

MEMORANDUM

May 9, 2018

TO: Board of County Commissioners

FROM: Holland & Hart LLP (Scott Hess and Claire Rosston)

RE: S Bar Ranch's Second Request for Reconsideration

Executive Summary

On February 16, 2018, S Bar Ranch, LLC ("**S Bar Ranch**") submitted a Request for Reconsideration ("**First Reconsideration Request**") on the five Conditional Use Permits, CUP-2015-03, CUP-2015-04, CUP-2015-05, CUP-2015-06, and CUP-2015-07 (the "**CUPs**"), granted to Cat Creek Energy, LLC ("**Cat Creek**") by the Elmore County Board of County Commissioners ("**BOCC**") on February 10, 2017 and the development agreement executed by Elmore County, Cat Creek, and the owners of the property subject to the CUPs ("**Landowners**"), dated and recorded February 9, 2018 ("**Development Agreement**"). BOCC adopted its Findings of Fact, Conclusions of Law and Order on the First Reconsideration Request ("**First Reconsideration Order**") on April 6, 2018. On March 26, 2018, S Bar Ranch submitted a second Request for Reconsideration in connection with the CUPs and the Development Agreement ("**Second Reconsideration Request Original Submission**") that was supplemented on April 6, 2018 by its Supplemental Memorandum in Support of Request for Reconsideration filed March 26, 2018 ("**Second Reconsideration Request First Supplement**"). S Bar Ranch submitted another supplement to its Second Reconsideration Request Original Submission on May 1, 2018 ("**Second Reconsideration Request Second Supplement**") and together with the Second Reconsideration Request Original Submission and Second Reconsideration Request First Supplement, "**Second Reconsideration Request**"). This memorandum analyzes the arguments raised in S Bar Ranch's Second Reconsideration Request.

In summary, S Bar Ranch's objections to the procedures under which the CUPs were approved and the terms and conditions of BOCC's approval of the CUPs are unfounded. Even though S Bar Ranch's allegations of due process violations are misplaced, it is recommended that BOCC hold another hearing limited to the amendments to the CUP contemplated by the Development Agreement to more fully address the concerns of S Bar Ranch. Holding another public hearing furthers BOCC's efforts to do more than the minimal requirements under the law in terms of engaging the public in its decisions related to the use of land within Elmore County. Attached as Exhibit A to this memorandum is a list of the CUP amendments contemplated by the Development Agreement that are recommended to constitute the subject matter of the additional hearing.

Analysis

Below is a detailed evaluation of S Bar Ranch's arguments raised in its Second Reconsideration Request.

1. Many of S Bar Ranch's arguments are disposed of in BOCC's First Reconsideration Order.

With the exceptions discussed below, S Bar Ranch's Second Reconsideration Request contains the same arguments raised in its First Reconsideration Request without introducing any new or additional information. In its First Reconsideration Order, BOCC denied S Bar Ranch's First Reconsideration Request. Under Elmore County Code 6-3-2.K.1, BOCC's denial of a reconsideration request is not appealable. Accordingly, BOCC does not have the jurisdiction to take up these arguments again, and even if it did, S Bar Ranch has not given BOCC any reason to do so.

S Bar Ranch ("SBR"): As noted on page one of the *Supplement to Second Request for Reconsideration* "the Commissioners would not permit [SBR] to include the Modified Findings... as part of the Original Request..." This obligated SBR to file the Second Reconsideration Request.

2. S Bar Ranch's objection to separation of the CUPs is without merit, and accordingly, S Bar Ranch has standing to request reconsideration of BOCC's amendments to the Wind Farm CUP only.

In its Findings of Fact, Conclusions of Law and Order on the CUP Amendments, dated March 16, 2018 ("CUP Amendments Order"), BOCC approved separating its approvals of the CUPs from one another to allow for phasing of Cat Creek's project that involves wind, solar, and hydro electrical generating facilities, transmission lines, and a substation ("Project"). S Bar Ranch states that it "disputes the separation of the CUPs" without making any argument that separating the CUPs is deficient for failure to comply with applicable law or the record, as required by Idaho Code Section 67-6535(2). (Second Reconsideration Request Original Submission, at Attachment p. 1.)

SBR: SBR is unaware of any notice indicating that BOCC would be separating the Project/CUPs. Any such change to the Project/CUPs required notice and a meaningful opportunity for interested and impacted parties to evaluate the change under Idaho law. Electing to change the Project/CUPs during a hearing noticed for other purposes is not adequate.

Idaho Code Section 67-6535(2) requires that approval or denial of any application authorized pursuant to the Local Land Use Planning Act, Idaho Code Sections 67-6501 through 67-6538 ("LLUPA"), which includes applications for special or conditional use permits under Idaho Code Section 67-6512, be in a written statement "that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record." Under Idaho Code Section 67-6535(2)(b), an affected person objecting to BOCC's compliance with the written statement requirement of Idaho Code Section 67-6535(2) must seek

reconsideration of the decision by “identify[ing] specific deficiencies in the decision for which reconsideration is sought” before it may seek judicial review. In its CUP Amendments Order, BOCC based its decision to permit phasing of the CUPs on the record, citing information presented that the Project would be enhanced by such phasing and the sections of the Development Agreement that permit such phasing. (CUP Amendments Order, at p. 12.) S Bar Ranch does not dispute this or identify any law that restricts BOCC from separating its approvals of the CUPs. S Bar Ranch’s objection to the separation of the CUPs is unfounded and should be denied.

As a result, S Bar Ranch’s other objections should be limited to CUP-2015-06 for the proposed wind turbine electrical generating facility (“**Wind Farm CUP**”). Idaho Code Section 67-6535(2) restricts who may seek reconsideration of a board’s decisions to an affected person or applicant for an application authorized pursuant to LLUPA. An affected person is defined by Idaho Code Section 67-6521(l)(a)(i) to include “one having a bona fide interest in real property which may be adversely affected by: (i) The approval, denial or failure to act upon an application for a subdivision, variance, special use permit and such other similar applications required or authorized pursuant to this chapter.” (Emphasis added.) As the owner of property adjacent to land subject to the Wind Farm CUP, S Bar Ranch may be adversely affected by BOCC’s grant of the Wind Farm CUP. S Bar Ranch, however, does not offer any explanation as to how it may be adversely affected by BOCC’s grant of the other CUPs. All of its arguments regarding the adverse impacts of the Project concern the wind turbines only. (See Second Reconsideration Request First Supplement, at pp. 1–2 (describing the impact of the wind turbines, including their lights, on S Bar Ranch’s open and clear vistas surrounding its property and on the “enjoyment of peace and tranquility present” on its property as well as the possibility that the wind turbines could impact its property’s designation as an Idaho Shooting Preserve).) In addition, in submitting a \$800 reconsideration fee, which covers one but not all five of the CUPs, S Bar Ranch implicitly recognizes that its objections pertain to the Wind Farm CUP only. S Bar Ranch has failed to demonstrate that it has standing to request reconsideration of BOCC’s amendments to the CUPs other than the Wind Farm CUP.

SBR: Under this logic, BOCC or Applicant needs to decide which CUP Applicant appealed as Applicant only paid \$800 when appealing all five (5) CUPs from the Planning and Zoning’s denial of Applicant’s application. Further, \$800 is the fee that the BOCC required of SBR for the Second Reconsideration Request.

3. S Bar Ranch’s argument that the finality of the CUP Order was delayed until BOCC’s approval of the Development Agreement is incorrect.

Citing *Canal/Norcrest/Columbus Action Comm. v. City of Boise*, 39 P.3d 606, 610 (Idaho 2001), S Bar Ranch argues the CUP Order was not a final decision ripe for a request of reconsideration until BOCC approved the Development Agreement on February 9, 2018. (Second Reconsideration Request First Supplement, at p. 2.) To the contrary, the Idaho Supreme Court’s decision in *Canal* supports BOCC’s decision that the CUP Order was a final decision on February 10, 2017 even though the conditions of the CUP Order (“**Conditions**”) had not yet been met.

SBR: Idaho Code § 67-6512(d) states that conditions may be attached **upon the granting of the permit**. The law does not allow the conditions to be determined after the permit is granted! Yet this is the position that BOCC has taken – that the CUPs were approved in February 2017 but conditions were placed on the CUPs in February 2018. Further, design review is administrative whereas establishing the conditions and Development Agreement is quasi-judicial.

Additionally, the Holland & Hart argument is circular. The conditions put in place to ensure that the activity will not be “hazardous or a disturbance” but how can the conditions afford that protection if the conditions have not yet been established?

In *Canal*, the City of Boise approved an application for a CUP for a planned unit development that was located in a design review district and the district court declined to hear the plaintiff’s appeal of the CUP approval until after design review approval was obtained by the holder of the CUP. *Canal*, 39 P.3d at 608–10. The Idaho Supreme Court reversed the district court’s decision, holding that the City’s approval of the CUP application is a final, appealable decision subject to judicial review. *Id.* at 611. The Idaho Supreme Court reasoned that “an inquiry into whether further action by the Board or the City is required determines the finality of the approval for appeal purposes” and “[o]nly if the developer fails to comply with the stated conditions of” the CUP, including design review approval, will there be the possibility of revocation of the CUP by the Boise City Council. *Id.* at 610–11. Similarly in this matter, the Development Agreement is a Condition of BOCC’s approval of the CUPs and “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.” (CUP Order, Condition No. 2.)

S Bar Ranch argues this matter differs from the circumstances in *Canal* where the Idaho Supreme Court determined that “design review, although mandatory for projects within a ‘D’ overlay zoning district, has no bearing on the conditional use application and whether a planned unit development would cause any damage, hazard, nuisance or other detriment.” *Canal*, 39 P.3d at 610. According to S Bar Ranch, completion of the Development Agreement is necessary to meet Elmore County Code 6-27-7.A.2’s requirement that the proposed use be in harmony with the County’s comprehensive zoning plan, including a “special land use review and hearing procedure following the CUP process to fully evaluate any development proposals in any Area of Critical Concern.” (Second Reconsideration Request First Supplement, at p. 3 (quoting CUP Order, at p. 30).) This special land use review, however, is like the design review in *Canal* because it is a Condition of the CUPs granted pursuant to BOCC’s CUP Order that found “the proposed use under the Application, with the Conditions, will not be hazardous or disturbing to existing neighboring uses or impede their development.” (CUP Order, at p. 37.) In other words, as long as Cat Creek satisfies the Conditions of the CUPs, which includes a special land use review accomplished by Cat Creek obtaining approval from BOCC of a development agreement that satisfies applicable land use law, the use contemplated by the CUPs would not be hazardous or a disturbance.

In *Canal* and this matter, the CUPs were granted and could be revoked for failure to meet a Condition, but the Conditions that required further review of the uses contemplated by the CUPs were not identified as the point when the CUPs became final. *See Canal*, 39 P.3d at 610 (“Nothing in the code identifies the completion of the design review process as the point when

the conditional use permit becomes final, requiring no further action by the Council.”). In fact, the portion of the County’s comprehensive zoning plan cited by S Bar Ranch expressly recognizes that the special land use review “follow[s] the CUP process.” (Second Reconsideration Request First Supplement, at p. 3 (quoting CUP Order, at p. 30).) BOCC’s determination in its First Reconsideration Order that the CUP Order was a final decision when approved on February 10, 2017 should be affirmed. (See First Reconsideration Order, at pp. 5, 7, and 16.)

4. S Bar Ranch’s objection to the option of the two-year extension within the total possible approval period of seven years for the CUPs is unpersuasive for procedural and substantive reasons.

S Bar Ranch argues that the option for a two year extension of the CUPs that is set forth in Section 1.1 of the Development Agreement violates Elmore County Code 6-27-6. (Second Reconsideration Request Original Submission, at Attachment p. 5.) S Bar Ranch’s objection is misplaced on procedural and substantive grounds.

First, S Bar Ranch’s objection to the two-year extension option is not timely. BOCC concluded in its First Reconsideration Order that S Bar Ranch is not entitled to seek reconsideration of the Development Agreement, except to the extent that the Development Agreement contains amendments to BOCC’s original approval of the CUPs set forth in its Findings of Fact, Conclusions of Law and Order on the CUP Applications, dated February 10, 2017 (“**CUP Order**”). (First Reconsideration Order, at p. 16.) As BOCC recognized in its CUP Amendments Order, the new language of Condition No. 1 that is set forth in Section 1.1 of the Development Agreement and adopted by BOCC in its CUP Amendments Order did not change the option of a two-year extension: “Condition No. 1 has been modified to extend the time the Applicant has to complete the Project from four to five years with the retention of the extension period of two years and such other changes to Condition No. 1 as further set forth in Section 1.1 of the Development Agreement.” (CUP Amendments Order, at p. 11.) Any objection to a provision of the CUP Order that is not modified by the CUP Amendments Order is untimely. (See First Reconsideration Order, at p. 16 (“The Board concludes that the [CUP Order] were final on February 10, 2017 and the time has passed to seek reconsideration of the [CUP Order] under Idaho Code § 67-6535(2)(b) and the Zoning Ordinance § 6-3-2.F.”).) S Bar Ranch had until February 24, 2017 under Idaho Code Section 67-6535(2)(b) and February 20, 2017 under Elmore County Code 6-3-2.F to seek reconsideration of BOCC’s decision in its CUP Order that Cat Creek may seek a two-year extension of the CUPs.

Second, BOCC’s inclusion of a two-year extension option within the period of time of its approval of the CUPs is authorized by Elmore County Code 6-27-3.E and 6-27-5.A. Elmore County Code 6-27-3.E provides that approval of a CUP “shall be limited to a one (1) year period, unless some other period of time is specified in the permit, in which the applicant or owner must obtain all necessary permits and obtain a zoning permit.” (Emphasis added.) Similarly, Elmore County Code 6-27-5.A provides: “The term of approval of a Conditional Use Permit shall not exceed twelve (12) months unless some other period of time is specified in the permit.” (Emphasis added.) In this case, BOCC specified a different period of time for which the CUPs are approved in the CUP Order: four years from February 10, 2017 with the option of a two-year extension, for a total possible approval period of six years. (CUP Order, at Condition No. 1.)

Under Section 1.1 of the Development Agreement, the County agreed to amend this time period by adding an additional year to the base period and retained the option of a two-year extension, for a total possible approval period of seven years. BOCC adopted this amendment to the CUP Order in its CUP Amendments Order when it approved the new language of the Condition No. 1 by quoting the new language set forth in Section 1.1 of the Development Agreement. (CUP Amendments Order, at p. 11.)

The option of the two-year extension within the total possible approval period of seven years for the CUPs is separate from Cat Creek's right to seek a one-year extension of the CUPs under Elmore County Code 6-27-6.A. Cat Creek may also seek an one-year extension as long as it follows the procedures and meets the requirements of under Elmore County Code 6-27-6.A,¹ which includes a finding that the holder of the CUP has "adequately justified the need for a time extension" and the possibility of a hearing on the extension request and review by other agencies. By comparison, Condition No. 1 of the CUPs, as amended by the CUP Amendments Order, contains two requirements that Cat Creek must satisfy to receive the last two years of initial approval period of the CUPs: (1) show it has made "significant progress in obtaining federal permits" and (2) demonstrate it would likely "be in a position to commence regular operations within the two-year extension period." (CUP Amendment Order, at p. 11.) The process and requirements for obtaining the last two years of the initial approval period is different from the process and requirements for obtaining a one-year extension under Elmore County Code 6-27-6.A. The option of the two-year extension under Condition No. 1 of the CUPs is not an Elmore County Code 6-27-6.A extension.

SBR: BOCC has repeatedly argued that words in the Elmore County Code do not follow their plain meaning: a development agreement isn't really a development agreement; a zoning permit is actually a building permit; and now an extension is not actually an extension. BOCC must let SBR and public know when it is changing the plain definition of terms used in its ordinances.

5. S Bar Ranch's contention that there was no notice of BOCC's consideration of the amendments to the Conditions is misplaced.

S Bar Ranch argues that "none of the Notices of Public Hearing indicate that the Board would consider and potentially modify the Conditions." (Second Reconsideration Request First Supplement, at p. 5.) The notices for the October 20, 2017, December 22, 2017, and January 26, 2018 public hearings state that a public hearing will be held on the adoption of the Development Agreement and the testimony will be limited to the Development Agreement's terms and conditions. (Record, at pp. 10410–11, 8797, 9053–54.) The notices further provide that the record for this matter ("**Record**") may be reviewed prior to the hearing. *Id.* The proposed modifications of the Conditions were contained in the versions of the Development Agreement that were part of the Record, discussed during the public hearings, and made available at the public hearings. (Record, at pp. 8588–628, 8757–96, 9493–529, 9823–60, 10382–409, 10412–528.) Further, modifications of the Conditions by the Development Agreement were contemplated by the CUP Order. (CUP Order, at Condition Nos. 2, 8, and 30 (requiring a

¹ Elmore County Code 6-27-6.A contains a typographical error. The incorporation by reference of the ordinance in Chapter 3 of Title 6 for time extensions should be Section 6-3-12 rather than be Section 6-3-11.

development agreement among Cat Creek, the Landowners, and the County that, among other things, includes a site plan and project description based upon the site plan presented to BOCC at the November 16 and 17, 2016 hearings and “[i]ncorporation of the Conditions as may be expanded and refined by” BOCC and Cat Creek.)

SBR: It is acknowledged in the Development Agreement and Section 7 of this Memorandum that a revised Master Site Plan was approved and adopted by the BOCC, contrary to the language quoted above. Said revised Master Site Plan is more than an “expansion and refinement” of the site plan presented to BOCC at the November 16 and 17, 2016 hearings.

In the case of S Bar Ranch, its attorney obtained copies of the then-current version of the Development Agreement prior to the public hearings on January 26, 2018 and February 9, 2018, and submitted written comments on the those drafts. (Record, at pp. 9767–69, 10351–53, 10587–626, 10788–881.) S Bar Ranch’s attorney also obtained a copy of the Development Agreement that compared the changes between the drafts reviewed by the attorney, a copy of the draft language for the water provisions for the agreement, and additional information about the Project, such as the ownership and lease rights for the property subject to the Project. (Record, at pp. 10565–86, 10627–734, 10737–41, 10882–955.) S Bar Ranch’s attorney attended the hearings on January 26, 2018 and February 9, 2018 but chose not to testify. Given its attorney’s detailed analysis of the drafts of Development Agreement, significant engagement with the County about various aspects of the Project, and attendance at the January 26, 2018 and February 9, 2018 hearings, S Bar Ranch had actual notice of the proposals in the Development Agreement for amending the CUP Order. As a result, S Bar Ranch’s due process rights were not violated. *See In re Jerome County Bd. of Com’rs*, 281 P.3d 1076, 1092–93 (Idaho 2012) (“Regardless of whether Mr. Slone had received a mailed notice on time, the fact remains that somehow Mr. Slone was aware of the proposed LCO and was in fact on notice of the upcoming hearing. . . . [H]e still had time to prepare exhibits, and was still given the same opportunity to be heard as everyone else—an opportunity that has been found to not violate any due process rights.”); *Cowan v. Board of Com’rs of Fremont County*, 148 P.3d 1247, 1259 (Idaho 2006) (“[E]ven if the notice were defective, Cowan has failed to demonstrate how this defect prejudiced his substantial rights since he clearly had notice of the meeting.”).

SBR: SBR knew that there would be a hearing. However, SBR was not given notice of what was going to be considered in enough detail to be afforded a meaningful opportunity to comment. Further, the approval, signing and recordation of the Development Agreement, which all occurred on the same day, reflects the intent to deny SBR a meaningful opportunity to review and provide meaningful comments to the materially modified Development Agreement.

S Bar Ranch was afforded the opportunity to be heard on the CUP Amendments set forth in the Development Agreement in compliance with due process standards.

Contrary to its contentions, S Bar Ranch was afforded the opportunity to provide comments at a hearing on the proposed amendments to the CUP Order as required by LLUPA and Elmore County Code. In addition to meeting the minimal requirements of the law, BOCC gave S Bar Ranch the opportunity to submit written evidence and provide comments at a number of public hearings on the terms and conditions of the Development Agreement, which included, among other things, the proposed amendments to the CUP Order.

S Bar Ranch objects that the notice for the October 20, 2017 public hearing provided that it would cover “the adoption of a Development Agreement” but it only covered Cat Creek’s request for a six-month extension of the execution and recording deadline for the Development Agreement as authorized by Conditions No. 2 of the CUP Order. (Second Reconsideration Request First Supplement, at p. 4.) This public meeting, however, was the first of four public hearings on the terms and conditions of the Development Agreement, which included, among other things, the proposed amendments to the CUP Order. (Record, at pp. 10382–409.) Idaho Code Section 67–6512(b) requires “least one (1) public hearing” prior to granting a CUP, and by extension, prior to approving any amendment to a CUP. Similarly, Elmore County Code 6-3-2.H requires “a public hearing in accordance to Idaho Code and this Title [6]” for any appeals of decisions of the P&Z Commission, such as Cat Creek’s appeal of P&Z Commission’s denial of its applications for the CUPs, and by extension, any amendments to decisions made by BOCC under Elmore County Code 6-3-2. As the Idaho Supreme Court recognized in *In re Jerome County Bd. of Com’rs*, 281 P.3d 1076, 1091 (Idaho 2012), the “minimum procedural requirements” of “at least one public hearing” imposed by the law were met. With respect to the terms of the Development Agreement that did not concern amendments to the CUP Order, the public’s right to a hearing on these terms was not mandated by LLUPA or Elmore County Code but rather a right provided by BOCC as part of Condition No. 2 of the CUP Order. (See CUP Amendments Order, at p. 14 (concluding the Development Agreement is not an Idaho Code §67-6511A development agreement or a development agreement under Section 6-29-1 of the Zoning Ordinance).)

Further, additional means of being heard were afforded to the public. At all four hearings, representatives of the County as well as proponents and opponents of the proposals for the Development Agreement and related CUP Amendments were permitted to speak without any restriction on who could speak and for how long. (Record, at pp. 10389, 10391, 10397, 10403–05, 10357–58, 10359–60.) In fact, at the start of each hearing the Director of the County’s Land Use and Building Department invited “[a]ny and all interested persons . . . to provide verbal and written testimony.” (Record, at pp. 10357–58, 10359–60.) Written testimony was also accepted without restriction until the close of the final public hearing on February 9, 2018. *Id.* As mentioned above, S Bar Ranch took advantage of its opportunity to be heard by submitting written comments through its attorney in two separate letters dated January 25, 2018 and February 9, 2018, and as discussed in more detail below, the County adopted several of S Bar Ranch’s recommendations in its January 25, 2018 letter. (Record, at pp. 9767–69, 10351–53.) S Bar Ranch also attended the January 26, 2018 and February 9, 2018 hearings through its attorney, who chose not to testify.

In connection with choosing not to testify at the hearings and with submitting its written testimony on two occasions, S Bar Ranch never objected to the amount of time it was given to review the various drafts of the Development Agreement or that Cat Creek and the County were negotiating the terms of the agreement before the BOCC during the public hearings. See *Neighbors for the Preservation of the Big and Little Creek Community v. Bd. of Com’rs of Payette Cty.*, 358 P.3d 67, 76 (Idaho 2015) (“Notably, although H–Hook’s principal, Humphreys, testified before the Commissioners and identified problematic aspects of the development agreement, he did not contend that he lacked adequate time to review the development agreement. In a letter dated June 7, 2011, Humphreys again commented on aspects of the development agreement without stating that he had any issue with the amount of time that

he had to review the document.”). S Bar Ranch’s due process rights were not violated. *See In re Jerome County Bd. of Com’rs*, 281 P.3d 1076, 1091 (Idaho 2012) (holding appellants’ due process rights were not violated where the minimal requirements of the statute were met and people whose primary residence was within a mile radius of the proposed site were further given the opportunity to submit written evidence before the hearing).

S Bar Ranch also argues that it is “impossible for the public to provide meaningful comments to the Development Agreement as the Development Agreement was never finalized prior to any of the four public hearings” and that “the public had the right to rely on [Cat Creek]’s representation that a final version of the Development Agreement would be made available to the public before a public hearing where the Development Agreement would be adopted.” (Second Reconsideration Request First Supplement, at pp. 4–5.) Cat Creek’s statement at the October 20, 2017 hearing on the process by which BOCC would give the public the opportunity to comment on the proposed terms of the Development Agreement does not create a legal requirement for BOCC to provide the public with a final version of the Development Agreement prior to a hearing. Nor is there any requirement under the law or the CUP Order that the public receive a copy of the final version prior to the hearing on the proposals for the Development Agreement and related amendments to the CUP Order (“**CUP Amendments**”). If this were a requirement, very few, if any, agreements to which the County was a party would ever be approved because BOCC could not require any changes to any agreement before it for approval without another hearing that made the change in the agreement and circulated it to the public before BOCC approved the agreement’s terms. Further, the Development Agreement is not a development agreement under Idaho Code Section 67-6711A and Title 6, Chapter 29 of the Elmore County Code. Accordingly, the requirement of Elmore County Code 6-29-3.D that the “applicant or owner shall sign the development agreement prior to the Board action on the final development agreement” does not apply. Even if this requirement did apply, it does not require that the Development Agreement must be finalized, signed, and made available to the public prior to the hearing on the agreement. There is no requirement under any other provision of LLUPA or the Elmore County Code that a final version of an agreement must be made available to the public before a hearing on the agreement.

SBR: Idaho Code § 67-6512(b) requires a summary of the proposal be published prior to the hearing on the CUPs. One cannot craft a meaningful summary if it is unknown what is going to be decided/considered. Idaho Code § 67-6509(b) is instructive as to notice and the final matter to be heard. Idaho Code § 67-6509 requires another hearing if “the board makes a material change.” Taken in conjunction with Idaho Code § 67-6535, “sound reason and practical application of recognized principals of law” would require the BOCC to hold another hearing on the approved and materially modified Development Agreement, as was represented would occur at prior hearings.

Condition No. 2 of the CUP Order required “following ongoing discussions and draft reviews with county staff” that the development agreement be “presented to [BOCC] in a public hearing.” This requirement was satisfied over the course of the three public hearings held on December 22, 2017, January 26, 2018, and February 9, 2018, where BOCC was presented with a lengthy discussion of the proposed terms of the Development Agreement, the different positions of the County and Cat Creek on these terms, and the revisions to these terms based on the

ongoing discussions of the County and Cat Creek, reviews with County staff, and comments by the public. (Record, at pp. 10391–93, 10395, 10397–99, 10403–05.)

SBR: This establishes that the Development Agreement was constantly changed and modified between each public hearing and at each public hearing. Lacking a final Development Agreement until the end of a public hearing establishes that there was not a meaningful opportunity to be heard.

It was the very presentation of the County’s and Cat Creek’s differing positions on the proposed terms of the Development Agreement that afforded the public the opportunity to comment in a meaningful manner on these terms. (Record, at pp. 10391–93, 10395, 10397–99, 10403–05.) After hearing presentations from the County attorney and Cat Creek regarding their positions on the proposed terms, the public was afforded the opportunity to weigh in. (Record, at pp. 10357–58, 10359–60, 10389, 10391–93, 10395, 10397, 10403–04, 10357–58, 10359–60.) The presentation by the County’s attorney even included comments on the written testimony submitted by S Bar Ranch and his recommendation that the County have another work session on the Development Agreement to discuss “a number of comments in the Hawley Troxell correspondence [that] are valid and clarify items in the agreement.” (Record, at p. 10398.) Further, the public was given the opportunity to continue to comment on the proposed terms of the Development Agreement between the hearings until the final hearing on February 9, 2018. (Record, at pp. 10410–11, 8797, 9053–54.) S Bar Ranch took advantage of this and in doing so “commend[ed the County] for the work that obviously has been put into the revising of the latest version of the proposed Development Agreement” because the revisions to an earlier draft of the agreement “better protect[] Elmore County and its residents.” (Record 9767–68.)

S Bar Ranch’s attorney obtained copies of the then-current version of the Development Agreement prior to the public hearings on January 26, 2018 and February 9, 2018, as well as a comparison document showing the changes between the drafts. (Record, at pp. 9767–69, 10351–53, 10583–631, 10652–73, 10788–881.) That comparison document showed eight changes between the drafts, which were the same drafts of the Development Agreement that were made available at the public hearings on January 26, 2018 and February 9, 2018. (Record, at pp. 10453–527, 10654–731.) Of the eight changes between the two hearings, half of them were in response to the written testimony of S Bar Ranch’s attorney. (Record, at pp. 9767–69, 10453–527, 10654–731.)

At the February 9, 2018 hearing after Cat Creek testified it had reached agreement with the County on the terms of the Development Agreement except for the water provisions, people in favor of, neutral to, and opposed to the Project were given the opportunity to speak and no one, including S Bar Ranch who was present, spoke in opposition to the Project. (Record, at pp. 10403–04) S Bar Ranch, like the rest of the public, was given the opportunity to raise its objections to the terms of the Development Agreement that proposed amending the CUP Order and it declined to do so. (Record, at p. 10404.) Subsequently, Cat Creek proposed addressing the outstanding issues related to the water provisions with language that deferred negotiation and agreement on the water provisions no later than December 31, 2019 and required a public hearing with notice on the provisions (“**Water Deferral Language**”). (Record, at p. 10405.) Following its deliberations, BOCC approved the draft of the Development Agreement reviewed by S Bar Ranch with the addition of the Water Deferral Language except the deadline for

execution of the terms and conditions governing the water provisions, following a public hearing, was changed to December 31, 2018. (Record, at pp. 8967–9903, 10405, 10587–626.) S Bar Ranch was given, and took advantage of, its opportunity to comment on all provisions of the Development Agreement that were adopted by BOCC, with the exception of the Water Deferral Language, which gives S Bar Ranch the opportunity to comment on the water provisions when the hearing on these provisions will occur sometime later this year. (Record, at pp. 8967–9903, 10351–53.)

The public, and S Bar Ranch in particular, were given an opportunity to be heard at a meaningful time and in a meaningful manner as required by due process. *See Neighbors for the Preservation of the Big and Little Creek Community v. Bd. of Com'rs of Payette Cty.*, 358 P.3d 67, 76 (Idaho 2015) (holding that a development agreement was not required for a conditional rezone application and rejecting appellant's argument that his procedural due process rights were violated because he lacked adequate time to review the various drafts of the development agreement); *In re Jerome County Bd. of Com'rs*, 281 P.3d 1076, 1091 (Idaho 2012) (holding appellants' due process rights were not violated where the minimal requirements of the statute were met and people whose primary residence was within a mile radius of the proposed site were further given the opportunity to submit written evidence before the hearing); *Neighbors for a Healthy Gold Fork v. Valley County*, 176 P.3d 126, 127–28 (Idaho 2007) (rejecting appellant's argument that it was denied procedural due process where it did not know which site plan the board would consider because appellant "clearly had an adequate opportunity to be heard" when it presented written testimony at the first hearing and oral and written testimony at the second hearing); *Cowan v. Board of Com'rs of Fremont County*, 148 P.3d 1247, 1258 (Idaho 2006) ("Even assuming *arguendo* that P & Z's request to limit public comments to a few minutes per speaker prevented other citizens from presenting evidence and rebutting arguments, it afforded Cowan an opportunity to be heard at a meaningful time and in a meaningful manner. . . . [A]lthough we hold that Cowan's due process rights were not violated, limiting public comment to two minutes is not consistent with affording an individual a meaningful opportunity to be heard.").

6. BOCC's approval of the new master site plan as part of its CUP Amendments Order satisfied Elmore County Code 6-27-2.B's requirement of a new conditional use approval and did not violate S Bar Ranch's due process rights.

S Bar Ranch argues that under Elmore County Code 6-27-2.B the modification to Cat Creek's master site plan required BOCC to adopt a new conditional use approval. (Second Reconsideration Request Original Submission, at Attachment p. 5.) BOCC adopted the revised master site plan attached as Exhibit D to the Development Agreement in its CUP Amendments Order. (CUP Amendments Order, at p. 5.) The CUP Amendments Order modified BOCC's grant of the CUPs only to the extent set forth in the CUP Amendments Order and all other terms set forth in the CUP Order remain intact. (*See* CUP Amendments Order, at p. 15 ("Based upon the foregoing Findings of Fact and Conclusion of Law and the Record, the Board hereby approves the foregoing changes to the Initial Findings, the CUPs, the Approvals and Conditions.")). The result—the CUPs granted by the CUP Order as amended by the CUP Amendment Order following public hearings with notice—is a conditional use approval as required by Elmore County Code 6-27-2.B. To the extent S Bar Ranch is asserting that this approval should have been based on an application by Cat Creek for new CUPs for the Project or

the CUP Amendments Order should have restated each provision of the CUP Order that was not modified, S Bar Ranch places too much importance on the form of BOCC's conditional use approval.

Elmore County Code 6-27-2.B provides: "Any modification or expansion of a previously approved conditional use that would generate the need for a new master site plan review shall require a new conditional use approval." Elmore County Code 6-27-3.G describes specific changes to a site plan that can be approved by the Director of the Growth and Development Department (the "**Director**"), such as a reduction in the square footage of a proposed building. Read together, Elmore County Code 6-27-2.B and 6-27-3.G specify when changes to a previously approved site plan must go before the decision making body that originally approved the site plan rather than the Director. Regardless of whether the Director could have approved the revisions to the master site plan, BOCC did. (CUP Amendments Order, at p. 5.) BOCC was the proper decision making body to do so because the P&Z Commission never approved the CUPs in the first place. (CUP Order, at p. 3.) When the P&Z Commission denied Cat Creek's applications for the CUPs, it lost jurisdiction over any subsequent changes to the approvals of the CUPs.

SBR: The BOCC fails to cite to any rule that says a case never goes back to the Planning and Zoning Commission especially where, in this case, the project is substantially different than the project described in the original application and which was denied by the Planning and Zoning Commission or was conditionally approved by the BOCC.

In this case where BOCC approved amending the CUP Order, the terms of the CUP Order, including its findings and conclusions regarding how its approval of Cat Creek's applications for the CUPs complies with LLUPA and Elmore County Code, remain except to the extent modified by the CUP Amendments Order. As modified by the CUP Amendments Order, the CUP Order makes the required findings and conclusions regarding compliance with LLUPA and Elmore County Code. Whether these findings and conclusions are stated in one or two orders of BOCC is immaterial as long as BOCC's approval is in writing explaining BOCC's rationale for its decision based applicable law and the record after holding at least one public hearing following notice. *See* Idaho Code Sections 67-6512 and 67-6535 (setting forth requirements for approving conditional use permits); Elmore County Code Chapters 3 and 27 (setting forth requirements for approving conditional use permits).

S Bar Ranch also asserts it does not concede that notice of the material changes to the CUP Order by the CUP Amendments Order was proper. As discussed in detail above, any defect in notice of the proposed modifications to the CUP Order did not prejudice S Bar Ranch's substantial rights as required to find a violation of due process.

7. S Bar Ranch misconstrues the meaning of Condition No. 2(o), which even as misconstrued does not preclude BOCC from amending the Conditions it placed on the CUPs.

S Bar Ranch misinterprets the meaning of Condition No. 2(o) of the CUP Order. (*See* Second Reconsideration Request First Supplement, at pp. 6–7.) This Condition requires that the Development Agreement include, among other things, a provision that incorporates the

Conditions into the Development Agreement. This is satisfied by Section 2.12 of the Development Agreement.

Condition No. 2(o) also recognizes that the Conditions may be “expanded and refined by” agreement of BOCC and Cat Creek as reflected in the Development Agreement. Contrary to S Bar Ranch’s assertion, Condition No. 2(o) is not a limit on amendments that BOCC may make to the Conditions. Pursuant to BOCC’s authority to place conditions on the CUPs upon granting them under Idaho Code Section 67-6512(d) and Elmore County Code 6-27-4.J, following at least one public hearing and notice of the hearing to the public, BOCC also has the authority to approve changes to the original Conditions it placed on the CUPs. Condition No. 2(o) contemplates that such improvements to the Conditions would be set forth in the Development Agreement and approved by BOCC, as was done in the CUP Amendments Order after four public hearings, following notice and the opportunity to be heard by the public.

SBR: The issue again is that the BOCC did not place conditions on the CUPs in February, 2017. The BOCC deferred the placement as well as the determination of the conditions to a later date. As a matter of fact the BOCC has still yet to determine the conditions that apply to the hydro portion of the Project. How can the BOCC find that the conditions afford adequate protections when the conditions do not yet exist?

Regardless of whether any change to any Condition described in the CUP Amendments Order was contemplated by Condition No. 2(o), each change approved by BOCC was approved as an amendment to the CUP Order after BOCC satisfied the statutory requirement to hold at least one public hearing with notice to the public of the hearing. (See CUP Amendments Order, at p. 11 (“The Board further finds that certain Conditions under Condition No. 2 have been revised or modified, as stated above, as permitted under Condition No. 2 o, and to the extent, any changes or modifications may be beyond the scope of Condition No. 2 o, such changes shall be deemed approved by the Board as a modification of the Conditions as any such changes were made pursuant to four public meetings following notice and comment by the public.”) and p. 14 (“The Board concludes that the changes, deletions or modifications of the Conditions, Approvals or Initial Findings under the Development Agreement are permitted under Condition No. 2 o of the Conditions, and any modifications beyond those permitted by Condition No. 2 o are hereby approved by the Board as modifications of the Initial Findings, the Approvals or Conditions, following four public meetings, with notice and the opportunity to be heard by the public.”).)

8. As contemplated by Elmore County Code 6-8-94, BOCC properly requires Cat Creek to comply with Elmore County Code 6-8-94 to obtain the Wind Farm CUP.

S Bar Ranch argues that the intent of the CUP Order was to not require compliance with Elmore County Code 6-8-94. (Second Reconsideration Request Second Supplement, at p. 9.) In fact, BOCC found in its CUP Order: “in addition to a conditional use permit, additional requirements are found in the following Zoning Ordinance, Section 6-8-94, pertaining to Electrical Generating Facilities.” (CUP Order, at p. 16.)

Elmore County Code 6-8-94(A) provide:

Certain types of electricity generation facilities are permitted as conditional uses in zones as specified in Table 6-8-11(c) and must adhere to the following conditions:

....

9. Towers and structures that seek to exceed the building height restrictions from Table 6-8-12(C) must be compatible with the flight operations of MHAFB and the City of Mountain Home and Glenns Ferry public airport operations. The proposed plan should be coordinated and approved by local, state, federal and military aviation officials.

10. Towers and height variances shall not be granted within 5 miles of Mountain Home AFB or along depicted flight corridors.

....

With respect to the requirement set forth in Elmore County Code 6-8-94(A)(10)², BOCC found that subpart 10 does not apply to Cat Creek's Project because the property subject to the Project is more than five miles from the Mountain Home Air Force Base. (CUP Order, at p. 43.)

The requirement set forth in Elmore County Code 6-8-94(A)(9)³ applies because the wind turbines may exceed the height restrictions set forth in Table 6-8-12(C). (See CUP Amendments Order, at p. 5 (approving Exhibit D of the Development Agreement as the revised master site plan); Development Agreement, at Exhibit D (stating maximum height of 500 feet for wind turbines); Elmore County Code Table 6-8-12(C) (stating building restrictions).) Accordingly, Elmore County Code 6-8-94(A)(9) requires coordination and approval from local, state, federal, and military aviation officials. The County sent Cat Creek's applications for the CUPs to Mountain Home Air Force Base and the Mountain Home and Glenns Ferry airports and none of these aviation officials submitted any comments on Cat Creek's proposal for the Project. (See Record, at pp. 10956–58.) In fulfillment of Elmore County Code 6-8-94(A)(9), coordination with the aviation officials took place and they acquiesced to the proposed Project by virtue of their decision to not submit any comments or objections to Cat Creek's applications for the CUPs. The requirements of Elmore County Code 6-8-94(A)(9) have been satisfied.

9. Even though S Bar Ranch identifies imperfections in the notices given for the P&Z Commission and BOCC public hearings, no further action is required because there is no violation of S Bar Ranch's due process rights.

S Bar Ranch correctly identifies that the notices of the June 15, 2016 and July 13, 2016 hearings of the P&Z Commission and the appeal hearings of BOCC held on November 16 and 17, 2016 did not state the height of the wind turbines and location, as required by Idaho Code

² S Bar Ranch's Second Reconsideration Request Second Supplement contains a typographical error by identifying subpart 10 as subpart 5.

³ S Bar Ranch's Second Reconsideration Request Second Supplement contains a typographical error by identifying subpart 9 as subpart 4.

Section 67-6512(b). (Second Reconsideration Request Second Supplement, at p. 9; Record, at pp. 7758–60, 10760–61.)

As determined by BOCC in its First Reconsideration Order, any notice defects of the public hearings of the P&Z Commission, which denied Cat Creek’s applications for the CUPs, are immaterial because S Bar Ranch failed to meet Idaho Code Section 67-6535(3)’s requirement that a party appealing a final decision related to a CUP application show actual harm or violation of a fundamental right. (First Reconsideration Order, at pp. 8–9, 16.) Further, BOCC held an appeal hearing on Cat Creek’s applications for the CUPs that reviewed the applications *de novo*, following notice by mail to S Bar Ranch. (First Reconsideration Order, at pp. 9, 16.)

With respect to the BOCC’s appeal hearing, notice of the hearing was also posted along the boundaries of the property subject to the Project, giving S Bar Ranch notice that Cat Creek’s applications for the CUPs would cover property that neighbors its land. (Record, at p. 10767). With actual notice of the potential impact on its land, any imperfections in the notice required by Idaho Code Section 67-6512(b) does not mandate further action by BOCC because S Bar Ranch’s due process rights were not violated. *See In re Jerome County Bd. of Com’rs*, 281 P.3d 1076, 1092–93 (Idaho 2012) (“Regardless of whether Mr. Slone had received a mailed notice on time, the fact remains that somehow Mr. Slone was aware of the proposed LCO and was in fact on notice of the upcoming hearing. . . . [H]e still had time to prepare exhibits, and was still given the same opportunity to be heard as everyone else—an opportunity that has been found to not violate any due process rights.”); *Cowan v. Board of Com’rs of Fremont County*, 148 P.3d 1247, 1259 (Idaho 2006) (“[E]ven if the notice were defective, Cowan has failed to demonstrate how this defect prejudiced his substantial rights since he clearly had notice of the meeting.”).

SBR: While S Bar Ranch was aware that there was a hearing and did attend and participate as well as could be expected given that the actual facts were unknown, that lack of specificity itself is a due process violation.

10. S Bar Ranch’s conclusory allegation of unlawful amendment of the CUPs fails to give rise to a credible objection.

S Bar Ranch’s conclusory statement that BOCC’s amendments to the CUPs violates LLUPA, without more, is insufficient to support S Bar Ranch’s demand for remand of Cat Creek’s applications for the CUPs back to the Director. (Second Reconsideration Request Second Supplement, at pp. 9–10.)

11. Consideration of S Bar Ranch’s unlawful taking claim is premature.

S Bar Ranch argues that without reconsideration of the Wind Farm CUP, it is entitled to compensation for the taking of its property. (Second Reconsideration Request Second Supplement, at p. 10.) In holding another hearing on the amendments to the CUPs contemplated by the Development Agreement, which includes the revised site plan, S Bar Ranch will be given another opportunity to raise any concerns S Bar Ranch has with respect to the location and features of the wind turbines that Cat Creek proposes to locate near its property. In particular, S Bar Ranch may address the aspects of Cat Creek’s proposal that allegedly diminish the value of its property and propose mitigation measures that would alleviate these concerns. Before BOCC

has been given the chance to consider this, it is premature for BOCC to evaluate whether S Bar Ranch should be compensated for any alleged decrease in the value of its land as result of the Wind Farm CUP.

SBR: SBR has continually been seeking for a hearing and been denied. After denying the First Reconsideration Request, which required SBR to file a Petition for Judicial Review to preserve its claims, the BOCC appears to be taking the position that SBR should have known that another hearing was going to be scheduled and reserved its claim until after the newly scheduled hearing. Nothing in the BOCC's prior conduct or comments indicated that BOCC would hold another hearing, thus making SBR's claim timely.

Exhibit A

Amendments to CUP Order Contemplated by Development Agreement

The amendments to the CUP Order contemplated by the Development Agreement include the modification, removal, or addition of findings of fact, conclusions of law, or conditions set forth in the CUP Order on the following subject matters:

1. An extension of the time Cat Creek has to satisfy Conditions No. 2(b) and (c) of the CUP Order 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 CUP Order);
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. Cat Creek'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 CUP Order);
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 CUP Order);
14. An updated Wildlife Mitigation Plan/Environmental Impact Statement;
15. A power sale agreement between Cat Creek 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 County's approvals of the CUPs to allow phasing of the Project; and
20. Any other matter raised in the Development Agreement.