BEFORE THE IDAHO TRANSPORTATION DEPARTMENT

STATE OF IDAHO

SPARTAN PORTNEUF, LLC. **Applicant/Appellant.**	)	**Application #11529**
v.	)	**PROPOSED FINDINGS OF FACT CONCLUSIONS OF LAW AND PRELIMINARY ORDER**
IDAHO TRANSPORTATION DEPARTMENT, **Agency.**	)	

This matter involves the appeal of the denial of an Outdoor Advertising Sign Application and Permit (ITD 1850) filed with the Department by Spartan Portneuf, LLC. The matter was assigned by the Director of the Department to Hearing Officer Stephen A. Bywater on June 22, 2018, to preside at this matter, conduct a hearing, take evidence, and submit proposed findings of fact, conclusions of law, and a preliminary order to the Director. A hearing was held on October 25, 2018 pursuant to prior notice. Witnesses for each of the parties testified and Appellant's Exhibits A-K, K-1, K-2, and K-3 were offered and admitted into evidence. Appellant's Exhibits L and M were included in the record after the hearing when the Appellant's Motion to Augment the Record, filed February 22, 2019, was granted. Also included in the record at the hearing were ITD Exhibits A through R* (*). Following the hearing the Hearing Officer requested that

* The record contains two ITD Exhibits "L." This is due to an error made by the Hearing Officer in designating a one-page color photographic exhibit created by stipulation during the course of the Hearing as "ITD Exhibit L", (TR. Page 92, Lines 4-16) when another three-page color photographic exhibit designated "ITD Exhibit L" already existed. For clarity of the record the Hearing Officer has re-designated the original three-page exhibit as "ITD Exhibit L-1" and the one-page exhibit created by stipulation of the parties during the course of the hearing as "ITD Exhibit L-2."

post-hearing briefs be filed providing the legal positions of each party based upon the evidence received at the hearing. The parties stipulated to an extended period of time for the submission of post hearing briefing, and the stipulation was accepted by the Hearing Officer in an order dated December 7, 2018. All post hearing briefs were submitted in accordance with the order. The Hearing Officer having now reviewed the briefs of the parties as well as the exhibits admitted, having heard and evaluated the testimony presented in person, having reviewed the transcripts of the same, having considered the issues in the matter herein and being fully advised in the premises and the law, makes the following:

FINDINGS OF FACT

I.

Spartan Portneuf L.L.C. (Herein, Spartan) filed an Outdoor Advertising Sign Application and Permit on ITD Form 1850 with the Idaho Transportation Department (Herein, the Department) on April 25, 2018 (Herein, the Application). The Application was assigned the number 11529 by the Department. The Application requested a permit to install a monopole, directly illuminated, double faced sign, 14 feet by 48 feet in face surface and erected 20' off of ground level (Herein, the "proposed sign"). Pursuant to the Application, the proposed sign was to be located on property owned by Spartan at 8528 W. Hildreth Road in Bannock County, Idaho, and set back at least 20 feet from Interstate Highway 15 (Herein, I-15) near milepost 64 at the intersection of I-15 and Hildreth Road (Herein, the "Subject Premises"). The Application stated that the qualifying business activity on the Subject Premises was "Agri-business" and that the Business owner's name was "Spartan Group". The Application was accompanied by two aerial photographs of the Subject Premises, preliminary construction drawings for the proposed sign, a copy of a Warranty Deed showing ownership of the Subject Premises by Spartan, and a copy of a

decision dated February 21, 2018 by the Bannock County Planning and Development Council, granting Spartan a county permit for the construction of a billboard with a face of <200 square feet on the Subject Premises. The Application was signed by a representative of Spartan as the owner of the Subject premises, but the Zoning Authority Affidavit portion of the application was not signed.

II.

The evidence admitted at the Hearing established that on April 29, 2018, four days after the Application was filed with the Department, Thomas J. Katsilometes (Herein "Katsilometes"), Spartan's representative and attorney, contacted Justin Pond, the Department's Program Manager, Right of Way Section (Herein, "Pond"), by email. Katsilometes stated in the email that the filed Application would be amended with "stamped drawings, the correction of one typo, and "we'll have the County fill in the zoning statement once they issue their written decision where they granted a variance on April 18th to allow us to increase the size to 14x48." On May 21, 2018 Katsilometes send a second email message to Pond which included a copy of the Bannock County decision on the variance for the size of the billboard and stated that the stamped drawings for the billboard were forthcoming soon and once received, a building permit application would be filed with Bannock County and a copy would be provided to the Department when received. Katsilometes also stated that the Application would then be amended to correct the typo, and asked if anything else was needed to complete the Application. The record did not include a written response from Pond to the May 21 email from Katsilometes.

III.

On May 24, 2018 Pond issued a decision on the Application and sent it by letter to Spartan. In the letter Pond stated that the Application was denied for two reasons: The Subject Premises

were not zoned appropriately; and, there was no actual active commercial or industrial use on the Subject Premises. (ITD Exhibit B). The letter informed Spartan of its right to appeal and the time line for filing an appeal.

IV.

On June 21, 2018 Spartan filed a timely Notice of Appeal with the Department. Spartan's notice of appeal challenged both of the reasons given in Pond's May 24, 2018 letter for the Department's decision to deny the Application and requested that the decision be reversed or remanded with instructions.

V.

The Hearing Officer finds that preponderance of the substantial and competent evidence presented at the Hearing established that: The Subject Premises are located in unincorporated Bannock County; The Subject Premises are zoned "Multiple Use" by Bannock County; Commercial and Industrial uses are allowed "by permit" under the Bannock County Zoning Ordinance; The Subject Premises are located adjacent to the eastern right–of-way line of the northbound lanes of I-15 as it runs approximately southeast to northwest through this portion of Bannock County, Idaho; The site location for the proposed sign on the Subject Premises is approximately twenty feet east of the eastern right-of-way line of I-15; The Subject Premises are located adjacent to the Interstate highway within 660 feet from the edge of the Interstate highway right-of-way; The portion of I-15 lying immediately west of the Subject Premises are located within the city limits of the city of Pocatello, Idaho; and, The City of Pocatello has zoned the area which includes the portion of I-15 lying immediately west of the Subject premises as "Light Industrial."

VI.

The Hearing Officer finds that, as it relates to the use of the Subject Premises at the time of the application, the preponderance of the evidence presented at the Hearing established that: There are no permanent or temporary buildings, residences, or other physical structures on the Subject premises; There is evidence of a few meandering two track dirt roads on the premises that are partially overgrown with weeds in places; There are some fencing and gates installed in certain portions of the premises some of which appear to be overgrown with weeds; There is an area in the south west corner of the Subject Premises surrounded by fencing within which, or nearby, there are two piles of irrigation pipe, some fencing materials, and a pipe trailer.

VII.

With regard to the use of the Subject Premises, Katsilometes testified at the hearing that: Spartan entered into a cooperative farming agreement with Idaho CNG, LLC who obtained in 2014 Spartan's permission to conduct commercial activities on the Subject Premises, including a landscaping business, and a fence business which included the supply of fence materials and fencing services; A fence was built in late 2014 or early 2015 to house the materials and the inventory of these activities; Spartan Irrigation was allowed, from 2014 through the date of the Application, to operate an irrigation business on the Subject Premises that included the repair and the refurbishing of irrigation equipment.

VIII.

The record reflects that Spartan did not provide the Department or submit into evidence a copy of the cooperative agreement described by Katsilometes, or any documentary evidence of business communications or financial arrangements between Spartan and the other entities he described. Nor does the record reflect that Spartan provided the Department or submitted into evidence: Documentary or photographic evidence of business financial or tax records or

statements; Licenses or permits for the described businesses; Advertising or business contact information for the described businesses; Employee records for the described businesses; Utilities or telephone records for the described businesses; or, Evidence of the dates and hours of operation of the described businesses. When questioned about Spartan's failure to provide the Department with any documentary or photographic evidence of the commercial activities conducted upon the premises, Katsilometes testified that Spartan refused to provide such evidence on grounds of "relevancy." (Tr. P. 83, Line 22 through Page 85, Line 22.)

IX.

The Hearing Officer finds that the preponderance of the credible evidence admitted into the record in this matter establish that: 1. The existing uses on the Subject Premises as of the date of the application were agricultural, farming, and related activities; 2. The piles of irrigation pipe and fencing materials on the Subject Premises as of the date of the Application are evidence of transient or temporary business activities or of agricultural and farming activities; 3. There is no credible evidence of commercial or industrial activities on the Subject Premises that were visible from the main traveled way as of the date of the Application; 4. There is no evidence in the record that the any of the activities on the Subject Premises possessed a business or privilege license required by the city, county or state; 5. There is no credible evidence in the record that commercial or industrial activity had been conducted continuously on the Subject Premises a for a period of six (6) months prior to the time of the Application. 6. There is no evidence in the record that the existing uses on the Subject Premises as of the date of the application activity had utilities such as water, power, telephone, etc. provided to them; 7. There is no evidence in the record that the existing uses on the Subject Premises as of the date of the application were carried on in a permanent building designed, built or modified for current commercial or

industrial use nor is there any credible evidence that the fence surrounding a portion of the Subject Premises constituted a permanent building; 8. There is no credible evidence in the record that the existing uses on the Subject Premises as of the date of the application generated vehicular traffic; 9. There is no credible evidence in the record that the existing uses on the Subject Premises as of the date of the application had employees on-site during normal business hours which were normal, usual, and customary. 10. The evidence in the record established that the existing uses on the Subject Premises as of the date of the application lacked a frequency of operations which are considered usual, normal and customary for a commercial or industrial operation.

X.

Any of the foregoing Findings of Fact that are determined upon judicial review to be legal conclusions are hereby incorporated by reference into the Conclusions of Law below.

CONCLUSIONS OF LAW

I.

Title 40 Section 1911 of the Idaho Code provides as follows:

> Notwithstanding any other provision of this chapter, no advertising display shall be erected or maintained within six hundred sixty (660) feet from the edge of the right-of-way of the interstate and primary system of highways within this state except the following:
>
> (1) Directional or other official signs or notices that are required or authorized by law, informational or directional signs regarding telephone service, emergency telephone signs, buried or underground cable markers and above cable closures;
>
> (2) Signs advertising the sale or lease of property upon which they are located;
>
> (3) Displays advertising activities conducted on the property upon which they are located, provided that not more than one (1) such sign, visible to traffic proceeding in any one direction, and advertising activities being conducted upon the real property where the sign is located may be permitted more than fifty (50) feet from the advertising activity;

(4) Displays located within areas zoned industrial, business or commercial under authority of state law, or in unzoned industrial or commercial areas as determined by the department;

(5) Displays erected or maintained by the department on the right-of-way pursuant to regulation of the department designed to give information in the specific interest of the traveling public. The department, by and through its director, may, upon receipt of a certified copy of an ordinance from a board of county commissioners, or a city council, accompanied by all economic studies required by federal rules and regulations showing that the removal of tourist-related advertising activities would cause an economic hardship on a defined area, forward the ordinance to the secretary of the United States department of transportation for inclusion as a defined hardship area, qualifying for exemption pursuant to section 131(o), title 23, United States Code. The ordinance and economic studies shall show that (1) the tourist-related advertising devices provide directional information about goods and services in the interest of the traveling public, and (2) that the removal of the specific directional advertising displays will work a substantial economic hardship in the defined area;

(6) Signs lawfully in existence on October 22, 1965, determined to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance, the preservation of which would be consistent with the purposes of this chapter; and

(7) On or after July 1, 1985, no advertising structure or display shall be erected or maintained in this state, other than those allowed pursuant to subparagraphs (2), (3) and (4) of this section, which are located beyond six hundred sixty (660) feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected for the purpose of the message being read from that main traveled way of the system.

II.

Title 40 Section 1912 of the Idaho Code provides as follows:

(1) The provisions of section 40-1911, Idaho Code, shall not apply to those segments of the interstate and primary system of highways which traverse and abut on commercial, business or industrial zones within the boundaries of incorporated cities, wherein the use of real property adjacent to and abutting on the interstate and primary system of highways is subject to city or county regulation or control, or which traverse and abut on other areas where the land use is clearly established by state law or county zoning regulation, as industrial, business or commercial, or which are located within areas adjacent to the interstate and primary system of highways which are in unzoned commercial or industrial areas as determined by the department from actual land uses. The department shall determine the size, lighting and spacing of signs in the zoned and unzoned industrial, business or commercial areas.

(2) For the purpose of this chapter, areas abutting interstate and primary highways of this state which are zoned commercial or industrial by counties and cities

shall be valid as commercial or industrial zones only as to the portions actually used for commerce or industrial purposes and the land along the highway in urban areas for a distance of six hundred (600) feet immediately abutting to the area of the use, and does not include areas so zoned in anticipation of such uses at some uncertain future date, nor does it include areas zoned for the primary purpose of allowing advertising structures. All signs located within an unzoned area shall become nonconforming if the commercial or industrial activity used in defining the area ceases for a continuous period of six (6) months.

III.

Title 40 Section 122 of the Idaho Code provides in pertinent part as follows:

(1) "Unzoned commercial or industrial areas" mean those areas not zoned by state or local law, regulation or ordinance which are occupied by industrial or commercial activities, other than outdoor advertising signs, and the lands along the highway for a distance of six hundred (600) feet immediately abutting to the area of the activities. All measurements shall be from the outer edge of the regularly used buildings, parking lots, storage or processing areas of the activities, and shall be along or parallel to the edge of pavement of the highway.

"Commercial or industrial activities" mean those activities generally recognized as commercial or industrial by zoning authorities in the state, except that none of the following activities shall be considered commercial or industrial:
(a) Agricultural, forestry, grazing, farming and related activities including wayside fresh produce stands.
(b) Transient or temporary activities.
(c) Activities not visible from the main traveled way.
(d) Activities conducted in a building principally used as a residence.
(e) Railroad tracks and minor sidings…

IV.

Idaho Code Section 40-312 gives the Idaho Transportation Board the authority to promulgate rules and regulations pertaining to state highways and to enforce compliance with those rules and regulations.

V.

The Idaho Transportation Board adopted rules under the authority of Idaho Code Section 40-312 designated as IDAPA 39.03.60, “Rules Governing Outdoor Advertising,” IDAPA 39, Title 03,

Chapter 60. The purpose of these rules is to establish guidelines for the control of outdoor advertising signs, structures or displays along the interstate, primary system of highways, and National Highway System roads of the state of Idaho pursuant to Chapters 1, 3, and 19, Title 40, Idaho Code. (IDAPA 39.03.60.001.02.)

VI.

IDAPA 39.03.60.010.01 provides in pertinent part as follows:

> 01. Advertising Structure(s) or Sign(s), or Advertising Display(s). Any outdoor structure, display, light device, figure, painting, drawing, message, plaque, poster, billboard, or other thing which is designed, intended, or used to advertise or inform…

VII.

IDAPA 39.03.60.010.02 provides in pertinent part as follows:

> Commercial or Industrial Activities. Those activities generally recognized as commercial or industrial by zoning authorities in this State, except that none of the following activities shall be considered commercial or industrial:
>
> a. Agricultural, forestry, grazing, farming, and related activities, including but not limited to, wayside fresh produce stands.
>
> b. Transient or temporary activities.
>
> c. Activities not visible from the main traveled way.
>
> d. Activities conducted in a building principally used as a residence.
>
> e. Railroad tracks and minor sidings.
>
> f. Outdoor advertising displays.

VIII.

IDAPA 39.03.60.010.03 provides in pertinent part as follows:

> 03. Transient or Temporary Activity. An activity shall be considered transient or temporary for the purposes of Chapter 19, Title 40, Idaho Code when:
>
> a. The activity lacks any business or privilege license required by the city, county or state.

b. The activity on the property has not been conducted for at least six (6) months at the time of application for a sign permit.

c. The activity lacks utilities (water, power, telephone, etc.) and which are normally utilized by similar commercial activities.

d. The activity is not carried on in a permanent building designed, built or modified for its current commercial or industrial use, located within six hundred sixty (660) feet of the nearest edge of the right-of-way.

e. The property upon which the activity is conducted lacks direct or indirect vehicular access or does not generate vehicular traffic.

f. The activity does not have employees on-site during normal business hours which is considered normal, usual, and customary.

g. The activity lacks a frequency of operations which are considered usual, normal and customary for that type of commercial or industrial operation and the activity shall be visible and recognizable as a commercial or industrial activity.

IX.

IDAPA 39.03.60.010.04 provides in pertinent part as follows:

04. Commercial or Industrial Zones. The provisions of Section 40-1911, Idaho Code, shall not apply to those segments of the interstate and primary system of highways which traverse and abut on commercial, business, or industrial zones within the boundaries of incorporated municipalities, wherein the use of real property adjacent to and abutting on the interstate and primary system of highways is subject to municipal or county regulation or control, or which traverse and abut on other areas where the land use is clearly established by State law or county zoning regulation, as industrial, business, or commercial, or which are located within areas adjacent to the interstate and primary system of highways which are in unzoned commercial or industrial areas as determined by the Department from actual land uses; provided, however, that the Department shall determine the size, lighting, and spacing of signs in such zoned and unzoned industrial, business, or commercial areas. For the purpose of this rule, areas abutting interstate and primary highways of this State which are zoned commercial or industrial by counties and municipalities shall be valid as commercial or industrial zones only as to the portions actually used for commerce or industrial purposes and the land along the highway in urban areas for a distance of six hundred (600) feet immediately abutting to the area of the use, and does not include areas so zoned in anticipation of such uses at some uncertain future date nor does it include areas so zoned for the primary purpose of allowing advertising structures.

X.

At issue in this matter is the interpretation of the statutory language of I.C. §§40-1911 and 40-1912. When interpreting a statute, the entire statute must be read and constructed as a whole; The language of a particular section should not be viewed in a vacuum but all sections of applicable statutes must be construed together so as to determine the legislature's intent and the interpretation of a statute begins with the literal words of the statute which must be given their plain, usual, and ordinary meaning.

XI.

With regard to the applicability and interpretation of I.C. §40-1911 Spartan contends that the prohibitions of that section are inapplicable in this matter due to the zoning of the other properties in the vicinity of the Subject Premises and the language in Idaho Code §40-1912 which reads "The provisions of section 40-1911, Idaho Code, shall not apply to those segments of the interstate and primary system of highways which traverse and abut on commercial, business or industrial zones within the boundaries of incorporated cities . . ." Spartan takes the position that the "traversing and abutting" requirements have been met to make the prohibitions of I.C. §40-1911 inapplicable since the City of Pocatello has determined that: at the subject location I-15 is within the city limits; the zoning designation of the lands abutting I-15 on the west is "Light Industrial;" and the land adjacent to the south of the Subject Premises at Hildreth Road is within city limits and designated by the city as a commercial zone. Spartan argues that under the language of I.C. §40-1912 since the Interstate highway at the location of the Subject Premises has other properties zoned light industrial and commercial abutting it to the west and south of the Subject Premises, it does not matter what the Subject Premises have been zoned.

XII.

The Department argues that I.C. §40-1912 is written to address outdoor advertising in all of the

geographical areas of the state and that the statute establishes the areas along the state highway system where the prohibitions of I.C. §40-1911 do not apply. The Department contends that the Subject Premises upon which the proposed advertising display would be constructed are located in an area subject to county zoning regulation, but since the County has not zoned the Subject Premises as industrial, business or commercial and the Subject Premises are located adjacent to I-15 within 660 feet from the edge of the right-of-way, the prohibitions of I.C. §40-1911 apply.

XIII.

The Hearing Officer, after construing the literal words of the statute as a whole and giving them their plain, usual, and ordinary meaning, concludes that under I.C. §40-1912 there are three distinct areas where the prohibitions of I.C. §40-1911 do not apply. They are: 1) areas within city limits zoned commercial or industrial; 2) areas subject to state and County zoning regulations or which traverse and abut on other areas where the land use is clearly established by state law or county zoning regulation, as industrial, business or commercial; and 3) unzoned commercial or industrial areas where the use is commercial or industrial.

XIV.

The Hearing Officer has found above that the Subject Premises are in a county (not within the city limits) and are zoned by Bannock County. Further, the Hearing Officer has found above that the Subject Premises are not zoned industrial, business or commercial but are zoned Multiple Use. The evidence established that under the Multiple Use zoning designation of Bannock County industrial, business or commercial uses are allowed "by permit." The Hearing Officer has found above that the Subject Premises are located adjacent to the highway within 660 feet from the edge of the Interstate highway right-of-way. Accordingly, the Hearing Officer concludes that since the County has not zoned the Subject Premises upon which the proposed

advertising display would be constructed as industrial, business or commercial and the Subject Premises are located adjacent to the highway within 660 feet from the edge of the right-of-way, the prohibitions of I.C. §40-1911 do apply to the Subject Premises unless they are found to fit within the requirements for an exception under I.C. §40-1912(2). Accordingly, the Hearing Officer concludes that the factual findings regarding the actual usage of the Subject Premises at the time of the Application are indeed relevant and will determine whether the requirements for an exception under I.C. §40-1912 are met.

XV.

I.C. §40-1912(2) provides: "(2) For the purpose of this chapter, areas abutting interstate and primary highways of this state which are zoned commercial or industrial by counties and cities shall be valid as commercial or industrial zones only as to the portions actually used for commerce or industrial purposes and the land along the highway in urban areas for a distance of six hundred (600) feet immediately abutting to the area of the use, and does not include areas so zoned in anticipation of such uses at some uncertain future date, nor does it include areas zoned for the primary purpose of allowing advertising structures." The Hearing Officer concludes that under in I.C. §40-1912(2) there must be an active commercial or industrial use on the Subject Premises to qualify for an outdoor advertising display permit.

XVI.

The Hearing Officer entered Findings of Fact as to the uses and activities conducted on the Subject Property at the time of the Application based upon the evidence presented at the Hearing in Findings VI through IX above. Based upon those findings and the evidence in the record the Hearing Officer makes the following legal conclusions pursuant to the requirements, definitions, and exclusions contained in IDAPA 39.03.60.010.02-04 regarding the existence of an active

commercial or industrial use on the Subject Premises: 1. The existing uses on the Subject Premises as of the date of the Application were not commercial or industrial but rather agricultural, farming, and related activities; 2. The piles of irrigation pipe and fencing materials on the Subject Premises as of the date of the Application constitute evidence of transient or temporary business activities or agricultural, farming, and related activities; 3. There were no commercial or industrial activities on the Subject Premises that were visible from the main traveled way as of the date of the Application; 4. The activities on the Subject Premises as of the date of the Application lacked any business or privilege license required by the city, county or state; 5. No commercial or industrial activity had been conducted continuously on the Subject Premises a for a period of six (6) months prior to the time of the Application. 6. The existing uses on the Subject Premises as of the date of the Application lacked utilities (water, power, telephone, etc.); 7. The existing uses on the Subject Premises as of the date of the Application were not carried on in a permanent building designed, built or modified for current commercial or industrial use and the fence surrounding a portion of the Subject Premises did not constitute a permanent building; 8. The existing uses on the Subject Premises as of the date of the Application did not generate vehicular traffic; 9. The existing uses on the Subject Premises as of the date of the Application did not have employees on-site during normal business hours which were considered normal, usual, and customary; 10. The existing uses on the Subject Premises as of the date of the Application lacked a frequency of operations which are considered usual, normal and customary for a commercial or industrial operation.

XVII.

In its final post hearing brief Spartan urged the Hearing Officer to consider the administrative decision of *In the matter of Obie Media Corporation, Findings of Fact,*

Conclusions of Law, and Preliminary Order, [dated September 15, 1995], Before the Idaho Department of Transportation, for Sign Permit Application Nos. 52011; 52012; 52013; and, 52017. (Herein, "*Obie Media*") A copy of the decision in *Obie Media* along with a copy of a Memorandum filed by the Department legal counsel in that matter were included on the record as Appellant's Exhibits L and M after Spartan's Post-Hearing Motion to Augment the Record was granted. Spartan argues that the Department has based its denial of Spartan's application upon an interpretation of Idaho Code §40-1912(2) regarding use of the subject property and sign location which is "wholly inconsistent" with the decision in the *Obie Media* administrative proceeding in which "the Department ruled that a sign site must simply lie within a commercial zone surrounded by properties upon which commercial activity is pursued." Spartan urges the Hearing Officer to find that the Department is bound by *Obie Media* because "Idaho has long recognized that where rights and interests have become settled under a prior decision, the court will decline to reopen the question. The rationale is that once a question has been deliberately examined and decided, it should be considered as settled and as applicable unless it is demonstrably made to appear that the construction manifestly is wrong." The Department argues that the *Obie Media* decision: (1) is irrelevant to these proceedings; (2) does not meet the standards for admissibility in an administrative proceeding under I.C. §67-5251; (3) does not constitute binding precedent under I.C. §67-5250; and, (4) does not stand for the proposition that "a sign site must simply lie within a commercial zone surrounded by properties upon which commercial activity is pursued" as Spartan claims. After review and consideration of Appellant's Exhibits L and M, the Hearing Officer concludes that Spartan has misstated the holding of the *Obie Media* case. The premises under consideration in *Obie Media* were in fact zoned light industrial as required by Idaho Code §40-1912(2), unlike the Subject Premises. Hearing Officer

concludes that *Obie Media* does not constitute a Departmental decision which is inconsistent with the Department's position in this matter. The Hearing Officer further concludes that the decision in *Obie Media* does not constitute binding precedent in this matter.

XVIII.

The Hearing Officer finds and concludes that the Department's denial of the Applicant's Application for a permit to construct an Outdoor Advertising Sign on the Subject Premises was not made in violation of constitutional or statutory provisions, did not exceed the statutory authority of the agency, was not made upon unlawful procedure, was not arbitrary, capricious, or an abuse of discretion, and is supported by substantial evidence on the record as a whole.

XIX.

Spartan has requested an award of attorney's fees and costs pursuant to I.C. §12-117 which provides in pertinent part: (1) Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law. Upon review and consideration of these proceedings, the Hearing Officer finds and concludes that Spartan is not the prevailing party in this matter, and that both Spartan and the Department acted with a reasonable basis in fact and in law in the prosecution and defense of their legal positions in this matter.

XX.

Any of the foregoing Conclusions of Law that are determined upon judicial review, to be

factual findings are hereby incorporated by reference into the above Findings of Fact.

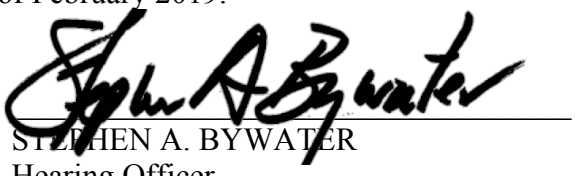
PRELIMINARY ORDER

Based upon the proposed Findings of Fact and Conclusions of Law set forth above the hearing officer enters the following preliminary order subject to the terms and conditions set forth in Appendix A, which is attached and made a part of this preliminary decision:

1. IT IS ORDERED that the decision of Justin Pond, the Idaho Transportation Department's Program Manager, Right of Way Section, made and entered on May 24, 2018 denying Outdoor Advertising Sign Application Number 11529 filed by Spartan Portneuf, LLC is UPHELD.

2. IT IS ORDERED that Spartan Portneuf, LLC's request for an award of attorney's fees and costs under I.C. §12-117 is DENIED.

DATED this __25th___ day of February 2019.



STEPHEN A. BYWATER
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of February 2019, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Applicant: SPARTAN PORTNEUF, LLC. C/O THOMAS J. KATSILOMETES PO BOX 777 BOISE, IDAHO 83701 TJK@208Lawyers.com	__ U.S. Mail __ Hand Delivered __ Overnight Mail __ Fax _X_ E-Mail
Department: J. TIM THOMAS DEPUTY ATTORNEY GENERAL IDAHO TRANSPORTATION DEPARTMENT P.O. BOX 7129 BOISE, IDAHO 83707-1129 Tim.Thomas@itd.idaho.gov	__ U.S. Mail __ Hand Delivered __ Overnight Mail __ Fax _X_ E-Mail

STEPHEN A. BYWATER
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Boise, Idaho 83717
Email: bywaterlaw@gmail.com
Telephone: 208-319-9820

APPENDIX A

THIS IS A PRELIMINARY ORDER OF THE HEARING OFFICER. It can and will become final without further action of the Hearing Officer unless any party petitions for reconsideration to the Hearing Officer issuing this Preliminary Order or petitions for review to the Director.

Any party may file a petition for the Hearing Officer's reconsideration of this Preliminary Order within fourteen (14) days of the service date of this Order. The Hearing Officer issuing this Preliminary Order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3), Idaho Code. (Parties should not combine a petition for reconsideration to the Hearing Officer with a petition for review to the Director. If a party wishes to petition the Director after receiving a ruling from the Hearing Officer on a petition for reconsideration, the petition to the Director should be filed according to the following provisions.)

Within fourteen (14) days after:

(a) The service date of this Preliminary Order,

(b) The service date of the Hearing Officer's denial of a petition for reconsideration from this Preliminary Order, or

(c) The failure within twenty-one (21) days of the Hearing Officer to grant or deny a petition for reconsideration from this Preliminary Order;

Any party may in writing petition for review or take exceptions to any part of this Preliminary Order and file briefs in support of the party's position on any issue in this proceeding to the Director. Otherwise, this Preliminary Order will become a Final Order of the Department.

If any party petitions for review before or takes exceptions to this Preliminary Order to the Director, opposing parties shall have twenty-one (21) days to respond before the Director to the petition for review or exceptions. Written briefs in support of or taking exceptions to this Preliminary Order shall be filed with the Director. The Director may review this Preliminary Order on its own motion.

If the Director reviews this Preliminary Order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to this Preliminary Order and may schedule oral argument in the matter before issuing a Final Order. The Director will issue a Final Order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter to the Hearing Officer for further evidentiary hearings if further factual development of the record is necessary before issuing a Final Order.

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this Preliminary Order becomes final, any party aggrieved by the Final Order or Orders previously issued in this case may appeal the Final Order and all previously issued Orders in this case to district court by filing a petition in the district court of the county in which:

(a) A hearing was held,

(b) The final agency action was taken,

(c) The party seeking review of the Order resides, or

(d) The real property of personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this Preliminary Order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the Order under appeal.