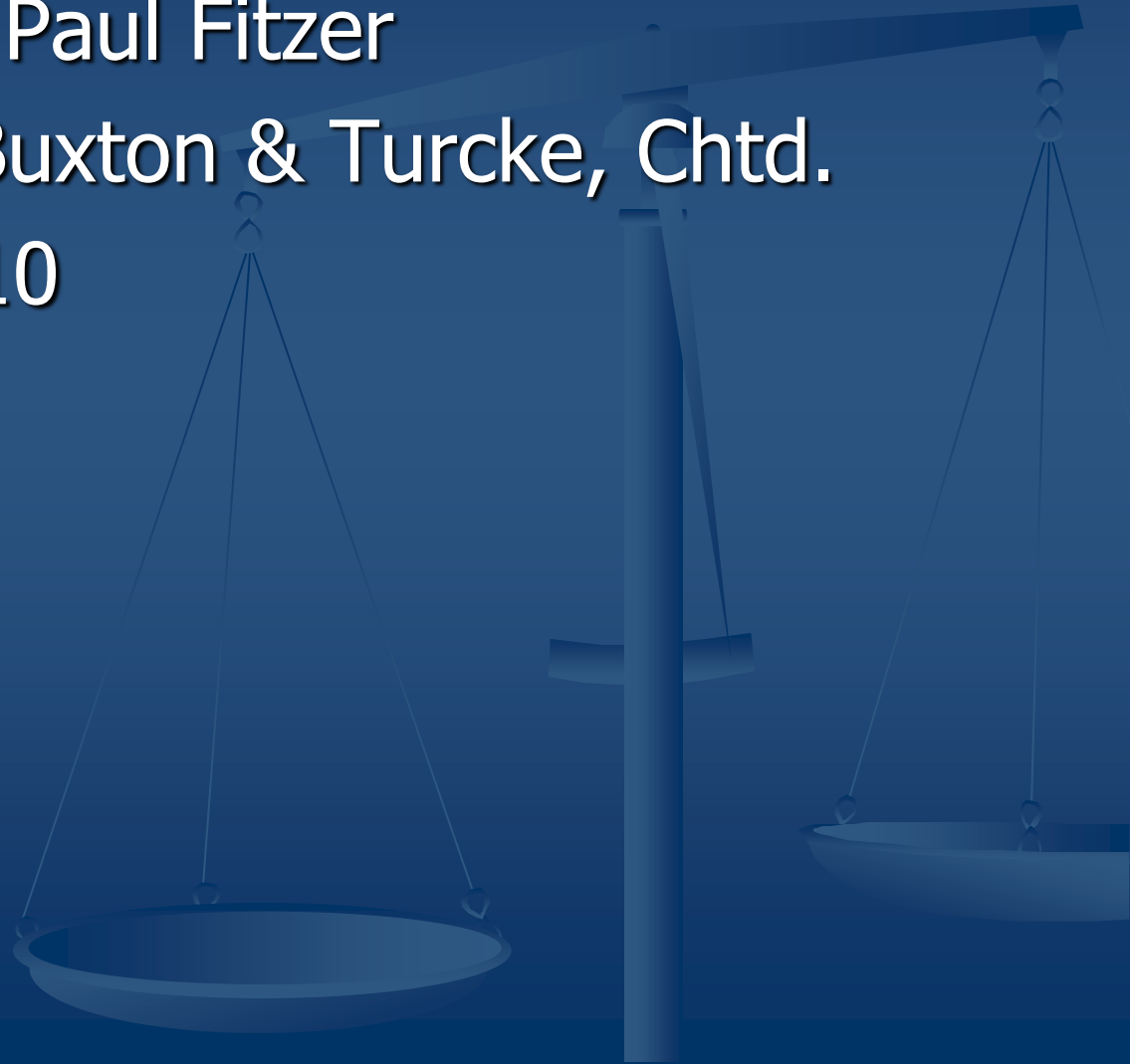


Judicial Review in the 21st Century

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- Moore, Smith, Buxton & Turcke, Chtd.
- October 14, 2010

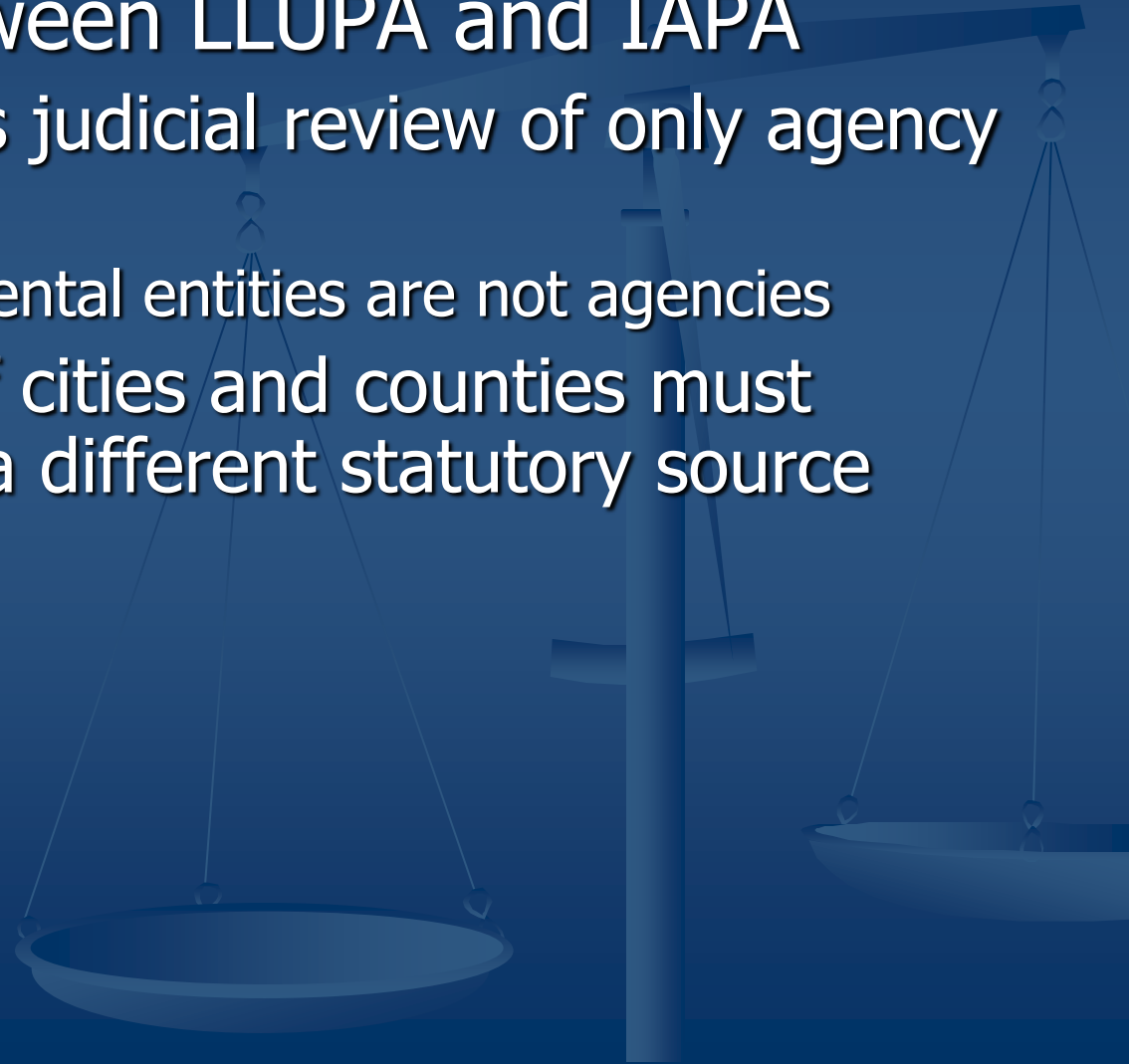


I. Introduction

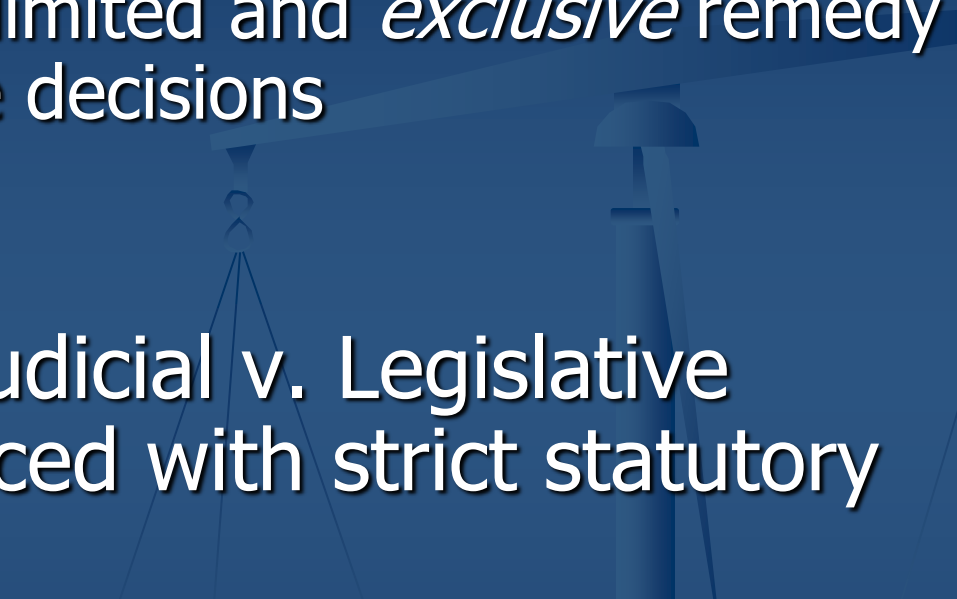
- IRCP 84 Judicial review of state agency and local government actions.
 - (1) Scope of Rule 84. The procedures and standards of review applicable to judicial review of state agency and local government actions shall be *as provided by statute*.
 - Actions of state agencies or officers or actions of a local government, its officers or its units are *not subject to judicial review unless expressly authorized by statute*.

I. Introduction

- Interaction between LLUPA and IAPA
 - IAPA authorizes judicial review of only agency actions.
 - Local governmental entities are not agencies
 - Thus, review of cities and counties must originate from a different statutory source



I. Introduction

- LLUPA provides a limited and *exclusive* remedy of certain land use decisions
 - Standing issues
 - Attorney fees
 - Historic Quasi/Judicial v. Legislative distinction replaced with strict statutory interpretation
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II. The Early Years: Quasi-judicial v. Legislative

■ Distinction

- Quasi-judicial – afforded Judicial Review under LLUPA
- Legislative – subject only to collateral attacks such Declaratory Judgment Actions

■ Early Cases

- *City of Idaho Falls v. Grimmett* -
 - Legislative activity is afforded presumptive discretion: “Every presumption is to be indulged in favor of that discretion, unless arbitrary action is clearly disclosed.”
- *Dawson Enterprises, Inc. v. Blaine County*
 - “Zoning is essentially a political, rather than a judicial matter, over which the legislative authorities have generally speaking, complete discretion”
- *Burt v. City of Idaho Falls*
 - Action is legislative when it affects a large area consisting of many parcels of property in disparate ownership.... Conversely, action is considered quasi-judicial when it applies a general rule to a specific interest, such as a zoning change affecting a single piece of property

III. The Middle Years: Pre-2010 Amendments

- The Shift to Strict Statutory Construction
 - Quasi-judicial/legislative distinction is not codified in statutes
- Cases
 - *Giltner Dairy v. Jerome County*
 - Challenge of a comprehensive plan map
 - Idaho Code §67-6519(4)
 - Judicial review available only for an applicant denied a permit or aggrieved by a decision.
 - Idaho Code §67-6521
 - Judicial review is available only to persons with an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing development.

III. The Middle Years (cont)

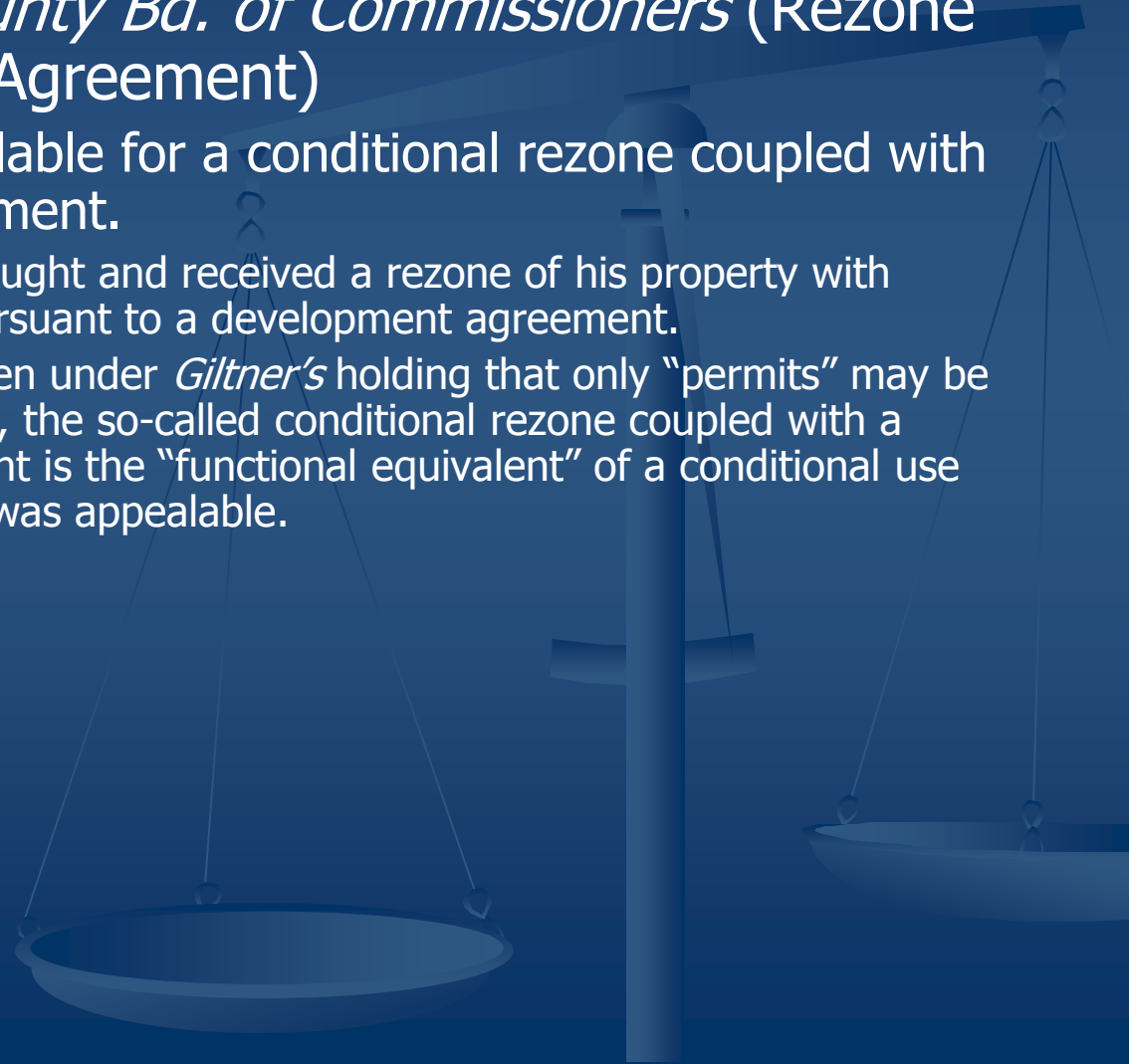
- *Highlands Development Corp. v. City of Boise*
 - Initial Zoning
 - Unlike *Giltner Dairy*, the *Highlands* decision focused on the word “permit” rather than on the “authorizing development” language, thereby adopting a simple test for determining whether judicial review is available: Is it a permit?
 - The court adopted a simple, if not simplistic, evaluation of what constitutes a “permit” under LLUPA.
 - The new rule of thumb is simply this: LLUPA authorizes judicial review of five, and only five, types of permits (variances, special use permits, subdivisions, PUDs and building permits). If the action is not one of these, then it must be challenged via some other form of action, typically a complaint for declaratory judgment.

III. The Middle Years:

- *Burns Holdings, LLC v. Madison County Bd. of County Commissioners* (Rezoning)
 - Judicial review was not available under LLUPA for rezoning.
 - If the applicant is not seeking a “permit,” judicial review is not available under LLUPA, period—irrespective of whether the action is legislative or quasi-judicial.
 - Adverse rezoning decisions would still be available via a declaratory action.
 - The court did not address the question of what standard would apply to such declaratory actions in the absence of the IAPA’s “arbitrary and capricious” standard.

III. The Middle Years:

- *Taylor v. Canyon County Bd. of Commissioners* (Rezone with a Development Agreement)
 - Judicial review is available for a conditional rezone coupled with a development agreement.
 - Here, the developer sought and received a rezone of his property with conditions imposed pursuant to a development agreement.
 - The court held that even under *Giltner's* holding that only "permits" may be appealed under LLUPA, the so-called conditional rezone coupled with a development agreement is the "functional equivalent" of a conditional use permit, and therefore was appealable.



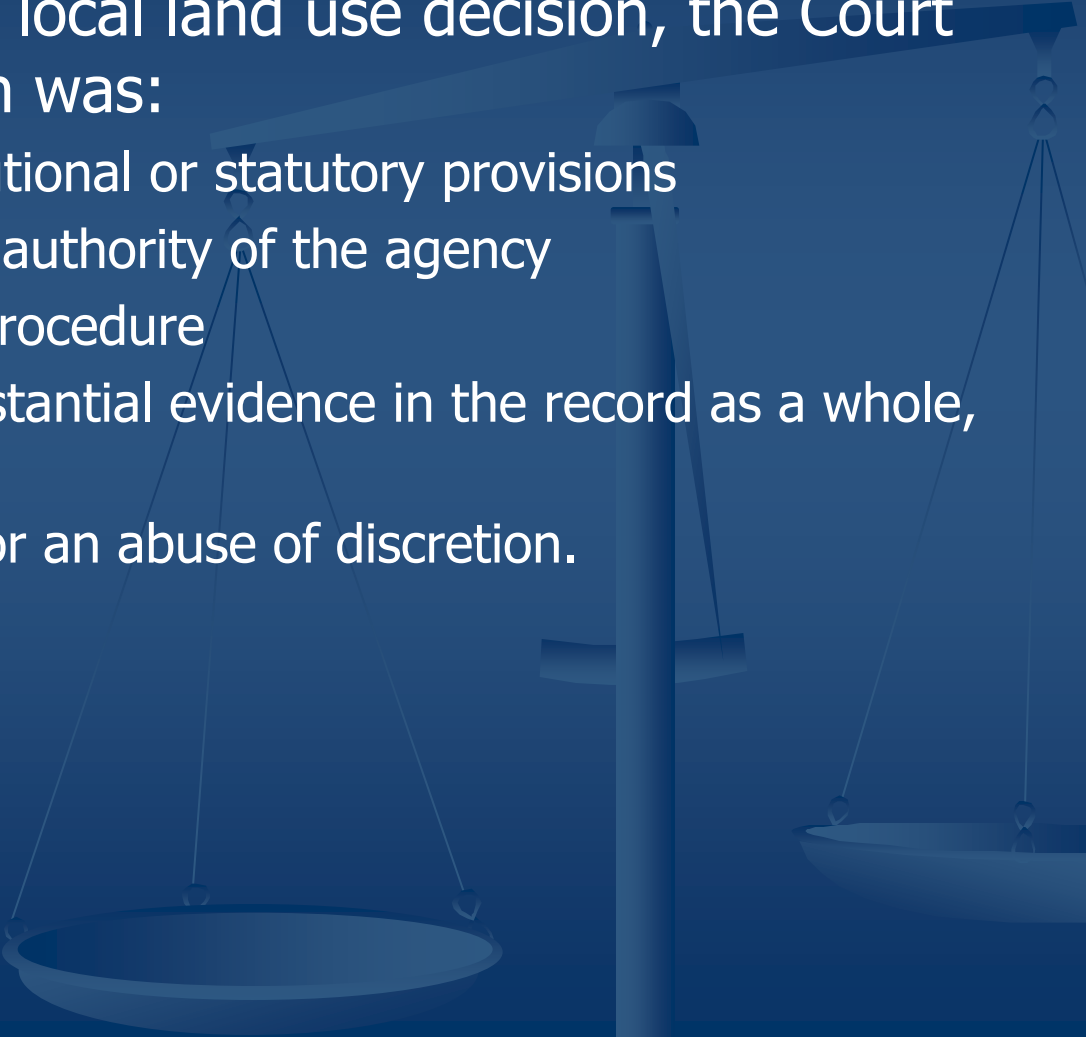
IV. Today

- 67-6521. ACTIONS BY AFFECTED PERSONS.
 - (1) (a) As used herein, an affected person shall mean one having a bona fide interest in real property which may be adversely affected by:
 - (i) The approval, denial or failure to act upon an **application** for a subdivision, variance, special use permit and such other similar applications required or authorized pursuant to this chapter;
 - (ii) The approval of an ordinance first establishing a zoning district upon annexation or the approval or denial of an application to change the zoning district applicable to specific parcels or sites pursuant to section [67-6511](#), Idaho Code; or
 - (iii) An approval or denial of an application for conditional rezoning pursuant to section [67-6511A](#), Idaho Code.

V. Judicial Review, Generally

- Judicial Review is Limited to the Agency Record
 - Limited Exceptions – (i.e. jurisdiction, standing, etc.)
 - Crown Point v. City of Sun Valley
- Questions of Fact:
 - The Court will not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. IC §67-5279
- Take Home message
 - Even if additional evidence is available showing the decision was flawed, it is too late to bring it up for the first time on appeal. The applicant must build the record before the original decision maker.

V. Standard of Review

- In order to reverse a local land use decision, the Court must find the decision was:
 - In violation of constitutional or statutory provisions
 - In excess of statutory authority of the agency
 - Made upon unlawful procedure
 - Not supported by substantial evidence in the record as a whole, or
 - Arbitrary, capricious, or an abuse of discretion.
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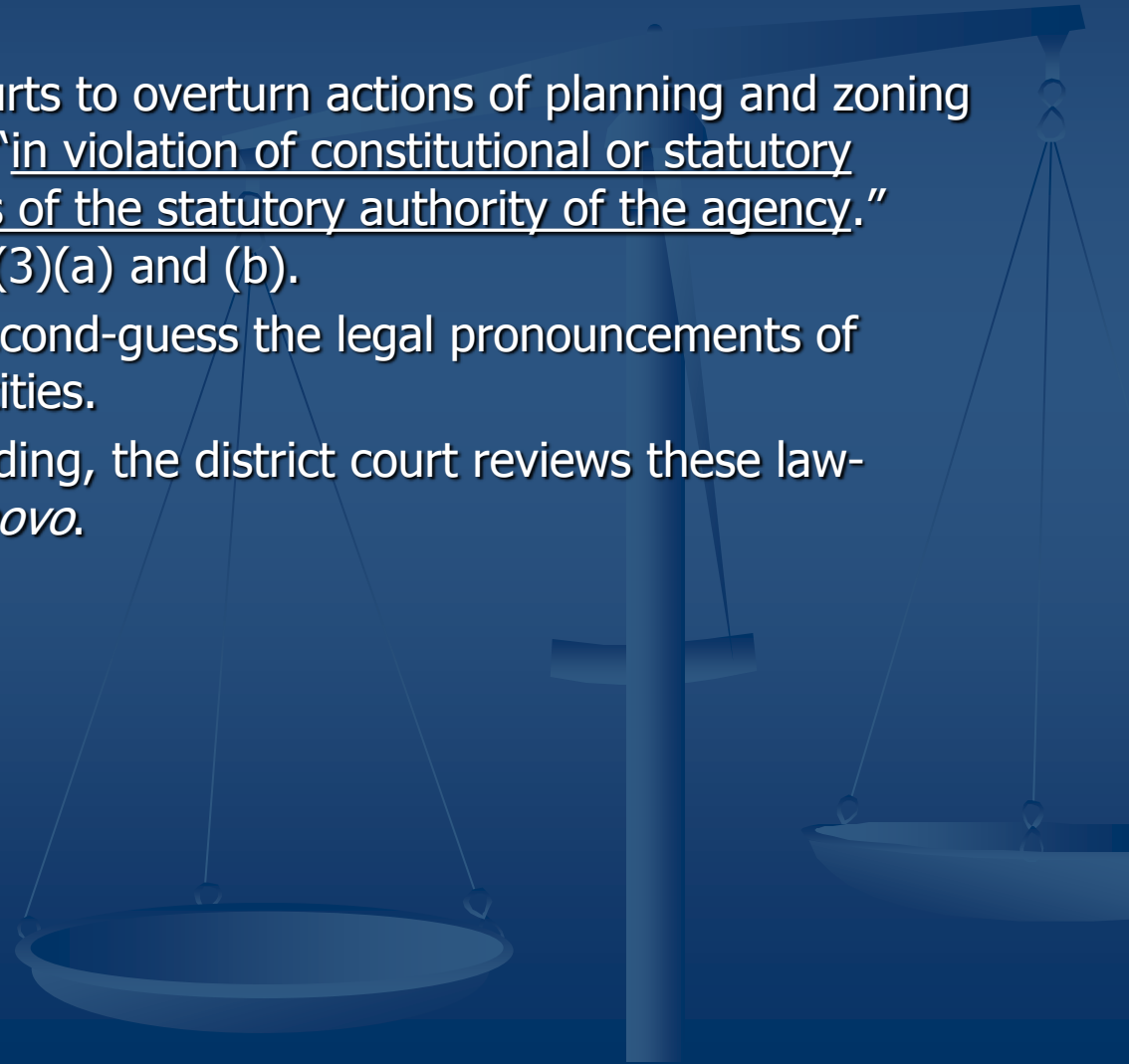
V. Standard of Review (cont)

- Presumption of Validity (*Evans v. Teton County*)
 - There is a strong presumption that the actions of the Board of Commissioners, where it has interpreted and applied its own zoning ordinances, are valid.
 - The party appealing the Board of Commissioners' decision must first show:
 - the Board of Commissioners erred in a manner specified under I.C. § 67-5279(3), and second,
 - that a substantial right has been prejudiced.

V. Standard of Review (cont)

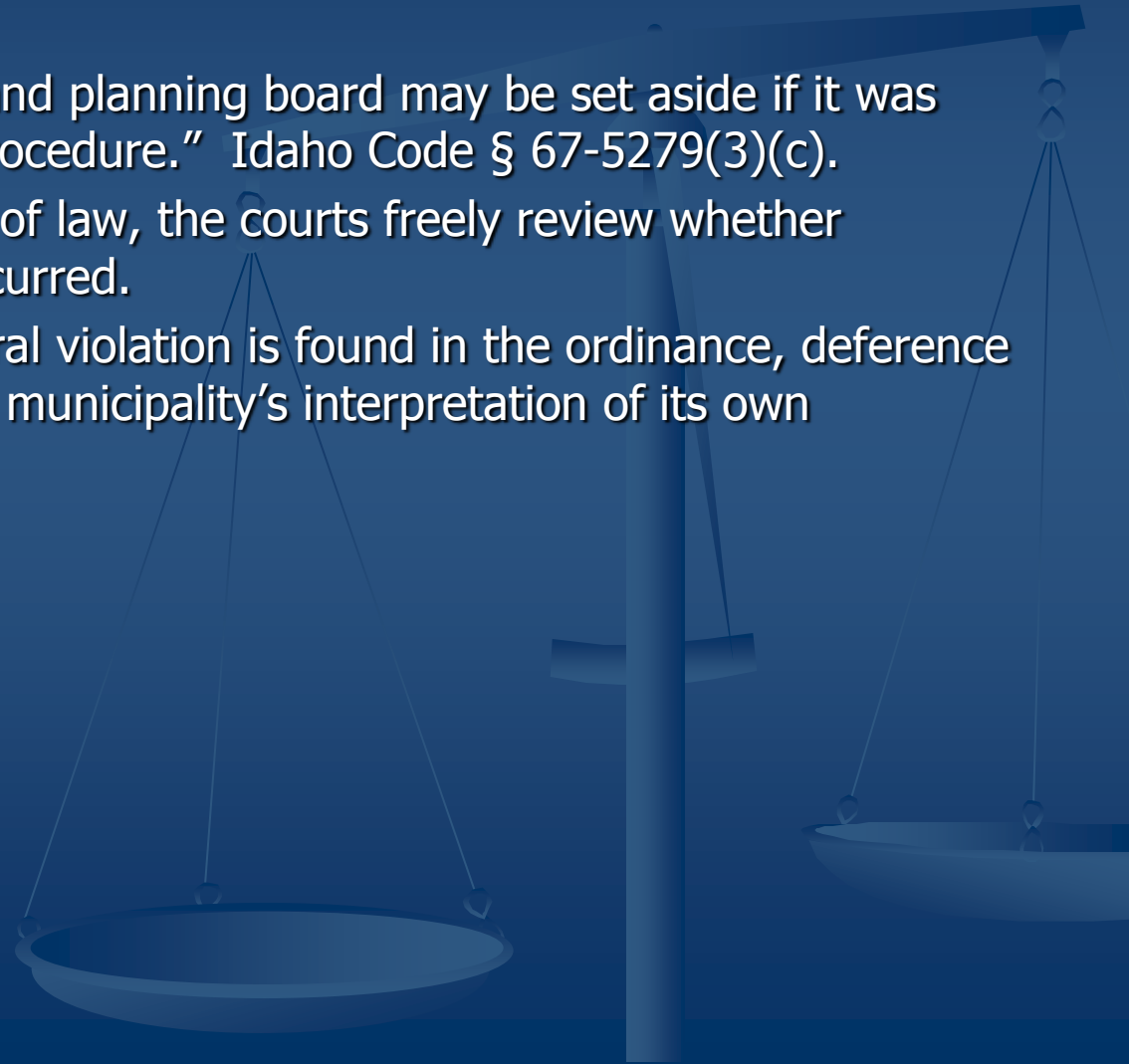
■ Questions of Law

- The IAPA authorizes courts to overturn actions of planning and zoning entities where they are “in violation of constitutional or statutory provisions” or “in excess of the statutory authority of the agency.” Idaho Code §§ 67-5279(3)(a) and (b).
- Thus, the courts may second-guess the legal pronouncements of planning and zoning entities.
- Unlike review of fact-finding, the district court reviews these law-declaring functions *de novo*.



V. Standard of Review (cont)

- Unlawful procedure
 - The action of a zoning and planning board may be set aside if it was “made upon unlawful procedure.” Idaho Code § 67-5279(3)(c).
 - As with other questions of law, the courts freely review whether procedural error has occurred.
 - But, where the procedural violation is found in the ordinance, deference may be accorded to the municipality’s interpretation of its own ordinance.



V. Standard of Review (cont)

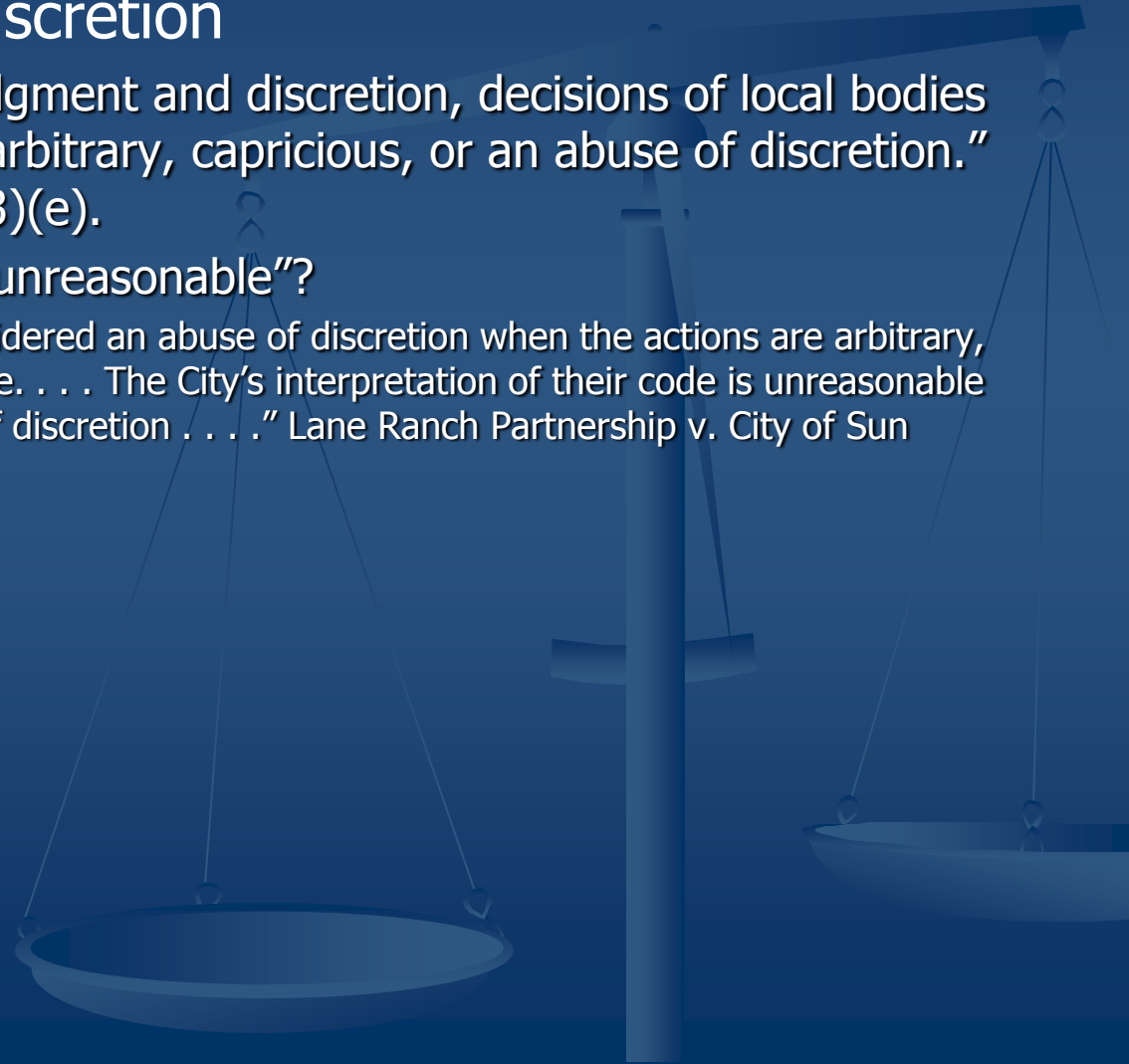
■ Judicial Review of Fact-Finding

- When an agency finds facts in an adjudicative context, the proper standard of review is whether the decision was “supported by substantial evidence on the record as a whole.” Idaho Code § 67-5279(3)(d)
- In the legislative context, the “arbitrary and capricious / abuse of discretion” standard is used to review both discretion and fact-finding. Idaho Code § 67-5279(2)(e).
- In the context of adjudicative decision making, however, the “arbitrary and capricious / abuse of discretion” standard applies only to the exercise of discretion, while fact-finding is reviewed under the substantial evidence test.

V. Standard of Review (cont)

■ Judicial Review of Discretion

- In the exercise of its judgment and discretion, decisions of local bodies may be challenged as “arbitrary, capricious, or an abuse of discretion.” Idaho Code § 67-5279(3)(e).
- In other words, was it “unreasonable”?
 - “A city’s actions are considered an abuse of discretion when the actions are arbitrary, capricious or unreasonable. . . . The City’s interpretation of their code is unreasonable and therefore an abuse of discretion” Lane Ranch Partnership v. City of Sun Valley (“Lane Ranch II”).



V. Standard of Review (cont)

■ Prejudice to a Substantial Right

■ Two-tiered burden of proof

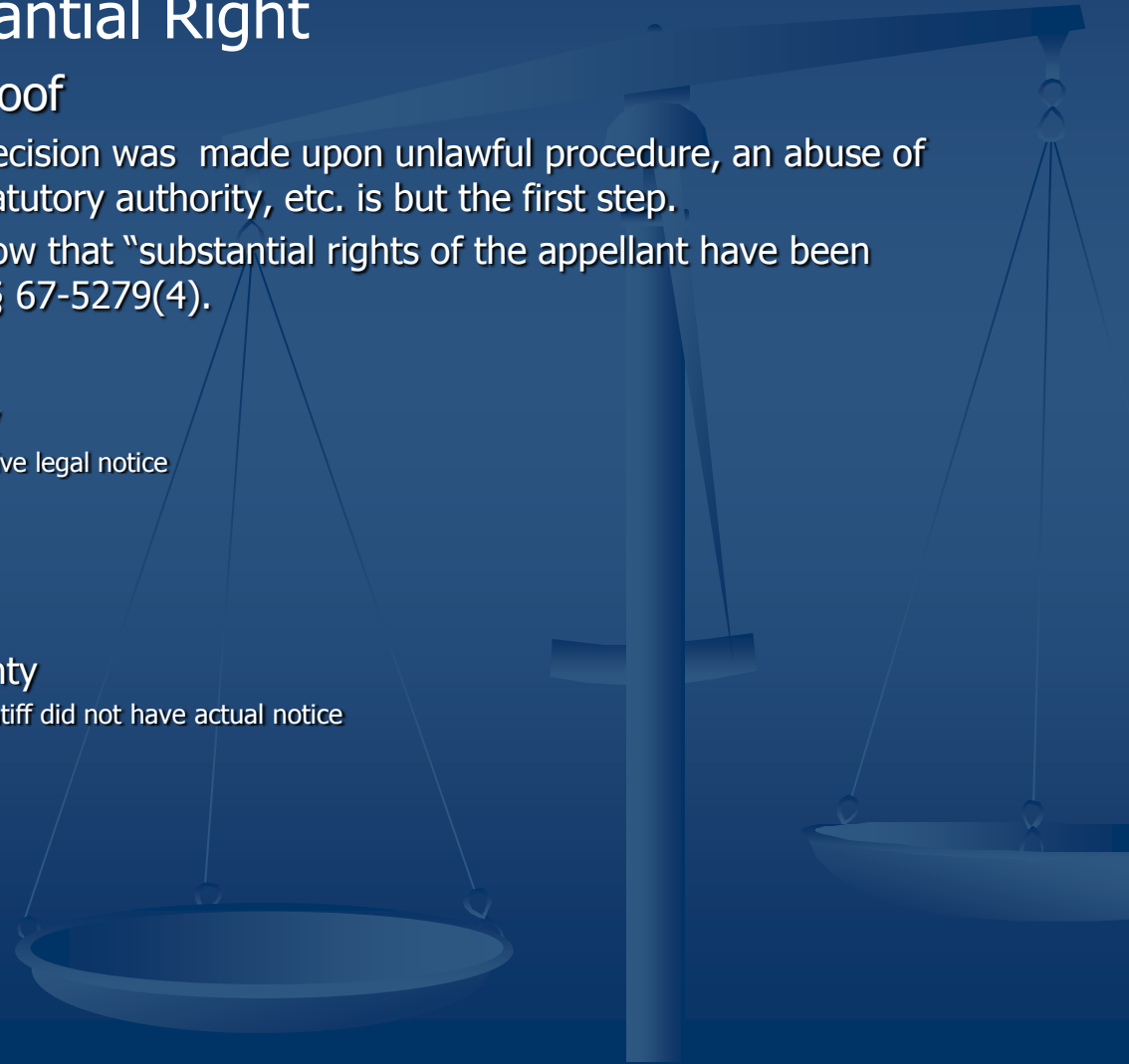
- Merely proving that the decision was made upon unlawful procedure, an abuse of discretion, in excess of statutory authority, etc. is but the first step.
- Second, the party must show that "substantial rights of the appellant have been prejudiced." Idaho Code § 67-5279(4).

■ Cases

- Cowan v. Fremont County
 - Actual Notice trumps defective legal notice
- Evans v. Cassia County
 - Illegal site visit

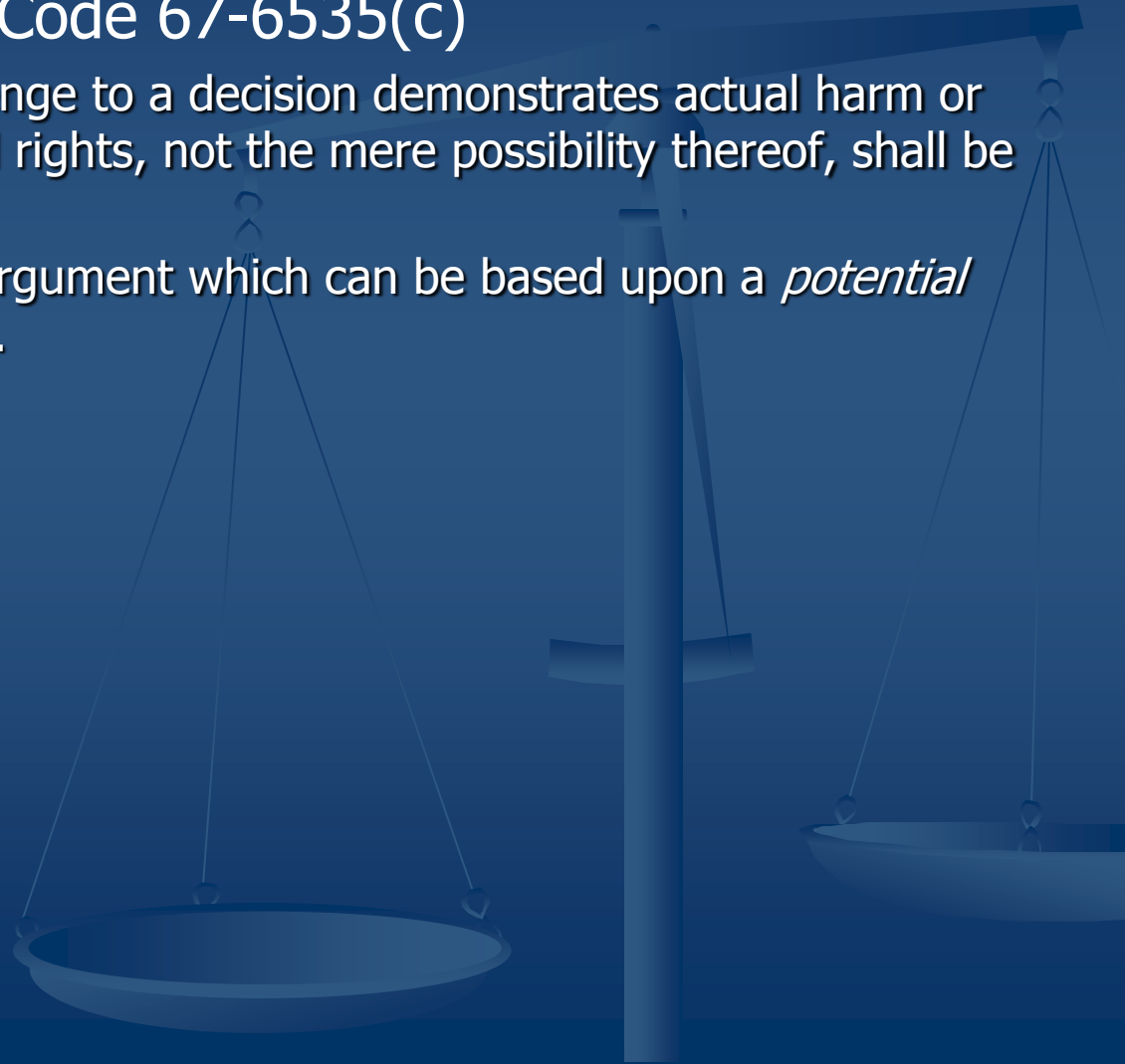
■ Counter

- McCuskey v. Canyon County
 - Defective notice where Plaintiff did not have actual notice



V. Standard of Review (cont)

- Actual Harm - Idaho Code 67-6535(c)
 - Only those whose challenge to a decision demonstrates actual harm or violation of fundamental rights, not the mere possibility thereof, shall be entitled to a remedy
 - Not akin to a standing argument which can be based upon a *potential but yet unrealized* harm.



VI. Attorney Fees I.C. 12-117

- Attorney fees cannot be awarded in judicial review cases. *Smith v. Washington County*
 - I.C. 12-117 allows for attorney fees to the prevailing party “in any administrative proceeding or civil judicial proceeding”.
 - An administrative proceeding is one before an agency and thus “no mechanism exists for courts to intervene in administrative proceedings to award attorney fees.”
 - A civil judicial proceeding is one commenced by filing a “complaint” not a petition for judicial. Therefore the Court will not award fees in judicial review cases.
 - Unless I.C. 12-117 is amended, there is little recourse (or deterrent) to arbitrary actions of governmental entities or frivolous lawsuits by disgruntled applicants or neighbors.