JAMES R. LASKI
JRL@LAWSONLASKI.COM

June 8, 2022

Kristine Hilt
Code Compliance Manager
Blaine County Land Use & Building Services
Via Email: khilt@co.blaine.us

RECEIVED
JUN - 8 2022
BLAINE COUNTY
LAND USE & BUILDING SERVICES

Re: Stream Alteration Permit Application
Skjonsby- 106 West Channel Lane
Our File No.: 10071-003

Dear Kristine:

We represent Greg and Hanna Skjonsby with respect to the above referenced stream alteration permit application submitted by Chuck Brockway. I understand from Dr. Brockway that you may believe the current grass/lawn is not grandfathered as it was not in place prior to the ordinance date of 1991. This, however, is not accurate.

Attached is a letter from Aaron Hill, who grew up on the property, which clarifies that the yard and grass extended all the way to the river prior to 1984, when the Hills purchased the property. Additionally, attached are two photos from 1987 and another from 1989 which all clearly show the lawn extending to the edge of the river. These all indicate that the lawn was legally in place prior to the ordinance.

Finally, attached is Judge May's 2003 decision in *Smith v. City of Ketchum*, Blaine County Case CV-02-08795, in which he ruled in favor of the landowner on this specific issue as it relates to the Ketchum's Flood Plain Ordinance. In short, the court concluded that, under Idaho law, "the owner of a lawful nonconforming use has the right to continue that use despite the conflicting provision of the subsequently enacted zoning ordinance." *See Decision at pp7.* Moreover, that decision clarifies that new applications cannot be conditioned on removal of all or part on the nonconforming use. This is the controlling law in Blaine County today.

Based on the foregoing, I respectfully request that you reassess your position that the existing lawn is not grandfathered, and that the pending application not be conditioned on removal of all or part of that legally grandfathered lawn.

Thank you for your attention to this matter. Please do not hesitate to contact me with any questions.

Sincerely,

LAWSON LASKI CLARK, PLLC

James R. Laski

Enclosures

Cc: client
Charles G. Brockway, Jr.

STEPHANIE
REED
real estate

trust us to bring you **home**

To whom it may concern,

My name is Aaron Hill. I grew up at the house at 106 West Channel Lane, Hailey ID 83333 starting in 1984. My parents Jim and Margie Hill purchased the home in 1984 from Clay Carter who built it in 1981 and lived there previous to our family. From when we purchased the house and throughout the entire time we owned it (1984 - 2002) the large beautiful yard and grass has gone all the way to the river as it does today. We have photos I could dig up if you would like.

If you have any questions, please reach out to me my email is aaron@stephanie-reed.com or phone: (858) 245-9783

Best,

Aaron Hill
858-245-9783
Keller Williams Sun Valley Southern Idaho
www.stephanie-reed.com

May '89

May '87

May '87

FILED AM/PM 11:15
MARSHA RIEMANN
APR 14 2003
CLERK DISTRICT
COURT BLAINE COUNTY IDAHO

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

ROBERT SMITH and JEAN SMITH, Husband and wife,

Petitioners,

v.

CITY OF KETCHUM, IDAHO, by and through its duly elected City Council,

Respondent.

Case No. CV-02-08795

MEMORANDUM DECISION

I. PROCEDURAL HISTORY

On April 7, 2003, this matter came before the Court upon Robert and Jean Smith's Petition for Judicial Review of the Ketchum City Council's decision affirming the Planning and Zoning Commission's decision on the Petitioners' application for a permit to proceed with their Stream Bank Stabilization Project; the Honorable James J. May presiding. The Petitioners were represented by Timothy Stover, Esq. of Twin Falls, and the City was represented by Margaret Simms, Ketchum City Attorney.

The Court, having reviewed the petition, matters of record, briefs, cases, statutes, ordinances, and arguments of counsel, and having independently researched the legal issues, now renders its decision.

II. STATEMENT OF FACTS

In 1978, Robert and Jean Smith ("Petitioners") constructed their home in Ketchum, Idaho, adjacent to the Big Wood River. In landscaping their property, the Petitioners planted Kentucky blue grass to the river bank, which grass has remained in place since that time.

In 1989, the City of Ketchum ("City") enacted Chapter 17.88 of the Zoning Code, the Floodplain Management Overlay District Ordinance ("FP"). The major purposes of the FP are to provide a governmental framework within which to regulate any development adjacent to waterways within the City, to provide for the maintenance and/or enhancement of the riparian environment, to review landscaping and surface access for flood-carrying capacity, and to preserve or enhance riparian vegetation. The FP requires any persons desiring to develop the floodplain, including any stream alteration, to obtain a development permit from the Planning and Zoning Administrator before any building, excavation, or grading permit may be issued.

In 1989, a publicly sponsored and funded drop structure was placed in the river near the downstream property line of the Petitioners' property to reduce water velocity and erosion resulting therefrom along the river bank. Since that time, the drop structure has received no maintenance by any public entity and the river bank has continued to erode. Therefore, pursuant to the FP, the Petitioners filed an application with the City seeking a permit to repair and

rip-rap the eroded area and to repair, rebuild, and secure the drop structure to its original design in May of 2000. The Petitioners also sought and obtained permits from the Idaho Department of Water Quality and the Army Corps of Engineers to complete the work. On October 23, 2000, the Ketchum Planning and Zoning Commission ("Commission") approved the Petitioners' application with certain conditions, including the requirement of the submission of a plan for the restoration of riparian vegetation. Because of certain conditions imposed by the Commission, the Petitioners chose not to do the work and the design review approval expired on May 13, 2001.

On March 25, 2002 two members of the Commission approved the Petitioners' application for an emergency Stream Bank Stabilization application which allowed them to repair the in-stream drop structure adjacent to their property. Subsequently, the Petitioners again filed an application with the City seeking a permit to complete the remaining work on their Stream Bank Stabilization Project.

On April 8, 2002, the Ketchum Planning and Zoning Commission ("Commission") conducted a public hearing on the Petitioners' application. As seen in the Findings of Fact, Conclusions of Law and Decision adopted April 22, 2002, the Commission approved the Petitioners' application subject to certain conditions. Condition number twelve, which the Petitioners specifically challenge in this appeal, states:

> A riparian vegetation restoration plan shall be submitted for review and approval by the Planning

> and Zoning Administrator prior to any construction. Said plan shall incorporate appropriate riparian vegetation within a 25 (twenty-five) foot corridor as measured from the mean high water mark.

The Petitioners appealed the Commission's decision to the Ketchum City Council ("Council") claiming that the Commission's decision violated their constitutional and statutory protections. On July 15, 2002, the Council heard the Petitioners' appeal and voted three to one to affirm the Commission's decision. The Council adopted its Findings of Fact, Conclusions of Law and Decision on September 3, 2002.

III. STANDARD OF REVIEW

The standard of review which a court is to apply when reviewing a city council's zoning decision is found in I.C. §§ 67-6521(1)(d) and 67-5279. *Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 39, 981 P.2d 1146, 1149 (1999). A court should defer to a city council's findings of fact unless those findings are clearly erroneous and unsupported by evidence in the record. *Id.* A court may not substitute its judgment for that of the city council as to the weight of the evidence on factual matters. I.C. § 67-5279. The city council's findings of fact are binding even where there exists conflicting evidence. *South Fork Coalition v. Board of Commissioners of Bonneville County*, 117 Idaho 857, 860, 792 P.2d 882, 885 (1990). A court will not reverse the findings of a city council if the findings are clear, dispositive and supported by the record. *Angstman v. City*

of Boise, 128 Idaho 575, 579, 917 P.2d 409, 413 (Ct. App. 1996).

The party attacking a zoning decision bears the burden of proving that the zoning ordinance was applied improperly. *Sprenger, Grubb & Associates, Inc. v. City of Hailey*, 127 Idaho 576, 586, 903 P.2d 741, 751 (1995). A strong presumption of validity favors the actions of zoning authorities when adopting, interpreting and applying their own zoning ordinances. *South Fork Coalition*, 117 Idaho at 860, 792 P.2d at 885; *see also Howard v. Canyon County Bd. of Comm'rs*, 128 Idaho 479, 480, 915 P.2d 709, 710 (1996). Such presumption can only be overcome by a clear showing that the ordinance as applied is confiscatory, arbitrary, unreasonable and capricious. *Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506, 511, 567 P.2d 1257, 1262 (1977). If the presumption is overcome, by evidence tending to show that the ordinance in question has been unreasonably applied to the property, the burden then shifts to the city to come forward with evidence to rebut and show that the ordinance is valid. *Sprenger, Grubb & Associates, Inc. v. City of Hailey*, 127 Idaho 576, 586, 903 P.2d 741, 751 (1995).

Under I.C. § 67-5279, review of a zoning board decision is a two-tiered analysis. *Angstman*, 128 Idaho at 578, 917 P.2d at 412. The first step under I.C. § 67-5279(3), is for

a court to determine whether a city council's zoning decision (1) violates constitutional or statutory provisions; (2) exceeds the city council's statutory authority; (3) is made upon unlawful procedure; (4) is not supported by substantial evidence on the record as a whole; or (5) is arbitrary, capricious, or an abuse of discretion. *Lamar Corp.*, 133 Idaho at 39, 981 P.2d at 1149. Second, under I.C. § 67-5279(4), even if the city council erred in any of the aforementioned ways, a court should affirm its action unless a substantial right of the applicant has been prejudiced. *Id.*

III. ISSUE

A. WHETHER THE PETITIONERS' LANDSCAPING OF THEIR PROPERTY WITH GRASS UP TO THE BANK OF THE BIG WOOD RIVER CONSTITUTES A PRIOR PERMITTED NONCONFORMING USE THAT IS PROTECTED BY THE DUE PROCESS CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS.

IV. ANALYSIS

A. The Petitioners' landscaping of their property constitutes a prior permitted nonconforming use which is protected by due process.

In Idaho case law, a prior permitted nonconforming use is defined as follows:

> When land is lawfully used or improved in a way that conflicts with requirements of a subsequently enacted zoning ordinance, the property is said to be nonconforming. From this status flows a limited protection against zoning requirements. .

Bastian v. City of Twin Falls, 104 Idaho 307, 308, 658 P.2d 978, 979 (Ct.App. 1983). Similarly, the City of Ketchum Zoning Code defines prior permitted nonconforming use as

> any legally existing use, whether within a building or other structure or on a tract of land, which does not conform to the use regulations of this Title for the district in which such "nonconforming use" is located either at the effective date of this Title or as a result of subsequent amendments which may be incorporated into this Title.

City of Ketchum Zoning Code § 17.136.010.

Under Idaho law, an owner of a lawful nonconforming use has a right to continue that use despite the conflicting provisions of the subsequently enacted zoning ordinance. *Glengary-Gamlin Protective Ass'n, Inc. v. Bird*, 106 Idaho 84, 89, 675 P.2d 344, 349 (Ct.App. 1983). In *Bastian*, the Idaho Court of Appeals stated concerning the protection of prior permitted nonconforming uses:

> The right to continue a nonconforming use or improvement of property derives from the due process clauses of the state and federal constitutions. This right (often termed a "grandfather right" in lay parlance) simply protects the owner from abrupt termination of what had been a lawful condition or activity on the property. The protection does not extend beyond this purpose.
>
> Thus, nonconforming status is not a talisman from which all zoning controls must retreat. Rather, the public policy embodied in zoning laws "dictates the firm regulation of nonconforming uses with a view to their eventual elimination."
>
> From that policy flows the corollary that nonconforming uses have no inherent right to be extended or enlarged.

104 Idaho at 309, 658 P.2d at 980 (citations omitted).

Concerning the possible application of subsequently enacted zoning laws to nonconforming uses, the Idaho Supreme Court has stated: "Both conforming and nonconforming uses are subject to ordinances and regulations of a police nature

predicated upon protection of the public health, safety, welfare, and general good." *Heck v. Commissioners of Canyon County*, 123 Idaho 826, 830, 853 P.2d 571, 575 (1993) (*quoting C.D.S., Inc. v. Village of Gates Mills*, 497 N.E.2d 295, 298 (Ohio 1986)). Although the issue has not been addressed in Idaho, the Michigan Court of Appeals has held that a prior permitted nonconforming use could be subject to zoning laws if it constitutes a nuisance. *Norton Shores v. Carr*, 265 N.W.2d 802 (Mich.App. 1978).

Maintenance or repair of a prior permitted nonconforming use is permitted. 101A *CJS Zoning and Land Planning* § 171 (1979); 83 Am.Jur.2d § 676 *Zoning and Planning* (1992). If a landowner seeks to conduct a proposed activity on his or her property and that activity falls within the scope of protection afforded a nonconforming use, the nonconforming use will not lose its protection merely because the landowner mistakenly seeks a permit to conduct that activity. *Glengary-Gamlin*, 106 Idaho at 90, 675 P.2d at 350. However, if a landowner engaged in certain constitutionally protected activities seeks to add uses not protected by any grandfather right, there is nothing inappropriate about local authorities inquiring whether the landowner is willing--as a condition of granting the requested permit--to allow regulation of all his activities under the current zoning ordinance. *Id.*

Based upon the above definitions in the Idaho case law and in the Ketchum Zoning Code, the Court finds that the Petitioners' landscaping of their yard with Kentucky blue grass constitutes a prior permitted nonconforming use. Clearly, landscaping is a use and improvement of land. The City argues that the Petitioners' grass does not fall under the definitions because the use is not continual in that the grass dies each winter and grows again each spring; thus, every year a new use arises. The Court rejects this argument and considers the Petitioners' landscaping use as analogous to agricultural use. Under the City's argument, agricultural use could not constitute a prior permitted nonconforming use because farmers harvest their crops in the fall causing the use to cease until planting in spring. This argument is absurd. As with agriculture use, landscaping is a use that can be protected as a preexisting nonconforming use.

The City argues that even if the Petitioners' landscaping constitutes a prior permitted nonconforming use, the City can impose the riparian vegetation condition for police power purposes. Specifically, the City argues that the Petitioners' use constitutes a nuisance. Black's Law Dictionary defines nuisance as follows:

> Nuisance is that activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to right of another, or to the public, and producing such material annoyance, inconvenience and discomfort that law will presume resulting damage.

BLACK'S LAW DICTIONARY, 737 (Abr. 6th ed. 1991). In the Commission's Findings of Fact, as affirmed by the Council, it is clear that the Commission believed the Petitioners' manicured lawn contributed to the erosion of the stream bank. However, nothing in the findings illustrates that the Commission considered the Petitioners' lawn as a nuisance. This term was first brought up in the City's argument before this Court. The Court does not believe that the Petitioners' use rises to the level of a nuisance. Furthermore, the degree that the manicured lawn contributes to any erosion will be greatly decreased once the Petitioners complete their bank stabilization project.

The Court further finds that by seeking a permit to conduct their Stream Bank Stabilization project, the Petitioners, have not sought to expand or extend their use, but only to maintain it which is clearly allowed by law. Therefore, the city cannot condition its approval of the Petitioners' application on the condition that they give up their grandfather right.

Based upon the foregoing analysis, the Court finds that the City's decision violates the due process clauses of the United States Constitution and the Idaho Constitution in that it attempts to deprive them of their grandfather right.

CONCLUSION

For the aforementioned reasons, the Court reverses the decision of the Council upholding the Commission's conditional approval of the Petitioners' application. The

Court remands the case to the City and directs it to issue to Petitioner the permit absent Condition No. 12.

Will Counsel for the Petitioners prepare a Judgment consistent with this decision.

DATED this 15th day of April, 2003.

James J. May
District Judge

<u>CERTIFICATE OF SERVICE</u>

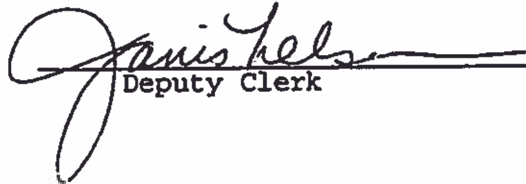
I HEREBY CERTIFY that on this 14th day of April, 2003, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Timothy Stover, Esq.
P.O. Box 1906
Twin Falls, ID 83303-1906

✓ U.S. Mail, Postage Prepaid
___ Hand Delivered
___ Overnight Mail
___ Telecopy

Margaret Simms, Esq.
Ketchum City Attorney
P.O. Box 2315
Ketchum, ID 83340

✓ U.S. Mail, Postage Prepaid
___ Hand Delivered
___ Overnight Mail
___ Telecopy



Deputy Clerk

FILED AM/PM 3:52
MAY 05 2003
CLERK DISTRICT
COURT BLAINE COUNTY IDAHO

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

* * * * * * * * * * * *

ROBERT SMITH and JEAN SMITH, husband and wife,

Petitioners/Appellants,

v.

CITY OF KETCHUM, IDAHO, By and through its duly elected City Council,

Respondent.

Case No. CV-02-8795

JUDGMENT

This matter came before the Court on April 7, 2003, upon Robert and Jean Smith's ("Smith") Petition for Judicial Review. The Petitioners were represented by Timothy J. Stover of the firm Robertson, Hepworth, Slette, Worst & Stover, PLLC, and the City of Ketchum ("City") was represented by Margaret Simms, Ketchum City Attorney.

Being duly and fully appraised in the premises, and having issued a *Memorandum Decision* dated April 14, 2003, holding and determining that the City's decision concerning the Smith Waterway Design Review Application for the Smith Streambank Stabilization Project ("Design Review Application") violated the due process clauses of the United States Constitution and the Idaho Constitution in that it attempts to deprive Smith of their grandfather right by imposing the following condition ("Condition No. 12"):

> A riparian vegetation restoration plan shall be submitted for review and approval by the Planning and Zoning Administrator prior to any construction. Said plan incorporates appropriate riparian vegetation within a 25 (twenty-five) foot corridor as measured from the mean high water mark.

and Smith is entitled to judgment as a matter of law.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The decision of the City Council regarding Smith's Design Review Application is hereby reversed.

2. The case be remanded to the City with direction to issue the Design Review permit to Smith absent Condition No. 12 or any other such condition.

3. This is a full and final judgment for all purposes, and serves to resolve all claims involving all parties. The Clerk is directed to forthwith enter this Judgment in accordance with I.R.C.P. 84(z).

In witness thereof, I have hereto set my signature and the seal of the above entitled Court this 5th day of ~~April~~ May, 2003.

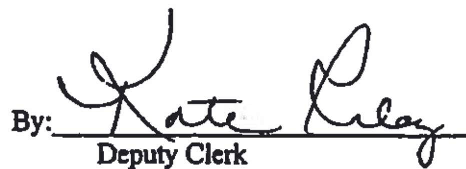
JAMES J. MAY, DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that on the 5 day of ~~April,~~ May 2003, she caused a true and correct copy of the foregoing instrument to be served upon the following persons in the following manner:

J. Evan Robertson Timothy J. Stover P.O. Box 1906 Twin Falls, ID 83303	[ ] [✓] [ ] [ ]	Hand Deliver U.S. Mail Overnight Courier Facsimile Transmission
Margaret J. Simms Ketchum City Attorney P.O. Box 2315 Ketchum, ID 83340	[ ] [✓] [ ] [ ]	Hand Deliver U.S. Mail Overnight Courier Facsimile Transmission

CLERK OF THE COURT



By: Deputy Clerk