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CLERK OF DISTRICT COURT

Deputy

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

**IN THE MATTER OF THE APPLICATION OF)
HAITHAM JOUDEH for JORDAN)
INTERNATIONAL TRADE AND)
CONTRACTING, INC., an Idaho Corp., for a)
CONDITIONAL USE PERMIT (STORAGE)
DEPOT AT MICA BAY))⁹⁸⁷³⁾**

Appellant,

vs.

**KOOTENAI COUNTY BOARD OF)
COMMISSIONERS; ELMER R. *RICK))
CURRIE, RICHARD PIAZZA; and TODD)
TONDEE,)**

Respondents,

**MICA KIDD ISLAND PROPERTY OWNERS,)
INC., an Idaho Corporation,)**

Intervenor.

Case No. **CV 2009 8458**

(Consolidated with Kootenai Co. Case
No. CV 2009 2698 and CV 2009

**MEMORANDUM DECISION AND
ORDER ON ADMINISTRATIVE
APPEAL**

I. BACKGROUND AND PROCEDURAL HISTORY.

Appellant Haitham Joudeh (Joudeh) owns ten acres of property adjoining Highway 95 in the Mica Flats area. On July 22, 2008, Joudeh, through Jordan International Trade and Contracting, Inc., applied for a Conditional Use Permit (CUP) to build a storage depot project at Mica Bay on the west side of Highway 95 just north of Carnie Road in the Mica Flats area of Kootenai County. On February 26, 2009, the Kootenai County Board of Commissioners (Board) voted unanimously to deny the application, and on March 26, 2009, the Board issued its decision. Joudeh timely filed a

Petition for Judicial review on April 3, 2009.

On July 10, 2009, this Court remanded to the Board for consideration of additional evidence after Joudeh sought and was granted augmentation of the record. On August 27, 2009, the Board again held a public hearing, and at the end of that hearing denied the CUP application and issued a written "Order of Decision of Denial on Remand" on September 17, 2009. Joudeh now seeks judicial review of the Board's September 17, 2009, decision.

On January 13, 2009, Joudeh applied for a Condominium Plat. This plat encompasses the same storage unit depot proposed via the conditional use permit for which Joudeh had previously applied. Joudeh sought approval of a plat consisting of several buildings, each housing multiple storage units, for a total of 141 units on the ten acres at issue. On October 28, 2009, the Kootenai County Building and Planning Department Director denied the application. Joudeh also seeks judicial review of the denial of his Condominium Plat application.

Joudeh raises the following issues on appeal on the Board's denial of the CUP: 1) whether denial of the CUP application was supported by substantial evidence on the record; 2) whether denial of the CUP was arbitrary, capricious, or an abuse of discretion; 3) whether denial of the CUP was in violation of constitutional or statutory provisions (in part because of unconstitutional vagueness); and 4) whether denial of the CUP was made upon unlawful procedure.

Joudeh also raises the following issues on appeal on the denial of the condominium plat application: 1) whether denial of that application was supported by substantial evidence on the record; 2) whether denial of that application was arbitrary, capricious, or an abuse of discretion; 3) whether denial of that application was in

violation of constitutional or statutory provisions (in part because of unconstitutional vagueness); and 4) whether denial of that application was made upon unlawful procedure. Appellant's Brief, p. 7.

II. STANDARD OF REVIEW.

The applicable standard of review is well settled:

The Idaho Administrative Procedures Act (IDAPA) governs the review of local zoning decisions. *Price v. Payette County Bd. of County Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998). In an appeal from the decision of the district court acting in its appellate capacity under the IDAPA, the Supreme Court reviews the agency record independently of the district court's decision. *Stevenson v. Blaine Co.*, 134 Idaho 756, 759, 9 P.3d 1222, 1225 (2000). The Court does not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The Court defers to the agency's findings of fact unless they are clearly erroneous. *Stevenson*, 134 Idaho at 759, 9 P.3d at 1225. The agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by evidence in the record. *Id.* There is a strong presumption favoring the validity of the actions of zoning boards, which includes the application and interpretation of their own zoning ordinances. *Howard v. Canyon County Bd. of Comm'rs*, 128 Idaho 479, 480, 915 P.2d 709, 711 (1996). The Court defers to the Board's interpretation and application of its zoning ordinance, unless such interpretation or application is capricious, arbitrary or discriminatory. *Rural Kootenai Organization, Inc. v. Board of Comm'rs*, 133 Idaho 833, 842, 993 P.2d 596, 605 (1999).

The Board is treated as an administrative agency for purposes of judicial review. *Stevenson*, 134 Idaho at 759, 9 P.3d at 1225. 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. I.C. §§ 67-5279(3)(a)(e); see also *Payette River Property Owners Ass'n v. Board of Comm'rs of Valley County*, 132 Idaho 551, 554, 976 P.2d 477, 480 (1999). The party attacking a zoning board's action under I.C. § 67-5279(3) must first demonstrate 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.*; see also *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998).

Whitted v. Canyon County Board of Com'rs, 137 Idaho 118, 121, 44 P.3d 1173, 1176

(2002).

III. ANALYSIS.

A. The Board's Decision.

1. The Board's Denial of the CUP Was Lawful in Light of the Kootenai County Comprehensive Plan and Zoning Ordinance.

Joudeh first argues the Board improperly denied his CUP application because of the Board's denial having been based "solely on their subjective and arbitrary opinion that the Project may not '*fit within the neighborhood.*'" Appellant's Brief, p. 10. (emphasis in original). Joudeh argues the Board "ignored the codified standard of review." *Id.* Joudeh's argument appears to be: in Kootenai County, all zoning ordinances must conform with the Kootenai County Comprehensive Plan and, because mini-storage facilities are specifically permitted in rural zones by the Kootenai County Zoning Ordinance, approval of the instant CUP application was mandated given Joudeh had approval of public agencies and Kootenai County's Zoning Ordinance's necessarily conforming to the County's Comprehensive Plan. *Id.*, pp. 11-13. Joudeh's circular reasoning in this regard is difficult to follow. Essentially, Joudeh contends that because mini-storage is permitted in the rural zone subject to a CUP, the Board's discretion in the matter was limited to whether the Comprehensive Plan's standards for CUPs were met in a general sense. Joudeh states the Board erred in (1) not considering whether applicable agencies approved of the CUP, and (2) ignoring his "Project clearly complied with the Comprehensive Plan." *Id.*, p. 13.

The Board answers this argument by pointing out the permissive "may" language used in the Kootenai County Comprehensive Plan with regard to its defining a CUP as "a use...which *may* be allowed with conditions under specific provisions of the ordinance, subject to the ability political subdivisions, including school districts, to

provide services for the proposed use, and when it is not in conflict with the comprehensive plan.” Brief of Respondents, p. 12, quoting Appellant’s Brief, pp. 11-12 (emphasis added). The Board next directs the Court’s attention to the mandatory language of the Zoning Ordinance:

...A Conditional Use shall not be approved unless and until:

4. The determination has been made that the granting of the Conditional Use Permit will not adversely affect the public interest and will be in general conformance with the *Comprehensive Plan*.

§ 9-23-2. (italics in original). The Board argues: a) Comprehensive Plan Goal Number Nine was addressed by the Board, which found CUP approval would not preserve neighbors’ quality of life and would amount to a non-compatible use which could not be buffered adequately from area prevailing uses; b) Comprehensive Plan Goal Number Fourteen was addressed and the Board found the proposed use would result in a high potential for vehicle crashes; and c) Comprehensive Plan Goal Number Twenty-Six and Twenty-Seven were addressed by the Board and it was determined the use density of 141 units, or 14 units per acre in density, was out of character with the area’s rural, agriculturally oriented landscape. Brief of Respondents, p. 13, citing Agency Record on Remand for CV 2009 8458, pp. 386-88. The Board also argues the Board properly found the CUP would not be in the public interest, because it was not compatible with the land uses prevailing in the area and was not in keeping with the rural character of the area. *Id.*, p. 14.

Intervenors argue that the proposed CUP was found by the Board to be commercial, in violation of the Kootenai County Ordinance No. 401, § 9-13-7(C). Brief of Respondent/Intervenor, p. 14. Intervenors quote two of the commissioners and opposition testimony from the hearing in support of their contention. Commission

Chairman Currie stated he disagreed with the storage units not being characterized as commercial:

[a]nd changing the name from condominium to a storage facility- it's doing the same thing and you know a rose is a rose by any other name-it's still a rose. And this is a storage facility. I do look at it as a commercial activity. It's not compatible with the- area.

Tr., p. 63, Ll. 17-22. Commissioner Tondee later clarified, "the concentration of the units are way too concentrated for the ten acres--140 units on the ten acres is--makes it appear while it's not listed as commercial- it makes it appear to be commercial in this rural area." Tr., p. 64, Ll. 20-24. Intervenors argue the commercial nature of the proposed project was just one portion of the substantial evidence on the record supporting the Board's determination that the CUP is not in conformance with the Comprehensive Plan and is not in the public interest.

Joudeh responds to the arguments of the Board and Intervenors by stating the project is, in fact, in general conformance with the Comprehensive Plan because no strict conformance is required and, generally, mini-storage facilities are provided for in the Zoning Ordinance and, therefore, necessarily conform with the Comprehensive Plan. Appellant's Reply to Respondent and Intervenor's Briefs, p. 5. Specific to this project, Joudeh argues only four of the twenty-seven goals in the Comprehensive Plan are challenged at all by the Board. *Id.*, p. 6. With regard to Goal Number Nine (addressing protection of property rights, maintenance of quality of life, providing adequate land for development, buffering non-compatible uses, and protecting the environment), Joudeh argues the Board failed to take his property rights into consideration, focusing instead only on neighboring property owners. *Id.*, pp. 6-7. As to Goal Fourteen (addressing provision of efficient, safe, and cost-effective movement of people and goods), Joudeh argues the Board ignored the opinions of the Worley

Highway District, who had no objection to the project, and Inland Northwest Consultants, who “buttressed the Worley Highway District’s conclusion, and bolstered the application’s compliance with Goal 14.” *Id.*, p. 7. Joudeh argues Goals Twenty-Six and Twenty-Seven (addressing the fostering of growth so as not to compromise visual qualities of Kootenai County and preservation, protection, and enhancement of natural landmarks and areas of scenic beauty) also require a balancing of competing property interests as does Goal Nine, but that the Board ignored Joudeh’s efforts, including his plans to conform with the nicer storage barns in the area, as well as his property rights. *Id.*, p. 8. Joudeh also argues the Board improperly analyzed public interest regarding the project. *Id.*, p. 9. Joudeh states the Board improperly considered only adjoining property owners, not Joudeh himself or any broader portion of Kootenai County’s population. *Id.*

Indeed, although *Bone v. City of Lewiston*, 107 Idaho 844, 850, 693 P.2d 1046, 1052 (1984) holds that a land use application need not strictly comply with a comprehensive plan, *Evans v. Teton County*, 139 Idaho 71, 76, 73 P.3d. 84, 89 (2003) states that the Comprehensive Plan cannot be ignored in making a decision to approve or deny a request. Even where there is conflicting evidence before an agency, the agency’s factual determinations are binding on the reviewing court as long as they are supported by substantial competent evidence in the record. *Lane Ranch Partnership v. City of Sun Valley*, 144 Idaho 584, 590, 166 P.3d 374, 380 (2007). Substantial and competent evidence is “relevant evidence which a reasonable mind might accept to support a conclusion.” *Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 43, 981 P.2d 1146, 1153 (1999).

In the instant case, the Board made seventeen findings of fact, addressed each

goal of the Comprehensive Plan, provided eight paragraphs of analysis and again reached the conclusion (1) the application was not in general conformance with the Comprehensive Plan and (2) the application would adversely affect the public interest. Supplemental Agency Record, p. 390.

Under the Course of Proceedings Heading, the Board wrote:

Following the close of the public hearing, the Board held deliberations in the issues pertaining to this request. Commissioner Tondee stated that access issues were not a concern to him, and that private ownership would cause the number of trips to be less. He states that his main issue was that it did not fit with the neighborhood, and specifically stated that 141 units would be too much of a concentration for the surrounding area. Commissioner Piazza agreed with Commissioner Tondee, but added that he still had issues with the traffic. Chairman Currie disagreed with the access. He believed the warranty deed still carried weight. He stated that no matter what you call the proposal, it is still a commercial use and he would not support the request. Commissioner Tondee agreed that because the use and the concentration of units were consistent with a commercial use, approval of this proposal would be used in the future as a tool for allowing commercial uses in the area.

Supplemental Agency Record, p. 382. Here, the Board has made specific, written findings of facts and conclusions upon which its decisions were based as required by *Price v. Payette County Bd. of Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 587 (1998).

The Board found the area surrounding the project consists of mainly rural residential developments on five-acre or larger parcels. Supplemental Agency record, p. 383.

“There is a commercial equestrian facility in close proximity as well as the Mica Flats Grange Hall, the Mica Kidd Island Fire District office and the Worley Highway District Office.” *Id.* Ultimately:

During deliberations, all three commissioners stated that the overriding reason for the decision of denial was that the storage facility proposed in the application is incompatible with the land uses which prevail in the Mica Flats area. This was also specified by Commissioner Tondee in his motion to deny the application. While the Mica Flats area may not be “separate from the rest of the county,” it is most certainly a rural, agriculturally oriented area of scenic beauty with its own unique

landscape. Regardless of whether the proposed use is technically a “commercial” development, the intensity of use which would result from this facility would be consistent with that of a commercial use more appropriately located among other similar commercial uses. To place a use of this intensity on this property, however, would not be in keeping with the rural character of the area. While there is evidence in the record of other commercial uses of property in the Mica Flats area, these uses are much less intense than the use proposed in this application and are consistent with the general rural residential and agricultural character of this area, as contemplated in the Comprehensive Plan. Thus, the use proposed in the application would not be compatible with the land uses generally prevalent in the area and would not be in harmony with the existing development pattern in the area.

Id., p. 390.

It is not disputed that commercial uses are prohibited in the rural zone, or that mini-storage facilities are conditional uses which may be permitted pursuant to Kootenai County Ordinance No. 401, § 9-23-1(B). Joudeh’s argument that his proposed use is in general conformance with the Comprehensive Plan is apt. However, the Board clearly did not ignore the Comprehensive Plan in the instant denial. Case law in Idaho establishes that, so long as the Board’s findings are supported by evidence in the record, the Board’s factual determinations are binding on this reviewing Court unless they are clearly erroneous. *Stevenson v. Blaine Co.*, 134 Idaho 756, 759, 9 P.3d 1222, 1225 (2000). That is the case even if the evidence before the Board is conflicting. There will almost always be conflicting evidence in any case. This case, like many cases on appeal from an administrative decision, because of the standard of review this Court must apply, could be affirmed by this Court if Joudeh would have prevailed before the Board and the Board and Intervenors were the parties appealing that decision. Joudeh seems to lose sight of the fact that this Court cannot not substitute its judgment for that of the Board as to the weight of evidence on questions of fact. I.C. § 67-5279(1). The evidence is conflicting, yet the findings of the Board are supported by

substantial competent evidence.

The Board was presented with evidence on public interest regarding the project via comments opposing the application including: “water concerns; preservation of the rural area; protection of neighbors’ property; the asphalt would be an eyesore; concerns for wildlife; and traffic/safety issues.” Supplemental Agency Record, p. 380. Following remand back to the Board after this Court issued its ruling on Joudeh’s motion to amend, the Board at its August 27, 2009, public hearing, received forty-four comment sheets: four from the Applicant/Representative; twenty-one in favor; twenty-three opposed; and one group with eleven signatures opposed. *Id.*, p. 382. Joudeh then gave the Board his rebuttal, focusing on the access to the proposed project and safety issues and stressed the CUP applicant, Joudeh, would comply with any conditions attached by the Board. *Id.* Thereafter, the Board closed the public hearing and held deliberations. *Id.*

There is a strong presumption favoring the validity of the actions of zoning boards, which includes the application and interpretation of their own zoning ordinances. *Howard v. Canyon County Bd. of Comm’rs*, 128 Idaho 479, 480, 915 P.2d 709, 711 (1996). The Court defers to the Board’s interpretation and application of its zoning ordinance, unless such interpretation or application is capricious, arbitrary or discriminatory. *Rural Kootenai Organization, Inc. v. Board of Comm’rs*, 133 Idaho 833, 842, 993 P.2d 596, 605 (1999). Here, Joudeh has improperly framed his issue on appeal. “[T]heir denial of a CUP for Mr. Joudeh’s Project is ‘*not supported by substantial evidence on the record as a whole*,’ is arbitrary and capricious, and should be reversed.” Appellant’s Brief, p. 15, citing I.C. § 67-5279(3) (emphasis in original). What Joudeh has failed to do is demonstrate for the Court that the Board’s factual

determinations were clearly erroneous, not supported by substantial evidence on the record as a whole. It is without question that the evidence before the Board was conflicting, but, as correctly argued by the Board, the existence of such conflicting evidence certainly does not mandate that the Board find in favor of an appellant. See Brief of Respondents, p. 15.

Joudeh's argument seems to be that since the hearing examiner Zanetti recommended approval to the Board, the Board should have approved the application. That argument would divest the Board of its discretion and render it a rubber stamp.

Joudeh comes close to arguing that if you make application, you should get it approved. At oral argument, Joudeh's counsel argued:

...to affirm that September 2009 order would be to hold that property owners in this county can purchase property, do research, prepare a site, craft a project in conformance with the ordinances in place at that time, and then on their application be denied because they don't fit the neighborhood.

This Court struggles to understand why Joudeh would make that "argument", because the Board is *required* to take the impact on neighboring property into account, the Board is *required* to determine whether the conditional use will adversely impact the public interest, and the Board is *required* to determine whether the conditional use will be in general conformance with the comprehensive plan. Kootenai County Ordinance No. 401, § 9-23-1(A) and (B). In turn, most of the comprehensive plan directly involves concerns about public interest, and some of the provision about neighbors in specific. (see Goal 9, 10, 25, 26). Finally, impact on neighboring property was only one of several factors mentioned by the Board.

Regarding "general conformance with the comprehensive plan", Joudeh makes sort of a "mathematical" argument that:

Out of the Comprehensive Plan's twenty-seven (27) "Goals," the Commissioners' conclusion the Mr. Joudeh's Project is not in "*general conformance with the Comprehensive Plan*" is based only on four (4) of those Goals, or less than 15%!

Appellant's Reply, p. 6. The words "general conformance" do not equate to "preponderance". On any given application there could be any *one* of the twenty-seven goals, of which, if there were sufficient problems, could result in a denial of that application.

Joudeh's counsel argues the Board has at all times had their collective mind made up, and are now simply finding additional facts to back up their first decision. First, Joudeh has absolutely no *evidence* to support that argument. Second, the Board is damned either way under Joudeh's logic. Joudeh initially wanted remand, and this Court gave it to him. Joudeh now objects to the Board finding additional facts that go against Joudeh on remand. That being the case, what good would ever be accomplished by the remand that Joudeh sought in the first place? Is Joudeh arguing remand is for establishing additional facts but only when those additional facts cut in his favor? Ironically, it is yet *another* remand that Joudeh now requests. Appellant's Reply, p. 1. At oral argument on May 5, 2010, Joudeh's counsel argued:

Now, what Mr. Joudeh contends is that what really happened here was a decision was made that this project or a storage project doesn't fit within the neighborhood, and everything else flowed from there. Decisions were created and reasons were given and justified, and if that's what happened, if what Mr. – excuse me, Commissioner Tondee said is what happened, on that alone this order must be remanded to be considered in accordance with Idaho law because there is no discretion for the Commissioners to approve or deny a project based on what fits within the neighborhood, so the first position would be right there this review ends and it should be remanded based on that alone.

Joudeh argues that the Board "completely ignores Mr. Joudeh's property rights", "at no point in the Commissioners' analysis of Goal 9 do they even attempt to balance

Mr. Joudeh's rights." Appellant's Reply, pp. 6, 7. At oral argument on May 5, 2010, counsel for Joudeh repeated this "balancing" argument several times. The problem is that "balancing" argument finds no support in the law. A little digging shows the genesis of Joudeh's "balancing" argument is from a quote from hearing officer Zanetti that "the land use rights of both the applicant and the surrounding property owners" are protected by Goal 9." *Id.*, p. 6, citing R. p. 621. The hearing officer's statement about the result of the application of Goal 9, cannot be elevated to the status of *law*. It is understandable why Joudeh may wish to have this Court focus on "balancing", given the actual *law* this Court must hold itself to on appeal and the difficult burden that *law* creates for Joudeh. As set forth above, that *law* begins statutorily: "The Court does not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." I.C. § 67-5279(1). Case law further clarifies: "The Court defers to the agency's findings of fact unless they are clearly erroneous", "The agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by evidence in the record", "There is a strong presumption favoring the validity of the actions of zoning boards, which includes the application and interpretation of their own zoning ordinances", and "The Court defers to the Board's interpretation and application of its zoning ordinance, unless such interpretation or application is capricious, arbitrary or discriminatory." (citations omitted but set forth above). Joudeh's "balancing" is simply not the legal standard. "Substantial evidence" *is* the standard. The Board's decision is supported by substantial evidence in this case.

2. The Ordinance is Valid and Does Not Provide Unfettered Discretion to the Commissioners.

Alternatively, Joudeh argues the Board did not have the authority to arbitrarily or

subjectively decide what fits within the neighborhood at issue because such a determination does not provide a landowner with codified standards to be reviewed and to which the landowner could conform in order to seek approval of an application.

Appellant's Brief, p. 15. Joudeh states:

[S]tandards for a CUP application in Kootenai County, as set forth above, do not permit any discretion for determining who or what so-called "fits within the neighborhood." But, to the extent the County is successful in asserting that the Commissioners' arbitrary ruling is supported by law, such a sweeping grant of discretion would be an invalid delegation of legislative powers, rendering the Zoning Ordinance unenforceable.

Appellant's Brief, p. 16. In response, the Board reiterates the applicable standards found in I.C. § 67-6512(a) and the Kootenai County Zoning Ordinance, which require special use permits, including CUPs, to conform with a jurisdiction's Comprehensive Plan and to not adversely affect the public interest. Brief of Respondents, p. 19. The Board correctly argues:

The Board did not simply state that the proposal did not fit within the neighborhood. Rather, the Board also articulated why it believed this to be the case, and also expressed other reasons for denial of the application. See S.A.R. p. 386-90; Tr. P. 215-23. It engaged in a three-page comprehensive plan analysis to determine whether the proposal was "in general conformance with" and "not in conflict with" the Comprehensive Plan. S.A.R. p. 386-88... the legal standards contained in I.C. § 67-6512(a) and Section 9-23-1(B) of the Zoning Ordinance are not so vague as to constitute a violation of the Due Process Clauses of the Fourteenth Amendment or of Article I, Section 13 of the Idaho Constitution.

Brief of Respondents, p. 19. In response to Joudeh's argument, Intervenor's state only, "[t]he Rural Zone prohibits commercial and the BOCC found the Jordan proposal commercial with an abundance of supporting evidence. The Rural Zone is valid." Brief of Respondent/Intervenor, p. 15. Joudeh responds he is not afforded his Constitutionally-provided due process rights where the Board's discretion is not curtailed by codified standards and, even if the Comprehensive Plan Goals analysis had been

properly performed by the Board, the question of what “affects the public interest” requires remand. Appellant’s Reply to Respondent and Intervenor’s Briefs, p. 10. Joudeh argues the Board only considered the effect upon neighboring property owners and “there is no limit to the discretion which the Commissioners have abused.” *Id.*

The constitutionality of a statute is a question of law over which reviewing courts exercise free review. *Lochsa Falls, LLC v. State*, 147 Idaho 232, 237, 207 P.3d 963, 968 (2009) (quoting *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007)).

There is a presumption in favor of the constitutionality of the challenged statute or regulation, and the burden of establishing that the statute or regulation is unconstitutional rests upon the challengers. An appellate court is obligated to seek an interpretation of a statute that upholds its constitutionality. The judicial power to declare legislative action unconstitutional should be exercised only in clear cases.

Id. The void-for-vagueness doctrine is premised on the due process clause of the Fourteenth Amendment to the United States Constitution; it is a basic principle of due process that an enactment is void where its prohibitions are not clearly defined. *State v. Korsen*, 138 Idaho 706, 711, 69 P.3d 126, 131 (2003). (citing *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294 (1972)). A statute is void for vagueness where it “either forbids or requires the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning.” *Haw v. Idaho State Bd. Of Med.*, 140 Idaho 152, 157, 90 P.3d 902, 907 (2004). Civil statutes will not be held void for vagueness where they can be given “any practical interpretation” or where persons of common intelligence “can derive a core meaning” from them. *MDS Inv., LLC v. State*, 138 Idaho 456, 461, 65 P.3d 197, 202 (2003). In a civil context, a statute is unconstitutionally vague where persons of ordinary intelligence must guess at the statute’s meaning. *Terrazas v. Blaine County ex rel. Bd. Of Com’rs*, 147 Idaho 193,

203, 207 P.3d 169, 179 (2009). Greater tolerance is permitted when addressing a civil statute as opposed to a criminal statute under the doctrine. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 716, 791 P.2d 1285, 1295 (1990).

Here, there is no question that the ordinance and statute at issue are civil in nature. As such, as long as the requirements in I.C. § 67-6512(a) and the Kootenai County Zoning Ordinance can be given “any practical interpretation” or where persons of common intelligence “can derive a core meaning” from them, they will be upheld. *MDS Inv., LLC v. State*, 138 Idaho 456, 461, 65 P.3d 197, 202. The Zoning Ordinance requires four things to approve an application for a CUP: (1) a written application indicating the chapter under which the CUP is sought and the grounds on which it is requested; (2) notice shall be provided for applications for Special Notice Permits; (3) a public hearing shall be held; and (4) the determination must have been made the CUP will not affect the public interest adversely and will be in general conformance with the Comprehensive Plan. Kootenai County Ordinance No. 401, § 9-23-1(B). Idaho Code § 67-6512(a) states:

A special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms of the ordinance, subject to conditions pursuant to specific provisions of the ordinance, subject to the availability of political subdivisions, including school districts, to provide services for the proposed use, and when it is not in conflict with the [Comprehensive] plan.

Regarding the Zoning Ordinance, it appears from his briefing Joudeh only takes issue with the fourth portion (adverse effect upon public interest and conformance with the Comprehensive Plan). At oral argument, counsel for Joudeh made it clear that it was both aspects of that fourth requirement (that the CUP *will not affect the public interest adversely and will be in general conformance with the Comprehensive Plan*) which Joudeh claims were not met. As to the LLUPA section on special use permits,

conditions, and procedures, Joudeh appears to only take issue with the Board's determination of his project's conflict with the Comprehensive Plan. As discussed above, the Board's discretionary findings as to conformance or conflict with the General Plan need only be supported by "relevant evidence which a reasonable mind might accept to support a conclusion." *Lamar Corp.*, 133 Idaho 36, 43, 981 P.2d 1146, 1153. There is no requirement that the Board rely on only that evidence in the record which is uncontradicted, or even that the Board reach the conclusion which a reviewing Court would reach based on the same evidence. See *Curtis v. M.H. King Co.*, 142 Idaho 383, 383, 128 P.3d 920, 922 (2005) (Supreme Court will not consider whether it would have drawn a different conclusion from the evidence presented to the Industrial Commission.); *Sandpoint Independent Highway Dist. V. Board of County Com'rs*, 138 Idaho 887, 891, 71 P.3d 1034, 1038 (2003) ("When conflicting evidence, all of which is supported by substantial and competent evidence, is presented, the findings of the commissioners must be sustained on appeal even if this Court would have reached a different factual conclusion.") Here, clearly, the Board analyzed each of the Goals of the Comprehensive Plan and found the proposed project would not be in conformance with the Goals affecting private property rights and land use (Goal 9), transportation (Goal 14), and community design (Goals 26 and 27). Supplemental Agency Record, pp. 386-388. The Board reached these conclusions based on testimony and other evidence presented both in favor of and in opposition to the proposed project.

The same conclusion must be reached with regard to whether the Board correctly found an adverse effect upon the public interest would result if the application were granted. Again, the Board reached its decision in this respect after considering testimony and other evidence presented at public hearing. *Id.*, pp. 379-382. Even if this

Court were to disagree with the factual conclusions reached by the Board, it would still not be able to overturn decisions supported by evidence in the record. Ultimately, the Zoning Ordinance and LLUPA do not forbid or require an act in terms so vague that people of common intelligence must necessarily guess at its meaning in order to successfully apply for CUP. Joudeh has failed to demonstrate that persons of common intelligence cannot derive their core meaning or that they could not be given *any* practical interpretation.

B. Kootenai County Building and Planning Department Director's Denial of Joudeh's Condominium Plat Application Cannot be Reviewed by This Court Because Joudeh Failed to Exhaust His Administrative Remedies.

Joudeh argues that, because the Board improperly denied his CUP, and thereafter the Building and Planning Department's Director relied upon the Board's erroneous denial and denied his condominium plat application, this matter must be remanded to the Building and Planning Department (Department). Appellant's Brief, p. 17. Joudeh also argues, regardless of the CUP application's outcome, the Department had a duty to approve his application in light of I.C. § 55-1523 and his compliance with the Kootenai County Zoning Ordinance. *Id.*, p. 18. The Board responds Joudeh failed to exhaust all administrative remedies by not filing an appeal with the Department's Director before seeking judicial review. Brief of Respondents, p. 21, citing Kootenai County Code, § 10-2-7(D)(8). The Board argues it did not waive the exhaustion doctrine argument when it stipulated to consolidation of this matter with judicial review of the CUP denial. *Id.*, pp. 21-22. The Board also argues the condominium plat application was properly denied because a CUP must be obtained for the use specified; a mini-storage unit is a conditional use in the rural zone at issue. *Id.*, p. 22. The Board states I.C. § 55-1527 must be read in conjunction with I.C. § 55-1527, resulting in local

and state laws relating to plats, recording, subdivisions and zoning applying to condominium plat applications. *Id.*, p. 23. The Intervenor concurs with the Board and state no condominium plat application could be granted after denial of the CUP application. Brief of Respondent/Intervenor, p. 16.

Joudeh replies that his application was never determined to comply with the requirements of the rural zone.

The B&P Department's scope of review is limited to whether or not the proposed Project "complies" with the requirements of the underlying zone. (See K.C. Ordinance No. 415, Section 6). The B&P Department completely failed to do any such analysis, which is undisputed on review, and its Order of Denial should be remanded.

Appellant's Reply to Respondent and Intervenor's Briefs, p. 11. Joudeh also urges the Court to review the Department's denial directly because the interest of justice so require and remand back to the Department would be futile as the Board is the very political body which twice rejected Joudeh's applications. *Id.*, pp. 11-12.

Pursuit of statutory administrative remedies is a condition precedent to judicial review. *Park v. Banbury*, 143 Idaho 576, 578, 149 P.3d 851, 853 (2006), citing *Fairway Dev. Co. v. Bannock County*, 119 Idaho 121, 124, 804 P.2d 294, 297 (1990). "The doctrine of exhaustion generally requires that the case run the full gamut of administrative proceedings before an application for judicial relief may be considered." *Regan v. Kootenai County*, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004). In *Park*, the Idaho Supreme Court determined the District Court lacked subject-matter jurisdiction over appellant's claims due to the failure to exhaust administrative remedies. 143 Idaho 576, 582, 149 P.3d 851, 857. An exception to the exhaustion doctrine exists where interest of justice so requires or where the agency does no act within its authority. *Bohemian Breweries v. Koehler*, 80 Idaho 438, 446, 332 P.2d 875, 880 (1958). Justice

would so require, for example, where exhaustion would be futile. *Arnzen v. State*, 123 Idaho 899, 907, 854 P.2d 242, 250 (1993).

Joudeh's argument that it is appropriate for this Court to now remand to the Building and Planning Department must fail. The requirement that Joudeh secure a CUP *before* a condominium plat application is approved can be analogized to a condition precedent. The Idaho Code does not permit a refusal of acceptance or approval of a plat solely because condominiums would be thereby created. I.C. § 55-1523. But, as noted by the Board, zoning laws in general must be applied when not inconsistent with the provisions or purposes of the Condominium Property Act. I.C. § 55-1527. Joudeh has not pointed the Court to any portion of the Condominium Property Act which would be inconsistent with the requirement that all requirements in the underlying zone, as set forth in the Kootenai County Code, must be complied with. "Joudeh's condo plat application was not denied on the basis that it was a condominium. Instead, it was denied because the Board previously denied the underlying CUP..." Brief of Respondents, p. 23. Joudeh has not demonstrated that the condominium plat application was denied despite his having complied "with all requirements of the underlying zone as set forth in the Kootenai County zoning ordinance." Kootenai County Code, § 10-2-7(B)(3)(a). It follows that remand to the Board on this matter would not be futile, but would be moot. This is due to the fact that the condition precedent to the condominium plat application, procurement of a CUP in the instant case, has not been met. Thus, no review by the Board of the Department's denial would grant Joudeh the relief he seeks.

Because neither the Board nor the Department acted in violation of I.C. § 67-5279 in denying Joudeh's applications, this Court need not determine whether any

substantial right of Joudeh's was also violated. It should be noted that Joudeh's right to develop his property pursuant to the requirements set forth in the Kootenai County Zoning Ordinance have not been impacted; he simply needs to comply with those requirements. As mentioned in *dicta* in *Noble v. Kootenai County*, 2010 WL 1241522, at *7 (Idaho, April 1, 2010), applicants do not have any right to approval of an application which does not meet the requirements of governing ordinances.

C. Attorney Fees and Costs

Joudeh seeks attorney fees under I.C. § 12-117. He states both denials at issue support an award of fees because of the Boards' complete disregard for the plain wording of the applicable statutes and ordinances. Appellant's Brief, p. 20. Because Joudeh is not the prevailing party he is not entitled to the fees he seeks.

However, it cannot be said that Joudeh acted frivolously or without a reasonable basis in fact or law so as to justify an award of fees and costs against him as sought by Intervenor. See *Cowan v. Bd. Of Comm'rs*, 143 Idaho 501, 148 P.3d 1247 (2006) (Where a landowner was not the prevailing party, but also did not act without a reasonable basis, neither the board of county commissioners nor the landowner who challenged the issuance of a permit to build a subdivision was entitled to attorney's fees).

This Court certainly understands and appreciates Intervenor's frustration. However, certain actions of Joudeh or his attorneys are really not before this Court. The fact that Joudeh's attorneys drafted an eighteen page Complaint to be filed in Federal District Court and sent a copy to Intervenor and the Board might be a questionable tactic, but really is of no import in determining if Joudeh acted without a reasonable basis.

It is troubling to this Court that the focus of Joudeh's course of litigation has changed. The focus of Joudeh before this Court the first time was the alleged racism and conspiratorial conduct of the Board, which at the time consisted of unsubstantiated accusations by Joudeh or at least his attorneys. This Court allowed remand to let Joudeh go back to the Board and explore whether there was any evidence to support those claims. Ruling on Motion to Present Additional Evidence, July 1, 2009, p. 1, L. 17- p. 2, L. 24. On remand, no "additional evidence" was presented by Joudeh to the Board. Joudeh has apparently found no additional evidence to support his claims of racism and conspiracy. Those issues were not argued to the Board and those issues are not now argued by Joudeh to this Court on his second trip to this Court. The only mention by Joudeh in his briefing is by historically noting the fact that his claims of racism and conspiracy were made on the first go around. Appellant's Brief, pp. 3-4.

On remand, the Board more thoroughly and in more detail, covered the reasons for its decision. In the instant appeal, the Board made seventeen findings of fact, addressed each goal of the Comprehensive Plan, provided eight paragraphs of analysis and again reached the conclusion: (1) the application was not in general conformance with the Comprehensive Plan, and (2) the application would adversely affect the public interest. Supplemental Agency Record, p. 390. While racism and conspiracy were not discussed (because Joudeh did not raise the issue this time around), the detail of the Board's decision improved.

The fact that the Board's decision improved the second time around makes Joudeh's burden more difficult this second occasion before *this* Court on this appeal. However, even though Joudeh has in rather convincing fashion failed in meeting that burden in his appeal, this Court cannot find that Joudeh has acted without a reasonable

basis. *Cowan v. Bd. Of Comm'rs*, 143 Idaho 501, 148 P.3d 1247 (2006).

III. CONCLUSION.

This Court affirms the decision of the Board's and the Building and Planning Department, denies Joudeh's Motion to Remand, and denies attorney's fees to all parties.

IT IS HEREBY ORDERED the decision of the Board is AFFIRMED for the reasons set forth above.

IT IS FURTHER ORDERED this Court lacks jurisdiction to review the decision of the Building and Planning Department because Joudeh has failed to exhaust his administrative remedies. Accordingly, that decision remains undisturbed.

IT IS FURTHER ORDERED Joudeh's Motion to Remand is DENIED.

IT IS FURTHER ORDERED Joudeh's request for attorney fees is DENIED.

IT IS FURTHER ORDERED the Intervenor's request for attorney fees is DENIED.

Entered this 10th day of May, 2010.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of May, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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