

RECEIVED
STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APR 28 2001
REQUEST FOR EXTENSION OF TIME

TO PROVIDE ADDITIONAL TIME IN WHICH TO SUBMIT PROOF OF
BENEFICIAL USE FOR A WATER RIGHT PERMIT

The Idaho Department of Water Resources will consider this form as a request that the permit holder(s) be granted an additional period of time under the provisions of Section 42-204, Idaho Code in which to complete development of a water right.

Permit No. 95-8856
Name(s) of Permit Holder: McCormack Properties of Idaho, Inc.
Address: P.O. Box 2637, 640 Thornton St. City Post Falls State ID Zip 83871-2637
Telephone No. (208) 664-0700 Date Proof is Due: May 1, 2001

Describe what work has been completed toward the development of this water right:
(This must be filled out! If no work has been completed, show "none".)

none

Costing \$ _____

The permit holder(s) has been unable to complete the remainder of the work for the following reasons:

Subdivision development has not yet begun due to pending outcome of litigation.

Permit holder(s) request an extension to May 1, 20 02

May McCaskie for McCormack Properties of Idaho, Inc.
(Signature)*

*If other than permit holder, Power of Attorney must be supplied.

ACTION OF THE DEPARTMENT OF WATER RESOURCES

IT IS HEREBY ORDERED that the above request for extension of time be

APPROVED and the time within which to submit proof of beneficial use is extended to May 1, 2002.

Signed this 11th day of May, 20 01

L. Glen Saxton
L. GLEN SAXTON, Chief
Water Allocation Bureau

JAN 12 2001

February 28, 2001

MC CORMACK PROPERTIES OF IDAHO INC
401 FRONT ST STE 3
COEUR D ALENE, ID 83814

PROOF DUE NOTICE

RE: PERMIT NO. 95-8856

Dear Permit Holder:

One of the conditions of approval of the above referenced water permit was that proof of the extent of your beneficial use must be submitted to this office on or before May 01, 2001. (See last page of your approval permit or your last approved extension request.) Enclosed is a form which when accompanied by the license examination fee or a completed field examination report prepared by a certified water right examiner may be used to submit the required proof.

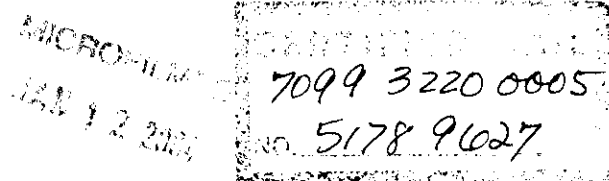
If you have not fully completed your project, and you or a previous owner of this permit have not received a prior extension of time, you may request an extension of time if the delay is for reasonable cause as provided in Section 42-204, Idaho Code. If you have been prevented from proceeding by a governmental agency or by litigation which might bring title to the water in question, more than one extension of time can be granted. An extension of time request form is enclosed for your convenience.

Either an acceptable proof of beneficial use submittal or an acceptable request for an extension of time must be received by this department on or before the above described proof due date. If neither is received, the department will send you a lapse notice. Within sixty (60) days of the mailing of the lapse notice, the permit will no longer be of any force nor effect.

Sincerely,

Deborah J. Gibson, Admin. Assistant
Water Allocation Bureau

Enclosures



STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
130 1st Orchard Street
Boise, Idaho 83706-2237

CERTIFIED MAIL



RECEIVED 7099 3220 0005 5178 9627

MAR - 8 2001

Department of Water Resources

95-8856

Resent 3/8/01. dg

MCC0401 838142006 1C99 04 03/03/01
FORWARD TIME EXP RTN TO SEND
: MCCORMACK PROPERTIES
4053 W RIVERBEND RD
POST FALLS ID 83854-8467

RETURN TO SENDER

83814-2734 03



STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
North Orchard Street, P.O. Box 83720
Boise, Idaho 83720-0098

Return Service Requested

CERTIFIED MAIL



3220 0005 5178 9665

RECEIVED

MAR 16 2001

Department of Water Resources

MCCORMACK PROPERTIES
4053 W RIVERBEND RD
POST FALLS ID 83854-8467

MICROFILM
3-10

Handwritten: 10/02/01
X

MCC0053 838542018 1101 06 03/14/01
RETURN TO SENDER
: MCCORMACK PROPERTIES
PO BOX 2637
POST FALLS ID 83877-2637
RETURN TO SENDER

5-8856
Proof Due Notice

83854-8467 10



PLACE STICKER AT TOP OF ENVELOPE
TO THE RIGHT OF RETURN ADDRESS.
FOLD AT DOTTED LINE

Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

MCCORMACK PROPERTIES
4053 W RIVERBEND RD
POST FALLS ID 83854-8467

95-8856

4a. Article Number

70993220000551789665

4b. Service Type

- | | |
|---|---|
| ☐ Registered | ☒ Certified |
| ☐ Express Mail | ☐ Insured |
| ☐ Return Receipt for Merchandise | ☐ COD |

7. Date of Delivery

5. Received By: (Print Name)

6. Signature: (Addressee or Agent)

X

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, December 1994

Domestic Return Receipt

Thank you for using Return Receipt Service.

MICROFILMED
JAN 12 2001

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

Article Sent To:

McCormack Properties

Postage \$

Certified Fee

Return Receipt Fee
(Endorsement Required)

Restricted Delivery Fee
(Endorsement Required)

Total Postage & Fees \$

MICROFILMED

JAN 12 2001

Postmark
Here

dg

Name (Please Print Clearly) (To be completed by mailer)

Street, Apt. No. or PO Box No.

4053 W Riverbend Rd

City

Post Falls, Id 83854-8467

PS Form 3800, July 1999

See Reverse for Instructions

7099 3220 0005 5178 9665

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

- ☐ Addressee's Address
- ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

McCORMACK PROPERTIES
PO BOX 2637
POST FALLS ID 83877-2637

MICROFILM

95-8856

4a. Article Number

70993220000551785032

4b. Service Type

- ☐ Registered ☒ Certified
☐ Express Mail ☐ Insured
☐ Return Receipt for Merchandise ☐ COD

7. Date of Delivery

MAR 23 2001

5. Received By: (Print Name)

JAN 12 2004

6. Addressee's Address (Only if requested and fee is paid)**6. Signature: (Addressee or Agent)**

X

PS Form 3811, December 1994

Domestic Return Receipt

Thank you for using Return Receipt Service.

PS Form 3800, July 1999		7099 3220 0005 5178 5032	
See Reverse for Instructions		City	
83877-2637		P.O. Box 2637	
Street, Apt. No., or PO Box No.		Name (Please Print Clearly) (To be completed by mailer)	
Total Postage & Fees		Postmark Here	
Restricted Delivery Fee (Endorsement Required)		3/20/01	
Return Receipt Fee (Endorsement Required)		MCCormack Properties	
Certified Fee		Article Sent To:	
Postage		(Domestic Mail Only; No Insurance Coverage Provided)	
U.S. Postal Service		CONFIRMED MAIL RECEIPT	

UNITED STATES POSTAL SERVICE



First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Print your name, address, and ZIP Code in this box •

DEBORAH GIBSON
DEPARTMENT OF WATER RESOURCES
101 N. ORCHARD ST.
ID 83706-2237

RECEIVED

MAR 28 2001

MICROFILMED
JAN 12 2004

Department of Water Resources



RECEIVED

APR 26 2001

Department of Water Resources

Steven C. Wetzel
Dana L. Rayborn Wetzel
Ronald P. Ringel, JD, CPA*

*Also admitted in Washington

February 14, 2001

Erika Ellingsen
Kootenai County Legal Services
P.O. Box 9000
Coeur d'Alene, ID 83816-9000

RE: STATUS OF THE RIDGE AT COUGAR BAY, CASE NO. S-661-95

Dear Erica:

On March 11, 1998 the Board of Commissioners approved a stay of all County imposed deadlines for the consruction of the Ridge at Cougar Bay until all litigation was resolved. A copy of that order is attached hereto for your reference.

On January 5, 1994 the Board of Commissioners approved the final plat for the subdivision, The Ridge at Cougar Bay, a copy of that Order is attached. The approval was upheld by Honorable Judge Mischaud on March 19, 1998. RKO did not appeal the decision of Judge Mischaud, so the approval of the final plat still stands. A copy of Judge Mischaud's decision is also attached for your reference.

On June 28, 2000 the Board of Commissioners reviewed on remand one issue of approval of the preliminary plat of the subdivision, The Ridge at Cougar Bay regarding the sufficiency of open space. The Board upheld its earlier findings regarding the subdivision and again approved the subdivision. A copy of the decision of the Board of Commissioners is also attached for your reference. Nothing changed in the subdivision between the final plat approval on January 5, 1996 and the approval granted by the Board of Commissioners on the preliminary plat rehearing.

We have affirmed orally with your office that the final plat remains in effect and the applicant does not have to resubmit the final plat for further review by the County including public hearings and new orders of approval. This letter is sent to confirm in writing that the final plat for The Ridge at Cougar Bay remains in effect and no further proceedings for final plat approval is required.

MICROFILMED

APR 12 2001

Erika Ellingsen
February 14, 2001
Page 2

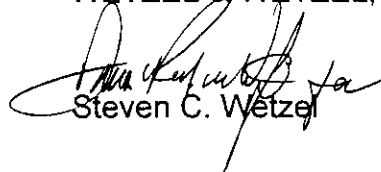
We further understand that before any construction permits will issue from Kootenai County, that specific conditions of the re-visited preliminary plat must be addressed, specifically requiring that the permit from DEQ for the wastewater facility and the permit from IDOT for access from US 95 be reaffirmed by those agencies. We are in the process of addressing these issues.

We also note that the expiration of the preliminary plat approval granted on July 19, 2000 is also stayed until all litigation has been resolved.

Please confirm the accuracy of this letter as McCormack Properties of Idaho needs a confirmation to show the lenders, buyers and investors. We are relying upon and proceeding with the development of this subdivision based upon the facts set forth in this letter.

Sincerely,

WETZEL & WETZEL, P.L.L.C.



Steven C. Wetzel

Enc. Order regarding Stay
Order approving Final Plat
Order approving re-visited preliminary plat
Decision of Judge Mischaud upholding the final plat approval
cc: Mike McCormack

n:\files\m\mccormack\coughan ellingsen ltr re status of subdivision 2-13-01.doc

MICHAEL
JAN 12 2001

August 3, 2000

Mr. Mike McCormack
McCormack Properties
4053 Riverbend Ave.
Post Falls, Idaho 83815

RE: SUMMARY OF LITIGATION CONCERNING THE RIDGE AT
COUGAR BAY

Dear Mike:

We have compiled a brief summary of the approvals granted by Kootenai County regarding The Ridge at Cougar Bay and the appeals taken therefrom by Rural Kootenai Organization ("RKO").

1. An application for approval of a PUD and the preliminary plat of the first phase of the subdivision, known as The Ridge at Cougar Bay, was submitted to the Kootenai County Planning Department in August of 1993; was reviewed and recommended for approval by the Planning and Zoning Commission and submitted to the Kootenai County Board of Commissioners where it was approved on January 5, 1994.
2. RKO immediately appealed the approval to the First District in Case No. CV-94-00276 before Judge Kosonen. On June 2, 1995, Judge Kosonen entered a decision upholding most of the approval and directing that a portion of the decision be remanded back for consideration by the County Commissioners.
3. Judge Kosonen's decision was appealed to the Idaho Supreme Court on June 15, 1995 and set as Docket No. 22271.
4. The Kootenai County Commissioners reheard that portion of the case remanded by Judge Kosonen and on November 22, 1995 again approved the PUD and preliminary plat for the first phase of the subdivision.
5. RKO immediately appealed the approval of the Board of County Commissioners to the First Judicial District, which was set before Judge Judd as Case No. CV-95-6927.

MICROFILMED

JUL 12 2000

6. The final plat for PUD and final plat for the first phase of the subdivision, The Ridge at Cougar Bay, was concurrently submitted to the Planning Department. Approval was recommended by the Planning and Zoning Commission and the final plat was approved by the Board of County Commissioners on January 5, 1996.

7. The approval of the final plat was immediately appealed by RKO to the First District Court and set before Judge Michaud in Case No. CV-96-663. The appeal by RKO before Judge Judd in Case No. 95-6927 was consolidated with the case before Judge Michaud. On March 19, 1998, Judge Michaud entered a decision upholding the approval by the Board County Commissioners in both cases. The final approval of the PUD and the approval of the final plat of the first phase of the subdivision, The Ridge at Cougar Bay was in all respects affirmed. RKO did not appeal Judge Michaud's decision.

8. The Idaho Department of Health and Welfare Division of Environmental Quality granted to McCormack Properties of Idaho Inc. a permit to construct a rapid infiltration wastewater treatment system in December of 1995. RKO appealed the decision to the Board of Health and Welfare. Following a seven day contested hearing, a Master appointed by the Board issued a decision upholding the permit on June 14, 1996. RKO appealed the Master's decision and on December 20, 1996 after review by the board the Board of Health and Welfare again affirmed the permit. RKO took no further appeal.

9. McCormack Properties of Idaho, Inc. requested the County Commissioners approve an extension of time limits and a stay of the development phasing schedule contained in the original order approving The Ridge at Cougar Bay until all litigation was resolved. The County Commissioners approved the request on March 11, 1998.

10. RKO immediately appealed the decision of the County Commissioners granting the Stay to the First District Court set before Judge Judd in Case No. CV-98-01492.

11. Judge Judd upheld the decision of the County Commissioners by Order dated November 12, 1998.

12. RKO appealed the decision of Judge Judd to the Idaho Supreme Court as Docket No. 25735.

13. The Idaho Supreme Court suspended any activity on Docket No. 25735 until a decision was rendered in Docket No. 22271.

MICHAUD

JAN 12 2001

14. On December 9, 1999, four years and six months after the appeal was filed, the Supreme Court rendered a decision upholding the preliminary approval of the PUD and the preliminary approval of the first phase of the subdivision in all but one aspect. The Supreme Court remanded a portion of the original decision regarding the ownership of certain submerged lands back to the Board of County Commissioners for further findings.

15. On March 20, 2000 the Idaho Supreme Court entered an order dismissing Docket No. 25735.

16. On June 28, 2000 the Board of County Commissioners held the hearing required by the supreme Court and on July 17, 2000 entered an order denying the PUD and affirming the approval of the preliminary plat of the first phase of the subdivision, The Ridge at Cougar Bay.

17. RKO has 28 days from the date of the decision, August 17, 2000, in which to file an appeal of the approval of the Board of Commissioners. *was appeal filed?*

At this point there is no litigation against The Ridge at Cougar Bay. The approval of the preliminary plat of the first phase of the subdivision is unchallenged.

If you have any questions concerning this past litigation, please contact us.

Sincerely,

WETZEL & WETZEL, P.L.L.C.

Dana L. Rayborn Wetzel

\\files\m\mccormack\client\el sum litigation to date 8-2-00

*McCormack
8/2/2000*



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098

Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

May 3, 2001

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

MCCORMICK PROPERTIES OF IDAHO INC
PO BOX 2637
640 THORNTON ST
POST FALLS ID 83877-2637

RE: Permit No. 95-08856

Dear Permit Holder:

The Department acknowledges receipt of your request for extension of time. Your request states that the delay in completion of this project is due to pending litigation. You have indicated no work has been completed, and supplied copies of two letters dated August 3, 2000 and February 14, 2001. In order to evaluate a Request for Extension of Time, especially a delay based on litigation, I will need evidence documenting the litigation in question, specifically during the previous extension period of November 19, 1999 to May 1, 2001.

Additionally, the letters you provided with your request brought up two questions I have, which, if you can respond to them, may give me the evidence to grant this request. The August 3, 2000 letter was waiting for RKO's response to a July 17, 2000 decision made by the Board of County Commissioners (see paragraph nos. 16 and 17). Did RKO file an appeal to this decision? If so, please provide me a copy of RKO's appeal, any documents resulting from their appeal, and any documents that show what the current status of that decision is to May 1, 2001. Secondly, the letter dated Feb. 14, 2001, asked Kootenai County Legal Services for a response to the facts layed out in that letter. Did Kootenai County give you a response? If so, could you provide me with a copy of that response, and anything that followed to date?

I believe the additional information I have requested will cover the time period of your first extension (Nov. 19, 1999 through May 1, 2001), however, if the documents do not, I request you provide any additional documents or pleadings, that would cover that time period. Please provide these documents to me before May 15, 2001.

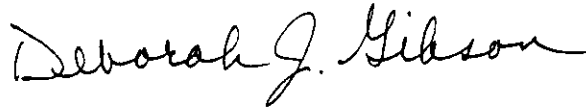
MICROFILMED

MAY 12 2001

Page 2

Thank you for your continued assistance in this matter. Please contact me at (208)327-7953, if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Deborah J. Gibson". The signature is fluid and cursive, with the first name "Deborah" and last name "Gibson" clearly legible.

Deborah Gibson
Administrative Assistant
Water Allocation Bureau

Enclosure

c: IDWR - Regional Office

MICHAEL
JAN 12 2004

May 9, 2001

Mike McCormack
McCormack Properties of Idaho Inc.
P.O. Box 2637
Post Falls, ID 83877-2637

RE: REQUEST FOR DOCUMENTATION OF ONGOING LITIGATION
REGARDING THE RIDGE AT COURGAR BAY SUBDIVISION

Dear Mr. McCormack:

Please feel free to forward the following summary and attached documents to the Idaho Department of Water Resources in response to the letter from Deborah Gibson dated May 3, 2001.

The history of litigation concerning the approved final plat of The Ridge at Cougar Bay Subdivision (the "Subdivision") is lengthy and still unresolved. The preliminary plat of the Subdivision was submitted to the County in 1994 as a planned unit development ("PUD") and was assigned a County Planning Case No. PUD -26-93 and as a Subdivision and the Subdivision was assigned a County Planning Case No. S-543-93. The PUD and preliminary plat of the Subdivision were approved by the County on January 5, 1994. This approval of the PUD and preliminary plat of the Subdivision was appealed to the District Court and set before Judge Kosonen as Case No. CV-94-0026. Judge Kosonen upheld the County's approval of the PUD and preliminary plat of the Subdivision on all but one aspect and remanded the matter back to the County for further review of one aspect of the approval. Judge Kosonen's decision upholding the County's approval was appealed to the Supreme Court and set as Docket No. 22271.

*who filed it
when?*

The County held the public hearing required by Judge Kosonen's order of remand and again approved the PUD and preliminary plat of the Subdivision. The County approved the final plat of the PUD and the Subdivision on January 5, 1996.

Mike McCormack

May 12, 2001

The County's order again approving the PUD and preliminary plat of the Subdivision as remanded from Judge Kosonen and the County's order approving the PUD and final plat of the Subdivision was appealed to the District Court and combined and set before Judge Michaud as Case No. CV-96-00663. Judge Michaud entered an order upholding the County's approval of the PUD and final plat of the Subdivision on March 19, 1998. No appeal of Judge Michaud's decision was taken, the decision still stands.

The Supreme Court heard arguments concerning the validity of the PUD and preliminary plat approval of the Subdivision and issued an order on December 9, 1999, (a copy of which is attached hereto as Exhibit "A") upholding the PUD and preliminary plat of the Subdivision on all issues except the inclusion of certain submerged lands in the PUD as open space. The Supreme Court remanded this one issue back to the District Court to require the County to again review and determine if certain submerged lands were excluded from the PUD would the PUD and Subdivision still meet the County's ordinance requirements for open space.

The District Court remanded the issue back to the County Commissioners for review and consideration in order dated April 10, 2000. The County set the required public hearing for the re-review of the PUD as Case No. PUD-26-93 and set the required public hearing for the re-review of the preliminary plat of the Subdivision as Case No. S-543-93. The County held the public hearing for both Cases and issued an order on July 19, 2000 (a copy of which is attached hereto as Exhibit "B") denying the approval of the PUD and upholding the previous approval of the preliminary plat of the Subdivision. ROK immediately appealed the decision to the District Court and the appeal was set before Judge Judd as Case No. CV-200-5104.

On January 9, 2001 Judge Judd rendered a decision upholding the decision of the County Commissioners denying the PUD and affirming the Subdivision (a copy of which is attached hereto as Exhibit "C"). RKO immediately appealed Judge Judd's decision to the Idaho Supreme Court which is now set as Docket No. 2000-5104 (a copy of the appeal filed by RKO is attached hereto as Exhibit "D"). A potential oral argument date has been set in October 2001. When a decision will be entered by the Court can not be predicted at this time.

* Exhibit
C & D

Mike McCormack

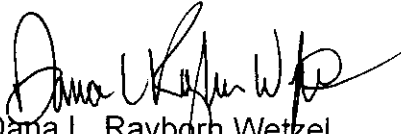
May 9, 2001

Mike McCormack
May 9, 2001
Page 3

If you have any questions concerning the status of the above litigation,
please call.

Sincerely,

WETZEL & WETZEL P.L.L.C.


Dana L. Rayborn Wetzel

Enc Supreme Ct. Decision Docket 22271 ("A")
 Board of County Commissioners Decision ("B")
 Judge Judds Decision ("C")
 RKO's Appeal ("D")

cmccormack@co.kern.ca.gov appeals@co.kern.ca.gov cmccormack@co.kern.ca.gov tel: 805/885-1234 fax: 805/885-1234

Mike McCormack

May 4, 2001

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 22271

RURAL KOOTENAI ORGANIZATION,)
INC., an Idaho nonprofit corporation,)
and LINDA ERICKSON,)

Plaintiffs-Cross-Appellants,)

v.)

BOARD OF COMMISSIONERS,)
KOOTENAI COUNTY, STATE OF)
IDAHO,)

Defendant-Cross-Respondent,)

and)

McCORMACK PROPERTIES OF)
IDAHO, an Idaho corporation,)

Intervenor-Cross-Respondent.)

Lewiston, April 1999 Term

1999 Opinion No. 120

Filed: December 9, 1999

Frederick C. Lyon, Clerk

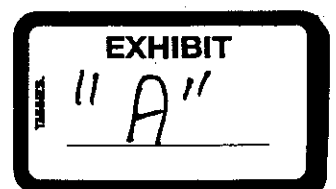
Appeal from the District Court of the First Judicial District of the State of Idaho, Kootenai County. Hon. Craig C. Kosonen, District Judge.

The district court's decision concerning whether the Kootenai County Board of Commissioners properly determined ownership of all the lands in the planned unit development is vacated and remanded. The remainder of the district court's decision is affirmed.

Sheroke & McGregor, Coeur d'Alene, for cross-appellants. Charles Sheroke argued.

Scott L. Wayman, Coeur d'Alene, for cross-respondents, Board of Commissioners.

Wetzel & Wetzel, Coeur d'Alene, for cross-respondents, McCormack Properties. Dana Wetzel argued.



SCHROEDER, Justice

This is an appeal of a land use decision made by the Kootenai County Board of Commissioners (Board or County) in favor of McCormack Properties of Idaho, Inc. (McCormack). The Board granted McCormack's application for preliminary approval of a planned unit development (PUD) and approval of a preliminary plat of a ninety-two lot subdivision located within the PUD. Rural Kootenai Organization (RKO), an organization which participated in the public hearings before the Board and which opposed McCormack's application, appealed the Board's decision to the district court which vacated and remanded a portion of the Board's findings and affirmed the remainder of the Board's decision. RKO challenges aspects of the Board's decision which were affirmed by the district court. This Court vacates and remands that portion of the district court's decision concerning whether the Board properly determined ownership of all the lands contained within the PUD. The remainder of the district court decision is affirmed.

I.

BACKGROUND AND PRIOR PROCEEDINGS

In August 1993, McCormack submitted an application for preliminary approval of a PUD and approval of a preliminary plat of a ninety-two lot subdivision (the subdivision) located within the PUD. The entire PUD consisted of 220 acres and was divided into two parts. One part consisted of 102 acres located within a bay of Lake Coeur d'Alene known as Cougar Bay. This area was designated as public open space within the PUD and was to be used as a wildlife sanctuary. McCormack agreed to sell and donate the 102 acres for a wildlife sanctuary to the Nature Conservancy for use as a public open space to protect water fowl habitat and wildlife if and when the PUD was approved by the County. The other part of the PUD consisted of approximately 118 acres which included the subdivision.

McCormack's application consisted of a fifty-six page narrative explaining the components of the PUD and setting forth engineering designs from J-U-B Engineers for all infrastructure including storm water and wastewater. The application also included letters from the fourteen affected agencies identified by the Kootenai County Planning and Zoning Staff. All of the submittals in the application were in response to the Kootenai County Subdivision Ordinance of 1978.

The Planning Administrator deemed the application complete, and the Kootenai County Planning and Zoning Commission (P & Z Commission) held public hearings on October 20, 1993, and November 3, 1993. The P & Z Commission placed conditions on the application and approved the application. The P & Z Commission forwarded the application to the Board with a unanimous recommendation to approve the preliminary application for the PUD and the preliminary subdivision plat.

The Board held public hearings on the application on December 7 and December 21, 1993. The Board granted both preliminary approval of the PUD and approval of the preliminary subdivision plat, subject to a number of conditions. On January 5, 1994, the Board adopted and approved an Order of Decision which is the focus of this appeal.

The procedural history of this matter is long and complex. RKO filed a petition for judicial review of the Board's January 5, 1994, decision with the district court (Judge Craig C. Kosonen presiding). The district court vacated and remanded to the Board certain findings made by the Board. The Board had found that the PUD and subdivision conformed with all of the goals and policies of the Kootenai County Comprehensive Plan (Comprehensive Plan). The Board had also found that the preliminary designs for wastewater treatment and storm water treatment met the requirements of review for approval of a preliminary plat. The district court, however, concluded that the language of Goals #8 and #9 of the Comprehensive Plan were contradictory, and directed the Board to confirm on remand that the Board's interpretation of this language and the application of its interpretation of this language to the facts in the case resulted in findings that the PUD and subdivision conformed with the Comprehensive Plan. The district court also concluded that there was insufficient evidence in the record to support the Board's findings that the preliminary designs for wastewater treatment and storm water treatment were adequate for preliminary approval.

McCormack appealed the district court's June 2, 1995, order. The County and RKO cross appealed. Before oral argument in the present appeal, the Board held a hearing to address the issues on remand from Judge Kosonen and entered an order reaffirming its approval of the preliminary plat. Less than a month later, the P & Z Commission held a public hearing to consider McCormack's application for final plat approval for Phase I of the subdivision. On January 5, 1996, the Board entered an order granting final plat approval of Phase I of the subdivision.

RKO appealed the Board's final plat approval to the district court (Judge James R. Michaud presiding). McCormack moved to dismiss its appeal that was pending before this Court on the basis that the Board's final plat approval and RKO's appeal of the final plat approval rendered this Court's review of the preliminary plat approval moot. This Court dismissed McCormack's appeal and conditionally dismissed RKO and the County's respective cross appeals. RKO responded with a request that its cross appeal remain. Ultimately, the parties stipulated to dismissal of the County's cross appeal. The Court ordered the appeal to proceed solely on the issues raised in RKO's cross appeal.

Thereafter, in August 1997, McCormack submitted a request to the Board for an extension and stay of the subdivision development schedule set forth in the Board's preliminary plat approval order of January 5, 1994. The Board granted McCormack's request for extension and stay on March 11, 1998. RKO petitioned the district court for judicial review of the Board's stay order (Judge James F. Judd presiding), Case No. CV 98-01492. Six days after RKO filed its petition for judicial review of the stay order, Judge Michaud rendered his opinion affirming the Board's final plat approval of Phase I of the subdivision. RKO did not file an appeal from this decision.

In addition to filing a petition for judicial review of the stay order which was still pending before the district court, RKO also filed a motion before this Court to augment the appellate record with the Board's March 11, 1998, stay order. This Court granted the motion and ordered the parties to submit supplemental briefing with regard to the issues surrounding the stay order. Less than a month later, however, a hearing was held in the district court (Case No. CV 98-01492), at which time the district court denied McCormack's motion to dismiss RKO's petition for review of the stay order. The district court concluded that it had jurisdiction to hear the issues surrounding the stay order and refused RKO's request to stay the district court proceedings pending review of the issues by this Court. The district court affirmed the Board's stay order on April 27, 1999. No appeal has been filed from this decision.

II.

ISSUES ON APPEAL

A threshold issue on appeal is whether the Board's January 5, 1994, order granting preliminary plat approval is an appealable order. This issue was raised in McCormack's appeal and

addressed by the County in its cross appeal, but RKO argues the issue is no longer before this Court because the respective appeals filed by McCormack and the County were dismissed. Even so, the question of whether the order granting preliminary plat approval is appealable raises the question of whether this Court has subject matter jurisdiction. The question of subject matter jurisdiction can be raised by the Court *sua sponte*. *State, Dep't of Law Enforcement v. One 1955 Willys Jeep*, 100 Idaho 150, 152 n.1, 595 P.2d 299, 301 n.1 (1979).

Assuming the Board's order granting preliminary plat approval is an appealable order, the following issues raised by RKO in its initial cross appeal remain:

- (1) Whether the Kootenai County Subdivision Ordinance requires a showing of feasibility of a proposed water system prior to approval of a preliminary subdivision plat and, if so, whether the record supports a finding of feasibility with respect to McCormack's proposed water system.
- (2) Whether the Board violated RKO's fundamental due process rights by failing to provide notice of the April 6, 1994, and April 20, 1994, meetings.
- (3) Whether the Board's decision not to address ownership of all the lands contained within the PUD violated applicable provisions of the Kootenai County Zoning Ordinance.
- (4) Whether the district court erred in upholding the adequacy of the transcripts.
- (5) Whether the Board's findings of fact are adequate to support a decision that the ordinance requirements for preliminary approval of a subdivision and PUD were met.
- (6) Whether RKO is entitled to an award of attorney fees under the Private Attorney General Doctrine and section 12-117 of the Idaho Code (I.C.).

RKO also raised issues in its supplemental brief concerning the validity of the Board's March 11, 1998, stay order. The same issues were pending before the district court at the time of oral argument in this matter and have subsequently been determined. The Court will not address these issues in view of this Court's decision in this case which renders the stay order moot.

III.

STANDARD OF REVIEW

The standard of review was recently set forth in *Payette River Property Owners Ass'n v. Board of Commissioners of Valley County*, __ Idaho __, 976 P.2d 477 (1999):

The Idaho Administrative Procedure[] Act (IDAPA) governs the review of local zoning decisions. . . . In a subsequent appeal from the district court's decision where the district court was acting in its appellate capacity under the IDAPA, the Supreme Court reviews the agency record independently of the district court's decision. The Court can not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The Court defers to the agency's findings of fact unless they are clearly erroneous and the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by evidence in the record. Additionally, there is a strong presumption of favoring the validity of the actions of zoning boards, which includes the application and interpretation of their own zoning ordinances.

A Board's zoning decision may only be overturned where its findings: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence; or (e) are arbitrary, capricious, or an abuse of discretion. The party attacking a zoning board's action under I.C. § 67-5279(3) must first illustrate that the zoning board erred in a manner specified in I.C. § 67-5279(3) and must then show that a substantial right of the party has been prejudiced.

Id. at ___, 976 P.2d at 480 (citations omitted).

IV.

THE BOARD'S ORDER GRANTING PRELIMINARY PLAT APPROVAL IS AN APPEALABLE ORDER.

A person aggrieved by a final agency action who has exhausted all administrative remedies available within the agency is entitled to judicial review. I.C. §§ 67-5270, -5271. The question is whether the Board's order granting preliminary plat approval is a final agency action and, therefore, subject to judicial review.

McCormack and the County rely on *South Fork Coalition v. Board of Commissioners of Bonneville County*, 112 Idaho 89, 730 P.2d 1009 (1986), for the proposition that an order granting preliminary plat approval is not a final decision and, therefore, not appealable. In *South Fork Coalition*, the Bonneville County Commissioners had granted preliminary approval of a PUD on the appellant's (J.R. Hays & Sons, Inc.) property. South Fork Coalition appealed the decision to the district court, which overturned the Commissioners' preliminary approval. Hays then appealed to

this Court which determined that the order granting preliminary plat approval was not a final decision subject to review. According to the specific language in section 1-2520 of the Bonneville County Zoning Ordinance, the Commission's preliminary approval served only as an "approval in principle" which could "not be construed to endorse a precise location of uses, configuration of parcels or engineering feasibility." 112 Idaho at 90, 730 P.2d at 1010 (quoting BONNEVILLE COUNTY ZONING ORDINANCE § 1-2520). Under the Bonneville County Zoning Ordinance, the Board retained jurisdiction to either approve or deny the final plan after reviewing it and after placing "such other restrictions [on it] as it deems advisable in the general welfare of the community and neighborhood." *Id.* (quoting BONNEVILLE COUNTY ZONING ORDINANCE § 1-2520). This Court determined that the appeal was premature and dismissed the appeal. *Id.*

In the present case the district court distinguished *South Fork Coalition* on the basis that the Kootenai County Subdivision Ordinance requires the developer, prior to obtaining final plat approval from the Board, to either (1) verify that the necessary infrastructure (*i.e.*, road, water, sewer, and fire systems) has been built, or (2) provide a suitable guarantee that the infrastructure will be built within a three-year period. KOOTENAI COUNTY SUBDIVISION ORDINANCE § 3.02(4). Unlike the Bonneville County Zoning Ordinance at issue in *South Fork Coalition*, where the Board's preliminary approval served only as an "approval in principle," the Board's preliminary approval under the Kootenai County Subdivision Ordinance serves as a green light for construction to begin. Although the developer must still obtain the necessary permits from the applicable agencies in order to begin site grading for roads and other physical changes, there is no further action required by the Board before construction may commence. The developer must still obtain final plat approval from the Board, but final plat approval under the Kootenai County Subdivision Ordinance appears to function as a confirmation of compliance on a project that may be near completion. Consequently, the district court concluded that judicial review is available at the preliminary plat stage in order to rectify any alleged errors in the application process. This Court agrees with the district court. Due to the nature of the Kootenai County Subdivision Ordinance, judicial review is appropriate once preliminary plat approval is obtained. This result is consistent with the Court's recent holding in *Payette River Property Owners Ass'n v. Board of Commissioners of Valley County*, __ Idaho __, 976 P.2d 477 (1999).

In *Payette River*, this Court held that “where preliminary plat approval and the issuance of permits places a developer in a position to take immediate steps to permanently alter the land before final approval, the decision is final for purposes of challenging the authorized action that permits the material alteration and can be reviewed on appeal.” *Id.* at ___, 976 P.2d at 481. The developer in *Payette River* intended to develop a thirty-eight lot subdivision on a tract of land adjacent to the North Fork of the Payette River. Most of the land in the proposed subdivision was located in a flood-prone area. *Id.* at ___, 976 P.2d at 479. The developer first applied to the county engineer for a flood plain development permit which was approved. The developer then applied for a conditional use permit and approval of a preliminary subdivision plat, which was approved by the Valley County Board of Commissioners (Board). *Id.* The Payette River Property Owners Association, Inc. petitioned for judicial review. The district court reversed the Board’s decision and the developer appealed to this Court.

The developer argued that the appeal should be dismissed because the Board’s decision was not a final agency decision subject to judicial review, relying on *Bothwell v. City of Eagle*, 130 Idaho 174, 938 P.2d 1212 (1997), which relied on *South Fork Coalition* to hold that approval of a preliminary plat is not a final decision subject to judicial review. *Payette River*, ___ Idaho at ___, 976 P.2d at 480-81. *Payette River* recognized that generally preliminary plat approval is not a final decision because final approval must still be obtained before a developer can build on the land; nevertheless, the Court held that the Board’s decision was a final decision subject to judicial review. The Court based its ruling on the fact that the conditional use permit for the preliminary subdivision plat, combined with the flood plain permit, allowed the developer to “significantly alter[] the land in such a way that would not permit, if final approval were ultimately not obtained, the land to be returned to the status quo.” *Id.* at ___, 976 P.2d at 481. Preliminary plat approval, together with the issuance of permits, “place[d the] developer in a position to take immediate steps to permanently alter the land before final approval,” making the Board’s decision final for purposes of challenging the authorized action on appeal. *Id.*

The Court in *Payette River* distinguished *Bothwell* “on the basis that in *Bothwell*, unlike the instant case, no permits had been issued that would have allowed an immediate and material alteration of the land.” *Id.* In *Bothwell*, the developer applied for approval of a preliminary

subdivision plat and a flood plain development permit. The city council approved the preliminary plat application, but the council did not approve or deny the flood plain permit application. 130 Idaho at 175, 938 P.2d at 1213. *Bothwell* held that the order granting preliminary plat approval was not a final decision subject to review because the city council had not yet approved the developer's final plat application and the flood plain permit application. *Id.* at 176, 938 P.2d at 1214. The issuance of a flood plain permit was a condition for the issuance of any building permit in a special flood hazard area. See EAGLE CITY CODE § 10-1-7(A). Had the city council approved both the developer's application for approval of the preliminary subdivision plat and the flood plain development permit, the developer would have been in the position to take immediate steps to permanently alter the land before the city council's final plat approval. See EAGLE CITY CODE § 9-2-4(D), which like the Kootenai County Subdivision Ordinance, requires that construction of certain improvements be either completed prior to final plat approval, or the developer provide a suitable guarantee for their completion as a condition to final plat approval.

The result in this case does not conflict with the Court's previous holdings in *South Fork Coalition* and *Bothwell*, where the Court concluded that the orders granting preliminary plat approval were not appealable orders. Further, *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998), is not preclusive authority on this issue. *Castaneda* cited *South Fork Coalition* and *Bothwell* for the general proposition that an order granting preliminary plat approval is not an appealable order. However, the question of whether an order granting preliminary plat approval which allows physical changes to the land is an appealable order was not an issue in *Castaneda*. The Court cited *South Fork Coalition* for the proposition that preliminary plat approval that constitutes merely "approval in principle" is not appealable. *Id.* That principle remains. However, the ordinances in *South Fork Coalition* and *Bothwell* were different from the ordinances in *Payette River* and this case which allow material alteration of the land before final approval of the plat.

According to *Payette River*, appealability turns on whether preliminary plat approval allows the developer to take immediate steps to permanently alter the land before final plat approval. The process for obtaining preliminary plat approval is not a uniform process; it varies from one county ordinance to another. Thus, whether an order granting preliminary plat approval is appealable depends upon the nature of the governing ordinance. The governing ordinance in this case allowed

the developer to take immediate steps to permanently alter the land by constructing the necessary infrastructure prior to final plat approval. No further action by the Board was required before the developer can begin construction. The Board's order granting preliminary plat approval is a final decision subject to judicial review.

V.

**UNDER THE PROCEDURAL POSTURE OF THIS CASE
RKO'S FAILURE TO APPEAL THE DISTRICT COURT'S
ORDER AFFIRMING THE BOARD'S GRANT OF FINAL PLAT
APPROVAL DOES NOT PRECLUDE IT FROM OBTAINING
A RULING ON THOSE ISSUES RAISED IN ITS CROSS-APPEAL
FROM THE ORDER GRANTING PRELIMINARY PLAT APPROVAL.**

This case has a long and complex history. The Court has previously considered whether RKO's cross-appeal from the preliminary plat approval should be dismissed and determined that it would not be dismissed. Proceedings were allowed to continue before the Board and in the district court while retaining the cross-appeal. Consequently, RKO is not precluded from obtaining a ruling on those issues raised in its initial cross-appeal from the order granting preliminary plat approval.

VI.

**THE ISSUE OF WHETHER THE RECORD SUPPORTS
A FINDING OF FEASIBILITY WITH RESPECT TO
McCORMACK'S PROPOSED WATER SYSTEM IS MOOT.**

RKO argues that the record does not support a finding that the water system which McCormack proposed for the subdivision was "feasible" at the time preliminary plat approval was sought. Even if this Court were to agree with RKO, such a determination by this Court would have no legal significance at this point. The issue is moot.

Under the Kootenai County Subdivision Ordinance (subdivision ordinance), prior to obtaining preliminary plat approval, the developer must submit written evidence to the P & Z Commission that the Health District has acknowledged its subdivision proposal and is satisfied that "the proposed method of sewage disposal and water supply is adequate and possible to be utilized" for the proposal. KOOTENAI COUNTY SUBDIVISION ORDINANCE, *Appendix A - Procedures for Preliminary Plat Approval* § A.1(2)(a). Prior to obtaining preliminary plat approval, the developer must also provide

[w]ritten assurance from the applicable reviewing agencies to the effect that adequate provisions have been made for [road, water, sewage and fire protection] systems and that their use herein does not have an adverse effect upon the public's health, safety, or welfare.

Id. § 2.06(5). The district court properly concluded that the Board must find that the developer's proposed road, water, sewage and fire protection systems are "feasible" before granting approval of the preliminary plat.

Once preliminary plat approval is obtained, but prior to obtaining final plat approval, the developer must provide written comments from the Health District "[t]hat the planned sewage disposal system and water supply systems have been designed and approved." *Id.* § 3.01(1). Section 3.02(2) also requires that upon submittal of the final plat to the P & Z Commission the Plat Administrator shall determine that the final plat "bears all the dedication certificates and statements of approval required by this Ordinance." *Id.* § 3.02(2). Thus, under Article 3.0 of the subdivision ordinance, the Board cannot grant final plat approval unless the applicable reviewing agency has given its formal "approval" of the water supply system.

Formal approval of McCormack's proposed water supply system was granted by the Department of Environmental Quality on September 1, 1995. With formal approval obtained, the question of whether the proposed water supply system was feasible at the time preliminary plat approval was sought is irrelevant. RKO has not cited any authority that suggests that this Court should, or could, render the applicable reviewing agency's approval null and void simply because feasibility was not proven at the preliminary plat approval stage.

VII.

RKO LACKS STANDING TO RAISE ITS DUE PROCESS ARGUMENT WITH RESPECT TO THE APRIL 6, 1994, AND APRIL 20, 1994, MEETINGS.

A. Factual Background

Two public hearings were held before the Board regarding the approval of McCormack's preliminary plat, one on December 7, 1993, and the other on December 21, 1993. On January 5, 1994, the Board met again at which time it entered its formal decision granting approval of McCormack's preliminary plat.

On April 6, 1994, the Board held a regular meeting (in compliance with the Idaho Open Meetings Act, I.C. §§ 67-2340 to -2347), at which time it addressed McCormack's request to change the location and route of a previously proposed water line. The Board unanimously approved the change in location and route of the water line, concluding that such a change was "not a substantial change from the original approval." The Board then agreed to table its decision until McCormack had "provided proof that the easements have been obtained and [had informed the Board as to whether] any blasting will occur on the site."

On April 20, 1994, the Board held another regular meeting in continuation of its April 6th regular meeting. During this meeting, counsel for McCormack informed the Board that "they [did] not know if there will be any blasting; however, they are willing to agree that if the adjoining property owners within 200 feet provide information regarding their wells beforehand and their water flow is affected, they will provide water to them at no charge." At the conclusion of the meeting, one of the commissioners directed the staff to draft written findings that the request to reroute the water line was not a substantial change to the Order of Decision.

Section 67-6509(b) of the Local Land Use Planning Act of 1975 provides: "Following the [public] hearing of the governing board, if the governing board makes a material change in the plan, further notice and hearing shall be provided before the governing board adopts the plan." RKO contends that new evidence was submitted during the Board's April 6th and 20th meetings, and the changes which resulted from those meetings were "material changes" which were incorporated into the Board's January 5, 1994, Order of Decision; thus, it was entitled to proper notice of the meetings.

A threshold question is whether RKO has standing to argue that its procedural due process rights were violated as a result of not receiving proper notice of the meetings. This Court concludes that RKO lacks standing to raise this issue,

B. Standing

In order to have standing, RKO must show that it has a personal stake in the outcome of this controversy. "[T]his requirement of 'personal stake' has come to be understood to require not only a 'distinct palpable injury' to the plaintiff, but also a 'fairly traceable' causal connection between the claimed injury and the challenged conduct." *Butters v. Hauser*, 131 Idaho 498, 500, 960 P.2d 181, 183 (1998) (quoting *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989)).

Simply because RKO's members may own property near the proposed subdivision, the location of their property alone does not confer standing. *Id.* at 501, 960 P.2d at 184; *Student Loan Fund of Idaho, Inc. v. Payette County*, 125 Idaho 824, 827-28, 875 P.2d 236, 239-40 (Ct. App. 1994). As the Court of Appeals explained in *Student Loan Fund*,

Status as an owner of land within a designated area does not relieve a complainant of the necessity of demonstrating a "distinct 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.

125 Idaho at 828, 875 P.2d at 240. In order to have standing to challenge the agency's failure to comply with the statutory procedures for conducting open public meetings under I.C. §§ 67-2342 and 67-6509, the plaintiff must show that a harm or peril personal to the plaintiff is caused by the agency's actions. *Id.* RKO has not presented any evidence that any of its members are abutting or otherwise affected real property owners. RKO has failed to present any evidence of a peculiarized harm. Thus, RKO lacks standing to raise this issue.

VIII.

THE BOARD ERRED BY NOT DETERMINING THE OWNERSHIP OF THE EIGHTY ACRES OF SUBMERGED LANDS LOCATED WITHIN THE WILDLIFE SANCTUARY OF THE PUD.

RKO contends that the Board erred by not determining the ownership of all the land in the PUD, specifically, eighty acres of submerged land located within the wildlife sanctuary of the PUD. The district court concluded that, even though the Board did not make a specific finding as to ownership of the submerged land, the ownership of this land was not a significant issue in the Board's overall approval of the PUD. This Court concludes that the Board's decision not to determine ownership of the submerged lands violated the applicable provisions of the Kootenai County Zoning Ordinance.

Section 15.07 of the Kootenai County Zoning Ordinance (zoning ordinance), which addresses the procedures for establishing a PUD, provides in pertinent part:

C. The applicant shall also submit a written statement providing the following information:

....

3. Proof of the present ownership of all of the land included within the [PUD] and the applicant's interest in the land proposed for development.

KOOTENAI COUNTY ZONING ORDINANCE § 15.07(C)(3). Section 15.01 of the zoning ordinance recognizes that "[c]ommon open space for recreational purposes may be an element of the development." If common open space is included in a proposal for a PUD, it must meet certain standards outlined in section 15.06 of the zoning ordinance.

In its application for preliminary plat approval McCormack proposed that 100 acres of its 218-acre PUD would be considered common open space and that the 100 acres would function as a wildlife sanctuary. Eighty acres of this 100-acre wildlife sanctuary is flooded meadows submerged under Lake Coeur d'Alene. McCormack submitted a commitment for title insurance as evidence of its ownership interest in the land located in the PUD, including the land located in the wildlife sanctuary. This document, however, excludes assurance of title to the eighty acres of submerged land within the wildlife sanctuary. The record also contains a letter from the Idaho Department of Lands, wherein the State asserts a claim of ownership in all submerged land 2,128 feet below sea level.

The letter from the Idaho Department of Lands claiming ownership in all submerged land below 2,128 feet sea level raises the question: Who owns the submerged eighty acres of land in the wildlife sanctuary? The Board did not resolve this question in its January 5, 1994, decision, nor could it have. It does not have jurisdiction over such matters. The ownership question could only have been resolved by a quiet title action brought before a court. *See generally Erickson v. State*, ___ Idaho ___, 970 P.2d 1 (1998). Prior to final plat approval, McCormack conveyed whatever interest it may have had in the eighty acres of submerged land to the State. The question is whether, under the zoning ordinance, common open space in a PUD can consist of public lands. A review of the applicable provisions in the zoning ordinance suggests that it cannot.

Generally, there is a strong presumption of favoring the validity of the Board's application and interpretation of its own zoning ordinance. *Howard v. Canyon County Bd. of Comm'rs*, 128 Idaho 479, 480, 915 P.2d 709, 710 (1996). This Court defers to the Board's application and interpretation of its zoning ordinance, unless such application or interpretation is capricious, arbitrary or discriminatory. *See South Fork Coalition v. Board of Comm'rs of Bonneville County*, 117 Idaho 857, 860, 792 P.2d 882, 885 (1990).

The Board and McCormack's position is that all that is required under section 15.07 of the zoning ordinance is proof of present ownership, including the applicant's interest in the land located in the PUD, not proof that the applicant has uncontroverted ownership of the land. The Board believed that the commitment for title insurance submitted by McCormack was sufficient to meet the requirements of section 15.07. The Board also takes the position that, because the land in the wildlife sanctuary was intended to be transferred to the Nature Conservancy which would preserve the area for the benefit of the wildlife and the public, any adverse claim by the State in the submerged lands would not conflict with the intended use of the wildlife sanctuary. According to the Board, any adverse claim by the State was not a significant issue for approval of the PUD.

Although section 15.07 is not entirely clear as to whether the applicant must own all of the land in the PUD, section 3.02(3) of the subdivision ordinance makes it clear that upon submittal of the final plat, the applicant must submit a title report which "confirms the title of the land on the proposed subdivision is listed in the name of the owner whose signature appears on the plat." Assuming the applicant/developer is the only party required to sign the plat, it follows that the applicant must be the owner of all of the land in the proposed development. Additionally, section 15.06 of the zoning ordinance which deals with common open space, provides:

All land shown on the final development plan as common open space shall be conveyed to an individual or organization responsible for ownership and maintenance of the open space. . . . *The individual or organization shall not dispose of the common open space without approval by the Board.*

KOOTENAI COUNTY ZONING ORDINANCE § 15.06(E) (emphasis added).

If the State owns the submerged eighty acres of land, according to section 15.06, the State's ability to dispose of that land is apparently subject to the Board's approval. However, the law is well

settled that "after statehood, the state holds the title to the beds of the navigable streams and *may dispose of them if it desires to do so to private owners,*" as long as "no such disposition . . . interfere[s] with the rights of the general government to regulate commerce on such navigable streams, or in any manner interfere[s] with the right to the use of the navigable lakes, rivers or streams as public highways over which every citizen has a natural right to carry commerce" *Callahan v. Price*, 26 Idaho 745, 754, 146 P. 732, 735 (1915). The only way the State's right of disposal would be subject to the Board's approval is if the submerged eighty acres originally belonged to McCormack and McCormack conveyed its interest in such lands subject to the conditions imposed by section 15.06. Because the question of ownership was never resolved, it remains unclear whether the State is bound by the conditions imposed by section 15.06. If the State is not bound by section 15.06, or any action taken by the Board in this matter, the State is certainly not bound by the Nature Conservancy's agreement to preserve the land as a wildlife sanctuary.

The requirements in sections 3.02(3) and 15.06 suggest that the applicant must own all of the land in the PUD, and may not include public lands as common open space within the PUD. Other language in section 15.06(E) provides:

The use and improvement of the common open space shall be planned in relation to any existing public or semi-public open space which *adjoins* or is *within one thousand (1,000) feet* of the perimeter of the [PUD].

(Emphasis added). This language contemplates public or semi-public open space which "adjoins" or is nearby the PUD, but it does not contemplate public open space within the PUD itself.

The Board's determination that McCormack need not present proof of its uncontroverted interest in all of the land in the PUD, including the submerged eighty acres, violates Article 15 of the zoning ordinance. The district court's decision concerning the Board's duty to determine ownership of the submerged lands is vacated and the matter is remanded to the district court with instructions to remand the matter to the Board. The Board must reconsider McCormack's application of a proposed PUD and ninety-two lot subdivision without considering the eighty acres of submerged land currently owned by the State. The Board must make new factual findings with respect to ownership of all the lands in the PUD and whether the applicable provisions of the zoning ordinance concerning common open space are met.

IX.

**THE TRANSCRIPTS OF THE PROCEEDINGS BELOW
ARE ADEQUATE FOR JUDICIAL REVIEW.**

Section 67-6536 of the Local Land Use Planning Act of 1975 provides: "In every case in this chapter where an appeal is provided for, a transcribable verbatim record of the proceeding shall be made and kept for a period of not less than six (6) months after a final decision on the matter." This Court has recognized that "the absence of a transcribable verbatim record" of zoning or land use proceedings may result in a violation of a party's right to procedural due process. *Chambers v. Kootenai County Bd. of Comm'rs*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1994) (citing *Cooper v. Board of County Comm'rs of Ada County*, 101 Idaho 407, 411, 614 P.2d 947, 951 (1980)). "[A] transcribable record [is] indispensable to meaningful judicial review of rezoning proceedings where the sufficiency of notice, adequacy of opportunity to present or to rebut evidence, or the existence of evidence supporting the agency's findings may be put at issue." *Gay v. County Comm'rs of Bonneville County*, 103 Idaho 626, 629, 651 P.2d 560, 563 (Ct. App. 1982).

The transcripts of the various proceedings below are replete with inaudible omissions. The district court recognized that the various inaudible omissions in the transcripts made judicial review "difficult," but it nevertheless concluded that the transcripts were adequate for purposes of ascertaining the basis of the Board's decision. The district court stated:

One who did not participate in the proceedings, who picks up any of the transcripts noted by the Court hereinabove as having a particularly large number of deletions, would be hard pressed to make any sense of the printed matter. However, by virtue of a careful sequential reading of all the transcripts, from page one of the first proceeding, together with a meticulous review of the minutes of all proceedings, it becomes clear to the reader that in most instances the deletions were very brief and can be "decoded" either by context, reference to the minutes, reference to written statements of persons speaking, or reference to other documents in the agency record. In many instances the omissions were not of critical information. Review is made difficult, of course, and, at times, very frustrating. . . .

In any event, the Court was able to determine the basis upon which the Commission made its recommendation and the Board made its decision from the entire transcript and record, and [RKO's] claim here is not sustainable.

RKO seeks a strict application of the "verbatim" requirement under I.C. § 67-6536, maintaining that the transcripts should reflect the content of the agency proceedings word-for-word. However, the somewhat informal, quasi-judicial nature of these proceedings makes satisfaction of such a requirement difficult.

All four public hearings held in this case were tape recorded and the documents presented at the hearings as exhibits were preserved in the record. The transcripts, and the record as a whole, adequately reflect that the parties were given notice of the proceedings and that they were given ample opportunity to present or rebut evidence.

RKO refers to specific portions of the transcripts that it believes are inadequate. Although these portions of the transcripts are replete with inaudible omissions, the "defect" caused by these omissions is curable. The individuals whose testimony has omissions objected to by RKO also submitted written testimony which is essentially duplicative of their oral testimony before the Board and the P & Z Commission. Furthermore, the individuals whose oral testimony is transcribed in these "questionable" portions of the transcript are generally individuals who opposed the proposed development. The minutes to three of the four public hearings held in this case sufficiently summarize the points of opposition made by these individuals. Thus, the "defect" caused by the inaudible omissions in the transcripts is cured by the written testimony contained in the record and the detailed minutes of the public hearings.

The district court's conclusion that the transcripts are adequate for judicial review is affirmed.

X.

THE BOARD MADE ADEQUATE FINDINGS OF FACT.

Section 67-6535(b) of the Local Land Use Planning Act of 1975 provides:

The approval or denial of any application provided for in this chapter shall be in writing and accompanied by a statement in the form of findings of fact and conclusions of law that explain the criteria and standards considered relevant, state the facts relied upon, and explain the justification for the decision based on the criteria, standards and facts set forth.

RKO claims the Board's findings of fact are general assertions devoid of any specific facts which the Board may have deemed relevant to its decision. Specifically, RKO claims the Board's

findings with respect to ownership of all the land in the PUD are insufficient. As previously discussed, the Board did not make a specific finding as to ownership of all the land in the PUD; therefore, its findings of fact are deficient in this respect. Under the zoning ordinance, common open space in a PUD may not consist of public lands. Consequently, all of the Board's findings with respect to common open space and the wildlife sanctuary are also suspect.

RKO also argues that the Board's findings are inadequate with respect to the feasibility of the proposed sewage treatment, storm water treatment and water supply system. The district court concluded that the record did not support a finding of feasibility with respect to the proposed sewage treatment and storm water treatment, and remanded the matter back to the Board on that basis. Accordingly, there is no need for this Court to address this portion of RKO's argument. This Court has already addressed the issue of feasibility with respect to the proposed water supply system and has determined that the issue is moot.

RKO claims the most "blatant deficiencies" are found on pages 5 through 10 of the Board's Order of Decision where the Board attempts to present findings and conclusions in accordance with the Comprehensive Plan. RKO claims that findings Nos. 1, 2, 3, 4, 6, 7, 8 and 9 contain conclusory statements without specific factual support. As previously noted, those findings which address common open space and the wildlife sanctuary are suspect -- specifically, findings Nos. 2, 7, 8 and 9. Findings Nos. 1, 3, 4 and 6, on the other hand, comply with the requirements of I.C. § 67-6535(b). With respect to these findings, the Board clearly set forth the ultimate facts relevant to its decision, and the facts are supported by the record.

Other than the deficiencies outlined above, the remainder of the Board's factual findings are adequate and meet the requirements set forth in I.C. § 67-6535(b).¹ Again, the Board on remand will need to: (1) reconsider McCormack's application for a proposed PUD and ninety-two lot

¹ The district court concluded that the Board's finding No. 5 concerning compliance with Goals #8 and #9 of the Comprehensive Plan needed more clarification and remanded that portion of the decision back to the Board. McCormack originally appealed the district court's decision in this respect, but that issue was dismissed when McCormack's appeal was dismissed. Technically, the Board's finding No. 5 is inadequate for the reasons stated by the district court. Nevertheless, the Board apparently addressed this area of concern in its Order on Remand, dated November 22, 1995. That Order is not a part of the record before this Court.

subdivision without considering the eighty acres of submerged land owned by the State; and (2) make new factual findings with respect to ownership of all the lands in the PUD and whether the applicable provisions of the zoning ordinance concerning common open space are met.

XI.

RKO IS ENTITLED TO AN AWARD OF ATTORNEY FEES ON APPEAL UNDER I.C. § 12-117, BUT NOT UNDER THE PRIVATE ATTORNEY GENERAL DOCTRINE.

RKO requests an award of attorney fees and costs on appeal. RKO's request for an award of attorney fees is based on the Private Attorney General Doctrine and I.C. § 12-117.

A. Private Attorney General Doctrine

RKO argues that by bringing the underlying action and defending the present appeal it has insured enforcement of the ordinance protecting the residents of Kootenai County from the results of inadequately designed or implemented sewage and storm water facilities. The district court found that the record did not support a finding of feasibility with regard to McCormack's proposed sewage treatment and storm water treatment and remanded the case back to the Board. While McCormack initially appealed that portion of the district court's decision, McCormack's appeal was dismissed. Therefore, RKO is no longer required to defend the district court's decision on appeal. Since the basis for RKO's argument under this theory is no longer an issue before this Court, RKO's request for attorney fees in this regard is denied.

B. I.C. § 12-117

Section 12-117(1) provides:

In any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the person reasonable attorney's fees, witness fees and reasonable expenses, if the court finds in favor of the person and also finds that the state agency, the city, the county or the taxing district acted without a reasonable basis in fact or law.

This section provides for an award of attorney fees against a Board of County Commissioners, assuming the Court finds in favor of the individual and that the Board acted without a reasonable basis in fact or law. *See Ockerman v. Ada County Bd. of Comm'rs*, 130 Idaho 265, 266-267, 939 P.2d 584, 585-86 (Ct. App. 1997).

The Board acted without a reasonable basis in fact when it granted approval of McCormack's preliminary plat after concluding that McCormack's proposal complied with the applicable ordinance requirements for common open space and proof of ownership, when in fact it did not so comply. Accordingly, RKO's request for attorney fees under I.C. § 12-117 is granted.

C. Costs

Pursuant to Rule 40(a) of the Idaho Appellate Rules (I.A.R.), "[c]osts shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court." Although RKO did not prevail on all of the issues it raised on appeal, it did prevail on the most significant issue -- the Board's failure to address the issue of ownership of the submerged lands. See *Chadderdon v. King*, 104 Idaho 406, 659 P.2d 160 (Ct. App. 1983) (trial court did not abuse its discretion in awarding costs to defendant contractor in breach of contract action where the contractor prevailed on the main issue of the case although he was denied affirmative relief on his counterclaim). Because RKO prevailed on the most significant issue in this appeal, RKO is the prevailing party on appeal and is entitled to an award of costs pursuant to I.A.R. 40(a).

Costs should be levied against both McCormack and the County. Section 12-117 provides a basis for recovery of attorney fees and "reasonable expenses" against a county. I.C. § 12-117(1). Furthermore, although this Court has never addressed the issue of whether costs may be levied against an intervening party, several federal courts have approved the levying of costs against an intervening party under Rule 54(d) of the Federal Rules of Civil Procedure, which is analogous to Rule 54(d) of the Idaho Rules of Civil Procedure. See *Carter v. General Motors Corp.*, 983 F.2d 40, 44 (5th Cir. 1993); *Swiftships Freeport, Inc. v. M.V. Cayman Endeavor*, 692 F. Supp. 722, 723 (S.D. Tex. 1988). In *Carter* and *Swiftships Freeport, Inc.*, the courts recognized that costs should be taxed to the extent of the intervenor's activity in the case. The reasoning of these cases on this issue is persuasive. McCormack, the intervening party, was very active in this appeal; in fact, it initiated the appeal. Accordingly, McCormack shall share the burden of appellate costs with the County.

XII.

CONCLUSION

The district court's decision concerning whether the Board properly determined ownership of all the lands contained within the PUD is vacated and remanded to the district court with instructions to remand to the Board with directions to reconsider McCormack's application for a proposed PUD and ninety-two lot subdivision, without giving consideration to the eighty acres of submerged land. The Board must also make new factual findings with respect to ownership of all the lands in the PUD and whether the applicable provisions of the Kootenai County Zoning Ordinance concerning common open space are met.

The remainder of the district court decision is affirmed.

Attorney fees and costs on appeal are awarded to RKO.

Chief Justice TROUT and Justices SILAK, WALTERS and KIDWELL CONCUR.

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF KOOTENAI COUNTY, IDAHO

IN THE MATTER OF THE APPLICATION OF
McCORMACK PROPERTIES OF IDAHO FOR
PLANNED UNIT DEVELOPMENT AND
PRELIMINARY SUBDIVISION APPROVAL
FOR THE RIDGE AT COUGAR BAY

) ORDER OF DECISION DENYING
) PUD-26-93 AND GRANTING
) PRELIMINARY SUBDIVISION
) APPROVAL OF S-543-93
)

I COURSE OF PROCEEDINGS

- 1.01 McCormack Properties of Idaho, Inc. submitted an application for Planned Unit Development and preliminary subdivision approval in August 1993. After duly noticed public hearings, the Board of County Commissioners approved the project and issued their Order of Decision on January 5, 1994.
- 1.02 That Order of Decision approving the project was appealed by the Rural Kootenai Organization, Inc (RKO). That appeal was decided by a Memorandum Opinion and Order On Review entered by Judge Craig Kosonen on June 2, 1995. That decision was amended by an Order Correcting Memorandum Opinion dated November 22, 1995. These decisions vacated the preliminary plat approval and remanded the applications to Kootenai County for further proceedings. McCormack appealed the District Court's decision to the Idaho Supreme Court, and RKO cross-appealed.
- 1.03 Upon remand to Kootenai County, the Board of County Commissioners (Board) reheard the case and issued an Order Following Remand on November 22, 1995, re-approving the applications and addressing the concerns expressed by Judge Kosonen. On January 5, 1996, after holding the necessary public hearings, the Board issued an Order of Decision granting final PUD approval and final approval of Phase 1 of the subdivision.
- 1.04 On December 9, 1999, the Idaho Supreme Court issued its opinion on RKO's appeal and the matter was remanded back to the Board, directing them to "...reconsider McCormack's application for PUD and subdivision without giving consideration to the 80 acres of submerged land. The Board of Commissioners is directed to make new factual findings as to the ownership of all lands within the PUD and as to whether the provisions of the Kootenai County Zoning Ordinance concerning open space are met."
- 1.05 The Planning Department issued a notice of Public Hearing on this application to be held June 28, 2000. On June 13, 2000, notice was published in the *Coeur d'Alene Press*. On June 21, 2000, notice was posted at the site. It is the Applicant's responsibility to notify all property owners within 300 feet of the project site. Based on the signed affidavit, and the information above, the requirements for public notification have been met.
- 1.06 Files and exhibits relative to this application are available for review in the Kootenai County Planning Department and are available for review at the hearing.

II FINDINGS OF FACT

- 2.01 Applicant(s). McCormack Properties of Idaho, Inc., and Edward Johnson, et al., 401 Front Avenue, Bank of America Building, Suite 3, Coeur d'Alene, ID 83814.

EXHIBIT

"B"

- 2.02 **Owner(s).** As of this writing, the current Assessor's records lists McCormack Properties of Idaho, Inc., as the owner of record of the upland portion of the site. The portion of the site that was noticed as the "Sanctuary" is shown in the Assessor's records as consisting of approximately 92 acres of submerged land, currently owned by the State of Idaho, and approximately 11.5 acres of land owned by the United States of America. Staff could not locate any letters in the file from either of these agencies authorizing the applicant to include these lands within the Planned Unit Development. Ownership of these lands has changed since the application was originally submitted.
- 2.03 **Proposal.** The request is for preliminary subdivision approval of a 92-lot residential subdivision on approximately 118 acres. The request also includes a proposal for Planned Unit Development approval, which would consist of the aforementioned subdivision and approximately 103 acres of Wildlife Sanctuary.
- 2.04 **Location.** The site is located along Highway 95, approximately 2 miles south of the City of Coeur d'Alene, on the west shore of Coeur d'Alene Lake's Cougar Bay.
- 2.05 **Physical Characteristics.** The residential portion of the project has slopes ranging from 10 to 60%, with a series of benches and rock outcroppings. The elevations range from 2140 to 2420 feet. The property is predominately covered with a selectively-cut coniferous and deciduous tree cover. A pasture is located in the northeast corner of the site. The remnants of an old farm are located in the northeastern corner of the site. A small, intermittent stream is also located in the northeast part of the site. A small area of wetlands is located near the stream. As of this writing, no wetland delineation has been done by the U.S. Army Corps of Engineers. Staff has requested comments from the Corps prior to the hearing.
- The Sanctuary portion of the site consists of approximately 92 acres of Lake Coeur d'Alene, and 11.5 acres of waterfront and wetlands property.
- The applicant has submitted a soil characterization report prepared by Howard Consultants, Inc., dated October 4, 1993. The report indicates that the soils in the residential portion of the project are Ulricher stony loam and Lacy Rock Outcrop Complex. The Ulricher soil is characterized as well drained with moderately rapid permeability, surface runoff is medium to rapid, erosion hazard is moderate to high. The Lacy soil has moderate permeability, very rapid runoff, and a high erosion hazard. Seasonal high groundwater exists at varying depths on the site. Some lots within the development have slopes steeper than 15%. A geotechnical engineering evaluation has been submitted. The report has recommendations for construction activities at the site and concludes that the site is suitable for the proposed subdivision.
- 2.06 **Zoning.** The upland portions of the site are zoned Agricultural Suburban. No zoning has been assigned to the submerged lands. Minimum lot size for residential uses in the Agricultural Suburban zone is 8,250 square feet.
- 2.07 **Development Characteristics.** The preliminary plat has a site data table that indicates that the lot sizes range from 0.5 to 0.9 acres. In addition, within the residential portion of the site, there are 34.9 acres of open space and 17.1 acres of road right of way. The total area dedicated to residential lots is not indicated, and no average lot size is shown. Building envelopes have been proposed to maximize open space area.
- 2.08 **Phasing.** The Applicant has indicated that they are proposing to develop the residential portion of the project in 3 phases. The dates in the phasing plan are no longer applicable and no updated phasing

schedule has been submitted. Section 2.05 of the Kootenai County Subdivision Ordinance states, in part, that "(p)reliminary plat approval shall be effective for 12 months." If the applicant files for final on a phase of the development that contains at least 25 lots, the remainder of the plat will be given a 12-month extension.

- 2.09 **Comprehensive Plan Designation.** This area is designated as a Transition Area on the 1978 Kootenai County Comprehensive Plan Map. With regard to Transition Areas, the Plan states: "This area should encourage a wider variety of residential development on individual lots where the specific location, the type of development and the availability of services will determine the level of services required in this area. It is mostly used around the maximum density areas and in that respect acts as a buffer between agricultural and rural uses and the maximum density areas with full services."

- 2.10 **Surrounding Land Use.** Using the current Assessor's records, the existing land uses within 0.25 miles of the residential portion of the project are as follows:

Parcel size in acres	Land Use
160	timber/agricultural
80	timber
4-10 acre parcels	timber
159	timber/residential
2.1	flooded land
14.9	flooded land
5.7	flooded land
4.3	public land
0.16	rural land
1.5	residential
27.6	rural land

- 2.11 **Domestic Water.** The Applicant has proposed a new public drinking water system to serve the residential portion of the project. The system uses a well on the Rathdrum Prairie Aquifer for its source and pumps the water over Blackwell Hill to a reservoir and distribution system at the site. Construction drawings for the system were submitted to the Department of Environmental Quality in 1997. DEQ approved the plans and specifications in a letter dated December 11, 1997, and gave the applicant 1 year to complete construction of the system. On June 20, 2000, Gary Gaffney, P.E., from DEQ indicated in a phone conversation that the approval had expired but there were no substantial changes in their requirements and it was likely that the same plans could be re-approved or an extension could be granted if the Applicant requested.
- 2.12 **Sanitary Sewer.** The Applicant has proposed a community sewage collection and treatment system consisting of a sewage lagoon, collection system, and rapid infiltration system. The lagoon and infiltration system is located in the northwest corner of the residential development. Construction drawings for the sewage system were submitted to the Department of Environmental Quality in 1997. DEQ approved the plans and specifications in a letter dated December 11, 1997, and gave the applicant 1 year to complete construction of the system. On June 20, 2000, Gary Gaffney, P.E., from DEQ indicated in a phone conversation that the approval had expired but there were no substantial changes in their requirements and it was likely that the same plans could be re-approved or an extension could be granted if the Applicant requested.
- 2.13 **Transportation.** The Applicant is proposing a series of publicly maintained roads to provide access to the residential portion of the project. These roads tie into the existing public road network at two locations, one on Cougar Gulch Road near its intersection with Highway 95, and the second directly

onto Highway 95, approximately 3100 feet north of the Highway 95/Cougar Gulch intersection. The Applicant submitted a Traffic Analysis for review by the Idaho Transportation Department in October 1993. ITD reviewed the study and required a new turn lane on Highway 95 at the northern access.

The interior roads are proposed to be maintained by the Worley Highway District. Construction drawings for the roads were approved by the Highway District Commissioners in January, 1995. In a phone conversation on June 22, 2000, Tom Nigh, Worley Highway District Supervisor indicated that prior to construction, they would need to re-review the plans and get Highway District Commissioners approval. There are new Commissioners now and they may have different views on the variances granted in the past. If they decide differently than previous Commissioners, they may not be able to accept the roads into their system for maintenance.

Staff could not locate any confirmation in the file that ITD has granted construction drawing approval for the turn lanes or granted an approach permit for the new public road approach onto Highway 95.

In a phone conversation on June 22, 2000, Carole Richardson, District Planner for ITD indicated that they did issue an approach permit for the new road. Prior to construction, however, they will be requiring a new traffic study or in lieu of a new study, the Applicant must include lighting and a left turn lane for the intersection.

- 2.14 **Stormwater Management.** The Applicant has proposed a series of conveyance ditches, swales and detention facilities to manage stormwater runoff at the site. The County's consulting engineer, Walter Potts, P.E., from Ruen-Yeager and Associates, reviewed plans and calculations and recommended conditional approval of the plans. Prior to construction the County will need to re-review the construction plans to evaluate any changes that result from other agency requirements.
- 2.15 **Fire Protection.** The site is within the Kootenai Fire Protection District No. 1. Deputy Chief Ron Sampert addressed the Fire District's requirements in 3 letters. In a phone conversation on June 22, 2000, Sampert indicated that he would be updating the District's letter of comment and that the requirements are likely to be similar to those previously requested.
- 2.16 **Schools.** The project is within Coeur d'Alene School District No. 271. The District provided a letter of comment (Exhibit PA3) regarding the anticipated number of students from the development and the enrollment numbers. Since the letter is now 7 years old, the enrollment numbers bear little resemblance to the current conditions. Staff has not solicited a new letter of comment from the School District.
- 2.17 **Area of City Impact/Extraterritorial Authority.** The City of Coeur d'Alene provided a letter of comment indicating that project is not within the area of their extraterritorial authority.
- 2.18 **Other Comments in Record.** Because of the lengthy history of this project, there is a substantial amount of additional agency and public comment in the record that cannot be summarized here. Staff has attempted only to identify the agencies from which permits or other approvals are required.

III APPLICABLE LEGAL STANDARDS

- 3.01 Kootenai County Subdivision Ordinance No. 26-A
- 3.02 Kootenai County Zoning Ordinance No. 159, as amended
- 3.03 Kootenai County 1978 Comprehensive Plan
- 3.04 Kootenai County Stormwater Management Ordinance No. 185

IV CONCLUSIONS OF LAW AND DISCUSSION

Planned Unit Developments are regulated by Article 15 of the Kootenai County Zoning Ordinance. The Board has concerns about the PUD application and its compliance with ordinance requirements. One concern is the development schedule and construction dates required in Section 15.07 C. 6-8. While this information was provided at various times in the 7-year history of this case, the time frames in those schedules have already lapsed.

A more troubling concern is the issue of ownership of the lands within the Sanctuary portion of the PUD. This is the reason this case is being re-heard. In its December 9, 1999 decision, the Idaho Supreme Court determined that the Applicant did not demonstrate who owned all of the land within the PUD. The issue of who owns the land has since been cleared up. The submerged lands are owned by the State of Idaho and the upland portion east of Highway 95 is owned by the Federal Government, all considered public lands. The Idaho Supreme Court also found that common open space within a PUD cannot consist of public lands, and that Article 15 of the Zoning Ordinance requires that McCormack present proof of its uncontroverted interest in all of the land in the PUD, including the submerged 80 acres. Because approximately 100 acres of the land within the PUD is clearly publicly owned, The Board of county Commissioners can only conclude that the PUD does not meet the requirements of Article 15 and should be denied.

With regard to the request for preliminary approval of the subdivision, the Board of County Commissioners will need to determine whether the application meets the requirements of the Subdivision Ordinance. Section 2.06 requires that the project be compatible with the Comprehensive Plan, the physical setting, and existing land uses and zoning activities. Written assurances from the applicable reviewing agencies to the effect that adequate provisions have been made for roads, water, sewage, and fire protection must be submitted. Congestive factors, impacts to incorporate municipalities, and other factors such as air quality, water quality, noise levels and light conditions must also be considered. If these issues are found to be sufficiently satisfied, and procedural requirements have been met, the subdivision could stand on its own without the Planned Unit Development.

McCormack's original application for development was joined together as a planned unit development encompassing a subdivision. The nature of the project, along with intervening events, such as conveyance of property originally within the PUD to third parties and into public ownership, and an appeal to the Idaho Supreme Court lead the Board of County Commissioners to believe and conclude that McCormack's subdivision proposal satisfies all applicable legal standards in order to obtain preliminary approval.

The Kootenai County subdivision ordinance requires the project to be compatible with the comprehensive plan. As we have stated on previous occasions, the comprehensive plan is merely an advisory guideline to be considered. It is not a controlling ordinance. We conclude that McCormack's subdivision proposal is in accordance, and compatible with, the Kootenai County 1978 comprehensive plan. The physical setting of the project is reasonably close to the City of Coeur d'Alene. We have previously found that although McCormack's property does not border the City of Coeur d'Alene, it is an example of development that is contiguous to the development occurring south of the Spokane River. The existing land uses in the area, while they are timber, agricultural, and residential, are not at all incompatible with the residential subdivision proposed by McCormack. The zoning ordinance standards required in the Agricultural suburban zone are also satisfied by McCormack's subdivision proposal.

The subdivision ordinance requires that written assurances from applicable reviewing agencies indicate that adequate provisions have been made for roads, water, sewer, and fire protection. According to District Judge Craig Kosonen, this equates to a finding of feasibility. Based on the information contained in the record before the Commissioners, we conclude that all of the applicable reviewing agencies have submitted information that the roads, water, sewer, and fire protection systems are feasible for McCormack's property.

The Board must also consider congestive factors, impacts to incorporated municipalities, and other factors such as air quality, water quality, noise levels, and light conditions. Congestive factors, such as impact on existing facilities and roadways, are certainly a factor in granting preliminary approval to a 92-lot subdivision. The Board concludes that the congestive factors have been addressed by McCormick, particularly with regard to impact on traffic and water quantity. McCormick will be required to install adequate traffic measures as requested by the applicable highway authorities. Concerns by the neighbors over the quantity and quality of water have been addressed by McCormick through the use of a water system obtaining water from the north side of Spokane River and a prohibition against on-site wells serving houses. McCormick has also obtained preliminary approval for a sewer system that should adequately protect water quality in the area of the project. McCormick's project will not adversely impact air quality in the area.

There is no evidence from appropriate public agencies that McCormick's project will not meet acceptable guidelines for air quality, water quality, noise level, or light conditions.

If a condition of law is erroneously designated as a finding of fact, it shall be deemed to be a finding of fact. If a finding of fact is erroneously designated to be a conclusion of law, then it shall be deemed a conclusion of law.

V. CONDITIONS OF APPROVAL/ORDER OF DECISION

Based upon the Findings of Fact and Conclusions of Law set forth in this document, the Board of County Commissioners hereby **DENIES** Case No. PUD-26-93, a request by McCormack Properties of Idaho, Inc., for approval of a Planned Unit Development on approximately 221 acres of land in the Agricultural Suburban zone.

Based upon the Findings of Fact and Conclusions of Law set forth in this document, the Board of County Commissioners hereby **APPROVES**, with the following conditions, Case No. S-543-93, a request by McCormack Properties of Idaho, Inc., for preliminary plat approval of a 92 lot subdivision in the Agricultural Suburban zone.

- 5.01 No lot shall be reserved, offered for sale, or sold until the final plat has been recorded. If the applicant provides a financial guarantee to record the final plat prior to completion of infrastructure, no lot shall be sold until the infrastructure is complete and the financial guarantee has been released.
- 5.02 It shall be noted on the plat that no lot shall be further subdivided.
- 5.03 Revisions required by the County Surveyor shall be made prior to submittal of a final plat for approval.
- 5.04 Preliminary plat approval shall be effective for 12 months from the date of approval by the Board of County Commissioners, unless an extension is granted in accordance with Section 2.05 of the Subdivision Ordinance. The Applicant may complete final plat approvals in phases as depicted in Exhibit A40.
- 5.05 All revisions of the preliminary plat shall be examined by the Planning Director to determine if the plat has been substantially changed. If a determination is made that the plat has been substantially changed from the preliminary approval, the plat shall then be re-submitted for preliminary plat review.
- 5.06 The placement and construction of all structures in this subdivision shall take place within the building envelopes delineated on the plats and this restriction shall be noted on the face of the plat. The remaining areas outside of the building envelopes shall remain in a naturally vegetated state. Land disturbing activities shall be limited to maintenance and enhancement of the natural vegetation.

- 5.07 No driveway within the development shall exceed 10% slope.
- 5.08 Prior to application for final plat approval, the Applicant shall obtain a letter from the Kootenai County Fire Protection District No. 1 indicating that all of their requirements have been met. If the Applicant chooses to provide a financial guarantee for infrastructure improvements, an additional letter from the Fire District may be required prior to release of the financial guarantee.
- 5.09 Prior to application for final plat approval, the Applicant shall obtain a letter from the Worley Highway District indicating that all of their requirements have been met. If the Applicant chooses to provide a financial guarantee for infrastructure improvements, an additional letter from the Highway District may be required prior to release of the financial guarantee.
- 5.10 Prior to application for final plat approval, the Applicant shall obtain a letter from the Idaho Transportation Department indicating that all of their requirements have been met. If the Applicant chooses to provide a financial guarantee for infrastructure improvements, an additional letter from ITD may be required prior to release of the financial guarantee.
- 5.11 Prior to application for final plat approval, the Applicant shall obtain a letter from the Kootenai County Planning Department indicating that the requirements for stormwater management and erosion control have been met. If the Applicant chooses to provide a financial guarantee for infrastructure improvements, an additional letter from the Planning Department may be required prior to release of the financial guarantee.
- 5.12 Prior to application for final plat approval, the Applicant shall obtain a letter from the Department of Environmental Quality indicating that all of their requirements for the water and sewer systems have been met. If the Applicant chooses to provide a financial guarantee for infrastructure improvements, an additional letter from DEQ may be required prior to release of the financial guarantee. If additional approvals other than DEQ's are required for the water line crossing the Spokane River, written verification shall be submitted from the appropriate agencies indicating that their requirements have been met.
- 5.13 Prior to application for final plat approval, the Applicant shall obtain a letter from the Panhandle Health District indicating that all of their requirements have been met and that the sanitary restriction will be lifted at the time of final plat signoff. If the Applicant chooses to provide a financial guarantee for infrastructure improvements, lifting of the sanitary restriction will not be possible at time of final plat signoff. Written confirmation that the sanitary restriction has been lifted must be submitted to the Planning Department prior to release of the financial guarantee.
- 5.14 Prior to application for final plat approval, the Applicant shall obtain a letter from the U.S. Army Corps of Engineers indicating that all of their requirements have been met.
- 5.15 All construction activity (infrastructure and development of individual lots) must comply with the recommendations in the July 22, 1994 Geotechnical Engineering Evaluation prepared by Howard Consultants, Inc. (Exhibit A64: in case file).
- 5.16 The CC & Rs shall be recorded concurrently with the final plat. Any proposed changes to the CC & Rs, Association By-Laws and the Articles of Incorporation shall require the approval of the Planning Director and shall also be recorded with the Kootenai County Recorder's office.

- 5.17 In the event that the water supply of the adjoining parcel owned by Graydon Johnson becomes contaminated, the Applicant shall provide water to that parcel for one single-family residential unit from the water system serving the project.
- 5.18 No well will be drilled either on-site or on an adjacent site to service this project, and the Spokane River shall not be used as a water source. Any wells currently existing on the site shall not be used.
- 5.19 The project engineer shall provide full-time continuous inspections during construction of all infrastructure systems, in a manner satisfactory to the County. The County will conduct inspections of the construction at its discretion.
- 5.20 A performance bond, equal to fifty (50) percent of the cost of construction as estimated by the project engineer and approved by the County shall be posted to guarantee on-going performance of private infrastructure improvements for a minimum of 2 years after their installation, with the exception of the stormwater system, which shall be guaranteed for 5 years after its installation.
- 5.21 Utilities shall be installed underground.
- 5.22 The CC & Rs shall require the project to continuously contract for individual home, curbside refuse collection services upon completion of 25% of the dwellings in the project.
- 5.23 The emergency access required by the Fire District shall be maintained by the Homeowner's Association as required by the Fire District.
- 5.24 Prior to constructing any trails in the common open space, the Applicant shall consult the Idaho Department of Fish and Game and follow IDFGs recommendations.
- 5.25 Common open space within the subdivision shall be conveyed to the homeowner's association, once the association is established.

DATED this 19th day of July, 2000.

BY ORDER OF THE KOOTENAI COUNTY
BOARD OF COMMISSIONERS

Richard Panabaker
Richard Panabaker, Chairman

Richard Compton
Richard Compton, Commissioner

Ronald D. Rankin
Ronald D. Rankin, Commissioner

ATTEST:
DANIEL J. ENGLISH, Clerk

Sandy Rockhart
DEPUTY CLERK

Page 1

Steven C. Wetzel and Dana Rayborn Wetzel, Coeur d'Alene, Attorney for McCormack Properties of Idaho, Inc. Steven C. Wetzel, Coeur d'Alene, argued.

PROCEDURAL AND FACTUAL BACKGROUND

This is the latest chapter in the saga of intervenor McCormack Properties' (hereinafter "McCormack") attempt to develop "The Ridge at Cougar Bay," an upscale subdivision located southwest of Coeur d'Alene. The Ridge is to be a three-phase development. Petitioner Rural Kootenai Organization (hereinafter "RKO") is organized opposition to this development.

The history of this case is succinctly summarized in the opinion of the Idaho Supreme Court in **Rural Kootenai Org. v. Kootenai County**, 133 Idaho 833, 834-36, 993 P.2d 596, 597-99 (1999) (hereinafter "**RKO**") (*filed in A.R. at 195-216*):

In August 1993, McCormack submitted an application for preliminary approval of a [planned unit development] and approval of a preliminary plat of a ninety-two lot subdivision (the subdivision) located within the PUD. The entire PUD consisted of 220 acres and was divided into two parts. One part consisted of 102 acres located within a bay of Lake Coeur d'Alene known as Cougar Bay. This area was designated as public open space within the PUD and was to be used as a wildlife sanctuary. McCormack agreed to sell and donate the 102 acres for a wildlife sanctuary to the Nature Conservancy for use as a public open space to protect water fowl habitat and wildlife if and when the PUD was approved by the County. The other part of the PUD consisted of approximately 118 acres which included the subdivision.

McCormack's application consisted of a fifty-six page narrative explaining the components of the PUD and setting forth engineering designs from J-U-B Engineers for all infrastructure including storm water and wastewater. The application also included letters from the fourteen affected agencies identified by the Kootenai County Planning and Zoning Staff. All of the submittals in the application were in response to the Kootenai County Subdivision Ordinance of 1978.

The Planning Administrator deemed the application complete, and the Kootenai County Planning and Zoning Commission (P & Z Commission) held public hearings on October 20, 1993, and November 3, 1993. The P & Z Commission placed conditions on the application and approved the

application. The P & Z Commission forwarded the application to the Board with a unanimous recommendation to approve the preliminary application for the PUD and the preliminary subdivision plat.

The Board held public hearings on the application on December 7 and December 21, 1993. The Board granted both preliminary approval of the PUD and approval of the preliminary subdivision plat, subject to a number of conditions. On January 5, 1994, the Board adopted and approved an Order of Decision which is the focus of this appeal.

The procedural history of this matter is long and complex. RKO filed a petition for judicial review of the Board's January 5, 1994, decision with the district court (Judge Craig C. Kosonen presiding). The district court vacated and remanded to the Board certain findings made by the Board. The Board had found that the PUD and subdivision conformed with all of the goals and policies of the Kootenai County Comprehensive Plan (Comprehensive Plan). The Board had also found that the preliminary designs for wastewater treatment and storm water treatment met the requirements of review for approval of a preliminary plat. The district court, however, concluded that the language of Goals # 8 and # 9 of the Comprehensive Plan were contradictory, and directed the Board to confirm on remand that the Board's interpretation of this language and the application of its interpretation of this language to the facts in the case resulted in findings that the PUD and subdivision conformed with the Comprehensive Plan. The district court also concluded that there was insufficient evidence in the record to support the Board's findings that the preliminary designs for wastewater treatment and storm water treatment were adequate for preliminary approval.

McCormack appealed the district court's June 2, 1995, order. The County and RKO cross appealed. Before oral argument in the present appeal, the Board held a hearing to address the issues on remand from Judge Kosonen and entered an order reaffirming its approval of the preliminary plat. Less than a month later, the P & Z Commission held a public hearing to consider McCormack's application for final plat approval for Phase I of the subdivision. On January 5, 1996, the Board entered an order granting final plat approval of Phase I of the subdivision.

RKO appealed the Board's final plat approval to the district court (Judge James R. Michaud presiding). McCormack moved to dismiss its appeal that was pending before this Court on the basis that the Board's final plat approval and RKO's appeal of the final plat approval rendered this Court's review of the preliminary plat approval moot. This Court dismissed McCormack's appeal and conditionally dismissed RKO and the County's respective cross appeals. RKO responded with a request that its cross appeal remain. Ultimately, the parties stipulated to dismissal of the County's cross appeal. The Court ordered the appeal to proceed solely on the issues raised in RKO's cross appeal.

Thereafter, in August 1997, McCormack submitted a request to the Board for an extension and stay of the subdivision development schedule set forth in the Board's preliminary plat approval order of January 5, 1994. The Board granted McCormack's request for extension and stay on March 11, 1998. RKO petitioned the district court for judicial review of the Board's stay order (Judge James F. Judd presiding), Case No. CV 98-01492. Six days after RKO filed its petition for judicial review of the stay order, Judge Michaud rendered his opinion affirming the Board's final plat approval of Phase I of the subdivision. RKO did not file an appeal from this decision.

The Idaho Supreme Court affirmed the decision of the Commissioners in all respects, with the exception of one issue. The Supreme Court determined that the Commissioners had erred by failing to determine the ownership of the submerged lands located within the portion of the proposed PUD. *RKO*, 133 Idaho at 841-43, 993 P.2d at 604-06. The Supreme Court thus remanded the matter to the Commissioners to make new factual findings with respect to the ownership of the lands within the proposed PUD, and to reconsider the subdivision plat and PUD applications in light of those findings. *Id.* at 843, 993 P.2d at 606.

This latest appeal by RKO concerns the Commissioners' approval of the preliminary plat at a hearing held on June 28, 2000 to consider the issues that were before them on remand. While the Commissioners gave preliminary approval to McCormack's subdivision application, it denied the application for a PUD. (Tr. at 86-87.) The Commissioners issued an Order of Decision, stating their findings of fact and conclusions of law, on July 19. (A.R. at 6-13.)

Largely because of the length of this litigation, the property has been foreclosed upon. (See *Johnson v. McCormack Properties of Idaho, Inc.*, Kootenai CV-99-04104 (Hosack, J.), *on appeal*; A.R. at 31-39.) At a sheriff's sale held on July 20, the plaintiffs in the *Johnson* case (hereinafter collectively referred to as "the Johnsons") purchased the property, which they do not intend to develop. (A.R. at 140-141.)

McCormack continues to have a right to redeem the property, however. See I.C. § 11-402.

ISSUES ON APPEAL

1. Whether the petitioners have standing to allege that the public hearing held on June 28, 2000 to reconsider McCormack's subdivision and PUD applications was conducted in violation of their right to due process.

2. Whether RKO's due process rights were violated because one or more of its members, and counsel for RKO, were not given an opportunity to review evidence prior to the hearing, or because they were not given an adequate opportunity to rebut the evidence and testimony that McCormack submitted at the hearing.

3. Whether the Commissioners' Order of Decision was clearly erroneous in its findings concerning the ownership of the property at issue, or whether it lacked sufficient detail for a reviewing court to determine why it decided as it did.

4. Whether the foreclosure and sheriff's sale to the Johnsons render the decision of the Commissioners moot, requiring the Commissioners' the Order of Decision to be set aside.

STANDARD OF REVIEW

I.C. § 67-5279 defines the scope of judicial review of agency decisions:

(1) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

...
(3) When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
 - (b) in excess of the statutory authority of the agency;
 - (c) made upon unlawful procedure;
 - (d) not supported by substantial evidence on the record as a whole;
- or

(e) arbitrary, capricious, or an abuse of discretion.
If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.
(4) Notwithstanding the provisions of subsections (2) and (3) of this section, agency action shall be affirmed unless substantial rights of the appellant have been prejudiced.

Although boards of county commissioners are not "agencies" as defined in I.C. § 67-5201(2), this provision has been made applicable to judicial review of planning and zoning decisions made by county commissioners by the Local Land Use Planning Act (LLUPA). I.C. § 67-6519. LLUPA also requires commissioners to submit written decisions in all planning and zoning matters, and include findings of fact and conclusions of law in such decisions. I.C. § 67-6535(b).

DISCUSSION

I. Due Process

A. Standing

The first issue to consider is whether either RKO or the other petitioner, Linda Erickson, has standing to raise the issue of inadequate due process. See **RKO**, 133 Idaho at 840-41, 993 P.2d at 603-04. Erickson testified at the hearing. (Tr. at 62-64.) In her testimony, she stated general concerns about the density of the project and the possible effect it may have on the amount of traffic at the intersection of East Riverview Drive and U.S. Highway 95. (Id.) I am unable to find that the alleged "magnitude of the injury suffered" is sufficient to "differentiate [Erickson] from the citizenry at large" so as to constitute a "distinct palpable injury" that would confer standing to raise this issue. **RKO**, 133 Idaho at 841, 993 P.2d at 604 (quoting **Student Loan Fund v. Payette County**, 125 Idaho 824, 827-28, 875 P.2d 236, 239-40 (Ct. App. 1994)). Therefore, I find that Erickson lacks standing to raise this issue.

As for RKO, in order to have standing to raise this issue, it must present evidence (1) that at least one of its members owns "abutting or otherwise affected" real property, and (2) that approval of the project would result in "a peculiarized harm." *RKO*, 133 Idaho at 841, 993 P.2d at 604. Virginia Johnson was the only person who testified who indicated that she was a member of RKO. (Tr. at 64-67.) At the hearing, she testified that she is "a founding member of the so-called splinter group that has opposed this." (Tr. at 64.) In previous testimony, Charles Sheroke, attorney for RKO, stated that "the main reason for the splinter group occurring was that we clearly felt that he did not own the property." (Tr. at 34, emphasis added.) Therefore, it is reasonable to conclude that the "splinter group" referred to in Sheroke's and Virginia Johnson's testimony is RKO, and I so find. Virginia Johnson went on to indicate that her water supply lay downstream from the proposed sewage treatment site that was to be built to service the subdivision, and that she was concerned that her water supply would be polluted. (Tr. at 65-67.) For these reasons, I find that Virginia Johnson, as a member of RKO, alleged at least the potential of a particularized harm that would be sufficient to meet this requirement. Therefore, I find that RKO has standing to raise this issue.

B. The Hearing Process

The process of making planning and zoning decisions has been found to be "quasi-judicial" in nature. *Cooper v. Ada County*, 101 Idaho 407, 410-11, 614 P.2d 947, 950-51 (1980). Thus, the requirements of procedural due process must be met. *Id.* The level of "process" that is "due" depends on a weighing of three factors: (1) the private interest that stands to be affected, (2) the risk of an erroneous deprivation of such interest, and (3) the government's interest in the function involved, and the fiscal or administrative burdens that would ensue if additional procedural protections were

required. **Matthews v. Eldridge**, 424 U.S. 319, 334-35 (1976); **Gay v. Bonneville County**, 103 Idaho 626, 628-29, 651 P.2d 560, 562-63 (Ct. App. 1982). While it is well settled that "due process requires: (a) notice of the proceedings, (b) a transcribable verbatim record of the proceedings, (c) specific, written findings of fact, and (d) an opportunity to be present and rebut evidence" in public hearings concerning subdivision plat or PUD applications, Idaho appellate courts have not imposed additional procedural requirements to such hearings since **Cooper** and **Gay** were decided. **Angstman v. City of Boise**, 128 Idaho 575, 578, 917 P.2d 409, 412 (Ct. App. 1996).

RKO does not dispute that notice of the proceedings was adequate or that a transcribable verbatim record of the proceedings was made. It does contend that it was not given a fair "opportunity to be present and rebut evidence" because Sheroke was not allowed to examine evidence submitted in support of the project prior to the hearing, and because the Commissioners limited the time in which he was allowed to speak. It also disputes the issues of whether the written findings of fact were sufficiently specific. This issue is discussed in Part II of this opinion.

RKO cites **Johnson v. City of Homedale**, 118 Idaho 285, 796 P.2d 162 (Ct. App. 1990), for the proposition that "[h]aving no opportunity to review evidence prior to its submission and three minutes in which to rebut evidence of an unknown nature strains the concept of fundamental fairness as envisioned by the procedural due process requirements" (Petitioners' Brief at 5.) However, the holding in **Johnson** was on much narrower grounds than RKO's contentions would indicate. The **Johnson** Court merely held that the failure to comply with the City of Homedale's zoning ordinance, which required the inclusion of a "concept plan" and a "narrative statement"

with any application for a special use permit, constituted inadequate *notice* to the public. **Johnson**, 118 Idaho at 286-87, 796 P.2d 163-64.

RKO, however, cites the following passage from **Johnson** in support of its contention that evidence that will be presented at the hearing should be made available for review prior to the time at which the hearing is to take place:

[I]t is clear that an application for a special use permit must include a concept plan and narrative statement to put the public on notice of the effects of the proposed special use. This notice allows citizens to make informed arguments and objections when a public hearing is held on the proposed land use. Absent these attachments, citizens are left with a dearth of information on whether – and in what regard – to object to the proposal. 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.

Id. at 287, 796 P.2d at 164. Again, however, this was cast as a failure to give adequate *notice*, and nothing more. RKO does not contend that notice of the hearing was inadequate; in fact, it appears from the records that ample notice was given prior to the hearing. (See A.R. at 226-64.) Instead, it appears that RKO is simply complaining about a perceived lack of ability to *effectively* rebut the evidence presented by McCormack.

Although these hearings are quasi-judicial in nature, they do not contemplate formal discovery processes, nor has any Idaho court so required. Courts in other jurisdictions have recognized that there is no constitutional right to discovery in administrative proceedings. **Silverman v. Commodity Futures Trading Comm'n**, 549 F.2d 28, 33 (7th Cir. 1977); **Mohilef v. Janovici**, 58 Cal. Rptr. 2d 721, 741 (Cal. Ct. App. 1996). Idaho law simply requires that public hearing procedures are to “provide an opportunity for all affected persons to present and rebut evidence.” I.C. § 67-6534; **Angstman**, 128 Idaho at 578, 917 P.2d at 412.

Appendix "A" to the Kootenai County Subdivision Ordinance prescribes a procedure that must be followed by a person requesting approval for a subdivision. RKO argues that these procedures were not followed because the documents concerning the ownership of the various parcels to be included within the subdivision and PUD were not available for public inspection prior to the hearing. This matter was before the Commissioners on remand from the Idaho Supreme Court, which had directed the Commissioners to reconsider their previous approval of the subdivision plat and PUD "without considering the eighty acres of submerged land currently owned by the State." *RKO*, 133 Idaho at 843, 993 P.2d at 606. The Supreme Court had also directed the Commissioners to "make new factual findings with respect to ownership of all the lands in the PUD and whether the applicable provisions of the zoning ordinance concerning common open space are met." *Id.* Thus, the purpose of the hearing held on June 28, 2000 was to consider only these narrow issues; it was not intended as a *de novo* review of either the subdivision or the PUD.

At the hearing, Sheroke raised the issue of whether the land that was the subject of the subdivision itself was in fact owned by McCormack. This parcel was referred to as "parcel number one" by Commissioner Rankin. (Tr. at 31.) With regard to that parcel, Sheroke submitted the decision of the Honorable Charles Hosack in the foreclosure case. (Tr. at 31; A.R. at 31-39.) The Commissioners accepted this opinion, and no one representing McCormack objected, even though it was not notified that it would be submitted to the Commissioners for their consideration. (Tr. at 31, 36-37.) Commissioner Rankin then asked further questions of Sheroke regarding McCormack's ownership interest in the property. (Tr. at 31-33.) The Commissioners also ascertained that the sheriff's sale pursuant to the judgment of foreclosure would not occur until July

20. (Tr. at 32.) Based on these facts, I find that RKO was afforded an adequate opportunity to be present and rebut evidence on the issues concerning the ownership of the property that was the subject of the preliminary subdivision plat approval request.

Sheroke was also questioned by Rankin regarding the other parcels that were included within the proposed PUD. (Tr. at 31-36.) Eventually, Sheroke and the Commissioners agreed that the parcel consisting of submerged land was owned by the State of Idaho, consistent with the decision of the Idaho Supreme Court, and that the upland parcel was owned by the Bureau of Land Management, which had acquired it from The Nature Conservancy after McCormack had sold any interest it had had in the property to that organization. (Tr. at 31, 33-36.) Largely because it was determined that these parcels were public land, McCormack's application for a PUD was denied. (A.R. at 7, 10-11.) Thus, I find that RKO had more than an adequate opportunity to rebut evidence that McCormack presented concerning the proposed PUD, and in fact received a favorable ruling from the Commissioners on this issue. Even assuming *arguendo* that RKO may not have been afforded an adequate opportunity to rebut McCormack's evidence on this issue, its argument that it was thereby deprived of due process is rendered moot by the denial of McCormack's PUD application.

The transcript of the hearing shows that testimony was presented both for and against the proposed development, as well as some testimony from those who considered themselves neutral. Sheroke, in fact, was afforded the same three-minute time period given to all speakers. (Tr. at 27-30.) He was then given additional time to make his case due to the Commissioners' desire to clarify statements that he had made. (Tr. at 30-37.) Virginia Johnson, Erickson and others were also given the opportunity to make spoken or written comments in opposition to the proposed

subdivision and PUD. (See Tr. at 24-26, 39-47, 51-52, 62-71.) Therefore, I find that the time limits imposed by the Commissioners did not operate to deny RKO of due process.

For the reasons stated above, I find that the Commissioners did not deprive the petitioners of due process in the conduct of this hearing.

II. The Commissioners' Findings

I.C. § 67-6535 requires that an approval or denial of a subdivision or PUD request by a board of county commissioners be made in writing, based upon previously adopted standards and criteria. That statute reads as follows:

(a) The approval or denial of any application provided for in this chapter shall be based upon standards and criteria which shall be set forth in the comprehensive plan, zoning ordinance or other appropriate ordinance or regulation of the city or county.

(b) The approval or denial of any application provided for in this chapter shall be in writing and accompanied by a reasoned 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.

(c) It is the intent of the legislature that decisions made pursuant to this chapter should be founded upon sound reason and practical application of recognized principles of law. In reviewing such decisions, the courts of the state are directed to consider the proceedings *as a whole* and to evaluate the adequacy of procedures and resultant decisions in light of practical considerations with an emphasis on fundamental fairness and the essentials of reasoned decision-making. *Only those whose challenge to a decision demonstrates actual harm or violation of fundamental rights, not the mere possibility thereof, shall be entitled to a remedy or reversal of a decision.*

I.C. § 67-6535 (emphasis added). Thus, the clear intent of the Legislature was to keep county commissioners' decisions concerning planning and zoning from being reversed on merely technical grounds.

Here, the Commissioners submitted detailed findings of fact and conclusions of law which take into consideration various factors, including water and sewer

arrangements, water and air quality, and actions to alleviate impacts to neighbors, roads and schools. (A.R. at 6-13.) They also cite the fact that ownership of the lands sought to be included as open space in the PUD application had been determined, and that because they were owned by public entities, they could not be used to meet the county's requirements for open space in PUDs. (A.R. at 10-11.) After considering these factors, the Commissioners denied the PUD application, and gave preliminary plat approval to the subdivision, subject to 25 conditions that addressed various concerns. (A.R. at 11-13.)

I find that the Commissioners' decision complies with I.C. § 67-6535. I further find that the decision is based upon substantial and competent evidence in the record, and is neither arbitrary nor capricious. This is especially so in light of the fact that the Idaho Supreme Court remanded this matter to the Commissioners on rather narrow grounds; these grounds were in fact sufficient to cause the Commissioners to deny the PUD application, reversing their prior decisions on that issue.

III. Mootness

RKO argues that this case is now moot since the Johnsons are now the owners of the property. This argument is flawed for a few reasons. First of all, McCormack retains a right of redemption on the property for one year after the sheriff's sale takes place. See I.C. § 11-402. Apparently, it intends to exercise that right if this litigation is finally settled and the financing can be obtained. (McCormack Brief at 17; Tr. At 58.) Thus, McCormack's right of redemption is a property right that is very real, allowing McCormack to render the title conveyance via sheriff's sale a nullity if the right is exercised. See **Steinour v. Oakley State Bank**, 45 Idaho 472, 480, 262 P. 1052 (1928). On this basis, the case would not be moot even if the Johnsons effectively

withdrew as co-applicants by stating that they did not intend to develop the property if the PUD and/or subdivision applications were approved.

Second, even if McCormack were not to exercise its right of redemption, the case would not be moot because it would also apply to the Johnsons as co-applicants, were they to change their minds and decide to develop the property. It is worth noting, as both McCormack and the County point out, that the Johnsons did not at any time formally withdraw from the process, even though their attorney, Scott Reed, did write a letter to the Commissioners that stated that they did not intend to develop the property. (A.R. at 140-41.) Nevertheless, the approval of the subdivision allows them to develop the property if they so chose, if the right of redemption is not exercised and the approval has not expired.

Finally, a ruling by this Court that this case is moot would lead to a dismissal of this petition for judicial review only, not a reversal of the Commissioners' decision. This would effectively allow the commissioners' decision to stand. If RKO desires to argue that the Commissioners' decision is moot, the proper place to make this argument is before the Commissioners themselves. For these reasons, I find that this petition for judicial review is not moot.

IV. Attorney Fees

I find that RKO has raised meritorious issues in this appeal. Therefore, I do not find that this case was brought "frivolously, unreasonably or without foundation." The motion for an award of attorney fees to McCormack under I.C. § 12-121 and I.R.C.P. 54(e)(1) will be denied on that basis.

CONCLUSION

Based on the foregoing discussion, I conclude that RKO has standing to assert that it was deprived of due process by the method in which the Commissioners conducted the hearing on McCormack's subdivision plat and PUD applications. I conclude, however, that Erickson lacks standing to assert this issue.

I conclude that RKO was given the opportunity to present and rebut evidence concerning the ownership of each of the parcels that were the subject of McCormack's requests for preliminary subdivision plat approval and for approval of the proposed PUD. I conclude that the time limits placed upon those who wished to testify at the hearing, and the enforcement thereof, were reasonable. Therefore, I conclude that the Commissioners did not deprive RKO of due process in the conduct of this hearing. Additionally, I conclude that, to the extent that it concerned the PUD application, the issue of whether RKO was denied the opportunity to present and rebut evidence is moot.

I conclude that the Commissioners' Order of Decision complies with the requirements of I.C. § 67-6535, and that it is based upon substantial and competent evidence in the record, and is neither arbitrary nor capricious. I conclude that this matter is not moot, both because McCormack retains a right of redemption to the parcel that was given preliminary subdivision plat approval, and because the Johnsons remained as co-applicants at the time the hearing was held.

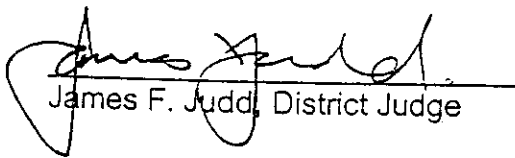
Based on the above conclusions, the Commissioners' Order of Decision will be affirmed. Because I conclude that McCormack is a prevailing party in this appeal, costs will be awarded to McCormack. However, because I conclude that the petitioners have

not brought this appeal frivolously, unreasonably or without foundation, no attorney fees will be awarded.

ORDER

NOW THEREFORE, based on the foregoing discussion and record herein, the respondent Kootenai County Commissioners' Findings of Fact, Conclusions of Law and Order approving a preliminary subdivision plat and denying a proposed planned unit development for the subdivision known as "The Ridge at Cougar Bay" are hereby **AFFIRMED**. McCormack shall be awarded costs on appeal pursuant to I.R.C.P. 54(d) and I.A.R. 40. No attorney fees shall be awarded.

DATED this 9 day of January, 2001.


James F. Judd, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 9 day of January, 2001 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail to:

Charles Sheroke
Sheroke & McGregor, PLLC
P.O. Box 580
Coeur d'Alene, ID 83816-0580

Dennis Molenaar
Kootenai County Department
of Legal Services
(via interoffice mail)

Steven C. Wetzel
Dana Rayborn Wetzel
Wetzel & Wetzel, PLLC
1322 W. Kathleen Ave., Suite 2
Coeur d'Alene, ID 83815

Judge Kosonen

Judge Michaud

Judge Hosack

Judge Luster

DANIEL J. ENGLISH
Clerk of the District Court

By 
Merri Thorne, Deputy Clerk

STATE OF IDAHO }
COUNTY OF KOOTENAI } ss
FILED:

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CLERK DISTRICT COURT

DEPUTY

SHEROKE & MCGREGOR, PLLC
Attorneys at Law
P. O. Box 580
Coeur d'Alene, ID 83816-0580
(208) 667-2483

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

RURAL KOOTENAI ORGANIZATION, INC.,	)	Case No. CV-2000-5104
an Idaho nonprofit corporation, and	)	
Linda Erickson,	)	
	)	
Petitioners/Appellants,	)	
	)	
v.	)	NOTICE OF APPEAL
	)	TO THE IDAHO SUPREME COURT
BOARD OF COMMISSIONERS, KOOTENAI	)	
COUNTY, STATE OF IDAHO,	)	
	)	
Respondents,	)	
	)	
and	)	
	)	
McCORMACK PROPERTIES OF IDAHO, INC.,	)	
an Idaho corporation,	)	
	)	
Intervenor/Respondent.	)	

TO: THE ABOVE NAMED RESPONDENTS, KOOTENAI COUNTY BOARD OF
COMMISSIONERS AND ITS ATTORNEY, ERIKA B. ELLINGSEN, DEPARTMENT
OF LEGAL SERVICES, 451 GOVERNMENT WAY, P. O. BOX 9000, COEUR
D'ALENE, IDAHO 83816, AND INTERVENOR McCORMACK PROPERTIES OF
IDAHO, INC., AN IDAHO CORPORATION, AND ITS ATTORNEY, STEVEN C.

NOTICE OF APPEAL TO THE
IDAHO SUPREME COURT

MICROFILMED

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PAGE 1 of 4

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WETZEL, WETZEL AND WETZEL, 1322 KATHLEEN AVENUE, SUITE 2, COEUR
D'ALENE, IDAHO 83815, AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellants, Rural Kootenai Organization, Inc. and Linda Erickson (RKO), appeal against the above-named respondent to the Idaho Supreme Court from the MEMORANDUM OPINION AND DECISION ON APPEAL entered in the above-entitled action on the 9th day of January, 2001, Honorable Judge James F. Judd presiding. (See p.p.s. 1 and 16 of the Opinion attached hereto.)

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgment and order described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(2), I.A.R.

3. The issues on appeal include procedural and substantive provisions of Kootenai County Ordinances and the Local Land Use Planning Act which were not followed; the denial of due process; the actions of Kootenai County were arbitrary and capricious and not supported by substantial evidence; the mootness of the applicant's subdivision request; and the District Court's decision and findings were erroneous; provided that this list shall not prevent the Appellant from asserting other issues on appeal pursuant to Rule 17, I.A.R.

4. A reporter's standard and supplemental transcripts of the hearings before the District Court are requested (Appellant's Motion to Augment and Oral Argument), it is further requested that the existing transcript of the hearing before the Kootenai County Board of Commissioners, which was available to the District Court and is part of the record, be forwarded to the Supreme Court as part of the administrative record.

FILED

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MICHAEL J. JUDG

JAN 12 1991

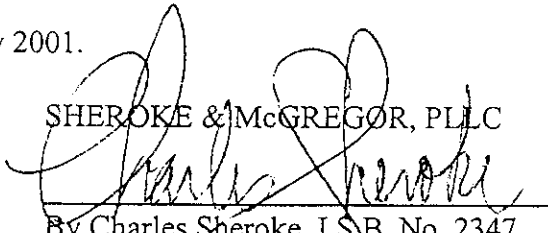
5. The appellants request that the agency record include all transcripts, briefs, exhibits, motions, and other documents that currently constitute the record on appeal before the District Court in this matter.

6. I certify:

- (a) That a copy of this notice of appeal has been served on the reporter and any estimated transcript fee when submitted will be paid.
- (b) That the clerk of the district court has not been paid the estimated fee for preparation of the reporter's transcript because, to the knowledge of the undersigned, no such estimate has been prepared.
- (c) That the Appellant's filing fee is being tendered with the filing of this NOTICE OF APPEAL.
- (d) That service has been made upon all parties required to be served pursuant to Rule 20, I.A.R.

DATED THIS 16th day of February 2001.

SHEROKE & MCGREGOR, PLLC

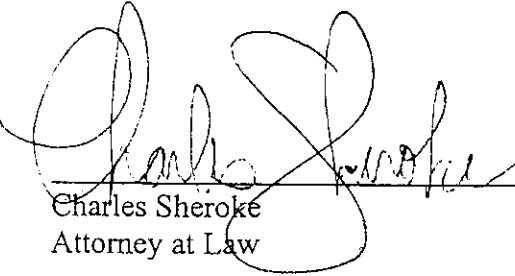

By Charles Sheroke, I.S.B. No. 2347
Of the firm, Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was [] mailed, postage prepaid; ☒ hand-delivered; [] faxed, this 16th day of February 2001:

STEVEN C. WETZEL
DANA RAYBORN WETZEL
WETZEL & WETZEL, PLLC
1322 Kathleen Avenue, Suite 2
Coeur d'Alene, ID 83815

DENNIS MOLENAAR/ERIKA ELLINGSEN
KOOTENAI COUNTY DEPARTMENT OF
LEGAL SERVICES
451 Government Way
C-9000
Coeur d'Alene, ID 83816-9000


Charles Sheroke
Attorney at Law

NOTICE OF APPEAL TO THE
IDAHO SUPREME COURT

FILED

JAN 12 2001

MAILED
JAN 12 2001

PAGE 4 of 4

State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

May 3, 2001

DIRK KEMPTHORNE
GovernorKARL J. DREHER
Director

MCCORMICK PROPERTIES OF IDAHO INC
PO BOX 2637
640 THORNTON ST
POST FALLS ID 83877-2637

RE: Permit No. 95-08856

Dear Permit Holder:

The Department acknowledges receipt of your request for extension of time. Your request states that the delay in completion of this project is due to pending litigation. You have indicated no work has been completed, and supplied copies of two letters dated August 3, 2000 and February 14, 2001. In order to evaluate a Request for Extension of Time, especially a delay based on litigation, I will need evidence documenting the litigation in question, specifically during the previous extension period of November 19, 1999 to May 1, 2001.

Additionally, the letters you provided with your request brought up two questions I have, which, if you can respond to them, may give me the evidence to grant this request. The August 3, 2000 letter was waiting for RKO's response to a July 17, 2000 decision made by the Board of County Commissioners (see paragraph nos. 16 and 17). Did RKO file an appeal to this decision? If so, please provide me a copy of RKO's appeal, any documents resulting from their appeal, and any documents that show what the current status of that decision is to May 1, 2001. Secondly, the letter dated Feb. 14, 2001, asked Kootenai County Legal Services for a response to the facts layed out in that letter. Did Kootenai County give you a response? If so, could you provide me with a copy of that response, and anything that followed to date?

- after 7/17/00
RKO Apped
- after 2/14/01.
Kootenai County
response

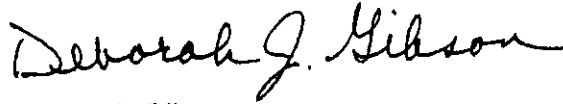
I believe the additional information I have requested will cover the time period of your first extension (Nov. 19, 1999 through May 1, 2001), however, if the documents do not, I request you provide any additional documents or pleadings, that would cover that time period. Please provide these documents to me before May 15, 2001.

MICRO...
500 6 2 2001

Page 2

Thank you for your continued assistance in this matter. Please contact me at (208)327-7953, if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Deborah J. Gibson". The signature is fluid and cursive, with the first name "Deborah" and last name "Gibson" clearly legible.

Deborah Gibson
Administrative Assistant
Water Allocation Bureau

Enclosure

c: IDWR - Regional Office

MICROFILM

SEP 11 2004



McCORMACK PROPERTIES OF IDAHO, INC.

FACSIMILE COVER PAGE

To: Dana Wetzel

Fax #: 664-6741

Company: Wetzel & Wetzel PLLC

From: Marsa McCusker

Fax #: (208) 664-5577

Tel #: (208) 664-0700

RECEIVED

MAY 11 2001

Subject: Ridge at Cougar Bay, Water Permit Extension

Department of Water Resources

Sent: 05/08/2001 at 2:11:54 PM

Pages: 3 (including cover)

Dana,

Attached is a letter we received from the Idaho Department of Water Resources in response to our application for extension of time due to pending litigation on The Ridge. The two letters to which they refer are letters you wrote regarding the status of the project (February 14, 2001), and summary of litigation (August 3, 2000). I included a copy of these letters with our application to the IDWR on April 25, 2001.

Could you please let me know whether the documents they request can be produced? If you have copies of these documents, could you supply me with a copy so I can forward it to the IDWR? Thank you very much for your help.

Marsa

MICHAEL J. JONES
2001-05-11



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

May 11, 2001

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

MCCORMICK PROPERTIES OF IDAHO INC
PO BOX 2637
640 THORNTON ST
POST FALLS ID 83877-2637

RE: Permit No. 95-08856

Dear Permit Holder:

Enclosed is a copy of the approved request for extension of time submitted in connection with the above referenced permit. This order extends the time within which to submit proof of beneficial use to **May 1, 2002**, due to delay of development caused by litigation. It is important that you work diligently toward the completion of the development, since the department may not be able to grant additional extensions in connection with this permit.

Section 42-248, Idaho Code, requires you or the owner of the water rights to maintain current ownership and address records on file with the department. Please contact any office of the department for the proper form to file a change of ownership of a water right and/or a change in the address of the owner.

Please contact me at (208)327-7953, if you have any questions regarding this matter.

Sincerely,

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

Enclosure

c: IDWR - Regional Office

M. A.

June 12 2001

February 28, 2002

MC CORMACK PROPERTIES OF IDAHO INC
401 FRONT ST STE 3
COEUR D ALENE, ID 83814

PROOF DUE NOTICE

RE: PERMIT NO. 95-8856

Dear Permit Holder:

One of the conditions of approval of the above referenced water permit was that proof of the extent of your beneficial use must be submitted to this office on or before May 01, 2002. (See last page of your approval permit or your last approved extension request.) Enclosed is a form which when accompanied by the license examination fee or a completed field examination report prepared by a certified water right examiner may be used to submit the required proof.

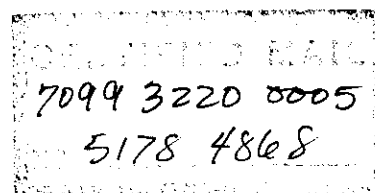
If you have not fully completed your project, and you or a previous owner of this permit have not received a prior extension of time, you may request an extension of time if the delay is for reasonable cause as provided in Section 42-204, Idaho Code. If you have been prevented from proceeding by a governmental agency or by litigation which might bring title to the water in question, more than one extension of time can be granted. An extension of time request form is enclosed for your convenience.

Either an acceptable proof of beneficial use submittal or an acceptable request for an extension of time must be received by this department on or before the above described proof due date. If neither is received, the department will send you a lapse notice. Within sixty (60) days of the mailing of the lapse notice, the permit will no longer be of any force nor effect.

Sincerely,

Deborah J. Gibson, Admin. Assistant
Water Allocation Bureau
Enclosures

MICROFILMED
JAN 7 2 2004



CERTIFIED MAIL

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

1 North Orchard Street, P.O. Box 83720

Boise, Idaho 83720-0098

Return Service Requested



7099 3220 0005 5178 4868

RETURNED
TO
SENDER
NOT DELIVERABLE
AS ADDRESSED
UNABLE TO FORWARD

FILE

MC CORMACK PROPERTIES OF IDAHO INC
401 FRONT ST STE 3
COEUR D ALENE, ID 83814

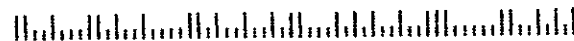
RECEIVED

MAR - 8 2002

Department of Water Resources

*McCormack
401 Front St Ste 3
Coeur d'Alene, ID 83814*

83814+2734 03



3.2

May 9, 2002

MC CORMACK PROPERTIES OF IDAHO INC
401 FRONT ST STE 3
COEUR D ALENE, ID 83814

LAPSE NOTICE

RE: PERMIT NO. 95-8856

Dear Permit Holder:

You are hereby notified that under the provisions of Section 42-218A, Idaho Code, the above referenced permit has lapsed and is of no further force nor effect. The department provided the proper forms to you in the proof due notice dated May 1, 2002. No further construction or additional development is authorized under this permit unless it is reinstated.

The permit can only be reinstated if you submit an acceptable proof of beneficial use or an acceptable request for extension of time to the department within sixty (60) days of the mailing of this lapse notice. An acceptable proof of beneficial use submittal must include the examination fee or a completed field examination report. A request for extension of time must be accompanied by a fifty dollar (\$50.00) fee.

Enclosed again for your use are a proof of beneficial use form and a request for extension of time form. Please note that only one extension of time can be granted unless the project has not been completed because of lack of a necessary approval by a government agency or by litigation which may bring title to the water in question.

Sincerely,

L. Glen Saxton, Chief
Water Allocation Bureau

Enclosures

REGISTRATION/MAILING
Therese Saxton, Chief
5/9/02
A copy of this notice of lapse was
deposited in the Coeur d'Alene mail
package (envelope) addressed to the
individual(s) named above.

dg

MICROFILMED
JAN 12 2003

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

1. North Orchard Street, P.O. Box 83720
Boise, Idaho 83720-0098

Return Service Requested

RECEIVED

MAY 17 2002

Department of Water Resources

95-8856

MC CORMACK PROPERTIES OF IDAHO INC
401 FRONT ST STE 3
COEUR D ALENE, ID 83814

CA 212 PH 00 953 A 1



I certify that file No. 95-8856

has been reviewed and is ready to be

MICROFILMED and DESTROYED.

Kari Lynn J.
Reviewer

11.8.02
Date

MICROFILMED
JAN 12 2004