

BEFORE THE BOARD OF COUNTY COMMISSIONERS, FREMONT COUNTY,  
A POLITICAL SUBDIVISION OF THE STATE OF IDAHO

In re: APPLICATION FOR A CLASS II  
PERMIT FOR RIVER'S EDGE ON THE  
HENRY'S FORK SUBDIVISION

**AMENDED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW, AND  
AMENDED ORDER**

ON REMAND FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR FREMONT COUNTY:

On July 26, 2007, the Board of County Commissioners of Fremont County, Idaho ("Board"), issued its Findings of Fact, Conclusions of Law and Order ("Order") in relation to an appeal filed by Henry's Fork Properties, LLC, an Idaho corporation ("Applicant"), appealing a decision by the Fremont County Planning and Zoning Commission denying its application for a class II permit to subdivide land. A true and correct copy of the Order is attached hereto as *Exhibit A*. In that Order, the Board denied the application.

In the Order, the Board found that the application "earned a cumulative score of +6 points on relative performance standards; but failed to comply with all absolute performance

standards” because it failed to comply with Fremont County Development Code Chapter VII.Z regarding “Connections.” (Order, p. 18).

On August 22, 2007, the Applicant filed a Petition for Judicial Review with the Seventh Judicial District Court, State of Idaho, to appeal the decision of the Board. Following briefing and argument by the Applicant and Fremont County, Judge Brent J. Moss issued his Memorandum Decision on April 21, 2008. A true and correct copy of the Memorandum Decision is attached as *Exhibit B*. In that Memorandum Decision, Judge Moss determined that the Board had “erred in a manner specified by Idaho Code § 67-5279(3) because the County’s interpretation of its development code was arbitrary, capricious, and an abuse of discretion.” (Memorandum Decision, p. 6). In particular, Judge Moss determined that the County’s interpretation of Section VII.Z of the Development Code was in error. Judge Moss remanded the “case back to Fremont County to determine without reliance on FCDC Ch. VII.Z.” (Memorandum Decision, p. 6).

In compliance with the Memorandum Decision of Judge Moss, and after further proceedings in accordance with the FCDC, the Board hereby enters an Amended Order in place of its previous Order. That previous Order is hereby rescinded except to the extent expressly re-incorporated herein. The Board makes the following amended findings of fact and conclusions of law and the following amended order in compliance with Idaho Code § 67-6535.

### **I. Decision**

The Board finds that the application for a class II permit to subdivide a 254-acre parcel of land into 46 residential lots complies with the Fremont County Comprehensive Plan

("Comprehensive Plan") and the Fremont County Development Code ("FCDC"), subject to the conditions provided in this Amended Order. Accordingly, the application is approved.

## **II. Background and Procedural History**

The Board adopts and incorporates by reference herein Sections II.A (Application to subdivide); II.B. (Administrator's report), II.C. (Planning and Zoning Commission decision), and II.D. (Appeal before the Board of County Commissioners) from the Board's initial Order.

### **A. Appeal before District Court.**

Following the Order issued by the Board, the Applicant filed a Petition for Judicial Review with the Seventh Judicial District Court on August 22, 2007, in order to appeal the decision of the Board. Briefs were submitted by the Applicant and by Fremont County. Oral argument was held before the Court in relation to the parties' positions.

On April 21, 2008, Judge Brent J. Moss issued his Memorandum Decision. (*Exhibit B*). In that Memorandum Decision, Judge Moss ruled that the County's interpretation of Section VII.Z of the Development Code was wrong. Judge Moss explained that "Rule of law requires some predictability, and here, there was no way a developer could foresee that the Fisherman's Drive relocation would violate the County's development code." (Mem. Dec. 5). Judge Moss also wrote:

There is no way Henry's Fork could foresee such an application of law. And without predictable application of the law, developers are exposed to the whims of the decision maker. Here the County's interpretation was unpredictable; it was arbitrary.

The County's arbitrary interpretation abused its discretion. Clearly, it has legitimate interests in its roads. Clearly it has legitimate interests in future development along one of its most important resources, the Henry's Fork River. Surely the County has discretion to protect those interests. The Court is reluctant to assert its opinion over an area of County discretion. But . . .

. . . But the Court must override County decisions that abuse its discretion. Here, the County abused its discretion with an arbitrary interpretation. The interpretation led to capricious results; it failed to afford a fixed rule of law; and it was unpredictable. The County wordsmithed a rule to obtain its desired results; the interpretation was arbitrary, an abuse of discretion.

(Mem. Dec. 5). As a result, Judge Moss remanded the “case back to Fremont County to determine without reliance on FCDC Ch. VII.Z.” (Memorandum Decision, p. 6).

On May 2, 2008, the Applicant filed a motion with the District Court requesting reimbursement of \$16,564.97 in attorney’s fees and litigation costs. On May 29, 2008, Judge Moss issued an Order that stated:

Section 12-117(1) affords prevailing parties against a county attorney’s fees and reasonable expenses if the county “acted without a reasonable basis in fact or law.” Here, Fremont County acted without a reasonable basis in law when it relied on an irrelevant portion of its development code to deny Henry’s Fork’s subdivision application. The County’s decision necessitated this appeal; Henry’s Fork is awarded the costs and fees of pursuing it.

(May 29, 2008 Order, at 1). As a result, Judge Moss ordered that Fremont County pay the developer \$16,564.97 in costs and fees. This amount has not yet been paid, and later became a subject of the appeal to the Idaho Supreme Court.

**B. Proceedings after District Court decision.**

Pursuant to notice, on Wednesday, May 21, 2008, the Board held another work session in relation to the litigation. At that work session, the Board discussed the District Court’s decision, and considered whether to appeal the decision to the Idaho Supreme Court. The Board decided to appeal the District Court’s decision. On May 28, 2008, Fremont County filed a Notice of Appeal giving notice that it was appealing the decision of Judge Moss to the Idaho Supreme Court.

As part of the Idaho Supreme Court appeal, the Idaho Supreme Court offered the parties the opportunity to conduct an appellate settlement conference conducted by a Justice of the Idaho Supreme Court, pursuant to Idaho Appellate Rule 49. That rule requires that “[a]ll parties to the appeal, or representatives of the parties empowered to enter into a binding settlement agreement, shall attend the settlement conference with their attorney.” The Board found that it would be within its discretion to enter into such a binding settlement agreement as long as the outcome was within the scope of the Board’s authority under the FCDC and applicable law. The parties therefore accepted this proposal.

On Wednesday, August 27, 2008, Justice Joel D. Horton of the Idaho Supreme Court conducted the appellate settlement conference. As part of this settlement conference, in light of the fact that the District Court decision had reversed the sole and exclusive justification relied upon by the County to deny the developer’s application, Justice Horton assisted Fremont County and the Applicant in considering conditions the County could impose on the development under Section III.J of the FCDC in order to meet the comments of the public at the prior public hearings, while reflecting the decision of the District Court.

The County’s appeal of the District Court order remains pending at the Idaho Supreme Court. On behalf of the Idaho Supreme Court, Justice Horton has agreed to delay the beginning of the appeal briefing schedule and other deadlines for a period of a month in order to allow the Board to consider whether the concerns of the public could be addressed by conditions on approval of the application designed pursuant to Section III.J of the FCDC to satisfy the concerns raised at the public hearing. If findings and conclusions incorporating such conditions

are not accepted by the Developer and approved by the County as a result of the appellate mediation, the litigation and appeal will continue.

The Board is presented with the options of continuing to litigate the dispute, or resolving the dispute in a manner consistent with the Comprehensive Plan and the FCDC.

These findings and conclusions are designed to resolve the issues in a manner consistent with the decision of the District Court, and within the authority of the Board under the FCDC, based upon the existing record before the Board at the time of its decision on July 26, 2007, while reflecting the public concerns and comments expressed at the public hearing, and finding a resolution to the litigation regarding the Board's decision

### **III. Findings of Fact and Conclusions of Law**

#### **A. Productive Cropland**

The Board adopts and incorporates by reference herein Sections III.A (Productive cropland) from the Board's initial Order.

#### **B. Absolute Performance Standards**

##### **1. Connections**

The Board's initial Order contained findings and conclusions regarding Section VIII.Z of the FCDC, relating to "Connections." The Board found that this Section VIII.Z prohibited the realignment of Fisherman's Drive. As explained above, the District Court has determined that the Board's interpretation of this provision was in error. The District Court has remanded the case back to the Board for further proceedings, although that order is currently on appeal to the Idaho Supreme Court.

The Board hereby rescinds the findings and conclusions and other content of Section III.B.1. of the Order. In place of Section III.B.1. of the Order, the Board hereby adopts the following findings and conclusions:

Based on the opinion and judgment of the District Court and in compliance therewith, the Board concludes that Section VII.Z. does not prohibit the relocation of the road (or, in other words, that the developer's relocation of the road as shown in the preliminary plat would not violate Section VII.Z.), and that the application meets the absolute performance standards of Section VII.Z. The Board finds that the proposed development is designed to optimize functional connections with adjoining developments.

## **2. Safe Roads**

Section III.B.2. of the Board's initial Order made findings regarding the requirement that there be "safe all-weather road access to all developments." (FCDC Ch. VII. JJ. Roads). The Board found that "Fisherman's Drive was constructed many years ago using different standards than today's and does not comply with the current county road standards set forth in Appendix B of the FCDC." (Order, pp. 12-13). The Board also found that "Fisherman's Drive – from U.S. Highway # 20 to the development site – is narrow, very close to the river with steep slopes, fails to meet current county road standards, and is likely unsafe." (Order, p. 13). For these reasons, the Board made it "a specific condition of approval that the applicant demonstrates compliance with the safe road standard." (Order, p. 13).

The District Court was critical of the Board's decision in this respect. The District Court wrote that "[t]he County's interpretation resulted in requiring Henry's Fork to incorporate a road it was forbidden from using. Decision maker caprice produced that result."

(Mem. Dec. 4). The District Court also wrote: “The County didn’t stop there. Immediately after requiring Henry’s Fork to incorporate Fisherman’s Drive, the County told Henry’s Fork that it couldn’t use it. Fisherman’s Drive is unsafe.” (Mem. Dec. 4). The District Court saw it as capricious that the Board would require the applicant to use the existing Fisherman’s Drive within the development site, and at the same time rule that Fisherman’s Drive was unsafe. (Mem. Dec. 4).

For these reasons, based upon the opinion and judgment of the District Court and in compliance therewith, the Board rescinds Section III.B.2 of the initial Order. In place of Section III.B.2., the Board hereby finds as follows:

Section VII.JJ of the Development Code provides the requirements for roads accessing a development:

**JJ. Roads.** There shall be safe all-weather road access to all developments (the requirement for all-weather road construction does not imply that roads must be maintained throughout the year). The design and construction of roads shall be in compliance with the detailed performance standards of Appendix B.

(FCDC Ch. VII. JJ. Roads). Appendix B of the Development Code provides the “Detailed Performance Standards for the Design and Construction of Roads.” In addition, the Board requires that an applicant bear the burden of demonstrating compliance with the safe road standard. An applicant has a continuing burden of proof to demonstrate to the board of county commissioners that the access road serving the development site will be improved to meet current county road standards, as far as reasonably possible.<sup>1</sup>

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<sup>1</sup> This reasonable improvements requirement, sometimes called the “Gunbarrel rule,” is more fully explained in the Findings of Fact and Conclusions of Law by the Board of Fremont



The Board therefore finds that Fisherman's Drive, a county road, provides access to the development site from U.S. Highway # 20. Fisherman's Drive was constructed many years ago using different standards than today's and does not comply with the current county road standards set forth in Appendix B of the FCDC. Mr. Sinclair Buckstaff, the applicant's retained road engineer, pointed out: "There are lots of safety concerns with Fisherman's Drive: steep slopes, no guardrails, poor sight distance, et. cetera . . . Whether adding one house, or more, along Fisherman's Drive, safety must be addressed."

The Board finds that Fisherman's Drive – from U.S. Highway # 20 through the development site – is narrow, very close to the river with steep slopes, fails to meet county road standards, and is likely unsafe. Accordingly, the Board finds that Fisherman's Drive – from U.S. Highway # 20 through the development site – will have to be improved by the applicant to meet the safe road standard of FCDC Ch. VII. JJ.

Accordingly, the Board makes it a specific condition of approval that the applicant demonstrate compliance with the safe road standard for the entire distance of Fisherman's Drive, from U.S. Highway #20 through the development site. This compliance may be met by compliance with the reasonable improvements rule. In light of the lack of adequate rights-of-way available from U.S. Highway # 20 to the beginning of the development site, this compliance may also be met by measures that do not require expanding the width of the road, such as adding guardrails along the portion of the road bordered by the river and adding signage to improve traffic flow and safety. This compliance should also include traffic turnouts for

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County Commissioners in the Gunbarrel at Shotgun Village Subdivision case on April 16, 2007, a copy of which may be obtained from the Fremont County Clerk.

safety within the length of the road from U.S. Highway # 20 to the beginning of the development site, if such turnouts can be accomplished within the existing right-of-way available and if such turnouts are considered appropriate by the Fremont County Director of Public Works.

The unsafe nature of the county road within the development site provides a sound reason to allow the relocation of the county road as requested by the applicant and as shown in the preliminary plat. The Board concludes that it is important for the road to be a safe thoroughfare for traffic. For these reasons, the safety of the road within the development will be addressed in connection with the discussion (below, Section III.B.4) of the applicant's request to re-locate the road.

### **3. Other Absolute Performance Standards**

The Board reviewed the Planning and Zoning Commission's scoring of each of the other absolute performance standards. The Planning and Zoning Commission found that the application complied with all of the absolute performance standards.<sup>2</sup>

#### *Wetlands: State and Federal regulations*

Section VII.E.1. of the Development Code requires that "[a]ll developments shall demonstrate compliance with state and federal wetlands protection requirements." (FCDC VII.E.1). The Board makes it a specific condition of approval that the Applicant obtain a Clean Water Act, Section 404 permit, prior to final plat approval.

#### *Scoring Affirmed*

The Board, having reviewed each of the other absolute performance standards, finds the scoring done by the Planning and Zoning Commission to be proper and based upon

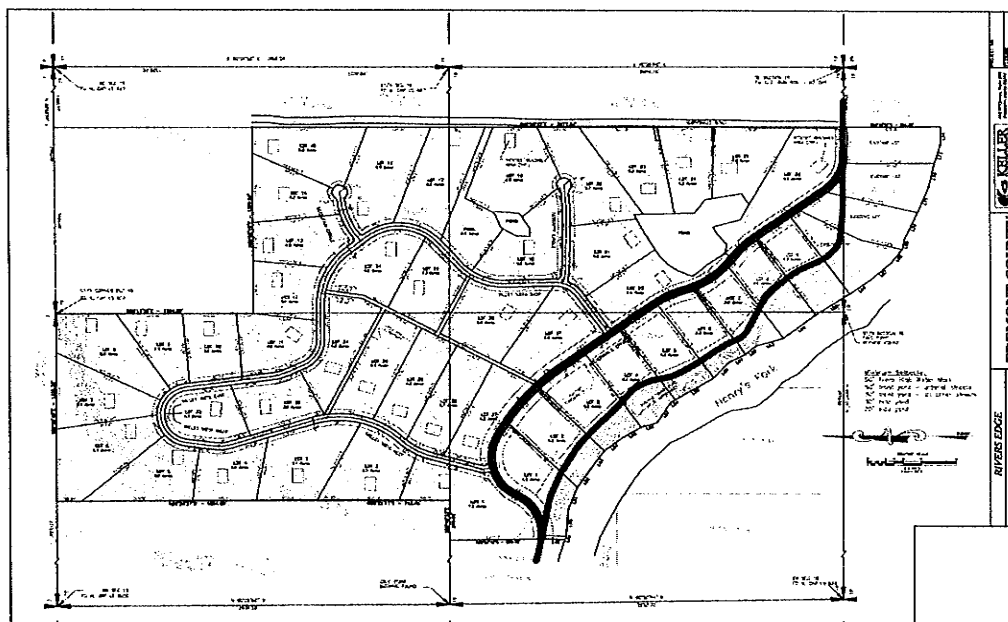
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<sup>2</sup> Record on Appeal ("R.") Ex. 15, pp. 321-324; Ex. 7, pp. 741-744.

substantial evidence in the record. Accordingly, the Planning and Zoning Commission's scoring of the remaining absolute performance standards is affirmed.

#### 4. Realignment of Road

The application proposes to relocate the existing county road through the development back away from the edge of the Henry's Fork River toward the interior of the subdivision. This proposed realignment of the county road is shown in Figure 1 below:



**Figure 1 - Applicant's Proposed Realignment of County Road Within Development Site.** The current location of the county road is in green. The proposed realignment of the road is in blue.

Fremont County's own Director of Public Works, Ms. Marla Vik, P.E., commented during the public hearing that she had serious concerns about the precedent that

could be set if the applicant is allowed to unilaterally relocate a county road.<sup>3</sup> Ms. Vik pointed out that about eighty-five percent of Fremont County roads were created by “prescription” – through public use and maintenance – and to allow individual landowners to begin moving the roads at will is certain to disrupt the county road system.<sup>4</sup>

On the other side of the issue, the applicant’s attorney Mr. Lary Larson commented that unlike dedicated roads, roads acquired by prescription may be unilaterally relocated by the owner of the land affected by the road. Attorney Larson argued that the policy in the State of Idaho is to allow private landowners to move public roads in order to maximize their individual land values.<sup>5</sup>

At the same time, much public comment focused on the scenic view afforded by driving or walking along Fisherman’s Drive as currently located on the private property of the Applicant. The Board concludes that the public wants to preserve the scenic view currently provided by the county road.

Unfortunately, the Development Code does not include any provision for preserving scenic views within this area.<sup>6</sup> Nor is the Board aware of any other law requiring the

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<sup>3</sup> See record of public hearing held May 8, 2007.

<sup>4</sup> See record of public hearing held May 8, 2007.

<sup>5</sup> See record of public hearing held May 8, 2007.

<sup>6</sup> The development site is located within the North Fremont Zoning District, which is governed by Chapter VII of the Development Code. (FCDC Ch. VII). That chapter does not include any provisions governing scenic views or visually sensitive areas. The Island Park Zoning District is governed by Chapter VIII of the Development Code. (FCDC Ch. VIII). The chapter governing the Island Park Zoning District includes a relative performance standard which states that “Residential developments shall be encouraged to maintain the scenic qualities of visually sensitive areas -2/+2(4).” (FCDC Ch. VIII. AA.).

applicant to maintain the scenic view presently existing on the road as currently configured.<sup>7</sup> On the contrary, private property rights indicate that a private property owner has the right to block any view across the private property owner's land (for example, by building homes, planting trees, fencing or closing unlawful accesses). As a result, even if the Board denied the proposed realignment of the road in this case, the Applicant could still easily take steps that would deprive the public of the scenic view it values.

This is not to say that property owners may unilaterally relocate County roads without County approval or review on some level. The Board concludes that it controls the location of county roads within the county highway system. Any request to re-locate a county road must be approved by the County. This authority allows the Board to decide on the basis of lawful criteria when the realignment of a county road is in the best interests of Fremont County and its citizens and in the best interests of the road system established by Fremont County.<sup>8</sup>

In this case, for the reasons discussed above and for the reasons discussed further below, the Board determines that it is in the best interests of the county to allow the realignment of the county road within the development site as requested by the Applicant and as shown in Figure 1, as long as certain conditions and requirements established herein by the Board are met

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<sup>7</sup> Case authorities provided to the Board by attorney Jeff Moss during the public hearing process all relate to the proposed relocation of platted, dedicated streets. Fisherman's Drive is a prescriptive easement, not a platted, dedicated street.

<sup>8</sup> For example, Idaho Code § 55-313 refers to the right of property owners to relocate certain roads within the borders of their property. But Idaho Code § 40-2318 provides a procedure for considering such a realignment of public highways located on private property. This procedure includes a petition or application, notice regarding the proposal, a review of the facts by the Board, and a decision by the Board based upon lawful criteria. In this case, the Board finds that the application of the developer and the notice previously provided and the meetings previously held met or exceeded the procedural requirements of this statute.

or exceeded. These conditions and requirements are designed to meet the concerns expressed by the public at the public hearing. These conditions and requirements are also designed to meet the purposes of the Fremont County Comprehensive Plan.

In particular, these conditions are designed and intended to meet four specific purposes: (1) to provide and preserve a safe and permanent location to view the Henry's Fork River; (2) to provide and preserve a safe and permanent location for pedestrian access to the banks of the Henry's Fork River; (3) to provide and preserve a safe and permanent location for recreational off-road vehicle and pedestrian trail access to Marysville Hill Road; and (4) to provide a safe roadway through the applicant's property.

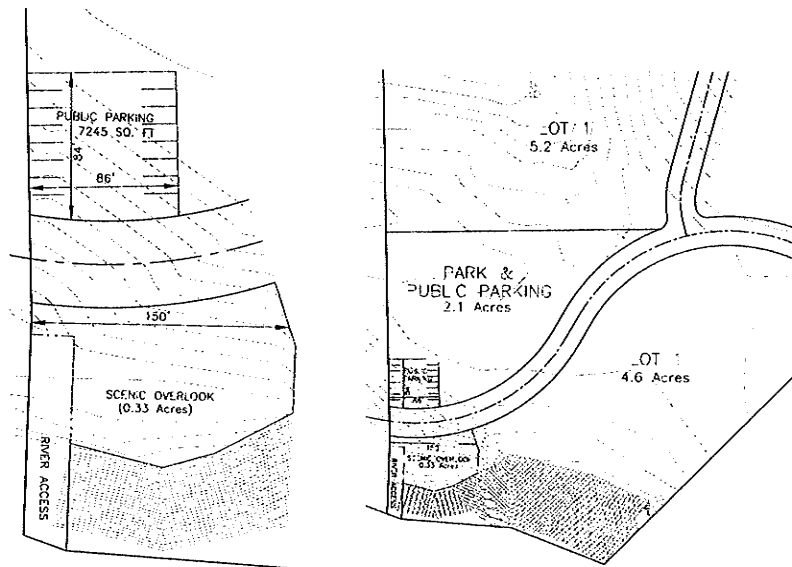
For these reasons and to meet these purposes, the Board hereby approves the application and the request to re-locate the county road within the development site, subject to the developer accepting and meeting the following conditions:

1. Scenic View. The applicant will provide a scenic overlook park located at the location designated on Figure 2 and Figure 3 below. This location is designated because it provides the best view of the Henry's Fork River from any elevated portion of the site. A rendering of this scenic view is provided in Figure 4 below.

*Size*. The scenic overlook park will consist of 2.43 acres of land at the location designated on Figure 2 and Figure 3 below. 0.33 acres of land shall be located on the southern side of the proposed road, and 2.1 acres of land shall be located on the northern side of the proposed road.

*Parking Facilities*. The scenic overlook park shall include sufficient vehicle parking to accommodate 12 vehicles, according to the standards prescribed by Appendix C –

Detailed Performance Standards for Off-Street Parking and Loading. (FCDC App. C). The parking area shall be designed and constructed consistent with the standards of Appendix C. (FCDC App. C).

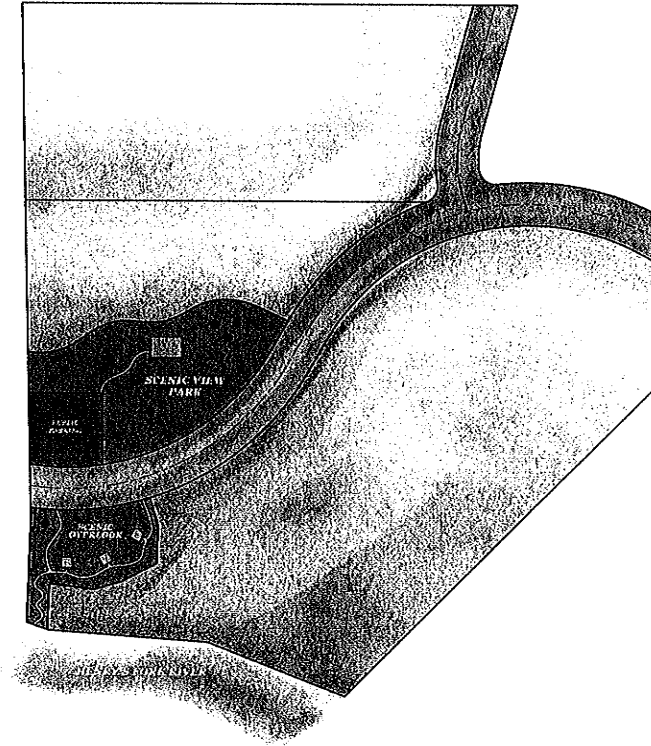


**Figure 2 – Location and Minimum Dimensions of Scenic Overlook Park.** Two views, showing both a close up view and a more distant view of the Scenic Overlook Park.

*Legal Rights.* The real property of the scenic overlook park shall be dedicated to Fremont County as part of the final plat of the development. Fremont County will accept the dedication of the scenic overlook park only upon approval of the facilities provided by the developer on such property.

*Landscaping.* The developer shall plant the area of the scenic overlook park south of the proposed road with grass or similar vegetation as specified by the Fremont County Parks Department. The developer shall plan the area of the park north of the proposed road with either grass or native vegetation. The developer shall provide and install landscape irrigation facilities according to the specifications of the Fremont County Parks Department.

*Appearance.* The scenic overlook park shall have the look and appearance shown in the rendering in Figure 3, Figure 4, and Figure 5 below.



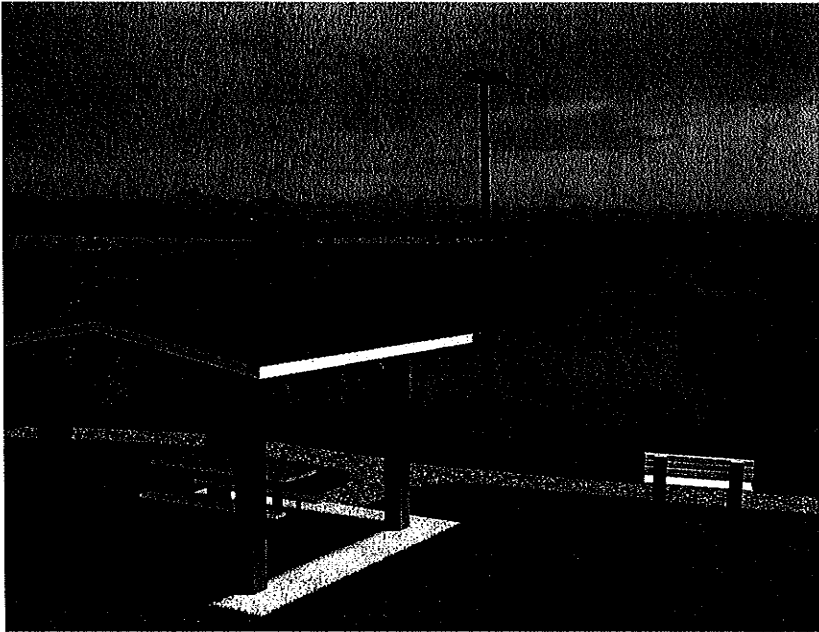
**Figure 3 – Plan View of Scenic Overlook Park.**

*Picnic Facilities and Shelters.* The developer shall include in the scenic overlook park a minimum of three (3) shelters capable of covering a single picnic bench each and a pavilion capable of covering at least four (4) picnic benches. The appearance of such picnic shelters shall be consistent with the rendering attached as Figure 4 and Figure 5 below.

*Maintenance.* The Applicant shall maintain the scenic overlook park, either directly or through the homeowners' association of the development. Prior to any sales of property within the developmnt, the Applicant shall enter into and record a maintenance



agreement placed as a restrictive covenant on the land of the development obligating the homeowners' association of the development to maintain the scenic overlook park in perpetuity.

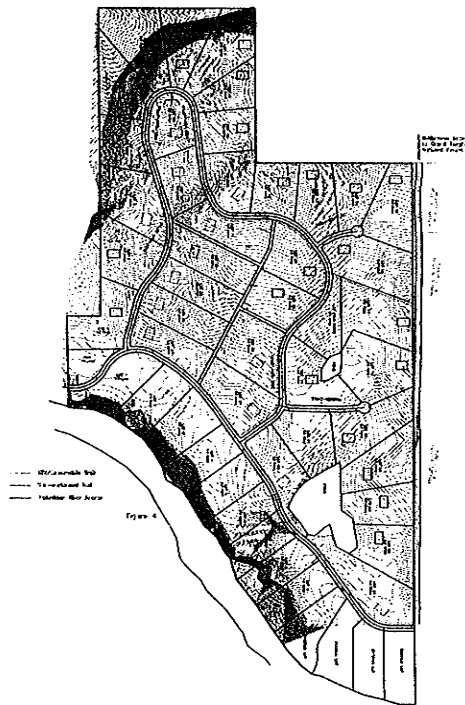


**Figure 4 – Rendering of Scenic Overlook Park on South Side of Fisherman’s Drive.**



**Figure 5 – Rendering of Park on North Side of Fisherman’s Drive.**

2. River Access. The applicant will provide pedestrian access to the Henry's Fork River from the scenic overlook park. This access will accommodate pedestrian travel from the scenic overlook park to the high water mark of the Henry's Fork River, in order to facilitate pedestrian access along the bank of the Henry's Fork River. The location of this pedestrian access will be at the location marked on Figure 2 and Figure 3 above and Figure 6 below. This river access will be provided to Fremont County by means of an easement provided to the public on the final plat.



**Figure 6 – Location of River Access Trail and Wilderness Access Trails.**

3. Wilderness Access. Marysville Hill Road is located on the eastern edge of the development site. Marysville Hill Road provides access to the Caribou-Targhee National Forest and recreational areas found within that area. However, there are no nearby parking facilities. The applicant will provide easements for the public on trails that lead from the scenic

overlook park to Marysville Hill Road. These easements will be made by means of the final plat. These trails will be sufficient to allow a right-of-way for the public to travel by foot or by off-highway vehicles from the parking facilities at the scenic overlook park to Marysville Hill Road. The locations of the wilderness access trails are shown on Figure 6 above.

4. Safety. The applicant will resolve safety concerns regarding the proximity of the road to the edge of the slope descending to the river and safety concerns regarding the twisting turn through Coleman Canyon by realigning the road to the location shown in Figure 1 above. In connection with this realignment of the road, the applicant shall construct the county road at its expense consistent with the road standards provided in Appendix B – Detailed Performance Standards for the Design and Construction of Roads. The road shall be dedicated to Fremont County by means of a public dedication on the final plat.

5. Litigation. The applicant will stipulate to the dismissal of the litigation currently pending before the Supreme Court of the State of Idaho without costs and fees awarded to either party, and will waive and release any attorney fees awarded to the applicant by the District Court.

**C. Relative Performance Standards.**

The Board adopts and incorporates by reference herein Section III.C. (Relative Performance Standards) from the Board's initial Order. As a result, the Board awards the application +6 points on relative performance standards.

**Order**

The Board concludes that the application filed by Henry's Fork Properties, LLC, for a class II permit to subdivide a 254-acre parcel of land into 46 residential lots earned a cumulative score of +6 points on relative performance standards. The Board also concludes that the application meets all absolute performance standards, with the conditions stated herein.

The Board also concludes that, although it has the right to determine the location of county roads, the applicant's proposed realignment of the county road is in the best interests of Fremont County, as long as the conditions and requirements specified above are met or exceeded.

The Board therefore concludes that the application complies with the Fremont County Comprehensive Plan and the Fremont County Development Code.

Accordingly, the application is approved.

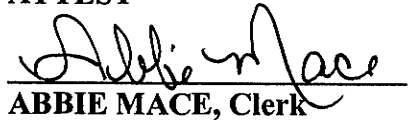
DATED this 29<sup>th</sup> day of September, 2008.

**FREMONT COUNTY BOARD OF  
COMMISSIONERS**



**PAUL ROMRELL, Chairman**

**ATTEST**

  
**ABBIE MACE, Clerk**

**CERTIFICATE OF SERVICE**

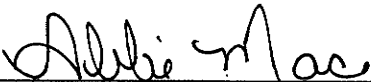
I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Findings of Fact and Conclusions of Law and Amended Order to be served by the method indicated below, and addressed to the following:

Lary S. Larson  
HOPKINS, RODEN, CROCKETT, HANSEN &  
HOOPES, P.L.L.C.  
P.O. Box 51219  
Idaho Falls, Idaho 83405-1219

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
Date: 9-30-08

Lee Radford  
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS,  
CHTD.  
P.O. Box 51505  
Idaho Falls, Idaho 83405-1505

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
Date: 9-30-08

  
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~~Lee Radford~~ Abbie Mace

# **EXHIBIT A**

**July 26, 2007 Findings of Fact,  
Conclusions of Law and Order**

KARL H. LEWIES, ISBN 4380  
Fremont County Prosecuting Attorney  
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St. Anthony, Idaho 83445  
(208) 624-4418  
Attorney for Fremont County

BEFORE THE BOARD OF COUNTY COMMISSIONERS, FREMONT COUNTY,  
A POLITICAL SUBDIVISION OF THE STATE OF IDAHO

In re: APPLICATION FOR A CLASS II	)	
PERMIT FOR RIVER'S EDGE	)	
ON THE HENRY'S FORK	)	<b>FINDINGS OF FACT,</b>
SUBDIVISION	)	<b>CONCLUSIONS OF LAW</b>
	)	<b>AND ORDER</b>
	)	
	)	

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ON APPEAL FROM THE FREMONT COUNTY PLANNING AND ZONING  
COMMISSION:

The board of county commissioners of Fremont County, Idaho, held a public hearing on Tuesday, May 8, 2007, on an appeal filed by Henry's Fork Properties, LLC, and Idaho corporation, appealing a decision by the Fremont County planning and zoning commission denying its application for a class II permit to subdivide land.

The board of county commissioners makes the following findings of fact and conclusions of law in compliance with Idaho Code § 67-6535.

## I. Decision

The board of county commissioners finds that the application for a class II permit to subdivide a 254-acre parcel of land into 46 residential lots fails to comply with the Fremont County Comprehensive Plan ("Comprehensive Plan") and the Fremont County Development Code ("FCDC"). Accordingly, the application is denied.

## II. Background and Procedural History

### A. Application to subdivide.

Henry's Fork Properties, LLC, filed a Fremont County class II permit application in the office of the Fremont County Planning and Building Department in St. Anthony, Idaho, dated September 27, 2006. The application identified the proposed subdivision as "River's Edge on the Henry's Fork."

### B. Administrator's report.

The planning and zoning department administrator scored the developer's application using the standard Fremont County Development Code scoring system<sup>1</sup> and prepared a written administrator's report. The report was subsequently presented to the planning and zoning commission. In his report, the administrator recommended the application be approved, subject to several conditions of approval. In support of his recommendation, the administrator reported a cumulative score of +14 points for the application on *relative performance standards*; and indicated that it complied with all *absolute performance*

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<sup>1</sup> See the North Fremont Zoning District Development Review Checklist (the "Scoresheet"), which is contained in the record.



*standards.*<sup>2</sup> Additionally, the administrator's report calculated the total dwelling units permitted on the 254-acre parcel to be 96 units.<sup>3</sup>

The administrator placed the application on the agenda for the next available planning and zoning commission meeting.

### **C. Planning and Zoning Commission decision.**

The planning and zoning commission took up consideration of the application during its regular meeting held Monday evening, October 16, 2006, however, the published notice of the public hearing contained incorrect information and the matter was rescheduled for the next regular meeting to be held November 20, 2006.<sup>4</sup>

In compliance with the procedures set out in the Fremont County Development Code, the planning and zoning commission conducted a public hearing on the application on November 20, 2006.<sup>5</sup> After the public hearing was closed the planning and zoning commission agreed to table its decision on the application for a period of up to 60 days to allow its members additional time to review and consider the matter.<sup>6</sup>

Then, at its regular meeting held on December 4, 2006, the planning and zoning commission again took up consideration of the application.<sup>7</sup> During that meeting,

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<sup>2</sup> "Relative performance standards" and "absolute performance standards" are defined in the Fremont County Development Code, chapter V. An application for a Class II permit to subdivide property must achieve a score of at least 0 points on relative standards; and must comply with all absolute standards.

<sup>3</sup> The Scoresheet may be referenced for more detailed, line-by-line, scoring information on each one of the many relative and absolute performance standards.

<sup>4</sup> See minutes of the Planning & Zoning commission meeting held Monday, October 16, 2006, p. 13.

<sup>5</sup> See minutes of the Planning & Zoning commission meeting held Monday, November 20, 2006, p. 2.

<sup>6</sup> See minutes of the Planning & Zoning commission meeting held Monday, November 20, 2006, p. 19.

<sup>7</sup> See minutes of Planning and Zoning Commission meeting held Monday, December 4, 2006, p. 2.

discussion focused on whether the proposed subdivision met the requirements of the Fremont County Development Code. In particular, the commission discussed whether the proposed development site was “productive cropland” or not.<sup>8</sup> This determination is made using the Fremont County Land Evaluation Site Assessment (LESA) scoring system.<sup>9</sup>

After considerable discussion, the commission found that the site was productive cropland.<sup>10</sup> This meant that the permitted density on the development site would be one dwelling unit per 40 acres, rather than one dwelling unit per 2 ½ acres as the planning and zoning administrator had determined in his report. Accordingly, only six dwelling units would be permitted on the 254-acre parcel. Therefore, the application for 46 dwelling units would be denied.

Additionally, the commission revised several other line items on the Scoresheet resulting in an overall score on relative performance standards of -35 points.

On Monday, January 8, 2007, the commission adopted Findings of Fact and Conclusions of Law denying the application.<sup>11</sup>

On January 19, 2007, the applicant filed a Fremont County notice of appeal form appealing the decision to the board of county commissioners.<sup>12</sup>

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<sup>8</sup> “Productive cropland” is defined in the Fremont County Development Code at Chapter XIV. AAA.

<sup>9</sup> The Land Evaluation Site Assessment (LESA) system is part of the Fremont County Development Code and is used for determining whether a development parcel is productive cropland. If a parcel is found to be productive cropland, then the permitted density is 1 dwelling unit per 40 acres.

<sup>10</sup> See minutes of Planning and Zoning Commission meeting held Monday, December 4, 2006, p. 6.

<sup>11</sup> See minutes of Planning and Zoning Commission meeting held Monday, January 8, 2007, pp. 1-2.

<sup>12</sup> Pursuant to the Fremont County Development Code, any decision of the planning and zoning commission may be appealed to the board of county commissioners.

#### **D. Appeal before the Board of County Commissioners.**

The board of county commissioners held a public hearing on the applicant's appeal on Tuesday, May 8, 2007 at 9:00 am in the Fremont County Annex Building. The hearing was properly noticed, conducted, and tape-recorded pursuant to the requirements set forth in the Fremont County Development Code.

The authority of the county commissioners in conducting an appeal hearing is set forth in the FCDC Ch. III. M. 5., which provides that they may "affirm, modify, or overturn" a decision of the planning and zoning commission.<sup>13</sup> The hearing was conducted *de novo*. Accordingly, the developer was allowed to present new expert testimony and other materials; and the opponents were allowed the same opportunity.

Following the public hearing, the county commissioners held four special work meetings to consider the application, including the preliminary plat, the administrator's report, the planning and zoning commission's action, and the other materials and comments presented and made part of the record. The work meetings were properly noticed as open public meetings and took place on Friday, May 11<sup>th</sup>; Tuesday, May 22<sup>nd</sup>; Monday, July 16<sup>th</sup>; and Thursday, July 26<sup>th</sup>, 2007, respectively. Representatives of the applicant, as well as representatives of the opponents to the subdivision application, attended all work meetings but were not allowed to participate in the deliberations or offer any new evidence or materials.

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<sup>13</sup> The authority of the county commissioners in the context of an appeal hearing is set forth in the Fremont County Development Code in chapter III. Paragraph M. 5., which reads, in relevant part, as follows: "*The commission or board [of county commissioners] shall determine whether the decision being appealed is in compliance with the comprehensive plan and this ordinance, and affirm, modify, or overturn that decision accordingly.*"

### III. Findings of Fact and Conclusions of Law

#### A. Productive cropland

The board first took up consideration of the question whether the proposed development site was “productive cropland” as defined in the Fremont County Development Code.

As mentioned above, the planning and zoning administrator’s report found the site was *not* productive cropland, but the planning and zoning commission rejected the administrator’s finding and instead found the site *was* productive cropland. Both the administrator’s finding and the commission’s finding were based on their respective scoring of the site using the Land Evaluation Site Assessment (LESA) System.<sup>14</sup>

There are two components to the LESA system: (1) Land Evaluation component – which calculates cropland soil productivity; and (2) Site Assessment component – which calculates how agriculturally oriented the ½-mile area surrounding the site is and anticipates the impact of land use conflicts.<sup>15</sup> The Fremont County Development Code, Chapter XIV. AAA., defines productive cropland as follows:

*“Productive cropland shall be identified using the Fremont County LESA System. Productive cropland shall include all lands in those farmland subgroups identified by the Land Evaluation System as having an average productivity index of over 75 when irrigated or over 55 when nonirrigated, with sites being rated for their best potential, irrigated or nonirrigated. Sites with a Site Assessment System score of less than 15 shall not, however, be considered productive cropland.”*

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<sup>14</sup> See footnote 9, supra.

<sup>15</sup> See Fremont County Development Code, Land Evaluation Site Assessment System, pp. 12-13.

On the Land Evaluation component of the LESA calculations, the administrator included the entire 254 acres of the site in his calculations, but the planning and zoning commission excluded 76 acres from its calculations on the basis that they constituted waste ground that could never be farmed and should not be included as part of the site. These differing interpretations of whether to include all 254 acres in the calculation, or whether to exclude waste ground, gave rise to a need for the board of county commissioners to decide the following question: "What constitutes the *site* for purposes of productive cropland determinations using the Fremont County LESA system?"

Although the board recognized that it was not actually necessary to decide this question in this particular case (because both the administrator's method of scoring and the planning and zoning commission's method of scoring both resulted in Land Evaluation component scores of *less than 75 points* meaning the site did not satisfy the definition of productive cropland no matter which method was used) the board agreed to decide the question simply to provide guidance in future cases.

Reading from the Fremont County Development Code LESA System's Appendix C, entitled, "The Fremont County Land Evaluation Component," the board found that in the case of waste ground not listed in Table C-1 (Soil Mapping Units), "Where such units constitute less than 15% of a given site, they should be ignored in the calculation of the Land Evaluation score. Where they constitute more than 15% of a site, they should be accounted for in a weighted land evaluation score, with the score for these units being set at zero." <sup>16</sup>

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<sup>16</sup> Fremont County Development Code, Land Evaluation Site Assessment System, p. C-2, "Missing Mapping Units."

Applying this rule to the instant case, the board found that since the 76 acres of waste ground constituted more than 15% of the 254-acre development site, it should be accounted for in the Land Evaluation score. In other words, all 254 acres should be included as the "site" for calculating the Land Evaluation component score. Since the planning and zoning administrator did include all 254 acres in his calculations, the Board affirms the administrator's Land Evaluation score of 47 points for the subject site. On the other hand, if the waste ground had constituted less than 15% of the total development site, then it should have been excluded from the calculations and then the method used by the planning and zoning commission would have been correct.

Finally, the board found it necessary to clarify how the two components of the LESA System – the Land Evaluation component and the Site Assessment component – relate to each other in determining whether a site is productive cropland. The reason the board found this necessary is because the planning and zoning commission had wrongly concluded that a score of 15 or more on the Site Assessment component automatically meant the development site was productive cropland, regardless of the site's score on the Land Evaluation component. Specifically, the planning and zoning commission had concluded that the River's Edge development site was productive cropland because it had a Site Assessment component score of +19 points (even though it had a Land Evaluation component score of only 67).

However, a careful reading of the Fremont County Development Code's definition of productive cropland,<sup>17</sup> will reveal that an irrigated site such as the one in

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<sup>17</sup> Fremont County Development Code, Chapter XIV. AAA. defines "productive cropland."

question, must have a Land Evaluation component score of *over 75* to be considered productive cropland, notwithstanding its Site Assessment component score.

Since the River's Edge site had a Land Evaluation score of only 67, it did not meet the 75 score required to be considered productive cropland. This remains true even though the site's Site Assessment score was 15 or more. In other words, a high Site Assessment score cannot make an unproductive Land Evaluation score productive.

## **B. Absolute Performance Standards**

### **1. Connections.**

The most contentious issue during the public hearing concerned the applicant's proposal to relocate an existing county road, Fisherman's Drive, back away from the edge of the Henry's Fork River toward the interior of the subdivision so the developer could offer high-value riverfront lots. It was estimated that the nine riverfront lots could be sold for approximately \$300,000 each.

There was significant public opposition to the developer's proposal to move Fisherman's Drive. In fact, one opponent who owns adjacent land, Mr. Frank Vandersloot, took out several whole-page color advertisements in the local newspaper urging other members of the public to show up at the public hearing and oppose the developer's plan to move Fisherman's Drive. At the public hearing there were, indeed, many public comments received opposing the developer's road relocation plan.<sup>18</sup>

Fremont County's own Director of Public Works, Ms. Marla Vik, P.E., commented during the public hearing that she had serious concerns about the precedent that could be

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<sup>18</sup> See record of the public hearing held May 8, 2007.

set if the applicant is allowed to unilaterally relocate a county road.<sup>19</sup> Ms. Vik pointed out that about eighty-five percent of Fremont County roads were created by “prescription” – through public use and maintenance – and to allow individual landowners to begin moving the roads at will is certain to disrupt the county road system.<sup>20</sup>

On the other side of the issue, the applicant’s attorney Mr. Lary Larsen, commented that unlike dedicated roads, roads acquired by prescription may be unilaterally relocated by the owner of the land affected by the road. Attorney Larsen argued that the policy in the State of Idaho is to allow private landowners to move public roads in order to maximize their individual land values.<sup>21</sup>

The board of county commissioners recognized that moving Fisherman’s Drive was a very sensitive issue. So, during its first work meeting the board considered whether relocating Fisherman’s Drive would comply with the Fremont County Development Code. However, the board was unable to identify any particular FCDC provision directly addressing the question of a developer’s proposal to unilaterally relocate county roads – a question of first impression for the board in Fremont County. During its second work meeting the board of county commissioners determined that FCDC Ch. VII. Z. “CONNECTIONS,” seemed applicable to the case presented. Paragraph Z. provides as follows:

*“All developments shall be designed to optimize functional connections with adjoining developments, including shared access to arterial roads,*

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<sup>19</sup> See record of public hearing held May 8, 2007.

<sup>20</sup> See record of public hearing held May 8, 2007.

<sup>21</sup> See record of public hearing held May 8, 2007.



*shared parking and service access, shared buffers and open space, and shared pedestrian circulation.*"

The board of county commissioners recognized that although the express language of paragraph Z. provided that new developments "*optimize functional connections with adjoining developments,*" the language could be interpreted somewhat more broadly to mean that new developments must also "*optimize functional connections with adjoining public infrastructure*" – county roads, for example.

Commissioners Romrell and Trupp agreed that this interpretation and application of paragraph Z. was reasonable, and furthermore, was *necessary* to protect the county's existing public infrastructure – in this case Fisherman's Drive – from being unilaterally relocated by the developer. Commissioner Romrell commented during the work meetings that he didn't want to set a precedent of allowing private landowners to move county roads.<sup>22</sup> Commissioners Trupp and Hurt agreed with Romrell on this statement of policy.<sup>23</sup>

Commissioner Skip Hurt, however, disagreed with the other two commissioners on this interpretation of paragraph Z. He took the position that since the language of paragraph Z. did not expressly provide that new developments must "*optimize functional connections with adjoining public infrastructure,*" then it could not be interpreted to have such a meaning.

Ultimately, the majority of the board decided to interpret and apply paragraph Z to mean that all new developments had to "*optimize functional connections with adjoining public infrastructure.*" And as applied in the instant case, the proposed River's Edge

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<sup>22</sup> See record of Special Work Meeting held May 22, 2007.

<sup>23</sup> Ibid.

subdivision would be required to optimize functional connections to Fisherman's Drive. In turn, the Board interpreted this to mean the applicant would be required to design its preliminary plat to incorporate the *full-length* of the existing, and long-established, Fisherman's Drive county road as it winds through the proposed development site. It would not be acceptable to relocate Fisherman's Drive through the subdivision and merely connect the two end points of the new road to the existing Fisherman's Drive.

Therefore, since the application's preliminary plat failed to incorporate the full-length of Fisherman's Drive through the proposed development site into its design, but instead proposed to obliterate the existing road and build an entirely new road some distance away, the application failed this standard. And since this is an "absolute standard," its failure will cause the entire application to be denied.

## 2. Safe Roads

Even though the application will be denied for failing to optimize connections to the existing county road, as described above, the commissioners deemed it worthwhile to consider whether the access road leading to the development site satisfied the requirements of FCDC Ch. VII. JJ. ROADS, which requires the following:

*"There shall be safe all-weather road access to all developments (the requirement for all weather road construction does not imply that roads must be maintained throughout the year). The design and construction of roads shall be in compliance with the detailed performance standards of Appendix B."*

The board found that Fisherman's Drive, a county road, provided access to the development site from U.S. Highway #20. Fisherman's Drive was constructed many years ago using different standards than today's and does not comply with the current

county road standards set forth in Appendix B of the FCDC.<sup>24</sup> <sup>25</sup> In fact, as the applicant's own retained road engineer, Mr. Sinclair Buckstaff, pointed out, "There are lots of safety concerns with Fisherman's Drive: steep slopes, no guardrails, poor sight distance, et. cetera...Whether adding one house, or more, along Fisherman's Drive, safety must be addressed."<sup>26</sup>

The board of county commissioners found that Fisherman's Drive – from U.S. Highway #20 to the development site – is narrow, very close to the river with steep slopes, fails to meet current county road standards, and is likely unsafe. Accordingly, the board unanimously found that Fisherman's Drive – from U.S. Highway #20 to the development site – would have to be improved by the applicant to meet the safe road standard of FCDC Ch. VII. JJ.

The applicant has the burden of demonstrating compliance with the safe road standard. As such, the applicant has a continuing burden of proof to demonstrate to the board of county commissioners that the access road serving the development site will be improved to meet current county road standards, as far as reasonably possible.<sup>27</sup> The entire length of Fisherman's Drive – from U.S. Highway #20 to the development site – has to meet the county safe road standards.

Accordingly, the board of county commissioners makes it a specific condition of approval that the applicant demonstrates compliance with the safe road standard.

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<sup>24</sup> See FCDC Appendix B, "Detailed Performance Standards for The Design and Construction of Roads."

<sup>25</sup> See record, generally.

<sup>26</sup> Comments of Sinclair Buckstaff made during the public hearing held Tuesday, May 8, 2007.

<sup>27</sup> This reasonable improvements requirement, sometimes called the "Gunbarrel rule," is more fully explained in the Findings of Fact and Conclusions of Law issued by the Board of Fremont County Commissioners in the Gunbarrel at Shotgun Village Subdivision case on April 16, 2007, a copy of which may be obtained from the Fremont County Clerk.

### 3. Other Absolute Performance Standards

The board of county commissioners reviewed the planning and zoning commission's scoring of each of the other absolute performance standards.

#### *Wetlands: State and Federal Regulations*

The board made it a specific condition of approval that the applicant obtains a Clean Water Act, Section 404 permit, prior to final plat approval.

#### *Scoring Affirmed*

The board of county commissioners, having reviewed each of the other absolute performance standards, found the scoring done by the planning and zoning commission to be proper and based upon substantial evidence contained in the record.<sup>28</sup> Accordingly, the planning and zoning commission's scoring of the remaining absolute performance standards is *affirmed*.<sup>29</sup>

### C. Relative Performance Standards

#### *1. Wetlands: Open Space Use.*

The commissioners considered whether the application satisfied the requirements of FCDC Ch. VII. E.2., which requires the following:

*"The open space use of wetlands and/or their enhancement to a higher functional value shall be encouraged...."*

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<sup>28</sup> See, record generally.

<sup>29</sup> See the North Fremont Zoning District Development Review Checklist (the "Scoresheet") for the proposed River's Edge on the Henry's Fork Subdivision, which is contained in the record.

The board found that the applicant had made an inadequate attempt to provide for the open space use of the wetlands on the development site.<sup>30</sup> Accordingly, the board scored this standard -1 point. When multiplied by the importance factor of 3, the score on this standard was -3 points.

*2. Stream Corridors: Open Space.*

The commissioners considered whether the application satisfied the requirements of FCDC Ch. VII. F.2, which requires the following:

*"The open space use of stream corridors and retention or restoration of riparian vegetation shall be encouraged...."*

The board found that the applicant had made a minimally adequate attempt to meet this standard.<sup>31</sup> Accordingly, the board scored this standard 0 points.

*3. Slopes: Open Space.*

The commissioners considered whether the application satisfied the requirements of FCDC Ch. VII. H. 1 and 2, which require the following, respectively:

*"1. Open space use of slopes of 30% or more, or other slopes identified as unstable, shall be encouraged."*

*2. The open space use of 15-30% slopes shall be encouraged."*

The board found that the applicant had made a successful effort to implement these performance standards.<sup>32</sup> Accordingly, the board scored both the standards +1 point. When multiplied by the importance factor of 4 for 30% slopes, and 2 for 15-30% slopes, the respective scores were +4 and +2 points.

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<sup>30</sup> See record, generally.

<sup>31</sup> See record, generally.

<sup>32</sup> See record, generally.

4. *Wildlife Habitat: Open Space Use.*

The commissioners considered whether the application satisfied the requirements of FCDC Ch. VII. J.1., which requires the following:

*"Open space use of critical wildlife habitat areas shall be encouraged."*

The board found that the applicant had made a successful effort to implement this performance standard.<sup>33</sup> Accordingly, the board scored this standard +1 point. When multiplied by the importance factor of 5, the score on this standard was +5 points.

5. *Native Plants: Use Encouraged.*

The commissioners considered whether the application satisfied the requirements of FCDC Ch. VII. K., which requires the following:

*"The use of native plants propagated from local stock in the revegetation and buffering efforts required by this ordinance shall be encouraged."*

The board found that the applicant had made a successful effort to implement this performance standard.<sup>34</sup> Accordingly, the board scored this standard +1 point. When multiplied by the importance factor of 1, the score on this standard was +1 point.

6. *Protecting Agricultural Lands.*

The commissioners considered whether the application satisfied the requirements of FCDC Ch. VII. Q., which requires the following:

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<sup>33</sup> See record, generally.

<sup>34</sup> See record, generally.

*"Conversion of productive agricultural land to other uses shall be discouraged."*

The board found that since the development site had been determined not to be productive agricultural land by the LESA System, this performance standard was not relevant. Accordingly, the board scored this standard 0 points.

#### *7. Other Relative Performance Standards*

The board of county commissioners reviewed the planning and zoning commission's scoring of the remaining relative performance standards.

#### *Scoring Affirmed*

The board of county commissioners, having reviewed each of the other relative performance standards, found the scoring done by the planning and zoning commission to be proper and based on substantial evidence contained in the record.<sup>35</sup> Accordingly, the planning and zoning commission's scoring of the remaining relative performance standards is *affirmed*.<sup>36</sup>

#### *Overall Relative Performance Standards Score*

Overall, the board of county commissioners awarded the application +6 points on relative performance standards.

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<sup>35</sup> See record, generally.

<sup>36</sup> See the North Fremont Zoning District Development Review Checklist (the "Scoresheet") for River's Edge on the Henry's Fork subdivision, which is contained in the record.

**Order**

The board concludes that the application filed by Henry's Fork Properties, LLC for a class II permit to subdivide a 254-acre parcel of land into 46 residential lots earned a cumulative score of +6 points on relative performance standards; but failed to comply with all absolute performance standards. The application failed to comply with Fremont County Development Code Chapter VII. Z. CONNECTIONS.

The board of county commissioners therefore concludes that the application fails to comply with the Fremont County Comprehensive Plan ("Comprehensive Plan") and the Fremont County Development Code ("FCDC").

Accordingly, the application is denied.

**DATED this 26<sup>th</sup> day of July 2007.**

**FREMONT COUNTY  
BOARD OF COMMISSIONERS**

  
\_\_\_\_\_  
**PAUL ROMRELL, Chairman**

**ATTEST:**

  
\_\_\_\_\_  
**ABBIE MACE, Clerk**



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Finding of Facts and Conclusion of Law have been served upon the individuals listed below and in the following manner:

Lary S. Larson, Esq.  
HOPKINS, RODEN, CROCKETT,  
HANSEN & HOOPES, P.L.L.C.  
P.O. Box 51219  
Idaho Falls, ID 83405-1219

U.S. Mail – Postage Prepaid ( )  
Hand delivered (✓)  
Fax ( )  
Date: 7-26-07

Drake Munson  
Henry's Fork Properties, LLC  
4201 S. Achilles Drive  
Salt Lake City, UT 84124

U.S. Mail-Postage Prepaid ( )  
Hand delivered ( )  
Fax: ( )  
Date: \_\_\_\_\_

Jeff Moss, Esq.  
2880 North 55<sup>th</sup> West  
Idaho Falls, Idaho 83402

U.S. Mail-Postage Prepaid ( )  
Hand delivered ( )  
Fax: ( )  
Date: \_\_\_\_\_

U.S. Mail-Postage Prepaid ( )  
Hand delivered ( )  
Fax: ( )  
Date: \_\_\_\_\_

Abbie Mae

# **EXHIBIT B**

**April 21, 2008 Memorandum Decision**

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR FREMONT COUNTY**

HENRY'S FORK PROPERTIES, LLC,	)	
	)	
Petitioner,	)	Case No. CV-07-471
	)	
v.	)	MEMORANDUM DECISION
	)	
FREMONT COUNTY BOARD OF	)	
COMMISSIONERS,	)	
	)	
Respondent.	)	
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**SUMMARY**

Fremont County Board of Commissioners denied a subdivision application that proposed relocating a county road. According to the County, its development code requires that new developments “optimize functional connections with adjoining developments,”<sup>1</sup> and relocating county roads violates that requirement. The issue before this Court is whether the County’s interpretation was reasonable. Because the County’s interpretation led to capricious results, did not afford a fixed rule, and was unpredictable, the Court finds the County’s interpretation arbitrary, capricious, and an abuse of discretion. The Court remands the case back to the County.

**FACTS**

Henry’s Fork Properties, LLC (“Henry’s Fork”) submitted an application to subdivide 254 acres along the Henry’s Fork River into 46 residential lots. The subdivision proposed relocating a county road, Fisherman’s Drive, back away from the Henry’s Fork River toward the interior of the subdivision so Henry’s Fork could sell the lots as high-value riverfront lots.

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<sup>1</sup> Fremont County Development Code, Ch. VII. Z.

The Fremont County Board of Commissioners denied the application. The County was concerned about an individual developer's ability to move its roads, roads like Fisherman's Drive created by public use and maintenance. This is a reasonable concern. Testimony before the County stated that 85% of the roads in Fremont County are public-use-and-maintenance roads. Developers' movements of these roads to increase property values would have a significant impact on the County's transportation. The County looked to its development code to set a precedent that would protect its interests in its roads.

The County asserted that relocating Fisherman's Drive failed to "optimize functional connections with adjoining developments"; the subdivision failed to comply with Fremont County Development Code Chapter VII. Z.<sup>2</sup> Nothing less than full incorporation of Fisherman's Drive into the subdivision would satisfy the code. Henry's Fork appeals that interpretation. Before the Court is the sole issue of whether the County's interpretation of its own development code erred in a manner specified in Idaho Code § 67-5279(3). The Court will focus on this issue.

#### STANDARD OF REVIEW

The Idaho Administrative Procedures Act ("APA") governs the review of local zoning decisions.<sup>3</sup> The Court will affirm the County's decision unless Henry's Fork establishes that the County's decision erred in a manner specified in Idaho Code § 67-5279(3), and that the County's decision prejudiced one of Henry's Fork's substantial rights.<sup>4</sup>

The Court refuses to consider whether the County's decision was in violation of constitutional or statutory provisions; the Court will not delve de novo into the legality of the County's decision. Rather, the Court sees this as a matter of County discretion and

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<sup>2</sup> *Findings of Fact, Conclusions of Law, and Order*, p.18 (26 July 2007).

<sup>3</sup> *Price v. Payette County Bd. Of County Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998).

<sup>4</sup> I.C. § 67-5279(3), (4).

will only consider whether the County's interpretation was reasonable—or whether the County's decision was arbitrary, capricious, or an abuse of discretion.<sup>5</sup>

This analysis begins by presuming the County's interpretation is legitimate: “There is a strong presumption favoring the validity of the actions of zoning boards,” and this Court will uphold the validity of the County's interpretation if it is “free from capriciousness, arbitrariness or discrimination.”<sup>6</sup>

## DISCUSSION

### 1. The County's interpretation

Fremont County has a reasonable interest in its roads. Henry's Fork's subdivision proposed relocating a county road. The County was uncertain about its ability to prohibit Henry's Fork from moving its road outright—it was uncertain about its ability to refuse to allow relocation without reliance on a statute. So, it looked to its development code.

The Fremont County Development Code requires that new developments “optimize functional connections with adjoining developments.”<sup>7</sup> The County reasoned as follows: developments includes public infrastructure; public infrastructure includes county roads; Fisherman's Drive is a county road; the proposed subdivision must “optimize functional connections” with Fisherman's Drive; the proposed subdivision relocates Fisherman's Drive; relocation is not optimizing; *therefore*, Henry's Fork's subdivision violated the County development code and the application was denied.<sup>8</sup>

### 2. Arbitrary, capricious, and an abuse of discretion

The Court presumes this interpretation is legitimate. That is, the Court will not reinterpret the ordinance or attach its own meaning to the words. Instead, the Court will

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<sup>5</sup> I.C. § 67-5279(3)(e).

<sup>6</sup> *South Fork Coalition v. Board of Comm'rs of Bonneville County*, 117 Idaho 857, 861, 792 P.2d 882, 885 (1990).

<sup>7</sup> Fremont County Development Code, Ch. VII. Z (emphasis added).

<sup>8</sup> *Findings of Fact, Conclusions of Law, and Order*, p.12.

look for arbitrariness, capriciousness, and discrimination. The Court first looks to the results of the County's interpretation.

Henry's Fork's application was denied because it failed to *optimize functional connections* with public infrastructure, Fisherman's Drive. The County required that the subdivision "incorporate the full-length of Fisherman's Drive through the proposed development site into its design."<sup>9</sup> The County didn't stop there. Immediately after requiring Henry's Fork to incorporate Fisherman's Drive, the County told Henry's Fork that it couldn't use it. Fisherman's Drive is unsafe.

Fisherman's Drive has "steep slopes, no guardrails, [and] poor sight distance"; the road "is narrow, very close to the river with steep slopes, [and] fails to meet current county road standards."<sup>10</sup> The Fremont County Development Code requires safe access roads. The County's interpretation resulted in requiring Henry's Fork to incorporate a road it was forbidden from using. Decision maker caprice produced that result. Even if the Court presumes that an unsafe dirt road constitutes public infrastructure (and even if the Court presumes that public infrastructure is a development), the results the County reached were capricious.

The County's interpretation has more than capricious results; it leaves the County completely open to *grant* subdivision applications under the exact same facts. The interpretation does not afford a fixed rule of law.

Suppose another developer comes before the County with a subdivision application that proposes a county road relocation. The same ordinance the County relies on here, the optimize-functional-connections ordinance, could be read to *allow* the relocation. The County could just as easily decide that relocation optimizes functional connections: the proposed new road would be safer, drivers could actually use it, the road connects at the same end points, and the route is shorter. The County's interpretation is not a fixed rule of law; it is an open door to deny subdivisions—and developers—the County does not like.

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<sup>9</sup> *Findings of Fact, Conclusions of Law, and Order*, p.12.

<sup>10</sup> *Findings of Fact, Conclusions of Law, and Order*, pp. 12-13.

Without rule of law, a developer's compliance with the code would be irrelevant to obtaining a subdivision permit; rather, subdivision permits would depend on the developer's relationships with board members, the developer's in-state/out-of-state status, and the developer's ability to pacify adjacent landowners. The County's open-door interpretation leads to arbitrary decisions, not decisions based on fixed legal principles.

Rule of law also requires some predictability, and here, there was no way a developer could foresee that the Fisherman's Drive's relocation would violate the County's development code. Prediction here would require Henry's Fork to see that developments include public infrastructure, and that public infrastructure includes unsafe dirt roads. If Henry's Fork had the clairvoyance to maneuver that thicket, it would still have to reason that *optimization* of the unsafe dirt road meant that the road had to stay put.

There is no way Henry's Fork could foresee such an application of law. And without predictable application of the law, developers are exposed to the whims of the decision maker. Here, the County's interpretation was unpredictable; it was arbitrary.

The County's arbitrary interpretation abused its discretion. Clearly it has legitimate interests in its roads. Clearly it has legitimate interests in future development along one of its most important resources, the Henry's Fork River. Surely the County has discretion to protect those interests. The Court is reluctant to assert its opinion over an area of County discretion. But ...

... But the Court must override County decisions that abuse its discretion. Here, the County abused its discretion with an arbitrary interpretation. The interpretation led to capricious results; it failed to afford a fixed rule of law; and it was unpredictable. The County wordsmithed a rule to obtain its desired results; the interpretation was arbitrary, an abuse of discretion.

### **3. A substantial right prejudiced**

Henry's Fork bought the 254 acres with the intention to subdivide. At the time of purchase, it reasoned that compliance with a reasonable interpretation of the County's

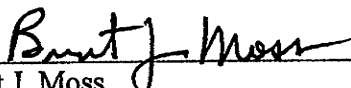
development code would allow it to subdivide. Fremont County's denial of Henry's Fork's subdivision application restricted the use of its property. This restriction constitutes the prejudice of Henry's Fork's substantial right.

### CONCLUSION

Henry's Fork established that the County erred in a manner specified by Idaho Code § 67-5279(3) because the County's interpretation of its development code was arbitrary, capricious, and an abuse of discretion. Henry's Fork has also established that it had a substantial right prejudiced. The County may have ultimately reached the right conclusion; maybe counties can deny subdivision applications that propose relocating county roads. But a county must reach that conclusion with reasonable, principled justifications. The Court remands this case back to Fremont County to determine without reliance on FCDC Ch. VII. Z.

So ordered.

Dated this 21 day of April, 2008.

  
\_\_\_\_\_  
Brent J. Moss  
District Judge



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing  
MEMORANDUM DECISION was this 21 day of April, 2008, served upon the  
following individuals via U.S. Mail, postage prepaid, unless otherwise indicated:

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\_\_\_\_\_  
Law Clerk