

1 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

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4	ALAMAR RANCH, LLC, an Idaho limited	: Case No. 1:09-CV-00004
	liability company; and YTC, LLC, an	:
	Idaho limited liability company,	:
5		: TESTIMONY OF
	Plaintiffs,	: LINDA ZIMMER
6		: THORVAL ERIK OAAS
	vs.	: RORA A. CANODY
7		:
	COUNTY OF BOISE, a political	:
8	subdivision of the State of Idaho,	:
		:
9	Defendant.	:
		:
10	- - - - -	x

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13 REPORTER'S TRANSCRIPT OF PROCEEDINGS

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 before B. Lynn Winmill, Chief District Judge,
15 sitting with a jury.

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18 DAY 6, December 13, 2010

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20 VOLUME 6

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 Pages 1190 to 1423

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PROCEEDINGS

Monday, December 13, 2010

THE CLERK: The court will now hear Civil Case 09-4-S-BLW, Alamar Ranch, LLC, et al., versus County of Boise, for day six of jury trial.

THE COURT: Good morning, Counsel.

Apparently some issues have been resolved, others not. Is that fair to say?

MR. BANDUCCI: I think that's true, Your Honor.

MR. BRASSEY: Yes.

THE COURT: All right. One issue that I understand there is an issue of dispute concerning is the cross-designation on Ms. Burke's deposition and perhaps other depositions.

The requirement -- well, if it's a deposition that was taken that was intended to be a trial deposition, then I think you know all bets are off, because then you should be able to -- well, let me put it this way: The person offering the videotape deposition defines the parameters of the direct examination; the opposing side can ask any questions that are within the scope of that direct, if it's a trial deposition.

If it's a nontrial deposition and it's

being offered for some other purpose, then the provisions of Rule 32(a)(6) and Rule 106 of the Federal Rules of Evidence come into play. And those are, I call it the Doctrine of Completeness, that if the portions designated by one party standing alone would be misleading to the jury in some way if they didn't see the broader response that was given, then the rule requires that in fairness, at that time, the portion offered by the, I guess in this case, the defendant should be played at that time.

Now, I don't know where this all fits in. I don't know. My understanding is Ms. Burke has some medical problems, and that there was at least one time a thought that the deposition was a perpetuation of her testimony for trial. That's one thing.

If it was just a discovery deposition, then the only way it's offered, it would have to be offered either that she is not available or she is a party under Rule 32, or an officer or director of a party.

So where are we?

Can someone very quickly --

MR. BANDUCCI: Very quickly, Your Honor.

There was a deposition taken of Ms. Burke in July of 2009. And then there was a subsequent deposition taken of Ms. Burke very shortly before trial, on the 3rd of December.

With respect to -- we intend to read from both. Ms. Burke is unavailable due to her eyesight. She just had surgery, apparently, and she is recovering. Both sides have agreed that she is not available.

When I took -- or shortly before I took the deposition of Ms. Burke, I told counsel and said that I was not going to replot the ground that I already plowed in the first deposition, and that I was going to use both depositions at trial.

And I received agreement that that was okay.

Now, what the issue seems to me to be, given what the court has just said, is really in a sense with respect to the video deposition, I guess, since the court sees those two depositions differently.

THE COURT: Well, I don't know that I do. It's just that, again, the -- a trial deposition is basically where the parties have agreed that a witness is not available and that whatever happens

during the deposition would be just like at trial, which means that the plaintiff in this case would ask the questions as -- in a nonleading fashion in their direct examination, and then there would be an opportunity for cross-examination, which could be as broad as the opening examination in terms of questions.

MR. BANDUCCI: Well, Ms. Burke is an agent of --

THE COURT: Right.

MR. BANDUCCI: -- Boise County. So the examination, the form of the examination was in leading form both times.

THE COURT: Okay. And that's the other -- again, I was talking more in generalities there. But you're absolutely right, you can ask by nonleading questions since she is associated with Boise County.

MR. BANDUCCI: Right.

Your Honor -- and I guess -- I'm certainly aware of the difference between a discovery deposition and a deposition that is taken for purposes of perpetuation at trial. They're both depositions. The rules don't make a distinction between those depositions. And when a

1 witness is unavailable, as Patti Burke is, I think
 2 both of those depositions can be used equally.
 3 THE COURT: Just let me back up. But by
 4 either party, if she is unavailable.
 5 MR. BANDUCCI: Yes.
 6 THE COURT: Okay. Then what's the issue?
 7 Why is there an issue about
 8 cross-designation if Mr. Brassey could also take
 9 her deposition and offer portions of it?
 10 MR. BANDUCCI: Your Honor, I think you need
 11 to understand, there is two issues here. First,
 12 one is time. I want to make sure that if we read
 13 Patti Burke's deposition, and there is literally,
 14 particularly in the video deposition, there are
 15 probably more pages of Patti Burke's deposition
 16 designated by them, including --
 17 THE COURT: Well, let me cut to the chase on
 18 that. That time will be charged to the defendant.
 19 MR. BANDUCCI: Okay.
 20 THE COURT: So that's not an issue.
 21 MR. BANDUCCI: Okay. All right. So if I
 22 understand the court's indication here, then,
 23 since we're using this for purposes of trial, then
 24 the rule of completeness is not what we're looking
 25 at here?

1 done, it was done by sending it with the pages
 2 they wanted yellow.
 3 And that's fine, Judge. It's not by
 4 way of complaint. It's just, it took me awhile.
 5 Then this morning, real early, I
 6 designated about four more pages. And they are
 7 crucial, because what the plaintiff, near as I can
 8 tell, in the first deposition is contending is
 9 that the final conditions, Your Honor, that are
 10 attached to the memorandum decision were all done
 11 beforehand.
 12 And to us, they have spot -- they
 13 haven't read the whole -- the whole testimony of
 14 Ms. Burke on how that occurred. And so for the
 15 part of completeness in that discovery deposition,
 16 we added the pages that I sent counsel this
 17 morning, because without them, Judge, in our
 18 opinion, they won't make sense, and it's a crucial
 19 issue; in other words, how that process, how those
 20 conditions came about.
 21 THE COURT: Is it enough that it's going to
 22 be read?
 23 I mean, what I was going to propose is
 24 that we read them -- the designations first and
 25 then the cross-designations, so we can keep track

1 THE COURT: That's exactly right.
 2 MR. BANDUCCI: All right.
 3 THE COURT: I think she can be used by
 4 either party for any purpose, as long as there is
 5 an agreement that she is unavailable under Rule
 6 32(a)(5), I think.
 7 MR. BANDUCCI: We agree on that.
 8 THE COURT: So -- Mr. Brassey?
 9 MR. BRASSEY: Your Honor, we do. She is
 10 unavailable, and we have settled some issues we
 11 had about the use of the first deposition.
 12 My concern is severalfold, and it has
 13 to do, Your Honor, with the first deposition. And
 14 so -- sometime last week the plaintiffs designated
 15 the part of the video deposition, so we have had
 16 that for a while.
 17 Friday night we received the parts of
 18 the first deposition, the so-called discovery
 19 deposition. And that's fine, Judge.
 20 But my computer crashed, so I sent part
 21 of what we wanted to add to counsel on Sunday.
 22 That discovery deposition, Judge, is 150 pages.
 23 And then I -- Mr. Banducci and I talked last
 24 night, because I was having difficulty getting it
 25 up and figuring out -- because the way it was

1 of time. It will all be done at the same setting.
 2 Does it need to be interspersed, where
 3 your cross-designations need to be interspersed
 4 with the plaintiffs' designations?
 5 MR. BRASSEY: I think so, Judge, or it won't
 6 make sense, particularly with the issue that I'm
 7 talking to you about, which goes from page 81
 8 through, I believe it's page 85. If it's not read
 9 together, Your Honor, it won't make sense.
 10 MR. BANDUCCI: Your Honor, if I may --
 11 MR. BRASSEY: Just --
 12 MR. BANDUCCI: I'm sorry, Andy.
 13 MR. BRASSEY: I'm not done.
 14 The other thing, Your Honor, we
 15 had -- they have designated a page -- Ms. Burke
 16 was asked a question -- and keep in mind,
 17 Your Honor, at this point in time, we were --
 18 there were still issues over executive session
 19 privilege. This was all early in the litigation.
 20 In this case, there was a question asked: "Did
 21 you ever tell Ms. Kirkpatrick something about the
 22 county's position?"
 23 And she answered: "No."
 24 And this is contrary to what we
 25 thought. So I had a motion in the deposition to

1 strike.

2 And finally, Your Honor, there is
3 a -- in the deposition, the question was asked:
4 "I'm going to ask you a series of questions, and I
5 assume your counsel is going to instruct you not
6 to answer."

7 Now, before that, Your Honor, I had
8 actually let Ms. Burke talk in general terms about
9 some issues that were discussed, the FHA, in
10 executive session, just like I did Mr. Lawson,
11 which was in his deposition, and which Mr. Woodard
12 and I talked about -- before he got on the witness
13 stand -- with the court.

14 Well, I did instruct her not to answer.
15 And I don't think that's fair.

16 THE COURT: Well, let me back up. I'm
17 worried we're going to take a lot of time from our
18 time with the jury today, and we're trying to
19 catch up some time.

20 Is there a problem with whoever is
21 going to be running the videotape -- "the
22 videotape" -- DV- -- whatever it is.

23 MR. BANDUCCI: We're not running a
24 videotape, Your Honor.

25 THE COURT: What are we running? DVR?

1 THE COURT: Well, is it important to have
2 those comments in, Mr. Banducci?

3 MR. BANDUCCI: Your Honor, I want to make
4 sure that we're addressing the various issues that
5 Mr. Brassey is bringing up.

6 There were questions, and they are
7 designated in the deposition, where I asked Patti
8 Burke questions that she was instructed not to
9 answer on the basis of either attorney-client
10 privilege or executive session. This goes to a
11 motion in limine that we filed with you.

12 If -- I mean, I think it's important
13 for this jury to know that we were not allowed to
14 inquire into these areas.

15 Now, it is not to suggest that it's an
16 inappropriate instruction. But what will happen
17 in this trial, whether we like it or not, is that
18 there are going to be various efforts to -- by the
19 county to explain this memorandum decision, or
20 explain how they came up with the decision that
21 they did.

22 And I'm simply putting in, by this
23 designation, and probably by some other questions
24 that will occur live with some of their witnesses
25 in their case-in-chief, the fact that that

1 MR. BANDUCCI: We decided that takes too
2 much time. We're going to put a witness on -- we
3 did videotape one of the depositions, but we're not
4 going to use it.

5 THE COURT: So it's going to be read.

6 MR. BANDUCCI: Right.

7 THE COURT: Well, why can't we, just as we
8 go along, we have a track, you know what the
9 cross-designations are. I just will note that
10 this is a cross-designation by the defendant, and
11 Ms. Huang can keep track of the time that way.

12 MR. BRASSEY: That would be fine,
13 Your Honor.

14 THE COURT: Is there objection to that,
15 Mr. Banducci?

16 MR. BANDUCCI: Your Honor, it's entirely up
17 to you.

18 THE COURT: Let's do it that way. That
19 solves the problem. We can move on.

20 Thank you, Mr. Banducci.

21 MR. BRASSEY: Your Honor, I have -- also in
22 a designation there are comments by me in the
23 transcript, and I don't know how the court views
24 that.

25 And second --

1 information is all off bounds. And that's not our
2 making. That is the making of the county.

3 So this is the first of several where
4 the fact of executive session was raised when
5 questions were asked, and it was declared off
6 bounds. And I think that the jury needs to know
7 that, because otherwise, they're not going to be
8 able to put this case in any kind of context.

9 THE COURT: Okay. Let me hear from
10 Mr. Brassey very quickly.

11 MR. BRASSEY: Your Honor, the court has
12 already talked to the jury about executive
13 session. So to read questions where counsel says,
14 "I know your lawyer is going to object," and then
15 I do, it seems to me to serve no purpose.

16 The court has already instructed that
17 there are motions in limine on it. Not only that,
18 I actually let her answer questions in the
19 deposition before that period of time on that
20 subject.

21 But, Your Honor, we got into a document
22 that was produced in the deposition that we all
23 agreed may have -- although it was produced
24 through a Freedom of Information Act, may have
25 some privilege attached to it.

1 So, Your Honor, I took a break at one
2 time, with counsel's agreement, came back on the
3 record and said, "I talked to her about these
4 issues." So it seems to me it's unfair.

5 And finally, Judge -- and I know we're
6 in a hurry -- but in part of this deposition, the
7 inquiry was on these conditions that are attached
8 to the decision and order, and how did they come
9 about.

10 And I made this statement: "I think
11 there is both a clean copy and a red-lined copy.
12 Obviously, some of those conditions could not, and
13 were not, as far as I know, Tom, were not prepared
14 before the deliberation."

15 It's a little hard to tell, because
16 it's just drawn by an arrow. But as I understand
17 it, they want to read that. So I just want the
18 court's guidance on why my comments about a
19 document we're talking about ought to be in front
20 of the jury.

21 THE COURT: Let me --

22 (Simultaneous discussion.)

23 THE COURT: We have got to settle this. My
24 concern -- I think it is appropriate for the
25 plaintiffs to argue that they -- there were limits

1 don't have a problem if the court wants to
2 instruct the jury on this.

3 THE COURT: Well, that's what I would
4 probably do.

5 MR. BANDUCCI: And so, you know, no mention
6 is made at all. I mean, really, I agree entirely
7 that this is a matter of, the jury is wondering,
8 "What the heck is going on here." "We don't get
9 to hear this?"

10 THE COURT: All right.

11 MR. BANDUCCI: And that plays in in ways
12 that I don't think I understand.

13 If Mr. Brassey will simply point out
14 what he is referring to with respect to this other
15 document, I may -- this is the first I've heard
16 this.

17 THE COURT: Okay.

18 MR. BANDUCCI: What is the -- just show the
19 passage and --

20 THE COURT: Counsel, Counsel, could we -- is
21 this the only issue we need to resolve before the
22 jury is brought back? Because we're now at
23 quarter to.

24 MR. BRASSEY: And Judge -- Tom, you've got
25 Linda Zimmer to finish. You've got Mr. Oaas.

1 placed upon them as far as what information they
2 could obtain properly because of executive
3 session; but it explains, perhaps, to the jury why
4 the plaintiff -- there are certain things the
5 plaintiff cannot present during the trial.

6 Invariably, when I talk to juries after
7 the trial, they want to know, "Why didn't we hear
8 this? If we had only heard this, it might have
9 made all the difference."

10 So I think it is important for the jury
11 to know why it is that some information was off
12 bounds. But I don't think that it's necessary to
13 kind of beat the county around the head and
14 shoulders with an assertion of executive or
15 attorney-client or work product privilege.

16 I'm going to just have to see it in
17 context. And so probably as we -- if you can give
18 me a copy of the transcript, I assume somebody has
19 an extra copy that I can read along with. As I
20 see that, I can indicate that it's either -- it's
21 unnecessary and we don't need to include it.

22 But we've got to move on. The problem
23 is we're eating up everybody's time.

24 Mr. Banducci?

25 MR. BANDUCCI: A couple of suggestions. I

1 Maybe, Judge, in between we can take a quick break
2 and I can show counsel what I'm talking about and
3 solve it.

4 THE COURT: We're going to take a 15-minute
5 break midway through the morning. Perhaps you can
6 do it that break.

7 MR. BRASSEY: Fine.

8 THE COURT: All right.

9 MR. BANDUCCI: Whatever. We'll be happy to
10 do that.

11 THE COURT: Thank you.

12 MR. BANDUCCI: Thank you, judge.

13 THE COURT: All right. Let's bring the jury
14 in.

15 (Jury present.)

16 THE COURT: For the record, I'll note that
17 the jury has been brought into the courtroom.

18 I think we had Ms. Zimmer on the stand.
19 I'm trying to figure out where you disappeared to.
20 Ms. Zimmer, I'll remind you that you are still
21 under oath, having previously been sworn.

22 THE WITNESS: Yes, Your Honor.

23 THE COURT: Mr. Banducci, you may inquire of
24 the witness.

25 MR. BANDUCCI: Thank you, Your Honor.

1 LINDA ZIMMER,
2 having been previously duly sworn to tell the
3 truth, was examined and testified as follows:
4 CONTINUED DIRECT EXAMINATION
5 BY MR. BANDUCCI:

6 **Q.** Good morning, Ms. Zimmer.

7 **A.** Good morning.

8 **Q.** Now, Ms. Zimmer, I would like to talk
9 to you a little bit about these emails that came
10 in through Ms. Kirkpatrick, and see if we can't
11 connect some dots.

12 BY MR. BANDUCCI: First, I would like the
13 witness to be shown Exhibit 1044, page 26 of 49.
14 All right. And, Kathy, if you could bring out
15 that statement with "D.C.," so it's shown.

16 BY MR. BANDUCCI:

17 **Q.** Now, Ms. Zimmer, I think you may have
18 seen this before, but this is in evidence. This
19 is the transcript from the P & Z hearing.

20 MR. BRASSEY: Your Honor, I object to the
21 form, given her testimony last week about the P
22 & Z transcripts.

23 THE COURT: What, that she had not reviewed
24 it?

25 MR. BRASSEY: Correct.

1 THE COURT: Well, I think --

2 MR. BANDUCCI: That's not my question.

3 THE COURT: Proceed. We'll see how this
4 plays out, but at this point I'll overrule the
5 objection.

6 MR. BANDUCCI: Okay.

7 BY MR. BANDUCCI:

8 **Q.** Now, Ms. Zimmer, we have highlighted --
9 this is our highlighting. It says -- and this is
10 Mr. Charney presenting to the P & Z. Mr. Charney
11 says, "Probably anything less than 72 would not be
12 profitable, and they would not be able to
13 successfully operate this in the black if it was
14 anything less than 72."

15 Do you see that?

16 **A.** I do.

17 **Q.** Were you aware of that, that that was
18 the -- that was the information at the P & Z
19 hearing?

20 **A.** Yes.

21 **Q.** Okay. Thank you.

22 MR. BANDUCCI: Now you can take that down.

23 BY MR. BANDUCCI:

24 **Q.** Now, you were in court when you heard
25 Ms. Kirkpatrick testify that it was well known to

1 the opponents of Alamar that if Alamar Ranch was
2 reduced to 24 students, it wouldn't be profitable.
3 She says something along the lines of, "That it
4 wouldn't be profitable? Pretty good chance,
5 yeah."

6 Do you remember her testimony in that
7 regard?

8 **A.** Yes. I remember her testimony.

9 **Q.** Okay. And the opponents of Alamar
10 didn't have the financial information of Alamar;
11 correct? As far as you know?

12 **A.** Correct.

13 **Q.** Okay.

14 MR. BANDUCCI: Now, can the witness be shown
15 Exhibit 1067.

16 BY MR. BANDUCCI:

17 **Q.** All right. Now, the P & Z hearings are
18 on -- are in August. Patti Burke takes over, as
19 the testimony has shown, in October. On December
20 31st, this email from Jeri Kirkpatrick is written,
21 and it says, "Good morning. Something to chew on
22 as we begin this new year. I had one of my
23 'conversations' Saturday night regarding Alamar."

24 Now, we'll skip the first paragraph
25 here, because we'll come back to that a little

1 later.

2 The next paragraph says, "Another piece
3 of the conversation at the P & Z administrator's
4 training held a couple of weeks ago for Idaho
5 counties, Idaho's land use attorneys were stating
6 in this training that if a county has a
7 conditional use permit process, they can't really
8 deny, but what they legally can do in Idaho is
9 place enough conditions on the CUP that the
10 project is not profitable, and this forces them to
11 move somewhere else.

12 "The comment made was, 'the county may
13 have to approve the CUP, but we don't have to
14 ensure there is a project.'

15 "Some positive statement made, 'I
16 haven't talked to anyone who wants Alamar,' the
17 commissioners are taking this very seriously, and
18 they are reading everything.

19 "My distinct impression from this
20 conversation is that if the commissioners do
21 approve Alamar's CUP, there will be multiple
22 conditions placed on it. Some comments made about
23 conditions were a significant limit to the number
24 of beds, a security piece, such as 24-hour
25 security guards to help alleviate the neighbors'

1 concerns, and others I can't think of right now.
2 However, the commissioners are reading and
3 researching on their own."

4 Then the last sentence in the next
5 paragraph says, "I believe the comment made was
6 something like, the county may have to approve a
7 CUP, but the county doesn't have to concern itself
8 with the profitability of the proposed use."

9 Do you see that?

10 **A. I do.**

11 **Q.** Okay. Now, let's go back to the first
12 page.

13 MR. BANDUCCI: Kathy, can you show -- the
14 first page, please?

15 And this doesn't -- this doesn't show
16 where this was sent.

17 Pardon me? That's been redacted. All
18 right.

19 BY MR. BANDUCCI:

20 **Q.** Do you know -- all right. Never mind.

21 Let's go now, then, to the P & Z
22 hearings. Before we go there, though, isn't that
23 exactly what happened, that the number of students
24 was reduced and conditions were placed on Alamar,
25 such that Alamar could not proceed with its

1 business?

2 **A. I don't believe so.**

3 **Q.** You don't believe that enough

4 conditions were placed on Alamar so that Alamar
5 could [sic] proceed with its own business?

6 **A. No, I don't.**

7 **Q.** Okay. You would agree that you did
8 reduce the number of students.

9 **A. Yes, we did.**

10 **Q.** And you would agree that the CUP
11 showed -- reduced the number of students to
12 something less than 72, which Mr. Charney told the
13 county would make it unprofitable; correct?

14 **A. Could you repeat that?**

15 **Q.** Sure.

16 You understand that the commission
17 reduced the student population below 72; and you
18 understood, based on the statements by Mr. Charney
19 at P & Z, that that number being less than 72
20 would render the project unprofitable; correct?

21 **A. According to Mr. Charney's testimony.**

22 **Q.** All right. And you didn't receive
23 testimony from anybody else that said if you go
24 below 72, it will be fine financially; right?

25 **A. We had other testimony that had 20. We**

1 **had other testimony that did.**

2 **Q.** My question goes to the profitability,
3 Ms. Zimmer?

4 **A. Yes.**

5 **Q.** Did anybody testify, to your knowledge,
6 that if you go below 72, that Alamar will be
7 financially viable?

8 **A. I believe that we did.**

9 **Q.** You believe that you heard someone say
10 that?

11 **A. That they could be, yes.**

12 **Q.** And who said that?

13 **A. Mr. -- I believe his name is Sapp.**

14 **Q.** Pardon me?

15 **A. I think his name is Mr. Sapp.**

16 **Q.** Mr. Sapp?

17 **A. From the -- he has a ranch at Gem
18 County, a youth ranch. And he --**

19 **Q.** Did he say -- you believe that he said
20 that Alamar Ranch would be profitable at less than
21 72?

22 **A. No; but he has a ranch of 20.**

23 **Q.** That's not my -- I need you to answer
24 my question, ma'am. My question is: Did you hear
25 anybody at the hearings say that Alamar's business

1 model, what it was proposing to the county, would
2 be profitable at less than 72?

3 **A. No. We never saw a business model.**

4 **Q.** That's not the question I asked you,
5 Ms. Zimmer. Do you understand, I'm asking you
6 if --

7 **A. Yeah.**

8 **Q.** -- anybody testified that Alamar's
9 business model, which proposed 72, students would
10 be financially viable at a number less than that?

11 **A. No, I don't believe anybody did.**

12 **Q.** Okay. And others testified that,
13 indeed, if you went below 72 -- or stated in
14 public hearings that if you went below 72, it
15 wouldn't be profitable; right?

16 **A. I don't remember that.**

17 **Q.** Well, I just showed you Mr. Charney's
18 statement.

19 **A. Right.**

20 **Q.** That was one; right?

21 **A. Yes.**

22 **Q.** Thank you.

23 Now, I asked you a question about this
24 email. And isn't it true that you reduced the
25 student count below 72 and placed conditions on

1 it?

2 Correct?

3 **A. Yes, we did.**

4 **Q.** All right. So to the extent that

5 Ms. Burke -- this is a letter sent --

6 MR. BANDUCCI: Put the email back up.

7 BY MR. BANDUCCI:

8 **Q.** This is an email sent on December 31st,

9 2007. This is a full two-and-a-half months before

10 the deliberation hearing; correct?

11 **A. Yes.**

12 **Q.** And Ms. Burke is predicting what the
13 commission is going to do with respect to lowering
14 the student population and placing additional
15 conditions on the project; correct?

16 Let me show you that paragraph on the
17 second page.

18 MR. BANDUCCI: Right there at the top.

19 Thank you, Kathy.

20 BY MR. BANDUCCI:

21 **Q.** It says right here, "The commissioners
22 are taking this very seriously and are reading
23 everything. My distinct impression from this
24 conversation is that if the commissioners do
25 approve the Alamar CUP, there will be multiple

1 conditions placed on it. Some comments made about
2 conditions were a significant limit to the number
3 of beds, a security piece, such as 24-hour
4 security guards to help alleviate the neighbors'
5 concerns, and others I can't think of right now."

6 She was predicting what the commission
7 did two-and-a-half months later; right?

8 **A. Maybe I'm misunderstanding this, but I
9 believe it was written by Jeri Kirkpatrick.**

10 **Q.** This is -- yes. But Ms. Kirkpatrick
11 testified that Jeri -- that Patti Burke told her
12 these things. Do you remember that?

13 **A. I understood in this email that you
14 showed me that they learned it at a meeting.**

15 **Q.** Ms. -- well, do you understand that
16 this email relates a conversation between Patti
17 Burke and Jeri Kirkpatrick, and Patti Burke is
18 telling Jeri Kirkpatrick what she learned at a
19 meeting, an AG meeting?

20 Do you remember that, that testimony
21 from Jeri Kirkpatrick?

22 **A. Yes.**

23 **Q.** Okay. So my point to you is that if
24 this, as Ms. Kirkpatrick says, accurately relates
25 a conversation she had with Patti Burke, then

1 Patti Burke is predicting what happened
2 two-and-a-half months later at your deliberations
3 hearing; correct?

4 **A. I couldn't say that for sure.**

5 **Q.** Isn't this, what I've outlined in this
6 paragraph, what you all did on March 10th at your
7 deliberations hearing?

8 **A. We had no knowledge of this email.**

9 **Q.** That's not the question I'm asking you,
10 ma'am. The question I'm asking you is: Doesn't
11 this accurately predict what the commission did?

12 **A. We put extra conditions on, yes.**

13 **Q.** It says: "The commissioners" -- it
14 says, "Patti Burke's distinct impression is that
15 if the commissioners do approve the Alamar CUP,
16 there will be multiple conditions placed on it."

17 Were you and other commissioners in
18 December, at the time this -- this email was sent,
19 already talking about additional conditions to put
20 on the Alamar project?

21 **A. No, we were not.**

22 **Q.** Ma'am, everything you did in --

23 MR. BANDUCCI: Your Honor, I would like a
24 sidebar before I ask this next question.

25 THE COURT: Okay. Approach.

1 (Sidebar commences as follows:)

2 MR. BANDUCCI: In light of what we just
3 discussed before this, my next question was going
4 to be: You say you did not talk about these
5 things.

6 This email does. Patti Burke is saying
7 that they talked about these things, that they
8 were thinking about these things.

9 My next question was going to be:
10 Well, ma'am, that's impossible for us to find out
11 what you were thinking or what you were doing with
12 respect to the Alamar CUP application, because all
13 of that occurred in executive session, and we have
14 no way of finding out one way or the other.

15 And I didn't want to ask that question
16 without --

17 THE COURT: Mr. Brassey?

18 MR. BRASSEY: Well, here is the dilemma I
19 have, Judge, and that is if there were -- I want
20 to ask --

21 THE COURT: Well, I'm inclined to let
22 counsel ask the question, but advise the jury,
23 again, that there is nothing improper about going
24 into executive session if it's done within the
25 parameters of the statute.

1 MR. BRASSEY: Okay. Then the question
2 becomes, Judge, what if the facts are this wasn't
3 the subject of the executive session back in
4 December?

5 Then I'm in a -- I can't answer.

6 MR. BANDUCCI: Well, Your Honor, there
7 are --

8 THE COURT: Is there evidence --

9 MR. BANDUCCI: Yeah. Yeah.

10 THE COURT: -- that there were executive
11 sessions back in --

12 MR. BANDUCCI: And I can show the emails.

13 MR. BRASSEY: Well, but executive sessions
14 for Alamar?

15 MR. BANDUCCI: Yeah. Oh, yeah. I can show
16 the emails. I can go get an email right now that
17 will show you that.

18 MR. BRASSEY: Well, then I need
19 some -- well --

20 THE COURT: I mean, I'm not going to,
21 obviously, allow counsel to invade that privilege;
22 but I think to point out that the plaintiffs and
23 no one else is able to determine what was or was
24 not discussed in executive session.

25 MR. BRASSEY: Except, Judge, that on Friday,

1 we let -- we had Fred Lawson, because I let him
2 say it in his deposition, that the question was
3 asked whether the number of beds, for example, the
4 population, could be reduced. And he answered
5 that and said, yes.

6 So -- so if the facts are, Judge, that
7 it wasn't discussed in the fashion that that email
8 suggests in December, I can't defend myself.

9 THE COURT: The way the question is
10 going -- well, the problem is that the plaintiff
11 has the same, the reverse problem, in that they
12 can't determine what was or not discussed because
13 of executive session, since the county is the one
14 that went into executive session. I think they
15 are kind of at risk that there will be a negative
16 inference drawn from that.

17 MR. BRASSEY: Well, can I ask -- I don't
18 want to run afoul of -- because of the rulings the
19 court has made, but can I ask Ms. Burke [sic], "Do
20 you agree" --

21 MR. BANDUCCI: Burke?

22 MR. BRASSEY: Well, "Do you agree with
23 Ms. Burke's characterization of" -- and then --
24 and --

25 MR. BANDUCCI: Of Patti Zimmer's [sic] --

1 MR. BRASSEY: Right. And Judge, one thing
2 I'm worried about in this case --

3 MR. BANDUCCI: "Patti Zimmer" -- Patti
4 Burke.

5 MR. BRASSEY: -- and one thing I'm worried
6 about in the depositions, they are not real --

7 MR. BANDUCCI: I have no problem with that.

8 MR. BRASSEY: -- they will blurt something
9 out. And I'm not being critical, Judge, but --

10 THE COURT: No, I understand. But I think
11 I'm going to have to just allow him to go forward.
12 And all he is going to do is establish that there
13 are things that went on in executive session, and
14 that the plaintiff and, for that matter, the jury
15 is just not going to hear about, because it was
16 done in executive session.

17 MR. BRASSEY: Can -- here is what I'm
18 worried about: I'm worried if I ask her
19 something, she is going to blurt something out.

20 MR. BANDUCCI: Well --

21 THE COURT: Well, obviously, I'm going to
22 give you leeway to lead the witness, even show she
23 is clearly a representative, when you get into
24 that area. So you can keep that to a minimum.
25 Okay?

1 MR. BANDUCCI: Fine. Thank you, Your Honor.
2 (Sidebar concluded.)

3 THE COURT: Mr. Banducci, proceed, if you
4 would, in accordance with our discussion --

5 MR. BANDUCCI: Thank you, Your Honor.

6 THE COURT: -- at sidebar.

7 MR. BANDUCCI: If I may ask the court
8 reporter just to give me the last question and
9 answer, so I can remember.

10 (The record was read.)

11 MR. BANDUCCI: All right.

12 BY MR. BANDUCCI:

13 **Q.** But it's fair to say, is it not,
14 Ms. Zimmer, that when the commissioners met
15 regarding the Alamar CUP, you met in executive
16 session, so neither Alamar nor this jury will know
17 what was deliberated on during those executive
18 sessions?

19 MR. BRASSEY: Your Honor, I object to the
20 characterization. I object to the form.

21 THE COURT: All right. I'm going to allow
22 the witness to answer.

23 But, again, ladies and gentlemen, as I
24 think I've instructed you previously, there are
25 issues of privilege that occur throughout this

1 trial. There is communications between an
2 attorney and the client, which is privileged, and
3 therefore those communications cannot be revealed
4 to others, including juries in a court of law.

5 Likewise, the county is granted the
6 prerogative of -- the county commissioners are
7 granted the prerogative of meeting in executive
8 session to discuss personnel matters, possible
9 litigation, things of that sort.

10 And so although I'm going to allow the
11 witness to answer, I need to point out that there
12 is nothing improper with a Board of County
13 Commissioners going into executive session.

14 With that, I'll direct the witness to
15 answer.

16 BY MR. BANDUCCI:

17 **Q.** Do you remember the question, ma'am?

18 **A.** I think I do.

19 **Q.** Okay.

20 **A.** I don't believe that we -- before
21 January 28th, 2008, I don't believe we talked
22 about it. That was our first hearing. I don't
23 believe -- if we did, maybe we talked about the
24 hearing that would -- but I don't believe we did.

25 **Q.** Okay. And my question to you is,

1 whether you did or not, we're not going to be able
2 to find out because the application of Alamar was
3 considered in executive session by the
4 Commissioners; correct?

5 No matter when it was considered;
6 correct?

7 **A.** Probably part of it, yes.

8 **Q.** Anything that was considered by the
9 commissioners outside of executive session should
10 be in the public record somewhere?

11 **A.** Yes.

12 **Q.** We should be able to lay hands on it
13 and see what you were saying.

14 **A.** Yes.

15 **Q.** And if there is nothing in the public
16 record other than what's in the transcripts of the
17 deliberation and the January 28th hearing, would
18 that surprise you?

19 **A.** No.

20 **Q.** Okay. Thank you.

21 MR. BANDUCCI: Let's -- Kathy, would you go
22 to the second paragraph right below the one we
23 just identified? I want to get back on track
24 here.

25 BY MR. BANDUCCI:

1 **Q.** Going to that last sentence here, it
2 says: "I believe the comment made was something
3 like, 'The county may have to approve a CUP, but
4 the county doesn't concern itself with the
5 profitability of the proposed use.'"

6 Do you see that?

7 **A.** Yes, I do.

8 **Q.** And you understand from
9 Ms. Kirkpatrick's testimony that she was part of
10 the legal team for the opponents of Alamar;
11 correct?

12 **A.** She was part of the group for the
13 opponents, yes.

14 **Q.** And she mentioned she was on the legal
15 team. Do you remember that?

16 **A.** Yes.

17 **Q.** Okay.

18 MR. BANDUCCI: So now let's go to
19 Exhibit 1076. And Kathy, if you would go to page
20 39 of 88.

21 BY MR. BANDUCCI:

22 **Q.** This is the January 28th hearing, page
23 39 of 88. And, again, we'll be looking at
24 Mr. Charney's statement --

25 MR. BANDUCCI: Kathy, if you could bring out

1 just this part here. Okay.

2 BY MR. BANDUCCI:

3 **Q.** This is Mr. Charney's -- again -- now
4 he is speaking to you, and he says, "If the board
5 accepts the compromise that the opponents of
6 Alamar advanced in their brief, which would be a
7 12-bed facility, which would be more compatible
8 with the comprehensive plan, a lower burden on
9 county services, not as much of a concern on
10 private property values that are held by first in
11 time people there, then Alamar can't come to you
12 and complain, 'We can't make any money that way.'
13 It's not a valid consideration for me to argue to
14 you, 'They're going to make millions,' and it's
15 not a valid consideration for them to argue, 'We
16 can't make it with this number of beds in this
17 particular facility.'"

18 Isn't there -- isn't Mr. Charney there
19 saying: "You folks don't need to worry about the
20 profitability of the Alamar project when you're
21 making your decision?"

22 **A.** Yes.

23 **Q.** All right. Now, in another email --

24 MR. BANDUCCI: Let's put up Exhibit 1068.

25 BY MR. BANDUCCI:

1 **Q.** This is an email that we also saw
2 entered through Ms. Kirkpatrick. And this is -- I
3 want to focus you on -- well, let's read the first
4 paragraph. It says, "Sorry, Dennis." That's
5 Mr. Charney. "Hope the subject matter above has
6 caught your attention. Please let me revise the
7 facts regarding Chrys" -- that's Chrys Pereida.
8 She's another opponent of Alamar; do you know?

9 **A. I believe she was.**

10 **Q.** -- "earlier email regarding McNeese and
11 Butler before you do anything that might
12 jeopardize Patti's position.

13 "Here are the facts: McNeese is
14 telling Patti and others at the county level that
15 he was told by an expert on land use law that the
16 county commissioners cannot add any of their own
17 new conditions, if they choose to approve Alamar;
18 that they can only use the existing P & Z
19 conditions.

20 "At first, Patti stated it was someone
21 who was an expert, then later stated it was one of
22 the other county attorneys. However, she also
23 stated a couple of weeks ago that Butler is the
24 expert for land use; all the cities hire her. I
25 didn't ask her at the time who told her that.

1 "So what she" -- Ms. Burke -- "is
2 asking about from us" -- in other words the
3 opponents of Alamar -- "is to make sure the
4 commissioners, county attorneys, P & Z
5 administrator, et cetera, clearly understand what
6 they can do regarding approving with conditions.

7 "Patti did ask me to find the actual
8 state statutes regarding the appeal process and
9 what the commissioners can do. I haven't found
10 the right statute, but we must" -- "but we just
11 need to make sure the county attorneys know on the
12 record what the commissioners can do.

13 "However, again, I must ask that you
14 ensure no one can infer her involvement" --
15 meaning Patti's involvement -- "in any of this,
16 please."

17 Now, let's go to the hearing on the
18 28th.

19 MR. BANDUCCI: And Kathy, if you can go to
20 page 40 of 88.

21 Just one second. I may have the
22 wrong -- I'm sorry. 1076. There we go.

23 BY MR. BANDUCCI:

24 **Q.** All right. Now, this is the hearing
25 before you --

1 "The conversations with McNeese have
2 come about because she" -- meaning Patti -- "is
3 currently wanting to put together a list of
4 conditions for the commissioners to look at, if
5 they approve.

6 "I am getting the written transcript of
7 the P & Z hearings and am highlighting all the
8 conditions Alamar agreed to during the hearings,
9 on top of all the others.

10 "She" -- meaning Patti -- "also states
11 we should read all these conditions out loud at
12 the hearing on the 14th" -- now, that was
13 ultimately on the 28th; correct? The hearing?

14 **A. Yes, it was.**

15 **Q.** -- "just so the commissioners 'hear'
16 them and they entered into the record.

17 "What is concerning to me is that I
18 understood her to say that the conditions the
19 commissioners could impose were only what was in
20 conclusions, facts and order, which, of course,
21 Mr. Wolford left out all but the basics."

22 Now, she is referring there to the
23 P & Z order; correct?

24 **A. Yes, she is.**

25 **Q.** Okay.

1 MR. BANDUCCI: And let's -- the comments by
2 Mr. Charney at the middle. There we go.
3 BY MR. BANDUCCI:

4 **Q.** "Okay. I have for each of you, and one
5 for the clerk -- and that is written in letter
6 form -- which contains additional conditions, that
7 if you are inclined to grant this, are additional
8 conditions that the opponents of Alamar feel
9 should be considered by this Board. The applicant
10 has set forth a variety of conditions it feels
11 appropriate."

12 So Patti's request that the opponents
13 of Alamar submit additional conditions at this
14 hearing was actually acted upon by counsel, Dennis
15 Charney; correct?

16 **A. By the letter that you read, which was
17 December, I don't -- I didn't feel like anybody
18 was instructed --**

19 **Q.** Ma'am --

20 **A. -- to do conditions.**

21 **Q.** -- my question is simply this --

22 **A. Oh.**

23 **Q.** -- Ms. Zimmer: You just saw this
24 email --

25 **A. Yes.**

1 **Q.** -- where Patti Burke is asking the
 2 opponents of Alamar to submit additional
 3 conditions to the commissioners, so they hear it
 4 loud and clear; right?
 5 **A.** Yes.
 6 **Q.** And isn't that exactly what happens at
 7 the hearing?
 8 **A.** Yes. **But we never saw the email before**
 9 **the hearing.**
 10 **Q.** I understand that, ma'am.
 11 **A.** Okay.
 12 **Q.** I understand that. I understand you
 13 didn't see the email.
 14 MR. BANDUCCI: Now, let's go to
 15 Exhibit 1172A.
 16 Your Honor, that hasn't been admitted
 17 yet.
 18 THE COURT: I'm sorry?
 19 MR. BANDUCCI: It is Exhibit 17 to the
 20 record. 1172 has been -- this is part of the
 21 record, Andy.
 22 (Counsel conferring.)
 23 THE COURT: Is it part of the entire -- it
 24 says, "Record on appeal from" --
 25 MR. BANDUCCI: I know, Your Honor. This is

1 make sure this is not misleading to the jury in
 2 any way.
 3 MR. BRASSEY: All right.
 4 THE COURT: 1172A will be admitted.
 5 (Plaintiffs' Exhibit 1172A admitted.)
 6 MR. BANDUCCI: Thank you, Your Honor.
 7 May it be shown?
 8 THE COURT: Yes.
 9 MR. BANDUCCI: Kathy, if you can go to --
 10 well, let's stay with the first page first.
 11 And, Kathy, if you could blow up the
 12 top half it, actually including the date and to
 13 whom it's being submitted. There we go.
 14 BY MR. BANDUCCI:
 15 **Q.** All right. So this is the same date as
 16 the hearing. It's January 28th. Do you see that?
 17 **A.** Yes.
 18 **Q.** And it's to the Boise County
 19 Commissioners, including yourself. It says:
 20 "Dear Commissioners Day, Lawson and
 21 Zimmer:
 22 "The conditions for approval submitted
 23 by the Alamar Ranch legal team represent only
 24 those conditions that Alamar believes can be
 25 implemented economically and without affecting

1 a portion -- this is actually -- it is a 10-page
 2 letter. This is the letter that was submitted at
 3 that hearing, when that passage was --
 4 THE COURT: 1172 is the entire record, which
 5 I assume is very voluminous, and this is just a
 6 portion of it?
 7 MR. BANDUCCI: Correct.
 8 MR. BRASSEY: Your Honor, I have no
 9 objection to this. But it seems we ought to put
 10 1172 in.
 11 THE COURT: Is there any objection?
 12 MR. BANDUCCI: Well, Your Honor, it's just
 13 going to -- we're going to be dealing with this
 14 beast of an exhibit, and people are going to
 15 be -- I mean, I don't know why we would do that.
 16 MR. BRASSEY: Well, Your Honor, I don't
 17 think we ought to -- I have no objection to --
 18 THE COURT: All right.
 19 MR. BRASSEY: -- this document, but I think
 20 we ought to put the record in.
 21 THE COURT: All right. I'm going to
 22 overrule the objection. I'll admit Exhibit 1172-
 23 we'll call it -A. And counsel can, pursuant to
 24 Rule 106 and the Rule of Completeness, offer
 25 additional portions of that as they see fit, to

1 their time table or profit flow. These conditions
 2 do not necessarily consider the concerns of the
 3 citizens of Boise County. County commissioners
 4 are not obligated to consider only conditions of
 5 approval from the applicant. As a publicly
 6 elected body, county commissioners should consider
 7 conditions submitted by their constituents."
 8 Have you ever -- have you ever, in your
 9 past experience, submitted conditions or imposed
 10 conditions submitted by constituency?
 11 **A.** At that time, I would say no.
 12 **Q.** Okay.
 13 MR. BANDUCCI: Now, back away from that, if
 14 you would, Kathy.
 15 BY MR. BANDUCCI:
 16 **Q.** The first proposed opponents of Alamar
 17 condition is the lighting. Do you see that?
 18 **A.** Yes.
 19 **Q.** Okay. We're not going to spend a lot
 20 of time on lighting.
 21 Let's go to the second page.
 22 MR. BANDUCCI: And, Kathy, if you could blow
 23 up No. 4.
 24 BY MR. BANDUCCI:
 25 **Q.** "Secondary egress. As requested by

1 Commissioners Kane and Bart and agreed to by
2 Alamar, a second separate egress from Alamar be
3 provided that, A, does not use the existing Klam
4 Ranch Road bridge over Grimes Creek; B, allows
5 two-traffic" -- "two-way traffic at all times of
6 the year; and C, avoids a long and poorly
7 maintained road to Route 21 or another major road
8 that could easily become impassable during a fire
9 or other emergency."

10 So this is a condition requested by the
11 opponents of Alamar; correct?

12 **A. Yes.**

13 **Q.** All right. So when Patti Burke sent
14 out or talked to -- talked to her friend, Jeri
15 Kirkpatrick, in this email, Jeri Kirkpatrick then
16 did exactly what she said she was going to do when
17 she said, "I am getting the written transcript of
18 the P & Z hearings and am highlighting all the
19 conditions Alamar agreed to during the hearings."
20 This is one of those; correct?

21 **A. Yes, it is.**

22 **Q.** All right. Now --

23 MR. BANDUCCI: Thank you. Take that down,
24 Kathy, please.

25 And if we can go to 1086, last page,

1 page 4. Highlight 27.

2 BY MR. BANDUCCI:

3 **Q.** Now, this is the document that was
4 carried into the commission hearing by you
5 commissioners; correct?

6 **A. I believe it is. Yes.**

7 **Q.** Okay. And we -- we're not sure whether
8 there is a later version of this or not, but this
9 is certainly -- this is the only one you all could
10 find; right -- of what was used at the
11 deliberation hearing; correct?

12 **A. That is correct.**

13 **Q.** And 27 was read into the record, wasn't
14 it, as a condition on Alamar?

15 **A. I believe it was.**

16 **Q.** All right. So as requested by
17 Ms. Burke --

18 MR. BANDUCCI: And we can go back to that
19 exhibit, Exhibit 1068.

20 BY MR. BANDUCCI:

21 **Q.** This is what Ms. Burke requests as of
22 January 5th.

23 MR. BANDUCCI: Go up to the date, Kathy,
24 please.

25 BY MR. BANDUCCI:

1 **Q.** This is requested of you all on -- this
2 is what Patti Burke requests through Jeri
3 Kirkpatrick of the opponents of Alamar in January
4 of 2008; correct?

5 **A. It's addressed to Dennis Charney from
6 Jeri Kirkpatrick.**

7 **Q.** This is what was requested by Patti
8 Burke of Jeri Kirkpatrick and the opponents of
9 Alamar; correct?

10 **A. (No response.)**

11 **Q.** Look at the second-to-last page. It
12 says, "So what she is asking about from us..." Do
13 you see that?

14 **A. I do.**

15 **Q.** So my question is: This is what Patti
16 Burke requested through Jeri Kirkpatrick on
17 January 5th of 2008; correct?

18 **A. It's her conversation, yes.**

19 **Q.** And lo and behold, on March 10th, 2008,
20 at the deliberation hearing one of the -- at least
21 one of the conditions requested -- I'm not going
22 to go through the rest of that letter at this
23 point, but at least one of the conditions
24 requested by the No Alamar opponents in the letter
25 that we just looked at, which is 1172A, was indeed

1 imposed on Alamar; correct?

2 **A. Yes, it was. And also, it was in the
3 P & Z conditions.**

4 **Q.** Well, we'll talk about whether or
5 not -- what was precisely worded in this letter.
6 Can you say that for sure, ma'am?

7 Can you say what was -- what was
8 imposed in the conditions on Alamar is the
9 precisely worded condition from the P & Z
10 transcript?

11 **A. No.**

12 **Q.** You don't know, do you?

13 **A. I don't think any of them are exactly
14 the words.**

15 **Q.** Okay. Do you know if they are
16 different in any material way?

17 **A. Not -- not exactly.**

18 **Q.** All right. Now --

19 MR. BANDUCCI: Let's stay with -- let's go
20 back to 1086, Kathy.

21 Now, last page.

22 BY MR. BANDUCCI:

23 **Q.** With respect to condition 28 --

24 MR. BANDUCCI: We'll pull that out --

25 BY MR. BANDUCCI:

1 **Q.** -- that was another request of the
 2 folks of Alamar -- No Alamar; correct?
 3 **A.** That -- it's just a blank residence
 4 number.
 5 **Q.** But the -- the opponents of Alamar
 6 asked that the -- that the resident population be
 7 reduced; correct?
 8 **A.** They did.
 9 **Q.** And when you all got into the hearing,
 10 you went to the opponents' brief, and you raised
 11 the question, "Well" -- and pointed out that the
 12 opponents wanted 12; correct?
 13 **A.** We may have went to the brief, but I'm
 14 not sure of that. But we did point that out, yes.
 15 **Q.** Pardon me?
 16 **A.** I did point that out, yes.
 17 **Q.** You pointed out that the starting
 18 number of 12 came from the opponents' brief;
 19 correct?
 20 **A.** I believe I did.
 21 **Q.** Okay. So, again, the requests of the
 22 opponents find a place in the transcript -- excuse
 23 me -- in the script of 1086, which is carried into
 24 the deliberation hearing, and the blank is filled
 25 using a number that was derived from the

1 opponents' brief; correct?
 2 **A.** And from our sub- --
 3 **Q.** Pardon me?
 4 **A.** And from our -- one of our ordinances
 5 had 12 mentioned in it.
 6 **Q.** Really? Which?
 7 **A.** Comprehensive plan.
 8 **Q.** The comprehensive plan mentions
 9 something about 12?
 10 **A.** I believe so. I might be wrong, but I
 11 think it does.
 12 **Q.** Well, didn't you testify, ma'am, that
 13 24 had absolutely no basis in the record?
 14 **A.** You know, on my first deposition, which
 15 was July 22nd, '09, I believe, I believe I did say
 16 that. But I -- since I -- it is in the record,
 17 there is all different numbers.
 18 **Q.** "There is all different numbers."
 19 Well, ma'am, when I deposed you in
 20 2009, that was closer in time to the hearing than
 21 we are today; correct?
 22 **A.** Yes.
 23 **Q.** Now, when I deposed you, you were under
 24 oath?
 25 **A.** Yes, I was.

1 **Q.** And I asked you very directly --
 2 MR. BANDUCCI: And let's get your deposition
 3 out.
 4 BY MR. BANDUCCI:
 5 **Q.** -- at 123 --
 6 THE COURT: Was that published on Friday?
 7 MR. BANDUCCI: Yes, it was, Your Honor.
 8 THE COURT: Okay. Do you have a copy there?
 9 THE WITNESS: I do, yes.
 10 THE COURT: Very good.
 11 BY MR. BANDUCCI:
 12 **Q.** Tell me when you get to page 123,
 13 ma'am.
 14 **A.** Okay.
 15 **Q.** That's volume 1.
 16 **A.** That's what I want, huh? I'm there.
 17 **Q.** We'll talk about the testimony right
 18 above your line 8, but let's -- right now, let's
 19 talk about line 8. My question was: "Would you
 20 agree with me that there is absolutely no support
 21 in the record for coming up with the number of 24
 22 beds?"
 23 And your answer was, "Yes."
 24 Is that true?
 25 **A.** It was.

1 **Q.** Are you changing your testimony now?
 2 **A.** Well, this is the first time I had ever
 3 had a depo, and I was --
 4 **Q.** Ma'am --
 5 **A.** -- believing the exhibits you showed me
 6 was the record at the time. And that's -- that --
 7 I -- I beat myself up enough over this.
 8 **Q.** Well, ma'am, my question is
 9 simply -- you know, I'm not -- I don't want you to
 10 beat yourself up over this, ma'am. But what we're
 11 here to do is to try and find out what the truth
 12 is. Okay?
 13 **A.** Okay.
 14 **Q.** And if you want to change your
 15 testimony today, you're entitled to do that.
 16 Obviously, I can point that out. But I want to
 17 know: Are you sticking with what you said in your
 18 deposition, or are you changing your testimony?
 19 **A.** I believe phase 1 of their application
 20 states 24 beds. That is a record. I, at the
 21 time, wasn't thinking that as the record.
 22 **Q.** Well, ma'am, they didn't apply for 24
 23 beds, did they?
 24 **A.** No.
 25 **Q.** They applied for 72.

1 **A. Yes.**
 2 **Q.** Okay. And my question to you is: When
 3 we were looking at the transcript -- let's go back
 4 to earlier portion of your depo, okay?

5 **A. Okay.**
 6 **Q.** Let's start with -- let's go to page
 7 120. Let's start at line 6. Okay?

8 **A. Okay.**
 9 **Q.** Let's start at line 1. I said:
 10 "[Question:] Okay. Now you said in
 11 your earlier answer that you thought 24 might be a
 12 little low. There could have been a few more
 13 beds. I think I heard you -- I think I heard you
 14 correctly."
 15 "Answer: You did."
 16 "[Question:] How many beds did you
 17 think was appropriate?"
 18 "Answer: I thought probably 36, 35, in
 19 that range. I never felt that we should go over
 20 that. That one, I think there was a couple other
 21 studies that was somewhere mentioned, and I'm not
 22 sure where, that there were -- beds were 30, and
 23 there was different -- 24. There was 12. There
 24 was some studies of what they were doing
 25 comparatively."

1 the question so that my question and your answer
 2 come out."

3 So I asked the question again -- or the
 4 record was read by the reporter.

5 I said: "[Question:] Did you speak up
 6 at the -- and I'll confess to you, I have not read
 7 all the transcripts of this case."

8 "Answer: Yes."
 9 "[Question:] I will at some point, but
 10 I haven't yet.

11 "Did you at this deliberation hearing
 12 speak up for more beds?"

13 "Answer: I don't believe I did."

14 "Question: Why not?"

15 "Answer: Because I think it started at
 16 12, and then we went to 24, and that's where it
 17 ended."

18 "[Question:] Who proposed 12?"

19 "[Answer:] I think it could have been
 20 me, to start with."

21 "[Question:] You proposed 12?"

22 "Answer: Well, I don't know."

23 Mr. Brassey says something, and then
 24 you say:

25 "[Answer:] Well, I was thinking that

1 "[Question:] Okay. You testified a
 2 few minutes ago that when you -- what was that?"

3 "[Answer:] I just said 'so.'"

4 "[Question:] Oh. Did you finish your
 5 answer? I don't want to interrupt you."

6 "[Answer:] No, I'm fine."

7 "[Question:] You testified a few
 8 minutes ago that when you entered the deliberation
 9 hearings on March 10th, 2008, it had crossed your
 10 mind that the bed count should be reduced. Do you
 11 remember testimony to that effect?"

12 "[Answer:] Yes."

13 "[Question:] What in the record had
 14 led you to think that way?"

15 "[Answer:] I really don't know. It's
 16 just something that was on my mind."

17 "[Question:] Okay. But as you sit
 18 here today, you can't point to anything in the
 19 record that really supports this idea of
 20 reducing --"

21 "Answer: My whole idea, no."

22 "[Question:] You need to let me
 23 finish."

24 "[Answer:] I'm sorry."

25 "Question: You need to let me finish

1 there was -- they were talking back and forth, and
 2 there was just this --"

3 And I say: "[Question:] 'They,' being
 4 the commissioners?"

5 "Answer: The commissioners.

6 "And I just said, 'Well, how many beds
 7 do you want? Do you want 12?' I think it just
 8 went out that way. I don't think it was -- and
 9 I'm not sure that's what I said, but it may be."

10 "Question: Let's assume -- because I'm
 11 not going to go through the transcripts at this
 12 point -- that that is what you tossed out. What
 13 you're telling me is you had no basis for tossing
 14 the number '12' out?"

15 "Answer: No."

16 "[Question:] You would agree with me?"

17 "Answer:] I don't know why I did it,
 18 if I did it."

19 "[Question:] All right. Do you know
 20 who was responsible for moving it up to 24?"

21 "[Answer:] No."

22 "[Question:] When it got to 24, since
 23 you believed that the number should be more in the
 24 35 neighborhood, why didn't you speak up?"

25 "Answer: I don't know."

1 "[Question:] Do you regret speaking
2 up?" [Sic]
3 "[Answer:] Maybe a little."
4 "Question: Would you agree with me
5 that there is absolutely no support in the record
6 for coming up with the number of 24 beds?"
7 "Answer: Yes."

8 Now, that was your testimony --

9 **A. Yes.**

10 **Q. -- correct?**

11 **A. Yes.**

12 **Q. Now, let me digress for a minute. You
13 thought that, really, the number should be higher
14 than 24; right?**

15 **A. Yes, I did.**

16 **Q. And yet you didn't speak up; correct?**

17 **A. I don't believe so.**

18 **Q. Well --**

19 **A. Yes.**

20 **Q. You've looked through the transcript.
21 You didn't speak up, did you?**

22 **A. No.**

23 **Q. And the reason you didn't speak up was
24 because this was a pretty intimidating crowd,
25 wasn't it?**

1 **A. I don't think that was why.**

2 **Q. Was there another reason why you didn't
3 speak your mind on such an important issue, given
4 that you knew that less than 72 would make this
5 project unfeasible?**

6 **A. I didn't know that it would make it
7 unfeasible.**

8 **Q. Okay. Well, you still had it in mind.
9 We'll let that go.**

10 Ma'am, my question to you is: This
11 is -- obviously, the number of beds is important
12 to Alamar, isn't it?

13 **A. Yes, it is.**

14 **Q. Well, why didn't you speak your mind in
15 this -- the context of this hearing, which was a
16 room filled of mostly No Alamar folks; right?**

17 **A. Yes.**

18 **Q. So would you agree with me that you
19 were a little intimidated by that?**

20 **A. No. I don't think I was. I think it
21 was more we were trying to come to an agreement
22 with the three of us.**

23 **Q. Okay. So you knew at that point in the
24 process that Terry Day was going to vote against
25 the whole project; right?**

1 **A. Possibly.**

2 **Q. Well, that's what he was telling you,
3 wasn't he?**

4 **A. Pretty much.**

5 **Q. Well, let's go back at page 47 of the
6 transcript.**

7 MR. BANDUCCI: That's going to be the
8 March 10th, transcript, which I think is -- hang
9 on, Kathy. I'll get it to you. It is
10 Exhibit 1084.

11 March 10th; I think it's 47.

12 BY MR. BANDUCCI:

13 **Q. Let me refer you right here --**

14 MR. BANDUCCI: Kathy, if you can blow this
15 up, right here -- perfect.

16 BY MR. BANDUCCI:

17 **Q. Now, Mr. Day is saying -- woops -- "But
18 you know, I think I -- now I said this once, and I
19 don't want to get myself in a situation, I don't
20 think it complies with the plan. I don't think
21 it's in the intent of the comprehensive plan. But
22 if it wasn't so big, I could see where it would be
23 easier on the property rights issue."**

24 Do you see that?

25 **A. I do.**

1 **Q. And you testified at your deposition,
2 didn't you, that Mr. Day -- one of the things that
3 convinced Mr. Day to agree to any kind of a
4 conditional use permit was the reduction of the
5 population; correct?**

6 **A. Yes.**

7 **Q. And before that, he was -- he was going
8 to vote against it; right?**

9 **A. Possibly.**

10 **Q. Well, isn't he right here saying: "You
11 know, if we can make it smaller, if we can make it
12 smaller, I might withdraw my objection"?**

13 **A. Yes.**

14 **Q. Okay. And so --**

15 MR. BANDUCCI: Kathy, if you could back up
16 from that blow out, and let's go to the next page.
17 Okay. Let's go down to the bottom, where
18 Mr. McNeese -- actually, right here in the middle,
19 where it says "Chair," down about -- there you go.
20 All the way down, that whole area.

21 I'm not doing a good job of expressing
22 myself.

23 BY MR. BANDUCCI:

24 **Q. This is Mr. - this is -- Mr. Lawson
25 says, "Somewhere along the line, I don't know, the**

1 opponent here -- and I don't know that you told me
2 this, Tim" -- meaning Mr. McNeese -- "or somewhere
3 I read this, that a smaller facility would be more
4 to their liking."

5 McNeese said, "I believe the opponents
6 were in favor of that."

7 And Day said, "I believe that was
8 mentioned. That was written in the rebuttal, I
9 believe."

10 "In their brief," says McNeese.

11 And Day says, "In their brief."

12 And you say, "Yeah."

13 McNeese says, "It was also submitted in
14 an exhibit they presented to you at the hearing on
15 January 28th through Mr. Charney."

16 That's this Exhibit 1172 that we were
17 just looking at.

18 And if we were to take the time, it
19 would say, "The size of the facility should be
20 limited to a size more in keeping with the
21 surrounding area. That number is one housing unit
22 of 12 youths."

23 So, they go on, Lawson says, "So they
24 were" -- "they" meaning the opponents -- "were in
25 favor of a smaller facility."

1 to Terry Day that the opponents of Alamar weren't
2 going to be upset about a smaller facility;
3 correct?

4 **A. Yes.**

5 **Q.** And that was what you were -- what you
6 were trying to do is you were going to reduce the
7 number so that you could get Day on your side
8 relative to voting for the CUP; correct?

9 **A. Not just to get him on our side.**

10 **Q.** Well --

11 **A. It's -- we want to work out a solution.**

12 **That's what --**

13 **Q.** You wanted to work out a solution where
14 the three of you would vote to the same position;
15 correct?

16 **A. Well, at least two of us.**

17 **Q.** But you wanted Terry Day to vote for
18 it, too, didn't you?

19 **A. Well, it's better that way.**

20 **Q.** Okay. And I'm not debating that with
21 you, ma'am. A unanimous decision is better than a
22 dissenter; right?

23 **A. Right.**

24 **Q.** And in order to get Terry Day to do
25 that, you had to drop to something like 12 or

1 And McNeese says, "The opponents said that
2 in their rebuttal brief, and they also said that
3 in Exhibit 46 or 47."

4 I think he is right; that is
5 Exhibit 47.

6 Ms. Zimmer, you say, "And I believe
7 that was 12 beds."

8 That's the first time the number 12
9 shows up. So you did throw it out; correct?

10 **A. Yes.**

11 **Q.** Okay. And then McNeese says, "They
12 suggested something smaller, such as 12."

13 You say, "Such as 12. Okay."

14 Let's keep going now.

15 And then McNeese says, "I think you're
16 correct, the largest facility in the -- what --
17 what was a, 32 bed, and that might be Project
18 PATCH, or Project PATCH was at around that
19 number."

20 Then Mr. Lawson says this: "So did you
21 pick that up, Terry, that they weren't, I guess,
22 against" --

23 And Day says, "I did pick up on it."
24 -- "a smaller facility?"

25 So Mr. Lawson and you were pointing out

1 maybe -- actually, Terry Day was the one who
2 bumped it up to 24; right?

3 **A. I believe so.**

4 **But I also believe further back in my
5 testimony I said 32 beds.**

6 **Q.** Well, sure. But you started with
7 12 --

8 **A. And then, I --**

9 **Q.** It was Terry Day who ultimately said,
10 "Oh, let's bump it to 24." Do you -- do you
11 remember that?

12 MR. BANDUCCI: Let's go to page
13 71 [sic].

14 THE WITNESS: Yes.

15 THE COURT: Was there an answer to the last
16 question?

17 THE WITNESS: Yes.

18 BY MR. BANDUCCI:

19 **Q.** You do remember?

20 **A. Yes.**

21 THE COURT: Thank you. It needs to be
22 audible.

23 THE WITNESS: Okay. Thank you.

24 MR. BANDUCCI: I think I overshot it. Go
25 back one page.

1 Next page back.
 2 Next page back.
 3 You're at page 68. I think we need to
 4 be -- I said 51. You may have heard me say 71.
 5 I'm sorry.
 6 Just the top. There we go. Down to
 7 Terry Day.
 8 BY MR. BANDUCCI:
 9 **Q.** And this is where Terry Day knocks it
 10 up to 24. He says, "Well, I think that figure I
 11 read at 12, I think that's probably pretty low. I
 12 wouldn't go higher than that" -- "I would go
 13 higher than that. I wouldn't go any higher than
 14 24."
 15 Correct?
 16 **A.** Yes.
 17 **Q.** And that's when you could have said,
 18 "Well, you know, I've been thinking it should be
 19 higher"; correct?
 20 **A.** I could have, yes.
 21 **Q.** But Mr. Day says, "I wouldn't go any
 22 higher than 24."
 23 So when he says that, you stick at 24;
 24 correct?
 25 **A.** I did.

1 **Q.** Because then he is going to be -- it's
 2 going to be a unanimous decision; correct?
 3 **A.** Yes. **And I had thought about the fact**
 4 **that it was phase 1.**
 5 **Q.** Well, ma'am -- ma'am, this was a 72
 6 application. It's a 72-bed application; right?
 7 **A.** I understand that.
 8 **Q.** Okay. So the fact that phase 1 is 24
 9 doesn't have a thing to do with whether or not
 10 this company can operate a residential treatment
 11 center viably; correct?
 12 **A.** Well, in the past we have -- we had
 13 approved subdivisions in phases and phases. Then
 14 they come back and amend them, and we have had
 15 phase 1, phase 2, and so on.
 16 **Q.** Well, but --
 17 **A.** But this isn't a subdivision, I realize
 18 that.
 19 **Q.** But that's not this case, is it?
 20 **A.** No.
 21 **Q.** This case was for 72; correct?
 22 **A.** The full case --
 23 **Q.** Yes.
 24 **A.** -- later down the road, yes.
 25 **Q.** Yes. And you had heard, as you

1 testified first thing this morning, that less than
 2 72 was going to be unprofitable; correct?
 3 **A.** As I heard later, yes.
 4 **Q.** Heard later when?
 5 **A.** Well, unprofitable with -- Dennis
 6 Charney made that statement, but not necessarily
 7 that I believed it.
 8 **Q.** Oh, you didn't necessarily believe it?
 9 **A.** I mean, I -- no.
 10 **Q.** You didn't do anything to investigate
 11 it, though, did you?
 12 **A.** Yes.
 13 **Q.** What did you do?
 14 **A.** I -- I read the 28th hearing. I
 15 listened to the other -- I read the other
 16 people's, and the one RTC in Gem County was a
 17 20-bed, and it was profitable. He made the
 18 statement.
 19 **Q.** When did you read that?
 20 **A.** I read that then, and I've read it
 21 since.
 22 **Q.** You've read it since the lawsuit was
 23 filed?
 24 **A.** Yes.
 25 **Q.** Okay. And we have already decided --

1 we have already discussed the fact that that
 2 RTC -- because that RTC is profitable in -- at 20,
 3 doesn't mean that Alamar is going to be profitable
 4 at 20; correct?
 5 **A.** Not necessarily.
 6 **Q.** And you don't know what the programming
 7 is at that other, Emmett RTC, as compared to what
 8 Alamar was proposing; correct?
 9 **A.** The way he stated it, it sounded very
 10 much similar.
 11 **Q.** Well, ma'am --
 12 **A.** So I don't know.
 13 **Q.** -- are you telling this jury that
 14 because of what Mr. Sapp said, you decided that 20
 15 was going to be appropriate?
 16 **A.** Not necessarily. There was other
 17 testimony of 32. I also knew Project PATCH, and
 18 I -- I knew about Project PATCH.
 19 **Q.** Sure you did. And we'll talk about
 20 Project PATCH in a minute.
 21 Let me get back to your
 22 testimony -- well, let's get back to the email,
 23 the first email again. One more time here. And
 24 we're going back to 1067.
 25 Oh, one last question, though. If

1 Mr. Sapp's testimony was so important, why didn't
2 you mention that in your deposition?

3 **A. I believe it's mentioned somewhere in
4 my deposition.**

5 **Q.** That that was the basis for going to
6 24?

7 **A. I don't know if it's in that context,
8 but I believe somewhere I did mention it.**

9 **Q.** That's my question. When I said to you
10 there is absolutely no basis in the record, you
11 didn't say, "Oh, yes there is. Mr. Sapp said 20."

12 **A. I did not, no; and I don't know why.**

13 **Q.** All right. Now, let's go back. We're
14 back at Exhibit 1067. And now I would like you to
15 look at the first full paragraph. It says, "It
16 appears the county's stance regarding fire, water,
17 et cetera, is going to be weighted heavily by what
18 the emergency management person's opinion is."

19 Do you see that?

20 **A. Yes, I do.**

21 **Q.** And this is December 31st, 2007;
22 correct?

23 **A. Yes.**

24 **Q.** So as of December 31st, 2007, was the
25 commission already deciding to weigh the emergency

1 services person's opinion heavily with respect to
2 fire and water, et cetera?

3 **A. I don't know.**

4 **Q.** Now, the emergency management person
5 that's being referenced here is Mr. Ravenscroft;
6 correct?

7 **A. Yes, it was.**

8 **Q.** Okay. So let me ask you this: As of
9 December 31st, 2007, was the commission weighing
10 Mr. Ravenscroft's opinions about the fire plan
11 more heavily than Wilderness Ranch Fire District?

12 **A. I don't know that we were at that time.**

13 **Q.** And we'll not --

14 **A. I don't know.**

15 **Q.** -- we'll never know that -- we'll never
16 know that, will we, because you were in executive
17 session when you were having these discussions?
18 Correct?

19 **A. I don't think everything we discussed
20 was always in executive.**

21 **Q.** Okay.

22 **A. I don't think -- until after the
23 hearing, we had a lot of discussions.**

24 **Q.** Okay. But -- but if there is something
25 about the balancing between Mr. Ravenscroft's

1 views and Wilderness Ranch Fire District's fire
2 plan, which was proposed shortly before this
3 December 31st date, if that was considered a
4 public record, we should be able to put our hands
5 on it; correct?

6 **A. We should.**

7 **Q.** Does it surprise you that there is
8 nothing in the record in that regard?

9 **A. It does.**

10 **Q.** All right. Now, isn't it true that
11 ultimately the commissioners did override the
12 Wilderness Ranch Fire District's fire plan, based
13 on what Gordon Ravenscroft said?

14 MR. BRASSEY: I'm going to object to the
15 form.

16 THE COURT: How so?

17 MR. BRASSEY: Well, the form as to the whole
18 fire plan.

19 MR. BANDUCCI: I'll rephrase.

20 THE COURT: All right.

21 BY MR. BANDUCCI:

22 **Q.** Isn't it true that the county overrode
23 the road, the access road plan proposed by
24 Wilderness Ranch Fire District based on
25 Mr. Ravenscroft's comments?

1 **A. I believe we weighed Mr. Ravenscroft's
2 comments into it, yes.**

3 **Q.** You were here when Mr. Day said that he
4 rejected Wilderness Ranch Fire District's road
5 plan because he thought it was inadequate; right?

6 **A. Yes.**

7 **Q.** And what did you put in, in place?

8 **A. We wanted an ingress/egress roads. We
9 wanted a way in, a way out.**

10 **Q.** And who was the county person that was
11 consulted on that issue?

12 **A. Gordon Ravenscroft.**

13 **Q.** Okay. So in January -- excuse
14 me -- December 31st, 2007, Patti Burke is
15 predicting what you all did in March; is that
16 right?

17 **A. That looks as though that's what it is,
18 but I never saw it until after all this.**

19 **Q.** Let's go to Exhibit 1088. And one of
20 the conditions that was imposed --

21 MR. BANDUCCI: Kathy, let's go to page 20 of
22 30, and go down to condition 10.

23 BY MR. BANDUCCI:

24 **Q.** Now, one of the conditions imposed that
25 was not a part of the Wilderness Ranch Fire

1 District is this language in 10, which says that,
2 "The access road and driveway onto the property
3 shall be improved to PCU collector road, as
4 defined in Boise County Road Ordinance 25-04."

5 And you've heard both Mr. Day and Mr.
6 Lawson testify that that was a mistake; correct?

7 **A. I did.**

8 **Q.** Do you agree?

9 **A. I do.**

10 **Q.** Now, if this isn't a mistake, then it
11 requires the paving of the access roads on the
12 property; right?

13 **A. According to -- to --**

14 **Q.** This language.

15 **A. Yes.**

16 **Q.** Yes? Now let's --

17 **A. But it's not what we understood, but**
18 **yes.**

19 **Q.** It's not what you understood.

20 **A. No.**

21 **Q.** Okay.

22 MR. BANDUCCI: Now, let's go to page -- page
23 26. Let's blow up 10. No, you're going the wrong
24 way. Page 26. Back one more. There we go, at
25 the bottom. No, no. No. 10, Kathy.

1 Sorry.

2 BY MR. BANDUCCI:

3 **Q.** Now, this is a red-line version --

4 BY MR. BANDUCCI: I need page 26. Sorry
5 about that.

6 All right. Let's blow up No. 10.

7 BY MR. BANDUCCI:

8 **Q.** Now, this is a red-line version, and
9 this is a part of your same decision. This is a
10 part of 1088.

11 **A. Yes.**

12 **Q.** And this is showing the changes to the
13 conditions. Do you see that?

14 **A. Yes.**

15 **Q.** Now, 10 shows that "PCU local road,"
16 "local" is crossed out; right?

17 **A. It is.**

18 **Q.** "Local" would be the gravel road;
19 right?

20 **A. Correct.**

21 **Q.** And "collector" is added, and
22 "collector" is the asphalt, paved road; right?

23 **A. Yes.**

24 **Q.** Are you still saying that this was a
25 mistake?

1 **A. I don't -- I believed it was a gravel**
2 **road that we were asking. That's what --**

3 **Q.** Well, my question to you is:

4 **A. I think it's a mistake.**

5 **Q.** You think -- so they mistakenly crossed
6 out "local" and mistakenly added "collector."

7 **A. I do.**

8 **Q.** Is that what you're saying?

9 **A. Yes.**

10 MR. BANDUCCI: Let's go to Exhibit 1092.

11 It's not been in evidence yet, Your Honor.

12 BY MR. BANDUCCI:

13 **Q.** Now, what is before you, Ms. Zimmer, is
14 a document entitled "Regulatory Takings Analysis."

15 MR. BANDUCCI: Kathy, you can go to the last
16 page of that.

17 BY MR. BANDUCCI:

18 **Q.** And you signed this document; correct?

19 **A. Yes.**

20 **Q.** It's part of the record regarding the
21 Alamar application; correct?

22 **A. Yes.**

23 MR. BANDUCCI: We would offer it,
24 Your Honor.

25 THE COURT: Any objection?

1 THE WITNESS: I believe so.

2 THE COURT: I'm sorry?

3 MR. BRASSEY: I'm sorry, Your Honor. No
4 objection.

5 THE COURT: All right. The exhibit will be
6 admitted and published to the jury.

7 (Plaintiffs' Exhibit 1092 admitted.)

8 MR. BANDUCCI: All right. Let's go back to
9 the first page of 1092.

10 BY MR. BANDUCCI:

11 **Q.** Now, after the decision of the board,
12 Alamar requests something called a "takings
13 analysis." Do you know that?

14 Do you remember that?

15 **A. I don't remember that. But --**

16 **Q.** Do you understand what a takings
17 analysis is?

18 **A. No, not exactly.**

19 **Q.** Do you understand that when a
20 government takes the property of a citizen, such
21 that it's rendered valueless, that there are some
22 constitutional provisions that come into play?

23 MR. BRASSEY: Your Honor, I object to the
24 form, characterization.

25 THE COURT: Well, I don't know how else to

1 get to the problem. The witness says she is not
 2 familiar with the takings analysis.
 3 Finish your characterization, and if
 4 Mr. Brassey has an objection, I'll --
 5 MR. BANDUCCI: I'm done. That's as far as I
 6 can take the takings question at this point.
 7 THE COURT: Go ahead.
 8 MR. BANDUCCI: I think the question is
 9 pending, Your Honor.
 10 THE WITNESS: And would you repeat the
 11 question?
 12 MR. BANDUCCI: Sure.
 13 THE COURT: Okay.
 14 BY MR. BANDUCCI:
 15 **Q.** Are you aware that sometimes when a
 16 government, like a county government, takes
 17 property from a citizen so he can't use it
 18 anymore, that there are certain constitutional
 19 protections that come into play?
 20 MR. BRASSEY: And, Your Honor, my objection
 21 is to the form, as to the characterization of
 22 what -- well, the characterizations being made in
 23 the form of that question.
 24 THE COURT: Overruled.
 25 THE WITNESS: I don't clearly understand

1 **I believe.**
 2 **Q.** No. This is not in the court. This --
 3 **A.** To us.
 4 **Q.** -- is before you.
 5 **A.** Right.
 6 **Q.** This is before the Board of County
 7 Commissioners.
 8 **A.** Okay.
 9 **Q.** Do you see that?
 10 **A.** Yes, I do see that.
 11 **Q.** Okay.
 12 MR. BANDUCCI: Let's go to the last page,
 13 Kathy, and let's show signatures.
 14 BY MR. BANDUCCI:
 15 **Q.** This is a decision that was entered
 16 by --
 17 **A.** Okay.
 18 MR. BANDUCCI: Blow that up, Kathy.
 19 BY MR. BANDUCCI:
 20 **Q.** -- by the county commissioners. And
 21 that's your signature in the middle there, right?
 22 **A.** It is.
 23 **Q.** Okay.
 24 MR. BANDUCCI: Now, if we can go to page 3.
 25 Well, actually, before we go to page 3, let's go

1 that, no.
 2 BY MR. BANDUCCI:
 3 **Q.** Okay. Well, you -- this document says
 4 it's before the Boise County Board of
 5 Commissioners. Do you see that?
 6 And it's, "In the matter of the
 7 conditional use permit of Alamar Ranch."
 8 MR. BANDUCCI: Blow that up, Kathy, that top
 9 half.
 10 THE WITNESS: Yes.
 11 BY MR. BANDUCCI:
 12 **Q.** Okay. And this was done in June of
 13 2008, not long after you issued your decision on
 14 Alamar Ranch; correct?
 15 **A.** Correct.
 16 **Q.** Do you remember that Alamar said,
 17 "Well, now you've deprived us of our use of our
 18 property, and we want you to analyze whether or
 19 not certain constitutional provisions come into
 20 play"?
 21 Do you remember anything like that?
 22 **A.** Similar, yes.
 23 **Q.** Okay.
 24 **A.** I -- I think there was something, but
 25 I'm not -- it went to court. It was in the court,

1 to page 2 just for a second.
 2 BY MR. BANDUCCI:
 3 **Q.** In the middle of page 2 there is a
 4 question. These are a series of questions that
 5 the commission has to answer.
 6 Do you remember answering questions
 7 relative to what the economic impact of the
 8 decision was on Alamar Ranch's business?
 9 Remember that?
 10 **A.** Yes.
 11 **Q.** Okay. And No. 4 of the questions that
 12 the commission had to answer was: "Does the
 13 regulation have a significant impact on the
 14 landowner's economic interests?"
 15 Do you see that?
 16 **A.** Yes.
 17 **Q.** And the answer was, "No. The CUP
 18 conditions do not appear to have a significant
 19 negative impact on the landowner's economic
 20 interests."
 21 Do you see that?
 22 **A.** I do.
 23 **Q.** And then at the very bottom, the
 24 commission starts to go into an analysis of the
 25 various conditions. Do you see that?

1 For example, at the very bottom it
 2 says, "There were no changes to conditions 1, 4,
 3 12, 13, 16 and 18 proposed by the applicant."
 4 Right?
 5 **A. Yes.**
 6 **Q. Okay.**
 7 MR. BANDUCCI: Let's go to the next page.
 8 BY MR. BANDUCCI:
 9 **Q. And then up at the top it talks about**
 10 **some more conditions, and it says that those**
 11 **conditions don't have a significant impact of**
 12 **additional costs on the project.**
 13 MR. BANDUCCI: Then let's back away from
 14 that, Kathy.
 15 THE WITNESS: Okay.
 16 BY MR. BANDUCCI:
 17 **Q. And down at No. 2 --**
 18 MR. BANDUCCI: Let's go to the next
 19 paragraph.
 20 BY MR. BANDUCCI:
 21 **Q. -- it says, "The following conditions**
 22 **will have associated costs." Do you see that?**
 23 **A. I do.**
 24 MR. BANDUCCI: And back away from that,
 25 Kathy.

1 BY MR. BANDUCCI:
 2 **Q. And there is a discussion in "A" of**
 3 **condition 5; right?**
 4 MR. BANDUCCI: Back away from that.
 5 BY MR. BANDUCCI:
 6 **Q. And in B there is a discussion of**
 7 **condition --**
 8 MR. BANDUCCI: That's A still.
 9 BY MR. BANDUCCI:
 10 **Q. -- B is condition 9.**
 11 Now, condition 9 says, "The changes to
 12 condition 9 require the applicant to widen the
 13 existing bridge to a width larger than it had
 14 proposed in order to accommodate a collector road
 15 rather than a local road, and to comply with
 16 International Fire Codes.
 17 "Condition 10 requires the road onto
 18 the property to be built as a collector road
 19 rather than a local road. This requires widening
 20 and paving, and will require dust abatement
 21 procedures."
 22 It was no mistake, was it?
 23 **A. There is no dust abatement on a paved**
 24 **road, ever.**
 25 **Q. Ma'am, doesn't this say specifically**

1 that condition 10 required paving?
 2 **A. It does, yes.**
 3 **Q. And you signed it?**
 4 **A. Yes.**
 5 **Q. Are you saying that this is a mistake,**
 6 **that comes out specifically after the red-line,**
 7 **after the imposition of these conditions, and says**
 8 **it's paving? Are you saying this is a mistake,**
 9 **too?**
 10 **A. It very well could have been. Because**
 11 **why would abatement procedures --**
 12 **Q. Is there --**
 13 (Simultaneous discussion.)
 14 **A. -- be on there as --**
 15 **Q. -- dust anywhere in Boise County other**
 16 **than just roadways?**
 17 **A. Is there what?**
 18 **Q. Dust.**
 19 **A. Not that you would put abatement on, I**
 20 **don't believe.**
 21 **Q. That says "paving," doesn't it?**
 22 **A. It does.**
 23 **Q. Thank you.**
 24 MR. BANDUCCI: Now, can Exhibit 1048 be put
 25 up, please?

1 BY MR. BANDUCCI:
 2 **Q. This is the opinion of the Planning and**
 3 **Zoning Commission. And I don't want to spend a**
 4 **whole heck of a lot of time on this, ma'am.**
 5 **A. Yes.**
 6 MR. BANDUCCI: Let's go to page 12 --
 7 actually, page 10, first.
 8 BY MR. BANDUCCI:
 9 **Q. I'm going to direct your attention to**
 10 **the separate statement of the commissioners that**
 11 **voted in favor of Alamar at the Planning and**
 12 **Zoning level --**
 13 THE COURT: Mr. Banducci, I just noticed.
 14 We're going to take a little bit earlier break
 15 because we're going to break at noon. We'll
 16 probably break in the next three to five minutes.
 17 So do you want to take the break now?
 18 MR. BANDUCCI: That's fine.
 19 THE COURT: All right. Why don't we go
 20 ahead and take the first break of the day.
 21 I'll again admonish the jury not to
 22 discuss the case among yourselves or with anyone
 23 else, nor should you form or express any opinions
 24 about the case until it is submitted to you.
 25 We'll be in recess for 15 minutes.

1 (Recess.)
 2 (Jury present.)
 3 THE COURT: I'll note that the jurors are
 4 present.
 5 I'll remind, Ms. Zimmer, you are still
 6 under oath.
 7 Mr. Banducci?
 8 MR. HOWELL: He went to the restroom.
 9 THE COURT: Mr. Brassey, we looked and saw
 10 somebody there at counsel table, but didn't notice
 11 your absence. My apologies.
 12 MR. BRASSEY: That's okay.
 13 THE COURT: Mr. Banducci?
 14 MR. BANDUCCI: Thank you.
 15 MR. BRASSEY: Thanks a lot.
 16 MR. BANDUCCI: I had no idea. I was a deer
 17 in the headlights.
 18 Can the witness be shown Exhibit 1048,
 19 please.
 20 BY MR. BANDUCCI:
 21 **Q.** Very quickly we're going to go through
 22 this as quickly as I think we can, Ms. Zimmer.
 23 You recall there was a Planning and Zoning
 24 decision entered, and part of that decision or
 25 attached to that decision is this statement of the

1 concerns and argue that, like the ones above, are
 2 not legitimate concerns and, therefore, cannot be
 3 used as the basis for denying the Alamar
 4 application."
 5 Okay. Let's go to the next paragraph,
 6 then. That first one is that, "Children will run
 7 away from Alamar and commit crimes in Boise
 8 County. Although many people have expressed fears
 9 that children would run away from Alamar and
 10 commit crimes in the local neighborhood, we have
 11 seen no evidence that this actually happens in the
 12 high-end residential treatment centers like
 13 Alamar. Given all of the effort expended by
 14 opponents of Alamar and the lack of any
 15 well-documented evidence that such crimes are a
 16 frequent problem, we do not think this argument
 17 can be used to deny the application."
 18 You agree with that statement, don't
 19 you?
 20 **A.** I do.
 21 **Q.** Okay. And, in fact, you've had
 22 experience with Project PATCH, haven't you?
 23 **A.** Yes, I have.
 24 **Q.** Okay. And your experience with Project
 25 PATCH came about as a result of your service to

1 commissioners, Kane, Bart, and Evans, relative to
 2 their views regarding the P & Z decision; correct?
 3 **A.** Yes.
 4 **Q.** Okay. Now, let's go to page 14. I'm
 5 going to skip a lot of this because we've covered
 6 it with Mr. Day.
 7 Now, in this part --
 8 MR. BANDUCCI: Kathy, if you could
 9 identify -- or just blow up the paragraph under
 10 "Other possible concerns."
 11 BY MR. BANDUCCI:
 12 **Q.** In this section of the statement by
 13 Bart, Kane, and Evans, they're talking about
 14 concerns raised during the Planning and Zoning
 15 hearings. And this first paragraph says, "We
 16 believe we have shown above that the reasons given
 17 by our colleagues for rejecting Alamar application
 18 are not consistent with our responsibilities under
 19 the law and, therefore, must be rejected. But
 20 even though our recommendations must be based on
 21 the public record presented to us, the county
 22 commissioners, assuming they review the Alamar
 23 application, will, presumably, be compiling a new
 24 record and may be concerned about other impacts of
 25 Alamar. We now discuss three of these potential

1 the community as a juvenile probation officer?
 2 **A.** Yes, it was.
 3 **Q.** Okay. And why don't you tell the jury
 4 how you encountered Project PATCH as a result of
 5 your work as a juvenile probation officer.
 6 **A.** Well, we had three juveniles that run
 7 away from Project PATCH. They stole a van and
 8 took off. And Project PATCH immediately contacted
 9 the Sheriff's Department, and they were picked up
 10 down the road less than five miles. They,
 11 actually, ran into another van by -- that was
 12 Project PATCH, and these juveniles were then in
 13 court, and they were under my probation, and I
 14 went to Project PATCH to visit with them and to
 15 see that they were getting all the skills that
 16 they said they were and everything was going
 17 accordingly. And it was.
 18 The youth then later returned back to
 19 their homes. But it was a very interesting group
 20 of three young men, and they were all from
 21 different states.
 22 **Q.** You liked them?
 23 **A.** I liked them. Yes, they were very nice
 24 young men. I got to know their parents because of
 25 the fact that they were on probation with me.

1 **Q.** Did it strike you that the parents were
2 sending these kids to Project PATCH to get them as
3 far away from the parents as possible?

4 **A.** No.

5 **Q.** These parents loved these kids?

6 **A.** Yes.

7 **Q.** And were deeply concerned about them;
8 that's why they were doing this?

9 **A.** Yes. They weren't -- well, one of them
10 was in trouble with the law. There was one that
11 the family had disabilities. The parents had
12 disabilities, and they just felt this would be
13 good for him to be out with a different group, and
14 they had sent him there. He was from California,
15 I believe. But -- and I think he learned a lot
16 from Project PATCH.

17 **Q.** So your experience with Project PATCH
18 was that it was really a pretty great community
19 asset?

20 **A.** Yes.

21 **Q.** And you talk about these three kids.
22 How many incidents involving -- you were a
23 juvenile probation officer for like ten years?

24 **A.** No. I was -- I worked in the community
25 justice department. I started the community

1 service program, and then I spent some time as a
2 juvenile probation officer, as well as the
3 director of community justice.

4 **Q.** So was that the ten-year period?

5 **A.** It was in that ten-year period, yeah.

6 **Q.** In that ten-year period, then, you
7 would have been familiar with how many incidents
8 involving Project PATCH kids had occurred?

9 **A.** Yes.

10 **Q.** Tell the jury over that ten-year period
11 how many times Project PATCH kids got in trouble?

12 **A.** I think that was the main one. We had
13 one kid -- he went across the river and broke into
14 a guy's house, and the gentleman wanted to handle
15 it on his own, didn't want the kid to go through
16 court. He preferred to deal with it himself. He
17 had the youth come over and do work for him.

18 **And there was, prior to me being that,**
19 **there was a couple that the other juvenile**
20 **probation officer had had that I don't know what**
21 **the incidents were. But we had very little.**

22 **Q.** So you had, over that ten-year period,
23 dozens of incidents with kids out of Boise County?

24 **A.** Yes. Most of our kids come out of Ada
25 and Canyon County, sorry to say, but, yes, we have

1 some in Boise County, too.

2 **Q.** Well, you had at least 40 kids that you
3 were involved with over that course of time, and
4 that was relative to theft and alcohol, drug
5 abuse, and sexual issues; correct?

6 **A.** Yes. Yes.

7 **Q.** And other than what you just talked
8 about, the van incident and the kid swimming
9 across the river, those were all kids that weren't
10 in residential treatment centers; right?

11 **A.** Yes.

12 **Q.** Okay. And you thought that Project
13 PATCH did a really good job of controlling the
14 kids; right?

15 **A.** I did.

16 **Q.** And the community looked upon them, the
17 Garden Valley community looked upon them as though
18 they were okay?

19 **A.** Yes. They're on the outskirts of
20 Garden Valley, so they have community service
21 projects in Garden Valley. As you go to Garden
22 Valley, if you look off to the right, you can
23 actually see -- there's a big meadow on the other
24 side there, is where the camp is.

25 **Q.** So they were a community asset in the

1 fact that they did out -- they actually did
2 service?

3 **A.** They still do, yes.

4 **Q.** And that was part of what Alamar
5 proposed that it would do with its kids, too;
6 correct?

7 **A.** Yes.

8 **Q.** And as best you can tell, the kind of
9 kid that was at Project PATCH is the same kind of
10 kid that was going to go to Alamar; correct?

11 **A.** Yes.

12 **Q.** So did you ever tell the people who
13 were really upset about Alamar, "Hey, wait a
14 minute, you know, look at Project PATCH. Project
15 PATCH is a community asset, and it's a good thing
16 for the kids, and it's a good thing for the
17 community." Did you ever say that to the
18 opponents of Alamar?

19 **A.** In a public meeting probably not. If
20 somebody had come up and asked me on the street, I
21 would have told them that.

22 **Q.** But you didn't -- you didn't say what
23 you thought?

24 **A.** I don't think in a public hearing, I
25 did.

1 **Q.** And that's because this was a pretty
2 intimidating crowd?

3 **A.** Well --

4 **Q.** It was, wasn't it?

5 **A.** A hearing, in my eyes, is that we're
6 taking evidence and listening, and so that's the
7 way I felt about it.

8 **Q.** But you could have asked questions in
9 that hearing?

10 **A.** Yes, you can, yes. And I did.

11 **Q.** All right. But not in that direction,
12 right?

13 **A.** No, I didn't.

14 **Q.** You considered the folks, the
15 opposition to Alamar, to be NIMBY, didn't you;
16 that they were -- they espoused the view of not in
17 my backyard?

18 **A.** Some of the opponents, yes.

19 **Q.** Well, you would -- let's take a look at
20 your deposition. And I think it's Volume I, and I
21 think it's page 68. At line 6 -- are you there?

22 **A.** No, I'm not.

23 **Q.** No hurry. You with me?

24 **A.** Yes, I am.

25 **Q.** Okay. At page 40 -- excuse me, 68,

1 line 6, I say, "Okay. How would you characterize
2 it?"

3 And you were saying, "I would -- I
4 think their opposition wasn't anger. I think it
5 was more it's 'not in my neighborhood' thing.

6 "Question: Not in my backyard?"

7 "Yeah, not in my backyard."

8 So as an overall general position, the
9 opposition was motivated by fear that the kids
10 would run away and commit crimes; right?

11 **A.** The -- some of the opponents felt that
12 way, yes.

13 **Q.** And that was a view that was held by
14 many of the opponents; yes?

15 **A.** The Alamar opponents that was speaking
16 out legally, yes.

17 **Q.** And that's -- I mean, this isn't just
18 about running away and committing crimes; it's
19 being fire-starters. You had no experience at all
20 with Project PATCH being fire-starters; right?

21 **A.** No.

22 **Q.** Or somehow they would reduce the value
23 of property. You never had anybody complain about
24 Project PATCH reducing the value of property, did
25 you?

1 **A.** No.

2 **Q.** Did you ever say anything, in a public
3 context, and stand up for what you thought on that
4 issue?

5 **A.** I didn't just stand up and verbally
6 yell, "This is what I think."

7 **Q.** Well, I didn't ask you if you yelled
8 it, ma'am. I wouldn't expect you to yell it. I'm
9 just saying, you know it's your job to keep these
10 sort of NIMBY attitudes out of the decision-making
11 process; right?

12 **A.** They have a voice also.

13 **Q.** They have a voice, but you have a
14 responsibility to keep this NIMBY attitude from
15 impacting the decision-making process; correct?

16 **A.** To persuade us one way or the other?

17 **Q.** From affecting the decision-making
18 process; correct?

19 **A.** We have to take in their thoughts, too.
20 We have to take in everybody's, but, yes.

21 **Q.** Okay. And you never stood up and said
22 what you thought about the quality of the kids
23 going to Alamar and the unlikelihood of any impact
24 on sheriff, fire, whatever; right?

25 **A.** I probably did not.

1 **Q.** And that's because this was an
2 intimidating crowd, and you had Terry Day who
3 opposed it, too; correct?

4 MR. BRASSEY: Your Honor, I object. It's
5 been asked and answered.

6 THE WITNESS: I don't think it's because --

7 THE COURT: Just a moment. Overruled.

8 You may answer.

9 THE WITNESS: I'm sorry.

10 THE COURT: Go ahead.

11 THE WITNESS: I don't think it was just
12 because it was an intimidating crowd. I think I'm
13 one of those people that read information and keep
14 it quiet, and if somebody asks me, I tell them my
15 opinion, but I don't voice it as much as I
16 probably should.

17 BY MR. BANDUCCI:

18 **Q.** Now, let's talk just very briefly now
19 about January 28th hearing. Okay? Now, when you
20 went into the January 28th hearing, you had no
21 information about the Fair Housing Act's
22 applicability to Alamar; correct?

23 **A.** That's correct.

24 **Q.** And you hadn't read the portion of
25 Alamar's brief that related to the Fair Housing

1 Act; correct?

2 **A. I don't believe I had.**

3 **Q.** And so you didn't have any information
4 to evaluate Mr. McDonald's presentation; correct?

5 **A. Yes.**

6 **Q.** Let's take a look at your notes --

7 **A. Okay.**

8 **Q.** -- from the January 28th hearing.

9 MR. BANDUCCI: Kathy, that's Exhibit 1082.

10 And we'll lay foundation for that. It
11 has not been admitted, Your Honor.

12 And I'm -- maybe want to do the
13 first -- can we provide her with a handwritten
14 version? Maybe it's a little better. Let's do
15 this on the ELMO.

16 Your Honor, I'm going to put this on
17 the ELMO, but it still has not been admitted.

18 THE COURT: I've turned off the jury
19 projector so you can. Go ahead.

20 Would you turn on, Ms. Gearhart --

21 MR. BRASSEY: You want to offer it?

22 MR. BANDUCCI: Yes.

23 MR. BRASSEY: I have no objection.

24 THE COURT: All right. Exhibit 1082 will be
25 admitted.

1 (Plaintiffs' Exhibit No. 1082
2 admitted.)

3 THE COURT: Do you still wish to use the
4 document camera?

5 MR. BANDUCCI: Yes, Your Honor. And this
6 shows the deposition number, which is Exhibit 65,
7 so we're going to have to put a new exhibit number
8 on it since this is -- we had only marked the
9 virtual copy.

10 THE COURT: All right.

11 MR. BANDUCCI: So when we --

12 THE COURT: We can do that on a break.

13 MR. BANDUCCI: Yes, okay.

14 BY MR. BANDUCCI:

15 **Q.** Let me just show the top page of this
16 so far. Wait a minute here. Okay.

17 Do you recognize -- do you recognize
18 this document?

19 **A. Yes, I do.**

20 **Q.** And is that your document?

21 **A. It is.**

22 **Q.** Your handwriting?

23 **A. It is.**

24 **Q.** Okay. And these are notes that were
25 taken during the January 28th hearing; correct?

1 **A. They are.**

2 **Q.** Okay. And, in fact, this shows, you
3 know, who you listened to that day. For example,
4 JoAnn Butler is at the top here; correct?

5 **A. Yes.**

6 **Q.** And then Amy Jeppesen?

7 **A. Yes.**

8 **Q.** And then JoAnn Butler again, and then
9 Dan McDonald; correct?

10 **A. Yes.**

11 **Q.** And then a little later on, on page 3,
12 Dennis Charney starts to talk; correct? Right
13 there, do you see that?

14 **A. Yes.**

15 **Q.** Okay. And Mr. Charney is talking, and
16 these are your notes, and you say, it says here,
17 "Reject FHA. Agreed." What did you mean by that?

18 **A. I really don't know. I wouldn't say
19 that I agreed. He agreed.**

20 **Q.** Okay. Let me ask this question: When
21 you were listening to Mr. McDonald, you made this
22 note. It says, "Look up FHA." Do you see that?

23 **A. Yes, I do.**

24 **Q.** Did you ever look up the FHA?

25 **A. I believe I read some on it, yes.**

1 **Q.** Oh, you did?

2 **A. But I -- it's just a general -- if it
3 was in our documentation, I read it.**

4 **Q.** All right. You never -- well, let's go
5 to your deposition, your second volume of your
6 deposition, ma'am. And I'm going to direct you
7 to -- I'm going to direct you to page 159 of your
8 deposition.

9 **A. Okay.**

10 THE COURT: Ms. Gearhart, will you change
11 the input source back to the computer?

12 MR. BANDUCCI: The page number is 159.

13 BY MR. BANDUCCI:

14 **Q.** Have you found that, Ms. Zimmer?

15 **A. Yes.**

16 **Q.** Okay. Now, at line 22, we're looking
17 at your notes at the time of your deposition.

18 **A. Yes.**

19 **Q.** And I asked you -- I say, "The next
20 line says, 'Look up FHA.' Do you see that?"

21 And you say, "Mm-hmm."

22 And I say, "You have to answer audibly
23 for her."

24 And you say, "Oh, yes."

25 "Question: Was this a note to

1 yourself?

2 "Yes.

3 "Question: At the time of the
4 January 28th hearing, did you feel like you needed
5 to look up the Fair Housing Act to see what it
6 required of the commission in connection with the
7 Alamar application?

8 "Let me ask the question differently.
9 Why would you say to yourself, 'Look up FHA' in
10 your notes at the January 28th hearing?

11 "Answer: Well, just for my
12 satisfaction of what he was saying to see if
13 that's what was correct.

14 "Question: Okay. So you didn't have
15 information at hand at that point to know
16 whether -- what he was saying was; correct?

17 "Answer: Right.

18 "So did you look up the FHA after the
19 January 28th hearing?

20 "Answer: I don't know.

21 "Do you remember?

22 "I don't."

23 That was your testimony then; correct?

24 **A. Yes.**

25 **Q. Okay. Now, let's go back to**

1 Exhibit 1076 and to page 2688. Now, this is the
2 January 28th hearing. And I want to direct your
3 attention to -- it would be page 26 to the C.W.

4 This is the statement of one of the people
5 attending the hearing on January 28th.

6 She says, "Hi. My name is Cathy Wise,
7 and I live at 4303 Kingswood Drive. I've owned
8 property in Boise County for 17 years. I have a
9 definite invested interest in what happens in
10 Boise County, but I want to make a comment here
11 that I hope has some bearing on what's happening
12 today. Youth are our legacy. And I believe this
13 and have supported this belief by opening my home
14 to foreign exchange students and foster care.
15 Regardless of where these children's parents live,
16 I open my home. I believe that Boise County will
17 have missed an opportunity to substantially
18 contribute to the community and beyond if they
19 don't take advantage of this opportunity.

20 "How can we close our doors to children
21 in need? When my teenage daughter was here at the
22 last meeting she said to me, 'They are
23 discriminating against teenagers.' And I,
24 honestly, have to question if that is not the
25 case. Would this same opposition be prevalent if

1 it was a retirement home? Would these same
2 conversations be taking place? I don't think so.

3 "That being said, we cannot
4 discriminate against our youth, our legacy. I
5 implore you to reconsider and grant this
6 conditional use permit and lead Boise County with
7 a positive legacy, one that we can all be proud
8 of."

9 Let me ask you, ma'am: First, do you
10 remember that testimony?

11 **A. I do.**

12 **Q. When Ms. Wise asked you, "Would this
13 same opposition be prevalent if it was a
14 retirement home," did you, in your head, answer
15 that question?**

16 **A. I -- I don't know at that time if I
17 did.**

18 **Q. Well, let me ask you now: Would we be
19 here, seeing all of this, all of this rancor, all
20 this anger if Alamar had been a retirement home?**

21 **A. Possibly, we would be.**

22 MR. BANDUCCI: That's all I have.

23 THE COURT: Mr. Brassey.

24 CROSS-EXAMINATION

25 BY MR. BRASSEY:

1 **Q. Ms. Zimmer, can we -- I want to go back
2 to something we talked about last -- it seems like
3 a long time ago now -- but last Friday afternoon
4 when you were on the witness stand. Can we show
5 Plaintiffs' Exhibit 1076, which I believe is the
6 transcript. And I want to look at page 16.**

7 And I want to ask you a question,
8 Ms. Zimmer, first. Do you remember Mr. Banducci's
9 questions of you last week with regard to the
10 report that Sheriff Roeber generated in this case
11 and the document he mentioned that was a letter in
12 response from Amy Jeppesen? Do you have -- do you
13 remember that?

14 **A. Vaguely.**

15 MR. BRASSEY: Okay. Let's -- Pat, if we
16 can, I want to blow up about -- about two thirds
17 of the way down, where it says, "We appreciate."
18 Can you blow that part up? And go up just --
19 you've got it, okay.

20 BY MR. BRASSEY:

21 **Q. Ms. Zimmer, I'll represent to you that
22 this is a statement made by JoAnn Butler. Do you
23 remember Ms. Butler, one of the lawyers for Alamar
24 Ranch?**

25 **A. Yes, I do.**

1 **Q.** I'm going to read you something, and
2 then I'm going to ask you a question. Ms. Butler
3 says to you at the January 28th, 2008, hearing:
4 "And we appreciate your request to the sheriff to
5 get beyond what you're hearing and get the
6 information for yourself."

7 Do you remember her -- do you recall
8 this at all, Ms. Zimmer, this discussion about
9 that JoAnn Butler is talking about here, about you
10 asking the sheriff for information?

11 **A.** Vaguely, yes, I do.

12 **Q.** Okay. She goes on to say: "Sheriff
13 Roeber's indicated a possibility of approximately
14 36 calls per year. But we do need to point out
15 that the list of RTCs that were analyzed and the
16 information obtained from the list includes mostly
17 RTCs that don't resemble Alamar Ranch, and the
18 list does not include Project PATCH, which you
19 know that you have the most experience with. The
20 one RTC that is most familiar or is most closely
21 resembling Alamar Ranch had a call rate of .04
22 calls per year, which translates to less than
23 three calls a year for Alamar Ranch."

24 Here's my question: Do you remember
25 her presenting to you a rebuttal of sorts to

1 Sheriff Roeber's report?

2 **A.** I don't.

3 **Q.** Okay. And if at the time -- you were
4 at this hearing, weren't you?

5 **A.** Yes, I was.

6 **Q.** Do you believe you would have heard
7 this testimony or -- it's not sworn testimony, but
8 this statement from Alamar's lawyer presenting
9 what they thought the calls might be with regard
10 to the sheriff's office?

11 **A.** Yes.

12 **Q.** Okay.

13 MR. BRASSEY: Thank you, Pat. I'm sorry.
14 While we've got 1076, I want to go to page 28.

15 A little bit ago -- Pat, I apologize,
16 but let's go back to the list of people and find
17 on that list "A.S." I think it's --

18 BY MR. BRASSEY:

19 **Q.** Ms. Zimmer, you mentioned an
20 individual, and "A.S.," at least in this
21 transcript, refers to a gentleman by the name of
22 Andy Seth. Does that name sound familiar?

23 **A.** Yes.

24 MR. BRASSEY: Okay. Pat, let's go back to
25 page 28. And if we can, I want to blow up the

1 part with Mr. Seth.

2 BY MR. BRASSEY:

3 **Q.** And is this the same individual,
4 Ms. Zimmer, that you referred to who had an RTC in
5 Gem County over by Emmett?

6 **A.** Yes.

7 **Q.** Okay. And you remember him speaking?

8 **A.** I do.

9 MR. BRASSEY: I want to go to the next --
10 I'm sorry, Pat -- to the next page, page 29,
11 starting three lines down, and highlight, oh, not
12 just the -- yeah, go up just one to where it --
13 where it says "so" on the right-hand side. Pat,
14 if you can just -- take it from the top. There
15 you go. Thank you.

16 BY MR. BRASSEY:

17 **Q.** And so this is Mr. Seth who has
18 indicated to you on the previous page that he's a
19 licensed clinical psychologist, the founder, CEO,
20 and majority owner of a ranch-style therapeutic
21 boarding school in Gem County. I'm going to read
22 you something, and then I'm going to ask you a
23 question.

24 "So we've -- we currently have 20
25 students, and we've helped a lot of these kids and

1 families, and they've went home, and they're doing
2 well at home. It's interesting to me about --
3 like the handicaps and things, because like the
4 kids that I work with are similar to these kids,
5 the kids that Alamar is proposing, and these are
6 great kids. I mean, yeah, they do have some
7 learning disabilities and ADHD and anxiety and
8 depression and things, but I wish I would have
9 brought some to show you, because they're very
10 nice, well-behaved, polite kids."

11 Do you remember him talking to you
12 about that?

13 **A.** Yes.

14 MR. BRASSEY: Now, I want to go down, Pat,
15 about just over halfway down where it says, "We
16 have several doctors."

17 BY MR. BRASSEY:

18 **Q.** Do you remember him talking to you
19 about they had doctors, master's level teachers,
20 therapists, those sorts of folks?

21 **A.** Yes.

22 MR. BRASSEY: Now, go down, Pat, where it
23 says, "We've spent 1.5," and then highlight some
24 below that.

25 BY MR. BRASSEY:

1 **Q.** He indicated to you that they'd spent
2 "\$1.5 million in construction. On top of the
3 220-acre ranch that we purchased, there's been
4 another \$3 million in land and buildings purchased
5 in the area for, you know, people working."

6 And he also talked to you about jobs,
7 didn't he?

8 **A. I believe he did.**

9 **Q.** Okay. Now, with regard to your
10 thoughts in this case, did you take into account,
11 at all, what Mr. Seth had to say to you about the
12 size of his program, the 220 acres, and,
13 apparently, how they were doing? Did you take it
14 into account?

15 **A. I did.**

16 MR. BRASSEY: Thank you, Pat.

17 BY MR. BRASSEY:

18 **Q.** I want to go back to page 120 of your
19 deposition, Volume I.

20 You were asked a question, a series of
21 questions, and I believe counsel read you page
22 120, 121, and 122, and part of 123. Do you
23 remember that?

24 **A. Yes.**

25 **Q.** Okay. If you look at page 120, counsel

1 read you about your statement that the number of
2 beds that are appropriate, and you already talked
3 about 36, 35, in that range. Do you see that?

4 **A. Yes.**

5 **Q.** Okay. And then you mention a couple
6 other studies and different numbers. What studies
7 are you referring to, to the jury? What are you
8 talking about? Do you know?

9 **A. I believe there was another one that
10 spoke of a psychiatric study or something that
11 said 20 beds was very good -- or 26 or whatever --
12 a lower number was well. But that's the only one
13 I can say, right off the top of my head, that I
14 can think of.**

15 **Q.** Okay. A little bit ago we entered into
16 evidence what we call the full record of the
17 hearing. I think it's 1172. Do you remember us
18 talking about that?

19 **A. Yes.**

20 **Q.** Okay. And with regard to the documents
21 that you received in this case, were there quite a
22 few exhibits of all kind and character, so to
23 speak, that the commission received and you
24 reviewed?

25 **A. Yes.**

1 **Q.** Okay. Is that part of what you're
2 talking about on this page?

3 **A. I believe so.**

4 MR. BRASSEY: Okay. Thank you, Pat.

5 Would you look at -- I'm sorry, Pat.
6 Let's go back to -- I think 1076 is the January
7 28, 2008, hearing, page 15. And down about the
8 last one third, where it says, "We very much
9 appreciate." And I'm sorry, Pat, if you can hold
10 that, can we go back to the prior page 14 so we
11 know -- I'm sorry. It's the top of the page -- so
12 we can see who's speaking.

13 BY MR. BRASSEY:

14 **Q.** And, Ms. Zimmer, I'll represent to you
15 "J.B." stands for JoAnn Butler.

16 **A. Yes.**

17 **Q.** Now let's go back where we were. And
18 I'm going to read you something, then I'm going to
19 ask you a question.

20 Mr. Butler indicates: "We very much
21 appreciate your emergency manager, Mr. Gordon
22 Ravenscroft's, expertise as that emergency
23 manager. He provided us with detailed comments.
24 He provided those to the county last July, and we
25 had thorough discussions with him at that time.

1 "And those discussions resulted in
2 several different conditions of approval, and
3 those conditions required by your emergency
4 manager state that Alamar will instart" -- excuse
5 me -- "install an emergency generator, a radio
6 communications system, and they will also
7 designate a Life Flight landing area, which at
8 least one letter to the county, from a resident in
9 the area, said this is a much-needed service in
10 that area, and they gave a story about the number
11 of hours it took to get ambulance service for
12 their daughter, and they had some trouble."

13 Now, you know Mr. Ravenscroft?

14 **A. Yes, I do.**

15 **Q.** This hearing was in January 2008. In
16 July of 2007, do you remember who the Planning and
17 Zoning administrator was that took or helped
18 Alamar through the Planning and Zoning process?

19 **A. That was Mr. --**

20 MR. BANDUCCI: Excuse me, Your Honor. This
21 is outside the scope. It has nothing to do with
22 this.

23 MR. BRASSEY: Judge, they brought -- I'm
24 going to get to -- they brought up ingress and
25 egress, and I'm going to get there in a minute.

1 THE COURT: Let's proceed towards, though, a
2 subject matter that was covered on the direct
3 examination.

4 BY MR. BRASSEY:

5 **Q.** Ms. Zimmer, who was the Planning and
6 Zoning administrator back in July of 2007?

7 **A.** I believe it was Craig Wolford.

8 **Q.** And can we -- I want to look at the
9 deliberation transcript, and I believe it's 1084.
10 And I want to look at page 52.

11 And, Ms. Zimmer, I want to direct your
12 attention to the middle of the page. I'm going to
13 read you something and then ask you a question.

14 "And another thing I'm still a little
15 confused about are ingress/egress, our roads, our
16 fire roads and stuff don't -- from Gordon's
17 report, I believe that we were supposed to have
18 two ways in and out."

19 Do you remember saying that?

20 **A.** Yes.

21 **Q.** Now, with regard to the ingress and
22 egress that you talked with counsel about just a
23 little bit ago, was that something -- or do you
24 remember if it was something referred to by
25 Mr. Ravenscroft?

1 **Q.** Ms. Zimmer, with regard to Project
2 PATCH, where is that?

3 **A.** It's located in the Garden Valley area.
4 As you come into town from, say, Horseshoe Bend,
5 you would -- on Highway 17 instead of turning left
6 to go to Crouch, they're past the meadows on the
7 right, and you can see some of the buildings
8 off -- back there kind of in the edge of the
9 trees.

10 **Q.** How far away are they from Garden
11 Valley, itself?

12 **A.** Maybe two or three miles.

13 **Q.** Ms. Zimmer, you were asked about some
14 emails that Ms. Kirkpatrick sent and involving
15 Patti Burke. Do you remember that?

16 **A.** Yes, I do.

17 **Q.** In the December 2007 time frame, what
18 discussions, if any, were you having with Patti
19 Burke about Alamar and conditions?

20 MR. BANDUCCI: Your Honor, if this is going
21 to be conversations between Patti Burke and Linda
22 Zimmer that I was not allowed to inquire into, and
23 I was not, then this would run afoul of the
24 court's existing order.

25 MR. BRASSEY: Can we approach, Your Honor?

1 MR. BANDUCCI: Your Honor, he's leading the
2 witness. And the questions that I asked
3 specifically related to paving. We're going off
4 on general -- on an exhibit that doesn't -- that
5 was not brought up.

6 THE COURT: Mr. Brassey, where are we going?

7 MR. BRASSEY: Well, Judge, he asked about
8 the secondary ingress and egress, and I think it's
9 fair for the witness to point out what she said in
10 the transcript and the fact that there was a
11 report from Gordon Ravenscroft.

12 THE COURT: I'll allow it. I suppose it's
13 your time. If you intend to call Ms. Zimmer back,
14 then we won't be going over these topics again, I
15 assume?

16 MR. BRASSEY: We won't, Judge. And I'll
17 just -- I'll stop with this question.

18 THE COURT: All right.

19 MR. BRASSEY: Ms. Zimmer, I've kind of
20 forgotten what I asked, if you want to know the
21 truth.

22 THE WITNESS: So have I.

23 MR. BRASSEY: Your Honor, I'll move on to a
24 different subject.

25 BY MR. BRASSEY:

1 THE COURT: Yes.

2 (Sidebar commences as follows:)

3 MR. BRASSEY: I don't want to run afoul of
4 your order, and I don't want to open up, Tom, but
5 I don't know how else -- I mean, if there are no
6 discussions -- I don't know.

7 MR. BANDUCCI: He certainly -- I am not
8 going to object if he says -- if he -- I'll let
9 him lead her: "Were there no discussions," that's
10 fine.

11 THE COURT: All right.

12 MR. BRASSEY: Okay.

13 (Sidebar concluded.)

14 THE COURT: Proceed.

15 MR. BRASSEY: Thank you.

16 BY MR. BRASSEY:

17 **Q.** Ms. Zimmer, let me rephrase this a
18 little bit. In the December 2007 time frame, is
19 it true there were no discussions between you and
20 Ms. Burke about conditions for the Alamar Ranch
21 project?

22 **A.** Yes.

23 **Q.** Is it true you didn't deliberate prior
24 to the time of the deliberation hearing on
25 March 10, 2008, with regard to the Alamar Ranch

1 CUP application?

2 **A. Yes.**

3 MR. BANDUCCI: I will object to that,
4 Your Honor, on the basis that there is no way I
5 can cross-examine on that issue.

6 THE COURT: Just a moment.

7 MR. BRASSEY: Your Honor, I asked the
8 question based on my previous question.

9 MR. BANDUCCI: Well --

10 THE COURT: Just a moment. But it's a
11 different question because now you're talking
12 about deliberations. Well, the challenge, again,
13 is that counsel cannot inquire --

14 MR. BRASSEY: Your Honor, I'll withdraw it.

15 THE COURT: All right. I'll strike the
16 response. The jury is instructed to disregard.

17 BY MR. BRASSEY:

18 **Q.** You were asked some questions,
19 Ms. Zimmer, about conditions being imposed on a
20 CUP application. Are you -- do you know if, as a
21 commissioner, prior to Alamar Ranch, you ever
22 heard any other CUP appeals?

23 MR. BANDUCCI: Objection. Outside the
24 scope.

25 THE COURT: Well, Counsel, I'm going to give

1 you some leeway, but if you're going to re-call

2 Ms. Zimmer, then we should --

3 MR. BRASSEY: I'll move on, Judge, because
4 we intend to re-call her.

5 THE COURT: All right.

6 MR. BRASSEY: Let me look at my notes,
7 Judge, and I might speed this up.

8 Can we look at Exhibit 1084, page 49.
9 Down -- correct.

10 BY MR. BRASSEY:

11 **Q.** Ms. Zimmer, you were asked some
12 questions about, I believe, these passages in the
13 deliberation hearing; do you remember that?

14 **A. Yes.**

15 **Q.** Okay. What did you mean when you said,
16 "It might be a trial way of seeing if it would
17 work"?

18 **A. I believe that if they started with the
19 24 -- that's two units they had proposed, so they
20 have the two houses, which is part of their Phase
21 I -- that then they could -- then that would give
22 them the opportunity to show to the community and
23 everybody that this is a viable program, and it
24 could work.**

25 MR. BRASSEY: Your Honor, with the idea in

1 mind that we'll call her back, that's all I have
2 at this time.

3 THE COURT: Mr. Banducci.

4 MR. BANDUCCI: Very quickly.

5 Could you put back up 1084, page 49.
6 Would you blow up both Ms. Zimmer's and
7 Mr. McNeese's comments there.

8 REDIRECT EXAMINATION

9 BY MR. BANDUCCI:

10 **Q.** You were saying, "It might be a trial
11 way of seeing if it would work."

12 Then Mr. McNeese says, "Well,
13 Mr. Chairman, Commissioner Zimmer, you may be
14 correct about that, but remember that the
15 application is based on staffing models and
16 factors that the applicant feels is most economic
17 to them based on the 72-bed facility. If you
18 reduce the size of that, you'd be adversely
19 affecting their ability to have an economic
20 benefit and also seriously calling into question
21 the entirety of the application, based on the
22 model that's been presented, and that everybody,
23 including the Planning and Zoning Commission and
24 this Commission staff, has been working on, and
25 that is the 72-bed facility. At this juncture, I

1 couldn't tell you what the applicant would have to
2 do and the way of reducing the 150, 160 staff to
3 meet the needs of 12 people. Do you follow me?"

4 And your answer is -- slide it up
5 there, Kathy -- "I follow you, yes."

6 So you raised the possibility of kind
7 of a, you know, let's try this out at 12 --
8 because 12 was what was under consideration at
9 this point; right?

10 **A. Yes, that's true.**

11 **Q.** You said, "Let's try this out at 12."

12 And Mr. McNeese said, "Well, now, wait
13 a minute. You can't do that because that's not
14 their model." Right? He told you that right
15 there in deliberations?

16 **A. That's what he said.**

17 **Q.** All right. Now, let's go to
18 Exhibit 1076, page 29. This is Andy Seth.

19 MR. BANDUCCI: Kathy, if you'll
20 illuminate -- no. That's the first page. The
21 first page of his testimony. If you would
22 illuminate the first -- okay. That's good.
23 Page 28.

24 BY MR. BANDUCCI:

25 **Q.** Third line, it says, something, "Andy

1 Seth, a licensed clinical psychologist. I'm the
2 founder and CEO and majority owner of a
3 ranch-style therapeutic boarding school in a
4 neighboring community." "Therapeutic boarding
5 school."

6 MR. BANDUCCI: Can the witness be shown
7 Exhibit 1036, page 4.

8 This is in evidence, Your Honor.

9 BY MR. BANDUCCI:

10 **Q.** You were here when you heard -- when
11 Amy Jeppesen testified; correct?

12 **A.** Yes, I was.

13 **Q.** Okay. Do you remember her talking
14 about where Alamar fit on the RTC spectrum?

15 **A.** Yes, I do.

16 **Q.** And she pointed out that a therapeutic
17 boarding school, like Mr. Seth's school, is not
18 what Alamar Ranch is; correct?

19 **A.** Yes. When she gave her testimony, she
20 pointed that out.

21 **Q.** All right. Thank you.

22 Now, if you would turn to your
23 deposition at page 16, Volume I. Wait a minute.
24 I may have the wrong number here. Excuse me,
25 Ms. Zimmer.

1 "Answer: Yes.

2 "Okay. When you said, 'If we picked
3 her brain on Alamar, it would be in one of those
4 meetings,' would that be -- are you talking about
5 a hearing or are you talking about an executive
6 session? What are you talking about?

7 "Answer: Well, it can be an executive,
8 but we can also agenda Alamar on our agenda and
9 talk about it, 'Hey, I had a question here about
10 somebody.'

11 "Question: Okay. Did that happen?

12 "Answer: I'm not sure.

13 "Question: Maybe the best way to get
14 to this is can you describe for me Patti Burke's
15 involvement with the commission on the Alamar
16 project?

17 "Okay. Patti Burke kind of got thrown
18 into that because Craig Wolford left, and we put
19 her in that position.

20 "And so her part was to continue from
21 where he left off and give us the information we
22 needed for the appeal and move on with the
23 appeal."

24 Then let's go to line -- I'm sorry.

25 "And to give us all the exhibits and so

1 All right. Let's go to line 15 of page
2 55. And can you pull out line 15, just down to
3 the remainder of the -- to the bottom of the page?
4 Line 1-5, line 15.

5 "And you have an employee of the
6 county, Patti Burke, who works for Planning and
7 Zoning?

8 "Answer: Yes.

9 "So I'm just wondering if you avail
10 yourselves of the opportunity to pick her brain on
11 the Alamar issues, and how that happened, if it
12 did. That's really all I'm trying to figure out.

13 "Answer: If we picked her brain, it
14 would be in one of our meetings.

15 "Question: Okay. So there wouldn't
16 be -- "

17 You answer: "I don't think, anyway for
18 me -- I don't think" -- let's go to the top of the
19 next page -- "I ever went and said, 'You know, I
20 have a question here,' that kind of thing, on
21 Alamar.

22 "Question: Okay. Do you do it on
23 other projects? I mean, would you talk to Patti
24 about other projects if you had a question about
25 Planning and Zoning ordinance, for example?

1 on that come into our office. We worked with
2 her." I'll stop right there.

3 So you had meetings with Patti Burke;
4 they may have been in public, they may have been
5 in executive session; correct?

6 **A.** Could have been, yes.

7 MR. BANDUCCI: That's all I have. Thank
8 you.

9 THE COURT: Anything else, Mr. Brassey?

10 MR. BRASSEY: No. No, I'm sorry,
11 Your Honor.

12 THE COURT: Ms. Zimmer, you may step down.

13 THE WITNESS: Thank you.

14 MR. BRASSEY: I think Mr. Banducci and I had
15 one matter on the next --

16 MR. BANDUCCI: Maybe we can present that to
17 the court as we go. How's that? And I won't read
18 that question until you get a ruling.

19 THE COURT: Thank you, Ms. Zimmer. You may
20 step down.

21 MR. BANDUCCI: And we'll release her,
22 Your Honor.

23 THE COURT: What's that?

24 MR. BANDUCCI: We'll release her. We had
25 her on -- although, she's here, I guess --

1 THE COURT: She's here, I think, as a
2 representative of the county.
3 MR. BANDUCCI: This is your chance,
4 Ms. Zimmer, run.
5 MR. BRASSEY: Your Honor, can we approach?
6 THE COURT: Yes.
7 (Sidebar commences as follows:)
8 MR. BRASSEY: I'm not sure it's a big deal,
9 but I have some questions that I want read. He
10 has questions he wants read.
11 THE COURT: Are they all in the deposition
12 of Ms. Burke?
13 MR. BRASSEY: Yeah.
14 MR. BANDUCCI: Yes.
15 MR. BRASSEY: The way I've always done -- I
16 mean, I've always seen it done is they get read.
17 There's not a distinction whose question
18 because --
19 THE COURT: Well, the reason we're going to
20 do it here is because of timekeeping.
21 MR. BRASSEY: Oh, oh, oh. Okay, but I don't
22 want to give the jury the -- I mean, I'm going to
23 read a bunch of questions that aren't my
24 questions.
25 THE COURT: Right. I will instruct the jury

1 deposition and its significance here in just a
2 moment. We'll be in recess for just five minutes.
3 MR. BANDUCCI: Thank you.
4 (Recess.)
5 (Jury present.)
6 THE COURT: My apologies. It struck me that
7 I was supposed to make a phone call before 11:30
8 that was kind of urgent. And if I had not done
9 that right then, we would have had to take a break
10 here, anyway.
11 As I understand, Counsel, we're going
12 to read -- Mr. Banducci, you will read the
13 excerpts which you're designating.
14 Mr. Brassey will read the portions
15 which he's designating, even though that may not
16 be who actually asked the question during the
17 deposition; correct?
18 MR. BANDUCCI: That's right.
19 MR. BRASSEY: Correct.
20 THE COURT: Ladies and gentlemen, you're
21 going to now hear deposition of a witness. I
22 think, as you're well aware by now, the deposition
23 is simply an opportunity for an attorney to ask
24 questions of a potential witness while that
25 witness is under oath. The responses, the

1 these are the questions that you wish to have
2 asked. Okay?
3 MR. BRASSEY: All right. Thank you.
4 (Sidebar concluded.)
5 THE COURT: Mr. Banducci?
6 MR. BANDUCCI: Yes, Your Honor. At this
7 time we would like to read excerpts from the
8 deposition of Patricia Burke. There were two
9 depositions taken, Your Honor. One on July 24th,
10 2009, and another that was taken on just
11 December 2nd of this year.
12 We're going to read excerpts, first,
13 from July 24th, 2009, and since there are
14 questions that Mr. Brassey wants read out of this
15 deposition, he's going to read the ones he's asked
16 for. I'm going to read the ones of -- that we
17 request. And Ms. --
18 THE COURT: Counsel, there's one matter I
19 need to take up very shortly. Maybe we can take a
20 five-minute break before we start so we don't
21 interrupt.
22 MR. BANDUCCI: That's fine.
23 MR. BRASSEY: That would be great.
24 THE COURT: But before we do -- well, I'll
25 instruct the jury about the reading of the

1 questions and the responses, are taken down by a
2 court reporter, such as Ms. Hohenleitner here in
3 the courtroom.
4 You are to consider this testimony just
5 as you would if the witness was testifying live to
6 the best -- to the extent that you can.
7 I would caution both counsel and the
8 reader that you're not to give any inflection into
9 the -- because since we're not there, we don't
10 know what inflection was given to particular
11 words, so try to, essentially, be as monotone as
12 you can without being -- I mean, I don't know if
13 "monotone" is the right word, but be very careful
14 to avoid any inflection.
15 And I might suggest that when counsel
16 asks a question that was not asked by you at the
17 deposition that you so indicate, such as,
18 "Question by Mr. Banducci."
19 MR. BANDUCCI: This entire deposition --
20 this is the discovery deposition that I took of
21 Patti Burke, so this is -- this is all my
22 questioning, Your Honor.
23 THE COURT: All right. Then with that,
24 let's go ahead and have the reader take the stand.
25 Counsel, I assume you'll waive

1 reporting of the reading of the deposition?
 2 MR. BANDUCCI: Sure.
 3 MR. BRASSEY: Yes.
 4 THE COURT: All right.
 5 MR. BANDUCCI: Your Honor, I think one other
 6 thing needs to be mentioned before we proceed, and
 7 that is that the reason we're reading this
 8 deposition rather than having Ms. Burke here is
 9 because she is unavailable.
 10 THE COURT: All right.
 11 MR. BRASSEY: Correct.
 12 THE COURT: And both parties agree that she
 13 is unavailable and, therefore, we will have to
 14 proceed in this fashion.
 15 Mr. Banducci, you may proceed.
 16 MR. BANDUCCI: Thank you.
 17 (Depositions of Patricia B. Burke taken
 18 July 24, 2009, and December 2, 2010, published;
 19 portions read into the record.)
 20 MR. BANDUCCI: Your Honor, the
 21 communications here related -- that are on these
 22 pages, 81 through 84, relate to communications
 23 between Burke and McNeese, and I was not allowed
 24 to inquire at the depositions.
 25 THE COURT: Mr. Brassey?

1 it's not in context.
 2 MR. BANDUCCI: Where?
 3 MR. BRASSEY: You want to ask on 83, 84.
 4 You've got 83, 84, 85.
 5 MR. BANDUCCI: No, I don't.
 6 MR. BRASSEY: Tom, I got your -- that's not
 7 my arrow. That's your guys. I ran it off my
 8 computer.
 9 MR. BANDUCCI: No. These are the ones you
 10 asked for this morning.
 11 THE COURT: No. What Mr. Brassey is
 12 referring to is other pages that you designated.
 13 MR. BANDUCCI: Those are yours.
 14 MR. BRASSEY: Tom -- we don't need to argue.
 15 MR. BANDUCCI: Okay, well, then I'll
 16 withdraw those questions.
 17 THE COURT: Good. That will solve the
 18 problem.
 19 MR. BRASSEY: So where are you going?
 20 MR. BANDUCCI: We go to page 89.
 21 THE COURT: Counsel, you're going to have to
 22 file with the court something that memorializes
 23 what's been read to the jury. Because without the
 24 court reporter taking it down, we need to make a
 25 record as to what --

1 MR. BRASSEY: Your Honor, can we approach?
 2 These are his questions.
 3 THE COURT: Approach.
 4 (Sidebar commences as follows:)
 5 THE COURT: Were these background questions
 6 of some kind?
 7 MR. BRASSEY: Well, Judge, he asked, and she
 8 answered. Now, there are a couple --
 9 THE COURT: No, I know. I'm trying to
 10 figure out why -- apparently, you were getting
 11 into an area which you were not allowed to answer
 12 questions, but these questions were, in fact,
 13 answered.
 14 MR. BANDUCCI: Right. But this is regarding
 15 communications with McNeese, and I was not allowed
 16 to inquire of McNeese about those communications.
 17 THE COURT: See, the problem, Mr. Brassey,
 18 is if you inject -- if you interpose a privilege
 19 objection, that stops the inquiry, so even though
 20 some background questions may have been asked,
 21 presumably, Mr. Banducci did not get a chance to
 22 go and resolve those questions.
 23 MR. BRASSEY: Well, then he shouldn't be
 24 able to ask, Judge, the questions he wants to ask
 25 on the next couple of pages, because if he does,

1 MR. BANDUCCI: I'll make sure that we get
 2 that.
 3 MR. BRASSEY: Okay, Tom, so you're going to
 4 read --
 5 THE COURT: Let's do this off the record.
 6 Why don't you go back and confer about that; okay?
 7 (Sidebar concluded.)
 8 (Counsel conferring.)
 9 MR. BRASSEY: Your Honor, we may have a
 10 question. I think we're going to read something,
 11 and we may have a question.
 12 THE COURT: Mr. Brassey, I couldn't hear the
 13 last part of what you just said.
 14 MR. BRASSEY: I'm sorry. I think we're
 15 going to read something, Judge. We've conferred,
 16 and then we may have a question. And I'm not sure
 17 what time the court was going to break.
 18 THE COURT: We'll have to take a recess
 19 right at 12:00 or sooner.
 20 (Continued reading of the deposition
 21 of Patricia B. Burke.)
 22 MR. BRASSEY: Your Honor, I apologize. Can
 23 we approach?
 24 THE COURT: Yes. We're just about where
 25 we're going to take the break. But go ahead,

1 let's approach.

2 (Sidebar commences as follows:)

3 THE COURT: Mr. Brassey?

4 MR. BRASSEY: So now we're going to get into
5 that kind of a question. You're there; right?

6 That's your circle.

7 MR. BANDUCCI: What page are you at? You've
8 got to read that. I don't know. Let's see.

9 MR. BRASSEY: I mean, that's how this --

10 MR. BANDUCCI: No, I don't have that.

11 MR. BRASSEY: Tom --

12 THE COURT: Take the lunch hour. We'll just
13 take the break now. Take the lunch hour, go back
14 over your designations, and make sure they're
15 right. Apparently, you're not communicating. So
16 why don't you use the lunch hour; okay?

17 MR. BANDUCCI: I'll give you this, so you
18 can have this.

19 MR. BRASSEY: This is what I've got.

20 THE COURT: It doesn't matter.

21 MR. BRASSEY: I agree, Judge.

22 Your Honor, I apologize. It might be
23 easier just to take the break now so we can --

24 THE COURT: That's what I'm saying. Take
25 the break.

1 I did want to at this time kind of
2 clarify a matter that the court had previously
3 advised you concerning, and that is the fact that
4 Ms. Burke was not available to testify, and
5 explain why that is.

6 Ms. Burke suffers from a medical
7 condition that precludes her from being here for
8 the trial itself, and also has affected her vision
9 in such a way that it's difficult or perhaps even
10 impossible for her to read. And that's been kind
11 of a lingering problem, and that explains why she
12 is not here and why we're relying upon the
13 deposition. And as I understand, even at the time
14 of the deposition, she was struggling with her
15 vision and had a difficult time reading documents
16 and whatnot.

17 So I wanted to clarify that for the
18 record, so there was no thought on the jury's part
19 that she was not available for some other reason.

20 So with that, as I understand it,
21 Mr. Banducci, you and Mr. Brassey perhaps may do a
22 Laurel and Hardy routine of sort here and --

23 (Simultaneous discussion.)

24 MR. BANDUCCI: -- microphone, Your Honor.

25 MR. BRASSEY: At least you didn't say Mutt

1 (Sidebar concluded.)

2 THE COURT: Ladies and gentlemen, I think
3 we'll give counsel an opportunity to work together
4 and get on the same page, which, apparently,
5 they're not, up to this point; that will solve
6 some of the problems we're having here.

7 Let's go ahead and take the noon
8 recess. We'll try to reconvene at 1:30.

9 I would, again, admonish you not to
10 discuss the case among yourselves or with anyone
11 else, not to form or express any opinions about
12 the case until it is submitted to you. Be very
13 careful as you leave the courthouse today to not
14 have any contact at all with the attorneys, the
15 witnesses, or the parties. And, likewise, when
16 you return, I assume you go to the fifth floor
17 jury assembly room again until all the jurors are
18 present, and then you'll be brought up to the
19 sixth floor.

20 We'll be in recess until 1:30.

21 (Recess.)

22 (Jury present.)

23 THE COURT: I'll note for the record the
24 jury is present. We were going to proceed with
25 the reading of Ms. Burke's testimony.

1 and Jeff.

2 MR. BANDUCCI: This way, Your Honor, I think
3 we can go a little more quickly, based on the
4 designations.

5 THE COURT: All right.

6 MR. BANDUCCI: We're going to start,
7 Ms. Smith, at page 104.

8 Ready?

9 (Continued reading of the deposition.
10 of Patricia B. Burke.)

11 MR. BANDUCCI: That's the end of the
12 deposition taken on July, 2009. Now, we have a
13 deposition taken on the 2nd of December. I'm
14 going to start on page 5, line, 16.

15 (Continued reading of the deposition
16 of Patricia B. Burke.)

17 (Deposition reading paused.)

18 MR. BANDUCCI: And actually, Your Honor, we
19 have stipulated authenticity, and the fact that
20 these subdivision files are records of County of
21 Boise and that they're authentic.

22 MR. BRASSEY: I agree, Judge. We just
23 object as to relevance.

24 THE COURT: What are they marked as? What's
25 the exhibit number?

1 MR. BANDUCCI: Your Honor, they are marked
2 as Exhibits -- we're going to have to get
3 through -- they're identified in various places.
4 I think it's 1026 -- I'm sorry. It's actually
5 1120 through 1126, I believe, Your Honor. 1120
6 through 1126, Your Honor.

7 THE COURT: What is the relevance, briefly?
8 I don't want to have much of a speaking objection,
9 but if you could --

10 MR. BANDUCCI: I won't, Your Honor.
11 The -- these are subdivision files that would
12 contain -- excuse me -- the conditions imposed on
13 those subdivisions. And we believe that they are
14 relevant for comparison purposes.

15 THE COURT: All right. I will overrule the
16 objection and admit the exhibits. Exhibits 1120
17 through 1126 will be admitted.

18 (Plaintiffs' Exhibit Nos. 1120, 1121,
19 1122, 1123, 1124, 1125, and 1126
20 admitted.)

21 MR. BANDUCCI: Okay.

22 (Continued reading of the deposition
23 of Patricia B. Burke.)

24 MR. BRASSEY: Your Honor, I've made a number
25 of objections, but with the Court's ruling on

1 subdivision, we don't need to read those.

2 THE COURT: All right. Thank you.

3 (Continued reading of deposition.)

4 MR. BRASSEY: Your Honor, can we approach?

5 THE COURT: Yes.

6 (Sidebar commences as follows:)

7 MR. BRASSEY: Okay. Tom asked the question
8 and I let him answer -- I let her answer it.

9 We produced this document that we
10 believe Mr. McNeese prepared because Terry Day had
11 written notes on it. And I produced it. And she
12 has indicated something in response to
13 Mr. Banducci that -- I mean, what it says, Judge,
14 is that he said we're not going to tell him how
15 many residents to put in here.

16 And so now I'm in a bind, if now
17 they're testifying to it, that we didn't have any
18 ruling yet on -- this was on December 2nd. But I
19 let her say it.

20 MR. BANDUCCI: Well, and -- I know you did.
21 And I --

22 THE COURT: Closer to the mike.

23 MR. BANDUCCI: Yeah. You know, I am not
24 going to try and take advantage of the situation
25 here and have -- read her answer about a

1 conversation with McNeese where, A, you have taken
2 the position that McNeese-Burke communications are
3 privileged; and, B, I can't confirm anything with
4 McNeese, because all conversations with Burke and
5 the commissioners were off limits.

6 MR. BRASSEY: Well -- but in Patti Burke's
7 original deposition, I objected.

8 And you said, "Executive session, et
9 cetera, with the commissioners is fine, but not
10 with Patti Burke."

11 And I don't know when this conversation
12 happened, Judge. I don't know if it's just in the
13 everyday --

14 THE COURT: The conversations between Patti
15 Burke and the commissioners are off limits?

16 MR. BANDUCCI: They are, and they were.

17 THE COURT: Because of privilege?

18 MR. BANDUCCI: Executive session.

19 THE COURT: Because all communications
20 between her and the commissioners occurred in that
21 context?

22 MR. BANDUCCI: Apparently. I mean, I
23 don't -- that's the problem. I don't know.

24 MR. BRASSEY: We don't know that, Judge.
25 And I don't know that this conversation occurred

1 in executive session. And because -- because I
2 produced the document that Tim McNeese prepared
3 that we're talking about, I thought, you know, in
4 fairness to Tom, I had to answer --

5 (Simultaneous discussion.)

6 MR. BANDUCCI: No, no, no.

7 THE COURT: Counsel, I'm not sure I even
8 understand what the --

9 MR. BANDUCCI: I don't --

10 THE COURT: -- dispute is about.

11 MR. BANDUCCI: Do you want to read this, or
12 what?

13 MR. BRASSEY: I don't want to waive
14 anything, Judge. But I let her answer the
15 question, and Tim McNeese said we're not going to
16 limit them on --

17 MR. BANDUCCI: Well, do you want to read it
18 or not?

19 I was not going to read it, because I
20 don't want to invade the privilege in front of
21 this jury.

22 MR. BRASSEY: I don't want to -- I don't
23 know where that conversation took place, Judge. I
24 don't know that it took place in executive
25 session, so I let her answer.

1 THE COURT: Well, if there was -- if there
 2 is -- apparently her testimony was that the only
 3 communications she had with them was in executive
 4 session.
 5 MR. BRASSEY: You mean Tim McNeese or the
 6 commissioners?
 7 THE COURT: No, between Burke and the
 8 commissioners.
 9 MR. BRASSEY: I don't think so.
 10 THE COURT: Or between Burke and McNeese.
 11 MR. BRASSEY: No.
 12 MR. BANDUCCI: Part of the problem is this,
 13 Your Honor: In McNeese's -- this is
 14 complicated -- McNeese's testimony -- and I can
 15 show it to you if you would like -- McNeese's
 16 testimony at the deposition of McNeese is that
 17 Patti Burke is a client.
 18 MR. BRASSEY: Right.
 19 But, Judge, throughout everybody's
 20 deposition, for example, Fred Lawson, I let him
 21 say, in executive --
 22 MR. BANDUCCI: Are you agreeing to waive it
 23 or do you want to preserve it? I'm game for
 24 either way.
 25 THE COURT: Well, if you want to waive it,

1 proceed, Mr. Banducci.
 2 MR. BANDUCCI: Thank you, Your Honor.
 3 (Continued reading of the deposition.)
 4 THE COURT: Counsel, is that exhibit
 5 admitted?
 6 MR. BANDUCCI: I offered it at this depo.
 7 THE COURT: What is the exhibit number
 8 again?
 9 MR. BANDUCCI: 1080.
 10 THE COURT: There is a stipulation to its
 11 admission, so I'll admit the exhibit at this time.
 12 MR. BRASSEY: I'm sorry, I didn't hear you.
 13 THE COURT: I'll admit the exhibit. There
 14 was a stipulation to its admission pretrial.
 15 (Counsel conferring.)
 16 MR. BRASSEY: I don't think so, Judge. But
 17 if we did, we did. But --
 18 MR. BANDUCCI: Well, Your Honor, let's read
 19 from this, and then I'll make an offer.
 20 THE COURT: Well, let's -- the problem is
 21 once you read from it, then I can't undo -- can't
 22 unring the bell.
 23 What's the objection?
 24 MR. BRASSEY: We'll stipulate to it, Judge.
 25 THE COURT: All right. The exhibit then

1 then we go ahead and read it. If you want to
 2 preserve it, we don't.
 3 MR. BANDUCCI: I mean, that's why I didn't
 4 read it. I didn't want to just jump in the middle
 5 of the privilege.
 6 MR. BRASSEY: Well, I can't waive it because
 7 I can't waive it without having three
 8 commissioners together --
 9 THE COURT: Then you better move on and not
 10 waive it.
 11 MR. BRASSEY: But -- but --
 12 THE COURT: I can't take you off the hook
 13 from that dilemma.
 14 MR. BANDUCCI: Andy, it's not that big a
 15 deal. I mean, this is -- we're only talking about
 16 a page.
 17 THE COURT: Well, make your choice. That's
 18 all I can do.
 19 MR. BRASSEY: I can't waive it, but I'm
 20 going to reserve the right to come back --
 21 THE COURT: All right.
 22 MR. BRASSEY: -- if I find myself in a bind.
 23 THE COURT: Okay.
 24 (Sidebar concluded.)
 25 THE COURT: If you would go ahead and

1 will be admitted and published to the jury.
 2 (Plaintiffs' Exhibit No. 1080
 3 admitted.)
 4 (Continued reading of the deposition.)
 5 THE COURT: Anything else, Mr. Brassey, or
 6 does that conclude?
 7 MR. BRASSEY: Let me just look, Judge. I
 8 want to look at page 115, line 21.
 9 Are you there?
 10 MS. SMITH: Yes.
 11 (Continued reading of the deposition.)
 12 MR. BANDUCCI: Your Honor, we're at a point
 13 now where the examination exceeds the scope of
 14 direct. And I'm going to object to it, and if
 15 Mr. Brassey wants to put this in, I've got no
 16 problem -- in his case-in-chief. I won't object.
 17 THE COURT: How much longer do you have,
 18 Mr. Brassey?
 19 MR. BRASSEY: A few minutes.
 20 THE COURT: How much more do you have?
 21 MR. BRASSEY: A couple, a few minutes, I
 22 think.
 23 THE COURT: Well, Mr. Banducci, I think just
 24 to keep things moving I'm going to allow him to go
 25 ahead and complete the testimony.

1 MR. BANDUCCI: All right. No problem.
2 THE COURT: So the objection is noted, but
3 overruled.

4 MR. BRASSEY: Page 18. I'm going to start
5 with line 14.

6 (Continued reading deposition.)

7 MR. BRASSEY: End of the deposition,
8 Your Honor.

9 THE COURT: All right. You may step down.
10 Thank you for being our reader.

11 Mr. Banducci?

12 MR. BANDUCCI: Call Erik Oaas.

13 THE COURT: Please step before the clerk and
14 be sworn.

15 THORVAL ERIK OAAS,
16 having been first duly sworn to tell the whole
17 truth, testified as follows:

18 THE CLERK: Please state your complete name
19 and spell your last name for the record.

20 THE WITNESS: Thorval Erik Oaas, O-A-A-S.

21 THE COURT: You may inquire, Mr. Banducci.

22 MR. BANDUCCI: Thank you, Your Honor.

23 DIRECT EXAMINATION

24 BY MR. BANDUCCI:

25 **Q.** Good afternoon, Mr. Oaas.

1 **A.** Good afternoon, Tom.

2 **Q.** Mr. Oaas, could you tell the jury a
3 little bit about yourself, your background, where
4 you grew up, how you ended up in Boise?

5 **A.** I would be glad to. I was born in
6 Butte, Montana, in 1953. I grew up in Montana,
7 went to local schools there. I graduated from the
8 University of Montana in Missoula with honors,
9 with a bachelor's degree in business
10 administration, with emphasis on management.

11 And following graduation, I joined my
12 father in a family business that he and my
13 grandfather started right after World War II, that
14 was a pressure-treated wood-preserving business,
15 that was in the business of manufacturing
16 telephone poles and power poles and foundation
17 piling and that sort of thing.

18 And I worked in the business through
19 all my college years beforehand, so I had a pretty
20 good idea of how the business operated, and I was
21 very interested in ultimately hopefully taking
22 over the business, the family business, at some
23 point.

24 After a couple of years working in the
25 family business, of course, I -- I thought I knew

1 more about business than my dad did, and I didn't.
2 But nonetheless, we came to the conclusion that I
3 really ought to -- I ought to go and gather some
4 additional work experience outside of the family
5 business, and then ultimately decide
6 whether -- you know, whether I wanted to come back
7 and live and manage the business going forward.

8 I took a job with a company in
9 Greenwood, South Carolina, called Champion
10 Building Products. It was a very large
11 corporation in the business of manufacturing
12 plywood, a big plywood mill operation. And it
13 was -- it was a real culture shock for me, being
14 that far away from Montana, and obviously lots of
15 different customs and cultures and that sort of
16 thing.

17 But I was hired as a shift supervisor
18 in what's called the "veneer drying operation,"
19 and worked in that capacity. And then I -- I
20 think I would like to say that because I had
21 some -- some capabilities to grow, the plant
22 manager put me in sort of a management trainee
23 position. And I worked in a few different
24 capacities around the operation, and ultimately
25 ended up in the accounting department, and sort of

1 learned that part of the business, as well.

2 It was -- my wife and I were married in
3 South Carolina, but it was about that time,
4 after -- after a couple of years there that my
5 youngest brother passed away very unexpectedly
6 while he was attending college in Colorado. And
7 that was particularly difficult on my dad, and the
8 business was having some financial difficulties at
9 the time. And because it was so difficult, my dad
10 asked me to come back and help him run the
11 business and actually take over the business,
12 because he was -- because it was a pretty
13 devastating experience.

14 So my wife and I and our son moved back to
15 Montana. This was in 1980. And as I had
16 indicated, the business was having some real
17 financial difficulties at the time, or some real
18 cash flow problems. And from 1980 until 1984 we
19 did our very best to try and pull the business
20 out, but ultimately ended up having to liquidate
21 the business, close the business and liquidate it
22 in 1984.

23 It was then that, you know, I had two
24 children, a home in Butte, Montana, that I
25 couldn't sell. And my wife and I sort of did a

1 little bit of soul searching and decided -- she
2 had always wanted to come to Boise. She felt
3 Boise was a real interesting city. So we moved to
4 Boise.

5 And although I didn't have a job, I
6 decided to -- you know, I figured I could pound
7 the pavement here. And I had proven myself in
8 different work activities in my past, that I felt
9 that, you know, I could probably come up with
10 something.

11 So after interviewing for a couple of
12 different positions around, and I got -- I
13 actually was offered a job with a business out in
14 Meridian, a wood products business. But it was
15 about that time that I was introduced to a
16 start-up company by the name of Micron Technology.

17 And the individual who had suggested to
18 me that I go interview for a job out there --
19 because he had heard they were hiring -- he said,
20 "You know, it's -- if you've got a job offer out
21 here, you know, you probably ought to take it,
22 because that start-up company, that Micron
23 Technology Company, you know, is sort of a real
24 gamble as to whether it will make it or not."

25 But, you know, I figured I was young

1 and I had a lot of years left, you know, to
2 recover, and so I interviewed at Micron, and the
3 company hired me. So I started at Micron, and I
4 worked for Kip Beddard, who was a former football
5 star at Boise State. And I worked in the systems
6 group. This was in -- this would have been in
7 1984, in August of 1984.

8 The systems group was part of the
9 company that was focused on and helping the
10 company diversify its interests. At the time,
11 they were very heavily dependent on one or two
12 different semiconductor memory chips. And this,
13 the systems group, was a part of the company to
14 help -- to hopefully help the company diversify
15 into other areas, so it wouldn't be so reliant on
16 semiconductors.

17 One of the products we were involved
18 with was a, what was called a "burn-in oven."
19 Another was a digital camera. And so it was -- it
20 was that sort of thing. It was, I guess some
21 people might call it "skunk works."

22 But at any rate, I really enjoyed that
23 part -- that experience. I was hired as a
24 purchasing supervisor. And over the course of the
25 next several years, I actually grew in

1 responsibilities. Because -- because the company
2 really afforded those who really wanted to get in
3 and get involved and really do whatever it took,
4 it gave them tremendous opportunities. And I felt
5 very, very fortunate.

6 **Q.** So did you stay with Micron Technology
7 the entire time, or did you move out to Micron
8 Electronics?

9 Tell the jury, really, if you can,
10 almost in a timeline, punctuated way, where
11 you -- where you went after you got started at
12 Micron.

13 **A.** Sure. I joined the company in 1984 as
14 a purchasing supervisor. In 1980 -- 1987,
15 our -- we split off a portion of the systems
16 group. I became an operations supervisor for what
17 was called the "contract manufacturing." It was
18 sort of printed circuit board assembly work. And
19 we formed a small division called -- gosh, what
20 was it called? Well, it's not significant, other
21 than that it was sort of the precursor to what
22 became the custom manufacturing services group.
23 And we ultimately were relocated from the main
24 site out on Federal Way to a building over near
25 the mall on West Park Street. We bought a

1 building over there.

2 **Q.** What positions did you hold there?

3 **A.** I held the position of -- it was at
4 that point that I just, because of my
5 responsibilities and my experience, that I had
6 grown into the company operating division's
7 financial chief. And as the company continued to
8 grow into a separate subsidiary, I was named as
9 the company's chief financial officer and a member
10 of the board of directors.

11 **Q.** Now, let me stop you there. Chief
12 financial officer, what are the responsibilities
13 of chief financial officer for -- this was MCMS;
14 correct?

15 **A.** Correct.

16 **Q.** All right. So what were your
17 responsibilities as chief financial officer for
18 MCMS?

19 **A.** As the chief financial officer, I
20 was -- because we were a separate company, with
21 the parent company Micron Technology owning well
22 over 80, 85 percent of the company, I was
23 responsible for generating and -- generating and
24 reviewing and oversight of all of the financial
25 activities of the business.

1 **Q.** Okay. So you had ultimate
2 responsibility for the financial side?

3 **A.** Correct.

4 **Q.** Now, in the course of performing your
5 function as a chief financial officer, did you
6 become familiar with what Charles Wilhoite was
7 talking about earlier in this trial, what he
8 referred to as the discounted cash flow method?

9 **A.** Yes. Ultimately, our company, as you
10 recall from Mr. Tverdy's testimony, our company
11 was merged with two other divisions -- with
12 another division of Micron called Micron Computer,
13 and we were merged into Zeos International, which
14 is a public company out of Minneapolis at the
15 time.

16 And through the reverse merger of those
17 three companies, there were three different chief
18 financial officers in all three entities, and I
19 was named as the chief financial officer of the
20 new entity that became Micron Electronics. So
21 that's how the company became public, if you will,
22 became a public company, by being merged into a
23 public company.

24 **Q.** Before we talk about discounted cash
25 flow -- because that's my question to you -- what

1 was the revenue of these three companies that you
2 were now chief financial in oversight for?

3 **A.** We were -- we were pushing revenues of
4 a billion dollars, over a billion.

5 **Q.** Okay. So very quickly now, how did you
6 become familiar with this discounted cash flow
7 method?

8 **A.** Well, the discounted cash flow that
9 Mr. Wilhoite was talking to us about is a very
10 commonly used evaluation tool in businesses,
11 looking at -- basically, looking at the viability
12 of any kind of a -- of a business investment.

13 You essentially look at what the cost
14 of doing, of making investment today will bring
15 over the years that it will be in service, and
16 then you essentially, with a basic understanding
17 that a dollar two years from today or five years
18 from today or ten years today is not worth the
19 same as a dollar today, you go through a process
20 of discounting all of those future cash flows back
21 to today. Because that's really the only number
22 that's really meaningful is: What is it worth
23 today?

24 **Q.** So was that something you used in your
25 work as a chief financial officer?

1 **A.** Correct.

2 **Q.** Now, when Mr. Wilhoite testified, he
3 used a discount factor of 23 percent. And did you
4 have a reaction to that discount factor?

5 MR. BRASSEY: Your Honor -- excuse me,
6 Mr. Oaas.

7 I object. I mean, insofar as Mr. Oaas
8 hasn't been offered as an expert witness in this
9 case, so I object.

10 THE COURT: Mr. Banducci?

11 MR. BANDUCCI: I'm not offering him as an
12 expert, Your Honor. I'm just simply going to ask
13 whether he viewed the 23 percent as really
14 conservative. That's all I'm asking.

15 MR. BRASSEY: Well --

16 THE COURT: Just a moment.

17 Counsel, I think that requires an
18 expert opinion.

19 MR. BANDUCCI: It's his own business.

20 THE COURT: Well, the witness can clearly
21 testify as to the value of his own business, but I
22 think the -- that's based upon his own experience,
23 not some mathematical calculation.

24 MR. BANDUCCI: No, Your Honor, but I --

25 THE COURT: Well, if you want to approach at

1 sidebar and explain --

2 MR. BANDUCCI: Your Honor -- well, yeah.

3 THE COURT: Okay.

4 MR. BANDUCCI: Very briefly, yes.

5 (Sidebar commences as follows:)

6 MR. BANDUCCI: This does go to his valuation
7 of his own company. He is looking at the
8 company -- at Alamar as a business and applying
9 his knowledge of valuation techniques that he used
10 in his business. All I'm going to ask him is, did
11 he consider the 23 percent to be an extremely
12 conservative number.

13 And he will say yes. That's --

14 MR. BRASSEY: But that's an opinion, Tom,
15 and it wasn't disclosed as it.

16 THE COURT: All right. I'm going to sustain
17 the objection to that question as phrased. I
18 think the witness can testify and offer an opinion
19 as to the value of his own property, the value of
20 his own claim, and you can ask him whether he
21 bases his view on using a discount rate something
22 like the 23 percent, or something like that. But
23 I think to get him just to offer kind of a
24 bolstering role with -- what's the --

25 MR. BANDUCCI: Wilhoite.

1 THE COURT: -- Wilhoite, Mr. Wilhoite -- I'm
2 losing my voice. Sorry, Counsel.

3 MR. BRASSEY: So am I.

4 THE COURT: I'm not talking that much.

5 I think the problem is, he can offer an
6 opinion about the value of his own company, the
7 value of his own loss, and he can perhaps offer an
8 indication why, what value -- or what numbers he
9 used to back that up.

10 But as far as offering an opinion
11 whether 23 percent is a conservative figure or
12 not, I'm going to have to sustain the objection.

13 MR. BANDUCCI: All right. Very well. Thank
14 you.

15 (Sidebar concluded.)

16 THE COURT: Proceed.

17 MR. BANDUCCI: Thank you. We'll move on
18 from that question.

19 BY MR. BANDUCCI:

20 **Q.** Finish up the Micron part of the
21 episode quickly, and then we'll go into Oaas
22 Laney.

23 **A.** Very good. Well, we -- as I had
24 indicated, we merged into Zeos and became Micron
25 Electronics in the spring of '95. And I've

1 skipped an awful lot in between, but I don't think
2 it's -- I don't think it's worth going back and
3 going through every day, certainly.

4 But from 1985 until -- well, for the
5 next two to three years we went out and, because
6 we were a public company and I was the chief
7 financial officer for a public company, it
8 takes -- it takes on a whole different role in
9 terms of responsibility and accountability,
10 because the Securities and Exchange Commission
11 looks very carefully at a company's quarterly
12 financial reports and annual financial reports to
13 assure the shareholders that -- that the company
14 is really upholding the financial standards in its
15 reporting that it's obligated to do.

16 So -- and the chief financial officer
17 can be held personally responsible if there are
18 instances of inaccuracies or purposeful
19 misrepresentations --

20 **Q.** Mr. Oaas, I think you're kind of
21 wandering off my question.

22 **A.** All right.

23 **Q.** Are you nervous?

24 **A.** Yes.

25 **Q.** Okay. All right. Well, that's okay.

1 It's okay to be nervous.

2 **A.** So between --

3 **Q.** Let me pose a question to you so that
4 we can move this along. Because I think -- I
5 simply wanted the jury to understand your
6 background.

7 If we can get basically to Oaas Laney.
8 You were at -- you held the chief financial
9 officer position at Micron -- Computers; is that
10 correct?

11 **A.** Micron Electronics.

12 **Q.** Micron Electronics, excuse me.

13 And was that the last position you
14 held, or did you end up -- at Micron?

15 **A.** Yes, from 1995 to 1998, we went out and
16 did some very significant fund raising activities
17 on behalf of our parent company, Micron
18 Technology, who at that point owned about
19 70 percent of the company.

20 **Q.** About how much -- about how much -- and
21 you need to listen to my questions, because I'm
22 asking you very specific questions so that we can
23 move out of your background and into the topics of
24 this case.

25 Just to finish that topic, in terms of

1 the funds you've raised in those last three years
2 for Micron Electronics, could you tell the jury
3 about your fundraising efforts in that forum.

4 **A.** Sure. We raised over \$250 million for
5 the parent company, Micron Technology, through a
6 secondary offering of our stock.

7 **Q.** Okay. Now, when did you leave Micron,
8 and why?

9 **A.** I left Micron in 1998. It was at that
10 point in time that we had about -- oh, gosh, it
11 was about 150 million in cash on the company's
12 balance sheet. We had no debt. And we had a line
13 of credit that we hadn't drawn on. Essentially,
14 the company's financial position was very strong.

15 We had brought in a new CEO at the time
16 that I had found very, very difficult to work
17 with. He didn't share the same kind of integrity
18 and values that I had had since my dad had
19 instilled them in me many, many years before.

20 So I decided to -- that I just could
21 not be part of this company going forward with
22 that kind of leadership. I retired in 1998, and
23 took two years off.

24 **Q.** Okay. And when was it that you
25 realized that you needed to do something?

1 I think there is a little story about
2 rearranging the freezer.

3 **A.** Well, I got a dog and decided to train
4 a puppy. But I also got involved in very
5 important things at home, like rearranging the
6 freezer. And it was at that point in time that my
7 wife said, "You've got to get a job."

8 So -- and so it was at that point in
9 time that my business partner -- or a very close
10 friend of mine, Steve Laney -- he and I had worked
11 together for years and years, and we decided that
12 we were going to get into a business of consulting
13 with small businesses and bringing troubled
14 companies out of trouble, and ultimately working
15 with them and finding a way to, you know, to
16 either hold them or to sell them to another larger
17 company.

18 **Q.** So was that the creation of Oaas Laney?

19 **A.** That was the beginning of Oaas Laney.

20 Ultimately, we decided that every --
21 each of those had a real estate component. His
22 brother at the time was involved in a real estate
23 development business, so we decided to join
24 forces, if you will.

25 **Q.** Okay. Now, Mr. Laney -- you have been

1 here while Mr. Laney testified, and he testified
2 about a number of projects that Oaas Laney has
3 been involved in. But I don't think he mentioned
4 the FACES project. If you could just briefly
5 describe that, and then we'll get into the issues
6 related to this case.

7 **A.** Sure. One of the projects that we got
8 involved with in downtown Boise is a -- it was an
9 old building that had come into significant
10 disrepair on the corner of Myrtle and Sixth
11 Street. It was an old John Deere farm implement
12 dealership. It was built back in the 1940s. And
13 it was actually, I think, a fallout shelter for
14 the City of Boise way back when.

15 But we bought the building and
16 refurbished the interior of the building, and
17 ultimately leased it to Ada County for its Family
18 Advocacy Services for -- Family Advocacy Center
19 for Emergency Services.

20 **Q.** Okay. Now, could you tell the jury
21 about your experience as a member of Oaas Laney
22 with Planning and Zoning Commissions. And I guess
23 start with, you know, a general sense -- give them
24 a general sense for the number of times that you
25 have appeared before Planning and Zoning

1 Commissions or similar regulatory agencies.

2 **A.** I have appeared before Planning and
3 Zoning any number of times. I mean, I couldn't
4 give you an accurate number, but it's many, many.

5 **Q.** Okay. Now, as a result of your
6 experience in front of Planning and Zoning
7 Commissions, what has been your experience with
8 respect to how you get approved in a conditional
9 use permit process?

10 **A.** Well, essentially, you -- you would sit
11 down with the Planning and Zoning administrator or
12 one of the Planning and Zoning staff, and
13 essentially lay out your project or your concept
14 for your project, and gather input from the
15 Planning and Zoning Department.

16 And then typically that -- that process
17 involves understanding what the various ordinances
18 are that impact your project, or your project will
19 impact, the comprehensive plan that impacts the
20 project and what would govern how the project
21 comes together, and any department heads and
22 regulatory bodies that were also -- that have
23 authority over, you know, over that particular
24 business. So it's a matter of vetting all of
25 those things up front.

1 **Q.** What is it, in your view, that assures
2 the approval of a conditional use permit?

3 **A.** Well, it's -- it's been my experience
4 that if you comply with all the ordinances of the
5 city or county, if you comply with the
6 comprehensive plan, and if you address the
7 concerns of the regulatory agencies that are
8 involved, legally, they have no reason, no right
9 to prevent them from granting you a conditional
10 use permit.

11 **Q.** Okay.

12 MR. BANDUCCI: Can the witness be shown
13 Exhibit 1023?

14 This is not yet in evidence. A, I'm
15 sorry; 1023A.

16 BY MR. BANDUCCI:

17 **Q.** Displayed on the monitor in front of
18 you, Mr. Oaas, is an email that you prepared on
19 February 23rd, 2007; is that correct?

20 **A.** That's correct.

21 **Q.** It was sent to Tverdy, Jeppesen, Laney,
22 and Fuller; is that correct?

23 **A.** Correct.

24 **Q.** And is this in relation to the Alamar
25 project?

1 **A. That's correct.**
 2 MR. BANDUCCI: I offer it, Your Honor.
 3 MR. BRASSEY: No objection.
 4 THE COURT: Exhibit 1023A. Are there going
 5 to be other subparts to this, I assume?
 6 MR. BANDUCCI: No. Your Honor, the other
 7 version of 1023 had some handwriting on it that no
 8 one was able to identify.
 9 THE COURT: All right. We'll admit, then,
 10 1023A.
 11 (Plaintiffs' Exhibit No. 1023A
 12 admitted.)
 13 MR. BANDUCCI: Very well.
 14 All right. Let's blow up the
 15 "to/from/re:" lines. There we go. Great.
 16 BY MR. BANDUCCI:
 17 **Q.** This was sent by you to people on the
 18 Alamar team in February of 2007; correct?
 19 **A. That's correct.**
 20 **Q.** And what was happening in the time
 21 frame of this email?
 22 **A. This email would have -- would have**
 23 **taken place after we had filed the conditional use**
 24 **permit application for the Green Ranch property**
 25 **and before we had filed the application for the**

1 **indicated to him that we were -- just due to all**
 2 **of the issues and concerns and clamor that the**
 3 **Green Ranch property application submittal had**
 4 **created, that we had -- we had believed that we**
 5 **had identified a way to sort of make it a win-win**
 6 **for everybody, we had identified the Klam Ranch**
 7 **property, and that we were looking for his**
 8 **feedback.**
 9 **Q.** Okay. Now --
 10 THE COURT: Mr. Banducci, we're at a
 11 breaking point, but you can pick your spot.
 12 MR. BANDUCCI: Your Honor, I'll stop right
 13 now before we -- I mean, I'll be able to finish
 14 this email probably in three or four minutes. But
 15 I can quit now and --
 16 THE COURT: Well, while we're right in the
 17 middle of it, let's go ahead and finish it.
 18 MR. BANDUCCI: Okay.
 19 BY MR. BANDUCCI:
 20 **Q.** No. 1 says, "We all know we made a
 21 conscious decision to put together our original
 22 application on an expedited basis, et cetera. He
 23 said that the CUP application reflected our haste
 24 and we would be well advised to submit a complete
 25 and thorough application the next time."

1 **Klam Ranch property.**
 2 **Q.** Okay. And at this point, were you
 3 looking at making the transition from Green Ranch
 4 to Klam Ranch?
 5 **A. That's correct.**
 6 **Q.** Okay.
 7 MR. BANDUCCI: Let's go to the -- if we can
 8 have the top half of that document. Yeah. There
 9 we go.
 10 BY MR. BANDUCCI:
 11 **Q.** Now, does this -- this reflects a
 12 conversation. It says, "As we discussed today,
 13 Craig shared some insights with us relative to our
 14 CU application that I think we should consider
 15 seriously for the next application we submit."
 16 Who is Craig?
 17 **A. This refers to Craig Wolford, who at**
 18 **the time was the Planning and Zoning**
 19 **administrator.**
 20 **Q.** Okay. And what -- what was it -- you
 21 say, "As we discussed today..." Was there a
 22 meeting that you had with Mr. Wolford with respect
 23 to the items in this email?
 24 **A. That's correct. I had asked**
 25 **Mr. Wolford for a meeting, in which I had**

1 Is this the kind of advice you would
 2 expect to get from Mr. Wolford as a Planning and
 3 Zoning administrator?
 4 **A. Absolutely.**
 5 **Q.** Okay. No. 2, "He thought we ought to
 6 submit a security plan as part of the application.
 7 He said that he is confident that we have one, but
 8 to not share it in the application seemed to
 9 create more problems than it solved."
 10 Again, same question: Would you expect
 11 this of a Planning and Zoning administrator?
 12 **A. That's correct.**
 13 **Q.** Okay. Three: "The perception at the
 14 school district, right or wrong, is that we could
 15 potentially bankrupt the district if we have too
 16 many students who need IEPs."
 17 What is an IEP?
 18 **A. Individual educational program.**
 19 **Q.** Okay. It says, "Beth" blank "is, in
 20 his words, panic-stricken as we talked about,
 21 'Let's think of setting funds aside for them to
 22 access for specific purposes, EG, preschool
 23 program and impact on District of Alamar IEPs.'"
 24 Did you ultimately do that?
 25 **A. That's correct.**

1 **Q.** Okay. Going to No. 4, "He said that
2 most people in Boise County don't particularly
3 care about the benefits of the program for youth,
4 particularly if most of the clients will not come
5 from Boise County.

6 "However, economic development and tax
7 impact are things that everyone can relate to. He
8 suggested that we not only hit the employee base
9 issue, but equally importantly the tax base
10 provided by the commercial valuation of Alamar.
11 Pound that home, in his words."

12 Was this a revelation to you?

13 **A. No. Absolutely not.**

14 **Q.** Okay. And in your experience, is this
15 the kind of information that you've received from
16 other Planning and Zoning administrators?

17 **A. Yes. That's correct.**

18 **Q.** In any context whatsoever, did
19 Mr. Wolford tell you at any time what the
20 commissioners, either the Planning and Zoning
21 commissioners or the county commissioners, were
22 thinking about the Alamar project?

23 **A. Absolutely not. Mr. Wolford was -- was
24 a gentleman who I had come to know had a very high
25 level of integrity and honesty, and he would -- he**

1 **absolutely knew where the boundaries were. And
2 regardless of what relationship I had with him, or
3 anyone else, he would never cross that line.**

4 **Q.** Okay.

5 MR. BANDUCCI: Your Honor, I think this is a
6 good time to break.

7 THE COURT: All right. We'll try to hold
8 this to absolutely no more than 15 minutes. We'll
9 try to reconvene at 3:45.

10 I'll admonish the jury not to discuss
11 the case among yourselves or with anyone else, nor
12 should you form or express any opinions about the
13 case until it is submitted to you.

14 We'll be in recess.

15 (Recess.)

16 (Jury present.)

17 THE COURT: For the record, I'll note that
18 the jurors are present.

19 Mr. Oaas, I'll remind you, you are
20 still under oath.

21 Mr. Banducci, you may resume your
22 examination.

23 MR. BANDUCCI: Thank you.

24 BY MR. BANDUCCI:

25 **Q.** Mr. Oaas, do you recall attending a

1 meeting between the folks who were supporting
2 Alamar -- who were creating Alamar, I should say,
3 and the opposition to Alamar at the Grange Hall in
4 Idaho City in mid-2007?

5 **A. That's correct.**

6 **Q.** Now, Mr. Tverdy has already testified
7 about this, generally. I just want to direct your
8 attention to one issue. Do you recall fielding a
9 question that asked you to talk about the need for
10 72 students at the facility?

11 **A. Yes, I do.**

12 **Q.** Now, when you were asked about that,
13 was that the first time you'd heard that question
14 fielded to you?

15 **A. That's probably the first time that I
16 recall having heard it, but, most definitely, I
17 did hear -- or the question was posed, "Can you do
18 it for less than 72 beds." And my response was,
19 "Our entire business model had been built around
20 72 beds."**

21 **Q.** Okay. Now, the commission hearing --
22 excuse me -- the P & Z hearings. You attended the
23 P & Z hearings?

24 **A. I -- yes. I attended the P & Z
25 hearings; that's correct.**

1 **Q.** And can you describe for the jury the
2 atmosphere at the P & Z hearings?

3 **A. Well, it was -- it was very hard to
4 believe. And, I guess, let me paint a picture for
5 you. Driving up from Boise to Idaho City, passed
6 by -- just after driving by Lucky Peak Reservoir,
7 you see a huge banner on the side of the road, "No
8 Alamar Ranch," and flagging people down driving up
9 Highway 21 to sign a petition. You know, that was
10 not a good sign.**

11 So as we drove on up to Idaho City for
12 the hearing, stopped in and got a bite to eat, and
13 then went to the high school where the hearing was
14 to be held. And at that point the banners that
15 were on the side of the road on the way up were
16 now plastered on the side of trucks right in the
17 parking lot of the school, and there were all
18 kinds of people milling around out in the parking
19 lot.

20 The atmosphere was tense. It was
21 unusually -- I mean, it just seemed very, very
22 strange. As we worked our way into the building,
23 you know, you sort of had to elbow your way
24 through the crowd, and you could overhear
25 comments, "Well, you know, we're going to defeat

1 **this," and "We don't need this stuff in our**
2 **county" and --**

3 MR. BRASSEY: Your Honor, I object, as to
4 characterization of comments made. I think the
5 question is as to the atmosphere, so to that
6 extent, I'd object.

7 THE COURT: Proceed. I'm not going to
8 strike the prior testimony.

9 But in terms of describing the
10 atmosphere, try to avoid, if you can, any
11 particular characterizations of what was said.
12 All right?

13 THE WITNESS: Yes, Your Honor.

14 THE COURT: Go ahead. Continue.

15 THE WITNESS: So we got into the hearing,
16 and the hearing begins, and the opposition starts
17 coming up to the podium to present their
18 testimony. And, honestly, you smell -- there were
19 some that smelled of alcohol. And just the
20 outlandish comments, again, and I won't go into
21 those, in particular, but -- but it was -- it was
22 intense. It was mean-spirited. And it was out of
23 control. You know, there was cheering from the
24 audience, you know, for these comments that were
25 being made. You know, and that's completely out

1 **Clinic with my wife, at the time. I believe I was**
2 **with her on both the January 28th and the**
3 **deliberations in March.**

4 **Q.** Okay. How did you learn about the
5 Commission's decision rendered on March 10th?

6 **A.** It was a phone call from Amy Jeppesen
7 to me. I had asked her to, you know, to keep me
8 posted. And I can recall very clearly getting
9 this call.

10 **Q.** Where were you?

11 **A.** I was -- I was at the Mayo Clinic.

12 **Q.** Okay.

13 **A.** And I recall getting this call, and I
14 was stunned. I was absolutely stunned. It seemed
15 like such a shame because we had tried so hard,
16 and we had done everything we possibly could,
17 meeting with neighbors over and over and over
18 again, meeting with all the county departments,
19 meeting, complying with the comprehensive plan and
20 the ordinances of the county. We had gone above
21 and beyond any project that I had ever been
22 involved in. It was -- it was stunning. And I
23 knew at the time that they killed the project.
24 And it was a real shame for Boise County.

25 **Q.** Why did you know they had killed the

1 of line. And no matter how many times the
2 chairman tried to bring the meeting into order,
3 there was complete disregard for that.

4 BY MR. BANDUCCI:

5 **Q.** What about at the break?

6 **A.** At the break, we -- because there were
7 so many new things that were being thrown at us
8 that we -- with our attorney and our experts, we
9 decided to have a little caucus in one corner of
10 the room. And Mr. Butte and Brian Bulow, who was
11 one of the heads of the opposition, came over and
12 stood right next to us, you know, purposely, just
13 sort of challenging us to try and have a private
14 meeting where we could kind of talk about things.

15 And we asked Mr. Bulow if we could have
16 some privacy, and he said, "It's a free country, I
17 can stand anywhere I want." It very -- was very
18 close to ending up into a physical altercation. I
19 mean, it was unbelievable.

20 **Q.** All right. Now, the commission
21 hearings you were not able to attend; correct?

22 **A.** That's correct.

23 **Q.** Why not?

24 **A.** My wife has some serious medical
25 problems, and I recall being back at the Mayo

1 project?

2 **A.** Because they cut the -- amidst
3 everything else, I mean, the expensive additional
4 conditions that the commissioners imposed without
5 any reason or regard, but as soon as I heard that
6 they had cut our head count to 24, that nothing
7 else mattered.

8 **Q.** Okay. Can the witness be handed or
9 shown Exhibit 1088, which is the decision of the
10 commissioners. This is 1088. Can you go to the
11 second page?

12 Did you note, as indicated in the
13 highlight, that -- well, first of all, when the
14 issue -- when 1088, the board's decision, was
15 issued, did you read it?

16 **A.** Yes.

17 **Q.** Okay. I'm focusing you on a comment in
18 the paragraph on the second page where it says,
19 "The board's decision on this appeal is final and
20 need not be referred to the commission." Do you
21 see that?

22 **A.** Yes, I do.

23 **Q.** Okay. Did you have conversations with
24 the team about what that meant?

25 **A.** Absolutely.

1 **Q.** And what did you -- what did the team
2 conclude?

3 **A.** That there was absolutely no doubt in
4 our mind that this decision was final. It was the
5 final order by the county, and there was no room
6 for us to, you know, to go back and appeal.

7 **Q.** Did you ask for a takings analysis?

8 **A.** We asked for a takings analysis,
9 because, in our opinion, that's exactly what the
10 county had done. They had taken the property that
11 we had intended for this project and prohibited us
12 from doing what we had every legal right to do.

13 MR. BANDUCCI: Can the witness be shown
14 Exhibit 1092.

15 Your Honor, this is also in evidence.
16 This is the Regulatory Takings Analysis that was
17 admitted this morning.

18 Kathy, could you go to the second page,
19 please. Well, actually, the bottom of the first
20 page is the question that's posed, and the answer
21 starts on the second page.

22 BY MR. BANDUCCI:

23 **Q.** The question at the bottom is: "Does
24 the regulation deprive the owner of all
25 economically viable uses of the property?"

1 Next page. "Answer: No. The
2 conditional use permit does not deprive the
3 property owner of all economically viable uses of
4 the property. The CUP application sought approval
5 for the operation of a 72-bed residential
6 treatment facility for at-risk teenage youth. The
7 CUP allows Alamar, hereinafter 'Applicant,' to
8 operate a 24-bed facility. If the Applicant does
9 not desire to operate the property under the terms
10 of the CUP, the Applicant may utilize the property
11 for various other allowed uses and may seek
12 approval for conditional uses, all of which are
13 listed in the tables set forth in Chapter 1."

14 MR. BANDUCCI: Kathy, can we go back, and
15 let's go down to the next question, No. 4.
16 BY MR. BANDUCCI:

17 **Q.** This one is: "Does the regulation have
18 a significant impact on the landowner's economic
19 interest?"

20 "Answer: No. The CUP conditions do
21 not appear to have a significant negative impact
22 on the landowner's economic interest. The
23 granting of the CUP enhances the value of the
24 property by allowing a conditional use that
25 previously was not permitted. The Board's action

1 does not preclude, prevent, or inhibit the
2 Applicant from seeking other allowed or
3 conditional uses for the property."

4 After reading this, did you have any
5 sense that the commission was going to consider,
6 even if you made a motion to amend the CUP where
7 it would be granted?

8 MR. BRASSEY: Your Honor, I object. I mean,
9 "a sense," I think it calls for speculation.

10 THE COURT: Restate the question.

11 MR. BANDUCCI: Yes, Your Honor.

12 BY MR. BANDUCCI:

13 **Q.** Based on the takings analysis and the
14 language in the takings analysis, did you believe
15 that an effort to amend the CUP is -- would be
16 well taken?

17 **A.** Absolutely not. They made it very
18 clear that this decision was final and that, in
19 essence, what had killed the project was the
20 reduction to 24 beds, and there was no room,
21 whatsoever, for that number to change.

22 **Q.** Okay. In fact, let's go back to that
23 prior paragraph. In this paragraph don't they
24 tell you that if you don't want to operate -- "If
25 Applicant does not desire to operate the property

1 under the terms of the CUP" -- which is 24-bed
2 facility -- "the Applicant may utilize the
3 property for various other allowed uses," not as a
4 residential treatment center; correct?

5 **A.** That's correct.

6 **Q.** All right. So did you go back for any
7 sort of amendment of the CUP?

8 **A.** No, we did not.

9 **Q.** Why not?

10 **A.** Because we knew that this was a final
11 decision and it would have been completely futile.
12 We did, however, feel that it was important,
13 important enough that -- there was no opportunity
14 to do anything more with the county. We did file
15 an appeal for a judicial review.

16 **Q.** And did they oppose that appeal?

17 **A.** That's correct.

18 **Q.** Now, as a result of the county's
19 imposition of the conditions, including the
20 reduction of student population, what did you have
21 to do?

22 **A.** We had -- we had to make -- I,
23 primarily, had to make the difficult decision
24 that -- that it was over, and that we had to lay
25 all of the individuals off that we had hired, all

1 of the time, effort, and blood, sweat and tears
2 we'd put into this program were gone. And,
3 ultimately, we knew we had to -- we had debt on
4 the property that we had to liquidate, so we felt
5 there was no other choice but to sell the property
6 in a very poor market.

7 **Q.** Okay. And the funds that you sold the
8 property, you received funds from the sale of the
9 property, what did you do with those funds?

10 **A.** Those funds, almost exclusively, were
11 used to pay off the bank loan against the
12 property.

13 **Q.** Okay. Now, was it your intent with
14 Alamar to diversify the portfolio or continue the
15 diversification of the portfolio of Oaas Laney and
16 investors?

17 **A.** I'm sorry?

18 **Q.** Well, did you consider Alamar Ranch to
19 be a step in the direction of diversification of
20 your portfolio?

21 **A.** Oh, absolutely. I mean, when
22 we -- when we considered building this program a
23 number of years earlier, it was -- it was part of
24 our plan -- if there was one thing that we learned
25 from our years at Micron Technology, that to rely

1 on one portion of your business was foolish, or
2 one segment of the economy, one product line.

3 And we had -- at that point, we had
4 invested in some Alzheimer's care facilities, and
5 we were operating those. We had a -- angel
6 investors in a startup company, a technology
7 company. And the Alamar Ranch piece was going to
8 fit very nicely alongside of the Alzheimer's care
9 facilities because they operate on similar models.

10 And when this was pulled, this leg was
11 pulled out from underneath us, when the real
12 estate market was going south, it had a
13 devastating effect on the company.

14 MR. BANDUCCI: That's all the questions I
15 have. Thank you.

16 THE COURT: Cross-examination.

17 MR. BRASSEY: Thank you, Judge.

18 CROSS-EXAMINATION

19 BY MR. BRASSEY:

20 **Q.** Good afternoon, Mr. Oaas.

21 **A.** Good afternoon, Mr. Brassey.

22 **Q.** You and I have met before?

23 **A.** Yes, we have.

24 **Q.** With regard to the Green Ranch
25 property, do you remember when that was withdrawn,

1 the application for the Green Ranch, Alamar Ranch
2 CUP application?

3 **A.** It would have been shortly -- shortly
4 after my meeting with Mr. Wolford.

5 **Q.** Plaintiffs' Exhibit 1023A would
6 indicate -- at least your email is dated
7 February 23rd, 2007, so I -- would your meeting
8 with Mr. Wolford have taken place sometime around
9 that date?

10 **A.** That's correct.

11 **Q.** And so the application had not yet been
12 withdrawn by the time of your meeting with
13 Mr. Wolford?

14 **A.** I don't recall that it had, no.

15 **Q.** Okay. And you knew Mr. Wolford. You'd
16 been friends at Micron?

17 **A.** Yes, I did. I had actually hired
18 Mr. Wolford. He worked for me a number of years
19 earlier at Micron Technology. It was probably in
20 about 1980 -- oh, gosh, 1985. His father -- he
21 had retired from the military, and I hired him
22 into the purchasing group, very, very talented
23 individual. And his father became gravely ill and
24 he -- before I had an opportunity to -- to
25 encourage him to just take a leave of absence, he

1 resigned from the company. And his father passed
2 away shortly thereafter, and I had lost track of
3 him until -- until I, actually, saw him at -- at
4 one of the Planning and Zoning hearings for the
5 end of the Alamar Ranch.

6 **Q.** Okay. You had a good relationship with
7 him?

8 **A.** Yes. We, obviously, had a great
9 relationship earlier, and I had no reason to
10 believe that it would be anything different.

11 **Q.** Okay. And you'd agree that one of the
12 things that a planning and zoning administrator
13 should do is work with the applicant, as you
14 mentioned, to look at the project, look at the
15 application, and to assist the applicant through
16 the process?

17 **A.** That's correct.

18 **Q.** There's nothing wrong with that in the
19 world, is there?

20 **A.** No.

21 **Q.** And that's been your experience in
22 counties other than just Boise County, isn't it?

23 **A.** That's correct.

24 **Q.** Been your experience here in Ada
25 County?

1 **A. That's correct.**
 2 **Q.** Would you agree that it would also be
 3 one of the jobs of the planning and zoning
 4 administrator that if people who had questions
 5 about a particular application could call and seek
 6 advice about the process, would that make sense?
 7 **A. Absolutely.**
 8 **Q.** Okay. And if somebody didn't
 9 understand the process, would you agree, they
 10 could call the planning and zoning administrator
 11 and ask, "How does this process work? How can I
 12 present something?" things along that line?
 13 **A. That's correct.**
 14 **Q.** I assume it gets a little tough if you
 15 have a lot of people asking you those questions,
 16 as the administrator, but that's one thing the
 17 administrator ought to do; is that right?
 18 **A. Either the administrator or someone on**
 19 **his staff.**
 20 **Q.** Sure. I said the "administrator."
 21 Somebody from planning and zoning, part of their
 22 job is to deal with the public, so to speak, and
 23 answer their questions?
 24 **A. That's correct.**
 25 **Q.** And you know because of the business

1 that you're in, sometimes planning and zoning
 2 administrators or the office gets inundated with
 3 folks who may not be wild about a particular
 4 project?
 5 **A. That's correct.**
 6 **Q.** And it comes with the territory?
 7 **A. That's correct.**
 8 **Q.** And you've, I assume, Mr. Oaas, in your
 9 years of being in the development business, since
 10 you left Micron, have had some flavor of that,
 11 perhaps, in the development business. Would that
 12 be a fair statement?
 13 **A. Yes, but not to the level that we saw**
 14 **here.**
 15 **Q.** I understand. And -- well, strike
 16 that.
 17 Let me ask you this: In your -- in
 18 your memo that's 1023 and in your discussion about
 19 it with Mr. -- it's Exhibit 1023.
 20 A lot of free advice over here.
 21 MR. BANDUCCI: I thought he was talking
 22 about the date, and I thought he had it wrong,
 23 Your Honor.
 24 MR. BRASSEY: Once again -- I forgot what I
 25 was going to ask you.

1 THE WITNESS: He's been very willing to give
 2 me advice.
 3 MR. BANDUCCI: All right. Enough.
 4 MR. BRASSEY: I kind of lost track of what I
 5 was thinking.
 6 MR. HOWELL: 1023.
 7 MR. BRASSEY: Yeah, I know.
 8 BY MR. BRASSEY:
 9 **Q.** What I was going to ask you is this:
 10 With regard to the application, obviously,
 11 Mr. Wolford thought you hadn't gone about it quite
 12 right. I mean, that's maybe an
 13 overgeneralization, but, obviously, he was a
 14 little critical of your application?
 15 **A. I would say that I asked him for some**
 16 **feedback on what we could do better the next time.**
 17 **Q.** Okay. And is that what you outlined in
 18 your memorandum or were there other items?
 19 **A. That's all I recall we talked about.**
 20 **Q.** And one of the things he talked to you
 21 about, at least in his experience in Boise County,
 22 that people were interested in tax base and
 23 potential jobs, weren't they?
 24 **A. Among other things, but, yes.**
 25 **Q.** Okay. I mean, there are other issues

1 people worry about all the time, but in Boise
 2 County that was, according to Mr. Wolford, a big
 3 deal because of the economy that exists in Boise
 4 County. Would that be a fair statement?
 5 **A. Well, you would have to ask him,**
 6 **but --**
 7 **Q.** Is that what you gathered?
 8 **A. Yes.**
 9 **Q.** On the meeting, Mr. Oaas, that you
 10 mentioned at the Grange Hall, were any of the
 11 county commissioners there that you're aware of?
 12 **A. No, they were not.**
 13 **Q.** When you were talking about the takings
 14 analysis just a little bit ago, with regard to
 15 questions that were asked by your counsel, a
 16 taking analysis, part of it is to determine
 17 whether all economic benefit has been erased, so
 18 to speak, from, in this case, your property at
 19 Klam Ranch? Isn't that part of the process?
 20 **A. That's correct.**
 21 **Q.** And so when we were looking at some of
 22 the paragraphs we looked at in the takings
 23 analysis, that's why certain statements are made
 24 in the takings analysis with regard to various
 25 uses that can be made of the project?

1 MR. BANDUCCI: Objection; calls for
2 speculation, Your Honor.
3 MR. BRASSEY: Well -- Your Honor, he's
4 testified about the takings now, so I think that's
5 a fair question.
6 MR. BANDUCCI: Well, then maybe I'll just
7 object on the grounds that it's vague.
8 THE COURT: I'm going to overrule the
9 objection. I think this is really foundational or
10 background to other questions, so I'll allow you
11 to go ahead and proceed.
12 MR. BRASSEY: I kind of forgot my question.
13 (Record read.)
14 THE WITNESS: That's correct.
15 BY MR. BRASSEY:
16 **Q.** You're familiar, at least to some
17 degree, Mr. Oaas, with regulatory takings
18 analysis, correct, as it relates to property?
19 **A.** Yes. I wouldn't say that I'd gone
20 through it multiple times, but, generally, I'm
21 pretty familiar with it.
22 **Q.** In your memo -- I wanted to ask you
23 something -- at the very end you say, "We're in
24 this to win the war, not the first battle."
25 What's that mean?

1 potential witness.
2 THE COURT: Okay.
3 BY MR. BRASSEY:
4 **Q.** Mr. Oaas, with regard to the team that
5 looked at the regulatory analysis provided by
6 Boise County, did the team include any lawyers?
7 **A.** Did the team include any lawyers?
8 **Q.** Right.
9 **A.** As part of our application process for
10 entitlements?
11 **Q.** No. Well, as part of the decision that
12 you indicated was made after the regulatory taking
13 analysis was received, you mentioned the team got
14 together and made a decision that it was final,
15 and there was nothing to be done. And my question
16 is: Did that team involve any of your counsel
17 from Spink Butler?
18 **A.** Yes.
19 **Q.** So those -- those decisions were made
20 in conjunction with your lawyers?
21 **A.** Yes.
22 **Q.** That you've just described?
23 **A.** That's correct.
24 **Q.** Now, I assume, then, that your lawyers
25 gave you advice about the Petition for Judicial

1 **A.** Well, specifically, you know, part of
2 my job as leader in the company is to rally the
3 troops. You know, when you get beaten down, as we
4 had been, already, in the Green Ranch property, I
5 wanted to raise the spirits, let them understand
6 that we're not in this to get run out of town.
7 **Q.** Your dealings with planning and zoning
8 in Boise County with the Alamar Ranch was not the
9 first time you've dealt with planning and zoning
10 for the county; correct?
11 **A.** That's correct.
12 **Q.** You have a project in Garden Valley of
13 which you and Mr. Laney are part owners; is that
14 right?
15 **A.** That's correct.
16 **Q.** Called South Fork Landing?
17 **A.** That's correct.
18 **Q.** And it's a planned unit development?
19 MR. BANDUCCI: Your Honor, this exceeds
20 scope. And I know that they've called Mr. Oaas in
21 their case in chief.
22 THE COURT: Do you intend to call Mr. Oaas?
23 MR. BRASSEY: I'll move on, Judge.
24 THE COURT: Thank you.
25 MR. BRASSEY: We've listed him as a

1 Review that was actually filed in Boise County?
2 **A.** That's correct.
3 **Q.** And it would be fair to say that you
4 talked to them about how that process worked?
5 **A.** Yes.
6 **Q.** And you had -- you filed the petition,
7 and you, actually, had the ability to have the
8 court in Boise County review the actions of the
9 county commissioners to look at the decision to
10 determine if it was appropriate?
11 **A.** I think you're -- is that a yes-no
12 answer or --
13 **Q.** Yeah. Yes. Sorry.
14 **A.** Would you read the question again,
15 please, I'm sorry.
16 MR. BRASSEY: Well, I'll ask it again.
17 Well, you'd better read it back.
18 (Record read.)
19 MR. BANDUCCI: Objection, Your Honor. I
20 think this assumes facts not in evidence. I don't
21 think anything was filed in Boise County relative
22 to judicial review.
23 MR. BRASSEY: It hasn't been admitted yet,
24 Judge. Let's show the witness Defendant's
25 Exhibit 2062.

1 THE COURT: I've turned off the jury
 2 monitor.
 3 MR. BRASSEY: Pat, can we go to the end --
 4 MR. BANDUCCI: We'll stipulate its
 5 admission.
 6 MR. BRASSEY: Okay. We'd move for the
 7 admission, Judge, of --
 8 THE COURT: All right. 2062 is admitted.
 9 (Defendant's Exhibit No. 2062
 10 admitted.)
 11 BY MR. BRASSEY:
 12 **Q.** Now, Mr. Oaas, was it your
 13 understanding when you met with the legal team
 14 that Alamar Ranch, LLC, had the right to go to
 15 state court and have a state judge review this
 16 matter to determine certain aspects of the
 17 decision and whether the decision, in a general
 18 sense, was appropriate?
 19 MR. BANDUCCI: Your Honor, I think the way
 20 that question is framed that it invades the
 21 attorney-client privilege.
 22 MR. BRASSEY: Well --
 23 THE COURT: I'll sustain the objection.
 24 Rephrase the question.
 25 BY MR. BRASSEY:

1 **Q.** Let me ask you this, Mr. Oaas: I
 2 assume when I'm asking you those sorts of
 3 questions, those are discussions you would have
 4 had with your counsel?
 5 **A.** That's correct.
 6 **Q.** Do you know whether with regard to the
 7 petition for review -- well, strike that.
 8 What happened to the petition? Do you
 9 know?
 10 **A.** The petition that's on the screen here?
 11 **Q.** Correct.
 12 **A.** I believe that we withdrew the
 13 petition.
 14 **Q.** Do you know if the petition was stayed
 15 by agreement of the parties, meaning to hold it?
 16 **A.** I recall there being some discussion
 17 about that, but I don't -- you know, the details
 18 are -- have escaped me.
 19 **Q.** And without regard or without getting
 20 into, Mr. Oaas, any discussions with your lawyers,
 21 the Petition for Judicial Review was not pursued
 22 by Alamar Ranch to determine whether a judge might
 23 overturn the decision made by the Board of County
 24 Commissioners?
 25 **A.** Is your question did we withdraw the

1 **petition?**
 2 **Q.** No. Whether it was stayed, meaning
 3 held in abeyance, or withdrawn, Alamar Ranch made
 4 a decision to not have the court in Boise County
 5 determine whether the decision of the Board of
 6 County Commissioners was legal?
 7 **A.** Alamar Ranch chose to withdraw the
 8 petition and pursue its legal remedies under the
 9 Fair Housing Act.
 10 **Q.** Okay. And was it your understanding
 11 that part of the relief or decision that you might
 12 have obtained at the county court level was the
 13 judge, the court, overturning the commissioners'
 14 decision? I'm not saying he or she would have.
 15 Is that your understanding?
 16 MR. BANDUCCI: Objection; lack of
 17 foundation. It calls for a legal conclusion as to
 18 this man's understanding of --
 19 THE COURT: Well, as we discussed earlier,
 20 I've allowed the witness, in terms of explaining
 21 their actions, provide the jury with an
 22 understanding of what they understood the law to
 23 be.
 24 MR. BRASSEY: Your Honor, I can rephrase.
 25 THE COURT: Rephrase.

1 BY MR. BRASSEY:
 2 **Q.** Mr. Oaas, what I'm trying to get at
 3 is -- I don't want to know what your lawyers told
 4 you. What I want to know is your understanding of
 5 a Petition for Judicial Review, and that's why I
 6 asked you your knowledge as to whether it was your
 7 understanding that this is a process under Idaho
 8 law by which a decision, such as that rendered by
 9 the Board of County Commissioners in this case,
 10 can be reviewed by the court for its legality?
 11 MR. BANDUCCI: Your Honor, not only legal
 12 conclusion, but I think it's a 403 objection at
 13 this point. It's -- whether or not Alamar could
 14 pursue its rights in Boise County or in federal
 15 court, I'm not sure that's got anything to do with
 16 the action before you. And I think, based on 403,
 17 we're heading down a --
 18 THE COURT: I'm inclined to sustain the
 19 objection. Because we are injecting a side issue
 20 into the case. Now, if you want to persuade me at
 21 a sidebar that, in fact --
 22 MR. BRASSEY: Your Honor, I'll move on. I'm
 23 going to re-call him, and I might ask to do that.
 24 THE COURT: All right.
 25 BY MR. BRASSEY:

1 **Q.** Mr. Oaas, one of the things you
2 indicated that the team made the decision that you
3 just didn't feel like there was anything that
4 could be done; correct? After the regulatory
5 takings analysis came out?

6 **A.** We made the decision as we -- as I'd
7 indicated, we made the decision that we were going
8 to pursue our legal remedies through the Fair
9 Housing Act.

10 MR. BRASSEY: Can we put up the regulatory
11 taking? Is it 1092? Let's go down to the end.

12 BY MR. BRASSEY:

13 **Q.** Mr. Oaas, this is the Regulatory
14 Takings Analysis, and the conclusion being that
15 "Based on the preceding analysis, the Board
16 concludes that the granting of the conditional use
17 permit to operate a residential treatment facility
18 for at-risk teenage youth does not constitute a
19 regulatory taking."

20 Do you see that?

21 **A.** Yes.

22 **Q.** Then down at the end, it's dated
23 June 2nd -- let's highlight that, Pat -- June 2nd,
24 2008. Do you see that?

25 **A.** Yes.

1 true that neither you nor Mr. Laney nor anyone
2 else on behalf of Oaas Laney, YTC, or Alamar
3 Ranch, asked the county, or anyone at the county,
4 nor did you ask your legal counsel to ask the
5 county, for any kind of relief or accommodation
6 from the decision that was rendered by the Board
7 of County Commissioners on March 10, 2008, and
8 memorialized in their written decision and order?

9 MR. BANDUCCI: I'd like to have that -- that
10 was a long question, Your Honor. I was about to
11 make an objection and then -- it may have cured
12 the concern I had with the question.

13 THE COURT: If the objection is --

14 MR. BANDUCCI: Well, first of all, as to
15 time, because I'm not sure that -- I'm trying to
16 remember the entire question -- but I'm not sure
17 that the question is limited to a request for
18 reasonable accommodation at any time, because
19 that's, obviously, a big issue in the case.

20 THE COURT: Just a moment. Just a moment.
21 I'm going to overrule the objection. I think the
22 question, as asked, has to do with requesting an
23 accommodation after the decision was issued.

24 MR. BRASSEY: Correct.

25 THE COURT: And nothing more than that.

1 **Q.** Let's go back to the Petition for
2 Judicial Review. And the Petition for Judicial
3 Review, at least according to the document, was
4 received by the clerk of the court on June 27th,
5 2008, 25 days after the regulatory taking analysis
6 came out; is that right?

7 **A.** Yes.

8 **Q.** Mr. Oaas, isn't it true that neither
9 you nor Mr. Laney nor anyone on behalf of Oaas
10 Laney or Alamar Ranch, nor anyone on your behalf,
11 including your legal counsel, went back to Boise
12 County after the written decision was entered by
13 the Board of County Commissioners asking them for
14 any accommodation or any relief from the decision
15 that was made and that's been entered as a matter
16 of record in this case? Isn't that true? That
17 was never done.

18 **A.** The decision reached by the Board of
19 County Commissioners was an effective denial, and
20 under -- as a result of the effective denial,
21 primarily due to the reduction of the head count
22 to 24, there was no -- and because it was final,
23 there was no possibility -- there was no avenue.
24 There was no ability for us to do that.

25 **Q.** Okay. Here's my question: Isn't it

1 MR. BRASSEY: Right.

2 THE COURT: That is an issue that I think is
3 better left for the jury to decide, whether or
4 not -- what the statute required. The court will
5 instruct the jury as to what the statute provides,
6 and then the jury can determine whether or not the
7 efforts made by Alamar constituted a request for
8 reasonable accommodation or not. And, therefore,
9 I think it's appropriate for the witness to answer
10 counsel's question.

11 Do you understand the question?

12 THE WITNESS: I believe so.

13 THE COURT: All right.

14 THE WITNESS: Mr. Brassey, in our minds,
15 final is final.

16 BY MR. BRASSEY:

17 **Q.** Mr. Oaas, I'd like an answer to my
18 question. And it's yes or no.

19 **A.** The answer is it was final, so, no.

20 **Q.** And there wasn't a time when you
21 authorized or requested your then legal counsel to
22 go to Boise County's legal counsel to discuss, "Is
23 there anything we can do about this decision?"
24 You didn't authorize Spink Butler or anyone else
25 to do that?

1 MR. BANDUCCI: Asked and answered,
2 Your Honor.
3 THE COURT: Counsel, again, you've not put a
4 time frame on it.

5 MR. BRASSEY: I apologize, Judge.
6 BY MR. BRASSEY:

7 **Q.** Mr. Oaas, and let me just say if I ask
8 you several questions, I'm talking about after the
9 decision was entered by the Board of County
10 Commissioners. You never authorized your lawyers
11 to go to the lawyers for Boise County to see if
12 there was something that could be done about the
13 decision? You didn't authorize that, did you?

14 MR. BANDUCCI: Asked and answered. And
15 that's the third time he's asked the same
16 question.

17 THE COURT: I'm going to allow it one more
18 time, and then let's move on, Mr. Brassey.

19 MR. BRASSEY: Thank you, Judge.

20 THE COURT: You may answer.

21 THE WITNESS: The answer is it was a final
22 decision.

23 BY MR. BRASSEY:

24 **Q.** And you didn't make that authorization?

25 **A.** Because it was a final decision, no.

1 **Q.** It's true you didn't authorize that;
2 correct?

3 MR. BANDUCCI: Asked and answered,
4 Your Honor. He's answered the question.

5 THE COURT: Counsel, again, Mr. Brassey, I
6 think you interposed a double negative into the
7 question.

8 MR. BRASSEY: I just want to make sure --

9 THE COURT: I think it's clear that he --
10 he's indicated that he did not authorize his
11 attorneys to approach the county attorney or
12 planning and zoning.

13 BY MR. BRASSEY:

14 **Q.** Or the Board of County Commissioners,
15 correct, Mr. Oaas?

16 **A.** That is correct.

17 MR. BRASSEY: Your Honor, we may re-call
18 Mr. Oaas in our case.

19 Thank you, sir.

20 THE COURT: Redirect?

21 MR. BANDUCCI: No, Your Honor.

22 THE COURT: All right. You may step down,
23 Mr. Oaas. Thank you.

24 THE WITNESS: Thank you.

25 THE COURT: Call your next witness.

1 MR. BANDUCCI: Plaintiff rests.

2 ^ (Plaintiffs rest.)

3 THE COURT: All right. Mr. Brassey, are you
4 prepared to go forward? I know there's motions I
5 need to take up, but I would like to have them
6 made formally, for the record, but reserve
7 argument on them and perhaps proceed; otherwise,
8 we're going to lose some time here this afternoon.
9 But I don't know where you are.

10 MR. BRASSEY: Can we approach, Your Honor?

11 THE COURT: Yes.

12 (Sidebar commences as follows:)

13 MR. BRASSEY: I want to make sure what
14 you're telling me. I mean, we have a witness here
15 we can call. We have a motion --

16 THE COURT: I'm going to ask you to make the
17 motion here. I assume you're making a Rule 50
18 motion for judgment as a matter of law on all
19 counts?

20 MR. BRASSEY: Correct.

21 THE COURT: What I'd like to do is reserve
22 taking that up so we can move forward.

23 MR. BRASSEY: That's fine.

24 THE COURT: But without any jeopardy to the
25 motion itself. I'm just asking you to go ahead

1 and proceed. I'll take it up, perhaps -- I have a
2 complicated case management conference tomorrow
3 afternoon at, I think -- what time does that
4 start?

5 THE CLERK: 3:00.

6 THE COURT: 3:00.

7 MR. BRASSEY: Maybe we could quit -- we're
8 kind of shuffling witnesses now, Judge, because
9 today may be --

10 THE COURT: We may take it up tomorrow
11 morning at 8:00. That's the best I can do.

12 Because I'm just not going to have time to,
13 otherwise, take it up after. If you would prefer
14 to do it, I guess we could do it Wednesday at
15 8:00.

16 MR. HOWELL: We can do it tomorrow morning.
17 Whatever the court prefers.

18 THE COURT: Okay. Keep in mind I've heard
19 the evidence, so all you need to do is get right
20 to the point on your arguments, and then we can go
21 from there.

22 All right. Let's go ahead and call
23 your next witness.

24 MR. BRASSEY: Thank you, Judge.

25 (Sidebar concluded.)

1 THE COURT: Counsel, as we discussed at
2 sidebar, the Rule 50 motion has been made, and the
3 court will, essentially, take it under advisement,
4 pending argument of counsel, which we'll hear
5 tomorrow morning. Without prejudice to the
6 court's consideration of that motion, I'm going to
7 ask counsel to go ahead and proceed with the
8 presentation of their first witness.

9 ^ (Defendant's Rule 50 motion made and
10 taken under advisement.)

11 ^ (Defendant's case commences.)

12 Mr. Howell?

13 MR. HOWELL: Rora Canody. Could I go get
14 her, Your Honor?

15 THE COURT: Yes, you may.

16 MR. BANDUCCI: Your Honor, while they're
17 retrieving Ms. Canody, we had a motion in limine
18 on this case.

19 THE COURT: There is -- and I read the
20 opening. Was there a reply brief filed?

21 MR. BANDUCCI: No.

22 THE COURT: Because I read the opening brief
23 over the weekend, but I wasn't -- at that point,
24 at least, a reply brief had not been filed. I'll
25 just have to take it up as the matter comes up.

1 plaintiffs, I think on Friday or sometime late
2 last week.

3 MR. BANDUCCI: We filed it -- I think we
4 found out about Ms. Canody being their first
5 witness on Saturday, and so we filed a motion on
6 Saturday, Your Honor.

7 THE COURT: I guess that's why I didn't get
8 to look at it until Sunday, I guess.

9 MR. BANDUCCI: I'm not surprised at all,
10 Your Honor.

11 THE COURT: So now I know who to blame for
12 the weekend.

13 MR. BANDUCCI: When you said we filed it on
14 Friday, I was thinking that was better timing than
15 I think we had.

16 THE COURT: All right. Although, I think we
17 will need to take that up, because I am fairly
18 strict about disclosures under Rule 26 being
19 complied with so counsel has fair notice of what
20 the witness's testimony will be.

21 Proceed, Mr. Howell.

22 MR. HOWELL: Thank you, Your Honor.

23 DIRECT EXAMINATION

24 BY MR. HOWELL:

25 Q. Mrs. Canody, are you currently

1 In fact, I'm going to pull it up here in a minute
2 so I can see the motion again.

3 Ms. Canody, would you please come to
4 your right there and around counsel table, step
5 before Ms. Gearhart. She'll place you under oath
6 and then direct you from there.

7 RORA A. CANODY,

8 having been first duly sworn to tell the whole
9 truth, testified as follows:

10 THE CLERK: Please state your complete name
11 and spell your last name for the record.

12 THE WITNESS: Rora A. Canody, C-A-N-O-D-Y.

13 THE COURT: Mr. Howell, you may inquire.

14 The pending motion has to do with
15 whether or not the initial disclosures concerning
16 this witness provides -- or whether you intend to
17 go beyond the subject matter set forth in the
18 initial disclosure. We have about 25 minutes
19 before we'll recess for the evening. Perhaps, we
20 could be very careful to stay within that
21 disclosure, and if we're going to go beyond that,
22 we're going to have to have a discussion at
23 sidebar as to whether there was a seasonable
24 supplementation of the initial disclosure. That's
25 pursuant to a motion in limine filed by the

1 employed?

2 A. Yes, I am.

3 Q. Where are you employed?

4 A. With the Boise County Planning and
5 Zoning Department.

6 Q. What is your position there?

7 A. I'm the administrative assistant.

8 Q. How long have you held that job?

9 A. Almost four years now.

10 Q. Where do you currently reside?

11 A. I live in Idaho City.

12 Q. And how long have you lived there?

13 A. Since September of 1976.

14 Q. Could you just give the jury a
15 thumbnail sketch of your educational background?

16 A. Yes. I graduated from high school in
17 1969 in Southern California, and then I attended
18 the Boise State University and graduated in May of
19 1988 with a bachelor of arts in accounting.

20 Q. Are you married?

21 A. Yes, I am.

22 Q. And kids?

23 A. I have two. I have a daughter that
24 just turned 40 this year. She lives in Texas.

25 And my son is 43, and he currently is a teacher in

1 Idaho City.

2 **Q.** Now, did you say you moved to Idaho
3 City, was it 1975 or '76?

4 **A.** I moved to Idaho in 1975, but I moved
5 into Idaho City in '76.

6 **Q.** Okay. When you moved into Idaho City,
7 did you obtain employment there?

8 **A.** Yes. I became the city clerk for the
9 City of Idaho City, a part-time position.

10 **Q.** How long did you hold that job?

11 **A.** Until 1983 when I started college. And
12 the job became full time, so I couldn't take that
13 job because I had started college.

14 **Q.** And you mentioned you obtained a
15 degree; is that right?

16 **A.** Yes.

17 **Q.** And then you -- what did you do after
18 graduating from college?

19 **A.** After I graduated from college, I was
20 hired by Boise County clerk's office as a
21 part-time deputy court clerk in January of 1988.
22 And I held that job until December of 1994 when I
23 became the elected county clerk.

24 **Q.** Okay. And how long did you hold the
25 county clerk position?

1 administrator.

2 **Q.** And then who took the position after
3 your interim position?

4 **A.** That was Patti Burke, and she is still
5 our current administrator.

6 **Q.** Okay. Now, are you familiar with the
7 Boise County laws regarding land use development?

8 **A.** Yes, I am.

9 **Q.** How are you familiar?

10 **A.** I've studied both the -- well, both of
11 our ordinances, the subdivision ordinance, the
12 zoning and development ordinance. We have a
13 comprehensive plan. We also have our road
14 standards ordinance and our rural addressing
15 ordinance, building permit ordinance, and our
16 resolutions.

17 **Q.** And do you utilize those ordinances in
18 the course and scope of your employment?

19 **A.** Yes, I do.

20 **Q.** Are you familiar with the processes and
21 procedures that an applicant goes through in order
22 to obtain a CUP or conditional use permit?

23 **A.** Yes, I am.

24 **Q.** And I just indicated a CUP. Are you
25 okay if I call it a CUP or a C-U-P?

1 **A.** I was county clerk until January of
2 2007.

3 **Q.** And does that bring us up to speed when
4 you obtained, I guess, your job with the Planning
5 and Zoning Commission?

6 **A.** That's correct. I went from being
7 elected county clerk to the P & Z administrative
8 assistant.

9 **Q.** Who was the P & Z administrator when
10 you were hired at the P & Z Commission?

11 **A.** Craig Wolford.

12 **Q.** And since January, I think you said
13 January 2007, have you consistently been employed
14 at the P & Z Commission?

15 **A.** Yes, I have.

16 **Q.** Have you held the same job the entire
17 time?

18 **A.** Yes.

19 **Q.** Have you served in any other capacities
20 during that time?

21 **A.** There was a period of a month and a
22 half, almost two months, where Mr. Wolford retired
23 from Boise County, and I became the interim
24 administrator while the Board of County
25 Commissioners searched for a new P & Z

1 **A.** Yes, that's fine.

2 MR. HOWELL: Pat, could you show the
3 witness -- or could we put up on the display
4 Exhibit 1000 -- which, Your Honor, has admitted
5 into evidence.

6 BY MR. HOWELL:

7 **Q.** Are you familiar with this document,
8 Ms. Canody?

9 **A.** Yes, I am. It's our zoning and
10 development ordinance.

11 MR. HOWELL: And, Pat, could you go to page
12 10 of 86, I guess. I'm not sure how you want me
13 to refer to it. No, no, no. You were right
14 first. It's page 6, but -- okay.

15 BY MR. HOWELL:

16 **Q.** Ms. Canody, I've gone to page 6. Do
17 you see it in front of you on the monitor?

18 **A.** Yes, I do.

19 **Q.** Okay. And I just want to give the jury
20 some background, I guess, on the conditional use
21 permit, the CUP. And explain to the jury what it
22 is.

23 MR. BANDUCCI: Your Honor -- excuse me. I'm
24 sorry. I thought you were done.

25 Your Honor, this is not what she was

1 designated to testify about.

2 THE COURT: Counsel, I'm going to try to do
3 this without sending the jury out or at a sidebar.
4 When you say that "she was designated," are you
5 talking only about the initial disclosure?

6 MR. BANDUCCI: That's all that we have on
7 her, other than what was given to us in the
8 witness list, which, of course, is -- was provided
9 to us right before trial.

10 MR. HOWELL: Your Honor?

11 THE COURT: Mr. Howell.

12 MR. HOWELL: She was identified, obviously,
13 it's a minimal disclosure. I have no -- we have
14 no qualms with that, Your Honor. The point of her
15 designation as a trial witness is with respect to
16 the limitations that another witness has. And all
17 she's going to talk about is the process and
18 procedures, Your Honor, just to give the jury
19 background as to how one goes through and obtains
20 a CUP. And that was --

21 THE COURT: Are you referring to Ms. Burke?

22 MR. HOWELL: Yes.

23 MR. BANDUCCI: Well, Your Honor, they
24 deposited Ms. Burke as a trial deposition
25 preservation. They've got their deposition

1 preservation. They have now -- they're trying to
2 qualify, with all due respect, an administrative
3 assistant to walk this jury through the ordinance,
4 which is getting pretty close to expert testimony,
5 and, certainly, is not in the designation. The
6 only designation we have is that Ms. Canody has
7 knowledge with regard to the plaintiffs'
8 application for a CUP brought before the Planning
9 and Zoning Commission.

10 THE COURT: All right. Counsel, give me
11 just a moment to look at the -- I'll tell you
12 where my concern is. The provisions of Rule 26(1)
13 are not, particularly, clear as to exactly how
14 much detail must be included in that initial
15 disclosure. And therein lies my concern.

16 The testimony is going to be restricted
17 just to the procedures that are normally followed
18 in that office or with regard to the procedures
19 actually used in the plaintiffs' application.

20 MR. HOWELL: The procedures followed in the
21 office, Your Honor. So I -- well, it's going to
22 be limited to the customary procedures and
23 policies -- or procedures utilized by Boise County
24 or by an applicant to go through and obtain a CUP.
25 It's not getting into any factual issues

1 pertaining to Alamar, the application or, you
2 know, what people said, anything like that, Judge.

3 MR. BANDUCCI: That's the concern I have,
4 Your Honor. I mean, that's not at all what she
5 was designated to testify about.

6 THE COURT: Well, the disclosure says --

7 MR. BANDUCCI: It relates to the plaintiffs'
8 application, and it limits it to the Planning and
9 Zoning Commission. My concern here, candidly, is
10 that we're going to end up having Ms. Canody
11 testify about, you know, what people normally do
12 and what the normal processes are and --

13 THE COURT: Okay.

14 MR. BANDUCCI: -- and that's --

15 THE COURT: Well, at this point, for the
16 next 15 minutes, until I have a chance to recess
17 and do some research on this, I am going to limit
18 you to the topic mentioned in the initial
19 disclosure, which is testimony with regard to the
20 plaintiffs' application for a conditional use
21 permit brought before the Planning and Zoning
22 Commission, which is what I understand she was
23 designated for in the initial disclosures.

24 MR. BANDUCCI: Correct.

25 MR. HOWELL: Okay, Your Honor. And just so

1 I don't run afoul of the court's order,
2 Your Honor, the last question, I think, goes --
3 doesn't that go right into that issue?

4 THE COURT: Well, it may. Why don't you
5 rephrase it just to be sure.

6 BY MR. HOWELL:

7 **Q.** Ms. Canody, do you know the time period
8 that Alamar Ranch filed a CUP application?

9 **A.** I don't remember the date that it was
10 accepted by the administrator.

11 **Q.** Okay. And I mean, it's into evidence,
12 and I can represent to you that it occurred in the
13 spring of 2007. Would you have been working in
14 the office at that time?

15 **A.** Yes, I did work in the office at that
16 time.

17 **Q.** Were you familiar with the procedures
18 that Alamar would have had to follow with respect
19 to the CUP application?

20 **A.** Yes.

21 **Q.** And can you just -- can you tell the
22 jury what a conditional use permit is?

23 MR. BANDUCCI: Your Honor, I'm sorry, but
24 this is -- this is a thinly veiled attempt to
25 start talking about general questions about a CUP,

1 and she is -- first of all, there's no
 2 qualification on this, but it is not -- I mean, if
 3 she wants to testify that this is the application,
 4 and here's how we handled Alamar's application at
 5 the Planning and Zoning level, I have no objection
 6 to that. But if she's going to be used as,
 7 basically, an expert on what a CUP is and how you
 8 should do this, I mean, we're back to where we
 9 were.

10 THE COURT: Let's rephrase the question
 11 again, Mr. Howell.

12 MR. HOWELL: Okay.

13 BY MR. HOWELL:

14 Q. Does the --

15 MR. HOWELL: Well, I guess, Judge, the
 16 problem I'm having is nobody has really set forth
 17 and explained the process yet, and that's where we
 18 were going with this.

19 THE COURT: Well, if you feel you can't go
 20 any further until I have a chance to review it, I
 21 suppose we could just recess early for the
 22 evening, and then I'll take a look at this and
 23 take it up again tomorrow morning.

24 MR. HOWELL: I would appreciate that,
 25 Your Honor.

1 THE COURT: All right. Ladies and
 2 gentlemen, I think we'll just have to take the
 3 recess at this time. Perhaps, what I'll do is
 4 I'll send you home for the evening, and I'll have
 5 counsel remain, and we can discuss this further
 6 and, perhaps, resolve the issue.

7 As we take the evening recess, I'll,
 8 again, admonish you not to discuss the case among
 9 yourselves or with anyone else, nor should you
 10 form or express any opinions about the case until
 11 it is finally submitted to you. Since, I guess,
 12 I'll keep everyone here in the courtroom, you
 13 shouldn't have too much difficulty bumping into
 14 them in the hallways. But, again, be very careful
 15 to follow the court's admonition throughout the
 16 course of the trial.

17 Ms. Huang, if you want to escort the
 18 jury out.

19 We're going to start at 8:30 tomorrow
 20 morning. We'll recess around 2:30.

21 (Jury absent.)

22 THE COURT: The concern I have, I guess,
 23 Mr. Banducci, the language of Rule 26(a)(1)
 24 -- (a)(i) provides that "a party must, without
 25 awaiting a discovery request, provide to the other

1 parties: the name and, if" -- well, the name "of
 2 each individual likely to have discoverable
 3 information -- along with the subjects of that
 4 information -- that the disclosing party may use
 5 to support its claims or defenses, unless the use
 6 would be solely for impeachment."

7 The question is, is the disclosure of
 8 the discoverable information or is it the name of
 9 the individuals? I'm assuming it's the name of
 10 the individuals, and I think that's your argument,
 11 that you have to disclose those individuals and
 12 the subjects of their information that a party
 13 intends to use to support their claims or
 14 defenses.

15 MR. BANDUCCI: Right, Your Honor, and you
 16 know, what I would -- what I would say is this,
 17 just so that the court has, kind of, the
 18 practical, real-world context for this.
 19 Ms. Canody is a secretary with -- and, believe me,
 20 the world does not run without that important
 21 aspect of a business or office or public office --
 22 but with this sort of minimal description, and
 23 that's it, no supplementation during discovery --
 24 and, frankly, Ms. Canody's name not coming up at
 25 all in all the other depositions that we took,

1 there is no way we could be on notice of anything
 2 other than what's here.

3 Now, if you lay that up next to what
 4 they're saying she's going to testify to about
 5 now, she's talking about procedures and processes
 6 relative to building a facility such as Alamar,
 7 not just Alamar, but -- now we're talking about
 8 building. Then she's going to testify with regard
 9 to other developments and proposed development in
 10 Boise County and the processes the applicants,
 11 whoever they might be, went through, and then
 12 she's going to talk about a specific residential
 13 treatment center named "Narconon."

14 I mean, there's no way that we could,
 15 under any conceivable scenario, have anticipated
 16 that Ms. Canody would be producing this sort of
 17 testimony.

18 And I think that's -- I mean, let's
 19 talk -- I mean, that's what the rule is there for.
 20 The rule is there so that both sides can have a
 21 good sense of who's going to say what and the
 22 subject matter. You can't do that. And if you do
 23 do that at initial disclosures, fine, but then
 24 the -- there is a requirement in the rule for
 25 supplementation.

1 And this is -- this is, as they say,
2 this is lying behind the log, as far as I'm
3 concerned, and I -- I mean, we have no idea what
4 Ms. Canody is going to say about all of this. And
5 they had Patti Burke, she could have testified
6 about the ordinance. They have commissioners that
7 they could call to testify about the ordinance.
8 But they don't. And, in fact, you know, there is
9 no designation of such.

10 So I think that this is -- aside from
11 not meeting the letter of the rule, it's just,
12 from a practical standpoint, it's tremendously
13 prejudicial to put us in the position where all of
14 a sudden, now, this is the first witness they call
15 who is going to be talking about topics we had no
16 clue about.

17 THE COURT: All right. Mr. Howell.

18 MR. HOWELL: Thank you, Your Honor.

19 The timing of all of this is important,
20 Judge. When we learned -- and there was briefing
21 on the Patti Burke issue and the motion to vacate.
22 When we learned of that, Your Honor, we knew of
23 her limitations with respect to her ability or
24 inability to read. And she -- I mean, it's in the
25 deposition testimony. She doesn't have the

1 Ms. Canody and Ms. --

2 THE COURT: No, I know it's listed the same.
3 But I'm wondering if there was a supplementation
4 as to Ms. Burke?

5 MR. HOWELL: No, Your Honor. I mean --
6 well --

7 THE COURT: Well, here is what the
8 rule -- you know, I read the rule just a moment
9 ago, and it requires as part of an initial
10 disclosure, which must be done at the very outset,
11 that counsel provide to the opposing side the name
12 of each individual likely to have discoverable
13 information along with the subjects of that
14 information, that the disclosing party may use to
15 support its claims or defenses.

16 Then the commentary to the rule
17 provides or indicates that that subparagraph
18 requires "an identification of all persons who are
19 likely to have discoverable information relevant
20 to the factual disputes between the parties. All
21 persons with such information should be disclosed,
22 whether or not their testimony will be supportive
23 of the position of the disclosing party. As
24 officers of the court, counsel are expected to
25 disclose the identity of those persons who may be

1 ordinance memorized. She can't read the
2 ordinance. Our point, then, was to, okay, we need
3 somebody here to explain what this process is all
4 about. That's all this is, Judge. They've known
5 about her. Her name shows up in an email.
6 They've talked about --

7 THE COURT: When did her name show up in the
8 email?

9 MR. HOWELL: It was admitted in a --

10 THE COURT: Oh, you mean in a trial exhibit
11 reference?

12 MR. HOWELL: Yeah, from an email back in
13 January 2008. And we're not using this witness,
14 Judge, to go into factual disputes or what he said
15 or she said. It's simply a matter of laying --
16 trying to give the jury a roadmap as to what
17 happened in this case, from the county's
18 standpoint, as to the application that was
19 submitted and is at issue.

20 THE COURT: Was a disclosure made of
21 Ms. Burke as having this information, that you
22 intended to call her?

23 MR. HOWELL: Judge, I'd have to look at it.
24 I'm sorry.

25 MR. BANDUCCI: It is the same.

1 used by them as witnesses or who, if their
2 potential testimony were known, might reasonably
3 be expected to be deposed or called as a witness
4 by any of the other parties," and then it says,
5 "indicating briefly the general topics on which
6 such persons have information should not be
7 burdensome and will assist other parties in
8 deciding which depositions will actually be
9 needed."

10 What that's telling me is that it does,
11 in fact, require that you disclose all potential
12 witnesses, and that would include the subjects of
13 that information that the witness may testify
14 concerning; however, the last comment indicates
15 only a requirement that you briefly indicate the
16 general topics about which the witness may --
17 about which the witness has knowledge and,
18 therefore, may testify.

19 The question is whether the disclosure
20 here is sufficient to allow you to call her as
21 kind of a general witness testifying as to the
22 general procedures utilized generally, and without
23 regard to this case, or whether her testimony must
24 be restricted only to the actual procedures
25 involved in this application and only through the

1 Planning and Zoning Commission stage, since that's
2 the reference.

3 Now, Mr. Howell, that's -- that's the
4 lay of the land. I know it all came up over the
5 weekend. I had a chance to do nothing more than
6 just read the opening brief, and there was no
7 reply brief yet filed because of the fact that it
8 was not filed until Saturday. But that's what the
9 rule requires.

10 Now, within that parameter, Mr. Howell
11 -- I should add also that the enforcement
12 provision on that is in Rule 37. And Rule 37 says
13 that, I think, except for -- was it "good cause
14 shown" or something to that effect, "evidence that
15 is not disclosed should be excluded."

16 It says if -- 37(c)(1) says that "If a
17 party fails to provide information or identify a
18 witness, as required by Rule 26(a), the party is
19 not allowed to use that information or witness to
20 supply evidence on a motion unless" -- "or at
21 trial, unless the failure was substantially
22 justified or is harmless."

23 So I guess my view is that the witness
24 is limited just to the matter set forth in the
25 initial disclosure, unless you can persuade me

1 that there was substantial justification for being
2 relieved from the requirements of Rule 26(a) or
3 you can convince me that it's harmless to the
4 other side.

5 MR. HOWELL: Well, I guess -- I'll speak to
6 that just for a moment, Your Honor, and,
7 obviously, defer to the court's ruling. But, I
8 mean, then with this witness, I will ask her
9 questions with respect to this application and how
10 the process was utilized or how it moved forward
11 throughout -- through the P & Z level. Okay? And
12 the ordinance speaks to -- I mean, I still think,
13 like the last question, "What is a conditional use
14 permit?" I'm not sure why that falls outside of
15 that.

16 Because all we're doing here,
17 Your Honor, is just educating the jury as to what
18 is the actual issue here. This is a conditional
19 use permit. And so I see no prejudice or harm to
20 plaintiffs' counsel or plaintiffs when just laying
21 that just, you know, foundation for the jury in
22 order to understand what actually happened in this
23 case.

24 MR. BANDUCCI: I have no objection to the
25 answer to that question. What is a conditional

1 use permit? Let her have at it.

2 THE COURT: I'm going to allow it. Let
3 me -- let me indicate what my ruling is going to
4 be. I'm going to allow the witness to testify,
5 and I'm going to take a fairly broad view of the
6 disclosure. And I'm going to have to bring that
7 up here.

8 I think the disclosure indicated that
9 these individuals, which included both Ms. Burke
10 and Ms. Canody, have knowledge with regard to the
11 plaintiffs' application for a CUP brought before
12 the Planning and Zoning Commission.

13 I think by way of general background to
14 explain her testimony concerning the application
15 in this case, that she should be allowed to
16 identify what is a CUP, what is the Planning and
17 Zoning Commission, matters of general background
18 of that sort.

19 At this point what I'm not going to
20 allow is to have her broaden that to include some
21 testimony as to what is the norm, what is the
22 typical way in which these are processed. She can
23 testify as to how this application was processed
24 through the Planning and Zoning Commission stage.
25 She can testify as to general background matters,

1 but I'm not going to allow it to go beyond that.

2 The problem with -- I can't find that
3 it's harmless, because I already know -- you know,
4 I sense at least one of the arguments the
5 plaintiffs intend to present to the jury at the
6 close of the case -- and they're laying the
7 groundwork for it now, and, in fact, we've had
8 motions in limine on that -- is that if, indeed,
9 normal procedures were not followed, then that's
10 an indication that, in fact, there may be
11 discriminatory animus. And there's case law
12 indicating as much.

13 And so it is not harmless for the
14 county to be able to, now, stand up and call a
15 witness to identify what are the normal
16 procedures, without their having an opportunity to
17 depose that individual, to test that individual's
18 testimony through the deposition and, potentially,
19 be prepared to call a rebuttal witness in that
20 regard.

21 So at this point, that will be my
22 ruling. We'll allow her to testify about the
23 procedure used in this case through the Planning
24 and Zoning Commission stage. I'll expand that to
25 include general background information, without

1 testimony as to what is the norm or what is the
2 normal procedure. But I think that,
3 appropriately, balances the interests that I think
4 are set forth in Rule 26(a)(1) and Rule 37 -- is
5 it (c), (c)(1)?

6 MR. BANDUCCI: The other concern I have,
7 Your Honor -- you are correct in our concern --
8 but the other concerns, I am going to be quite
9 concerned of a question of Ms. Canody like, "Well,
10 you know, isn't it normal for people to come in
11 and ask for an amendment to a CUP?"

12 THE COURT: Well, that's precisely why I
13 gave as an example -- or why it's not harmless,
14 because that's one of the plaintiffs' case is that
15 what the normal processes here could clearly bear
16 upon a critical element in their case. And,
17 therefore, I'm not going to allow it, except as it
18 applies in this case, and then only through the
19 P & Z Commission stage. Okay?

20 All right. Counsel, I'll see you at
21 8:00 o'clock tomorrow morning. We'll very briefly
22 hear arguments concerning the Rule 50 motion, and
23 then try to be ready to go at 8:30 with the jury.

24 MR. BANDUCCI: Thank you, Your Honor.

25 MR. BRASSEY: Thank you, Your Honor.

1 THE COURT: We'll be in recess.
2 (Court recessed at 5:03 p.m.)
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REPORTER'S CERTIFICATE

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3
4
5 I, Tamara I. Hohenleitner, Official
6 Court Reporter, State of Idaho, does hereby
7 certify:

8 That I am the reporter who transcribed
9 the proceedings had in the above-entitled action
10 in machine shorthand and thereafter the same was
11 reduced into typewriting under my direct
12 supervision; and

13 That the foregoing transcript, pages
14 1194 to 1423, contains a full, true, and accurate
15 record of the proceedings had in the above and
16 foregoing cause.

17 IN WITNESS WHEREOF, I have hereunto set
18 my hand December 15, 2010.
19
20
21

22 -s-

23 Tamara I. Hohenleitner
24 Official Court Reporter
25 CSR No. 619

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