



Comments on draft Hearing Bodies and Hearing Procedures Amendments

Case OA-144-09

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By Terry J. Harris and Jeff Faught

Kootenai Environmental Alliance (KEA) is pleased to comment on the proposed legislation to modify Kootenai County's hearing procedures. Unfortunately, KEA believes that the procedures as proposed lack some basic due process rights and remain confusing and we urge a number of amendments to this draft legislation. We pledge our cooperation and assistance as this reform process advances.

It is our understanding that the planning commission recognizes that the current set of hearing procedures are inadequate and that the commission intends to pass some version of the proposed changes as a temporary fix, in anticipation of a more comprehensive fix down the road. Although this legislation is perhaps well-intended, in attempting to place a band-aid on the present set of hearing procedures, the County may do more harm than good. If the County decides to adopt an admittedly flawed set of hearing procedures, the County would be placing a fresh stamp of approval on a bad set of laws and procedures for an indeterminate amount of time before a more comprehensive overhaul. Instead, KEA believes that Kootenai County should adopt a set of hearing procedures that are both fair and clear, that provide appropriate due process rights, and that creates a solid framework for further improvement.

New hearing procedures need not be made out of whole cloth. Both the American Bar Association and the American Planning Association provide model comprehensive hearing procedures. Both of these sets of model procedures were developed by nationally known authorities on land use law. In addition, both sets of procedures provide multiple options throughout their procedural scheme that would allow the commission to pick which rules best fit the County. KEA suggests that the commission use these guidelines as a starting point in developing a new comprehensive set of hearing procedures. There is no reason to reinvent the wheel.

Notwithstanding the above recommendation, KEA feels the need to make comments on the proposed hearing procedures. Our view is that the proposed hearing procedures do not provide the correct balance of notice and comment opportunities to satisfy due process rights.

1. The definition of “affected person” in section 2-1-2 should be changed to better reflect a person’s standing to challenge an administrative decision.

The Local Land Use Policy Act (LLUPA) defines an affected person as “one having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing development.” Idaho Code §67-5521. However, the Idaho Supreme Court has challenged the legislature’s ability to proscribe standing requirements. *Evans v. Teton County*, 73 P.3d 84, 88 (2003). The Idaho Supreme Court has said that a person has standing to challenge land use decisions if they can show the existence of real or potential harm. *Id* at 89. The commission should adopt a definition of affected persons that provides constitutionally recognized standing requirements.

2. The heading of section 2-1-5 should be changed so that it does not cause confusion.

The heading of section 2-1-5 reads, “APPLICATION HEARING PROCEDURES”. The heading seems to suggest that the hearing procedures contained in the section are limited to those dealing with applications and applicants. However, the hearing procedures also include procedures governing legislative actions. Some legislative actions do not require an application or an applicant. In order to make it clear that the proposed hearing procedures apply to all legislative and quasi-judicial actions the heading should plainly read “HEARING PROCEDURES”.

3. The commission should update the notice requirements contained in section 2-1-5A to increase public participation.

A. Electronic notice and web-based docketing should be allowed and encouraged.

The commission has shown some interest in improving notice procedures in attempt to give the public a greater opportunity to participate. If the commission truly wishes to move in that direction, KEA suggests that the commission adopt notice procedures that acknowledge the world that we live in now, not 40 years ago. This is not to say that the current notice procedures are not lawful. The problem is that they are not effective. Newspaper readership has been steadily declining due to the availability of internet access. Those that still read the newspaper rarely read legal notices.

To promote public participation and access to decisions made by the commission, the commission should adopt a strategy of notice that takes advantage of the internet. Every form of notice should include a web address that points the reader to a central location where more information on the particular application can be sought. This would include making the web address prominent in notices provided by certified mail, on signs, and in newspapers. In addition,

the web address should be highlighted at hearings. Bringing attention to a web address will go a long way in involving the local community.

B. Notice by mail should be sent to those reasonably anticipated to be affected.

However, it will still be necessary to provide notice by certified mail to those that can be reasonably anticipated to be interested persons. The commission should extend the *minimum* distance within which land owners should receive notice by certified mail from 350' to 1000'. Though, we believe a “reasonably anticipated” standard should probably apply, so as to accommodate the many different circumstances that might occur in this diverse county. Doing so will increase public participation and decrease claims based on insufficient notice.

If the commission is truly concerned about the rare possibility of prohibitive costs associated with an expansion of notice provisions, the commission should adopt a notice rule that allows for a different form of notice when costs for providing notice becomes prohibitive. Such provisions are commonly included in notice procedures and can be easily lifted from other jurisdictions.

Notice by certified mail should be provided to community groups known to be involved in land use issues or who might subscribe to a general interested party list. Such notice is common in other jurisdictions because community groups are anticipated to be interested parties. Doing so will save the County trouble down the road -- upfront and efficient communication is often the best method for avoiding procedural challenges later.

4. Section 2-1-5B of the proposal relating to changes or additions to applications does not respect due process rights because it anticipates allowing ex-parte communications.

Section 2-1-5B seems to allow ex-parte communications and changes to applications after notice is provided. As a basic rule, ex-parte communications between applicants and

hearing bodies in quasi-judicial proceedings violates due process rights unless those communications are fully disclosed at a hearing. *Eacret v. Bonner County Board of Commissioners*, 86 P.3d 494, 500 (2004). In the proposed text of Section 2-1-5B, the draft seems to allow *the hearing body* to recommend modification of an application to an applicant *before* a hearing is held. Perhaps this is not what the legislation intends, but it should be clearer that hearing procedures should expressly disallow ex-parte communications in a quasi-judicial hearing.

5. Section 2-1-5B provides insufficient notice for modified applications

As written, Section 2-1-5B essentially provides insufficient notice to interested parties because it still allows the applicant to make changes to the application after notice has been served, and in some cases after the hearing has been held. In the most problematic case, it allows the application to be modified *after* a hearing, but with no further opportunity to comment. In such case, changes to an application without an opportunity to be heard will violate due process rights if the change is so substantial that prior meaningful comment is rendered meaningless. We would suggest that in most cases in Kootenai County, *any* change to an application is substantial, and each such case would open the door to legal challenge. As a basic rule, interested parties must be given enough notice to allow them to provide meaningful comment on a submitted application. Interested parties cannot make meaningful comment on a *modified* application if they have only been given notice and opportunity to comment on the *original* application.

6. Notice and hearings should require a complete application as a condition precedent.

To ensure that interested parties have the opportunity to make meaningful comment, the commission should adopt hearing procedures that include a requirement that an application be

complete, and perhaps certified by the Director, before a hearing is even scheduled and notice is sent out. Such a requirement will be beneficial to all those involved. The hearing body will have *all* the information in front of them when it comes time to make a decision. In addition and out of necessity, applicants will be better prepared for the hearings. Most importantly, such a requirement will allow all interested parties the opportunity to provide meaning comment on a fixed application package at the hearing.

In any event, changes to a complete application should not be allowed after notice is sent out. If an applicant needs to modify an application he or she should begin the process anew.

7. Section 2-1-5C and E(5) disallows the acceptance of written comments during a hearing and in doing so violates due process rights and Idaho law.

Due process requires that interested parties be provided the opportunity to give meaningful comment at a meaningful time. *Cowan v. Board of Commissioners of Fremont County*, 148 P.3d 1247,1258 (2006). Idaho Law requires that all interested persons be provided an opportunity to present evidence at hearings. Idaho Code §67-6521. There is no other more meaningful time to comment than at a hearing. *Cowan*, 148 P.3d at 1259. Not accepting written comment at a hearing violates due process rights and Idaho law in cases in which public testimony is limited by time constraints. *See Id.* at 1258-1259. It is a common occurrence for the hearing body to limit public testimony at hearings. Allowing written comments in lieu of speaking time allows interested parties to make meaningful comment. The committee should adopt hearing procedures that fully embrace the submission of written comments during hearings so that the hearing procedures will be in compliance with due process requirements.

8. If written comments are required in advance, then the existing notice period is unfair and insufficient.

If the County were to adopt procedures requiring written comments to be made up to 14 days in advance of the actual hearing, then the notice period is unfairly limited. If, for example in a typical case, 28 days notice is provided prior to a hearing, then the period in which an interested party can provide written comment is substantially and unfairly shortened. Instead, the notice period should be amended to allow 28 days before *written comment* is due.

9. Section 2-1-5F(3 & 4) does not accurately reflect Idaho law because it only provides the opportunity for rebuttal to the applicant.

Idaho law requires that *all* interested persons be provided the opportunity to rebut evidence. Idaho Code §67-6534. The proposal does not reflect this reality. The proposal only refers to the applicant's right to rebuttal. The procedures should be amended to better reflect the reality that all parties are afforded the opportunity to rebut evidence.

10. Section 2-1-6 is confusing and therefore may be over- or under-inclusive.

The title of section 2-1-6 reads, "APPEAL HEARING PROCEDURES". The title suggests that the hearing procedures outlined in the section will cover *all* hearings held on appeal. However, the section repeatedly refers to *Department action* as the grounds for an appeal. The section leaves open the question as to what law governs hearing procedures held on other types of appeal. The commission should attempt to address this by either changing the title of the section or the applicability of the section.