appellate Rule 13[.]").

The same is true here. Once SBar Ranch filed its petition for judicial review requesting review of the Board's denials of SBar Ranch's First and Second Requests for Reconsideration, the Board's authority to act in this matter was limited to those actions listed in Idaho Appellate Rule 13. As such, the Board was without authority to hold, sue sponte, a new hearing and to alter or amend its prior decisions. Accordingly, all "findings made by the [Board] in regard to the [matter], subsequent to the date the [petition for judicial review] was filed, [should] be stricken from the record." *Youmans*, 161 Idaho at 13.

It is also logical to conclude, that once the Board lost the authority to alter or amend its prior decisions in this matter, the Board lost the authority to conduct a public hearing for the purpose of amending the Development Agreement or taking any action to amend the Development Agreement because amending the Development Agreement effectively amends the CUPs.

F. Petitioner's substantial rights have been prejudiced.

In *Hawkins v. Bonneville Cty. Bd. of Comm'rs*, 151 Idaho 228, 233, 254 P.3d 1224, 1229 (2011), the Idaho Supreme Court noted that to establish prejudice to substantial rights when opposing a land-use decision the "petition opposing a permit must be in jeopardy of suffering a substantial harm if the project goes forward, such as a reduction in the [Petitioner's] land value or interference with his or her use or ownership of the land." *Id.*

Here, Petitioner's substantial rights have been prejudiced because the Board's failure to provide meaningful notice and an opportunity to be heard as well as to follow the applicable Idaho Code and Elmore County Ordinance provisions resulted in the approval of the CUPs and Development Agreement, including the wind turbines. As discussed above, the wind turbines,

the transmission lines, and the substation all directly interfere with Petitioner's use and enjoyment of its property. *Supra* pp. 30-34. Moreover, as shown by the Appraisal, the wind turbines will cause a direct reduction in Petitioner's land value. [R. 011378-11472, Appraisal, at R. 010987-]. Thus, because Petitioner has shown that "if the project goes forward" it will interfere with Petitioner's use and enjoyment of its property and result in a reduction in land value, Petitioner's substantial rights have been prejudiced. *Id.*; *see also Price v. Payette Cnty. Bd. of Cnty. Comm'rs,* 131 Idaho 426, 431, 958 P.2d 583, 588 (1998) (vacating a board decision because it could impact property value or the petitioners' use and enjoyment of their land).

Moreover, if the Court finds that Petitioner's due process rights have been violated by the failure to provide proper notice and an opportunity to be heard or by the Board's *ex parte* communications, that too evidences prejudice of a substantial right. *See Eddins v. City of Lewiston*, 150 Idaho 30, 36, 244 P.3d 174, 180 (2010) ("This is a relatively easy question in this case because due process rights are substantial rights . . . Thus, because [appellant] has demonstrated that his due process rights have been violated by the City's actions, he has similarly demonstrated that a substantial right has been prejudiced for the purposes of I.C. § 67–5279(3).").

VI. CONCLUSION

The Court is urged to declare the CUPs and the Development Agreement invalid and return the matter to the Director of the Elmore County Land Use & Building Department and the Planning and Zoning Commission.

Respectfully submitted.

DATED THIS 7th day of March, 2019.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
Merlyn W. Clark, ISB No. 1026
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of March, 2019, I caused to be served a true copy of the foregoing PETITIONER'S OPENING BRIEF IN SUPPORT OF ITS PETITION FOR JUDICIAL REVIEW by the method indicated below, and addressed to each of the following:

L. W. (Buzz) Grant III 246 S. Cole Road Boise, Idaho 83709 P. O. Box 872, Boise, ID 83701 (*Attorney For Respondent Elmore County*)	☐ U.S. Mail, Postage Prepaid ☐ Hand Delivered ☐ Overnight Mail ☐ E-mail: ☑ Telecopy: 208.336.0388 ☐ iCourt e-serve
Scott D. Hess CLAIRE C. ROSSTON Holland & Hart, LLP 800 W. Main Street, Suite 1750 P.O. Box 2527 Boise, ID 83701 (*Attorney for Respondent Elmore County*)	☐ U.S. Mail, Postage Prepaid ☐ Hand Delivered ☐ Overnight Mail ☐ E-mail: sdhess@hollandhart.com; ccrosston@hollandhart.com ☐ Telecopy: 208.343.8869 ☑ iCourt e-serve
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Merlyn W. Clark