

What is a Building Owner to do? Appealing Building Permit Decisions Under Current Idaho Law

T. Hethe Clarke
Geoffrey Wardle

Building codes impact every owner of real property at some point during their ownership. Building codes exist to address life-safety concerns, improve energy efficiency, and protect property.

Land use and zoning regulations are often intertwined with building code matters. While the Idaho Supreme Court and Legislature have clarified the path for challenging local governments' land use and zoning decisions, the same cannot be said for building codes. When building owners are confronted with an adverse ruling on a building code issue, the available remedies are unclear.

This article addresses the history of the International Building Code (IBC) and its implementation in Idaho; surveys case law regarding the overlap between building code and land use decisions; discusses the challenges that exist in contesting building code decisions; identifies the recognized power to challenge code decisions; and finally recommends solutions to this conflict.

History and background of the International Building Code

Historically, regional organizations developed three building codes: the International Conference of Building Officials developed the Uniform Building Code (UBC); the Southern Building Code Congress International developed the Standard Building Code (SBC); and the Building Officials and Code Administrators International developed the BOCA/National Building Code



(BOCA/NBC). Some larger municipalities and states also developed their own codes.

Regional usage of these codes continued throughout much of the 20th Century each with their specific nuances. However, as real estate development and ownership became less regional, and the marketing and development of building materials became more national, the inefficiencies caused by regional codes became evident.

In the 1990s, the three regional organizations joined with the International Codes Council to develop the IBC. The Council published the first edition of the IBC in 1997. Upon publication of the second edition of the IBC in 2000, the three regional organizations ceased to develop their respective codes.

Jurisdictions throughout the United States and its territories, including Idaho, have adopted the IBC. It has also served as the basis for codes adopted by countries in the Carribean, Central America, and the Middle East.¹

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Implementation of the International Building Code in Idaho

Idaho utilized the UBC, but was a relatively early adopter of the IBC. In 2002, the Idaho Legislature enacted Idaho Code 39-4109, adopting the 2000 IBC. The Legislature also enacted Idaho Code 39-4116, requiring local governments to enforce building codes consistent with the Idaho Building Code Act. Idaho Code 39-4116 specifically required juris-

dictions that issue building permits and undertake code enforcement to adopt the IBC, the International Energy Conservation Code, and certain provisions of the International Residential Code by January 1, 2003. Jurisdictions could adopt local amendments that “reflect local concerns” if such amendments provided an equivalent level of protection.²

In 2009, the Idaho Legislature further amended Idaho Code 39-4109 to grant the Idaho building code board the power to adopt future editions of the specified codes by rule, including the IBC, the International Residential Code, and the International Energy Conservation Code. The Division of Building Safety has adopted IDAPA 07.03.01.004 pursuant to Idaho Code 39-4109, which specifies the relevant codes being adopted and the state-specified amendments thereto.³ This change occurred in acknowledgement of the fact that the I-Codes are updated on a three-year cycle.

Authority for appeal of Idaho land use and zoning decisions

Although building codes are distinct from land use regulations, they intersect in practice. Many jurisdictions organize their building and land use functions within the same department. They frequently utilize their power under one to enforce the other.

Given this overlap, it is not surprising that Idaho courts have confused land use regulations with building codes and have applied land use law in building code actions. However, building codes do not arise from and are not implemented pursuant to Idaho’s Local Land Use Planning Act (LLUPA)⁴. This creates significant procedural problems.

The right to challenge land use decisions has shifted over the last

decade. After LLUPA’s adoption, the Idaho Supreme Court held that only certain land-use applications would be subject to judicial review under the Idaho Administrative Procedures Act.⁵ Judicial review existed for “quasi-judicial” decisions (e.g., conditional use permits or rezones) that involved application of existing policy to specific properties or applications, but not for “legislative” decisions (e.g., comprehensive plan amendments or initial zoning of property) that involved decisions setting generally applied land-use policy.

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The Idaho Supreme Court adopted a new rule focusing on the language of LLUPA as it then existed, in *Burns Holdings, LLC v. Madison County Board of County Comm’rs*, where the Court found that a rezone—previously a quasi-judicial decision subject to judicial review—was not reviewable because the application was not for a “permit authorizing development” in LLUPA.⁶ The prior quasi-judicial vs. legislative approach was replaced with an inquiry into whether judicial review under the Administrative Procedure Act is

statutorily authorized. Subsequent amendments to LLUPA provided specific statutory authorization for judicial review for many land use actions.⁷

Overlap in land-use and building regulation cases

The Idaho Supreme Court has recognized the breadth of power vested by building codes. Of concern, however, is the manner in which local jurisdictions have grafted building permit approvals into land use approvals, and the Court’s willingness to acknowledge such, while ignoring the clear statutory and procedural distinctions between them.

In *County of Ada v. Henry*,⁸ Ada County obtained a permanent injunction against a land owner who had “despite repeated warnings and restraining orders persisted in the continued construction of a dwelling on their property, in violation of ordinances relating to zoning and building permits.”⁹ A prior owner illegally subdivided property before selling it to the Henrys. Ada County denied the Henrys a building permit and the Ada County Zoning Commission denied the Henrys’ appeal. The Henrys proceeded with construction despite the denial and even a temporary restraining order. The Henrys again applied for a building permit and a zoning certificate. Both were denied by staff and by the county commissioners on appeal.

The Henrys did not appeal that denial but continued construction. A contempt hearing followed and the Henrys suspended construction in the face of an additional restraining order. Only then did the Henrys respond to the initial complaint with various defenses and a counterclaim challenging Ada County’s ordinances.¹⁰

The Court's decision focused on Ada County's zoning power and found that no constitutional deprivation occurred, because "the Henrys could and should have ascertained, and are charged with knowledge of, the zoning and building restrictions which were applicable to the land at the time they acquired it."¹¹

This decision conflated building codes and land use ordinances. Unfortunately, the *Henry* decision is just one example of this in Idaho.

This also occurred in *Palmer v. Board of County Commissioners of Blaine County*,¹² where the Court's opening paragraph states: "This is a zoning case. The dispositive issue presented is whether the Palmers, who were ordered to stop work on a residence for which a building permit had previously been issued failed to exhaust their administrative remedies before bringing this action."¹³

The Palmers obtained a building permit to construct a residence near the Picabo airport. The permit required compliance with the then-existing zoning ordinance. One year later Blaine County issued a stop work order alleging a violation of the zoning ordinance.¹⁴ The County objected to the height and proximity of the house and an electrical pole to the airport. The County wanted the house moved; the Palmers wanted the County to move the runway.

The Court focused on the obligation to exhaust remedies under the existing code and whether the owner's efforts were sufficient to do so. In the end, the Court determined that because the Palmers had not sought a special use permit (a land-use permit authorized under LLUPA), they failed to exhaust their administrative remedies in connection with the building permit.¹⁵ The decision in

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Palmer suggests that notwithstanding the exhaustion issue, the failure to comply with zoning regulations will defeat a valid building permit.¹⁶

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The Staffords obtained a building permit, completed construction of a residence, and obtained a certificate of occupancy.¹⁸ Several years later, the Staffords obtained a building permit for an addition to the residence. During the framing inspection the inspector noted a certificate of occupancy would be denied because the Staffords' landscaping violated the county's zoning ordinance regulating site disturbance.¹⁹ At issue was an ordinance that required an "undisturbed natural vegetation buffer" within twenty five feet of any waterfront. The Staffords' property had previously been logged and was not in an undisturbed natural condition.²⁰

On appeal, the Court found the county's interpretation of its ordinance was unreasonable.²¹ The Court also noted that the code provision authorizing the building official to withhold a certificate of occupancy was limited to structural violations:

A County enforcement officer explained to the hearing examiner and to the Board the basis of the County's claim that it had the right to refuse issuance of the certificate of occupancy in order to force compliance with the County's demand that the Staffords perform site remediation on their property. Its asserted justification for doing so was section 105.4 of the International Residential Code, which the County had adopted. That section provides, "The building official is also authorized to prevent occupancy or use of a structure where in violation of this code or of any other ordinances of this jurisdiction." The words "where in violation" refer to the structure. The structure must be in violation of the code or some other ordinance. Unless the addition was in violation of the building code or some other ordinance, this provision would not give the county authority to withhold the certificate of occupancy. During oral argument, the County admitted that the addition was not in violation of the code or any other ordinance. The County apparently chose to ignore the applicable

section of its building code which stated, "After the building official inspects the building or structure and finds no violations of the provisions of this code or other laws that are enforced by the department of building safety, the building official shall issue a certificate of occupancy..."²²

However, that analysis was mooted when the Court found it lacked jurisdiction to hear the case:

... this case does not involve the denial or granting of a permit. In the order appealed from, the Board of Commissioners determined that the Staffords had violated the site disturbance ordinance by landscaping their property without first obtaining a permit. The Staffords have not appealed the denial of a permit or the conditions attached to a permit. Although the denial of the certificate of occupancy was involved in this case, that certificate neither is a permit under LLUPA nor was it addressed in the agency order appealed from.²³

Even though the Court rejected the county's interpretation of its ordinances and the relevant building code, the Court left the property owner without a remedy for the county's refusal to issue a certificate of occupancy for a code compliant structure.

Review of building code decisions under Idaho law

Explicit statutory authorization for judicial review of building code decisions is lacking. This is important in a post-*Burns Holding* world where the Idaho Supreme Court will be looking for an explicit statutory authority permitting judicial review.

This does not, however, mean that building code decisions cannot be challenged. The following cases provide examples of building code matters reviewed and acknowledged by the Idaho Supreme court.

Issuance of building permits are ministerial decisions

*Ben Lomond, Inc. v. City of Idaho Falls*²⁴ is an important Idaho land use case cited for the proposition

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that "[a] zoning ordinance is not retroactive so as to affect rights that have already vested."²⁵ However, the case arose from the refusal of the City of Idaho Falls to issue a building permit.

The owner's property had been annexed but the city failed to zone the property for nearly a year. The city rejected repeated applications for building permits before and after it ultimately zoned the property. The owner filed suit to obtain a building permit for a service station.

Although *Ben Lomond* is primarily cited for its vested rights language, the Court's pronouncements regarding building permits remain relevant: "[t]he weight of (and in our opinion the better reasoned) authority from other jurisdictions ..., is to the effect that a public official must issue a building permit when the applicant has complied with all existing requirements."²⁶ The Court suggests issuance of building permits is a ministerial function, meaning the discretion to issue a building permit is extremely limited and may be challenged by means of a writ of mandate or declaratory action. That said, the ambiguity in "all existing requirements" and what is required under land use regulations has proven to create further difficulties.

Due process rules apply to issuance and appeal of building permits

Case law also demonstrates that due process must be respected in building permit proceedings.

In *McVicker v. City of Lewiston*,²⁷ the McVickers objected when their neighbor, Cook, began building a storage structure without a building permit. The city brought a code enforcement action, stopping construction. The city issued a building permit with a condition that the structure could not be utilized for a commercial purpose without a conditional use permit.²⁸

Upon learning of the issuance of the building permit, the McVickers contacted city staff, met with the city manager and city attorney, delivered a letter objecting to the issuance of the permit, met with the mayor and city council, appeared at a city council meeting and objected to technical issues of the structure through their counsel, and attempted to appeal to the planning and zoning commission. Planning staff rejected the appeal as untimely.²⁹

The Court held that the city had erred and that the McVickers' initial written objection to the permit was an appeal. The Court then remanded the matter, directing the city to hold a hearing on the appeal and finding that the city had denied the McVickers the opportunity to exhaust administrative remedies.³⁰

These lessons were revisited in *Boise Tower Associates, LLC v. Hoggland*.³¹ There, the City of Boise issued a building permit for the construction of a high rise condominium that "would expire if work . . . was suspended or abandoned for a period of 180 days."³² The project languished and the permit was to expire on November 11, 2002; however, the City of Boise mistakenly calculated the expiration date as November 3, 2002. When the contractor recommenced work on November 7, 2002, the city issued a stop work order.³³

As a condition to allow construction to proceed under the existing permit (revoking the stop work order), city staff required the owner to enter into a settlement agreement that required evidence of financing for the project. Although the owner signed the settlement agreement, it failed to satisfy that condition. Thereafter, the owner appealed the matter to the board of appeals and, in the alternative, to the City Council.³⁴ The City Council found that staff had erred and reinstated the permit in April 2003.

In November 2004, the owner filed suit alleging various tort and constitutional claims.³⁵ The Idaho Supreme Court found that the code granted the code official "broad discretion to direct and enforce all provisions of the UBC."³⁶ The Court also found that such discretion allowed the director to negotiate a resolution instead of merely revoking the permit.³⁷

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The Court also found that although the city erred in finding the permit had expired, the owner received adequate process to protect its interests in the permit. The Court noted that the code "clearly provides for an appeals process from any final decisions made by the building official" and that even though the city deviated from its ordinance and the UBC, the owner "received constitutionally adequate procedural due process in the form of notice and a hearing."³⁸

Conclusion

Although the Idaho legislature has addressed the issue of what constitutes an appealable permit under LLUPA, building permits are not permits issued under LLUPA. This distinction confuses those who do not regularly venture into this arena. As most jurisdictions have combined building code enforcement into planning and development operations, it is important that the distinction is recognized.

Coupling building permits with conditions arising from ordinances adopted under LLUPA give jurisdictions the hammer of revoking building permits or withholding a certificate of occupancy, without the property owner having the protections afforded under LLUPA. As was the

case in *Stafford v. Kootenai County*, this can occur even if the structure is compliant with the relevant building codes.

In light of the Idaho Supreme Court's decision in *Burns Holdings*, and other recent matters, this will require a legislative correction. The solution may be as simple as specifying that the right to judicial review under LLUPA be expanded to include building permits if they have been coupled with compliance with LLUPA ordinances. An alternative might be to specifically authorize a right to judicial review for appeals under the Idaho Building Code Act. These modifications would help bring this area into alignment with land use and zoning decisions, with obvious benefits of predictability for both practitioners and the development community.

Practitioners and jurisdictions should not ignore the fact that fundamental constitutional protections remain applicable to code proceedings as do other protections under Idaho law, even if judicial review is not available.

Endnotes

1. The IBC is now part of a family of codes developed by the ICC known as the "I-Codes", including the International Residential Code, the International Energy Conservation Code, the International

Existing Building Code, and certain other mechanical, electrical, and plumbing codes. The I-Codes have various levels of adoption throughout the United States, with the IBC being the most universally adopted.

2. The comprehensive rewrite of The Idaho Building Code Act adopted as HB No. 586. 2002, ch. 345, sec. 13, p. 971, incorporated these concepts.

3. At present, Idaho is operating under the 2012 IBC, and the 2012 editions of the International Residential Code, International Energy Conservation Code and International Existing Building Code.

4. I.C. §§ 67-6501, *et seq.*

5. See *Cooper v. Board of County Com'rs of Ada County*, 101 Idaho 407, 614 P.2d 947 (1980); *Burt v. City of Idaho Falls*, 105 Idaho 65, 665 P.2d 1075 (1983); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984).

6. 147 Idaho 660, 214 P.3d 646 (2009)

7. Idaho Code Section 67-6521

8. 105 Idaho 263 (1983).

9. [Insert citation]

10. *Id.* at 265-66.

11. *Id.* at 266.

12. 117 Idaho 562 (1990).

13. *Id.*

14. *Id.* at 563.

15. *Id.* at 565.

16. See also, *McQuillen v. City of Ammon*, 113 Idaho 719 (1987) as an example of building code and land use regulations being intertwined for enforcement purposes. There, the city had issued a building permit and moving permit to permit the placement of two log structures on a parcel in the city. When the city revoked the permits due to violation of zoning regulations litigation ensued.

17. 150 Idaho 841 (2011).

18. Certificates of occupancy are issued at the completion of construction after inspection, authorizing the use of a structure. A certificate of occupancy is intended to evidence satisfaction of code and inspection requirements. It does not, however constitute a waiver of violations of the building code or other jurisdictional regulations. See IBC Sections 111.1 and 111.2.

19. *Id.* at 843.

20. *Id.* at 844.

21. *Id.* at 844-45.

22. *Id.* at 845 (emphasis in original).

23. *Id.* at 848.

24. 92 Idaho 595, 601 (1968)

25. *Id.* at 601.

26. *Id.* at 600.

27. 134 Idaho 34 (2000).

28. *Id.* at 35.

29. *Id.* at 35-36.

30. *Id.* at 38. In 2004, the Court revisited the matter in *McVicker v. City of Lewiston*, 140 Idaho 489 (2004) ("McVicker II") and ruled on the availability of attorneys' fees under Idaho Code 12-117. On remand, the planning and zoning commission had determined that "the issuance of the building permit to Cook and no basis in the law." *Id.* at 490. The Court noted that the structure had been deemed a nuisance and ordered removed and that in a separate proceeding the permit applicant, Cook, had unsuccessfully appealed the decision to revoke his building permit. *Id.* at 490-91.

31. 147 Idaho 774 (2009).

32. *Id.* at 777.

33. *Id.*

34. *Id.*

35. *Id.* at 777-78.

36. *Id.* at 779.

37. *Id.* at 779-80.

38. *Id.* at 781-82. The Court did not, how-

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ever, rule whether or not a building permits confers a property right. The Court avoided that issue variously "assuming arguendo that BTA had a constitutionally protected property right," *id.* at 782, "BTA alleges that it was deprived of two pieces of property—the building permit itself and BTA's right to develop the project pursuant to the permit," *id.*, and "assuming arguendo that BTA had a constitutionally protected property interest," *id.* at 782. The Court then remanded the matter for further proceedings related to those claims.

T. Hethe Clark is a partner with Spink Butler, LLP. Hethe is a graduate of Duke University and Washington University School of Law and just completed a term as chair of the Real Property Section of the Idaho State Bar. His practice is focused on all aspects of real estate development and land use, including appeals.



Geoffrey Wardle is a partner with Spink Butler, LLP. A graduate of Case Western Reserve University School of Law, Geoff focuses on real estate development and land use matters. He also serves as a member of BOMA International's Building Codes and Voluntary Standards Committee.

