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

MICHAEL BUDIG, TODD BRINKMEYER, JOHN STOCKTON, and **PRIEST LAKE CABIN OWNERS' ASSOCIATION, INC.**, an Idaho non-profit corporation Petitioners, v. **BONNER COUNTY BOARD OF COMMISSIONERS**, Respondent, **TRICORE INVESTMENT, LLC.**, Intervenor.	Case Nos. CV09-22-1232 CV09-22-1717 **MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING** **I.A.R. 42(b)**

COMES NOW, Respondent Bonner County, Idaho, by and through Deputy Prosecuting Attorney William S. Wilson, and hereby submits its Memorandum in Support of Petition for Rehearing pursuant to Idaho Appellate Rule 42(b).

I. INTRODUCTION

This litigation springs from Bonner County's administrative approval of two Minor Land Divisions (MLDs) near the south end of Priest Lake in Bonner County, Idaho. A MLD is a division land resulting in no more than four (4) lots. Bonner County Revised Code (BCRC) § 12-611. From the outset, the County has maintained that Intervenors used a loophole to secure the approvals in question, and as a result, the County had no interest is substantively defending the underlying administrative decisions. However, the basis for the Court's recent Memorandum Decision and Order on Petitions for Judicial Review (dated July 7, 2023) calls into question the entire framework upon which the County approves MLDs and other administrative land divisions. This development obligated the County to submit the instant petition and supporting authority to provide the Court with a perspective which it may not have considered prior to the issuance of its decision, or at the very least clarify the Court's rationale so that the County can faithfully comply with the Court's directives.

In essence, the Court remanded the MLDs in question because the County did not create written findings of fact and conclusions of law sufficient to satisfy the requirements set forth in the Local Land Use Planning Act (LLUPA). If MLDs were subject to LLUPA, the County would take no issue with this line of reasoning. However, the County created a statutory framework to specifically exclude MLDs from LLUPA review. As such, the County now contends that the Court should permit an additional hearing to allow the Parties an opportunity to explore this issue.

II. FACTUAL AND PROCEDURAL HISTORY

Intervenors submitted applications for two contiguous MLDs in August of 2021. (R. No. 1, p. 1); (R. No. 2, p. 1).[1] At the time, the applicable provision of the Bonner County Revised Code allowed such divisions to occur on adjacent lots or parcels, and both applications were grudgingly deemed legal following administrative review. Following the procedure set forth at BCRC § 12-661, planning staff recommended approval to the Bonner County Board of Commissioners and the files were approved on the consent agenda at regularly scheduled business meetings dated June 21, 2022, and October 11, 2022, respectively. (R. No. 1, p. 91); (R. No. 2, p. 66). Neither file was the subject of a noticed public hearing.

Unhappy with this result, Petitioners sought judicial review of both decisions, citing a litany of potential errors. Before briefing began on the merits, Petitioners sought to have both cases tried in unison on the basis of judicial economy. The County chose not to actively participate in that hearing, but Intervenor objected. Following briefing and oral argument, the Court took the matter under advisement, then issued a decision remanding both cases back to the Board for additional review. In particular, the Court found that the Board had failed to produce written findings of fact and conclusions of law as set forth in LLUPA, and the resulting decisions were therefore rendered invalid.

This left the County in a difficult position. The County has no desire to advocate for approval of the MLDs in question. Those files were only approved

[1] This petition addresses two underlying cases with two separate records. The County will reference the record for MLD0143-21 as R. No. 1 and the record for MLD0144-21 as R. No. 2, respectively.

because Intervenor exploited a loophole (which was subsequently corrected after the fact). However, if left undisturbed, the rationale for the Court's decision will have far-reaching impacts on the County's ability to review and approve not just MLDs, but other administratively approved land divisions as well. As such, the County now seeks permission to present the Court with argument and authority suggesting that MLDs are not subject to LLUPA review, and consequently do not require the Board to produce written findings of fact and conclusions of law.

III. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 84 governs administrative appeals to the District Court. IRCP 84(a)(1). That rule states in relevant part:

> (r) Other Procedural Rules. Any procedure for judicial review not specified or covered by these rules must be in accordance with the appropriate rule of the Idaho Appellate Rules to the extent not contrary to this Rule 84.

Following that authority, Idaho Appellate Rule 42 sets forth the procedure to seek rehearing after an initial decision, stating in part:

> (a) Time for Filing--Filing Fee. Petitions for rehearing must be physically filed with the Clerk of the Supreme Court, together with the filing fee, within 21 days after the filing date of the Court's opinion, and must be served upon all parties to the appeal or proceeding. If the opinion is modified, other than to correct a clerical error, an aggrieved party may physically file another petition for rehearing within 21 days from the date of the modified opinion and serve all adverse parties in the appeal or proceeding. No response to any petition for rehearing shall be made except upon direction of the Court.
>
> (b) Briefs on the Petition. A brief or memorandum in support of the petition must be filed within 14 days of the filing date of the petition and shall be typewritten on letter size paper. If the appeal was expedited pursuant to Rule 12.2, the brief in support of the petition shall be filed with the petition or the petition will be summarily dismissed. The original petition and brief shall be filed with the Clerk of the Supreme Court. No copies are required.

> (c) Oral Argument on Petition for Rehearing. There shall be no oral argument upon the petition for rehearing of an appeal or proceeding unless ordered by the Supreme Court.

No specific grounds for granting or denying a petition for rehearing are stated in I.A.R. 42. However, a petition should have good grounds for rehearing, such as (1) a perceived error in or omission from the facts relied upon by the Court, (2) misapplication of a particular authority to the facts, (3) the omission of discussion of a particular issue on appeal that the petitioner deems crucial to further proceedings, or (4) the discussion by the Court of an issue not necessarily raised or briefed by the parties. Excerpt from the Idaho Appellate Handbook, 63 Advocate 28, 29 (2020).[2]

IV. ARGUMENT

a. Judicial review under LLUPA is limited to a discrete list of land use applications, including subdivisions.

Idaho Code § 67-6521 defines an "affected person" for standing purposes as:

> one having a bona fide interest in real property which may be adversely affected by:
>
> (i) The approval, denial or failure to act upon an application for a subdivision, variance, special use permit and such other similar applications required or authorized pursuant to this chapter;
>
> (ii) The approval of an ordinance first establishing a zoning district upon annexation or the approval or denial of an application to change the zoning district applicable to

[2] This is admittedly non-binding, persuasive authority. However, research has not revealed more reliable authority on the topic, and the bases offered for granting a petition may be helpful for the Court as it approaches this issue.

specific parcels or sites pursuant to section 67-6511, Idaho Code; or

(iii) An approval or denial of an application for conditional rezoning pursuant to section 67-6511A, Idaho Code.

(Emphasis added). Only an affected person may seek judicial review under LLUPA. I.C. § 67-6521(1)(d). Notably, a subdivision is explicitly identified as one of the applications which may be challenged under LLUPA.

b. LLUPA compels each county to adopt a subdivision ordinance and specifically incorporates Idaho Code § 50-1301, which empowers the County to create its own definition of the term "subdivision."

Idaho Code 67-6513 compels each county to adopt an ordinance "for standards and for the processing of applications for subdivision permits under sections 50-1301 through 50-1329, Idaho Code." Idaho Code § 50-1301 defines a "subdivision" as:

> A tract of land divided into five (5) or more lots, parcels, or sites for the purpose of sale or building development, whether immediate or future; provided that this definition shall not include a bona fide division or partition of agricultural land for agricultural purposes. A bona fide division or partition of agricultural land for agricultural purposes shall mean the division of land into lots, all of which are five (5) acres or larger and maintained as agricultural lands. Cities or counties may adopt their own definition of subdivision in lieu of this definition(.)

(Emphasis added). The importance of this definition can hardly be overstated. It stands for the idea that not all divisions of land must be considered a "subdivision." Instead, it holds that even under the default definition, a division of land resulting in less than five (5) lots is not a subdivision, and by extension, not subject to appeal under LLUPA. Moreover, it even empowers counties to

adopt their own definition if they so choose. Coincidentally, Bonner County has done just that.

c. <u>The County has specifically excluded MLDs from its definition of "subdivision."</u>

The County utilized the authority set forth above to define a subdivision as "any division of land into eleven (11) or more lots or parcels or divisions of those parcels that do not qualify for a Minor Land Division or Short Plat." BCRC § 12-611. Moreover, that ordinance also states, "[t]he term 'subdivision' shall not include: …. I. Minor Land Divisions." This is crucially important, as it demonstrates a deliberate effort to carve MLDs out of the ordinary subdivision review process, including judicial review under LLUPA.[3]

d. <u>If MLDs are not subdivisions, they are not subject to challenge under LLUPA, and the Board of Commissioners is not obligated to draft written findings of fact and conclusions of law when reviewing them.</u>

The Court's rationale for remand is rooted in Idaho Code § 67-6535(2), which states, in pertinent part:

> The approval or denial of any application <u>required or authorized pursuant to this chapter</u> 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.

[3] This also creates a dilemma for the County if it must comply with the Court's order as written. The County followed its procedure for the review of MLDs in this matter faithfully; it does not have another one. Since the County has no codified procedure by which it can produce written findings for an MLD sufficient for purposes of LLUPA review, it would have no way to comply with the Court's directive and the applications would be *de facto* denied.

(Emphasis added). If MLDs were subject to review under LLUPA, they would certainly fail to meet this standard. Like other administratively reviewed applications, the Board has limited involvement in their review, and largely delegates that process to the Planning Department. However, since MLDs are not reviewable under LLUPA, that requirement does not apply to them.

e. Petitioners should have sought relief via an action for declaratory judgment instead of judicial review under LLUPA.

The rationale presented herein is relatively esoteric and, as best the County can tell, a matter of first impression in Idaho. The closest analog for comparative analysis is Arnold v. City of Stanley, 162 Idaho 115 (2017). In that case, property owners sought judicial review after their application for a building permit was denied by the City of Stanley. Id. at 115-116. Examining the language previously cited in Idaho Code § 67-6521(1)(a), the Court paid particular attention to the catch-all phrase, "and such other similar applications required or authorized pursuant to this chapter," but ultimately held that building permits are not subject to LLUPA review. Id. at 117. This Court should adopt a similar finding for MLDs.

While MLDs are similar to subdivisions in that they effectuate a division of land, they are not mentioned anywhere in LLUPA. To the contrary, LLUPA incorporates the definition of "subdivision" at Idaho Code § 50-1301 which explicitly allows counties to carve out their own definition of that term. Construing the statutes *in pari materia*, their plain meaning suggests that MLDs (or any other county-created division of land smaller than a subdivision, for that matter), are not properly reviewed under LLUPA. Of course, this should not be taken to mean that Petitioners lack a method to challenge the applications in

question; they could have sought declaratory relief under Idaho Code §§ 10-1201 et seq. However, that is an entirely different kind of litigation in which the County would not be compelled to produce written findings of fact and law as it otherwise would under LLUPA.

f. The Court's decision has important public policy ramifications which may not be obvious at first glance.

If left unaltered, the Court's current order will have far-reaching impacts on the County's ability to administer its land use code. In particular, if the Court rejects the distinction between a subdivision and an MLD because they are both divisions of land, it will throw into question the County's review process for another important tool: family divisions. Like most other jurisdictions, Bonner County offers a process by which family members may divide and gift their property to one another. See BCRC § 12-612(C). Like MLDs, a family division may create a maximum of four (4) parcels. Id. Also like MLDs, all the substantive review for family divisions occurs in the Bonner County Planning Department and does not require written findings by the Board of Commissioners. Without a rehearing on this matter, the County will have to implement a moratorium not just on MLDs, but on family divisions as well. This will create great hardship for the residents of Bonner County which the Court may wish to avoid, either by granting the petition for rehearing, or at the very least addressing the scope of its current order.

V. CONCLUSION

Based on the foregoing, Bonner County respectfully requests that its Petition for Rehearing be granted. This would allow the Petitioners and Intervenor the opportunity to subject the County's theory of the case to scrutiny

and debate, thereby providing the Court with the analysis necessary to either uphold or amend its current order in the best manner possible.

DATED: 8/2/2023

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CERTIFICATE OF SERVICE

I hereby certify that on this 8/2/2023, I served a true and correct copy of the foregoing via icourt File and Serve to the following:

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