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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.

Case No.: CV09-22-1232
Case No.: CV09-22-1717

**MEMORANDUM IN SUPPORT OF
INTERVENOR, TRICORE
INVESTMENT, LLC'S MOTION
FOR RECONSIDERATION/
PETITION FOR REHEARING**

TRICORE INVESTMENT, LLC

Intervenor.

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**MEMORANDUM IN SUPPORT OF INTERVENOR, TRICORE INVESTMENT,
LLC'S MOTION FOR RECONSIDERATION/PETITION FOR REHEARING- 1**

COMES NOW BRENT C. FEATHERSTON of FEATHERSTON LAW FIRM CHTD. for and on behalf of the Intervenor, Tricore Investment, LLC ("Tricore") and hereby submits the following Memorandum in Support of Motion for Reconsideration/Petition for Rehearing, as follows:

I. PREFACE

Tricore, disagrees with the County's characterization of Tricore's application and securing of Minor Land Divisions of the two (2) parcels as "taking advantage of a loophole". As discussed, Tricore, as an owner of real property in Bonner county, has certain legal and real property rights granted by the County's codes. Such entitlements vest to Tricore at the time of them filing applications for Minor Land Division under the then existing county codes, even if said "loophole" is subsequently modified. South Fork Coalition v. Board of Commissioners of Bonneville County, 117 Idaho 857, 792 P.2d 882 (1990). Further, the laws in effect at the time of Tricore's application for the Minor Land Divisions are "presumed valid". Howard v. Canyon County Board of Commissioners, 128 Idaho 479, 480, 915 P.2d 709, 710 (1996).

Otherwise, Tricore joins and incorporates by reference the arguments, reasoning and citations to legal authority in the County's Petition for Rehearing.

II. STATEMENT OF FACTS

These cases concern two (2) Petitions for Judicial Review from the Bonner County Board of Commissioners' ("BOCC") approval of minor land divisions and the application entitled MLD0143-21 and MLD0144-21.



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MLD0143 application was filed August 9, 2021, seeking the creation of four (4) lots with proposed acreage of 5.01 acres to 5.19 acres each. MLD0143-21 R. p. 2.

MLD0144 application was filed August 9, 2021, and proposed the creation of four (4) lots of five (5) acres to six (6) acres each. MLD0144-21 R. p.2.

Bonner County code defines a “Subdivision” as the division of land into eleven (11) or more lots, parcels or divisions of those parcels that “do not qualify for a Minor Land Division”. BCRC 12-611. The county code further provides that a Minor Land Division is not considered a subdivision and provides for administrative review for recommendation of approval by department director. The Directors’ approval is ministerial act upon review and upon recommendation of the director, County Commissioner approval does not require public hearing, comment or commissioner’s findings of fact or conclusions. BCRC 12-611, 12-660 and, 12-661.

These two (2) separate applications were processed in due course pursuant to Bonner County Code and resulted in the County Planning Director’s conditional approval that was submitted for signature and approval of the BOCC at the next business meeting. In keeping with the MLD ordinance’s designation of this as an administrative or ministerial approval, the BOCC approved the MLD plats. Each application was processed separately with different timelines, but in each instance, the Petitioners filed a Request for Reconsideration, which, though not provided for under Bonner County Ordinance, the County and BOCC granted Petitioners this right. The BOCC thereafter approved the MLD’s as required by Bonner County Revised Code (“BCRC”) 12-661.



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These Petitions followed in Case No. CV09-22-1232 (“1232”) and CV09-22-1717 (“1717”).

In September, 2022, Intervenor appeared in Bonner County Case No. CV09-22-1232 (“1232”). The County’s Agency Record and Transcripts were prepared and filed November 29, 2022.

On December 19, 2022, Petitioners filed the Petition for Judicial Review under Bonner County Case No. CV09-22-1717 (“1717”) seeking review of MLD0144-21.

Petitioners then filed a Motion for Scheduling Order in Case 1717 as well as a Motion and Memorandum in Support of Motion to Consolidate and Motion to Augment which was set for hearing on January 20, 2023. The Court thereafter issued its Order Re Motions on February 3rd, which provided that Petitioners’ Motions to Consolidate, Motion to Augment and Motion for Scheduling Order be heard after the preparation of the Agency Record in CV09-22-1717 and that the parties would be permitted to file supplemental briefing on the “pending motions” within fourteen (14) days of the agency record being “finalized” in Case No. 1717. The Agency Record and Transcripts in Case 1717 were filed with the Court March 28, 2022.

The parties were unclear as to the Court’s definition of the record being “finalized” and entered a Stipulation for Order Re Clarification Re Order Regarding Motions that provided that the supplemental briefing would be filed within fourteen (14) days of the County filing the settled Agency Record and Transcript after a determination of any objections and with the Petitioners to obtain a hearing date on their Motions to Augment



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**MEMORANDUM IN SUPPORT OF INTERVENOR, TRICORE INVESTMENT,
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and Motion to Consolidate “no sooner than 30 days after the filing of the settled record”.

Order Re Clarification Re Order Regarding Motions signed March 14, 2023.

Thereafter, the matters came before the Court on the Petitioners Motion to Consolidate and Motion to Augment and Motion for Scheduling Order¹ for hearing on June 22nd at 1:30 p.m.

At no time did the court or Petitioners’ counsel give notice to the County or Tricore that the hearing on June 22nd was for the purpose of arguing the merits of the case or arguing anything other than the “pending motions” which were procedural requesting consolidation or augmenting of the record. In fact, the Petitioners third “motion” requested a scheduling order for future briefing and arguments on the merits which Tricore joined in.

The Court then issued its Memorandum Decision and Order on Petitions for Judicial Review issuing a ruling on the merits without providing the parties any opportunity to be heard other than on Petitioners pending Motion to Consolidate and Motion to Augment.

The sua sponte Memorandum Decision and Order on Petitions for Judicial Review deprived the Intervenor, Tricore Investments, LLC, of an opportunity to present argument to the Court. The Decision is both procedurally and substantively in error.

Tricore respectfully requests the Court reconsider or rehear the issues set forth in its Memorandum Decision and Order in a manner that allows the parties meaningful opportunity to submit briefing and oral argument as provided by rule and caselaw.

¹ Tricore joined the motion for scheduling order to establish briefing and oral argument schedule on the merits of the petitions. The Court heard arguments on the motions to consolidate and augment but gave no indication to counsel that it intended to issue a Memorandum Decision on the merits of the petitions without opportunity to be heard.

III. ARGUMENT

A. **Procedurally Tricore is entitled to an opportunity to be heard on the merits before the Court's Decision is rendered.**

Both Petitions cite to the authority of Rule 84. Rule 84 is explicit that upon filing and serving the petition, the record of the agency proceedings must be prepared. The Petitions for Judicial Review filed in both cases, 1232 and 1717, are then procedurally governed by I.R.C.P. Rule 84, that states:

(1) *Scope of Rule.* This rule addresses judicial review of the actions of state agencies or officers, or actions of a local government, its officers or its units when judicial review is expressly authorized by statute.

I.R.C.P. Rule 84(a)(2023)

Rule 84 further provides the agency record is to be lodged and objections or motions to augment the record are resolved before the record is settled and briefing or argument received by the Court. I.R.C.P. Rule 84 (f-1)(2023). This settling of the record was precisely the status of the case as of the June 22nd hearing on Petitioners' Motion to Augment and Motion to Consolidate the cases.

After settling of the agency record, the Court is required to set briefing and argument schedule (which Tricore joined Petitioners in requesting).

(p) Briefs and Memoranda. Briefs and memoranda must be in the form and arrangement and filed and served within the time provided by the Idaho Appellate Rules unless otherwise ordered by the district court; provided that such briefs may be typewritten and copies may be photo copies. Only one original signed brief need be filed with the court and copies must be served on all parties.

(q) Oral Argument. Oral argument may be heard by the district court after notice to the parties in the same manner as



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notice of hearing of a motion before a trial court under these rules.

I.R.C.P. Rule 84 (p) and (q) (2023)

Rule 84 provides the County and Tricore the right to submit briefing on the merits of the issues and to submit oral argument to the Court after notice in the same manner as notices of hearing of a motion before a trial court occurs under the Idaho Rules of Civil Procedure. That did not occur in this instance. The Court did not provide Tricore or the County any notice of its intent to issue a decision on the merits in advance of the June 22nd hearing. Further, the Decision was made without benefit of any briefing, argument or hearing. The June 22nd hearing was, according the Court's order, limited to the "pending motions" raised by Petitioners for consolidation or augmentation of the record and setting of a scheduling order.

"Clearly, notice and an opportunity to be heard are components of due process."
Jasso v. Camas Cnty., 264 P.3d 897, 903, 151 Idaho 790, 796 (2011).

Tricore and the County were provided no notice or opportunity to be heard before the Court's Memorandum Decision was issued remanding the case on the merits.

Tricore's due process right to be heard as provided by Rule 84 were not provided. Tricore seeks reconsideration or rehearing of the Court's Memorandum Decision because it was issued without such due process and under circumstances in which the agency record had not even been settled and no notice or opportunity was provided Tricore to present briefing or argument as mandated by Rule 84. Further, the decision is in error, as discussed below.



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At minimum, the Court must vacate its Memorandum Decision and provide Tricore this modicum of procedure and opportunity to be heard both on the merits of the County's "ministerial" approval of the MLD's and on the merits of Petitioner's claims upon settlement of the record on appeal in both cases, 1232 and 1717. As discussed below, a brief review of County Code makes clear that the Petitioners' arguments and the Court's Memorandum Decision misconstrues the applicable Bonner County code.

B. The Court erred in applying caselaw and LLUPA to the MLD

1. A Minor Land Division is an administrative or ministerial approval.

Bonner County adopted a minor land division ordinance which permits minor land division through a "ministerial review" so long as the land division results in four (4) or fewer lots from the original parcel. These Minor Land Divisions are reviewed by the County Planning Director for compliance with specified criterion, including easements or access to the property, depth to width ratio of lots, exclusion of submerged lands from lot size, and design criterion around natural hazards, and consideration of sanitary restrictions.

Upon completion of this review, an MLD plat is prepared by a licensed surveyor containing plat certifications, legal descriptions, approvals and comments as set forth in the provisions of BCRC 12-646, 12-647 and 12-649. This minor land division plat is submitted to the County Planning Department Director, who shall "*approve, conditionally approve or deny the application*" and upon the Director making such decision, "*the MLD Plat Map and the legal descriptions shall be signed as approved and transmitted to the Board of County Commissioners at the next business meeting*". BCRC 12-661(C) and (D).



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These provisions of BCRC 12-661 make no provision for county public hearing or for findings of fact or conclusions by the Board of County Commissioners. Furthermore, a Minor Land Division (“MLD”) is not a “subdivision” nor does it follow subdivision approval criteria including the holding of public hearings and the issuance of findings of fact and conclusions of law as provided for in other portions of Bonner County Revised Code or as discussed in the Local Land Use Planning Act (“LLUPA”).

2. LLUPA does not apply to the MLD process.

The Court’s Memorandum Decision reversed for failure to include findings and conclusions in the record and failure to comply with LLUPA. This is in error because an MLD approval is a ministerial or administrative act, not a subdivision or other process under LLUPA that requires quasi-judicial proceedings.

LLUPA defines what land use decisions are subject to the Act and define what is an “affected” person such as the Petitioners assert in this appeal. Affected persons under LLUPA are persons having a bona fide interest in real property that may be adversely affected by “subdivision, variance, special use permit and such other similar applications”, or the “{ approval of an ordinance”, or approval or denial of an “application for conditional rezoning”. Idaho Code § 67-6521 (2023) The ministerial or administrative approval of a Minor Land Division under Bonner County Code is not within the purview of the LLUPA.

3. Bonner County explicitly defines Subdivisions to exclude MLD’s.

BCRC 12-611, et seq. explicitly provides that subdivisions are defined as a division into eleven (11) or more lots or parcels or divisions of those parcels that do not qualify for minor land division or short plat. LLUPA explicitly empowers the County to adopt its



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own definition of Subdivisions that may require public hearing that the type of quasi-judicial findings the Court held were lacking in its Decision.

Each governing board shall provide, by ordinance adopted, amended, or repealed in accordance with the notice and hearing procedures provided under section 67-6509, Idaho Code, for standards and for the *processing of applications for subdivision permits* under sections 50-1301 through 50-1329, Idaho Code.

Idaho Code § 67-6513(2023)

This Court has frequently stated, and it is now beyond dispute, that a local legislative body has the right to enact zoning ordinances.

Dawson Enterprises, Inc. v. Blaine Cnty.,
567 P.2d 1257, 1262, 98 Idaho 506, 511 (Idaho, 1977)

The County's adoption of legislative adoption of ordinances has a "strong presumption of validity" that can "only be overcome by a clear showing that the ordinances as applied is confiscatory, arbitrary, unreasonable and capricious". *Id.*

Further, LLUPA's reference above to Idaho Code §50-1301 is instructive as it includes what is defined as a subdivision:

(18) Subdivision: 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;

Idaho Code § 50-1301 (2023)



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Bonner county's Minor Land Division Ordinance is clear and distinguishes it from subdivisions, as follows:

12-611: DEFINITIONS:

MINOR LAND DIVISION (MLD):	Any division of land into four (4) or fewer lots or parcels. Exception: those lots under common ownership, and limited in use to common open space or agricultural pursuits, need not be counted as a lot for purposes of determining applicable land division procedures only. . A minor land division shall not be used contiguously to avoid the regular subdivision process. (See BCRC 12-600 C.)
SHORT PLAT:	Any division of land into five (5) to ten (10) lots or parcels.
SUBDIVISION:	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. The term "subdivision" shall not include: A. The lease of agricultural lands for agriculture or agricultural
...	
	I. Minor Land Divisions. (Ord. 557, 11-10-2016; amd. Ord. 591, 10-23-2019; Ord. 634, 8-4-2021)

BCRC 12-611(2023)

So, while a subdivision application requires public hearing, an MLD process does not according to Bonner County Code. Despite this, the BOCC provided opportunity for public input on the Petitioner's request for reconsideration and then properly, and administratively, approve the MLD0143-21 and MLD0144-21 as required by Bonner County Code.

Tricore Investments, LLC had a vested right to avail itself of the legal entitlements permitted under Bonner County Code, that is the creation of up to four (4) lots divided from a single parcel so long as it met the design criteria and zoning lot size minimum of five (5) acres. Which it met. The Director approved after review for compliance and the County Commissioners then approved and signed the Petition, pursuant to BCRC 12-660



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and 12-661. No public hearing was required. No findings of fact or conclusions are mandated under those County Code provisions of this “ministerial” review and approval. Because it did not implicate the quasi-judicial decision making process that is required of subdivisions, the MLD’s were administratively approved and the Court’s decision remanding for such proceedings is in error. As the County code provides, Minor Land Divisions are designed to “expedite the process for those small divisions of lands that conform to the existing zone regulation”. BCRC 12-660.

The *sua sponte* Memorandum Decision and Order on the merits of the case deprived Tricore of an opportunity to be heard on the merits, which Tricore would have then advised the Court of the administrative, not quasi-judicial, nature of the MLD process. Had this opportunity been provided, Tricore is confident the Court would not have reversed and remanded as it did in its Decision.

C. The Court Erred in Reversing the County’s Ministerial Act.

“There is in Idaho, as in most states, a presumption of regularity in the performance of official duties by public officers.” Roper v. Elkhorn at Sun Valley, 605 P.2d 968, 971, 100 Idaho 790, 793 (1980); Citing: Farm Bureau Finance Co., Inc. v. Carney, 100 Idaho 745, 605 P.2d 509 (1980); Monson v. Boyd, 81 Idaho 575, 348 P.2d 93 (1959); G. Bell, Handbook of Evidence for the Idaho Lawyer, 240-41 (2d ed. 1972).

“It is also ordinarily true that an appeal does not lie from purely ministerial acts.” Common School Dist. No. 58 of Kootenai Cnty. v. Lunden, 233 P.2d 806, 809, 71 Idaho 486, 489 (Idaho 1951).



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The Court's Decision is based upon its finding that the County Commissioners erred in approving the MLD's without issuance of findings and conclusions and holds that such failure amounts to an arbitrary and capricious decision that affects the Petitioners' substantive rights. Memorandum Decision Pp. 9-13 Because the County approval of an MLD is a ministerial act from which there is no right to appeal- an argument Tricore intended to make when offered the opportunity to brief and argue the matter – it was error to reverse and remand.

The Court's Decision relies heavily upon the Idaho Supreme Court's decision in Jasso v. Camas County, a petition for judicial *review of a subdivision* due to inadequate findings and conclusions following a public hearing in which the county's decision under LLUPA implicates its role as a quasi-judicial body. The Court reversed the county commissioner's decision as conclusory. Jasso v. Camas Cnty., 264 P.3d 897, 903, 151 Idaho 790, 796 (Idaho, 2011)

Reliance on Jasso is misplaced because of the distinctly different procedures that apply to the County commissioners in a subdivision that requires the taking of evidence and issuance of findings of fact and conclusions, versus the purely administrative and ministerial act provided for in a Minor Land Division. A subdivision hearing places the agency in a quasi-judicial role of determining disputed facts and making conclusions of law, as opposed to the county's authority to make purely ministerial decisions which are not appealable.

"[Q]uasi-judicial activity [by the county] impacts specific individuals, interests or situations." Cowan v. Board of Com'rs of Fremont Cnty., 148 P.3d 1247, 1255, 143 Idaho



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501, 509 (2006); quoting: Burt v. City of Idaho Falls, 105 Idaho 65, 67, 665 P.2d 1075, 1077 (1983).

“Decisions of zoning agencies are quasi-judicial in nature”. Neighbors for a Healthy Gold Fork v. Valley Cnty., 176 P.3d 126, 132, 145 Idaho 121, 127 (Idaho,2007)[decision of county on application for planned unit development and conditional use permit]

A Minor Land Division is an administrative or ministerial approval process not a quasi-judicial process as established by county ordinance:

SUBCHAPTER 6.6 - MINOR LAND DIVISIONS

12-660: MINOR LAND DIVISION PROCEDURE:

A. Purpose: To ensure that land divisions comply with the applicable zoning regulations; to establish a ministerial review of all land divisions; and to expedite the process for those small divisions of land that conform to the existing zone regulations in which the division lies.

B. Procedure: Applications for a minor land division which contain four (4) or fewer contiguous lots under common ownership may be processed as "minor land divisions" as set forth in this section and section 12-661 of this subchapter; provided, that no planned unit development is requested to accommodate the proposed lot sizes. (Ord. 581, 10-24-2018)

BCRC 12-660

The processing of the MLD is an administrative review and approval process, not a quasi-judicial process, as stated in the code:

12-661: ADMINISTRATIVE REVIEW OF MINOR LAND DIVISION:

Upon receipt and review of completeness, the planning and zoning department shall:

- A. Review the MLD plat and supplemental information to determine compliance with these ordinances and prepare its report, which shall include comments received from other departments.
- B. Distribute the application to the county surveyor, the Assessor, the road and bridge department, GIS and floodplain administrator for review and compliance.
- C. *Based on the above findings, the planning director shall approve, conditionally approve, or deny* the application within thirty (30) days, from the date a completed application was stamped received.
- D. Once the director has made a recommendation, the MLD plat map and the legal descriptions shall be signed as approved and transmitted to the board of county commissioners at the next business meeting for review and possible approval.

(Ord. 557, 11-10-2016; amd. Ord. 591, 10-23-2019) BCRC 12-661

By definition, the director's review is limited to compliance with applicable criteria and county agency comment which is followed by the director's recommendation of approval or disapproval of the Minor Land Division applications referred to the County Commissioners. There is no quasi-judicial function and therefore no findings in such an administrative process. These ministerial acts are not quasi judicial requiring findings of fact and conclusions as held by the Court in its Memorandum Decision. The Court erred in issuing its Memorandum Decision based on the lack of findings and conclusions when the MLD approval is a "ministerial review" process that is approved by administrative act, rather than quasi-judicial proceedings.

The Court is asked to review its Memorandum Decision according to the applicable law and vacate the ruling. Further, as there exists no right of appeal from a purely



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administrative or ministerial decision, the Court is asked to dismiss both Petitions in cases 1232 and 1717.

IV. CONCLUSION

The Intervenor, Tricore, seeks rehearing or reconsideration of the Court's Memorandum Decision remanding the matters for further proceedings before the County. Tricore respectfully asserts that the Court's Decision was made without due process to it with a meaningful notice and opportunity to be heard on the matter. Further, the Decision was entered in contravention of I.R.C.P. Rule 84 and the related Idaho Appellate rules that govern these proceedings.

Lastly, on the merits of the Decision it is clear that Petitioners have no right of appeal or to petition for judicial review of the administrative or ministerial act of the County approving Tricore's MLD applications as represented in the two (2) cases designated here as Case #1232 and #1717.

As such, Tricore requests the Court dismiss the Petitions. Tricore seeks an award of attorney's fees and costs pursuant to Idaho Code, caselaw and applicable court rules. Tricore requests the opportunity to be heard on oral argument and further briefing as provided by court rule.

DATED this 3rd day of August, 2023.

FEATHERSTON LAW FIRM, CHTD.


By _____
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CERTIFICATE OF MAILING

I hereby certify that on the 3rd day of August, 2023, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

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**MEMORANDUM IN SUPPORT OF INTERVENOR, TRICORE INVESTMENT,
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