Volume 1

Idaho Land Use Handbook

The Law of Planning, Zoning, and Property Rights in Idaho

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VOLUME 1

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1. INTRODUCTION TO LAND USE LAW

Land use law encompasses the group of government regulations with which the property owner must comply to develop real property. The main areas of land use law are planning and zoning, subdivision regulation, and annexation. These are closely related to other topics of interest to the property owner and developer, including (1) judicial review of land use decisions, (2) eminent domain and inverse condemnation, (3) restrictions on property created by the developer's representations, (4) regional planning and public transportation, (5) impact fees, and (6) environmental considerations in real estate development. The purpose of this handbook is to offer a detailed discussion of the important issues in Idaho land use law in one place. To our knowledge, it is the first such comprehensive effort in Idaho.

Before *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926) was decided in 1926, the proposition that the government had the right to regulate the development of real property through zoning was debatable. However, the need for zoning was perceived by many. American cities were growing rapidly, and communities recognized the need for tools to ensure that development on one property did not harm other properties. There was also a growing sentiment that orderly planning would lead to more attractive cities and would enhance overall property values.

The precursors to modern, comprehensive zoning were various ordinances that tackled specific land use problems on a piecemeal basis.

> Acting under their police power authority, local governments adopted a wide range of individual laws regulating a variety of specific land use problems including the separation of incompatible uses[1] and building bulk, height, and location restrictions.[2]

Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulations: Paying for Growth with Impact Fees*, 59 S.M.U. L. Rev. 177, 193 (2006). With the

[1] *Pierce Oil Corp. v. Hope*, 248 U.S. 498, 499-500 (1919) (upholding ordinance excluding oil storage closer than three hundred feet from residences); *Hadacheck v. Sabastian*, 239 U.S. 394, 414 (1915) (upholding Los Angeles ordinance excluding existing brickyards from a residential area of the city); *Reinman v. Little Rock*, 237 U.S. 171, 180 (1915) (upholding ordinance excluding stables from a commercial district); *L'Hote v. New Orleans*, 177 U.S. 587, 600 (1900) (upholding New Orleans ordinance establishing areas of the city for prostitution).

[2] See Welch v. Swasey, 214 U.S. 91 (1909) (upholding Boston's building height limitations); see also *Eubank v. Richmond*, 226 U.S. 137, 145 (1912) (invalidating neighbor consent provision to establish building setback lines).

Supreme Court's blessing of comprehensive zoning in *Village of Euclid*, however, the nation launched into more sweeping zoning and planning efforts.[3]

The problem was, and is, that planning and land use regulation restricts individual property rights, one of the fundamental rights guaranteed by the United States Constitution. To this day, the clash of the police power and individual property rights is at the heart of most land use disputes.

The bottom line is that zoning and planning law lies at the intersection of major, legitimate governmental powers and significant individual rights. Justice Oliver Wendell Holmes' quote in this regard is a classic statement:

> Government hardly could go on if, to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases, there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

The seminal case *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926) recognized for the first time the authority of municipal governments to

[3] Interestingly, the *Village of Euclid* case did not address the question of takings despite the fact that the decision recited that the value of the property was reduced by 75% by prohibiting industrial use. *Village of Euclid*, 272 U.S. at 384. Instead, the issue was whether the local government, acting under its delegated police power, had the power to engage in this sort of regulation and whether such regulation violated due process and equal protection. *Village of Euclid*. 272 U.S. at 384. Perhaps this is a function of the fact that the concept of regulatory takings was still quite new, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) having been decided just four years earlier. Despite the fact that no taking claim had been raised, the Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 319 n.15 (2002) mentioned the 75 percent drop in value in *Village of Euclid* in string cite of cases that had survived takings challenges.

constitutionally restrict property use through zoning regulations.[4] Today, the government's authority to enforce land use regulations is settled. "This Court has recognized that aesthetic concerns, including the preservation of open space and the maintenance of the rural character of Blaine County, are valid rationales for the county to enact zoning restrictions under its police power. The purpose of the MOD [mountain overlay district], as set forth in B.C.C. § 9-21-1(B), falls squarely within the recognized powers of the County." *Terrazas v. Blaine Cnty.*, 147 Idaho 193, 198, 207 P.3d 169, 174 (2009) (Horton, J.) (citation omitted).[5]

Yet the details remain controversial[6] and questions remain about how the police power and private property rights match up in land use matters. In addition, the due process clauses of the United States and Idaho Constitutions have become increasingly important in recent years. Because land use applications implicate the property rights both of the developer and his or her neighbors, courts have recognized that many land use applications are "quasi-judicial" proceedings, and that the affected parties have a right to notice and a hearing before a decision is made. This requirement has raised another set of thorny issues, as P&Z commissions and governing boards struggle with how to offer court-like proceedings on land use matters.

Idaho's urban and resort areas have grown rapidly in recent years. This growth has strained Idaho's land use laws, which mostly were developed for a rural state without large urban areas. We undoubtedly will see further strain if growth continues, and greater pressure to change the law to meet the needs of larger

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[4] This case has been relied on by the Idaho Supreme Court. *Dawson Enterprises, Inc. v. Blaine Cnty.*, 98 Idaho 506, 512, 567 P.2d 1257, 1263 (1977) (Bistline, J.); *Cole-Collister Fire Protection Dist. v. City of Boise*, 93 Idaho 558, 562, 468 P.2d 290, 294 (1970).

[5] *Terrazas* relied on *Dawson Enterprises, Inc. v. Blaine Cnty.*, 98 Idaho 506, 567 P.2d 1257 (1977) (Bistline, J.). In *Dawson*, the Court noted that there is disagreement in other jurisdictions over whether zoning for purely aesthetic purposes falls within the police power. In the case of Blaine County's zoning ordinance, however, aesthetics was only an additional consideration, not the sole or exclusive purpose of the regulation. That, said the Court, clearly fell within the was the scope of the police power. *Dawson*, 98 Idaho at 518, 567 P.2d at 1269. Note that Dawson, though decided in 1977, was based on actions occurring before the adoption of LLUPA in 1975. See footnote 3 and Justice Bakes' dissent.

[6] A justice of the Idaho Supreme Court had this to say on the subject of zoning: "It is a strange West which we now have where a man of industrious nature is by a bureaucratic ordinance deprived of the right to build his own house on a ten-acre tract. And for what reason? Because it has been thought better that the law should be that a single dwelling be not erected on less than 80 acres! The proposition is basically so monstrous as to be undeserving of further comment." *Cnty. of Ada v. Henry*, 105 Idaho 263, 268, 668 P.2d 994, 999 (1983) (Bistline, J., dissenting). Curiously, this is the same justice who wrote the first opinion applying *Village of Euclid* in Idaho. *Dawson Enterprises, Inc. v. Blaine Cnty.*, 98 Idaho 506, 512, 567 P.2d 1257, 1263 (1977) (Bistline, J.).

communities. Many Idaho laws do not offer a good fit for promoting the quality growth of urban areas.

The chapters below offer an analysis of the largest questions in Idaho land use law. This is a general analysis intended to give the reader an introduction to the law. It does not, and cannot, replace the advice of a qualified attorney with regard to a specific matter. Land use regulation is a complex topic with many nuances. It is not possible to outline them all in a treatise of this kind. However, we hope the handbook is helpful and we would appreciate your comments for our future editions. Please feel free to contact any of the authors at (208) 388-1200 if you have any suggestions.

2. THE PLANNING AND ZONING POWER

A. The constitutional source

Cities and counties in Idaho have no inherent authority to legislate. Rather, their law-making power derives from grants of authority found in or necessarily implied by the Idaho Constitution or statute.

> Our analysis of this issue necessarily involves a review of the basic tenets of municipal corporation law. Idaho has long recognized the proposition that a municipal corporation, as a creature of the state, possesses and exercises only those powers either expressly or impliedly granted to it. This position, also known as "Dillon's Rule" has been generally recognized as the prevailing view in Idaho. Thus, under Dillon's Rule, a municipal corporation may exercise only those powers granted to it by either the state constitution or the legislature and the legislature has absolute power to change, modify or destroy those powers at its discretion.

Caesar v. State, 160, 610 P.2d 517, 519 (Idaho 1980) (Donaldson, C.J.) (citations omitted) (holding that the Boise City Building Code is preempted by state law governing state buildings).[7]

In Idaho today the authority of local governments to engage in planning and zoning activities derives from the grant contained in the state constitution as articulated and implemented by the Local Land Use Planning Act ("LLUPA"), Idaho

[7] Dillon's Rule is named after the judge who authored it. Justice Dillon stated:

> In determining the question now made, it must be taken for settled law, that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power.

Merriam v. Moody's Executors, 25 Iowa 163, 170 (1868) (Dillon, C.J.). In *Merriam*, the court invalidated the sale of a home for nonpayment of a special tax, noting that the Legislature authorized the tax, but did not expressly authorize the sale of property for nonpayment of the tax. The quoted passage is restated in nearly the same words in 1 J. Dillon, *Commentaries on the Law of Municipal Corporations* § 237 (5th Ed. 1911).

Code §§ 67-6501 to 67-6538[8]. But local governments also have zoning authority directly under the Idaho Constitution.

Article XII, section 2 of the Idaho Constitution grants the police power directly to cities and counties (without need for implementing legislation). This section states:

> Local police regulations authorized. — Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.

Idaho Const. art. XII, § 2.

In his seminal work, Michael Moore summarized this grant of police power as follows:

> Article 12, § 2, of the Idaho Constitution, is a grant of local police powers to Idaho cities. It is direct, self-executing, and requires no additional grant of authority from the Idaho legislature. To this extent, Idaho cities do have a grant of constitutional home rule powers.

Michael C. Moore, *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?*, 14 Idaho L. Rev. 143, 168 (1977).

The police power includes the power to zone. "The power of counties and municipalities to zone is a police power authorized by Art. 12, § 2 of the Idaho Constitution." *Gumprecht v. City of Coeur d'Alene*, 104 Idaho 615, 617, 661 P.2d 1214, 1216 (1983) (Bakes, J.), *overruled on other grounds by City of Boise City v. Keep the Commandments Coalition*, 143 Idaho 254, 257, 141 P.3d 1123, 1126 (2006) (Schroeder, J.).

> In *Citizens for Better Government v. Cnty. of Valley*, [95 Idaho 320, 508 P.2d 550 (1973),] the court recognized the constitutional authority of a county to enact zoning ordinances under art. 12, § 2, but held that, where the legislature had provided by statute that public hearings be

[8] LLUPA was enacted in 1975. S.B., 1094, 1975 Idaho Sess. Laws, ch. 188. LLUPA replaced earlier planning and zoning statutes enacted in 1967, 1967 Idaho Sess. Laws, ch. 429, and in 1957, 1957 Idaho Sess. Laws, ch. 225. Prior to 1957, Idaho has separate zoning statutes and planning statutes. The zoning statutes date to 1925. 1925 Idaho Sess. Laws, ch. 174; 1927 Idaho Sess. Laws, ch. 14 (previously codified at Idaho Code §§ 49-401 to 49-409 and later §§ 50-401 to 50-409). The first planning statutes were enacted in 1935. 1935 (1st Emergency Session) Idaho Sess. Laws, ch. 51 (previously codified at Idaho Code §§ 50-2702 to 2708).

> held prior to adoption of zoning ordinances, adoption of a zoning ordinance without holding a public hearing was in conflict with the general laws under art. 12, § 2.

Michael C. Moore, *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?*, 14 Idaho L. Rev. 143, 154 (1977) (citation in footnote shown in brackets).

This constitutional grant of plenary police power to counties and cities provides a foundation for zoning laws that pre-date the express delegation contained in LLUPA or its predecessors (see footnote 8 on page 38). This avoids an issue that arises in zoning cases in other states. In some states, county and municipal governments have zoning power only if the state legislature specifically grants the power. 83 Am. Jur. 2d *Zoning and Planning* § 6 (2003).

For instance, the Idaho Supreme Court upheld an Ada County subdivision ordinance despite an allegation that it was in excess of the authority granted by the then existing zoning statute (which did not authorize the regulation of subdivisions). The Court states:

> Under this provision [Idaho Const. art. XII, § 2] the counties and cities of this state are not limited to police powers granted by the legislature, but may make and enforce, within their respective limits, all such police regulations as are not in conflict with the general law.

State v. Clark, 88 Idaho 365, 373, 399 P.2d 955, 959 (1965) (quoting *Garland v. Talbott*, 72 Idaho 125, 129, 237 P.2d 1067, 1069 (1951)). As discussed below, however, the subsequent enactment of comprehensive state legislation on the subject constrains the authority of local governments to act with respect to planning and zoning.

B. The statutory source (LLUPA)

The current statutory basis for Idaho's planning and zoning law is the Local Land Use Planning Act of 1975 ("LLUPA") (see footnote 8 on page 38). LLUPA contains a broad grant of planning and zoning authority to local governments.[9] Indeed, it mandates that cities and counties must plan and zone. See discussion below in section 2.C(2) at page 41.

[9] "[I]n enacting the Local Planning Act of 1975, the legislature obviously intended to give local governing boards, such as the Kootenai County Commissioners, broad powers in the area of planning and zoning." *Worley Highway Dist. v. Kootenai Cnty.*, 104 Idaho 833, 835, 633 P.2d 1135, 1137 (Ct. App. 1983).

Although LLUPA broadly grants authority to cities and counties, it also constrains the even broader grant of zoning authority to local government embodied in the police power. The Legislature's power to limit the police power in this way is found in that constitutional grant itself, which requires that local governments exercise the police power in a manner consistent with other laws.[10] The Idaho Supreme Court repeatedly has recognized this principle.[11] The Court has also noted that LLUPA constitutes the exclusive means for local governments to implement their planning and zoning authority.[12] Thus, local governments today may not rely solely on the broad grant of police power under the Constitution to sustain their planning and zoning actions; they also must demonstrate that their actions are not in conflict with LLUPA. *Gumprecht*, 104 Idaho at 617, 661 P.2d at 1216 (holding that the City of Coeur d'Alene may not, in effect, delegate its planning and zoning responsibilities under LLUPA to the people by holding an initiative election on zoning issues).

C. Powers and duties of the P&Z commission

(1) Enumerated powers

Although LLUPA has been construed as a delegation of broad planning and zoning powers to local governments,[13] it contains no general grant of planning and zoning power. Instead, it sets out a series of specific, enumerated powers:

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[10] "Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws." Idaho Const. art. XII, § 2 (emphasis supplied).

[11] The Idaho Supreme Court has repeatedly cited this constitutional provision in striking down ordinances that are in conflict with state statutes. "An express limitation on localities' exercise of their police powers is contained in the foregoing constitutional authorization." *Gumprecht v. City of Coeur d'Alene*, 104 Idaho 615, 617, 661 P.2d 1214, 1216 (1983) (Bakes, J.), *overruled on other grounds by City of Boise City v. Keep the Commandments Coalition*, 143 Idaho 254, 257, 141 P.3d 1123, 1126 (2006) (Schroeder, J.). Other cases include *Heck v. Comm'rs of Canyon Cnty.*, 123 Idaho 826, 828, 853 P.2d 571, 573 (1993); *Envirosafe Services of Idaho v. Cnty. of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987); *State v. Barsness*, 101 Idaho 210, 211, 628 P.2d 1044, 1045 (1981); *Caesar v. State*, 610 P.2d 517, 520 (1980); *Clyde Hess Distributing Co. v. Bonneville Cnty.*, 69 Idaho 505, 512, 210 P.2d 798, 801 (1949); *State v. Musser*, 67 Idaho 214, 219, 176 P.2d 199, 201 (1946); *In re Ridenbaugh*, 5 Idaho 371, 49 P. 12, 13 (1897). An overview of the principle of preemption contained in this constitutional delegation is set out in Idaho Attorney Gen. Op. No. 92-5 (Dec. 1, 1992).

[12] "The LLUPA provides both mandatory and exclusive procedures for the implementation of planning and zoning." *Sprenger, Grubb & Associates v. Hailey* ("*Sprenger Grubb II*"), 133 Idaho 320, 321, 986 P.2d 343, 344 (1999) (Walters, J.).

[13] Idaho Attorney General Opinion No. 92-5 (Dec. 1, 1992); *Worley Highway Dist. v. Kootenai Cnty.*, 104 Idaho 833, 633 P.2d 1135 (Ct. App. 1983).

- To prepare and update a comprehensive plan for the area under its jurisdiction. (Discussed in section 3 beginning on page 51.)
- To adopt a zoning ordinance. Idaho Code § 67-6511.
- To issue conditional use permits (aka special use permits). Idaho Code § 67-6512.
- To issue permits for planned unit developments. Idaho Code § 67-6515.
- To grant variances from zoning criteria. Idaho Code § 67-6516.
- To recommend a "future acquisitions map" for roads, schools, airports, parks and lands for other public purposes. Idaho Code § 67-6517.
- To recommend areas for transferable development rights ("TDRs"). Idaho Code § 67-6515A.

LLUPA also articulates twelve specific purposes that underlie these enumerated powers. Idaho Code § 67-6502. This is a fairly comprehensive list ranging from protection of property rights to protection of "environmental features." Interestingly, protection or enhancement of aesthetic values is not specifically called out. Given that Idaho is a Dillon's Rule state (see discussion in section 29.C at page 653), it appears that these powers and purposes circumscribe the authority of local land use bodies.

(2) Mandatory planning duties

An interesting twist in the Idaho law is that cities and counties have a number of mandatory planning and zoning duties. "Exercise of the authority to zone and plan, whether by governing board or by the established commissions, is made mandatory by I.C. § 67-6503." *Gumprecht v. City of Coeur d'Alene*, 104 Idaho 615, 617, 661 P.2d 1214, 1216 (1983), *overruled on other grounds by City of Boise City v. Keep the Commandments Coalition*, 143 Idaho 254, 257, 141 P.3d 1123, 1126 (2006).

For example, cities and counties must:

- Adopt a comprehensive plan in accordance with the procedures and including the information required in Idaho Code sections 67-6507 through 67-6509. The Idaho Supreme Court has ruled that the failure to include (or to justify why it did not include) mandatory elements of a comprehensive plan invalidates not only the comprehensive plan, but also the underlying zoning ordinance and actions taken pursuant to that ordinance. *Sprenger, Grubb & Associates v. Hailey* ("*Sprenger Grubb II*"), 133 Idaho 320, 322, 986 P.2d 343, 345 (1999) (Walters, J.).

- Adopt a zoning ordinance including one or more "zoning districts" which are "in accordance with the policies set forth in the adopted comprehensive plan." Idaho Code § 67-6511.
- Adopt an ordinance governing the approval of subdivisions. Idaho Code § 67-6513. Further subdivision approval requirements are found in Idaho Code, Title 50, Chapter 13.
- Adopt an ordinance regulating the granting of variances. Idaho Code § 67-6516.
- Adopt a procedure for the granting of permits. Idaho Code § 67-6519(1).
- Issue written decisions in planning and zoning matters in the form of findings of fact and conclusions of law. Idaho Code § 67-6535(2).
- Create and preserve a transcribable, verbatim record of all administrative proceedings. Idaho Code § 67-6536.

D. Preemption

(1) State preemption of local zoning laws, generally

There are limits to the authority of a city or county to regulate. *Envirosafe Services of Idaho, Inc. v. Cnty. of Owyhee*, 112 Idaho 687, 735 P.2d 998 (1987) (voiding county action seeking to regulate hazardous waste).

The doctrine of preemption is grounded in Idaho's Constitution: "Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws." Idaho Const. art. XII, § 2 (emphasis supplied). The Idaho Supreme Court has repeatedly cited this constitutional provision in striking down ordinances that are in conflict with state statutes.[14]

Preemption may be either direct or implied. "Of course, direct conflict (expressly allowing what the state disallows, and vice versa) is 'conflict' in any

[14] *Heck v. Comm'rs of Canyon Cnty.*, 123 Idaho 826, 828, 853 P.2d 571, 573 (1993); *Envirosafe Services of Idaho v. Cnty. of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987); *State v. Barsness*, 101 Idaho 210, 211, 628 P.2d 1044, 1045 (1981); *Caesar v. State*, 101 Idaho 158, 161, 610 P.2d 517, 520 (1980); *Clyde Hess Distributing Co. v. Bonneville Cnty.*, 69 Idaho 505, 512, 210 P.2d 798, 801 (1949); *State v. Musser*, 67 Idaho 214, 219, 176 P.2d 199, 201 (1946); *In re Ridenbaugh*, 5 Idaho 371, 49 P. 12, 13 (1897). An overview of the principle of preemption contained in this constitutional delegation is set out in Idaho Attorney Gen. Op. No. 92-5 (Dec. 1, 1992).

sense. Additionally, a 'conflict' between state and local regulation may be implied." *Envirosafe*, 112 Idaho at 689, 735 P.2d at 1000 (citations omitted).

When there is no direct conflict between a state statute and a local ordinance, conflict (and hence preemption) will be implied where it is apparent that the Legislature intends through its statute to "occupy the field." Our Supreme Court has said:

> Where it can be inferred from a state statute that the state has intended to fully occupy or preempt a particular area, to the exclusion of municipalities, a municipal ordinance in that area will be held to be in conflict with the state law, even if the state law does not so specifically state.

Caesar v. State, 610 P.2d 517, 520 (Idaho 1980) (Donaldson, C.J.).[15]

> The doctrine of implied preemption typically applies in instances where, despite the lack of specific language preempting regulation by local governmental entities, the state has acted in the area in such a pervasive manner that it must be assumed that it intended to occupy the entire field of regulation.

Envirosafe Services of Idaho v. Cnty. of Owyhee, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987).[16]

(2) Preemption of LLUPA by the Idaho Public Utilities Commission

Under Idaho law, approval of an electric transmission line or other facility (*e.g.*, a substation or generating plant) does not automatically preempt local government planning and zoning decisions bearing on the facility. However, under certain circumstances, the Idaho Public Utility Commission ("IPUC") can preempt the local government and force the siting of the facility even though it conflicts with the local government's wishes.

Idaho Code § 67-6528, which is part of the Local Land Use Planning Act ("LLUPA"), states:

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[15] This doctrine, which reaches back to *In re Ridenbaugh*, 5 Idaho 371, 49 P. 12, 13 (1897), is now firmly fixed in Idaho law. "This Court adheres to the doctrine of implied preemption." *Heck v. Comm'rs of Canyon Cnty.*, 123 Idaho 826, 827, 853 P.2d 571, 572 (1993). "This state firmly adopted the doctrine of implied preemption . . . ." *Envirosafe Services of Idaho v. Cnty. of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987).

[16] See also *Idaho Dairymen's Ass'n v. Gooding Cnty.*, 2010 WL 337939 (Idaho 2010) (finding that local zoning ordinance restricting CAFOs was not implicitly preempted by state water quality regulation).

> If a public utility has been ordered or permitted by specific order, pursuant to title 61, Idaho Code, to do or refrain from doing an act by the public utilities commission, any action or order of a governmental agency pursuant to titles 31, 50, or 67, Idaho Code, in conflict with said public utilities commission order, shall be insofar as it is in conflict, null and void if prior to entering said order, the public utilities commission has given the affected governmental agency an opportunity to appear before or consult with the public utilities commission with respect to such conflict.

Idaho Code § 67-6528.

According to the IPUC's legal counsel, the IPUC does not attempt to exercise this preemption authority except in unusual circumstances. Even when the IPUC has approved an order that is sufficiently specific to be seen as being in conflict with a local government zoning ordinance or action, the IPUC still must consult with the local government before the IPUC order can be declared preemptive.

This means that in most cases a county or city will, as a practical matter, have substantial authority in the siting of an energy facility even though the IPUC has approved it.

We note that LLUPA obligates local governments to adopt comprehensive plans that include an analysis of, among many other things, "power plant sites [and] utility transmission corridors." Idaho Code § 67-6508(h). If the local jurisdiction objecting to the location of an energy facility has failed to follow this requirement, it would appear that the jurisdiction would have difficulty persuading the IPUC not to preempt under section 67-6528. Under section 67-6528, noted above, the IPUC still would be required to provide the local government the opportunity to appear and consult on the question.

Another point. Whatever preemptive authority there is under section 67-6528 applies to only to a "public utility." That term is not defined by LLUPA. The IPUC's position or practice is that public utilities only includes only those entities that have received a certificate of convenience and necessity under the state's utility laws, and the term does not extend to "qualifying facilities" (or QFs) that provide power to utilities under the Public Utility Regulatory Policies Act ("PURPA").

A final possible area of preemption applies solely to those transmission facilities located in a "national interest electric transmission corridor" established by the U.S. Department of Energy under section 1221 of the Energy Policy Act of 2005, 16 U.S.C. § 824p. The Idaho Legislature enacted a section of the public utilities code to address a state's responsibility, where such corridors are established, to provide

"efficient and timely review" of facilities proposed within such corridors. Idaho Code §§ 61-1701 to 61-1709. The authority expressly authorizes IPUC preemption of local government decisions. Idaho Code §§ 61-1703. However, as of this writing in early 2010, no such corridors have yet been established in Idaho.

(3) Federal preemption

As a general rule, state and local laws are preempted to the extent they are inconsistent with federal law.[17] While that general principle (arising under the Supremacy Clause[18]) is clear enough, the determination of whether there is sufficient inconsistency to give rise to preemption in a given case is a more uncertain task, complicated by the fact that there are as many as four theories of preemption.[19]

Two cases are particularly applicable. The first is *Ventura Cnty. v. Gulf Oil Corp*., 601 F.2d 1080 (9th Cir. 1979), *aff'd without opinion*, 444 U.S. 1010 (1980). This case came down forcefully on the side of preemption. In this case, the oil company obtained federal leases for oil exploration and development under the Mineral Lands Leasing Act of 1920. When it refused to apply for a local "open space use permit" under the county's zoning ordinance, the county sued. The court held that the county's zoning ordinance was preempted in accordance with *Kleppe v. New Mexico*, 426 U.S. 529 (1976). "The federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress." *Ventura Cnty.*, 601 F.2d at 1084. The decision was summarily affirmed by the U.S. Supreme Court. One commentator has interpreted the Court's holding this way: "[T]he actual holding apparently was that a state or local 'veto' power, whether or not exercised, was fundamentally inconsistent with the web of federal environmental controls stemming from various laws and regulations." George Cameron Coggins, 1 Pub. Nat. Resources L. § 5:25 (2nd ed. 2010).

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[17] "As a consequence, land owned or leased by the United States or an agency thereof for purposes authorized by Congress is immune from and supersedes state and local laws in contravention thereof." 4 *Rathkopf's The Law of Zoning* § 76:23 (4th ed. 2010). "The effect of this principle, which derives from the supremacy clause, art VI, cl 2 of the Constitution is that unless Congress clearly and affirmatively declares that federal instrumentalities shall be subject to state regulation, the federal function must be left free of such regulation . . . ." *Applicability of Zoning Regulations to Governmental Projects or Activities*, 53 A.L.R.5th 1, § 3 (1997).

[18] U.S. Const. art. VI, cl. 2.

[19] "Courts will override state laws if they are expressly preempted by Congress, if they directly conflict with federal law, if the federal law was intended to occupy the entire regulatory area to the exclusion of any state or local regulation, or if the state laws interfere with the accomplishment of federal purposes." George Cameron Coggins, 1 Pub. Nat. Resources L. § 5:19 (2nd ed. 2010).

Other courts have applied, distinguished, and pared away *Ventura County*'s holding.[20] The most significant post-*Ventura* precedent, however, is the Supreme Court's ruling in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987). This case came down the other way, finding that the California Coastal Commission had authority to impose some environmental requirements on the holder of white limestone mining claims located in the scenic Big Sur area. The case was complicated by the fact that the state, too, was acting under authorities derived and funded in part by the federal government. Ultimately, the Supreme Court drew a distinction between the environmental controls imposed here and state land use controls (such as those involved in *Ventura County*)—which it assumed, arguendo, were preempted by the NFMA and FLPMA. *Granite Rock*, 480 U.S. at 585. "Justice O'Connor, conceding that no bright line separated environmental regulation from land use planning, nevertheless opined that differences between the two are ascertainable and that the state may regulate for environmental protection even though it cannot dictate federal land use." George Cameron Coggins, 1 Pub. Nat. Resources L. § 5:27 (2nd ed. 2010).

In any event, the *Granite Rock* Court did not overturn its summary affirmance of *Ventura County* Thus, while there is certainly some murkiness in the law, the rule of thumb would appear to be that zoning laws (but not necessarily other environmental restrictions) are preempted in the context of mining and oil and gas leasing. Accordingly, applicants for federal land approvals on BLM, Forest Service, and other federal lands are not required also to obtain conditional use permits or otherwise comply with local zoning requirements.

Of course, Congress has the power to defer to local laws if it so chooses. It has done so to a limited extent by enactment of the Urban Land Use Act in 2002, 40 U.S.C. §§ 901 to 905. The Act applies only to "urban areas" defined narrowly as cities with a population of at least 10,000 and to certain other urbanized areas. 40 U.S.C. § 902(2). Within these urban areas, the Act requires the General Services Administration to notify local governments before purchasing real property. 40 U.S.C. § 903(a). If the local entity objects on the basis of inconsistency of the proposed federal use with local zoning laws, "the Administrator shall, to the extent the Administrator determines is practicable, consider all objections and comply with the zoning regulations and planning objectives." 40 U.S.C. § 903(b).

The fact that in 2002 Congress deferred (to some extent) to local zoning laws in the context of urban areas, but not elsewhere, reinforces the conclusion reached above that zoning laws are preempted by other federal permitting programs on federal lands.

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[20] *E.g.*, *Brubaker v. Bd. of Cnty. Comm'rs*, 652 P.2d 1050 (Colo. 1982); *Gulf Oil Corp. v. Wyoming Oil & Gas Conserv. Comm'n*, 693 P.2d 227 (Wyo. 1985); *Bd. of Cnty. Comm'rs v. BDS Int'l, LLC*, 159 P.3d 773 (Colo. App. 2006).

While local governments may not enforce zoning laws on federal lands, they are nonetheless free to zone the land. The effect of such action is that the zoning would become enforceable (presumably without nonconforming use protection) in the event the land subsequently is conveyed to private parties:

> Although zoning ordinances cannot be enforced against the federal government, municipalities are not precluded from classifying federally owned land as within specified zoning districts. The government often transfers its lands to private parties and if the zoning map shows the land as having been classified, the ordinance can immediately be enforced when a private individual assumes ownership. The Oregon court held that a county had authority to zone federal land as "farm forestry," thus prohibiting the operation of a quarry, which had been initiated by the government, after the federal government transferred the property to a private party. And, where buildings erected pursuant to the Lanham Act were subsequently sold to a private corporation, the fact that the government had taken back a mortgage in part payment of the purchase price was held not to confer federal immunity upon the buildings which were required thereafter to conform to the building code.

4 *Rathkopf's The Law of Zoning* § 76:23 (4th ed. 2010) (footnotes omitted) (citing *Lane Cnty. v. Bessett*, 46 Or. App. 319, 612 P.2d 297 (1980)).

E. Planning and zoning authorities (governing boards and P&Z commissions)

(1) Creation of P&Z commissions is optional

LLUPA authorizes cities and counties (acting through their city councils and county commissioners) to engage in planning and zoning activities. LLUPA allows the municipal entities some discretion in how they go about that.

At the outset, the municipal government must decide whether to exercise its planning and zoning authority directly or through the creation of a P&Z commission. Either is permissible. Idaho Code § 67-6504.

(2) Separate or combined "planning" and "zoning" commissions

If a municipality chooses to delegate its authority to a planning and zoning body, it may then act by ordinance to create a single "planning and zoning commission." If it prefers, however, the government may instead create separate

entities: a "planning commission" (to develop the comprehensive plan) and a "zoning commission" (to handle zoning and other matters). Idaho Code § 67-6504. So far as the authors are aware, no Idaho community has opted to create separate planning and zoning commissions.

A note on terminology: We refer in this Handbook to the combined commission as the "P&Z Commission" or simply, the "P&Z." All such references, of course, would be equally applicable in the case of separate planning and zoning commissions. Note also that references throughout this Handbook to the "commission" or "commissioners" may refer to the P&Z commission or to the city or county commissioners, as the case may be. In contrast, references to the "governing board" refer only to a city or county commission sitting in review of actions by a planning and zoning commission.

(3) Joint commissions (among neighboring communities)

LLUPA also authorizes neighboring counties and/or cities to establish joint planning, zoning, or planning and zoning commissions (referred to as "joint commissions.") Idaho Code § 67-6505.

(4) Delegation to the P&Z commission and appeal to city or county

As discussed above, LLUPA authorizes a city or county's governing body to create a planning and zoning commission and delegate much of its authority to the P&Z.[21] The only power that may not be delegated is "the authority to adopt ordinances or to finally approve land subdivisions." Idaho Code § 67-6504.[22] Therefore, matters that require the adoption of an ordinance, such as annexation, zoning or rezoning, adoption of development agreements, adoption of a future acquisitions map, and adoption of development standards require action by the city council or county board of commissioners, although planning and zoning commissions frequently offer recommendations on these matters.

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[21] The authority of the governing body to act on its own (without any planning and zoning commission) is express, as is the authority to delegate all decision-making authority to the planning and zoning commission. Idaho Code § 67-6504. The authority of the governing body to reserve appellate review authority over planning and zoning commission decisions, however, is only implicit. See Idaho Code § 67-6519(2) (referring to the action of the P&Z as a "recommendation or decision").

[22] "Under Idaho Code § 67-6504, the county commissioners cannot delegate to a planning and zoning commission the authority to adopt ordinances or to finally approve land subdivisions." *Brower v. Bingham Cnty. Comm'rs (In re The Application for Zone Change)*, 140 Idaho 512, 514, 96 P.3d 613, 615 (2004). In *Brower*, the court invalidated a local ordinance that said the P&Z's decision on zoning was valid unless a majority of the county commissioners overruled it. Instead, the court found that approval of a rezone required the affirmative approval of a majority; thus a 1 to 1 tie vote resulted in rejection of the rezone, despite its approval by the P&Z.

Whether a city or county retains any review authority over P&Z decisions is entirely up to it. It may choose to give the P&Z the final say-so (with direct appeal to district court). Idaho Code § 67-6521(1)(d). Or it may elect to retain review authority over P&Z decisions. If so, it appears that it may elect to make that review broad (*de novo*) or narrow (appellate). (See footnote 21 at page 48.)

In any event, all decisions made by P&Z commissions (with the exception of recommendations for ordinances or subdivisions) are decisions that become final if no appeal is taken. In other words, if no one appeals a P&Z decision, it is final. The governing board may not "reach down" and overturn an unappealed P&Z decision with which it disagrees.

In deciding which of these models to adopt, each Idaho municipal body must weigh countervailing goals. *De novo* review obviously gives the county a freer hand and more control. That comes at a price, however. The easier it is for a county to revisit and second-guess the determinations of the P&Z, the more likely it is that every controversial decision will have to be re-evaluated and re-decided by the county. This can undermine the very purpose of having a P&Z in the first place.[23] Under LLUPA, municipal entities are allowed to weigh the benefits and burdens of various modes of review, and decide just how much appellate review is right for them. Once that decision is made, however, they are bound by their own ordinances.

Some municipal ordinances are clearer than others when it comes to documenting what type of review is envisioned. Drafters of such ordinances are well advised to be specific in identifying whether review by the city or county of the P&Z's decision is a limited appellate-type review, a broad *de novo* review, or something in between.

(5) Non-delegation doctrine.

In *Johnson v. Blaine Cnty.*, 146 Idaho 916, 204 P.3d 1127 (2009), the Court gave short shrift to a party's argument that Blaine County's reliance on standards established by the local housing authority was an unconstitutional delegation of legislative power in violation of Idaho Const. art. III, § 1:

> The portion of Article III, Section 1, upon which Johnson relies states, "The legislative power of the state shall be vested in a senate and house of representatives." That

[23] One of the major policy considerations in creating a planning and zoning commission is to reduce the workload of the governing board. If a workload reduction is to occur, the governing board must be able delegate its full approval authority. Otherwise, no permit could be finally approved without some sort of blessing from the governing board. Further, anything less than a full delegation completely dis-empowers the planning and zoning commission as a practical matter because both applicants and opponents can treat the planning and zoning commission hearing as a risk-free "dry run" and obtain a second bite at the apple in an appeal.

> constitutional provision prohibits the Idaho legislature from delegating its powers to any other body or authority. *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 885, 499 P.2d 575, 584 (1972). The Board is not the Idaho legislature, and that constitutional provision therefore does not apply to it.

Johnson, 146 at 922, 204 P.3d at 1133. This remarkably broad statement implies that there is no limitation on a city or county's delegation of its land use planning authority.

3. COMPREHENSIVE PLANS

A. Introduction

> LLUPA requires the municipalities not make planning and zoning decisions on the fly, but instead within the context of an over-arching vision of the city's or county's future. Accordingly, it mandates that every city and county adopt a comprehensive plan. Idaho Code §§ 67-6508, 67-6509.

As its name implies, this plan is a comprehensive articulation of the conditions and objectives that will guide planning and zoning decisions within the municipality. "The plan shall consider previous and existing conditions, trends, desirable goals and objectives, or desirable future situations for each planning component." Idaho Code § 67-6508. The referenced "planning components" in the prior quotation are 17 specific areas of concern including such things as population, schools, natural resources, transportation, housing, and airports.[24] Idaho Code § 67-6508.

The comprehensive plan has one purpose and one purpose only: to guide planning and zoning decisions.

- LLUPA requires that "zoning districts shall be in accordance with the policies set forth in the adopted comprehensive plan." Idaho Code § 67-6511(1).

- Amendments to zoning ordinances shall occur only "[a]fter considering the comprehensive plan." Idaho Code § 67-6511(2)(b).

- If a zone change is found by the governing board to be "in conflict with the policies of the adopted comprehensive plan," the board may consider changes to the comprehensive plan, after which the zone change may be considered again. Idaho Code § 67-6511(2)(c).

- In addition to zoning changes, the conditional use permits (aka special use permits) may be issued only if found to be "not in conflict with the [comprehensive] plan." Idaho Code § 67-6512(a).

[24] LLUPA does not mention water rights planning in the context of the comprehensive plan. The closest that LLUPA gets to water rights is the mandate that applicants for land use changes be required to use surface water, where reasonably available, as the primary water source for irrigation. Idaho Code § 67-6537(1). In the same section, LLUPA requires that comprehensive plans consider "the quantity and quality of ground water in the area." Idaho Code § 67-6537(4). Nothing in LLUPA, however, requires comprehensive plans to consider the adequacy of a municipal provider's water rights to meet long term demand. See discussion *Water Law Handbook*.

- Finally, LLUPA references comprehensive plans in the context of the requirement for a reasoned statement by the decision-maker explaining the basis for the approval or denial of a land use application. Idaho Code §§ 67-6535(1) and 67-6535(2). See footnote 28 at page 33.

A comprehensive plan is a constantly evolving document. They are typically updated every few years, but may be amended as often as desired by the governing board. Idaho Code § 67-6509(d). Any person may petition for a revision to the plan as often as every six months. Idaho Code § 67-6509(d).

LLUPA not only authorizes but demands that every city and county engage in the visioning process that lies at the heart of sound land use planning and results in the development of a comprehensive plan. Idaho Code § 67-6508.[25]

A comprehensive plan, as its name implies, is a comprehensive articulation of the conditions and objectives that will guide future growth within the geographic boundaries of the city or county. Idaho Code Section 67-6508 mandates: "The plan shall consider previous and existing conditions, trends, desirable goals and objectives, or desirable future situations for each planning component." LLUPA contemplates the plan will include "maps, charts, and reports." Idaho Code § 67-6508.

The Idaho Supreme Court has described the role of the comprehensive plan, in contrast to zoning ordinances, this way:

> The Act [LLUPA] indicates that a comprehensive plan and a zoning ordinance are distinct concepts serving different purposes. A comprehensive plan reflects the "desirable goals and objectives, or desirable future situations" for the land within a jurisdiction. I.C. § 67-6508. This Court has held that a comprehensive plan does not operate as legally controlling zoning law, but rather serves to guide and advise the governmental agencies responsible for making zoning decisions. The Board may, therefore, refer to the comprehensive plan as a general guide in instances involving zoning decisions such as revising or adopting a zoning ordinance. A zoning ordinance, by contrast, reflects the permitted uses allowed for various parcels within the jurisdiction.

[25] Prior to the adoption of LLUPA in 1975, a separate, physical comprehensive plan document was not required. A conceptual comprehensive plan embodied in the government's zoning actions itself was sufficient. *Dawson Enterprises, Inc. v. Blaine Cnty.*, 98 Idaho 506, 510-11, 567 P.2d 1257, 1261-62 (1977) (Bistline, J.).

Urrutia v. Blaine Cnty., 134 Idaho 353, 357-58, 2 P.3d 738, 742-43 (2000) (Trout, C.J.) (emphasis supplied) (citations omitted).[26]

However, a comprehensive plan is more than an abstract planning document. The comprehensive plan is intended primarily to guide the development of zoning ordinances. For this reason, the adoption of a comprehensive plan is a legal prerequisite to the enactment of zoning ordinances.[27]

Not only must the comprehensive plan come first, LLUPA mandates that zoning ordinances must be "in accordance with" the comprehensive plan. Idaho Code§§ 67-6511 and 67-6535(1). This requirement is discussed below in sections 3.B and 3.D starting on page 54. Consequently, developers and other interested parties seeking or opposing rezones must pay particular attention to the comprehensive plan.

Developers and interested parties should consult the comprehensive plan (as well as the applicable ordinances) from the outset. Where appropriate, the developer should consider modifying the proposed action to ensure a good fit with the comprehensive plan. In some cases, changes in the plan may be required in order to authorize the specific zoning or other action sought.

The land use application should include a detailed, point-by-point recitation of the comprehensive plan provisions and how the proposed action squares with the comprehensive plan. Likewise, a project opponent should prepare a detailed critique of the proposed action based on the comprehensive plan. These analyses should be

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[26] The statement that "a comprehensive plan does not operate as legally controlling zoning law" was quoted from *South Fork Coal. v. Bd. of Comm'rs of Bonneville Cnty. ("South Fork II")*, 117 Idaho 857, 863, 792 P.2d 882, 888 (1990), and, prior to that, from *Bone v. City of Lewiston*, 107 Idaho 844, 850, 693 P.2d 1046, 1052 (1984). It has been quoted by the court repeatedly in subsequent cases. *E.g., Sanders Orchard v. Gem Cnty.*, 137 Idaho 695, 699, 52 P.3d 840, 844 (2002); *Whitted v. Canyon Cnty. Bd. of Comm'rs*, 137 Idaho 118, 122, 44 P.3d 1173, 1177 (2002); *Friends of Farm to Market v. Valley Cnty.*, 137 Idaho 192, 200, 46 P.3d 9, 17 (2002). Virtually identical language ("A comprehensive plan is not a legally controlling zoning law") is found in *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner I*"), 145 Idaho 630, 632, 181 P.3d 1238, 2140 (2008) and *Evans v. Teton Cnty.*, 139 Idaho 71, 76, 73 P.3d 84, 89 (2003) (Kidwell, J.).

[27] "[A] valid comprehensive plan is a precondition to the validity of zoning ordinances." *Sprenger, Grubb & Associates v. Hailey* ("*Sprenger Grubb II*"), 133 Idaho 320, 322, 986 P.2d 343, 345 (1999) (Walters, J.). "The enactment of a comprehensive plan is a precondition to the validity of zoning ordinances. . . . It follows a fortiori that an amendment to a zoning ordinance must also be in accordance with the adopted plan." *Love v. Bd. of Cnty. Comm'rs of Bingham Cnty.*, 105 Idaho 558, 559, 671 P.2d 471, 472 (1983). "[T]he mandate . . . is not a mere technicality . . . . Rather, the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. . . . [W]ithout a comprehensive plan, zoning . . . may tyrannize individual property owners." *Dawson Enterprises, Inc. v. Blaine Cnty.*, 98 Idaho 506, 509, 567 P.2d 1257, 1260 (1977) (Bistline, J.) (holding that a distinct written plan was not required prior to LLUPA, but is under LLUPA).

made part of the record and should serve as a guide for the decision-makers providing for a more defensible decision, in the event of an appeal.

Likewise, the P&Z commission and the governing board should include in their decision documents a thorough discussion of those elements of the comprehensive plan bearing on their decision.

B. Zoning ordinances must be in "accordance" with the comprehensive plan

LLUPA mandates that zoning ordinances be in accordance with the comprehensive plan. "The zoning districts shall be in accordance with the policies set forth in the adopted comprehensive plan." Idaho Code § 67-6511.[28]

[28] The requirement in Idaho Code § 67-6511 that zoning decisions be "in accordance with" the comprehensive plan is limited to the adoption of zoning ordinances (both initial zoning and rezones).

Another provision of LLUPA, Idaho Code § 67-6512(a), requires that special or conditional use permits shall be issued only when "not in conflict with the [comprehensive] plan."

Sections 67-6535(1) and 67-6535(2) of LLUPA also reference the comprehensive plan, however, they do not add any substantive requirements to those mandated by sections 67-6511 and 67-6512(a).

Idaho Code § 67-6535(1) states: "The approval or denial of any application required or authorized pursuant to this chapter shall be based upon standards and criteria which shall be set forth in the comprehensive plan, zoning ordinance or other appropriate ordinance or regulation of the city or county."

Idaho Code § 67-6535(2) requires that the approval or denial of land use applications be accompanied by a "reasoned statement" including an explanation of "the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record."

The thrust of section 67-6535 is a procedural requirement that decision makers explain their decisions in writing to assist the parties and to facilitate judicial review. It appears unlikely that references to the comprehensive plan in this section were intended to create new substantive law regarding the plan. The more plausible reading of section 67-6535(1) and (2) would seem to be that they simply require decision makers to identify and discuss whatever standards are "appropriate" and "applicable" to the decision. Thus, in the case of a rezone, the decision-maker must include an explanation of how the rezone ordinance is in accordance with the comprehensive plan, as required under section 67-6511. In the case of a CUP , there should be a discussion of whether it is "in conflict" with the comprehensive plan, as required in section 67-6512(a). In some cases it is also appropriate for cities and counties to look to their comprehensive plans to interpret their own ordinances, as was done in *Sanders Orchard v. Gem Cnty.*, 137 Idaho 695, 52 P.3d 840 (2002). For all other applications (*e.g.*, PUDs and subdivisions), there would be no need to address the comprehensive plan, because LLUPA mandates no "accordance" or "not in conflict" requirement for them. In sum, section 67-6535 requires that the comprehensive plan be addressed where "appropriate" and "applicable," that is, in the case of a rezone or a CUP.

In a 1990 case, however, the Idaho Supreme Court applied the "accordance" requirement to a planned unit development. *South Fork Coal. v. Bd. of Comm'rs of Bonneville Cnty.* ("*South Fork II*"), 117 Idaho 857, 792 P.2d 882 (1990). The Court failed to explain why the requirement would even be applicable to a planned unit development. Perhaps the applicable local ordinance mandated

This requirement also applies to rezones. Idaho Code § 67-6511(b). "The enactment of a comprehensive plan is a precondition to the validity of zoning ordinances. . . . It follows a fortiori that an amendment to a zoning ordinance must also be in accordance with the adopted plan." *Love v. Bd. of Cnty. Comm'rs of Bingham Cnty.*, 105 Idaho 558, 559, 671 P. 2d 471, 472 (1983).

The issue of accordance with the comprehensive plan is one of fact. Accordingly, the city or county adopting the zoning ordinance has considerable leeway in determining whether the requirement is met. "[T]he determination of whether a zoning ordinance is 'in accordance with' the comprehensive plan is one of fact. As a question of fact, the determination is for the governing body charged with zoning—in the present case the Board of County Commissioners." *Balser v. Kootenai Cnty. Bd. of Comm'rs,* 110 Idaho 37, 39, 714 P.2d 6, 8 (1986).

The Idaho Supreme Court has emphasized repeatedly:[29]

> A comprehensive plan is not a legally controlling zoning law, it serves as a guide to local government agencies charged with making zoning decisions. The 'in accordance with' language of I.C. § 67-6511 does not require zoning decisions strictly conform to the land use designations of the comprehensive plan. However, a board of commissioners cannot ignore their comprehensive plan when adopting or amending zoning ordinances.

Evans v. Teton Cnty., 139 Idaho 71, 76, 73 P.3d 84, 89 (2003) (Kidwell, J.) (citations omitted).

Idaho courts have tended to be deferential to the factual findings of land use agencies (particularly with respect to findings that actions conform to the comprehensive plan) so long as the land use agency undertakes a "factual inquiry" on the accordance issue.

On the other hand, the Idaho Supreme Court has been willing to second-guess local governments when they use the comprehensive plan as a basis to deny an application, particularly in context of a non-zoning action. This is discussed in section 3.D at page 61.

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this requirement, though the Court did not say so. The dissent to the earlier case of *South Fork Coalition v. Bd. of Comm'rs of Bonneville Cnty.* ("*South Fork I*"), 112 Idaho 89, 92, 730 P.2d 1009, 1012 (1986), suggests that the Court thought that the "in accordance with" requirement in section 67-6511 was applicable because the county's PUD ordinance essentially created "floating zones." In any event, this case predates the Court's more thorough treatment of the subject in *Urrutia*.

[29] See footnote 26 at page 53 for citations to other cases.

The early cases interpreting the "in accordance with" requirement offer little guidance about whether the requirement places any real limits on a land use agency's zoning power, so long as the agency undertakes the "factual inquiry." In *Roark v. City of Hailey*, 102 Idaho 511, 633 P.2d 576 (1981), the Court upheld an action by the Hailey City Council to annex and give business zoning to a twelve acre parcel. The Court analyzed the City of Hailey's comprehensive plan's provisions "to keep the commercial zone as the center or core of the community" and found it to be consistent with offering business zoning to land on the outskirts of town, but still along State Highway 75. Essentially, the Court deemed the outskirts of town to be "close enough" to the core of the community.

The Court's consistent position that the zoning decision need not conform exactly to the comprehensive plan is well illustrated in the seminal case of *Bone v. City of Lewiston*, 693 P.2d 1046 (Idaho 1984) (Bistline, J.). In *Bone*, the Idaho Supreme Court rejected a developer's argument that he was entitled to a rezone (an upzone) because it was consistent with the comprehensive plan. The property owner had appealed the City of Lewiston's denial of his request to rezone property from a residential zone to a commercial zone. The land use map in the comprehensive plan depicted the property to be suitable for commercial use. The Idaho Supreme Court held that the comprehensive plan map designation did not mandate that the city council approve the request to approve the commercial zoning of the property. Rather, the decision of whether the requested zoning designation was in accordance with the comprehensive plan was a case-by-case factual determination.

> It is illogical to say that what has been projected as a pattern of projected land use is what a property owner is entitled to have zoned today. The land use map is not intended to be a map of present zoning uses, nor even a map which indicates what uses are presently appropriate. Its only purpose is that which I.C. § 67–6508(c) mandates—to indicate "suitable projected land uses." Therefore, we hold that a city's land use map does not require a particular piece of property, as a matter of law, to be zoned exactly as it appears on the land use map.

Bone at 1052.

The Court reiterated this point in *Love v. Bd. of Cnty. Comm'rs of Bingham Cnty.* ("*Love II*"), 701 P.2d 1293 (Idaho 1985). "In *Bone*, a unanimous Court decided . . . that 'in accordance' does not mean that a zoning ordinance must be exactly as the Comprehensive Plan shows it to be." *Love II*, 108 Idaho at 730, 701 P.2d at 1295.

In *Love v. Bd. of Cnty. Comm'rs of Bingham Cnty.* ("*Love I*"), 671 P.2d 471 (Idaho 1983), the county approved a zone change from agricultural to manufacturing

after concluding that the change would be consistent with the comprehensive plan. A neighbor appealed. The Idaho Supreme Court overturned the county's action, declaring that "the findings of fact are insufficient to support the conclusion that the amendment was in accordance with the comprehensive plan." *Love I*, 105 Idaho at 560, 671 P.2d at 473. The Court remanded the matter to the county. On remand, the county commission again approved the application, including lengthy findings of fact and conclusions of law. This time, the Court sided with the county, emphasizing that the rezone did not need to be "in exact conformance with the County's Comprehensive Plan." *Love v. Bd. of Cnty. Comm'rs of Bingham Cnty.* ("*Love II*"), 108 Idaho 728, 730, 701 P.2d 1293, 1295 (1985).[30] Without any analysis, the Court declared that it had read the 200 pages of testimony in the record and found that the county's findings were adequately supported by substantial and competent evidence. *Love II*, 108 Idaho at 731, 701 P.2d at 1296. The take home message here is that the "in accordance with" requirement is a pretty squishy one and that a county's conclusion that an action is in accordance with its comprehensive plan will be upheld so long as it has taken the time to adequately explain its decision. (As explained below, a county's decision to reject an application because the proposed action is <u>not</u> in accordance with its comprehensive plan may be accorded more rigorous scrutiny.)

Once again, in *Balser v. Kootenai Cnty. Bd. of Comm'rs*, 110 Idaho 37, 39, 714 P.2d 6, 8 (1986), the Court reinforced the conclusion that a zoning ordinance need not strictly conform to the land use designation of a comprehensive plan. In *Balser*, the comprehensive plan designated the property owner's property for industrial use. When the property owner sought to rezone the property as industrial, the county denied the request, stating that the comprehensive plan stated future directions for development but did not mandate that current zoning immediately be conformed to the future industrial use. The Court agreed with the county that the decision to rezone was not "a purely ministerial duty" and that there might be good reasons for departing from the comprehensive plan. The Court did not discuss the factors in the record that supported the denial, but merely concluded that there was substantial evidence in the whole record to support the county's decision. *Balser*, 110 Idaho at 39, 714 P.2d at 8.

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[30] Oddly, in *Love I*, the court insisted that the "in accordance with" determination is "not a finding of fact, but rather a conclusion of law which if erroneous may be corrected on judicial review." *Love I*, 105 Idaho at 560, 671 P.2d at 473. Yet, in *Love II*, the court declared: "Whether a zoning ordinance is 'in accordance' with the comprehensive plan is a *factual question*, which can only be overturned where the fact found is *clearly erroneous*." *Love II*, 108 Idaho at 730, 701 P.2d at 1295 (emphasis original). The Court's statement in *Love II* (that consistency with the comprehensive plan is a question of fact) is consistent with the court's holdings in *Bone v. City of Lewiston*, 107 Idaho 844, 849-50, 693 P.2d 1046, 1051-52 (1984); *Balser v. Kootenai Cnty. Bd. of Comm'rs*, 110 Idaho 37, 39, 714 P.2d 6, 8 (1986); *South Fork Coalition v. Bd. of Comm'rs of Bonneville Cnty. ("South Fork II")*, 117 Idaho 857, 863-64, 792 P.2d 882, 888-89 (1990); and *Sprenger, Grubb & Associates v. Hailey* (*"Sprenger Grubb I"*), 127 Idaho 576, 585, 903 P.2d 741, 750 (1995) (Silak, J.).

In *Ferguson v. Bd. of Cnty. Comm'rs,* 110 Idaho 785, 718 P.2d 1223 (1986), the Supreme Court deferred to the land use agency's determination of whether the application is in accordance with the comprehensive plan, again allowing some departure from a strict reading of the comprehensive plan. The Idaho Supreme Court overturned the district court's determination that the rezone of one corner of the Overland and Five Mile intersection (at that time in Ada County's jurisdiction) was not in accordance with the Ada County comprehensive plan. The Court held it was acceptable to adopt a zoning classification in conflict with the comprehensive plan when "non-conforming uses are so pervasive that the character of the neighborhood has actually changed from the purported zoning classification."

Note that *Ferguson* is postured differently than *Bone* and *Balser*. In *Bone* and *Balser*, a developer sought an up-zone that was consistent with the comprehensive plan, and the county's decision to deny the upzone was affirmed. In other words, the Court said that the county was not required to accede to an upzone just because it was requested new use was expressly contemplated for that are in the comprehensive plan. The situation in *Ferguson* was reversed. The developer sought an upzone that was <u>not</u> consistent with the comprehensive plan, and the county's decision to grant it anyway was affirmed. In all three cases, the Court emphasized that there is no requirement of exact conformity.

Although it upheld the City of Hailey's action, the Court in *Sprenger, Grubb & Associates v. Hailey* (*"Sprenger Grubb I"*), 127 Idaho 576, 903 P.2d 741 (1995) (Silak, J.), demonstrated a new willingness by the Court to take a harder look at the relationship between the comprehensive plan and the zoning ordinance. Like *Roark, Sprenger Grubb I* involved an approximately twelve-acre parcel outside the central business district of Hailey in the Woodside development. This property had been given "business" zoning as part of the initial annexation and zoning of Woodside. The city council later downzoned the property to "limited business," thereby significantly reducing the value of the property. The developer charged that the downzone was inconsistent with the comprehensive plan. The Idaho Supreme Court upheld the downzoning, finding that it was consistent with the comprehensive plan's goal of encouraging development "around the existing core." Unlike the more conclusory decisions described above, the Court here showed a greater willingness to understand the underlying purposes of comprehensive plan and to explore whether the action was actually consistent with those goals.[31]

[31] The developer pointed to other zoning actions which it said were inconsistent with the county's action here. The county responded by explaining how each of them were consistent with the comprehensive plan:

> The rezoning of Power Engineers was adopted by the city because it posed no threats to the city since it was an engineering rather than a retail firm and, further, it would add employment opportunities to the area. The Rinker annexation was property lying

In *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner I*"), 145 Idaho 630, 181 P.3d 1238 (2008) (Eismann, J.), the Court repeated its holdings in *Bone* and *Balser* that a landowner is not entitled to a zone change simply because the requested change is consistent with a more intensive use contemplated by the land use map in the comprehensive plan. The issue was presented in the context of a jurisdictional challenge to an action brought by a neighboring dairy. When the landowner succeeded in obtaining a change in the land use map, the dairy appealed. The county and the landowner contended that the district court had no jurisdiction under LLUPA's review provision, Idaho Code § 67-6521, because the land use map change was not a "permit authorizing the development." The Idaho Supreme Court agreed—and awarded attorney fees against the dairy based on the clear precedent in *Bone* and *Balser*.

The *Giltner I* court went on to quote from a county memorandum it quoted before in *Balser*:

> In fact, there is a substantial difference between planning and zoning. Planning is long range; zoning is immediate. Planning is general; zoning is specific. Planning involves political processes; zoning is a legislative function and an exercise of the police power. Planning is generally dynamic while zoning is more or less static. Planning often involves frequent changes; zoning designations should not. Planning has a speculative impact upon property values, while zoning may actually constitute a valuable property right.

> close to the downtown area, which had been zoned commercial by Blaine County. By annexing these lots, the City of Hailey was able to gain control over the property's development, through the use of deed restrictions, restricting grocery stores, hardware stores and other retailers, with variances to be allowed only after the city's consideration and approval. Finally, the Northwest annexation involved property lying adjacent to the existing Hailey downtown business core. The annexation would square up the city boundaries; and, by annexing the property, which already had businesses on it (also zoned commercial by the county), the city hoped to gain some control over how this property, so close to its downtown area, would be developed.

Sprenger Grubb I, 127 Idaho at 586-87, 903 P.2d at 751-51 (quoting the district court). *See also Taylor v. Bd. of Cnty. Comm'rs, Cnty. of Bonner*, 124 Idaho 392, 860 P.2d 8 (Ct. App. 1993) (undertaking very detailed analysis of whether action was in accordance with the comprehensive plan, but not reaching accordance issue because the zoning decision was overturned on other grounds); *Evans v. Teton Cnty.*, 139 Idaho 71, 73 P.3d 84 (2003) (Kidwell, J.) (discussing the accordance issue in some detail).

> It seems clear, therefore, that while zoning designations should generally follow and be consistent with the long-range designations established in the Comprehensive Plan, there is no requirement that zoning immediately conform to the Plan. The Plan is a statement of long-range public intent; zoning is an exercise of power which, in the long run, should be consistent with that intent. Planning is a determination of public policy, and zoning, to be a legitimate exercise of police power should be in furtherance of that policy.

Giltner I, 145 Idaho at 633, 181 P.3d at 1241 (quoting a county memorandum of law that had earlier been quoted with approval by the Court in *Balser v. Kootenai Cnty. Bd. of Comm'rs*, 110 Idaho 37, 41-42, 714 P.2d 6, 10-11 (1986)). The take home message here is that comprehensive planning is forward thinking and thus inherently different than in-the-present zoning actions. Accordingly, in-the-present zoning decisions are not expected to conform precisely and immediately to the comprehensive plan.

C. Conditional use permits must be "not in conflict" with the comprehensive plan.

Another provision of LLUPA, Idaho Code § 67-6512(a), requires that special or conditional use permits shall be issued only when "not in conflict with the [comprehensive] plan."[32] The reason for the special treatment of conditional use permits, presumably, is that by their nature, they allow uses not in accordance with the normal zoning for an area. Thus, conditional use permits are, in essence, mini-zones. Thus, the consideration given to whether the zoning for a property is in accordance with the comprehensive plan must be re-visited when an applicant seeks a conditional use permit. Note also that the requirement is more limited than the one set out under section 67-6511. Conditional use permits are not required to be "in accordance with" the comprehensive plan. Instead, it is sufficient that they not be "in conflict" with the comprehensive plan. Thus, it appears, the conditional use need not satisfy every aspirational goal of the comprehensive plan, so long as it is not in direct conflict with specific prohibitions in the comprehensive plan.

In *Howard v. Canyon Cnty. Bd. of Comm'rs*, 128 Idaho 479, 480, 915 P.2d 709, 711 (1996), the Court upheld the county's determination that a conditional use permit for a 28-acre residential subdivision in an agricultural area conflicted with the comprehensive plan. The Court explained that one or two small residential

[32] The requirement of consistency with the comprehensive plan is recited in *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho 115, 117, 867 P.2d 989, 991 (1994), though the decision did not turn on this point.

developments might not threaten the agricultural character of the area, but that the county was justified in finding that this third subdivision was cumulatively too much.

In *Evans v. Bd. of Comm'rs of Cassia Cnty.*, 137 Idaho 428, 50 P.3d 443 (2002), the county issued a special use permit to the developer of a gravel pit. Neighbors in subdivision of "$200,000 'luxury' homes" appealed, contending, among other things, that the gravel pit was not consistent with the comprehensive plan. *Evans*, 137 Idaho at 430, 60 P.3d at 445. The Court held that there was ample evidence in the record to support the county's finding of consistency with the plan, which, by its own terms, encouraged gravel extraction.

Two more conditional use permit cases were decided in 2003. *Friends of Farm to Market v. Valley Cnty.*, 137 Idaho 192, 197, 46 P.3d 9, 14 (2002) and *Whitted v. Canyon Cnty. Bd. of Comm'rs*, 137 Idaho 118, 121, 44 P.3d 1173, 1176 (2002). In each, the county approved the applications and the Idaho Supreme Court affirmed. Accordingly, these cases shed no light on the circumstances under which a county properly may deny a conditional use permit application. In both cases, the Court simply recited some of the evidence upon which the county relied and declared that it was good enough to support the county's finding.

In *Friends*, the Court upheld the issuance of two conditional use permits to a developer against a challenge that the CUPs were contrary to the county's comprehensive plan.[33] *Friends* 137 Idaho at 197, 46 P.3d at 14. *Friends* quoted at length from *Urrutia*, discussed below.

The *Whitted*, the Court upheld the county commission's approval of a conditional use permit against a challenge by neighbors contended that the residential development located within an agricultural area was inconsistent with the comprehensive plan. The Court quoted once again from *Urrutia* to the effect that "a comprehensive plan does not operate as legally controlling zoning law." *Whitted*, 137 Idaho at 122, 44 P.3d at 1177.

D. The "in accordance with" requirement in the context of other land use actions.

As noted above, LLUPA's requirement of consistency with the comprehensive plan applies to zoning ordinances and conditional use permits, not to other land use actions. Idaho Code §§ 67-6511, 67-6512(a). See footnote 28 at page 33.

In some cases, local zoning or subdivision ordinances have imposed their similar consistency requirements in the context of PUDs. Court decisions in actions arising under these ordinances have borrowed from the law applicable to zoning ordinances, but have also drawn important distinctions. The key point made by these

[33] Recall that Idaho Code § 67-6512(a) mandates that conditional use permits (aka special use permits) be consistent with the comprehensive plan. See discussion in footnote 28 at page 33.

decisions is that while zoning and subdivision ordinances are controlling law, comprehensive planning is forward-looking guidance. Planning documents establish visionary and aspirational goals for the local government. These goals are best implemented not by direct application of the comprehensive plan to land use decisions, but by the adoption of zoning and other ordinances. These ordinances operate as law; they control and affect property. Planning documents, in contrast, are not prescriptive regulatory documents and should not be used to restrict property rights and upset expectations based on applicable ordinances. Accordingly, while a comprehensive plan apparently may be taken into account at some level in decision-making on individual land use applications, comprehensive plans may not form the basis for denial of an application which otherwise satisfies requirements under the applicable ordinance.

In *South Fork Coal. v. Bd. of Comm'rs of Bonneville Cnty.* ("*South Fork II*"), 117 Idaho 857, 860, 792 P.2d 882, 885 (1990) the county approved a PUD and project opponents sued contending, among other things, that the project was not consistent with the comprehensive plan. The Court affirmed the approval of the project. The case is mysterious in that the Court did not explain why consistency with the comprehensive plan was even a requirement. (Presumably a local ordinance so provided.) Instead, the Court cited *Bone v. City of Lewiston,* 107 Idaho 844, 693 P.2d 1046 (1984) and *Balser v. Kootenai Cnty. Bd. of Comm'rs,* 110 Idaho 37, 714 P.2d 6 (1986), both of which deal with the "in accordance" requirement in Idaho Code § 67-6511, which does not apply to PUDs. In any event, since the Court found there was conformity, it had no occasion to address whether and under what circumstances, if any, a county could deny a PUD on the basis of inconsistency with the comprehensive plan.

In a 2000 decision, the Idaho Supreme Court laid out its most complete explanation to date of the "in accordance with" principle. In *Urrutia v. Blaine Cnty.*, 134 Idaho 353, 2 P.3d 738 (2000), the Court addressed a Blaine County subdivision ordinance which conditioned subdivision approval upon, among other things, a finding that the subdivision "conformed" to the comprehensive plan.[34]

The county rejected a subdivision application that would allow houses to be constructed in a rural area on the basis that it violated its comprehensive plan's goal of preserving land in agricultural use. The Court reversed, holding that the subdivision application need not conform with every aspect of the comprehensive plan:

[34] As noted above, LLUPA does not require that subdivision actions be in accordance with the comprehensive plan. Blaine County's subdivision ordinance, however, contained such a requirement. Former Blaine County Subdivision Ordinance 77-6, § 9.01 provided: "Land being subdivided shall conform to the Comprehensive Plan, the zoning ordinance, this subdivision ordinance, and all other ordinances in effect in the County."

> In determining whether the land "conforms to the comprehensive plan" for the purposes of a subdivision application, the Board is simply required to look at all facets of the comprehensive plan and assure that the land fits within all of the various considerations set forth in the plan. It is to be expected that the land to be subdivided may not agree with all provisions in the comprehensive plan, but a more specific analysis, resulting in denial of a subdivision application based solely on non-compliance with the comprehensive plan elevates the plan to the level of legally controlling zoning law. Such a result affords the Board unbounded discretion in examining a subdivision application and allows the Board to effectively re-zone land based on the general language in the comprehensive plan.

Urrutia, 134 Idaho at 358-59, 2 P.3d 743-44 (emphasis supplied).

The Court explained that the real purpose of the comprehensive plan is to inform zoning decisions, not individual applications for subdivision. "The Board may, therefore, refer to the comprehensive plan as a general guide in instances involving zoning decisions such as revising or adopting a zoning ordinance." *Urrutia*, 134 Idaho at 358, 2 P.3d 743 (emphasis supplied). The Court continued:

> As indicated above, the comprehensive plan is intended merely as a guideline whose primary use is in guiding zoning decisions. Those zoning decisions have already been made in this instance, and land subdivided into twenty-acre lots and used for single family residences is specifically permitted in this agricultural area. Thus, we agree with the district judge that the Board erred in relying completely on the comprehensive plan in denying these applications, and should instead have crafted its findings of fact and conclusions of law to demonstrate that the goals of the comprehensive plan were considered, but were simply used in conjunction with the zoning ordinances, the subdivision ordinance and any other applicable ordinances in evaluating the proposed developments.

Urrutia, 134 Idaho at 358-59, 2 P.3d 743-44 (emphasis supplied).

In other words, the proper time to consider consistency with the comprehensive plan is when the city or county adopts its zoning ordinances, not when it applies those ordinances in the context of individual PUD or subdivision

applications. To require consistency with the comprehensive plan at the latter stage would allow the local government unbridled discretion to revisit its zoning decisions on individual applicants.

The conclusion reached by the Court in *Urrutia* was reinforced two years later by the Court in *Sanders Orchard v. Gem Cnty.*, 137 Idaho 695, 52 P.3d 840 (2002). This case involved the development of a 46-lot subdivision near Emmett. The developer first secured a change in the comprehensive plan map to allow greater density. The developer then sought a change in zoning to "B-1 Residential," which Gem County also approved. Meanwhile, the developer filed a preliminary plat application corresponding to the new zoning. The development then hit a snag, when the developer declined to agree to install central water and sewer. Gem County denied the preliminary plat on the basis that "[i]t is reasonable and consistent with the Gem County Zoning Ordinance to require central water and sewer systems." *Sanders Orchard*, 137 Idaho at 699, 52 P.3d at 842 (emphasis supplied). Thus, the county's denial was based a requirement in the ordinance, not the comprehensive plan.

The developer sought judicial review under LLUPA, and the district court set aside the county's decision on the basis that it exceeded the county's statutory authority and was not supported by substantial evidence—again, without implicating the comprehensive plan. This time the county appealed. The Idaho Supreme Court also sided with the developer, again ruling that the county's findings were not supported by substantial evidence: "There was nothing submitted in writing to the Board indicating that central sewer and water lines will be extended to that area in the reasonably near future, or ever." *Sanders Orchard*, 137 Idaho at 702, 52 P.3d at 847.

Before reaching that conclusion, however, the Idaho Supreme Court also addressed the threshold question of whether the county had the authority under its zoning ordinance to require central water and sewer in the first place. The zoning ordinance did not say, in so many words, that the county was authorized to require central water and sewer. But it came pretty close. It stated that the B-1 zone "shall be confined to areas which can be served by central water, and which may in the future . . . be served by central sewage systems." *Sanders Orchard*, 137 Idaho at 698, 52 P.3d at 843.[35] The developer contended that since the zoning ordinance did not expressly demand that central sewer and water be provided, the county had no discretion to impose the requirement. *Id.* The Idaho Supreme Court disagreed, declaring that the provision quoted above "would be meaningless unless central sewer could be required in B-1 zones." Again, this was an interpretation of the zoning ordinance, not of the comprehensive plan.

[35] The zone also provided, in a footnote, that the minimum lot size "[m]ay be reduced if on central water and sewer." *Sanders Orchard*, 137 Idaho at 698, 52 P.3d at 843.

Thus, the Court concluded that the county had discretion under LLUPA and its own ordinance to require central water and sewer. *Id*. The Court declared, "That discretion is not unbounded, however." *Id*. Thereupon the Court launched into a discussion of *Urrutia* in which it observed that a requirement in its subdivision ordinance requiring conformance with the comprehensive plan "does not incorporate by reference all the provisions of the Comprehensive Plan into the Subdivision Ordinance." *Sanders Orchard*, 137 Idaho at 699, 52 P.3d at 844.

The Court concluded, "The requirement that Sanders Orchard have a proposal for central water and sewer system in connection with the proposed subdivision is consistent with the requirements of the Gem County Comprehensive Plan." *Sanders Orchard*, 137 Idaho at 699-700, 52 P.3d at 844-45. In essence, the Court looked to the comprehensive plan as a sort of legislative history to support the county's interpretation of its ordinance as allowing the imposition of a requirement for central water and sewer. In so doing, the Court cautioned:

> The governing board cannot, however, deny a use that is specifically permitted by the zoning ordinance on the ground that such use would conflict with the comprehensive plan. . . . If there is a conflict between the comprehensive plan and a use permitted under the zoning ordinance, the zoning ordinance controls.

Sanders Orchard, 137 Idaho at 699, 52 P.3d at 844.

In sum, the comprehensive plan may play a role at the subdivision stage, but it is an extremely limited one. It may guide the interpretation and exercise of a specific authority articulated in the ordinance (*e.g.*, to require central water and sewer), but it may not be used to create brand new requirements or obstacles at odds with land uses permitted under the ordinance.

In the same year as *Sanders Orchard*, the Court handed down two more "in accordance" cases, both dealing with conditional use permits. *Friends of Farm to Market v. Valley Cnty.*, 137 Idaho 192, 197, 46 P.3d 9, 14 (2002) and *Whitted v. Canyon Cnty. Bd. of Comm'rs*, 137 Idaho 118, 121, 44 P.3d 1173, 1176 (2002). These are discussed above in section 3.C at page 60. Both decisions quote at length from *Urrutia*.

E. Required "components" of a comprehensive plan

LLUPA sets out fourteen specific "components." These are topics that must be addressed in the comprehensive plan. The fourteen components are:

1. property rights
2. population
3. school facilities and transportation

4. economic development
5. land use (including a land use map)
6. natural resources
7. hazardous areas
8. public services, facilities and utilities
9. transportation
10. recreation
11. special areas or sites
12. housing
13. community design
14. implementation

Idaho Code § 67-6508. These are just the headings. The statute sets out a brief explanation of each component.

In *Sprenger, Grubb & Associates v. City of Hailey* (*"Sprenger Grubb II"*), 133 Idaho 320, 986 P.2d 343 (1999) (Walters, J.), the Idaho Supreme Court held that each of the elements in section 67-6508 is mandatory. In that case, the Court ruled that the absence of a land use map and a property rights discussion voided the entire plan, the underlying zoning ordinance, and the city's zoning decision pursuant to the zoning ordinance. "Thus, we conclude that a valid comprehensive plan must contain each of the components as specified in § 67-6508, unless the plan articulates a reason why a particular component is unneeded." *Sprenger Grubb II,* 133 Idaho at 322. 986 P.2d at 345.

The *Sprenger Grubb II* case was affirmed but limited to some extent in *Neighbors for Preservation of Big and Little Creek Community v. Bd. of Cnty. Comm'rs of Payette County*, 159 Idaho 182, 358 P.3d 67 (2015) (Horton, J.). In *Neighbors*, Alternate Energy Holdings Inc (AEHI) sought to develop a nuclear power plant in Payette County. A group of neighboring landowners (led by H-Hook) opposed the project. The neighbors opposed a proposed amendment to the comprehensive plan on the basis that it failed to address the component dealing with power plants and transmission lines. The County amended the comprehensive plan to include language saying that proposals for new energy facilities would be addressed on an ad hoc basis. The neighbors contended this fell short of the "analysis" required under LLUPA and *Sprenger Grubb II*. The Idaho Supreme Court disagreed, finding that the minimal discussion was sufficient.

> This case differs from *Sprenger*. As amended, the comprehensive plan addresses power plant siting, albeit on a case-by-case basis. Although we acknowledge that this language provides little guidance, it would be extraordinarily difficult, if not impossible, to develop detailed plans for the many different types of power plants (i.e., natural gas, coal, wind, solar, hydroelectric,

> biomass, geothermal, nuclear) that may be proposed, particularly since the size of such projects can be widely variable. We agree with the district court that the amended comprehensive plan satisfied the requirements of Idaho Code section 67–6508(h) as to power plant siting.

Neighbors, 159 Idaho at 188, 358 P.3d at 73. In short, there is still a requirement to address each of the components set out in LLUPA, but not much analysis is required—at least in the case of power plants, which would be difficult to address in advance. Presumably, more rigorous analysis would be required for those components that are at the core of land use planning.

F. Manufactured homes

Note that a special section of LLUPA deals with manufactured homes. It requires that each comprehensive plan must permit manufactured homes on all land zoned for single family residential uses, except for land designated as a historic district. Idaho Code § 67-6509A(1). The statute includes a list of permissible restrictions on manufactured homes.

G. Land use map (aka future land use map)

The fifth component listed in section 67-6508 ("(e) Land Use") mandates the inclusion of a land use map as part of the comprehensive plan. "A map shall be prepared indicating suitable projected land uses for the jurisdiction." Idaho Code §§ 67-6508(e).[36] The land use map is a planning instrument providing a long term vision of the direction of future land use development. In other words, it is a guidance document displaying the municipal entity's current idea of how land uses and zoning may evolve in the future.

Being merely a guidance document, the land use map does not control current uses and should not be confused with the zoning map displaying the zones required to be established under section 67-6511.[37] The planning map reflects forward thinking (envisioning the future). "Thus, the land use map, in essence, is a goal or forecast of future development in the City." *Bone v. City of Lewiston*, 107 Idaho 844, 850, 693 P.2d 1046, 1052 (1984). The zoning map, in contrast, sets out the current, operative zoning districts that control what types of developments may be constructed in a given area. The Idaho Supreme Court has ruled that a local government is not bound to grant a rezone application simply because it is consistent

[36] The operative provision simply refers to this as a "map." Idaho Code § 67-6508(e).

[37] LLUPA does not require creation of a zoning map in so many words, but it does require the designation of zoning districts which, as a practical matter, are most readily displayed on a zoning map.

with the future contemplated uses shown on the land use map. *Bone v. City of Lewiston*, 107 Idaho 844, 850, 693 P.2d 1046, 1052 (1984).

At first glance, a land use map looks much like a zoning map; both are divided into color-codes regions. However, the regions on a zoning map are the zoning districts. The regions on a planning map often correspond to an entirely different set of definitions. For instance, as of this writing, the Boise City planning map contains a region labeled "planned community," despite the fact that the zoning map does not allow high-density development there today. Indeed, there is not even a zone called "planned community." This is simply an indication, on the planning map, that at some point in the future, the city anticipates zoning changes that will allow a planned community to be developed there.

In some instances, a municipal entity simply will adopt the zoning map as its land use map. While this is permissible, it defeats the purpose of having a future-looking land use map.

The land use map also should not be confused with the "future acquisitions map" contemplated under Idaho Code Section 67-6517.

H. Geographic scope of plan

LLUPA says, simply, "The plan shall include all land within the jurisdiction of the governing board." In the case of cities, this may include the designated area of city impact outside the cities' boundaries. As discussed in section 9 starting on page 113, Idaho Code Section 67-6526 outlines how cities and counties decide which jurisdiction's comprehensive plan applies in the area of impact. The city and county are obligated to reach an agreement between themselves as to which of their comprehensive plans will apply within the area of city impact.

I. Procedure for adoption of comprehensive plan

Idaho Code Section 67-6509 discusses the procedure for adoption of a comprehensive plan. Failure to follow these requirements likely voids the action taken. *Price v. Payette Cnty. Bd. of Cnty. Comm'rs,* 131 Idaho 426, 958 P.2d 583 (1998) (Trout, C.J.).

Any person may petition to amend the comprehensive plan at any time. Likewise, the commission may recommend text or map amendments as frequently as it chooses. Idaho Code § 67-6509(d). Until 2010, there was a restriction on how often the comprehensive plan map could be changed. The statute now provides that the map, as well as the plan itself, may be changed at any time "unless the governing board has established by resolution a minimum interval between consideration of requests to amend, which interval shall not exceed six (6) months." Idaho Code § 67-6509(d).

Adoption is a two-step process. The P&Z first holds a hearing and makes a recommendation. Then the governing board acts on the recommendation.

The P&Z hearing is mandatory. Idaho Code § 67-6509(a). The commission must give at least 15 days' notice prior to the hearing, including the time and place of the hearing and a summary of the plan. Idaho Code § 67-6509(a).[38] If the P&Z commission recommends a "material change" to the plan after it has conducted the hearing, it must give notice of the change and conduct another public hearing concerning the matter if the governing board is not going to conduct its own hearing. Idaho Code § 67-6509(a). At the conclusion of the P&Z process, the commission will make a recommendation to the governing board that the plan be adopted, amended, or repealed.

The governing board may simply act on that recommendation, or, at its option, it may conduct its own hearing on the comprehensive plan. Idaho Code § 67-6509(b). However, the governing board may not hold a public hearing until it has received a recommendation from the planning and zoning commission. Idaho Code § 67-6509(b). If the governing board holds its own hearing, its hearing notice must include a description of the P&Z's recommendation. Idaho Code § 67-6509(a). The notice requirements are the same as the P&Z's. Idaho Code § 67-6509(b). If the governing board makes a material change to the recommendation, the governing board must also provide "further notice and hearing." Idaho Code § 67-6509(b).

Originally, LLUPA required that the plan be adopted by ordinance. It now provides for adoption by resolution. The plan is not effective until the governing board approves a resolution adopting the plan.[39]

J. Comprehensive plans and zoning ordinances may not be adopted by initiative

Comprehensive plans and zoning ordinances cannot be adopted by initiative. *Gumprecht v. City of Coeur D'Alene,* 104 Idaho 615, 661 P.2d 1214 (1983), *overruled on other grounds by City of Boise City v. Keep the Commandments Coalition*, 143 Idaho 254, 257, 141 P.3d 1123, 1126 (2006).

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[38] The notice must be published in the official newspaper or newspaper of general circulation in the jurisdiction. Idaho Code § 67-6509(a). The commission must also "make available a notice to other papers, radio and television stations serving the jurisdiction for use as a public service announcement." Idaho Code § 67-6509(a). Further, notice must be sent to all political subdivisions providing services in the jurisdiction, including school districts, also 15 days before the hearing. Idaho Code § 67-6509(a). The commission must keep a record of the hearings, findings made, and actions taken. Idaho Code § 67-6509(a).

[39] The resolution may refer to the plan by definitive reference as opposed to attaching it. The jurisdiction is required to keep the resolution on file. Idaho Code § 67-6509(c).

K. Practical considerations for developers

Adoption of an overall comprehensive plan is a legislative action in which the governing board is given great discretion. The statute and case law suggest that a comprehensive plan could only be successfully challenged for failure to follow hearing or other procedural requirements or for failure to include a required element.

It remains an open question under Idaho law whether a comprehensive plan amendment affecting one or a few properties is a legislative or quasi-judicial action.

Developers sometimes require comprehensive plan amendments to permit development. These applications face significant hurdles and developers should use care prior to making them.

The first hurdle is that the decision to grant or deny a comprehensive plan amendment is almost totally in the discretion of the governing board. That is, the developer has virtually no rights to such a change. Therefore, the developer should be very comfortable that the governing board will support a comprehensive plan change before applying for one.

Determining the governing board's inclinations regarding a comprehensive plan change is something of a touchy matter due to the difficulty in determining when *ex parte* contact limitations apply. (See discussion in section 25.C starting on page 549.) Even if there is no limitation on contacting decision-makers on the comprehensive plan amendment itself, *ex parte* contact limitations almost certainly apply to other aspects of the application, such as rezoning, conditional use permits, subdivision, or variances. The best practice is to avoid *ex parte* contacts with decision-makers, especially after an application has been filed, and work with the jurisdiction's staff to gauge whether a comprehensive plan amendment will be well received.

The second limitation with comprehensive plan amendments is that the planning and zoning commission can recommend amendments to the land use map only every six months, Idaho Code § 67-6509(d), and the governing board can only address and adopt amendments following the commission's recommendation. If that timeframe does not work for the developer, he or she should consider a different strategy for the project.[40]

[40] Another open question around the six-month limitation is whether a comprehensive plan land use map amendment before the planning and zoning commission on a six-month review can be deferred and separated from the rest of the amendment without waiting another six months. That is, assume there are several proposed map amendments before a planning and zoning commission on a six-month review. Several of the amendments move forward but the applicant wishes to defer one to resolve some issues. Arguably, it seems to be contrary to the statute's requirement that the planning and zoning commission may not recommend changes more frequently than every six months if a recommendation were made on this application a month or two after the others. On the other hand,

A final set of issues arises if the comprehensive plan amendment affects development within an area of city impact. As discussed in section 9 starting on page 113, either the city's comprehensive plan and ordinances or the county's (or possibly some combination or special plan) may apply within the area of city impact. Special care will be required to determine what law applies and who must approve any change. Depending on what the applicable ordinances say, approval by both the city and county could be required.

Many applications in the area of impact include annexation into the city as one of the government approvals. In this case, county approval of the comprehensive plan change is usually not required as the property leaves county jurisdiction concurrently with the effectiveness of the comprehensive plan change.

A final practical tip is that it is often easier to obtain a comprehensive plan change as part of an overall modification of a comprehensive plan as opposed to a specific change for a specific development. Developers should strongly consider being involved in the comprehensive plan modification process if property they are interested in developing requires a comprehensive plan change.

L. Discretionary authority to change comprehensive plan

LLUPA includes an optional way to address a conflict with the comprehensive plan. Section 67-6511(c) states: "If the request is found by the governing board to be in conflict with the adopted plan, or would result in demonstrable adverse impacts upon the delivery of services . . . the governing board may consider an amendment to the comprehensive plan . . ." In our experience, this provision is rarely used. The practice seems to be that, if the governing board is inclined to approve the application, they find a way to make it fit in the comprehensive plan rather than requiring an amendment of the plan.

If the governing board does require a comprehensive plan amendment, the statute mandates the following procedure: "After the plan has been amended, the zoning ordinance may then be considered for amendment pursuant to Section 67-6511(b)." The Idaho Supreme Court has held that the comprehensive plan amendment and rezone applications can be considered in tandem (during the same hearing), but the board is required to deliberate on the comprehensive plan amendment prior to consideration of the rezone. This ensures that the rezone is in accordance with any revisions to the comprehensive plan. *Price v. Payette Cnty. Bd. of Cnty. Comm'rs*, 131 Idaho 426, 430, 958 P.2d 583, 587 (1998) (Trout, C.J.).

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since the application began with the others, one could argue it was part of the same batch, particularly if it were heard at the same time as the others before the governing board. If a developer finds himself or herself in this position, some discussion with the agency's staff is in order to make sure the comprehensive plan amendment is not unnecessarily delayed.

M. Comprehensive plans and "future needs" water rights

The comprehensive plan can also have implications for a city's ability to provide a municipal water supply. Under Idaho's water code, the cities, counties, and other municipal providers can obtain water rights to serve long term "reasonably anticipated future needs," but only to the extent such needs are "not inconsistent with comprehensive land use plans approved by each municipality." Idaho Code § 42-202B(8). See *Idaho Water Law Handbook* for a more complete discussion of municipal water rights.

4. ZONING ORDINANCES

A. Establishing zoning districts and rezoning

(1) Overview

The most fundamental land use action is to zone or rezone property. A zoning action establishes the core limitations on a property's development rights. Under Idaho law, the key questions in zoning and rezoning issues are:

What is the governing board's authority to adopt zoning restrictions?

What procedural steps must be followed to adopt a valid zoning ordinance?

What "particular consideration" must be given to the impact of the application on services?

What is the "uniformity" requirement?

What does it mean for a zoning ordinance to be "in accordance with the policies in the adopted comprehensive plan?"

What can be done if a proposed zone change is not in accordance with the policies in the plan?

What vested rights does a property owner have in a zone change? and

What happens if property enters a jurisdiction unzoned?

The subsections below address these issues in turn.

(2) Grant of authority

As discussed above, the constitutional grant of zoning powers is broad. Additionally, LLUPA includes an expansive list of potential aspects of a development that governing boards may regulate. Section 67-6511 authorizes governing boards to establish standards "to regulate and restrict the height, number of stories, size, construction, reconstruction, alteration, repair or use of buildings and structures; percentage of lot occupancy, size of courts, yards, and open spaces; density of population; and the location and use of buildings and structures." No Idaho court has invalidated a zoning ordinance for exceeding this grant of authority.

Zoning ordinances frequently include zoning requirements that are not specifically enumerated in this list. For example, many ordinances include off-site parking requirements, yet this is not an enumerated authority. One could undoubtedly come up with many other types of land use authorities that are not in the enumerated list. However, there is little reason to believe Idaho courts would look to this list as evidence of the Legislature's intent to limit the zoning power. To the contrary, Idaho courts are wont to observe that LLUPA's grant of authority is broad.

In fact, it appears the Idaho Supreme Court construes LLUPA's grant of the land use power to be as broad as the police power, unless LLUPA contains a specific limitation.

(3) Procedural requirements for validity

Zoning ordinances must be adopted, amended, or repealed in accordance with the procedural requirements of Idaho Code § 67-6509, which are discussed in section 3.I starting on page 68. Section 67-6509(a) requires that the planning and zoning commission conduct at least one hearing prior to recommending the "plan, amendment, or repeal of the plan to the governing board." This dovetails with the requirement in Section 67-6511(b) that rezoning requests first be submitted to the planning and zoning commission.

However, since Section 67-6509 addresses adoption of the comprehensive plan, the fit with rezoning applications is not perfect and there are questions and ambiguities as to what the notice requirements are. For example, Section 67-6509 requires notice to political subdivisions, which may make no sense in the context of a particular zoning application. For example, why should an irrigation district get notice of a rezoning application where it has no facilities on or near the rezoned property?

An additional ambiguity in the application of Section 67-6509 to rezones is the requirement to hold another public hearing at the planning and zoning commission if there is a "material change to the proposed amendment to the plan . . . ."

Section 67-6511 includes additional notice requirements that apply specifically to zoning district boundary changes. These applications require notice by mail to property owners or purchasers of record within the land being considered, within 300 feet of the external boundaries of the land, and any additional area that may be impacted by the proposed change as determined by the commission. Idaho Code § 67-6511(b). Such notice must also be posted on the premises not less than one week prior to hearing. (Note that this 300-foot requirement is also applicable for conditional use permits. Idaho Code § 67-6212(b).)

When notice is required to 200 or more property owners, the local jurisdiction may adopt an ordinance providing alternate forms of notice that would provide adequate notice in lieu of posted or mailed notice. In the absence of a locally adopted alternative, LLUPA deems notice to be adequate if notice is provided through a display advertisement at least four (4) inches by two (2) columns in the official newspaper of the jurisdiction at least fifteen days prior to the hearing date, in addition to site posting on all external boundaries of site at least 15 days before the hearing. The statute does not clarify what are "all external boundaries." This could

be an interesting question for an application affecting 200 or more parcels of property.

(4) Consideration given to impacts on services

Section 67-6511(a) requires that, in zone change applications, "Particular consideration shall be given to the effects of any proposed zone change upon the delivery of services by any political subdivision providing public services, including school districts, within the planning jurisdiction." No reported decision addresses whether this language imposes any substantive requirement. That is, does this language mean that the record of a rezoning application must address the impact of the application on the delivery of services? Or is the language just an admonition without substantive bite?

The Idaho Supreme Court's focus has plainly been on the accordance of the application with the policies in the comprehensive plan and has never addressed this language. The delivery of services requirement directly follows a sentence requiring that the application first be submitted to the planning and zoning commission. One could read this language as meaning that only the planning and zoning commission's recommendation must address the delivery of services. Even if this is the case, it is unclear whether the failure of the planning and zoning commission to address the issue would void an application. If the language also applies to the governing board, then it is possible that a finding of no adverse impact on services could be a mandatory finding for approval of a rezone.

In any case, it is difficult to get around the Legislature's use of the word "shall." Prudence would seem to dictate that zone change ordinances and the findings of fact and conclusions of law in zone change applications should address the delivery of services.

(5) Uniformity

Section 67-6511 includes the following provision: "All [zoning] standards must be uniform for each class or kind of buildings throughout each district, but the standards in one (1) district may differ from those in another district."

A zoning ordinance could run afoul of the uniformity requirement by treating similar uses differently in the same zoning district. For example, if a zoning district permits grocery stores but prohibits uses with similar impacts such as convenience retail uses, the ordinance may be subject to attack for lack of uniformity.

The likelihood is that a uniformity challenge to a zoning ordinance would be difficult to sustain. In most cases, the establishment of a zoning district will be a legislative matter in which the governing board is given broad discretion.

In *KGF Development, LLC v. City of Ketchum*, 149 Idaho 524, 236 P.3d 1284 (2010) (J. Jones, J), the Court struck down Ketchum's TDA ordinance for two reasons. First, it exceeded the scope of the TDA ordinance (see discussion in section 5 on page 101). Second, the Court found the ordinance violated the uniformity requirement in section 67-6511. Ordinarily, a TDR ordinance contemplates that development rights on a property in the "sending area" may be purchased and transferred to a site in the "receiving area." The *KGF* Court found that Ketchum's TDA ordinance did not work this way.

> The difficulty with the Ordinance is simply this: the "rights" that may be transferred under the Ordinance are not "rights" possessed by the sending site. Rather, the "development rights" defined by the Ordinance are synthetic creations authorizing sending site owners to transfer "rights" superior to the development rights they possess. That is, the property owners of sending sites do not have the right under the Ketchum scheme to develop the sending sites in a fashion permitted by the receiving sites. The effect of the TDR scheme created by the City is to allow receiving site property owners to purchase limited exemptions from the City's zoning regulations. This conflicts with the uniformity requirement of Idaho Code section 67–6511.

KGF, 149 Idaho at 530, 236 P.3d at 1290.

(6) Vested rights: four-year entitlement

Idaho Code Section 67-6511(d) prohibits a governing board from changing zoning for a period of four years following a property-owner requested zone change. If the board violates this requirement, the statute grants standing to the property owner to challenge the action.

(7) Initial zoning upon annexation and rights to develop unzoned property

If the annexation ordinance is silent regarding zoning, the annexed lands come into the municipality as unzoned property, regardless of prior zoning classification under county ordinances. *Burt v. City of Idaho Falls*, 105 Idaho 65, 67, 665 P.2d 1075, 1077 (1983) (Donaldson, C.J.). Under such circumstances, the municipality must pass a zoning ordinance before it will have authority to deny otherwise permissible uses of unzoned property.

In *Ben Lomond, Inc. v. City of Idaho Falls*, 92 Idaho 595, 598, 448 P.2d 209, 212 (1968), the Idaho Supreme Court adopted what it described as the majority rule, holding "that land formerly within the county's jurisdiction, upon annexation comes

into the city as unzoned land." The Court said it was compelled to so rule because "local subdivisions of government are separate sovereignties and [] the ordinances of one political subdivision are of no effect in another." *Ben Lomond*, 92 Idaho at 599, 448 P.2d at 213. After annexing the subject property, the city delayed adoption of a zoning ordinance for over a year. In the meantime, a landowner applied for a building permit. Accordingly, the Court ruled that since the property was annexed into a city without zoning, it may be put to any lawful use. "A service station, not being a nuisance per se, is a permissible use on unzoned land." *Ben Lomond*, 92 Idaho at 600, 448 P.2d at 214. The Court further ruled that the landowner was entitled to the building permit based on the zoning status at the time of application. "In such a situation, the later enactment of the ordinance cannot be held to divest appellant of this right." *Ben Lomond*, 92 Idaho at 600, 448 P.2d at 214.

(8) Spot zoning

Spot zoning refers to a change in zoning of a particular parcel or parcels that is out of character with the surrounding area and the comprehensive plan and is done for the benefit of the particular landowner rather than for the benefit of the community as a whole. Idaho, like most states, has recognized that spot zoning may be illegal and may be set aside.

Given the legislative nature of zoning, it is ordinarily very difficult to mount a successful challenge to zone change. *Dawson Enterprises, Inc. v. Blaine Cnty.*, 98 Idaho 506, 511, 567 P.2d 1257, 1262 (1977) (Bistline, J.) ("Zoning is essentially a political, rather than a judicial matter, over which the legislative authorities have generally speaking, complete discretion.") Spot zoning represents one of the few instances in which courts feel comfortable second-guessing a zoning decision on its merits.

The common law concept of spot zoning overlaps substantially with the statutory requirement that zone changes (as well as certain other actions) be "in accordance" with the comprehensive plan. Idaho Code § 67-6511 (see discussion in section 3.B at page 54). Indeed, on occasion, the Idaho Supreme Court has made statements that suggest that the two are the same thing:

"Price argues that the Board's decision to rezone Bone's property constitutes 'spot zoning,' in violation of I.C. § 67-6511." *Price v. Payette Cnty. Bd. of Cnty. Comm'rs,* 131 Idaho 426, 431, 958 P.2d 583, 588 (1998) (Trout, C.J.). "A claim of 'spot zoning' is essentially an argument the change in zoning is not in accord with the comprehensive plan." *Evans v. Teton Cnty.*, 139 Idaho 71, 76, 73 P.3d 84, 89 (2003) (Kidwell, J.) (quoted by *Taylor v. Canyon Cnty. Bd. of Comm'rs* ("*Taylor II*"), 147 Idaho 424, 436, 210 P.3d 532, 544 (2009) (Burdick, J.)). However, as discussed below, it is clear that acting in accordance with the comprehensive plan is but one factor to consider.

American Law Reports provides this useful summary of the doctrine:

> "Spot zoning" commonly refers to the singling out of one lot or other small area for a zoning classification that is different from that accorded similar surrounding land, usually for the benefit of the owner and to the detriment of the community. Although the courts have espoused numerous variations of this definition, these variations have but minor differences, and there is certainly general agreement on the definition of the term. In most jurisdictions, "spot zoning" is considered a legal term of art that refers to a practice that is invalid per se. In states adhering to this view, a judicial determination that a small parcel zoning or rezoning constitutes spot zoning is, ipso facto, a determination of illegal spot zoning. In other jurisdictions, "spot zoning" is considered a descriptive term only, rather than a legal term of art, and a small parcel zoning or rezoning may be valid or invalid depending upon the particular facts. As a practical matter, however, it makes little difference whether the court considers spot zoning to be a legal term of art or merely a descriptive term. Under either view, every case in this annotation at least impliedly supports the proposition that a determination of illegal spot zoning is dependent upon the facts and circumstances of the particular case.
>
> . . .
>
> The most widely accepted tests for determining illegal spot zoning, sometimes stated in combination, sometimes separately, are whether the zoning of the parcel in question is in accordance with a comprehensive zoning plan; whether the zoning of the subject parcel is compatible with the uses in the surrounding area; and whether the zoning of the subject property serves the public welfare or merely confers a discriminatory benefit on the owner of the property. These criteria are flexible and provide guidelines for judicial balancing of interests.

Mark S. Dennison, Determination of Whether Zoning or Rezoning of Particular Parcel Constitutes Illegal Spot Zoning, 73 A.L.R.5th 223 §2[a] (1999) (footnotes and cross-references omitted).

(a) "Descriptive" and "normative" spot zoning (*Dawson* and *Taylor I*)

The first Idaho case to employ the phrase "spot zoning" was *Dawson Enterprises, Inc. v. Blaine Cnty.*, 98 Idaho 506, 567 P.2d 1257 (1977) (Bistline, J.). In this case, and those that followed, the Court evolved the terms "descriptive" and "normative" to describe types of spot zoning.

> We note at the outset that the term "spot zone" has two different meanings which must be kept separate if confusion is to be avoided. See, Anno.: Spot Zoning, 51 A.L.R.2d 251 (1957). In its broadest, merely "descriptive" sense, spot zoning is simply the reclassification of one or more tracts or lots for a use prohibited by the original zoning ordinance. As such, a request for a spot zone has no negative connotations. It simply demarcates the starting point for a court's inquiry.

Dawson Enterprises, 98 Idaho at 514, P.2d at 1265 (emphasis added).

The *Dawson* Court then moved on to describe what has come to be called "normative" spot zoning:

> The most widely accepted tests of validity, sometimes stated or applied in combinations, sometimes separately, are whether or not the ordinance is in accordance with a comprehensive plan of zoning . . . and whether or not it is reasonably designed to promote the general welfare, or other objectives specified in the enabling statutes, rather than merely to benefit individual property owners or to relieve them from the harshness of the general regulation as applied to their property.

Dawson Enterprises, 98 Idaho at 514, P.2d at 1265 (ellipses original) (quoting from American Law Report, 51 A.L.R.2d at 266).

Thus both the Idaho Supreme Court and the commentators have recognized that the term "spot zoning" may be used in a purely descriptive sense (a small parcel—or spot—whose zoning is made less restrictive that the surrounding area) or as a normative term reflecting the legal conclusion that the zone change is unlawful.

These two meanings were clearly articulated in the *Taylor* case by the Idaho Court of Appeals in 1993:

> In *Dawson Enterprises, Inc.*, the Supreme Court addressed the two different meanings of the term "spot

zone." 98 Idaho at 514, 567 P.2d at 1265 (citing Anno., Spot Zoning, 51 A.L.R.2d 251 (1957)). The Court stated:

> In its broadest, merely 'descriptive' sense, spot zoning is simply the reclassification of one or more tracts or lots for a use prohibited by the original zoning ordinance. As such, a request for a spot zone has no negative connotations.

Id. The Court then described the term "spot zone" in its "normative" or "legal" meaning. In this sense of the term, the grant of a variance

> which singles out a parcel of land within the limits of a use district and marks it off into a separate district for the benefit of the owner, thereby permitting a use of that parcel inconsistent with the use permitted in the rest of the district, is invalid if it is not in accordance with the comprehensive zoning plan and is merely for private gain. [Citations omitted.]

Id. at 515, 567 P.2d at 1266.

Taylor v. Bd. of Cnty. Comm'rs, Cnty. of Bonner ("*Taylor I*"), 124 Idaho 392, 860 P.2d 8 (Ct. App. 1993) (Swanstrom, J.) (brackets original) (emphasis added).

(b) "Type one and "type two" spot zoning (*Evans*, *Taylor II*, and *Neighbors*)

In the 2003 *Evans* case, Idaho Supreme Court began to employ the terms "type one" and "type two" to describe spot zoning:

> A claim of "spot zoning" is essentially an argument the change in zoning is not in accord with the comprehensive plan. See *Price*, 131 Idaho at 432, 958 P.2d at 589. There are two types of "spot zoning." *Dawson Enter., Inc. v. Blaine County*, 98 Idaho 506, 514, 567 P.2d 1257, 1265 (1977). Type one spot zoning may simply refer to a rezoning of property for a use prohibited by the original zoning classification. The test for whether such a zone reclassification is valid is whether the zone change is in accord with the comprehensive plan. Type two spot zoning refers to a zone change that singles out a parcel of land for use inconsistent with the permitted use in the rest of the zoning district for the benefit of an

> individual property owner. *Id*. at 515, 567 P.2d at 1266. This latter type of spot zoning is invalid. *Id*.

Evans v. Teton Cnty., 139 Idaho 71, 76-77, 73 P.3d 84, 89-90 (2003) (Kidwell, J.).

The type one / type two terminology was employed again in the 2009 *Taylor II* case:

> In *Evans*, this Court clarified that there are two types of spot zoning. The first type, referred to as type one spot zoning, "may simply refer to a rezoning of property for a use prohibited by the original zoning classification." *Id*. "The test for whether [type one spot zoning] is valid is whether the zone change is in accord with the comprehensive plan." *Id*. at 77, 73 P.3d at 90. "[T]he question of whether a zoning ordinance is 'in accordance with' the comprehensive plan is a factual question which can be overturned only where the factual findings are clearly erroneous." *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 200, 46 P.3d 9, 17 (2002). The second type, referred to as type two spot zoning, "refers to a zone change that singles out a parcel of land for use inconsistent with the permitted use in the rest of the zoning district for the benefit of an individual property owner." *Id*.

Taylor v. Canyon Cnty. Bd. of Comm'rs ("*Taylor II*"), 147 Idaho 424, 436, 210 P.3d 532, 544 (2009) (Burdick, J.)) (emphasis added).

It seems that in *Evans* and *Taylor II*, the Court is essentially using the terms "type one" and "type two" for what the *Dawson* and *Taylor I* Court called "descriptive" and "normative."

Both *Evans* and *Taylor II* say that "type one" spot zoning s refers to a rezone that allows "a use prohibited by the original zoning classification." That sounds like the descriptive meaning of spot zoning—which is not illegal and does not have any special test associated with it (other than the standard requirement that the rezone is in conformance with the comprehensive plan). In contrast, a claim of type two spot zoning requires examination that goes beyond mere conformity with the comprehensive plan. It requires a subjective analysis of whether the rezone, although not in violation of the comprehensive plan, is nonetheless entirely out-of-character with the surrounding area and for no good reason other than to benefit the rezone applicant.

In *Neighbors for the Preservation of the Big and Little Creek Community v. Bd. of Cnty. Comm'rs of Payette Cnty.*, 159 Idaho 182, 358 P.3d 67 ("*Neighbors*")

(2015) (Horton, J.), the Court again employed the type one / type two analysis. The Court affirmed Payette County's up-zone of agricultural land to industrial in order to facilitate a nuclear power plant. In doing so, it found that the rezone was neither a type one nor a type two illegal spot zone.

Thus, the Court has clearly settled on the type one / type two analysis. The analysis begins by assessing whether the rezone is in accord with the comprehensive plan. In *Neighbors*, the Court adopted a rather deferential approach to that determination. Essentially the Court said that all that is required to meet the type one test is that the comprehensive plan be amended to prior to the rezone to say that the use is permissible. The *Neighbors* Court was not troubled by the fact that county's comprehensive planning did not actually engage in any real "planning" for nuclear power plants, but rather stated that energy projects could be proposed more or less anywhere and would then be evaluated on a case-by-case basis at the time of zoning.

The type two analysis in *Neighbors* was also deferential. The Court observed that the county justified its decision because there were five other industrial uses within five miles of the rezoned land (CAFOs and a landfill). That was enough to convince the Court that the County had not singled out this property for special and inconsistent treatment.

B. Conditional use permits (aka special use permits)

(1) Overview

Idaho Code Section 67-6512(a) authorizes, but does not require, local jurisdictions to include provisions for the issuance of special or conditional use permits. These terms are synonymous[41]; some localities issue what they call conditional use permits, others call them special use permits. We will generally refer to them as conditional use permits.

Essentially, a conditional use is one that is not outright allowed within a zone, but is allowed only if certain conditions specified in the ordinance are met. The statute authorizes issuance of such permits "if the proposed use is conditionally permitted by the terms of the ordinance, subject to conditions pursuant to specific provisions of the ordinance, subject to the ability of political subdivisions, including school districts, to provide services for the proposed use, and when it is not in conflict with the plan." Idaho Code § 67-6512(a).

Thus, the substantive standards for determining the validity of an action on a conditional use permit are: (1) the use must be conditionally permitted by the

[41] Idaho Code § 67-6512(a) ("each governing board may provide [for] . . . special or conditional use permits"); *Taylor v. Canyon Cnty. Bd. of Comm'rs*, 147 Idaho 424, 436, 210 P.3d 532, 544 (2009) ("Although Canyon County employs the term 'conditional use permit' rather than 'special use permit,' the two can be used synonymously.").

ordinance; (2) the permit must be judged based on specific provisions of the ordinance; (3) the approval is subject to the ability of political subdivisions to provide services; and (4) the proposed use must not be in conflict with the plan.

These standards raise several questions. First, issues may arise when a proposed use is not specifically listed in the zoning ordinance. This is usually addressed by review of the ordinance to determine whether the proposed use is similar to other uses that are conditionally permitted. If so, a conditional use permit may be issued.

Second, questions may arise about whether the criteria the jurisdiction uses are sufficiently "specific" to support issuance or denial of a conditional use permit. The reason for the specificity requirement is to promote uniform action on permits and prevent the differential treatment of similarly situated property owners.

Third, an unanswered question is whether it is mandatory for the local jurisdiction to address the ability to provide services and conflict with the plan as part of the decision. Local ordinances do not necessarily address these criteria as part of their conditional use ordinances.

Notice and hearing requirements apply to special permit applications. Idaho Code § 67-6512(b) and (c) (which incorporate by reference further hearing requirements in Idaho Code § 67-6509). At least one public hearing must be held prior to issuance of the permit. The jurisdiction must give at least 15 days' notice in the official newspaper or paper of general circulation. Notice may also be given as a public service announcement on radio, television or other newspapers. Notice must be posted on the property at least one week before the hearing. The jurisdiction must also provide notice to property owners within 300 feet of the external boundaries of the project and any other persons the planning and zoning commission determines are substantially impacted. The jurisdiction may adopt an ordinance offering alternative forms of notice if notice is required to more than 200 property owners. Publication of a display advertisement four inches by two columns in the official newspaper at least 15 days before the hearing is deemed to be adequate notice. Note that a "material change" in the application requires notice of the change and another public hearing concerning the matter. Idaho Code § 67-6509(a). Although the statute does not say so expressly, this may imply that a new hearing is required in the event of any amendment to the conditional use permit granted after issuance, such an extension of deadlines.

LLUPA authorizes the imposition of conditions on conditional use permits, including, but not limited to conditions to accomplish the following:

> Minimizing adverse impact on other development;
> Controlling the sequence and timing of development;
> Controlling the duration of development;

> Assuring that development is properly maintained;
> Designating the exact location and nature of development;
> Requiring the provision for on-site or off-site public facilities or services;
> Requiring more restrictive standards than those generally required in an ordinance;
> Requiring mitigation of effects of the proposed development upon service delivery by any political subdivision, including school districts, providing services within the planning jurisdiction.

Idaho Code § 67-6512(d).

The statute permits the jurisdiction to require studies "of the social, economic, fiscal, and environmental effects of the proposed special use." The issuance of a conditional use permit does not create a binding precedent to grant other conditional use permits. The permit is not transferable to another property. Idaho Code § 67-6512(e). Denial of a conditional use permit may be subject to a regulatory taking analysis pursuant to Idaho Code § 67-8003. Idaho Code §§ 67-6512(a) and 67-6535(3).

(2) Standards for permit approval

Depending on the type of permit applied for, both LLUPA and the applicable local ordinance may provide criteria for the approval of the permit. For example, LLUPA states the following about the granting of conditional use permits.

> A special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms of the ordinance, subject to conditions pursuant to specific provisions of the ordinance, subject to the ability of political subdivisions, including school districts, to provide services for the proposed use, and when it is not in conflict with the plan.

Idaho Code § 67-6512(a).

This section would appear to require that any local conditional use ordinance contain specific criteria for imposing conditions on the permit, as well as potentially imposing additional criteria regarding the ability to provide services and absence of conflict with the comprehensive plan.

Typical conditional use ordinances offer similar criteria, including consistency with the comprehensive plan, compatibility with neighboring uses, absence of an excessive burden on the transportation system, and the sufficient size of the site to accommodate the use and all yards, open space, etc. *See* Boise City Code Section

11-06-04.13. Ordinances often include specific criteria for specific kinds of conditional uses. *E.g.*, Boise City Code Section 11-06.

Under LLUPA, the ultimate decision must be "based upon standards and criteria which shall be set forth in the comprehensive plan, zoning ordinance or other appropriate ordinance or regulation of the city or county." Idaho Code § 67-6535(1).

LLUPA contains analogous standards pertinent to development agreements, Idaho Code § 67-6511A, planned unit developments, Idaho Code § 67-6515, variances, Idaho Code § 67-6516, and emergency ordinances and moratoria, Idaho Code § 67-6523.

(3) The conditions may not waive or postpone a prerequisite under the ordinance.

Conditional use permits routinely include conditions requiring the applicant to take further steps. There is nothing wrong in that; that is the whole idea of a conditional use permit. However, the conditioning process may not be used to delay compliance with prerequisites to the conditional use permit application.

In *Fischer v. City of Ketchum*, 141 Idaho 349, 109 P.3d 1091 (2005), the City of Ketchum issued a conditional use permit in connection with the construction of a four-story duplex located in an avalanche zone. The approval was conditioned on a requirement that the applicant secure certification of an avalanche attenuation device by a licensed engineer, subject to approval by the city's staff. The Court struck down the city's action, because the city's zoning ordinance expressly required that the engineering design occur before application for the conditional use permit and that its adequacy be evaluated by the planning and zoning commission.

The Court's opinion does not mention the harmless error provision in Idaho Code § 67-5279(4). In any event, the Court found the violation significant because it deprived the public of an opportunity to comment on the adequacy of the avalanche protection features, which the Court said was a violation of LLUPA's requirement for a public hearing, Idaho Code § 67-6512(b). It also violated LLUPA, said the Court, because it deferred a non-ministerial function (review of the engineer's certificate) to staff.

The Court gave short shrift to the applicant's practical argument that it should be allowed to postpone the expense of hiring an engineer until after it has secured the conditional use permit, citing the Court's rejection of a similar argument in *Daley v. Blaine Cnty.*, 108 Idaho 614, 701 P.2d 234 (1985).

The message to applicants for zoning approvals is clear: Read the ordinance and follow it with the utmost in punctilio. If the commission offers some slack, do not take it.

(4) Conditions attached to a conditional use permit may be modified.

The case of *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho 115, 867 P.2d 989 (1994), dealt with the question of whether conditions attached to a conditional use permit are permanently locked in or whether they may be modified. In this case, the holder of the conditional use permit for a baseball field sought to modify the conditions to allow night lighting and a later closing time. Neighboring landowners contended that the county was without authority to change the conditions or, in the alternative, could change them only on the basis of changed circumstances. The Court found that the county had authority to issue a new permit which effectively relaxed the conditions in the original permit, irrespective of whether circumstances had changed. *Chambers*, 125 Idaho at 117, 867 P.2d at 991.

The decision contains the broad statement that "[t]here is no indication in the statute [LLUPA] that once a conditional use permit is granted the conditions upon which it was granted cannot be changed or deleted." *Chambers*, 125 Idaho at 117, 867 P.2d at 991. However, this case dealt only with a request for modification by the holder of the permit. The authors are not aware of any case dealing with the unilateral modification of conditions in a permit, where the changes are were opposed by the holder. We presume that such a unilateral change would be impermissible unless, perhaps, the right to change the conditions was set out among the original conditions.

C. Planned unit developments

LLUPA expressly authorizes cities and counties to adopt ordinances to encourage planned unit developments ("PUDs"). Idaho Code § 67-6515. PUDs have been around for decades. They reflect the recognition that land use planning needs to be more flexible that the original Euclidian approach:[42]

> The planned unit development, in contrast to Euclidian zoning which divides a community into districts and explicitly mandates certain uses, is an instrument of land use control which permits a mixture of land uses on the same tract . . . .
> The planned unit development technique is a legislative response to changing patterns of land development and the demonstrated shortcomings of orthodox zoning regulations, intended to permit greater flexibility in development than is available under the general zoning

[42] Euclidian zoning has nothing to do with Euclidian geometry. Instead, it refers to the type of zoning approved by the U.S. Supreme Court's seminal decision, *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

> ordinance provision. Thus, the planned unit development is essentially a mechanism which allows property owners the option of clustering or configuring lots in a plat to avoid development in sensitive areas, create open space, or achieve other environmental or aesthetic amenities.

83 Am. Jur. 2d *Zoning and Planning* §§ 396-97, at 352-54 (2003) (footnotes omitted).

Under LLUPA's definition, a planned development is "an area of land in which a variety of residential, commercial, industrial, and other land uses are provided for under single ownership and control." Idaho Code § 67-6515.

The planned development can be a useful vessel for developers who want to build developments that do not fit well within traditional subdivision regulations. Planned developments offer the potential for mixed use, clustering of houses and uses, open space protection, provision of amenities and difficult site development. Planned developments work well for high quality designs and popular projects. The downside of planned developments is that they require discretionary approvals and usually do not involve black and white approval criteria. Therefore, if the jurisdiction is inclined to turn down the application or impose difficult conditions, a planned development becomes difficult or impossible.

The statute authorizes the governing board to adopt "requirements for minimum area, permitted uses, ownership, common open space, utilities, density, arrangements of land uses on a site, and permit processing." Idaho Code § 67-6515. Presumably, the governing board is also authorized to adopt regulations of similar matters, such as parking, signs, and landscaping, even if they are not explicitly enumerated.

Section 67-6515 permits processing of planned development permits "pursuant to the procedures for processing applications for special use permits following the notice and hearing procedures provided in Section 67-6512, Idaho Code." The implication is that alternate notice and hearing procedures would be acceptable as well.

In 2003, the Legislature added that "[d]enial of a planned unit development permit or approval of a planned unit development permit with conditions unacceptable to the landowner may be subject to the regulatory taking analysis set forth in Idaho Code Section 67-8003." Idaho Code § 67-6515.

The county's denial of an application for a PUD is subject to judicial review.[43]

[43] "Where an ordinance requires the granting of a planned development district application if the applicant complies with its standards and procedures, and the city council takes upon itself to determine whether the procedures are met, it is acting as an adjudicative body, and it is therefore

In *Johnson v. Blaine Cnty.*, 146 Idaho 916, 204 P.3d 1127 (2009), the Court held that a county has the authority under LLUPA to attach conditions to a planned unit development, just as it may do for a special use permit.

D. Overlay districts, historical districts, and design review

The U.S. Supreme Court established in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), that the purpose of zoning is broad enough to encompass such things as aesthetics:

> The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Berman v. Parker, 348 U.S. 26, 33 (1954). The Court later noted:

> The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

The use of zoning to promote physical, aesthetic, and monetary ends, has become commonplace. One of the most effective and widely used methods for regulating such considerations, without having to rezone the entire city, is through the use of overlay districts.

An overlay zone floats on top of the underlying zone and imposes additional burdens on the developer of land within the zone. They are used to address a variety of concerns, from aesthetics, to historical preservation, to avalanche protection, to wildlife. LLUPA does not expressly authorize overlay districts. However, overlay districts are generally understood to be permissible forms of zoning, so long as they comply with statutory, common law, and constitutional requirements for land use zoning.

When an overlay district is established, its provisions and requirements do not replace those of the existing, underlying district. Rather, they add a new layer of control to the underlying district or districts. The practice of using overlay districts

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proper for a court to review the record before the city council to determine whether evidence has been presented which justifies a decision to deny the application." 83 Am. Jur. 2d *Zoning and Planning* § 406, at 361 (2003) (footnotes omitted).

has arisen for various reasons, but is commonly used when a community does not wish to alter the preexisting pattern of acceptable uses in a given district. In Idaho, as in many other states, overlay districts have often been used in the preservation of historical buildings and neighborhoods, though their use has certainly not been limited to that purpose.

In these overlay districts, it is not uncommon for ordinances to prevent the building, alteration, or demolition of structures that would change the overall, established character of an area. To ensure that these goals are met, many cities and counties have used a design review board to review the architectural design of buildings or proposed changes before any permit is issued. Some cities delegate the responsibilities of a design review board to another body, such as the city council. In some municipalities, one body may review a certain type of proposal, while a different body reviews another. For example, a general design review board has been created for certain districts in the City of Boise, but the Historic Preservation Commission reviews proposals that fall within historic districts.

The use of a review board to ensure that a proposed building is harmonious in appearance with its neighboring buildings and its proposed location is often based on the desire to maintain a certain degree of congruity among buildings, especially in residential districts. Though less common, similar ordinances have also been used to disapprove permits for buildings that would look too similar to their neighbors, to prevent an overly monotonous appearance.

Though the Idaho Supreme Court has not directly addressed the validity of such ordinances, many other courts have upheld decisions or restrictions relating to the appearance or design of a proposed development. *See generally Richmond Co., Inc. v. City of Concord*, 821 A.2d 1059 (N.H. 2003) (upholding denial of site plan for retail shopping center based on incompatibility with existing historic buildings and architectural style); *Novi v. City of Pacifica*, 169 Cal. App. 3d, 215 Cal. Rptr. 439 (1st Dist. 1985) (upholding ordinance designed to prevent monotonous appearance that would result from proposed condominium development); *Georgia Manufactured Housing Ass'n v. Spalding Cnty.*, 148 F.3d 1304 (11th Cir. 1998) (upholding validity of ordinance requiring a 4:12 pitch on manufactured housing in residential district).

Although courts tend to give cities wide latitude in their authority to mandate design review, some courts have made it clear that a valid design review ordinance "must contain workable guidelines. Too broad a discretion permits determinations based upon whim, caprice, or subjective considerations." *Anderson v. City of Issaquah*, 70 Wash. App. 64, 81, 851 P.2d 744, 754 (1993) (citing *Morristown Road Associates v. Mayor and Common Council and Planning Bd. of Borough of Bernardsville*, 163 N.J. Super. 58, 67, 394 A.2d 157, 163 (1978)). Another court held that a valid ordinance must impose standards capable of reasonable application and which effectively limit and define the board's discretion. *Old Farm Road, Inc. v.*

Town of New Castle, 26 N.Y.2d 462, 259 N.E.2d 920 (1970); *see* 83 Am. Jur. 2d *Zoning and Planning* §155 (2003). Still, other courts have invalidated substantively similar ordinances that did not adequately describe the process of administrative decision or the criterion for judicial review. *See Morristown Road Associates v. Mayor and Common Council and Planning Bd. of Borough of Bernardsville*, 163 N.J. Super. 58, 394 A.2d 157 (1978). Because the design review board usually exists as a subcommittee of the planning and zoning commission, a decision by the review board can be appealed to that body and beyond.

E. Ground water and land use planning

In 2005, the Idaho Legislature enacted a law requiring planning and zoning commissions to require developers to fully utilize available surface water before making any use of ground water.[44]

F. Sexually-oriented businesses

The term "sexually-oriented business" encompasses a variety of adult business ventures that may include movie theaters, bookstores, hotels and motels, houses of prostitution, arcades, novelty stores, video stores, cabarets, topless/bottomless bars, and strip clubs. The terms "sexually oriented business" and "adult business" have been summarily described by one expert in this field of the law simply as euphemisms "for an enterprise that purveys sex in one form or another." Jules Gerard, *Local Regulation of Adult Businesses 1* (1996). For simplicity's sake, this discussion will refer to these enterprises as sexually oriented businesses.

For various reasons and through various methods, state and local governing bodies have often sought to regulate sexually oriented businesses. Because this is a land use handbook, this discussion will focus primarily on zoning issues and strategies, as they relate to sexually oriented businesses. However, to fully comprehend such zoning strategies, one must have at least a superficial understanding of peripheral laws that are either implicated or in some instances incorporated by reference, such as the state or local obscenity laws.

Before examining the Idaho land use statutes that may apply to sexually oriented businesses, it is important to understand the terminology to which the statutes refer. The term "obscene" is defined by statute as "any matter:

> (A) "Obscene" material means any matter:
> (1) which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

[44] House Bill 281, 2005 Idaho Sess. Laws, ch. 338 (codified at Idaho Code § 67-6537(1) and (2)). See discussion in *Water Law Handbook*.

(2) which depicts or describes patently offensive representations or descriptions of :

(a) ultimate sexual acts, normal or perverted, actual or simulated; or

(b) masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

Idaho Code § 18-4101(A)(1)-(2)(b). The statutory definition then explicitly exempts from its purview any matter which, "when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value." Idaho Code § 18-4101(A)(1)-(2)(b). The "prurient interest" is defined as "shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." Idaho Code § 18-4101(B). Additionally, the statutory definition observes that if the material is intended for a particular audience or group, the "appeal of the subject matter shall be judged with reference to such audience or group." Idaho Code § 18-4101(B).

In the absence of local regulation, which may set higher or lower limitations, Idaho statute prohibits the operation of any store, shop or business, which sells or rents "obscene" materials "within twenty-five hundred (2500) feet of any school, church, or place of worship measured in a straight line to the nearest entrance to the premises." Idaho Code § 67-6533(a).

Also expressly prohibited from operating within twenty-five hundred (2500) feet of any school, church, or place of worship is any store, shop or business which sells or rents any materials described in Idaho Code Section 18-1515 as considered harmful to minors, "where such materials constitute ten percent (10%) or more of the printed materials held for sale or rent[al]." Idaho Code § 67-6533(b). Materials "harmful to minors" are enumerated by statute as including, among other things, visual or literary depictions of nudity, sexual conduct or sado-masochistic abuse, but are broad enough to include "any other material harmful to minors." Idaho Code § 18-1515(1)(a)-(c).

Because "[e]xpressive materials, including motion pictures, are presumptively entitled to First Amendment protection," it is not always easy to identify obscene materials or materials harmful to minors. *Video Software Dealers Ass'n v. City of Oklahoma* City, 6 F. Supp. 2d 1292, 1296 (W.D. Okla. 1997) (citing *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989)). In most situations, an adversarial hearing must take place before materials are condemned as obscene. *Chapman v. California*, 405 U.S. 1020 (1972) (citing *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968)). When the issue is brought before a court, sexually explicit books, magazines, and videos may fall under the First Amendment's freedom of speech and

press protections. The U.S. Supreme Court has even acknowledged that erotic nude dancing falls "within the outer ambit" of the First Amendment's protections. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991); *Schad v. Mount Ephraim*, 452 U.S. 61, 66 (1981).

While recognizing the potentially constitutionally protected nature of the material and activities disseminated by sexually oriented businesses, many municipalities have chosen to enact ordinances similar to the Idaho statute, requiring minimum distances between sexually oriented businesses and churches, schools, or other sexually oriented businesses. Other municipalities have chosen to concentrate the sexually oriented businesses into one geographic area, creating what some have referred to as a "red-light district." Patricia C. Tisdale, *Regulating Sexually Oriented Businesses in Small Towns: Practical Tips and Preventative Medicine,* 29-Oct Colo. Law. 85 (2000). Some small towns may prefer a combination of these two approaches. Patricia C. Tisdale, *Regulating Sexually Oriented Businesses in Small Towns: Practical Tips and Preventative Medicine*, 29-Oct Colo. Law. 85 (2000).

The U.S. Supreme Court has made it clear that treating sexually oriented businesses differently than other businesses does not violate the First Amendment, so long as the government's motivation is not to suppress protected speech, but is to protect the community from negative secondary effects. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). It is well settled that reasonable time, place, and manner regulations, such as the default distance requirements found in Idaho statute, will be upheld, so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986).

Time, place, and manner regulations generally are permissible because they are "content neutral," in that they are not directed at suppressing speech because of its content. Rather, such regulations are intended to prevent the negative secondary effects associated with peripherally speech-related businesses. Laws that regulate or prohibit speech based on its content are impermissible prior restraints. For that reason, regulatory attempts to require licensing of sexually oriented businesses based on the content of their goods or services have been commonly challenged. Content-based regulations are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992); *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 591 (2002) (Kennedy J. concurring). Such regulations are only constitutional if they promote a "compelling interest" and use "the least restrictive means to further articulated interest." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). There are certain categories of speech, such as child pornography, that lie outside the protections of the First Amendment and thus can be prohibited by content-based regulation without fear of successful constitutional challenge.

The United States Supreme Court has defined a content neutral regulation as one whose "justifications for regulation have nothing to do with content, *i.e.*, the desire to suppress crime has nothing to do with the actual films being shown inside the adult movie theaters . . . ." *Boos v. Barry*, 485 U.S. 312 (1998). The Supreme Court upheld a regulation banning all public nudity in *City of Erie v. PAP's A.M.*, 529 U.S. 277 (2000), finding that the regulation did not target nudity containing a particular message, rather, it banned all public nudity, regardless of whether that nudity was expressive in nature, and was aimed at fighting the negative secondary effects associated with public nudity.

In *Erie*, the Court acknowledged that even content neutral regulations will often have incidental impacts on expression that is otherwise protected by the First Amendment. *Erie* at 293; *see also Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981). Because of that impact, a regulation must satisfy the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968), to be held not to violate the First Amendment. Under *O'Brien*, a content neutral regulation is justified despite its incidental impact on First Amendment interests if: (1) the ordinance is enacted within the constitutional power of the government entity; (2) it furthers an important or substantial government interest; (3) the government interest is unrelated to the suppression of free expression; and (4) the incidental restriction is no greater than is essential to the furtherance of the government interest. The Court held that *Erie's* ban on all public nudity passed the *O'Brien* test, and that the resulting incidental impact – the dancers had to wear "pasties and G-strings" – had only a "minimal effect on the erotic message" of nude dancing. *City of Erie v. PAP's A.M.*, 529 U.S. 277, 294 (2000).

In *Nite Moves Entertainment, Inc., v. City of Boise*, 153 F. Supp. 2d 1198 (2001), the United States District Court, for the District of Idaho, held that while it is clear that "a city may go farther than the City of Erie and require more than just the wearing of pasties and a G-string," Boise City's ordinance banning what the court described as "anything more revealing than short shorts and a modest bikini top" burdened more speech than was "necessary to further the government's legitimate interests," and was "substantially broader than necessary to achieve the government's interest." *Nite Moves* at 1210 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)).

When using content neutral time, place, and manner regulations, government entities should also be careful not to zone sexually oriented businesses out of town entirely. To ensure alterative avenues of communication, the Supreme Court explained that municipalities must "refrain from effectively denying . . . a reasonable opportunity to open and operate" a sexually oriented business. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986). This can easily happen when, for example, a small town requires that relatively large distances separate sexually oriented businesses from churches, schools, or each other. These requirements may effectively leave no space for a sexually oriented business to locate.

In determining how much available land space is enough, a raw percentage number may be deceiving. While five percent in a large city may be more than sufficient, five percent in a small town with very little commercial zoning may be minuscule. A trend in the law seems to be focusing more on how many sites are available to be improved, developed, or otherwise occupied by a sexually oriented business, rather than an unhelpful general percentage of available land. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-48 (1986); *See also, Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102, 1108-1109 (9th Cir. 1988).

While it is important to leave sufficient space available for sexually oriented businesses to operate, some courts have determined that it is irrelevant that the only available relocation sites might result in lost profits, higher overhead costs, or even prove commercially unfeasible. *Woodall v. City of El Paso* (*"Woodall III"*), 49 F.3d 1120, 1125 (5th Cir. 1995); *Woodall v. City of El Paso* (*"Woodall II"*), 959 F.2d 1305 (5th Cir. 1992), *amending Woodall v. City of El Paso* (*"Woodall I"*), 950 F.2d 255 (5th Cir. 1992). However, the Ninth Circuit has treated the question differently. In its decision regarding *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), *cert. denied* 114 S. Ct. 1537 (1994), the Ninth Circuit created a series of considerations for courts when determining if alternative sites were available. Some of these considerations include whether the sites will ever be available to an actual business, whether they are reasonably accessible to the public, and whether they have a proper infrastructure of sidewalks, roads, and lighting. *Topanga Press* at 1531.

While the law governing the regulation of sexually oriented businesses is still evolving, there are steps a municipality that wishes to enact or amend its regulations can take immediately to more fully ensure that its laws are valid and constitutional. An important step is to seek out similar municipalities in the region whose laws have been challenged and upheld in court, and consider how such laws and ordinances might apply if passed in the municipality in question. Further, a municipality should carefully consider its unique characteristics that might have an effect on how the legislation should be written, such as the availability of commercial and industrial zones and the perceived secondary effects the regulation is designed to prevent.

In the legislative process, a municipality should be able show that it had pure motives in passing the ordinance, that is, that it was seeking to combat secondary negative effects, and not expressive conduct. It should also be able to show that it had a valid, reasonable basis for enacting the various provisions it enacted. While it is important for each municipality to carefully research and consider the potential secondary effects that sexually oriented businesses will have on their particular community, the U.S. Supreme Court has stated clearly that municipalities need not perform their own, expensive studies, whether in the planning or litigation stages, to prove that negative secondary effects result from the proliferation of sexually oriented businesses. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986).

In *Renton*, a sexually oriented business challenged its city's reliance on studies from another city, when Renton chose to respond differently to those effects than the city that originally performed the studies. In summary, the Court explained that cities "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986), citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976).

G. Right To Farm Act

The Idaho Right to Farm Act was enacted in 1981 and has been extensively amended. 1981 Idaho Sess. Laws, ch. 177 (codified, as amended, at Idaho Code §§ 22-4501 to 22-4506).

In addition, LLUPA protects agricultural operations from ordinances or resolutions that "[deprive] any owner of full and complete use of agricultural land for production of any agricultural product." Idaho Code § 67-6529. However, this section is not a carte blanche exemption from land use regulation. *Olson v. Ada Cnty.*, 105 Idaho 18, 665 P.2d 717 (1983).

In a 2002 case, the Idaho Supreme Court explained the basis of the Right To Farm Act:

> The Right to Farm Act . . . seeks to reduce the loss of agricultural operations by limiting the circumstances whereby the operations may deemed a nuisance. The Act protects existing agricultural operations from being declared a nuisance so long as the operation is not improper or negligent. The Act prevents the adoption of ordinances or resolutions declaring as a nuisance any agricultural operations operated in accordance with generally recognized agricultural practices.

Whitted v. Canyon Cnty. Bd. of Comm'rs, 137 Idaho 118, 124, 44 P.3d 1173, 1179 (2002) (citations to statute omitted).

In *Whitted*, the Court concluded that a subdivision for four new homes in a farming area did not violate the Right To Farm Act. The Court noted that the county had required the developer to include Right To Farm marketing disclosures and to impose deed restrictions "to prevent change to the character of the surrounding area." *Whitted*, 137 Idaho at 120, 44 P.3d at 1175. (It is unclear how a deed restriction on a dwelling site could prevent change to the character of the surrounding area.) The Court did not say whether the subdivision would have complied with the Act in the absence of these limitations.

In *McVicars v. Christensen*, 156 Idaho 58, 320 P.3d 948 (2014) (Burdick, C.J.), the Court which seems to say that the Right to Farm Act only applies if there is

a change in the surrounding neighborhood. In other words, it only applies when urban growth "comes to the nuisance." On the other hand, this case focused on section 22-4503, and does not address section 22-4504 at all. On its face, section 22-4504 is not limited to "coming to the nuisance" scenario.

H. CAFOs

LLUPA requires every county to adopt an ordinance addressing the approval and siting of confined animal feeding operations (also known as concentrated animal feeding operations or "CAFOs"). Idaho Code § 67-6529(2). This CAFO siting authority was enacted in 2000. 2000 Idaho Sess. Laws, ch. 217. It was amended in 2003 to make the adoption of local CAFO ordinances mandatory. 2003 Idaho Sess. Laws, ch. 297.

The Act mandates a public hearing prior to any CAFO siting decision. However, the Act contains a unique standing provision limiting public testimony to members of the public whose primary residence lies within one mile of the proposed site.

I. Group homes

LLUPA also has specific provisions addressing the location of group homes for persons with physical or mental handicaps, Idaho Code §§ 67-6530 through 67-6532.

J. Nonconforming uses (grandfathering of pre-existing uses)

A "preexisting nonconforming use" is a use of land that lawfully existed prior to the enactment of a zoning ordinance and is maintained after the effective date of the ordinance. *Baxter v. City of Preston*, 115 Idaho 607, 608, 768 P.2d 1340, 1341 (1989). The owner of a lawful nonconforming use has the right to continue in that use despite the subsequent enactment of conflicting zoning ordinances. *Glengary-Gamlin Protective Ass'n v. Bird*, 106 Idaho 84, 89, 675 P.2d 344, 349 (Ct. App. 1983) (Burnett, J.). Indeed, the maintenance of the existing use (without expansion) is constitutionally protected. *Taylor v. Bd. of Cnty. Comm'rs, Cnty. of Bonner* ("*Taylor I*"), 124 Idaho 392, 397, 860 P.2d 8, 13 (Ct. App. 1993) (Swanstrom, J.) (citing *O'Connor v. City of Moscow*, 69 Idaho 37, 202 P.2d 401 (1949). This right is different from a variance, in that the nonconforming use existed *prior* to enactment of the prohibiting regulations. By contrast, a variance is sought to allow an otherwise prohibited use to continue despite its noncompliance with zoning regulations.

The Idaho Supreme Court has recognized that the right to continue a nonconforming use derives from the due process clauses of both state and federal constitutions. *Glengary*, 106 Idaho at 89-90, 675 P.2d at 348-49; *see also O'Connor v. City of Moscow*, 69 Idaho 37, 202 P.2d 401 (1949). However, the Court explained that such right does not extend beyond the purpose of protecting an owner from

abrupt termination of what had been a lawful activity or condition on the property. "Nonconforming uses have no inherent right to be extended or enlarged." *Glengary*, 106 Idaho at 90, 675 P.2d at 350.

While nonconforming uses are protected from abrupt termination, they have no inherent right to be extended or enlarged. *Glengary*, 106 Idaho at 90, 675 P.2d at 350. If a nonconforming use expands in violation of a valid zoning ordinance, the Idaho Court of Appeals has held that the owner of the nonconforming use may lose the "grandfathered" right he sought to expand. *Taylor v. Bd. of Cnty. Comm'rs, Cnty. of Bonner* ("*Taylor I*"), 124 Idaho 392, 397, 860 P.2d 8, 13 (Ct. App. 1993) (Swanstrom, J.) (citing *Baxter v. City of Preston*, 115 Idaho 607, 609, 768 P.2d 1340, 1342 (1989). This limitation follows from the general purpose stated by the Idaho Supreme Court that "the continuation of nonconforming uses is designed to avoid the imposition of hardship on the owner of the property but eventually the nonconforming use is to be eliminated." *Cole-Collister Fire Protection Dist. v. City of Boise*, 93 Idaho 558, 561, 468 P.2d 290, 293 n.3 (1970) (citing 8A McQuillin, *Law of Municipal Corporations*, § 25.183, at 16-18 (1965)).

In *Baxter*, a farmer converted a field formerly use to graze cattle during only non-winter months into a year-round feedlot, installing a portable manger and a new shed on the property. Such changes produced an increase in accumulated manure, which annoyed neighboring residents. The Court explained that in determining whether a nonconforming use has expanded the dispositive factor "is not into which general classification a use can be pigeonholed, but the character of the particular use. Otherwise, a property owner in an 'industrial' zone manufacturing thumbtacks could thereafter produce automobiles solely on the basis that both are industrial endeavors." *Baxter v. City of Preston*, 115 Idaho 607, 609, 768 P.2d 1340, 1342 (1989). The Court concluded that these changes were a change in character and were properly found by the trial court to be an expansion and enlargement of the farmer's nonconforming use. *Baxter v. City of Preston*, 115 Idaho 607, 610-11, 768 P.2d 1340, 1343-44 (1989).

On the other hand, the reasonable substitution of more modern facilities for obsolescent equipment does not constitute an enlargement or extension. Such was the case when an asphalt plant was modernized, and one of the rock crushing facilities was moved to a new location at the site. *Gordon Paving Co. v. Blaine Cnty. Bd. of Cnty. Comm'rs*, 98 Idaho 730, 732, 572 P.2d 164, 166 (1977). Evidence that the changes resulted in increased output by the plant was insufficient to prove enlargement or extension when both operating time and environmental impact on the area were substantially reduced despite the increased volume of output. *Gordon Paving Co. v. Blaine Cnty. Bd. of Cnty. Comm'rs*, 98 Idaho 730, 732, 572 P.2d 164, 166 (1977).

Is a use that still being developed considered an "existing" non-conforming use? In *City of Lewiston v. Bergamo*, 119 Idaho 221, 224, 804 P.2d 1352, 1355 (Ct. App. 1990), the Court grappled with this question. The Bergamos were in the process of developing a mobile home park on land they owned in unincorporated Nez Perce County. They also had plans to construct an automobile repair shop and salvage yard on the property. The City of Lewiston annexed the property, over the Bergamos' objection, and zoned it low density residential. The Court of Appeals affirmed the trial court's determination that mobile home park was an existing non-conforming use, but the other developments were not. The Court of Appeals found that "they had not made substantial expenditures or committed themselves, to their substantial disadvantage, in reliance on the preexisting zoning of their land." *Bergamo*, 119 Idaho at 225, 804 P.2d at 1356. From this it is clear that the business did not necessarily have to be up and running in order to qualify. It would have sufficed if the Bergamos had been able to demonstrate that they had made a substantial investment in reliance.

In 1999, the Idaho Legislature passed Idaho Code § 67-6538, giving statutory criteria for the continuation of non-conforming uses. This code provides that no city or county may deprive an owner of "the right to use improvements on private property for their designed purpose, based solely on the nonuse of the improvements for their designed purpose for a period of ten (10) years or less." Idaho Code § 67-6538(1). If such nonuse continues for a period of one (1) year or longer, the city or county may, in writing, require the owner to declare his intention regarding the continued nonuse of the improvements. The owner must respond with twenty-eight (28) days of receipt of the request. To continue the nonuse, the owner shall "notify the city or county in writing of his intention and shall post the property with notice of his intent to continue the nonuse of the improvements." Idaho Code § 67-6538(2). The owner must "also publish notice of his intent to continue nonuse in a newspaper of general circulation in the county where the property is located." Idaho Code § 67-6538(2). If the owner complies with these requirements, his right to use such improvements for their designed purpose shall continue, "notwithstanding any change in the zoning of the property." Idaho Code § 67-6538(2). The code also provides that the property owner may elect to withdraw the use, by filing an affidavit of withdrawn use with the clerk of the city or county. If such action is taken, the owner is deemed to have "abandoned any grandfather right to the prior use of the property." Idaho Code § 67-6538(3).

The aforementioned code section does not prohibit municipalities from "passing or enforcing any other law or ordinance for the protection of the public health, safety and welfare." Idaho Code § 67-6538(5). This right to pass and enforce laws for the protection of the public health, safety and welfare is often referred to as the police power. The Idaho Supreme Court also made this exception to the rules surrounding nonconforming use clear when it indicated that the rights associated with due process do "not absolutely prevent the county from exercising its police power,

even though the exercise may affect the preexisting use of property." *Heck v. Comm'rs of Canyon Cnty.*, 123 Idaho 826, 829, 853 P.2d 571, 574 (1993) (citing *Queenside Hills Realty Co. v. Sazl*, 328 U.S. 80 (1946)). The Court further clarified, quoting the U.S. Supreme Court, "in no case does the owner of property acquire immunity against exercise of the police power because [the owner] constructed it in full compliance with the existing laws. The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights." *Queenside Hills Realty Co. v. Sazl*, 328 U.S. 80, 82-83 (1946).

The municipality's zoning of the annexed lands must respect and allow existing non-conforming uses. *Boise City v. Blaser*, 98 Idaho 789, 791, 572 P.2d 892, 894 (1977). The non-conforming use must be one that actually exists, however. The municipality may bar a use for which the county had issued a permit if the use is "merely contemplated" rather than actually in existence—even when preliminary work, such as site preparation, has started. *Blaser*, 98 Idaho at 791, 572 P.2d at 894.

K. Variances

Consistent with Constitutional requirements for a valid zoning ordinance, LLUPA requires that each zoning ordinance provide for variances. The statute defines a variance as "a modification of the bulk and placement requirements of the ordinance as to lot size, lot coverage, width, depth, front yard, rear yard, setbacks, parking space, height of buildings, or other ordinance provision affecting the size or shape of a structure or the placement of the structure upon lots, or the size of lots." Idaho Code § 67-6516.

Section 67-6516 continues: "A variance shall not be considered a right or special privilege, but may be granted to an applicant only upon a showing of undue hardship because of characteristics of the site and that the variance is not in conflict with the public interest." In *City of Burley v. McCaslin Lumber Co.*, 107 Idaho 906, 693 P.2d 1108 (1984), the Court of Appeals overturned a variance approval on the ground that the circumstances justifying the variance were not "peculiar" to the property at issue under the terms of the ordinance. The applicant had sought a variance to increase the density of a project from a duplex to a triplex to make the project economically feasible.

Prior to granting a variance, the jurisdiction must provide adjoining landowners with notice and an opportunity to be heard. *City of Burley v. McCaslin Lumber Co.*, 107 Idaho 906, 693 P.2d 1108 (1984); s*ee Gay v. Cnty. Comm'rs of Bonneville Cnty.*, 103 Idaho 626, 651 P.2d 560 (Ct. App. 1982) (holding that variances are subject to notice and hearing requirements).

In *Burns Holdings, LLC v. Teton Cnty. Bd. of Comm'rs* ("*Burns Holdings II*"), 152 Idaho 440, 272 P.3d 412 (2012) (Eismann, J.), the Court held a variance is the only means by which cities and counties may grant relief from bulk and height

restrictions and that such relief could not be provided by conditions in a conditional use permit. The proposed project was a concrete batch plant located in Teton County within the City of Driggs's area of city impact. The county first granted an application to change the zoning to accommodate the batch plant. Thereafter, Burns Holdings applied for a conditional use permit to exceed the height limitation or the new zone. The county denied the application, and Burns Holdings appealed to district court. In something of an afterthought, the county defended its denial on the basis that the city's ordinance (applied by the county) which authorized height variances through the conditional use process was unlawful. The Idaho Supreme Court agreed.

The Legislature responded in the same year by amending LLUPA to expressly provide that conditional use permits may contain conditions granting exceptions or waivers of standards. Idaho Code § 67-6512(f).

5. TRANSFERABLE DEVELOPMENT RIGHTS ("TDRs")

Idaho Code Section 67-6515A authorizes local ordinances creating transferable development rights ("TDRs"). The idea is to set up a marketplace to allow and encourage the sale of development rights from areas the local government wants to be protected, and their transfer to areas the government views as more appropriate for development. Private parties may purchase development rights from areas that cities or counties want to preserve as open space, wildlife habitat, agricultural areas, etc. These development rights may then be sold to those seeking to develop properties in areas where cities and counties are willing to accept higher density development than the zoning ordinance would otherwise allow.

The legislation enables cities and counties to set up their own systems within their own jurisdictions. In addition, neighboring counties may set up a common system. But it is highly unlikely that far apart counties would enter into reciprocal agreements. Hence the TDR markets will all be more or less local.

TDRs sound like the conservation easements, but the idea is not quite the same. Conservation easements are essentially private conservation tools arrived at by agreement among private parties. The role of government is limited to providing certain tax incentives. The role of governments under the TDR legislation is more active. For one thing, the local government designates "sending areas" and "receiving areas." In essence, the local government gets out a map and identifies those areas it want to protect and those areas into which it seeks to channel new growth.

The sending areas might be foothills, riparian areas, flood plains, farmland buffers, or any area away from which the government would like to channel development. The receiving areas might be the urban core, or it might be outlying areas which nonetheless seem well suited for development.

The traditional zoning and subdivision laws would continue to operate in both sending and receiving areas. Like conservation easements, TDRs are voluntary. There would be no requirement that a developer buy TDRs in order to build in a receiving area. However, each jurisdiction would set up its own incentive program to encourage people to buy and use TDRs. For instance, there might be a formula that would award higher density, shorter setbacks, or less parking in exchange for TDRs. Or the ordinance might be implemented without a formula on a case-by-case basis. How the act is implemented at the local level is a local decision.

A key question is whether TDRs are permanent once they are sold. The answer is "no." At least they are not permanent with a capital P. They are permanent so far as the seller is concerned, of course. That is, the seller of development rights may not later change her mind unilaterally and decide to develop the property. However, the city or county that declared an area to be a "sending

area" could later change its mind and void all the TDRs which had been sold by landowners in that area.

Why would this be? Here's the rationale. The TDR legislation might be used to encourage infill and urban development for 20 years with enormous success. But then, as the community continues to grow in a healthy and controlled fashion, it eventually bumps up against a "sending area." With all the infill gone, the city has to expand somewhere. The city wants the flexibility to "undo" a particular sending area, from time to time, as it sees fit.

A piece of land may be subject to both the sale of TDRs and a conservation easement. For example, after Farmer Jones has sold all her TDRs, she can do nothing on her property except continue to farm. The only other remaining stick in her bundle of property rights is the glimmer of hope that someday, perhaps 20 years from now, the county will change its mind, declare her farm to be a receiving area, and release her from her TDR restrictions. A local land trust might be able to come in and buy that last stick, thus overlaying a permanent conservation easement over a temporary TDR.

Several ground rules will apply to TDR ordinances. These include:

- The transactions must be voluntary, both by the sending and the receiving party. Idaho Code §§ 67-6515A(1)(b), 67-6515A(3).
- Prior to designating sending and receiving areas, the city or county must perform a market analysis to determine if receiving areas will have the capacity to accept the number of development rights expected. Idaho Code §§ 67-6515A(2).
- An applicant cannot be forced to acquire TDRs if the applicant is entitled to develop under an existing ordinance or comprehensive plan. A city or county may not reduce density in an existing zone and then require TDRs to permit a zone change to increase the density. Idaho Code § 67-6515A(4).
- TDRs do not affect the validity of water rights. Idaho Code § 67-6515A(6).
- All lien holders on the sending property must consent to the transfer. Idaho Code § 67-6515(7)(a).
- TDRs run with the land and may not be taxed as real or personal property. Idaho Code § 67-6515A(7)(b).

A copy of a report from the Idaho Association of Counties to the Idaho Legislature regarding the implementation of the TDR legislation is set out under

Appendix D. In 2004, the Legislature eliminated the requirement for further reports on the implementation of TDRs. 2004 Idaho Session Laws, ch. 16.

In 2003, the Legislature amended Section 67-6515A. The changes clarify that whether the severance of development rights is permanent or for a set period is in the discretion of persons buying and selling TDRs. Further, TDR ordinances must prescribe what instruments are necessary to sever development rights from the sending property, and specifies that all persons having an interest in the sending property, including lien holders, must sign the instrument. 2003 Idaho Sess. Laws, ch. 224, p. 576.

In *KGF Development, LLC v. City of Ketchum*, 149 Idaho 524, 528, 236 P.3d 1284, 1288 (2010) (J. Jones, J), the Court struck down Ketchum's TDA ordinance, whose purpose "was to revitalize the downtown corridor while preserving historic buildings within that corridor." *KGF*, 149 Idaho at 529, 236 P.3d at 1289. The Court found the ordinance exceeded the authority for TDRs granted under Idaho Code § 67-6515A, which is limited to preserving open space, habitat, and the rural character of lands. "The language used in section 67–6515A does not indicate that the statute is intended to allow for the protection of historic properties." *KGF*, 149 Idaho at 528, 236 P.3d at 1288. Note: The *KGF* Court also found that the city's ordinance violated the uniformity requirement in Idaho Code § 67-6511. See discussion in section 4.A(5) on page 75.

6. CONSERVATION EASEMENTS

In 1988 the Idaho Legislature enacted the Uniform Conservation Easement Act (the "Act"). Idaho Code §§55-2101 to 55-2109. This is a model act, which has been enacted by 22 states plus the District of Columbia. As of this writing, Idaho's act has never been amended.

Note: For a background discussion of easements in general, see *Idaho Road Law Handbook*.

This Act expressly authorizes private parties to create conservation easements that permanently restrict land use.[45] In doing so, Idaho joined in what has become virtually universal recognition of the importance of this tool in land use planning. As of this writing, conservation easement acts of one sort or another have been enacted in all but three states.

The Act overrides several barriers and restrictions on conservation easements under common law. Idaho Code § 55-2104. For instance, at common law, conservation easements were deemed "easements in gross" (rather than "easements appurtenant") and therefore did not run with the land. The Idaho Legislature did away with this and all other restrictions, declaring: "Except as otherwise provided in this chapter, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements." Idaho Code § 55-2102(1).

Note: In *Fitzpatrick v. Kent*, 458 P.3d 943 (Idaho 2020) (Brody, J.), the Court held that held that one may not impose an easement on one's own land, even for purposes an anticipated subsequent conveyance of part of the property. Accordingly, the proper approach is to reserve an easement in the conveyance to the other party.

Although the Idaho Legislature allowed private parties to create conservation easements, it included several important limitations. These are discussed below.

First, a conservation easement may be conveyed only to a "holder" under the Act. Idaho Code § 55-2101(1). A "holder" is defined as a governmental body empowered to hold real property or a charitable corporation, charitable association, or charitable trust authorized to the natural, scenic, or open-space values of real property. Idaho Code § 55-2101(2). Thus, for instance, a person cannot create a conservation easement that bestows the development rights reflected in the easement to his children. Only a proper governmental or charitable entity may hold a conservation easement.

[45] Conservation easements are permanent unless otherwise provided in the easement. Idaho Code § 55-2102(3).

Second, conservation easements may not impair any existing property right.[46] Thus, for example, a landowner could not impair the rights of a tenant by creating a conservation easement that restricted the tenant's rights under the lease. This makes in important for the parties to ascertain or promise that there are no encubrances on the property that would be in conflict with the conservatoin easement. For instance, in an extreme example, if the land were subject to a 99-year ground lease allowing the construction of a hotel, restrictions in the conservation easement would not impair the ability of the lessee to undertake that development.

Third, conservation easements may not be created by eminent domain. Idaho Code § 55-2107. Thus, a governmental entity may condemn land in fee simple, but it may not simply condemn the development rights on a property, leaving the owner with undevelopable property.

Fourth, land subject to a conservation easement is not entitled to a reduction in ad valorem property taxes because the owner has conveyed away the development rights.[47] Thus, for example, a farm with no conservation easement but great development potential would be taxed the same as an otherwise identical farm whose development rights were held by a land trust. In each case, the landowner (not the tax-exempt land trust) would pay the full tax rate. This provision ensures that local governments are not deprived of tax revenue through the creation of conservation easements.

Fifth, for the conservation easement to be effective, the Act requires the acceptance of the easement by the holder (the grantee), and recording thereof. Idaho Code § 55-2102(2). Thus, a conservation easement is more than a deed (a one-way instrument of conveyance signed by the grantor only). It is also a recorded contract between the grantor and the grantee (the holder).

Sixth, the Act tackles the thorny issue of third-party enforcement by inviting the parties to address the issue in the creating instrument. The Act however only speaks of third-party enforcement by other governmental or charitable entities named in the easement. Thus, for example, the creators of a conservation easement could specify that it is enforceable not only by the holder (often a land trust) but also by the State of Idaho.

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[46] The Act provides: "An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it." Idaho Code § 55-2102(4).

[47] The Act provides: "The granting of a conservation easement across a piece of property shall not have an effect on the market value of property for ad valorem tax purposes and when the property is assessed for ad valorem purposes, the market value shall be computed as if the conservation easement did not exist." Idaho Code § 55-2109.

Finally, the Act ensures that permanent conservation easements are not created unintentionally. Although the Act does not require the document creating the conservation easement to be designated in any particular way, it does state that "the instrument creating the conservation easement shall state it was created under the provisions of this chapter." Idaho Code § 55-2105(1).

A discussion of the tax consequences of conservation easements is well beyond the scope of this discussion. However, the authors include here five points raised by the Internal Revenue Service in their denial of a claimed tax deduction for a conservation easement in Idaho:

> (1) the grant of the conservation easement was a condition of receiving permission from the county to subdivide the land; (2) the conservation easement was not protected in perpetuity because (a) the terms of the easement allowed [the taxpayer] and the Land Trust to amend the easement by agreement, (b) [the bank's] mortgage on the land was not subordinated at the time of the grant, and (c) the easement failed to provide for the allocation of proceeds to the Land Trust in the event the easement was extinguished; (3) [the taxpayer's] deduction for the contribution of the easement is limited to the basis allocated to the easement; and (4) the easement was overvalued.

7. TYPES OF OWNERSHIP INTERESTS (FEE, LICENSE, AND EASEMENT)

For a discussion of the various types of legal interests in property (fee, license, and easement), see the *Idaho Water Law Handbook* (chapter dealing with rights-of-way and easements held by irrigation entities and highway districts).

8. MORATORIA

In its simplest terms, a moratorium is the "suspension of a specific activity." *Black's Law Dictionary* 1026 (7th ed. 1999). In the context of land use planning and zoning, a moratorium temporarily suspends the right of property owners to obtain development approvals (or even file an application) while giving the local legislative body time to consider, draft, and adopt land use regulations or rules to respond to new or changing circumstances not adequately dealt with by current laws.

As communities develop, demands for particular uses of land may arise for which there exist no or inadequate controls. If the development of such uses is allowed before its overall effect on the comprehensive plan is considered, the ultimate worth of the plan could be undermined. In essence, a moratorium preserves the *status quo,* giving the municipality time to update its comprehensive plan or land use regulations.

A federal court justified the inherent power to enact such moratoria, within reasonable limits, in this way:

> [I]t seems to the court that it would be a rather strict application of the law to hold that a city, pending the necessary preliminaries and hearings incident to proper decisions upon the adoption and the terms of a zoning ordinance, cannot, in the interim, take reasonable measures temporarily to protect the public interest and welfare until an ordinance is finally adopted. Otherwise, any movement by the governing body of a city to zone would, no doubt, frequently precipitate a race of diligence between property owners, and the adoption later of the zoning ordinance would in many instances be without effect to protect residential communities--like locking the stable after the horse is stolen.

Downham v. City Council of Alexandria 58 F.2d 784 (E.D. Va. 1932). *See also Ben Lomond, Inc. v. City of Idaho Falls*, 92 Idaho 595, 610, 448 P.2d 209, 224 (1968) (McQuade, J., dissenting).

LLUPA includes an express authorization for local governments to issue moratoria. The statute creates two categories of moratoria: "emergency" and "interim." Idaho Code § 67-6523.

There are various situations in which a municipality might wish to enact a moratorium. A moratorium is particularly useful when a governing body is creating a new comprehensive plan, or making important changes to its existing plan. It gives the governing body time to evaluate the current state of development before allowing development to occur that might be adverse to the new or amended comprehensive

plan. This type of moratorium, carefully applied in anticipation of the issuance of a new ordinance, is a classic example of an "interim moratorium," as that term is used in the Idaho moratorium statute. On the other hand, if a new or unexpected form of development presents what the municipality finds to be an imminent threat to public health, safety, or welfare, it may need to pass an "emergency moratorium" to give itself a reasonable time to consider the new development's effect or to create regular ordinances to prevent the development from going forward. In Idaho, both emergency and interim ordinances and moratoria are controlled by statute. *See* Idaho Code §§ 67-6523, 67-6524.

Under Idaho statute, if a governing board finds that an "imminent peril to the public health, safety, or welfare requires adoption of ordinances . . . or a moratorium on the issuance of selected classes of permits, or both, it shall state in writing its reasons for that finding." Idaho Code § 67-6523. The board may then proceed upon "any abbreviated notice of hearing that it finds practical," to adopt the new ordinance or moratorium. Idaho Code § 67-6523. In other words, the ordinary notice and hearing requirements of Idaho Code Section 67-6509 may not apply. The statute then states that an emergency ordinance or moratorium may only be effective "for a period of not longer than one hundred eighty-two (182) days," and that such restrictions "may not be imposed for consecutive periods." Idaho Code § 67-6523. Further, the statute requires that an "intervening period of not less than one (1) year" exist between an emergency ordinance or moratorium, and the reinstatement of the same. Idaho Code § 67-6523. To sustain restrictions beyond the one hundred eighty-two (182) day period, a governing board must adopt an interim or regular ordinance, following the normal notice and hearing procedures, as provided in Idaho Code Section 67-6509. Idaho Code § 67-6523.

Idaho statute also provides for the procedure and limits on the establishment of interim ordinances and moratoria. Idaho Code § 67-6524. If a governing board finds that a "plan, a plan component, or an amendment to a plan is being prepared for its jurisdiction, it may adopt interim ordinances." Idaho Code § 67-6524. However, unlike in the case of an emergency ordinance, the adoption of an interim ordinance must be preceded by the notice and hearing procedures provided in Idaho Code Section 67-6509. Idaho Code § 67-6524. The governing board may also adopt an interim moratorium on the issuance of selected classes of permits if, "in addition to the foregoing, the governing board finds and states in writing that an imminent peril to the public health, safety, or welfare requires the adoption of an interim moratorium." Idaho Code § 67-6524. Neither interim ordinances nor interim moratoria are allowed to remain in full force and effect for more than one (1) calendar year. Idaho Code § 67-6524. To maintain the restrictions after a full year, the governing board must adopt a regular ordinance, following the hearing and notice procedures set forth in Idaho Code Section 67-6509. Idaho Code § 67-6524.

When a property owner seeks to challenge the issuance of an interim or emergency ordinance or moratorium, the property owner should note that there is a strong presumption favoring the validity of the actions of zoning boards, which includes the application and interpretation of their own zoning ordinances. *Payette River Property Owners Ass'n v. Bd. of Comm'rs of Valley Cnty.*, 132 Idaho 551, 554, 976 P.2d 477, 480 (1999) (Trout, J.) (citing *Howard v. Canyon Cnty. Bd. of Comm'rs*, 128 Idaho 479, 480, 915 P.2d 709, 711 (1996)). Still, the municipality should be prepared to show that the burden of the moratorium is shared by the public at large, and is not being visited upon a small minority of landowners. This principle was well stated by the New York Court of Appeals when it stated, "[T]he crucial factor, perhaps even the decisive one, is whether the ultimate economic cost of the benefit is being shared by the members of the community at large, or, rather, is being hidden from the public by the placement of the entire burden upon particular property owners." *Charles v. Diamond*, 392 N.Y.S.2d 594, 600, 360 N.E.2d 1295, 1300 (1977). If a moratorium is found to result in a temporary regulatory taking, the municipality may have to compensate the affected property owners.

It was in such a setting that a case arose in the Lake Tahoe region, and eventually found itself before the U.S. Supreme Court. In 2002, the Court finally brought to a close over fourteen years of litigation by Lake Tahoe Basin property owners. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (Stevens, J.). Lake Tahoe, lying on the border between California and Nevada, has long been known for the pristine beauty and unusual clarity of its waters. Due to the rapid increase in development that the area has experienced over the last forty or so years, the "lake's unsurpassed beauty, it seems, [had become] the wellspring of its undoing." *Tahoe-Sierra* at 307.

Apparently, the upsurge in development in the area had caused "increased nutrient loading of the lake largely because of the increase in impervious coverage of land in the Basin resulting from that development." *Tahoe-Sierra*, 535 U.S. 302(2002). The term "impervious coverage" referred to asphalt, concrete, buildings, and even packed dirt – essentially anything that "prevents precipitation from being absorbed by the soil." *Tahoe-Sierra*, 535 U.S. 302(2002). These elements, such as a driveway or a roof, caused larger amounts of water to flow with more erosive force, which in turn brought larger amounts of soil into the lake and affected its clarity and "trademark blue" color. *Tahoe-Sierra*, 535 U.S. 302(2002).

In an effort to combat this trend, the Tahoe Regional Planning Compact was created in 1968 between the state legislatures of California and Nevada, and with the approval of the United States Congress. The compact set goals for the protection and preservation of the lake and created the Tahoe Regional Planning Agency ("TRPA"), the nation's first interstate zoning agency. Over time, the TRPA divided the Basin into "land capability districts," based largely on steepness of land, as well as other factors that affected runoff. Dissatisfied with the TRPA, California eventually

withdrew its financial support and imposed stricter regulations on the portions of the Basin within its borders.

In 1980 the two states, with the approval of Congress and the President, redefined the structure, functions, and voting procedures of the TRPA. The TRPA was also directed to establish regional "environmental threshold carrying capacities" embracing "standards for air quality, water quality, soil conservation, vegetation preservation and noise." *Tahoe-Sierra* at 310.

The new compact provided that the TRPA had eighteen months within which to adopt the new standards, and that within one year after their adoption, the TRPA would have to adopt an amended regional plan that was to achieve and maintain those carrying capacities. *Tahoe-Sierra*, 535 U.S. 302 (2002). The compact also contained a finding by the legislatures of California and Nevada "that in order to make effective the regional plan as revised by [TRPA], it is necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan." *Tahoe-Sierra*, 535 U.S. 302 (2002). Accordingly, the compact itself prohibited the development of new subdivisions, condominiums, and apartment buildings, and also limited the number of permits that would be granted over the following three years.

As the TRPA set out to perform these obligations, as well as work on regional compliance with the Federal Clean Water Act, it soon realized that it could not meet the compact's deadlines. Based on this conclusion, it enacted the first of two moratoria on development that petitioners challenged and which eventually led the parties to the U.S. Supreme Court. The two moratoria lasted for thirty-two (32) months, though some petitioners were affected by way of an injunction for a total period of nearly six (6) years.

In writing for the Court, Justice Stevens described the question presented in the case as "whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation under the Takings Clause of the United States Constitution." *Tahoe-Sierra* at 306. The Court ultimately rejected the *per se* rule, but emphasized that they did not "hold that the temporary nature of a land-use restriction precludes finding that it effects a taking," but instead recognized "that it should not be given exclusive significance one way or the other." *Tahoe-Sierra* at 337. The Court instead reiterated the importance of the analysis found in its 1960 *Penn Central* decision involving concepts like "fairness and justice" that are "less than fully determinate." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1960) (Brennan, J.).

In response to petitioner's requests for compensation, the Supreme Court held that the TRPA had extracted only a "temporal slice of the fee interest" by imposing a

moratorium on development, not a temporary "taking" that rose to the level necessitating compensation. Parenthetically, Justice Stevens noted that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense'." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002).

Whatever else it proves to stand for in the future, the *Tahoe-Sierra* decision certainly reinforces the right of municipalities to use moratoria in the process of land use planning. Additionally, it emphasizes that future challenges to moratoria should be decided on a case-by-case basis. No bright-line, easy-to-interpret rule will be promulgated for analyzing regulatory takings. Instead, courts will use the type of ad hoc, factual inquiry analysis found in *Penn Central*, to determine if a given moratoria, and its duration, was indeed a regulatory taking when considering all the relevant circumstances.

9. ANNEXATION

A. The allocation of governmental authority between cities and counties.

All land in Idaho is subject to local governmental control, either by a county government or by a city government.[48] Cities typically provide relatively comprehensive municipal services to the residents within their boundaries. County governments, in contrast, fill in the interstices, providing typically more limited municipal services to less developed and more lightly populated areas outside the boundaries of cities.[49]

Cities have planning and zoning authority only within their municipal boundaries.[50] Counties have planning and zoning authority over all unincorporated areas within the county. The planning and zoning power must be exercised "within [the] limits" of the entity. Idaho Const. art. XII, § 2. This allocation of authority between cities and counties precludes "jurisdictional overlaps." *Boise City v. Blaser*, 98 Idaho 789, 791, 572 P.2d 892, 894 (1977).

To a limited extent, cities may influence planning beyond their boundaries within an established area of city impact.

Although a city may not exercise governmental authority beyond its borders, it is generally understood that a city may extend city services to lands beyond its boundaries. See discussion in *Idaho Water Law Handbook*. Note that cities may insist that persons outside the city's boundaries sign annexation agreements before the city will agree to extend services to them.

As cities grow, they annex "contiguous or adjacent" lands (typically but not always within the city's area of impact), detaching them from county government control and making them part of the city. This is often done involuntarily, that is

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[48] The authority to engage in planning and zoning activity is allocated solely between cities and counties. Highway districts and other special districts have no planning and zoning powers. *See*, *KMST, LLC v. Cnty. of Ada*, 138 Idaho 577, 67 P.3d 56 (2003) (Eismann, J.) (highway district did not have final authority to impose requirement that developer construct and dedicate street).

[49] "Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws." Idaho Const. art. XII, § 2.

[50] "Therefore, a city has jurisdictional authority to make zoning decisions including subdivision plat approvals, but only when the subdivision lies within the city limits." *Blaha v. Eagle City Council ("Blaha I")*, 134 Idaho 768, 770, 9 P.3d 1234, 1236 (2000) (Walters, J.). "Beyond the corporate limits of a city, the county has jurisdiction by statute to accept and approve subdivision plats. See I.C. § 50-1308. For the City of Eagle to be allowed to exercise co-equal jurisdiction with Ada County in the impact area lying beyond the city limits would not only be in conflict with the statute but also inconsistent with constitutional limitations placed on a city's powers." *Blaha v. Bd. of Ada Cnty. Comm'rs ("Blaha II")*, 134 Idaho 770, 777, 9 P.3d 1236, 1243 (2000) (Walters, J.).

without the consent of property owners within the annexed area and without the agreement of the county.

B. The power to annex

The Idaho Legislature's annexation power has been described as "absolute." Accordingly, the Legislature may enlarge the boundaries of a municipality "without the consent of the habitants of the property, and even against their wishes." *Willows v. City of Lewiston*, 93 Idaho 337, 341, 461 P.2d 120, 124 (1969).[51]

The annexation power is not an inherent power of cities but, rather, lies with the state.[52] The state may, and generally does, delegate to cities the power to annex, as in the case of Idaho's Annexation Statute, Idaho Code Section 50-222. *Willows v. City of Lewiston*, 93 Idaho 337, 341, 461 P.2d 120, 124 (1969).

Idaho's current Annexation Statute is codified at Idaho Code § 50-222.[53]

The Annexation Statute reflects the policy that cities should be able to make annexations when such annexations are reasonably necessary to assure the orderly development of the cities:

> Legislative intent. The legislature hereby declares and determines that it is the policy of the state of Idaho that cities of the state should be able to annex lands which are reasonably necessary to assure the orderly development of Idaho's cities in order to allow efficient and economically viable provision of tax-supported and fee-supported municipal services, to enable the orderly development of private lands which benefit from the cost-effective availability of municipal services in urbanizing

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[51] The United States Constitution apparently imposes no substantive restraints or limits on the annexation power of the State. *See Hunter*, 207 U.S. at 179 ("there is nothing in the Federal Constitution which protects landowners in annexed areas from injurious consequences such as lessened property values, increased taxes, or inconvenience").

[52] "A state legislature's power to annex is both exclusive and plenary." 56 Am. Jur. 2d *Municipal Corporations* § 41 (2000). The United States Supreme Court held in *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), that the State, "at its pleasure," may enlarge or contract the boundaries of a municipality, "with or without the consent of the citizens, or even against their protest." *Hunter*, 207 U.S. at 178-79. It has long been the law in Idaho that the legislature has the absolute power to enlarge and contract the boundaries of municipalities within the state. *Willows v. City of Lewiston*, 93 Idaho 337, 341, 461 P.2d 120, 124 (1969).

[53] The current version dates to a complete recodification in 2002. S.B. 1391, 2002 Idaho Sess. Laws, ch. 333. The Annexation Statute was previously codified at Idaho Code § 50-303; 1955 Idaho Sess. Laws, ch. 216, and before that at Idaho Code Annotated § 49-303. Its origins may be traced to 1905 Idaho Sess. Laws, p. 391 (codified at Idaho Revised Code 1908, Title 13, § 2172).

> areas and to equitably allocate the costs of public services in management of development on the urban fringe.

Idaho Code § 50-222(1).[54]

Municipalities may exercise only such annexation powers as are expressly granted by statute, or necessarily implied from the express grant.[55] Accordingly, compliance with the procedures and elements of Section 50-222 is a paramount concern.

In addition to meeting the procedural and substantive requirements of the Annexation Statute, a municipal annexation also must pass the judicially-imposed "test of reasonableness." See discussion in section 24.X(2) at page 445. (Presumably this test survives the 2002 amendment making Category B and C annexations subject to IAPA review.)

C. Effect of municipal annexation

A city's power to govern and regulate extends to its city limits. "Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws." Idaho Const. art. XII, § 2 (discussed in *Lisher v. City and/or Village of Potlatch*, 101 Idaho 343, 612 P.2d 1190 (1980).

The annexation extends the corporate boundaries of the municipality to include the annexed lands. Idaho Code § 50-223. All persons and property in the annexed lands become subject to the municipality's ordinances and by-laws, Idaho Code § 50-223, and are subject to the same taxation as other property within the municipality "as though said annexed portion had been a part of the said city from the date of its incorporation," Idaho Code § 50-224. Of course, the most important practical effect of annexation is the extension of city services to the annexed area.

If the municipality supplies services which had previously been supplied to the annexed lands by a district organized under state law, the annexation effects a withdrawal of the annexed lands from the district, effective December 31 of the

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[54] This statement of legislative purpose was not part of the original Annexation Statute; it was added as part of the comprehensive re-write of the statute in 2002. Idaho Sess. Laws, ch. 333 (2002).

[55] *Hendricks v. City of Nampa*, 93 Idaho 95, 98, 456 P.2d 262, 265 (1969); *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980) (Donaldson, C.J.). "Garden City has no inherent right of its own to annex property." *City of Garden City v. City of Boise*, 104 Idaho 512, 515, 660 P.2d 1355, 1358 (1983) (Huntley, J.) (emphasis original). "Municipalities thus may exercise annexation power only under the conditions, restrictions, and limitations imposed by the Legislature. *Hendricks*, 93 Idaho at 98, 456 P.2d at 265. The statutory procedures must be followed and the substantive elements must be satisfied to effect a valid annexation. "If the essentials of the statute are lacking the annexation ordinance is invalid." *Hendricks*, 93 Idaho at 98, 456 P.2d at 265.

calendar year in which the annexation took place. Idaho Code § 50-224. The annexed lands are relieved of all levies, taxes, and assessments thereafter made by the district. Idaho Code § 50-224.

Annexation does not, in and of itself, terminate pre-existing service contract rights in the annexed area, or authorize the city to oust a service provider having such rights in favor of another provider with whom the city has a contract for such services. For instance, a city may not exclude from the annexed area a garbage service provider holding therein pre-annexation service contracts in favor of another garbage service provider with whom the city has an exclusive service contract. In the absence of condemnation proceedings, such an exclusion amounts to a taking for which just compensation is owed. *Coeur d'Alene Garbage Service v. City of Coeur d'Alene*, 759 P.2d 879, 881-82 (Idaho 1988) (Johnson, J.); *see also Unity Light & Power Co. v. City of Burley*, 445 P.2d 720, 723 (Idaho 1968) (McFadden, J.) (similar outcome in regard to protecting a pre-annexation electrical service franchise with a highway district).

D. New zoning is required upon annexation

Newly annexed land is deemed unzoned, even if it was previously zoned by the county. See discussion in section 4.A(7) at page 76.

E. The Annexation Statute (Idaho Code § 50-222)

(1) Overview

The statute, as amended in 2002, begins with a general policy statement, Idaho Code § 50-222(1).

There is no requirement that cities first adopt implementing ordinances governing the annexation process. Rather, the statute declares the authority of cities to annex so long as the statute's procedures are followed. Idaho Code § 50-222(2). However, the decision to annex must be concluded with the passage of an annexation ordinance specific to that annexation. Idaho Code §§ 50-222(5) and 50-223.

Idaho's Annexation Statute, Idaho Code § 50-222, was completely revamped in 2002.[56] The 2002 amendment created three categories of annexation (designated Categories A, B, and C) each with its own set of procedures. Idaho Code § 50-222(3). Here is a thumbnail sketch:

[56] The 2002 version of section 50-222 replaced a previous Annexation Statute having the same section number. Idaho Sess. Laws, ch. 333, § 1 (2002). The prior statute, was added 1993. 1993 Idaho Sess. Laws, ch. 55, § 3. It was amended by 1994 Idaho Sess. Laws, ch. 375, § 1, 1996 Idaho Sess. Laws, ch. 116, § 1, and 1998 Idaho Sess. Laws, ch. 191, § 1. The overhaul of the statute in 2002 was a legislative response to controversial non-voluntary annexations undertaken by the City of Boise in prior years. As a result, non-voluntary annexations are still possible, but they are now more difficult and occur rarely.

Category A annexations are limited to two situations: (1) annexations where the owners of the land consent and (2) the annexations of small pockets of enclaved residential areas. Category A annexations may be undertaken unilaterally by the city by simple adoption of an ordinance.

Category B annexations may also occur over the objection of some (if a large annexation) or all (if a small annexation) land owners within the annexed area. Under Category B, the city must engage in substantial fact-finding to justify the annexation.

Category C annexations involve large annexations where the majority have not consented in advance. In addition to meeting all the Category B fact-finding requirements, Category C annexations require a subsequent round of voting in which the majority ultimately approve the annexation.

A significant limitation on Category B and C annexations is that they may occur only where the land is divided into lots of not more than five acres or where the lands are completely surrounded by the city.

A more detailed discussion of each category follows, beginning with the summary chart on the following page.

(2) Summary chart of Category A, B, and C annexations

Summary of Annexation Statute (Idaho Code § 50-222)
This summary omits some details and special exceptions.[57]
The reader should consult the statute in its entirety.

<table>
<tr><th></th><th>Category A</th><th>Category B</th><th>Category C</th></tr>
<tr><td>Definition of category:</td><td rowspan="2">All landowners provide written consent.
OR
Enclaved residential property of < 100 parcels.
OR
Special cases (fairgrounds, etc.).</td><td>< 100 parcels regardless of whether landowners consented.
OR
> 100 parcels and owners of > 50% (based on land) have provided written or implied consent.</td><td>> 100 parcels and owners of > 50% (based on land) have not provided either written or implied consent.</td></tr>
<tr><td colspan="2">AND
Annexed land is subdivided into lots of 5 acres or less, or Owner has begun to sell land in parcels of 5 acres or less.
OR
Annexed land is completely surrounded by the city.</td></tr>
<tr><td rowspan="4">Requirements and procedures applicable to each category:</td><td colspan="3">All annexed land must be contiguous or adjacent to city (regardless of category).</td></tr>
<tr><td>Need not be within area of city impact. Where all landowners consent, must be included in comprehensive plan.</td><td colspan="2">Must be within area of city impact.</td></tr>
<tr><td rowspan="3">May be annexed unilaterally by ordinance.</td><td colspan="2">City must prepare detailed annexation plan
Requires compliance with procedures for zoning district boundary change; publication and mailing to landowners; hearing; express findings.</td></tr>
<tr><td>So long as appropriate findings are made, annexation may proceed over objection of landowners.</td><td>After following procedures above, owners are polled again and over 50% must consent.</td></tr>
<tr><td>Judicial Review:</td><td>No judicial review (review by declaratory action only) (very deferential).</td><td colspan="2">By IAPA
(somewhat deferential).</td></tr>
</table>

(3) Category A annexations

Category A annexations arise in three circumstances. Idaho Code § 50-222(3)(a).

The first is where all landowners within the annexed area have provided written consent to the annexation. See discussion in section 9.E(6) at page 121 regarding consent.

[57] For instance, Category B also includes a subsection dealing with lands subject to a development moratorium or water and sewer restriction.

The second is where the annexation consists entirely of enclaved residential lands including fewer than 100 parcels. Note that these enclaved areas must be entirely residential to qualify. No consent is required for this type of Category A annexation.

The third is a set of special categories described in Idaho Code § 50-222(5)(b)(v) involving fairgrounds, etc.

The limitation to residential enclaves was added at the last moment during the legislative process in 2002 to ensure that the Category A procedures could not be used to annex enclaved industrial and commercial properties. However, if enclaved industrial or commercial properties are completely surrounded by the city, they are still subject to annexation under Category B.

Under Category A, "enclaved lands" must be within a city or "bounded on all sides by lands within a city and by the boundary of the city's area of city impact." Idaho Code § 50-222(3)(a)(ii). The second part of that definition is peculiar. It would appear to enable a city to annex (as an enclave) lands that are merely adjacent to the city (so long as they are touching either the city limits or the impact area boundary). That does not fit the ordinary meaning of an enclave.

Lands falling within Category A may be annexed by the city simply by adopting a municipal ordinance. Idaho Code § 50-222(5)(a). Public input would be required only to the extent that the city's own ordinance mandates public input for ordinances. Although the annexation itself may be undertaken unilaterally, the city would be required to follow public procedures to modify the comprehensive plan and establish zoning. Idaho Code § 50-222(5)(a).

(4) Category B annexations

Category B annexations apply to each of the following three situations:

- A small annexation (specifically, lands containing fewer than 100 separate private ownerships and platted lots of record) where some or all do not consent to annexation.[58]

- A large annexation (specifically lands containing more than 100 separate private ownerships and platted lots of record[59]) where the majority of

[58] The statute also requires that "not all such landowners have consented to annexation." Of course, if all the landowners had consented, then the city could proceed under a Category A annexation. Thus, this is not really so much a requirement as it is a statement of the obvious.

[59] The statute creates categories for less than 100 parcels and more than 100; it makes no provision for exactly 100 parcels. Category A uses the term "parcels;" Category B uses the phrase "private ownerships and platted lots." It is unclear what distinction, if any, was intended.

landowners (owning more than 50 percent of the land) have consented to the annexation.

- The annexation of lands subject to a development moratorium or a water or sewer connection restriction imposed by state or local health or environmental agencies, so long as the lands subject to the moratorium or restriction are not counted for purposes of determining the number of separate ownerships and platted lots of record for determining an annexation category.

Thus, Category B annexations may proceed over the objection of landowners. The city may override the preference of all landowners where fewer than 100 parcels are involved. If more than 100 are involved, only the minority (measured by land size) may be overridden.

All Category B and C annexations must also meet <u>one</u> of the following criteria:

- The land meets the "subdivision or sale" requirement (aka the "five-acre rule") under which either (1) the land has been subdivided or split entirely into parcels of 5 acres or less or (2) the owner has "begun to sell off" the land in tracts of 5 acres or less. This requirement is discussed below in section 9.E(7) at page 123.

or

- The land to be annexed is surrounded by the city. Unlike the more lenient definition of "enclaved" land under Category A, this criterion requires that the annexed land be literally surrounded on all sides by the city.

In short, the land must be either subdivided (or sold as if it were) or completely surrounded (without the exceptions applicable to Category A residential enclaves). Note also that the "completely surrounded" criterion applies to any type of property, not just residential property.

Thus, apparently, a city could annex Category B lands in two steps. First it could annex a large block of subdivided land (but fewer than 100 parcels) within the city's area of impact, carving out islands of agricultural and/or industrial land that do not meet the five-acre rule. Once that was accomplished, the city could initiate a second Category B annexation picking up the islands under the "completely surrounded by the city" criterion. This can be done over the unanimous objection of the landholders (so long as fewer than 100 parcels are involved).

The statute lays out detailed procedures for Category B annexations. The city must develop and publish a detailed "annexation plan." It must hold a hearing on the plan, and make a number of specific findings in support of the annexation, all laid out in the statute. Thus, although Category B annexations may occur over the objection of landowners (as discussed above), there are a lot of hoops to jump through.

Finally, the statute establishes a more accessible standard of judicial review for Category B and C annexations (discussed below).

(5) Category C annexations

This category applies to large annexations (involving over 100 parcels) in which fewer than half the landowners (measured by acreage) have consented to the annexation. (If more than half had consented, this would be a Category B annexation.) Under Category C, the city may nonetheless proceed with the annexation process, applying all the criteria and procedures set out for Category B annexations. In addition, however, once these procedures have been completed, the city must take a special vote of the landowners according to detailed procedures laid out in the statute. Then, the annexation may be completed only if the majority of landowners (again, measured by acreage) agree to the annexation.

Given that the majority had not consented at the outset, it is not terribly likely that the vote at the end of the process will approve the annexation. For this reason, we are not likely to see this procedure invoked by cities very often.

(6) Written consent and implied consent

The Annexation Statute includes various consent provisions. Category A requires written consent. Consent for purposes of Categories B and C may be either written or implied consent.

The statute defines written consent as follows:

> Evidence of consent to annexation. For purposes of this section, and unless excepted in paragraph (b) of this subsection, consent to annex shall be valid only when evidenced by written instrument consenting to annexation executed by the owner or the owner's authorized agent. Written consent to annex lands must be recorded in the county recorder's office to be binding upon subsequent purchasers, heirs, or assigns of lands addressed in the consent. …

Idaho Code § 50-222(4)(a).

Thus, consent may exist if the prior owner consented, even where the current landowner vehemently objects to the annexation. For instance, a developer's written consent, if properly recorded, is binding on subsequent homeowners.

The act defines implied consent as follows:

> Implied consent: In category B and C annexations, valid consent to annex is implied for the area of all lands

> connected to a water or wastewater collection system operated by the city if the connection was requested in writing by the owner, or the owner's authorized agent, or completed before July 1, 2008.

Idaho Code § 50-222(4)(b)(ii) (as amended by H.B. 143, 2009 Idaho Sess. Laws, ch. 53).

Thus, consent will be implied where the landowner requests and receives a connection to city water or sewer. (The request is not necessary if the connection occurred before 2008.) The statute does not squarely address whether a prior owner's implied consent is binding on the current owner (if the house sells after it was connected to water or sewer). But the implication is that it is binding on successors.

Written consent is required only for voluntary Category A annexations. Consent for Category B and C annexations may be either written or implied (based on connection to the water or sewer system). Note, however, that no consent at all is required for the following:

- Category A annexations of enclaved residential lands
- Category B annexations involving fewer than 100 parcels
- Category C annexations involving more than 100 parcels.

As discussed in in the prior section, the city may override the nonconsenting landowners in Category B and C annexations. However, for Category C, over 50% must vote to approve the annexation.

In *Steele v. City of Shelley (In re Annexation to the City of Shelley)*, 151 Idaho 289, 255 P.3d 1175 (2011) (Burdick, J.), the Court held that consent is implied by use of the city's water system, and that such consent cannot be revoked by a petition. Nor did testimony by opponents of the annexation as to their non-consent overcome the prima facie showing of consent based on use of the water system. Curiously, this case arose in the context of a Category A annexation, yet the Court did not address the fact that the implied consent provision in Idaho Code § 50-222(4)(b)(ii) is expressly limited to Category B and C annexations. A review of the briefs shows that the parties failed to draw the Court's attention to this provision.

Having determined that the city properly categorized the annexation as a Category A annexation, the Court concluded that there was no provision for judicial review and affirmed the trial court's dismissal of the case for lack of subject matter jurisdiction. The Court did not comment on whether the parties could have brought a declaratory judgment action instead.

Highlands Dev. Corp. v. City of Boise, 145 Idaho 958, 188 P.3d 900 (2008) (Eismann, J.), presents an interesting question.[60] In that case the developer sought annexation and simultaneously requested what it incorrectly called a "rezone" (really an initial zone) seeking a zoning classification similar to the one previously imposed by the county. The city agreed to annex, but decided to impose a more restrictive zone until the developer laid out a more specific plan of what it intended to do with the property. The lesson here is that anyone seeking voluntary annexation of a property under Category A should be careful to declare in writing that its agreement to annexation is conditioned upon a particular zoning or other matters and that if those conditions are not met, the landowner does not consent to the annexation.

(7) Subdivision or sale of five-acre lots

(a) The five-acre rule

The Annexation Statute subjects non-voluntary annexations to the "five-acre rule." Only land that has been subdivided into parcels of five acres or less may be annexed.

Under the pre-2002 version of Section 50-222 and its statutory predecessors, all annexations were subject to the five-acre rule. The current version applies the requirement only to Category B and Category C annexations. Thus a Category A annexation may occur with respect to a large block of land that has never been subdivided or sold into small lots, so long as the owner consents or it is enclaved residential property.

Category B and Category C annexations are authorized only if the land has been

> laid off into lots or blocks containing not more than five (5) acres of land each, whether the same shall have been or shall be laid off, subdivided or platted in accordance with any statute of this state or otherwise, or whenever the owner or proprietor or any person by or with his authority has sold or begun to sell off such contiguous or adjacent lands by metes and bounds in tracts not exceeding five (5) acres, or whenever the land is surrounded by the city.

Idaho Code § 50-222(5)(b)(ii) (Category B); *see* Idaho Code § 50-222(5)(c)(ii)(A) (Category C).

We have already mentioned the second criterion in the quoted passage (land surrounded by the city). There is not much else to say about this, other than to

[60] *Highlands*, although decided in 2008, was based on a pre-2002 annexation.

reiterate that that the "surrounded" requirement is both stricter and more lenient than the "enclave" requirement applicable to Category A. (Enclaves under Category A are limited to residential enclaves, but the definition of enclave is non-intuitive and includes some land outside the city. See discussion in in section 9.E(3) on page 118.)

If the "surrounded" criterion cannot be met, then a Category B or C annexation that the land must meet the first part of the definition dealing with subdivision or sale of parcels of five acres or less). This "subdivision or sale" requirement, which long pre-dates the 2002 re-write of the Annexation Statute, prohibits annexation of non-surrounded land unless the land sought to be annexed has been or will be laid off into lots or blocks of no more than five acres each, or unless the owner has sold or begun to sell the land in tracts not exceeding five acres. *Boise City v. Boise City Development Co*., 41 Idaho 294, 303, 238 P. 1006, 1009 (1925); *see also Batchelder v. City of Coeur d'Alene,* 85 Idaho 90, 95, 375 P.2d 1001, 1004 (1962) discussing *Boise City Development Co.* with approval). The subdivision or sale requirement is another statutory requirement "essential" for annexation. *See Finucane v. Village of Hayden*, 86 Idaho 199, 203, 384 P.2d 236, 238 (1963) (invalidating an annexation ordinance when it was undisputed the annexed agricultural lands "had never been laid off, nor sold, nor bargained for sale, in lots, blocks, or tracts not exceeding five acres").

The underlying rationale for the subdivision or sale requirement (the five-acre rule) is that by laying off, platting, subdividing, or selling lots of five acres or less, the landowner has implicitly "recogniz[ed] that his land has thus become urbanized [and] has thereby placed his land in such a position that the city may determine whether it wants to annex such territory." *Batchelder*, 85 Idaho at 95, 375 P.2d at 1004 (quoting *Boise City Development Co.*, 42 Idaho at 309, 238 P. at 1009). In essence, by laying off, platting, or subdividing the property into lots or blocks of five acres or less, or by selling or beginning to sell off lots or blocks of five acres or less, the landowner implicitly consents to annexation by "giv[ing] the municipality the authority to annex." *Boise City Development Co.*, 42 Idaho at 309, 238 P. at 1009.

Thus, for example, under Category B, a city may annex fewer than 100 parcels of subdivided lands over the objection of <u>all</u> landowners.

The subdivision or sale requirement is satisfied by <u>either</u> subdivision or sale. "It is not necessary that if sales are made the land shall have been platted or subdivided, nor, on the other hand, if platted or subdivided, that any such land shall have been sold." *Boise City Development Co.*, 42 Idaho at 303, 238 P. at 1009. Further, the requirement can be satisfied by the actions of either the current or former owners of the land. All that is required is that the subdivision or sale took place "at some time." *Batchelder*, 85 Idaho at 95, 375 P.2d at 1004.

The subdivision prong requires that <u>every</u> lot or block be five acres or less. "[I]f no sale of five acres or less has occurred, then according to the terms of the

statute every lot or block within the tract must be five acres or less in extent. It is not sufficient that some but not all of the lots contain five acres or less." *Hendricks v. City of Nampa*, 93 Idaho 95, 99, 456 P.2d 262, 266 (1969).

In contrast, the sale prong requires that only one lot sold be five acres or less. If there has been "a single sale of five acres or less from the tract whether subdivided, platted, laid off or not, then the entire tract may be ripe for annexation, even though the remainder is greater than five acres." *Hendricks*, 93 Idaho at 99-100, 456 P.2d at 266-67.[61] Because the statute only requires that an owner have "begun to sell off" five-acre lots, Idaho Code § 50-222(3)(b)(ii), the statute might be satisfied even when a sale is merely being negotiated, but has not taken place. *See Finucane*, 86 Idaho at 203, 384 P.2d at 238 (stating that an annexation was invalid when the annexed agricultural lands "had never been laid off, nor sold, nor bargained for sale, in lots, blocks, or tracts not exceeding five acres") (emphasis added); *Boise City Development Co.*, 42 Idaho at 306, 238 P. at 1011 (parenthetically commenting that a purchase negotiation "unquestionably is the beginning of a sale"). In addition, a single five-acre lot sale satisfies the sale prong even if the landowner made such a sale with no intention of making further sales or otherwise subdividing or developing the property. *See Boise City Development Co.*, 42 Idaho at 317, 238 P. at 1014 ("the statute does not say anything about intention, merely that the owner has sold or begun to sell").

If the property meets the "sale" test, the entire property becomes subject to annexation, not just the portion sold. "[I]f the owner has platted land into lots or blocks containing not more than five acres each, and has sold the same, or has sold without platting, in tracts of not more than five acres, such lots or tracts together with the additional portions still remaining in the possession of the former owner of such platted lots, or metes and bounds tracts, may be annexed." *Boise City Development Co.*, 42 Idaho at 303-04, 238 P. at 1009.[62]

Presumably, such land remains subject to annexation even if it is acquired by a successor. Thus, for example, the purchaser of a 20-acre parcel cannot know if she is safe from this type of annexation without researching the history of the acquired parcel to see if it was once part of a larger parcel out of which a parcel of five acres or less was previously carved out and sold.

However, the subdivision and sale requirement applies only to "all the tracts of a former owner in the direct chain of title of the land to be annexed, only up to the period during which such former owner in fact owned the land to be annexed."

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[61] *Boise City Development Co.*, 42 Idaho at 303-04, 238 P. at 1009, appears to be in conflict with *Hendricks*. *Boise City Development Co.* contains language to the effect that either a sale or a subdivision subjects the entire owner's parcel to annexation. Presumably the more recent and explicit discussion in *Hendricks* overrides any contrary reading of *Boise City Development Co.*

[62] Presumably, this applies only to the "sale" prong of the test. See footnote 61 above.

Hendricks, 93 Idaho at 100, 456 P.2d at 267. In other words, the city may not annex a parcel containing more than five acres based on the fact a former owner holding an even larger tract subdivided a portion of the retained property after the sale of the tract to the current owner.

(b) Landowner permission required for annexation of agricultural and forest land

In 2019 and 2020, the Legislature adopted amendments to the Annexation Statute requiring landowner approval before annexing any parcel of five acres or more that is actively devoted to agriculture or forest land. Idaho Code §§ 50-222(5)(b)(v)(C) and (D); H.B. 25, 2019 Idaho Sess. Laws, ch. 22; H.B. 451, 2020 Idaho Sess. Laws, ch. 240. Thus, the owner of a five-acre parcel of farm land may prevent the land from being annexed even if it is surrounded by the city and (apparently) even if the some five-acre parcels have been sold off.

(c) Burdens of proof

A duly enacted annexation ordinance is presumed valid, but the presumption is rebuttable. *Hendricks*, 93 Idaho at 98-99, 456 P.2d at 265-66. A party challenging the statute has the initial burden of demonstrating that the annexed property is greater in size than five acres and that the current owner has not authorized or allowed the laying off, subdivision or platting by blocks or lots of five acres or less, and has not sold or begun to sell any such lots or blocks. *Hendricks*, 93 Idaho at 99, 456 P.2d at 266. Such a showing rebuts the presumption of validity and the burden then shifts to the city to come forward with evidence that the ordinance is valid. Normally this will require a showing by the city that a prior owner laid off, subdivided, platted, or sold five acre lots or blocks. *Hendricks*, 93 Idaho at 99, 456 P.2d at 266. The Idaho Supreme Court has stated that considerations of "fairness" require that the city, rather than the owner, incur the inconvenience and expense of searching title records for proof if the city "insists" on annexation after the owner has rebutted the presumption of validity. *Hendricks*, 93 Idaho at 99 n.2, 456 P.2d at 266 n.2. "The ultimate burden of persuasion that the ordinance is invalid, of course, would remain with the person attacking the [annexation] ordinance." *Hendricks*, 93 Idaho at 99, 456 P.2d at 266.

(d) Statutory exceptions to subdivision or sale

Section 50-222 provides that certain subdivisions or sales will not satisfy the subdivision or sale requirement as a matter of statutory definition. Splits of ownership that occurred prior to January 1, 1975, and resulted from the placement of public utilities, public roads or highways, or railroad lines through the property "shall not be considered as evidence of an intent to develop such land and shall not be sufficient evidence that the land has been laid off or subdivided in lots or blocks." Idaho Code § 50-222(5)(b)(ii). In addition, a single sale of five acres or less to a family member occurring after January 1, 1975 for the purpose of constructing a

residence "shall not constitute a sale within the meaning of this section." Idaho Code § 50-222(5)(b)(ii).

(8) The contiguity requirement

Note: A useful summary of the law on the contiguity issue is contained in the Memorandum attached as Appendix H to the *Land Use Handbook*.

All annexations (under any category) must be of lands "contiguous or adjacent" to the city. Idaho Code §§ 50-222(4); 50-222(5)(a), 50-222(5)(b)(i), 50-222(5)(c)(i). (See section 9.E(9) at page 132 for discussion of special exceptions relating to rail lines and airports.) The statute does not define "contiguous or adjacent." The two words, however, are considered to be synonymous. 49 A.L.R. 589, §§ 2[a], 3[a] (1973).

While the city may only annex contiguous lands, it may acquire written consent agreements from non-contiguous landowners. Idaho Code § 50-222(4). This would typically occur when the city extends city services to such land. These consents will be valid when such lands become contiguous in the future, thus potentially qualifying the land for annexation. Idaho Code § 50-222(4).

The Annexation Statute does not define "contiguous or adjacent." The Idaho Supreme Court[63] has held that the terms are to be understood "in their primary and obvious sense" and limits a city to annexing lands that are "adjoining, contiguous, conterminous or abutting":

> The fundamental conception of a city or village is that it is a collective body of inhabitants, gathered together in one mass, with recognized and well-defined external boundaries which gather the persons inhabiting the area into one body, not separated by remote or disconnected areas. *In its territorial extent, the idea of a city, town or village is one of unity and of continuity, not separated or segregated areas*. Under statutes authorizing a city or village, under prescribed conditions, to annex adjacent or contiguous territory to the municipality, such statutes have been generally construed to include only contiguous or conterminous territory. The words "adjacent" and "contiguous" so used must be construed to have a meaning in their primary and obvious sense, and the territory to be annexed must be adjoining, contiguous, conterminous or abutting. *In other words "adjacent" as used in the statute means connected with*

[63] The "contiguous or adjacent" language in the current statute is carried forward from pre-2002 versions of the Annexation Statute. Consequently prior case law continues to be applicable.

> *and does not contemplate that a city or village should be divided into noncontiguous parts or separated areas. . . .* the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation.

Potvin v. Village of Chubbuck, 76 Idaho 453, 457-58, 284 P.2d 414, 416 (1955) (citations omitted) (italics in original). The "contiguous or adjacent" requirement is "essential" for annexation. *Potvin*, 76 Idaho at 459, 284 P.2d at 417. For instance, in *Hillman v. City of Pocatello*, 74 Idaho 69, 256 P.2d 1072 (1953), the Court voided the annexation of land lying 1500 feet from the city limit because "the land sought to be annexed was neither contiguous nor adjacent." *Hillman,* 74 Idaho at 71, 256 P.2d at 1073, *criticized on other grounds in Alexander v. Trustees of Village of Middleton*, 92 Idaho 823, 827, 452 P.2d 50, 54 (1969).

(a) The shoestring issue

Ordinarily, the shape of an annexation is of no consequence. "In fact, . . . the shape of the territory does not, of itself, result in a holding of lack of contiguity." 49 A.L.R.3d 589, §10 (1973). There is, however, one significant exception to this rule: the so-called "shoestring" annexation.

In some instances, cities have sought to annex an outlying tract of land by connecting it to the city with narrow strip of land. These are referred to in Idaho as shoestring annexations. The purpose of the shoestring is to satisfy the contiguity requirement. The bottom line is that they do not work.

In *Potvin v. Village of Chubbuck*, 76 Idaho 453, 284 P.2d 414 (1955), the Idaho Supreme Court invalided the Village of Chubbuck's annexation of a property connected to the city only by a three-mile long, five-foot wide strip of land along a public highway. *Potvin*, 76 Idaho at 455, 459, 284 P.2d at 415, 418.

The only other Idaho case to deal with the shoestring issue is *Fox v. Bd. of Cnty. Comm'rs, Boundary Cnty.* ("*Fox II*"), 121 Idaho 686, 827 P.2d 699 (Ct. App. 1991) (Winmill, J. Pro Tem).[64] In that case, the Idaho Court of Appeals upheld the district court's decision invalidating a shoestring annexation of land containing a tavern located 25 miles from the city "connected to the city by a one-dimensional line." *Fox II*, 121 Idaho at 688, n.1, 827 P.2d at 701 n.1.

The "no shoestring" rule was codified in the 1967 revision of the Annexation Statute, and was retained in the 2002 revision. Oddly, the provision does not appear in the part of the act containing the contiguity requirement. Instead it is found in the section dealing with jurisdiction over highways: "Provided further, that said city

[64] The shoestring rule is also mentioned in *Hendricks v. City of Nampa*, 93 Idaho 95, 101, 456 P.2d 262, 268 (1969), and *Oregon Shortline Railroad Co. v.* City *of Chubbuck*, 93 Idaho 815, 817, 474 P.2d 244, 246 (1970), but those cases did not turn on that issue.

council shall not have the power to declare such land, lots or blocks a part of said city if they will be connected to such city only by a shoestring or strip of land which comprises a railroad or highway right-of-way." Idaho Code § 50-222(2). In any event, the prohibition applies to all types of annexations (categories A, B, and C). Although the language of the act addresses only shoestrings along highways and railroads, the case law suggests that the principle may have broader applicability.

Idaho's shoestring rule, by the way, appears to be a departure from the majority view of other states. "The mere fact that the land annexed is joined to the city only by a narrow neck or stem of land does not render an annexation void, although many decisions, some of which are based on the wording of particular statues, are not in accord with this view." 2 McQuillin, *Law of Municipal Corporations*, § 7:34 (1999). In any event, the only Idaho cases on the subject have dealt only with the most extreme examples of shoestring annexations.

(b) The touching corners issue

We are not aware of any Idaho authority addressing whether annexation of land that touches only at the corners satisfies the contiguity requirement.

Black's Law Dictionary defines property as "contiguous" if it is "[t]ouching at a point or along a boundary." *Black's Law Dictionary* at 315 (7th ed. 1999) (emphasis supplied). At least one jurisdiction appears to agree with this definition: the Alabama Supreme Court held in *City of Dothan v. Dale Cnty. Comm'n*, 295 Ala. 131, 134, 324 So.2d 772 (1975), that statutory language requiring annexed property to be "contiguous to the boundary of the city at some point" did not necessitate a substantial common boundary.

There is surprisingly little discussion of this question in other jurisdictions. However, there is out-of-state authority for the view that touching at corners is insufficient. *See, e.g., W. Nat'l Bank v. Vill. of Kildeer*, 19 Ill.2d 342, 352, 167 N.E.2d 169 (1960); *Cnty. of Sarpy v. City of Gretna*, 273 Neb. 92, 96, 727 N.W.2d 690 (2007); *Big Sioux Township v. Streeter*, 272 N.W.2d 924, 926 (S.D. 1978); *Wild v. People*, 81 NE 707 (Ill. 1907); *LaSalle Bank Nat. Ass'n v. Village Of Bull Valley*, 355 Ill. App. 3d 629, 292 Ill. Dec. 308, 826 N.E.2d 449 (2d Dist. 2005), *appeal denied*, 215 Ill. 2d 598, 295 Ill. Dec. 521, 833 N.E.2d 3 (2005); *Matter of Annexation of Certain Territory to Village of Chatham*, 245 Ill. App. 3d 786, 185 Ill. Dec. 593, 614 N.E.2d 1278 (4th Dist. 1993) (U-shaped parcel not contiguous).

(c) The crossing water bodies issue

In *People ex rel. Redford v. City of Burley*, 86 Idaho 519, 388 P.2d 996 (1964), the Idaho Supreme Court rejected the argument that land located immediately across the Snake River from the City of Burley was not "contiguous or adjacent." The Court observed that the general rule is that "[t]erritory is contiguous to a municipality, however, if it is separated from it only by a watercourse that is or may

be spanned by a bridge." *Burley*, 86 Idaho at 523, 388 P.2d at 998 (internal quotation marks omitted) (citation omitted). The Court concluded that the river would not serve as "an inseparable barrier to complete amalgamation of the communities upon its opposite banks." *Burley*, 86 Idaho at 524, 388 P.2d at 999. In reaching this conclusion, the Court noted that the annexed land included a two-lane bridge connecting the annexed land to the city.

In the *Burley* case, the Court noted that the city would annex not only the land across the river, but the Snake River itself which, of course, is owned by the State of Idaho. The Court noted that the rule (then applicable to all annexations) that the tract be subdivided into parcels of five acres or less makes no sense in the context of submerged lands not susceptible to subdivision, and therefore was inapplicable. The fact that that annexation did not hop over the river but included the river has been noted by commentators and other courts as a justification for why the contiguity test was satisfied.[65]

The *Burley* case was cited with approval by the Idaho Supreme Court in 1969. "These [contiguity] rules, of course, are subject to a reasonable interpretation. Thus, land may be 'contiguous and adjacent' to a municipality although the two are separated by a watercourse." *Hendricks v. City of Nampa*, 93 Idaho 95, 101, 456 P.2d 262, 268 (1969).

This case has also been cited in other jurisdictions. For example, in *Anne Arundel Cnty. v. City of Annapolis*, 721 A.2d 217 (Md. 1998), the Maryland Supreme Court cited *Burley* in support of its conclusion that a peninsula separated on all three sides by bodies of water was nonetheless contiguous to land on the other side of the rivers flowing into the Chesapeake Bay. "Other states that have addressed this issue have concluded that municipal corporations may extend their boundaries across a waterbody even if the annexed land would be separated completely from the original city or town limits by that body of water." *Anne Arundel*, 721 A.2d at 230.

Indeed, decisions from numerous other jurisdictions have held that separation by water bodies does not violate the contiguity requirement.[66]

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[65] "[W]hether such barriers prevent contiguity seems to depend in part on whether the barrier is itself within the territory to be annexed so that following the annexation the barrier would be within the municipal boundaries." 59 A.L.R.3d 589, § 2[a] (1973).

[66] *Johnson v. Rice*, 551 So.2d 940, 945 (Ala. 1989) (property separated from city by body of water that otherwise met all annexation criteria was contiguous as a matter of law).

Garner v. Benson, 272 S.W.2d 442 (Ark. 1954) (okay to annex lands on opposite side of creek).

McGraw v. Merryman, 104 A. 540, 544 (Md. 1918) (okay to annex lands on opposite side of river).

Vogel v. City of Little Rock, 15 S.W. 836, 836-37 (Ark. 1891), *aff'd* 19 S.W. 13 (1892) (okay to annex lands on opposite side of river).

In contrast, the U.S. Supreme Court ruled that the rule of contiguity was violated by an annexation by a municipality on one side of Biscayne Bay sought to annex a detached tract on the other side of the bay such that residents of one side would be required to cross through other municipalities to reach the other part of the city. *Ocean Beach Heights v. Brown-Crummer Investment Co.*, 302 U.S. 614 (1938).

(d) The "single geographic unit" issue

Note that it is not necessary that each parcel within a group of parcels to be annexed be itself contiguous to the city. So long as the entire area to be annexed viewed as a "single geographic unit" is adjacent to the city, it is of no consequence that "certain of the parcels to be annexed, standing alone, did not have a common border with the city prior to enactment of the annexation ordinance." *Hendricks v. City of Nampa*, 93 Idaho 95, 101, 456 P.2d 262, 268 (1969) (citing *Potvin v. Village of Chubbuck*, 76 Idaho 453, 457-58, 284 P.2d 414, 416 (1955)). This "single geographic unit" approach essentially imputes the "contiguous or adjacent" character of one tract to all adjoining tracts within the area to be annexed, thus making large or far-flung areas susceptible to annexation.

Vestal v. City of Little Rock, 15 S.W. 891, 892 (Ark. 1891) (okay to annex lands on opposite side of river).

State ex rel. Taylor v. North Kansas City, 228 S.W.2d 762 (Mo. 1950) (okay to annex lands on opposite side of river).

Denver v. Coulehan, 39 P. 425 (Colo. 1894) (okay to annex lands on opposite side of natural stream).

Blanchard v. Bissell, 11 Ohio St. 96, 99 (1860) (okay to annex lands on opposite side of river).

Beauford Cnty. v. Thrask, 527, 563 S.E.2d 770 (S.C. Ct. App. 2002) ("the separation between the City and the Thrask property by the waters and marshes of the Beaufort River did not destroy contiguity").

Bryant v. City of Charleston, 368 S.E.2d 899 (S.C. 1988) (contiguity not destroyed by water or marshland separating parcels).

Tovey v. City of Charleston, 117 S.E.2d 872, 876 (S.C. 1961) (okay to annex lands on opposite side of river).

Pinckney v. City of Beaufort, 370 S.E.2d 909 (S.C. Ct. App. 1988) (upholding annexation of two lots on an island separated from the city by a river and tidal creek despite the fact than no direct bridge connected them).

Town of Delavan v. City of Delavan, 500 N.W.2d 268 (Wis. 1993) (allowing annexation of a nearby peninsula but not "distant lakeshore property").

Point Pleasant Bridge Co. v. Town of Point Pleasant, 9 S.E. 231, 232 (W. Va. 1889) (okay to annex lands on opposite side of river).

(9) Annexation across county lines

LLUPA expressly authorizes areas of city impact to cross a county line, but only where there is "agreement of the city and county concerned."[67] This addresses only the extension of an impact area across a county line, not the subsequent annexation.

A city might contend that under the Category A Exception, it need not extend its area of impact into another county and therefore needs no agreement with the county. This is a misreading of the statute.

As shown above, the Category A Exception allows annexation outside a city's ACI but does not allow annexation into another city's ACI.

Thus, where a city seeks to voluntarily annex "no man's land" within another county (that is, land not within another city's impact area), the Category A Exception would allow it to do so without first extending its own area of impact and without reaching an agreement with the neighboring county.

This make perfect sense. The Category A Exception allows a city to voluntarily annex "no man's land" within the same county without seeking approval of the county. It should be no different if the voluntary annexation crosses a county line.

But the situation is different where a city seeks to annex land across a county line that is within another city's previously established ACI. As shown above, the Category A Exception is too narrow to apply to an annexation invading another ACI. Accordingly, the exception does not come into play, which means that the city must comply with LLUPA's Sequencing Provision. Thus, the city must extend its impact area to cover the land it wishes to annex. And that will require an agreement with the neighboring county.

This, too, makes perfect sense. Where areas of impact in another county must be adjusted, the county that agreed to the original area of impact must be brought into to the dialog.

(10) Special cases

(a) Fairgrounds and recreational lands

County fairgrounds, or land owned by any entity and used as a fairgrounds, may not be annexed without the consent of a majority of the board of county commissioners in the county where the land lies. Idaho Code § 50-222(5)(b)(v)(A).

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[67] "Areas of city impact, together with plan and ordinance requirements, may cross county boundaries by agreement of the city and county concerned if the city is within three (3) miles of the adjoining county." Idaho Code § 67-6526(a).

Likewise, designated planned unit developments of fifty acres or more owned by nongovernmental entities that are used to provide outdoor recreational activities to the public and that do not require or use any city services may be annexed only with the express written consent of the owner. Idaho Code § 50-222(5)(b)(v)(B).

(b) Railroads

Special rules apply to annexations of railroad rights-of-way and airports. For annexation purposes, it is not enough that a railroad right-of-way is "contiguous or adjacent" to the city. Rather, a railroad right-of-way is subject to annexation only if the city adjoins or will adjoin both sides of the right-of-way. Idaho Code § 50-222(5)(b)(vii).

(c) Airports

In contrast, a city may annex a municipally owned or operated airport or landing field even if it is not contiguous or adjacent to the city. Idaho Code § 50-222(7). The city may not annex lands adjoining the non-contiguous airport or landing field that otherwise would not be subject to annexation, however. Idaho Code § 50-222(7).

(11) Judicial review of annexations

In 2002 the Legislature made Category B and C annexations subject to judicial review under the IAPA. S.B. 1391, 2002 Idaho Sess. Laws, ch. 333 (codified at Idaho Code § 50-222(6)).

See discussion in section 24.X (Judicial review of municipal annexation) at page 444 and section 24.M(4) (Actions not subject to judicial review may be challenged by way of declaratory judgment or other civil action.) on page 426.

(12) Annexation of state and federal lands

Cities have the power to annex state and federal lands. As with any other annexation, the effect is to shift local governmental control from the county to the city. Annexation does not resolve any issue of state or federal preemption.

> The general power to annex includes the power to annex land including a state institution or land acquired by the United States for a governmental purpose. The annexation of territory by a city is not precluded by the fact that such territory is a United States military reservation under the exclusive jurisdiction and control of the United States, notwithstanding that the power of the city may be curtailed and even suspended during the time that the territory is under such jurisdiction and control.

56 Am. Jur. 2d, *Municipal Corporations* § 54 (2000).

(a) Federal law permits unilateral annexation of federal lands

The seminal case addressing annexation of federal lands is *Howard v. Comm'rs of Sinking Fund of City of Louisville*, 344 U.S. 624 (1953), in which the United States Supreme Court upheld the annexation of a naval ordnance plant. The plaintiffs in *Howard* were civilian employees of the plant who objected to an occupational license tax on salaries, wages and commissions earned within the city limits. The Supreme Court gave no credence to the plaintiff's argument that federal lands could not be annexed:

> A change of municipal boundaries did not interfere in the least with the jurisdiction of the United States within the area or with its use or disposition of the property. The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.

Id. at 627.

It is unclear from *Howard* whether the federal government consented to annexation, but a subsequent federal case explains that no authorization was given. *Econ. Dev. & Indus. Corp. of Boston v. United States*, 546 F. Supp. 1204, 1209 n.11 (D. Mass. 1982) (federal government authorized the occupational tax in *Howard* but not the annexation itself), *overruled on other grounds by Econ. Dev. & Indus. Corp. of Boston v. United States*, 720 F.2d 1 (1st Cir. 1983). Moreover, *Howard* seems to categorically authorize municipal annexation of federal lands; nothing in the opinion or its cited cases[68] suggests that this power is dependent upon any particular facts or is otherwise conditional.

One appellate case suggests that the rule announced in *Howard* may not be absolute. In *U.S. v. McGee*, 714 F.2d 607 (6th Cir. 1983), the Sixth Circuit Court of Appeals upheld a district court decision that permanently enjoined the City of Dayton, Ohio, from annexing land belonging to the Wright-Patterson Air Force Base, which served as the headquarters for the Air Force's Logistical Command, its

[68] *Wichita Falls v. Bowen*, 143 Tex. 45, 182 S.W.2d 695 (1944); *Cnty. of Norfolk v. City of Portsmouth*, 186 Va. 1032, 45 S.E.2d 136 (1947).

Aeronautical Systems and Foreign Technology Divisions, its Institute of Technology and its four Aeronautical Laboratories. *Id.* at 609. The Sixth Circuit distinguished *Howard* on the basis of the potential for friction between the city and the Air Force, reasoning that "the potential for friction between city and military officials is much greater in a situation involving the annexation of a key military base than it is with respect to the annexation of a mere ordnance plant." *Id.* at 612 n.1.[69] However, this discussion was *dicta*, as an Ohio statute specifically prohibited annexation of territory within a military base without the approval of the Secretary of Defense, and such approval had not been granted. *Id.* at 611. In addition, *McGee* was not appealed to the Supreme Court, so the Court never had an opportunity to address the Sixth Circuit's interpretation of *Howard*. Finally, even assuming that *McGee* was decided validly, the Sixth Circuit was clearly concerned that Dayton might "interfere with the base's essential task of national defense." *Id.* at 612.

(b) Idaho law permits unilateral annexation of public lands

In Idaho, cities have power to annex additional territory only under the conditions, restrictions and limitations that the legislature imposes. *See, e.g., Hendricks v. City of Nampa*, 93 Idaho 95, 98, 456 P.2d 262, 265 (1969); *Or. Short Line R.R. Co. v. Village of Chubbuck*, 83 Idaho 62, 65, 357 P.2d 1101, 1103 (1960); *Potvin v. Village of Chubbuck*, 76 Idaho 453, 457, 284 P.2d 414, 416 (1955). Consequently, cities may only annex public lands to the extent permitted by statute.

Cities in Idaho historically have enjoyed broad annexation authority. For several decades, cities were free to annex any land—with or without the landowner's consent—that was divided into or sold as parcels of five acres or less. No distinction was drawn between private and public lands. For example, in *People ex rel. Redford v. City of Burley*, 86 Idaho 519, 388 P.2d 996 (1964), the Idaho Supreme Court upheld the annexation of state lands without discussing whether the State had provided consent.

The delegated annexation power changed relatively little until 2002, when the Idaho Legislature enacted a sweeping amendment. This amendment re-classified all annexations as falling into Category A, B or C, and added certain procedural requirements.

(i) Category A

Under the 2002 amendment, the only prerequisite for voluntary Category A annexations was that "all private landowners raise no objection." 2002 Idaho Sess.

[69] The Sixth Circuit claimed it was adopting the reasoning of the Eighth Circuit in *United States v. City of Bellevue, Nebraska*, 474 F.2d 473 (8th Cir. 1973). In fact, although the lower court in *Bellevue* seized upon *Howard*'s friction language, the Eighth Circuit expressly declined to reach this argument. *Id.* at 476.

Laws, ch. 333 (formerly codified at Idaho Code § 50-222(3)(a)). On its face, this language permitted cities to annex public lands unilaterally, although no reported case addressed this issue.

Section 50-222 was further amended in 2008. H.B. 545 (replacing H.B. 524), 2008 Idaho Sess. Laws, ch. 118. The definition for voluntary Category A annexations now reads:

> The three (3) categories of annexation are:
>
> (a) Category A: Annexations wherein:
>
> (i) All private landowners have consented to annexation. Annexation where all landowners have consented may extend beyond the city area of impact provided that the land is contiguous to the city and that the comprehensive plan includes the area of annexation;

Idaho Code § 50-222(3)(a)(i).

This amendment contains two potentially significant departures from the former language. First, the amendment does not expressly address whether it intended to restrict unilateral annexation of public lands beyond what was previously permissible; Section 50-222 initially states that "private landowners [must] have consented to annexation," but later states that "all landowners [must] have consented." (Emphasis added.) Second, Section 50-222 now refers to the "consent" of landowners, rather than "no objection" from them.

A. Section 50-222 does not preclude unilateral annexation of public lands

Section 50-222 expressly permits annexation within a city's ACI when all private landowners have consented. Public landowners are not mentioned. We see the only reasonable reading of this omission to be that consent of public landowners is not required for annexations within the ACI.

Section 50-222 further provides that annexations may occur outside the city's own ACI, provided that a comprehensive plan has been adopted, and "all landowners" have consented. There are two possible interpretations of this sentence. The first is that the legislature only intended to add a requirement to adopt a comprehensive plan, and the reference to "all landowners" is simply a reference back to "private landowners" in the prior sentence. The second interpretation is that, by using "all landowners," the legislature wished to add a requirement that both public and private landowner consent was also required for annexation outside the ACI.

The statute offers no justification for why the legislature would have maintained its century-long approach to permit non-consensual annexation of public lands within the ACI and yet changed course to require consent from public landowners outside it. Nonetheless, the two possible interpretations give rise to a technical ambiguity in the statute. When a statute is ambiguous, its interpretation should be guided by legislative intent. *See, e.g., In re Daniel W.*, 145 Idaho 677, 680, 183 P.3d 765, 768 (2008); *Mattoon v. Blades*, 145 Idaho 634, 636, 181 P.3d 1242, 1244 (2008); *State v. Kimball*, 145 Idaho 542, 544, 181 P.3d 468, 470 (2008). In doing so, "not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute and its legislative history." *In re Daniel W.*, 145 Idaho 677, 680, 183 P.3d 765, 768 (2008).

The Idaho Legislature identified two objectives behind the 2008 amendment to Section 50-222:

> The bill implements two recommendations of the interim land use study group of 2007…. First, this bill clarifies that Category A annexation which requires consent of all property owners may extend beyond the area of impact so long as the comprehensive plan includes the area of annexation. Second, the bill eliminates future implied consent to annexation arising from a property owner's hook up to water or sewer services.

2008 Idaho Sess. Laws, ch. 118, Statement of Purposes. The bill's sponsors made nearly identical statements before the House State Affairs Committee, the House Local Government Committee and the Senate Local Government and Taxation Committee. House State Affairs Committee, Minutes for February 19, 2008 at 2; House Local Government Committee, Minutes for February 26, 2008 at 1; Senate Local Government and Taxation Committee, Minutes for March 5, 2008 at 7.

Despite the reference to "all property owners" in the Statement of Purposes (as well as before the committees), there is no indication that the Idaho Legislature had governmental landowners in mind when it drafted the 2008 amendment to Section 50-222. The legislative history is devoid of allusions to governmental landowners, and Senator Fulcher explained to the Senate Local Government and Taxation Committee that—other than the elimination of implied consent (discussed below)—the bill "does not affect the current procedure." Minutes for March 5, 2008 at 7. Furthermore, the 2007 Joint Interim Land Use Study Group, which generated the recommendations that evolved into the 2008 amendment, did not discuss governmental landowners. *See* Minutes for August 16, 2007; Minutes for September 13, 2007; Minutes for October 25, 2007; Minutes for November 29, 2007; Minutes for December 20, 2007. It appears that the reference to "all landowners" simply was the result of careless draftsmanship, rather than a desire to require consent for

annexation of public lands outside the ACI. In other words, the most reasonable interpretation is that the phrase "all landowners" in Section 50-222(3)(a)(i) is a shorthand reference to the operable phrase "all private landowners" in the preceding sentence.

This conclusion is consistent with "the policy of the state of Idaho that cities of the state should be able to annex lands which are reasonably necessary to assure the orderly development of Idaho's cities." Idaho Code § 50-222(1). If cities are required to obtain express consent before annexing public land, governmental landowners effectively would hold a veto power over local land use decisions. It is difficult to imagine that the Idaho Legislature intended to dramatically alter the status quo without debating the issue or even acknowledging the effect of its actions.

Moreover, there are valid reasons for a statutory distinction between private and governmental landowners. Annexation has little effect upon governmental landowners. Unlike private landowners, governmental landowners do not pay municipal taxes and for the most part are not subject to municipal ordinances.[70] Because governmental landowners, particularly federal landowners, have few or no interests at stake in an annexation, there is no reason to require their consent.

B. Even if unilateral annexation of public lands is unlawful, express consent should not be required

The term "consent" is not defined in Section 50-222 and therefore should be given its common, everyday meaning. *See, e.g., State v. Yzaguirre*, 144 Idaho 471, 477, 163 P.3d 1183, 1189 (2007); *Landis v. DeLaRosa*, 137 Idaho 405, 407, 49 P.3d 410, 412 (2002); *State v. Larsen*, 135 Idaho 754, 757, 24 P.3d 702, 705 (2001). The dictionary definition of "consent" includes not only "approval," but also "acceptance" and "acquiescence." *American Heritage Dictionary of the English Language* (4th ed., 2006).

Paragraph 4 of Section 50-222 identifies the evidence of consent necessary for annexation. Before the 2008 amendment became effective, Paragraph 4 permitted consent to be implied by connection to a water or wastewater system operated by a city. 2002 Idaho Sess. Laws, ch. 333 (formerly codified at Idaho Code § 50-222(4)). "No notification [was] required to advise that hooking up to those services constitutes consent to be annexed, and no written acknowledgement [was] necessary verifying that a property owner intended to give consent to annexation." 2008 Idaho Sess. Laws, ch. 118, Statement of Purposes.

[70] One exception is that local land use ordinances apply to state lands "unless otherwise provided by law." I.C. § 67-6528. *See State ex rel. Kempthorne v. Blaine Cnty.*, 139 Idaho 348, 351, 79 P.3d 707, 710 (2003) (holding that mining lease was exempt from local zoning regulations because of directive to Land Board to maximize income to state on state endowment lands).

The 2008 amendment rewrote Paragraph 4 and several other passages of Section 50-222 to remove all vestiges of implied consent. For example, where Category B and C annexations once referred to landowners who have "evidenced their consent to annexation," they now refer to landowners who have "consented to annexation." *Compare* 2002 Idaho Sess. Laws, ch. 333 (formerly codified at Idaho Code § 50-222(3)(b)(ii), (c) *with* 2008 Idaho Sess. Laws, ch. 118 (codified at Idaho Code § 50-222(3)(b)(ii), (c)). Thus, for Category A annexations, the decision to replace "no objection" with "consent" apparently was intended to eliminate silence as a form of consent, and not to specify which words must be recited. Although Section 50-222 now requires a "written instrument" as evidence of consent, it does not mandate any particular form or content. Idaho Code § 50-222(4). Consequently, the word "consent" should not be accorded talismanic status; a written instrument from the landowner that acknowledges the city's intent to annex and expresses no opposition should suffice.

This conclusion is also consistent with good public policy. It may be extremely difficult for cities to obtain active consent from governmental landowners, particularly federal agencies. However, governmental landowners customarily have no reservations about expressing their lack of objection to annexation. Once again, it seems highly improbable that the Idaho Legislature intended to make such a sweeping change without even a cursory discussion.

(ii) Category B

The definition for Category B annexations reads:

> Category B: Annexations wherein:
>
> (i) The subject lands contain less than one hundred (100) separate <u>private</u> ownerships and platted lots of record and where not all such landowners have consented to annexation; or
>
> (ii) The subject lands contain more than one hundred (100) separate <u>private</u> ownerships and platted lots of record and where landowners owning more than fifty percent (50%) of the area of the subject <u>private</u> lands have consented to annexation prior to the commencement of the annexation process; or
>
> (iii) The lands are the subject of a development moratorium or a water or sewer connection restriction imposed by state or local health or environmental

> agencies; provided such lands shall not be counted for purposes of determining the number of separate private ownerships and platted lots of record aggregated to determine the appropriate category.

Idaho Code § 50-222(3)(b) (emphasis added). There are no references to public landowners, so the logical conclusion is that Category B annexations do not require the consent of such landowners.

(iii) Category C

Category C annexations are defined as "[a]nnexations wherein the subject lands contain more than one hundred (100) separate private ownerships and platted lots of record and where landowners owning more than fifty percent (50%) of the area of the subject private lands have not consented to annexation prior to commencement of the annexation process." Idaho Code § 50-222(3)(c) (emphasis added). Once again, public landowners are not mentioned, which indicates that the consent of such landowners is not necessary for Category C annexations.

(13) De-annexation

Cities have the power to de-annex land. The controlling statute provides:

> The boundaries of any city in this state may be altered and a portion of the territory thereof excluded therefrom, and the councils of such cities are hereby granted power to enact ordinances for that purpose. Such alteration shall not relieve any territory excluded from the limits of a city from its liability on account of any outstanding bonded or other indebtedness of such city or of any bonded or other indebtedness of any improvement district of which the excluded territory is an existing part at the time of the passage of such ordinance. For the purpose of collecting any of the indebtedness specified in this section, the territory so excluded shall be and remain under the jurisdiction of such city. Immediately after the passage, approval and publication of said ordinance, a copy thereof duly certified by the clerk of said city shall be filed in compliance with the provisions of section 63-215, Idaho Code. Thereafter, the boundaries of said city shall be as set forth in said ordinance.

Idaho Code § 50-225.

This statute was adopted in its present form (a recodification of prior annexation law) in 1967 and had never been amended.

On its face, the statute authorizes cities to act unilaterally. The statute does not set out any criteria or restrictions on de-annexation. Nor does it set out any procedural requirements (except for the filing requirement once the de-annexation is complete).

The statute contains no provision for judicial review. Historically, annexation actions have been deemed legislative and therefore not subject to judicial review under LLUPA and the IAPA (but subject to sharply limited review by way of declaratory action). In 2002 the Legislature made Category B and C annexations subject to review under the IAPA. Idaho Code § 50-222(6). No such review was provided for de-annexation.

The de-annexation statute has generated virtually no case law. *Greer v. Lewiston Golf & Country Club, Inc.*, 81 Idaho 393, 342 P.2d 719 (1959) (Taylor, J.), involved a challenge to a de-annexation (referred to there as disannexation), but the case was thrown out on standing grounds without a decision on the merits.

In *Steele v. City of Shelley (In re Annexation to the City of Shelley)*, 151 Idaho 289, 255 P.3d 1175 (2011) (Burdick, J.), residents within an area to be annexed challenged the annexation. The Court did not reach the merits, ruling instead that no judicial review is available for voluntary "Category A" annexations.

In *Wylie v. State*, 253 P.3d 700 (Idaho 2011) (J. Jones, J.), the Idaho Supreme Court enforced a development agreement entered into in conjunction with the annexation, initial zoning, and approval of a preliminary plat of a subdivision along Chinden Boulevard in Meridian. The Court expressly ruled, "The terms of the Agreement are binding on Wylie . . . ." *Wylie* at 706.

The development agreement at issue in *Wylie* included a de-annexation provision. The Court said: "The Agreement also provides that the terms of the Agreement are binding upon all successors in interest, and that the Property shall be de-annexed if any conditions contained in the Agreement, its incorporated documents, or any City ordinance, are not met." *Wylie* at 703. This particular provision was not at issue in the case, but the fact that the Court called it out and later held that the agreement was enforceable strongly suggests that the Court is quite comfortable with the idea that de-annexation is a proper remedy for failure to comply with an annexation/development agreement.

10. AREAS OF CITY IMPACT ("ACIS")

A. Purpose and overview of ACIs

LLUPA requires that every Idaho city establish an area of city impact ("ACI"). Idaho Code § 67-6526(a). The ACI is located outside of, but adjacent to, the boundaries of a city. The ACI describes the area where a city anticipates growing and, more specifically, extending city services.[71] Thus, the ACI is conceptually shaped like a donut surrounding the city limits.

The establishment of an ACI is the first step toward annexation, which may occur soon or years later. Indeed, the "Sequencing Provision" (Idaho Code § 67 222(1)) adopted in 1996 mandates that a city must establish its ACI before conducting any further annexations. See discussion in section 11.E on page 150.

Establishing an ACI is not a unilateral action by the city. The boundaries of the ACI and the applicable zoning rules are negotiated between the city and county.

If the city's ordinances are designated to apply within the ACI,[72] persons living within the ACI are entitled to representation on the city's P&Z Commission. Idaho Code § 67-6526(g) ("P&Z Representation Provision"). Members of the P&Z commission are appointed by the mayor with approval by the city council. Idaho Code § 67-6504. Thus, the mayor is required to appoint P&Z commissioners that roughly reflect the proportion of population lying in within the ACI. The code is not very precise about how this work. It simply states that persons living within the ACI (i.e., outside of the city) are "entitled to representation" on the P&Z commission. Presumably that means that those commissioners live in the ACI (outside of the city).

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[71] The role of the ACI dovetails with the express purpose of the Annexation Statute:

> Legislative intent: The legislature hereby declares and determines that it is the policy of the state of Idaho that cities of the state should be able to annex lands which are reasonably necessary to assure the orderly development of Idaho's cities in order to allow efficient and economically viable provision of tax-supported and fee-supported municipal services, to enable the orderly development of private lands which benefit from the cost-effective availability of municipal services in urbanizing areas and to equitably allocate the costs of public services in management of development on the urban fringe.

Idaho Code § 50-222(1). This codified statement of legislative intent added to the Annexation Statute as part of the comprehensive re-write of the statute in 2002. Idaho Sess. Laws, ch. 333 (2002).

[72] This requirement for representation on the city's P&Z commission is applicable only if the ACI "has been delimited pursuant to the provisions of subsection (a)(1) of this section." Idaho Code § 67-6526(g). The referenced subsection is the one describing the circumstance where the city and county agree that the city's ordinances shall apply within the ACI.

An ACI may cross a county boundary if additional procedures are followed. "Areas of city impact, together with plan and ordinance requirements, may cross county boundaries by agreement of the city and county concerned if the city is within three (3) miles of the adjoining county." Idaho Code § 67-6526(a). This gives the neighboring county veto-power over a city's extension of its ACI across a county line. (See discussion in section 9.E(9) on page 132 regarding annexation across a county line.)

B. Which plans and ordinances apply

The city and county are required to adopt coordinated ordinances establishing the ACI's boundary and specifying what planning and zoning ordinance will apply. Idaho Code § 67-6526(a).[73] They are free to select either the city's, the county's, or some combination or variation. Idaho Code § 67-6526(a).[74]

Whatever plans and ordinances are made applicable within the ACI, they will be enforced by the county.[75] This is true even if the city's ordinances are declared applicable.[76]

County enforcement is necessary because article XII, section 2 of the Idaho Constitution prevents a city from exercising jurisdiction outside its boundaries. "This Court recognized as far back as 1949 that a city's exercise of jurisdiction in an impact area lying beyond a city's limits is inconsistent with the constitutional limitations placed on a city's powers by Article XII, § 2 of the Idaho Constitution."). *Reardon v. Magic Valley Sand and Gravel, Inc.*, 140 Idaho 115, 120, 90 P.3d 340,

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[73] Idaho Attorney General's Opinion, OAG 95-1 (both the city and county must adopt an ordinance for an ACI to be effective).

[74] Technically, section 67-6526(a)(1) speaks only to planning and zoning ordinances ("ordinances adopted under this chapter"). However, provisions in Title 50 make clear that a city's subdivision ordinances may also be made applicable within the area of city impact. See Idaho Code § 50-1306 which deals with platting and which cross-references the area of city impact requirements. This section provides that if a proposed subdivision lies within an officially designated area of city impact, the subdivision application must be reviewed in accordance with whichever zoning and subdivision ordinances are made applicable pursuant to the area of impact ordinances of the city and the county. However, if no area of impact has been officially adopted and the subdivision lies within one mile of the corporate limits of a city, the county must transmit the application to the city for review and comment. The city must use its "subdivision ordinance and/or comprehensive plan" as "guidelines" for their comments. The county must consider the city's comments, but is not required to adopt them.

[75] *Burns Holdings, LLC v. Teton Cnty. Bd. of Comm'rs* ("*Burns Holdings II*"), 152 Idaho 440, 272 P.3d 412 (2012) (Eismann, J.).

[76] *Cf., Evans v. Teton Cnty.*, 139 Idaho 71, 73 P.3d 84 (2003) (Kidwell, J.), in which the Court noted in passing (and without apparent concern) that the Area of Impact Agreement between Teton County and the City of Driggs called for both governing bodies to review and approve plats and zone changes.

345 (2004) (awarding attorney fees against a city and county for adopting ordinances which purported to authorize the city to exercise jurisdiction within its ACI.[77]

Reardon confirmed the earlier holding in *Blaha v. Bd. of Ada Cnty. Comm'rs ("Blaha II")*, 134 Idaho 770, 9 P.3d 1236 (2000) (Walters, J.).[78] In *Blaha I and II*, landowners sought to develop Buckwheat Acres within the City of Eagle's ACI. The city and county adopted ordinances requiring approval first by the city and then by the county. This process was followed, and, over a period of time, both the city and county approved applications for preliminary plat, final plat, and a variance. Two neighbors, Mr. and Mrs. Blaha, filed various appeals from both the city and county actions. The Idaho Supreme Court determined that the city and county properly construed the city's action as merely in the nature of a recommendation to the county and not a pre-condition of the county's approval. To do otherwise, said the Court, would be in violation of state statute as well as Idaho Const. art. XII, § 2 which provides that cities have no jurisdiction outside of their city limits.[79] Accordingly, the Court upheld the subdivision approval.

C. Mechanisms for resolving ACI disputes

Section 67-6526(a) contemplates that the city and county are able to agree on the boundaries and provisions for the ACI. When this does not occur, LLUPA provides two mechanisms for resolving the dispute.

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[77] *Reardon*'s reference to 1949 presumably refers to *Clyde Hess Distrib. Co. v. Bonneville Cnty.*, 69 Idaho 505, 210 P.2d 798 (1949), which is mentioned in *Blaha v. Eagle City Council ("Blaha I")*, 134 Idaho 768, 769, 9 P.3d 1234, 1235 (2000) (Walters, J.) and *Blaha v. Bd. of Ada Cnty. Comm'rs ("Blaha II")*, 134 Idaho 770, 777, 9 P.3d 1236, 1243 (2000) (Walters, J.). *Clyde Hess*, was not a land use case. It dealt with the division of authority among the city, county, and state to regulate the sale of beer. *Blaha I* was the first case to address the division of authority between city and county with respect to areas of city impact.

[78] There was also a companion case, *Blaha v. Eagle City Council ("Blaha I")*, 134 Idaho 768, 9 P.3d 1234 (2000) (Walters, J.), in which the Blahas challenged the City of Eagle's approval of the same plat. The Court disposed of this appeal on procedural grounds, noting that whatever the effect of the city's action was, it was at most a non-appealable, interlocutory order. Only the county's final decision on the plat was appealable, said the Court.

[79] "Beyond the corporate limits of a city, the county has jurisdiction by statute to accept and approve subdivision plats. See I.C. § 50-1308. For the City of Eagle to be allowed to exercise co-equal jurisdiction with Ada County in the impact area lying beyond the city limits would not only be in conflict with the statute but also inconsistent with constitutional limitations placed on a city's powers." *Blaha II*, 134 Idaho at 777, 9 P.3d at 1243 (citing Idaho Const. art., § 2).

(1) When a city and county do not agree on the initial designation of an ACI (section 67-6526(b))—committee of nine followed by dec action

Idaho Code § 67-6526(b) is designed to resolve disagreements between a county and one city regarding the initial establishment of ACIs. Specifically, it applies where "the requirements of section 67-6526(a), Idaho Code, have not been met." (Section 67-6526(a) is the subsection requiring the initial establishment of complimentary ACI maps, ordinances, and plans by cities and counties.) This would arise, for instance, if a city wished to establish its ACI and the county did not agree with the city's proposal or simply failed to act (or vice versa).

Subsection (b) provides a negotiating process to be undertaken by what has come to be called "the committee of nine," which include the three county commissioners, three city representatives (who must be elected officials), and three at large members. The committee of nine is charged with developing and making a recommendation to the respective city and county based on majority vote of the committee. But this is only a recommendation.

If after all this, the city and county still fail to enact ordinances and adopt consistent maps, ordinances, and plans establishing the ACI, either the city or the county may seek a declaratory judgment. At that point, the district court is empowered to define the ACI and the applicable plan and ordinances.[80]

The statute sets out three broad factors for the court to apply, but provides no other guidance: "(1) trade area; (2) geographic factors; and (3) areas that can reasonably be expected to be annexed to the city in the future." These confusing (what is a "trade area"?) and amorphous (what are "geographic factors"?) criteria provide no meaningful standards for the court. Indeed, it is unclear how courts are expected to resolve what is fundamentally a political question.

(2) When ACI boundaries overlap (section 67-6526(c))—negotiation, followed by county recommendation, followed by election

The prohibition against two cities having overlapping ACIs is not explicit in the statute. But it is implicit in the entire ACI process outlined in section 67-6526. The whole purpose of having ACIs is to avoid conflicts between growth areas. It is particularly evident in section 67-6526(c) (which requires that overlapping ACIs be adjusted) and in section 67-6526(g) (which mandates that, if the city's ordinances

[80] Subsection (b) authorizes the city or county to "seek a declaratory judgment from the district court identifying the area of city impact, and plans and ordinance requirements." Idaho Code § 67-6526(b). Presumably the court order would instruct the city and county to enact ordinances and adopt plans as prescribed by the court.

apply, persons living within the ACI are entitled to representation on the city's planning and zoning commission).

In Idaho Code § 67-6526(c), a separate procedure is provided for disputes involving more than one city, i.e., where ACIs overlap. This could occur, for instance if the cities enacted conflicting impact area ordinances. It might also be read to apply to cities that propose conflicting areas of impact.

Subsection (c) does not employ the "committee of nine" process contemplated under subsection (b) and (d). Instead, under subsection (c), the competing cities are directed to attempt to negotiate a resolution of the area of impact boundary dispute. If they are unable to do so, the county commissioners step in to propose a resolution (upon request by one of the affected cities).

If either of the cities object to the county's proposal, the city may demand that the county conduct an election among the voters "residing in the overlapping impact area," allowing the voters to declare which city's ACI should apply. The results of the election are binding and conclusive.[81]

Why subsection (b) culminates in dec action and subsection (c) culminates in an election is a mystery.

(3) When existing ACI boundaries are to be changed (section 67-6526(d))

Another subsection deals with changes to existing ACI boundaries. Idaho Code § 67-6526(d). This subsection leads off with the firm premise that ACI boundaries and ordinance provisions remain fixed unless both the county and city that established them agree to change them. "Areas of city impact, plan, and ordinance requirements shall remain fixed until both governing boards agree to renegotiate." Idaho Code § 67-6526(d) (the "Fixed Boundary Provision"). This underscores that the intent of the legislation is that ACIs mean something, and that cities are entitled to rely on them.

This section provides that either the city or the county may request initiation of "renegotiations" of the ACI, which shall follow the committee of nine process set out in section 67-6526(b). It then provides that if the city and county are unable to reach agreement on the change, the judicial process set out in section 67-6526(b)

[81] When first enacted in 1975, subsection (c) authorized cities and counties to seek a declaratory judgment if necessary to resolve overlapping ACIs (the same mechanism used in subsection (b)). 1975 Idaho Sess. Laws, ch 188. In 1979, this was changed to an election procedure for subsection (c). 1979 Idaho Sess. Laws, ch. 87. However, the Legislature did not change subsection (b). Consequently, it is unmistakable that declaratory judgment remains the mechanism of last resort for ACI disputes between one city and a county, while an election is the mechanism of last resort for ACI disputes involving multiple cities.

"shall apply" (meaning that either entity may ask the district court to establish the ACI).[82]

Note that section 67-6526(d) loops into the procedures set out in section 76-6526(b).

(4) Election vs. district court

Where the dispute involves two cities with overlapping ACIs or a city and a county that have adopted conflicting ACIs (and, hence, there is a clearly defined boundary of the conflicted area), section 67-6526(c) provides for an election by residents of the overlapped area. In contrast, sections 67-6526(b) and (d) both provide resolution by the district court of disagreements between one city and the county of an initial establishment of an ACI or the modification of an existing ACI. Presumably, this is because there is no clearly defined geographic area in which voters may be heard.

(5) Implications for municipal water rights

There are collateral consequences respecting water supply for cities that fail to address potentially conflicting area of impact boundaries. The Department of Water Resources will not permit future need water right applications for areas "overlapped by conflicting comprehensive land use plans." Idaho Code § 42-202B(8). See *Idaho Water Law Handbook* for a more complete discussion of municipal water rights.

[82] Subsection (d) provides: "In the event the city and county cannot agree, the judicial review process of subsection (b) of this section shall apply." Idaho Code § 67-6526(d). Although subsection (d) references a "judicial review process" in subsection (b), that process is not technically judicial review. Subsection (b) authorizes a city or county to seek a "declaratory judgment," not "judicial review."

11. MAY CITIES ANNEX LAND IN ANOTHER CITY'S ACI?

Note: The issues addressed in this section were the subject of litigation in 2022 between the cities of Middleton and Star. That litigation was settled without resolution of the substantive legal questions regarding ACIs. The author represented one of the litigants.

A. Overview

Since 1993, the Annexation Statute has provided expressly that non-voluntary annexations are limited to land within the annexing city's ACI. See section 11.D on page 149 and section 11.F on page 151. This requirement was retained in the 2002 revamping of the statute (which added Categories A, B, and C). Idaho Code §§ 50-222(5)(b)(i) and 50-222(5)(c)(i)). Assuming compliance with the requirements in Idaho Code § 6526 that overlapping ACIs be avoided or fixed, the requirement to annex only within one's own ACI means it is not possible for a city to undertake a non-voluntary annexation into another city's ACI.

The harder issue is whether a voluntary Category A annexation may invade another city's ACI. The Annexation Statute expressly provides that a voluntary Category A annexation may reach beyond the annexing city's own ACI. Idaho Code § 50-222(3)(a)(i). It does not address whether a voluntary annexation my reach into another city's ACI. As explored below, the author's view is that this prohibition is implicit. If cities must adopt non-overlapping ACIs, how can it be that cities may invade each other's ACIs? See section 11.I(3) on page 154. But no court has answered this question. It may be resolved soon by legislation.

It comes down to this: Why would the Legislature allow voluntary Category A annexations outside of a city's own ACI? In the author's view, it is because ACIs are planning mechanisms—describing lands that may be annexed some time in the future. Voluntary annexations typically are initiated when a developer approaches the city and asks that its land be annexed. If the city agrees to annex, it would be pointless to require it to extend its ACI first and then promptly eliminate the new portion of the ACI by annexing that land. Invading another city's ACI is a different matter, and there is no reason to think the Legislature intended that to occur.

B. ACIs have been mandatory since 1975.

Since its enactment in 1975, LLUPA has mandated that every Idaho city establish an area of city impact ("ACI").

> The governing board of each county and each city therein shall, prior to January 1, 1977, adopt by ordinance following the notice and hearing procedures provided in section 67-6509, Idaho Code, a map identifying an area

> of city impact within the unincorporated area of the county.

S.B. 1094, 1975 Idaho Sess. Laws, ch. 188 (codified as amended at Idaho Code § 67-6526(a)). The statute reads the same today, except that the reference to the deadline for compliance has been removed.[83]

C. Initially, establishment of an ACI was not a prerequisite to annexation.

When LLUPA was adopted in 1975, neither it nor the Annexation Statute mandated that a city and county complete the negotiated ACI adoption process prior to annexation.

In a terse 1985 decision (before more recent amendments to the relevant statutes), the Idaho Court of Appeals ruled that Coeur d'Alene was not barred from undertaking a non-voluntary annexation of land notwithstanding its failure to complete its negotiation of an ACI with the county. *Coeur d'Alene Indus. Park Property Owners Ass'n v. City of Coeur d'Alene*, 108 Idaho 843, 702 P.2d 881 (Ct. App. 1985) (Burnett, J.). (The city had designated an area of city impact, but the county had not yet acted and no agreement had been reached as to which ordinances would apply.) The Court rested its decision on the absence of any language linking the ACI requirement in LLUPA with authority to annex in the Annexation Statute.

Presumably in response to this decision, the Legislature enacted in 1996 the very linkage the Court of Appeals found lacking. (See discussion of Sequencing Provision in section 11.E on page 150.) Given these subsequently adopted express statutory linkages, the Court of Appeal's conclusion that there is no linkage between the ACI requirement and the power to annex is obsolete and the opposite is now true.

D. Since 1993, only non-voluntary annexations are required to be within the annexing city's own ACI.

The Legislature's first statement addressing the interconnection between annexation and ACIs came in a 1993 amendment to the Annexation Statute. In that year, the Legislature adopted a requirement that a city may only annex land within its ACI, with an exception allowing voluntary annexations to occur outside of its ACI.[84]

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[83] LLUPA initially required that they be established by January 1, 1977. This was later changed to July 1, 1977 and then to October 1, 1994 (1993 Idaho Sess. Laws, ch. 55).

[84] The 1993 amendment stated:

> On and after January 1, 1995, <u>any land</u> lying contiguous or adjacent to any city in the state of Idaho, or to any addition or extension thereof <u>may be annexed by the city only if the land is lying in the area of city impact</u> as determined by procedures contained in section 67–6526, Idaho Code . . . . . An owner of land of any size may request that the tract of land be annexed by the

(This replaced much older language that also provided simplified procedures for voluntary annexations.[85])

This 1993 language pre-dated the establishment of annexation Categories A, B, and C in 2002. The 2002 revision to this provision (including the Category A Exception) is discussed beginning in section 11.F on page 151.

E. In 1996, the Legislature enacted an across-the-board "Sequencing Provision" mandating that an ACI be established before any annexation.

As a practical matter, the requirement discussed above (that a city annex within its own ACI) meant that a city must establish its ACI before undertaking a non-voluntary annexation. As of 1993, there was no comparable requirement for voluntary annexations. In 1996, LLUPA was amended to add the "Sequencing Provision." This provision made the establishment of an ACI a prerequisite to <u>any</u> type of annexation:

> Subject to the provisions of section 50-222, Idaho Code, an area of city impact must be established before a city may annex adjacent territory.

H.B. 641, 1996 Idaho Sess. Laws, ch. 641 (codified as amended at Idaho Code § 67-6526(a)). LLUPA's Sequencing Provision has not been amended since its enactment in 1996.[86]

> city whether the land <u>is or is not contained in the city's area of impact</u> by submitting such request in writing to the city council.

H.B. 154, 1993 Idaho Sess. Laws, ch. 55 (then codified to Idaho Code § 50-222(1)) (emphasis added).

[85] Simplified procedures for voluntary annexations predate LLUPA and its ACI provisions adopted in 1975. The reference to ACIs in the Annexation Statute amendment of 1993 replaced language dating to 1969 saying that annexation may occur "whenever the owner or proprietor or any person by or with his authority requests annexation in writing to the city council." 1969 Idaho Sess. Laws, ch. 404 (formerly codified at Idaho Code § 50-222).

[86] The 1996 amendment also added a reciprocal sequencing provision to the Annexation Act (which is no longer part of the Annexation Statute):

> If a city has not adopted an area of city impact prior to January 1, 1995, the city shall not be prohibited from annexing adjacent territory if an area of city impact has been adopted in accordance with the provisions of section 67–6526, Idaho Code, prior to annexation and all other requirements for annexation have been met.

H.B. 641, 1996 Idaho Sess. Laws, ch. 641 (then codified at Idaho Code § 50-222, repealed in 2008 by S.B. 1391, 2002 Idaho Sess. Laws, ch. 333). The double negative makes it difficult to parse, but this provision essentially said that even if a city fails to enact its ACI by 1995 (a deadline no longer in effect), if it enacts its ACI thereafter, it may annex land. This now obsolete language in the

Technically, the Sequencing Provision only states that an ACI be established somewhere. However, it is evident that the purpose of the Sequencing Provision is to require that the ACI include any land to be annexed. Otherwise, there would be no need for the "Category A exception" (Idaho Code § 50-222(3)(a)(i)), which allows a voluntary annexation to extend beyond the annexing city's ACI.

F. The 2002 overhaul of the Annexation Statute retained the requirement for Categories B and C that annexed lands be within the city's area of city impact, but was silent with respect to Category A.

In 2002, the Legislature completely revamped the Annexation Statute, adding for the first time the Category A, B, and C types of annexations. S.B. 1391, 2002 Idaho Sess. Laws, ch. 333 (codified as amended at Idaho Code §§ 50-222, 55-2505(12), 55-2508, 67-6526).

The 2002 amendment expressly required that Category B and C annexations be of land within the annexing city's ACI (Idaho Code §§ 50-222(5)(b)(i) and 50-222(5)(c)(i)), but it included no comparable requirement for voluntary Category A annexations. S.B. 1391, 2002 Idaho Sess. Laws, ch. 333(codified at amended at Idaho Code §§50-222, 55-2505(12), 55-2508, and 67-6526).[87]

The 2002 amendment's silence with respect to Category A presumably meant that a voluntary Category A annexation could include land outside of a city's own ACI. Thus, the 2002 amendment implicitly carried forward the 1993 provision allowing cities to annex beyond their ACIs if the annexation is voluntary.

G. The "Category A Exception," enacted in 2008, expressly confirmed that voluntary annexations may occur outside the annexing city's ACI.

In 2008, the Legislature added what is informally called the "Category A Exception."[88] The Category A Exception made explicit what was implicit in the

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Annexation Statute was eliminated in the 2002 re-write of the Annexation Statute, but LLUPA' Sequencing Provision remains unchanged.

[87] There are two types of Category A annexations (voluntary annexations and annexations of islands of enclaved residential property of less than 100 parcels). As for the latter, the enclaved lands were required to be within a city, between a city and a fairgrounds, or "bounded on all sides by lands within a city and by the boundary of the city's area of city impact." Idaho Code § 50-222(3)(a). Thus, except for the fairground exception, this second type of Category A annexation was required to be either within the city or within the area of city impact.

[88] The legislation was aimed primarily at eliminating implied consent (based on hooking up to city utilities) for Category A annexations. It also included the clarification that Category A annexations may extend beyond a city's own ACI.

2002 recodification. The 2008 amendment restated the statutory exception first adopted in 1993 allowing voluntary annexations to reach beyond a city's own ACI. The 2008 amendment also added a new requirement that the annexed land be within in the comprehensive plan.[89] It reads in full:

> (i) All private landowners have consented to annexation. Annexation where all landowners have consented may extend beyond the city area of impact provided that the land is contiguous to the city and that the comprehensive plan includes the area of annexation;

H.B. 545 (replacing H.B. 524), 2008 Idaho Sess. Laws, ch. 118 (codified at Idaho Code § 50-222(3)(a)(i)) (emphasis added). This language has not been amended and remains in effect today.

H. The Category A Exception (like its 1993 and 2002 predecessors) makes perfect sense.

At first blush, allowing a city to undertake a voluntary annexation beyond its own ACI might seem contrary to the purpose of requiring cities to adopt ACIs. But the reason for this special treatment of voluntary annexations is simple. As soon as the land is annexed, it is no longer in the ACI. Voluntary annexations that do not

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The latter was addressed four times in the legislative history. First, bill co-sponsor Rep. Lynn Luker explained, "This legislation makes clearer that under Category A, where there is one hundred percent consent, that this percentage [probably means annexation] can extend beyond the area [of impact] as long as it is within the comprehensive plan area." House State Affairs Committee Minutes (2/12/2008). Second, bill co-sponsor Rep. Lynn Luker explained "that this first clarifies Category A annexation, which requires consent of all property owners, and that it may extend beyond the area of impact so long as the comprehensive plan includes the area of annexation." House State Affairs Committee Minutes (2/19/2008). Third, bill co-sponsor Rep. Lynn Luker stated: "In addition, this bill clarifies that Category A annexation, which requires consent of all property owners, may extend beyond the area of impact, so long as the comprehensive plan includes the area of annexation. House Local Government Committee Minutes (2/26/2008). Fourth, bill co-sponsor Sen. Russ Fulcher explained: "It clarifies Category A annexations. There is a conflict in Code right now; 50-222 directly conflicts with 67-6526 and it has to do with annexations outside of areas of impact. One says it can be done, the other says it can't. This bill clarifies the code and supports 50-222 which is the current practice. This bill clarifies that Category A annexations that require the consent of all property owners may extend beyond the area of impact so long as the comprehensive plan includes the area of annexation." Senate Local Government and Taxation Committee Minutes (3/5/2008).

These statements essentially recite the language of the statute. Nothing was said suggesting that a city may annex into another city's ACI.

[89] The 2008 amendment also added a new proviso that the annexed land be included in the comprehensive plan. This presumably means that the annexed area must be included on the city's future land use map required by LLUPA. Idaho Code § 67-6508(e). However, nothing in the Annexation Statute or its legislative history explains what being "included" in the comprehensive plan means.

invade other ACIs are by definition not contentious. So, if there is no controversy, why put the city through the trouble and expense of expanding its ACI to include the annexed land when that ACI expansion will immediately disappear upon annexation?

In other words, the Legislature has recognized since 1993 that it is important for cities to establish and live within their ACIs where annexation is contested. Likewise ACIs are important where land may not be annexed for a number of years—thereby allowing planning, infrastructure, and investment decisions to be informed by knowing which city eventually will serve that land.

But these concerns melt away when:

(1) there is no controversy (because the annexation is welcomed by the landowner and does not interfere with the planning and investments of other cities private parties) and

(2) the expanded portion of the ACI will not last long enough to be of value because it will immediately become part of the city.

In short, the Category A Exception makes sense and means what it says: voluntary annexations may reach beyond a city's own ACI. There is no reason to read more into it (such as the right to invade other cities' ACIs).

I. LLUPA and the Annexation Statute, read together, compel the conclusion that cities may not invade other cities' ACIs.

(1) The Annexation Statute is silent on the question of invading other cities' ACIs.

The Annexation Statute addresses ACIs only in the context of when the annexed land must be within the city's own ACI and when annexation may extend beyond its ACI.[90] The Annexation Statute says nothing, one way or the other, about whether a city may annex into another city's ACI.[91]

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[90] As discussed above, for Category B and C annexations, the annexed land must be within the annexing city's ACI. Idaho Code §§ 50-222(5)(b)(i) and 50-222(5)(c)(i). The Category A Exception (Idaho Code § 50-222(3)(a)(i)) authorizes a city to undertake a voluntary Category A annexation of land that lies beyond its own ACI.

[91] On two occasions, the Legislature considered, but did not enact, legislation that would have amended the Annexation Statute to address this question.

In 2006, a bill was introduced that would have required approval of the county commissioners and of the other city council if a city proposed to annex lands within another city's ACI. The bill also laid out extensive criteria to be considered in such situations by the commissioners and city council. H.B. 856 (2006). The bill never received a hearing, so there is no legislative history.

In 2022, a bill was proposed that would have expressly authorized voluntary annexations that invade another city's ACI. H.B. 635 (2022). The bill was defeated in a floor vote in the Idaho

(2) LLUPA and the Annexation Statute should be read together.

The Annexation Statute and LLUPA must be read together. "Statutes and rules that can be read together without conflicts must be read in that way." *State v. Garner*, 161 Idaho 708, 711, 390 P.3d 434, 437 (2017).

The Idaho Court of Appeals found this was not the case in 1985. *Coeur d'Alene Indus. Park Property Owners Ass'n v. City of Coeur d'Alene*, 108 Idaho 843, 702 P.2d 881 (Ct. App. 1985) (Burnett, J.). (See discussion of this case in section 11.C on page 149.) Indeed, until 1993, the two statutes did not speak to each other. However, multiple amendments since then (discussed above) make clear that these statutes are now joined at the hip. Accordingly, it is appropriate to consider the question of annexation and ACIs in the context of both statutes.

(3) LLUPA's requirement that cities adopt non-overlapping ACIs before annexation necessarily conveys that cities may not unilaterally annex into other cities' ACIs.

The Legislature's mandate that cities establish non-overlapping ACIs is central to the goal articulated in the Annexation Statute of promoting the orderly development of Idaho's cities. This mandate is reflected in five requirements:

- The first is LLUPA's Mandatory ACI Provision (Idaho Code § 67-6526(a). Since its enactment in 1975, LLUPA has mandated that every Idaho city establish an ACI.

- The second is LLUPA's Sequencing Provision (Idaho Code § 67-6526(a)). It requires that a city must establish its ACI prior to annexing land. The Sequencing Provision states that it is "subject to" the Annexation Statute (which allows voluntary annexations by reach beyond the city's own ACI).

- The third is LLUPA's Fixed Boundary Provision (Idaho Code § 67-6526(d)). It states that ACI boundaries "shall remain fixed until both governing board agree to renegotiate." This provision provides that the renegotiation shall be undertaken pursuant to the ACI Conflict Resolution Procedures.

- The fourth is the P&Z Representation Provision (Idaho Code § 67-6526(g)) (applicable only if the city's ordinances shall apply).

Senate. The legislative history shows that the Senate felt that further evaluation of the situation was appropriate.

> The requirement that the mayor appoint persons living within the ACI to serve on the city's Planning and Zoning Commission reflects the legislative expectation that citizens and the city will engage in and rely on long-term planning within the ACI.

- The fifth is LLUPA's ACI Conflict Resolution Procedures (Idaho Code §§ 67-6526(b) and (c)). These provisions set out detailed mechanisms to ensure that any overlap between ACIs is resolved by negotiation, judicial decision, or election—not by the unilateral action of one city.

These provisions compel the conclusion that cities are not authorized to invade each other's ACIs. If a city has a problem with another city's ACI, it is supposed to employ the ACI Conflict Resolution Procedures, and live with those results. If, instead, cities were free to annex across ACI boundaries anytime a landowner consents to the annexation, there would be no need for those dispute resolution mechanisms.

It is inconceivable that the Legislature would have declared that ACI boundaries are "fixed" until renegotiated, enacted elaborate dispute resolution mechanisms, and empaneled citizens living within the ACI to engage in planning decisions, only to allow those boundaries to be incrementally carved up by a neighboring city at will.[92] Doing so would undermine the very purpose of having ACIs, which is to resolve up-front the development path for every Idaho city, thus allowing city planners, investors, homeowners, and the community to rely on those boundaries.

As the Idaho Supreme Court said: "The object of this requirement [to establish ACIs] was to delineate areas of future contiguous growth in order to assure their orderly development and thereby reconcile potentially competing designs for boundary expansion with accepted land use planning principles." *City of Garden City v. City of Boise*, 104 Idaho 512, 514, 660 P.2d 1355, 1358 (1983) (Huntley, J.).

The Idaho Legislature also has recognized that the central purpose of the annexation process is to assure the orderly development of Idaho's cities. The legislative intent set out at the beginning of the Annexation Statute states:

> Legislative intent. The legislature hereby declares and determines that it is the policy of the state of Idaho that cities of the state should be able to annex lands which are reasonably necessary to assure the <u>orderly development of Idaho's cities</u> in order to allow efficient and economically viable provision of tax-supported and

[92] The Category A Exception is not a minor carve-out. Most annexations in Idaho are Category A annexations.

> fee-supported municipal services, to enable the orderly development of private lands which benefit from the cost-effective availability of municipal services in urbanizing areas and to equitably allocate the costs of public services in management of development on the urban fringe.

Idaho Code § 50-222(1) (emphasis added).[93]

Reading LLUPA and the Annexation Statute to allow one city to unilaterally invade another city's ACI whenever one of those cities accepted a developer's request for annexation would conflict with the stated goal promoting the orderly development of Idaho's cities articulated by both the Idaho Supreme Court and the Legislature.

(4) The "subject to" language in the Sequencing Provision does not grant cities the right to invade other cities' ACIs.

This conclusion is not altered by words in the Sequencing Provision stating that it is "subject to the provisions of section 50-222." Idaho Code § 67-6526(a). That proviso simply reinforces the conclusion that the two statutes work together and that nothing in LLUPA's Sequencing Provision is intended to override any requirement in the Annexation Statute. There is nothing in the Annexation Statute (when the Sequencing Provision was adopted in 1996, or now) that speaks to whether cities may or may not invade other cities' ACIs.

Indeed, at the time the Sequencing Provision was adopted in 1996,[94] there were no Category A, B, or C annexations. That breakdown was not adopted until the revamp of the Annexation Statute in 2002, and the Category A Exception was not adopted until 2008. Accordingly, at the time of its enactment, the "subject to" language in the Sequencing Provision was not referring to the Category A Exception.

What was the "subject to" language referring to? In addition to underscoring that the Sequencing Provision was not intended to modify anything in the Annexation Statute, it reinforces that cities may continue to engage in voluntary annexations beyond their own ACI boundaries. The Annexation Statute has allowed that since 1993 and continues to allow it under the Category A Exception. But the Annexation Statute has never said that cities may annex into other cities' ACIs. Thus, the "subject to" language cannot be read to override the requirement that cities not invade each other's ACIs.

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[93] This statement of legislative intent was added as part of the comprehensive re-write of the statute in 2002. S.B. 1391, Idaho Sess. Laws, ch. 333 (2002) (codified at Idaho Code § 50-222(1)).

[94] H.B. 641, 1996 Idaho Sess. Laws, ch. 641 (codified at Idaho Code § 67-6526(a)). See discussion of the Sequencing Provision in section 11.E on page 150.

In sum, the Sequencing Provision requires a city to establish its ACI before annexation. The Fixed Boundary Provision and ACI Conflict Resolution Procedures require that the ACI not overlap another city's ACI. The only exception to the Sequencing Provision is that it is "[s]ubject to the provisions of section 50-222." Section 50-222 says nothing about annexing into another city's ACI. Thus, the "subject to" language cannot be read to override the requirement that cities not invade each other's ACIs. The provision in LLUPA saying it is "subject to" the Category A Exception simply confirms that the right to annex land voluntarily outside of a city's ACI is not overridden by LLUPA's Sequencing Provision.

12. THE SUBDIVISION PROCESS

This treatment of subdivision law breaks into two main categories: (1) the subdivision and "platting" process, which is the process of securing approvals from the local jurisdiction to divide a parcel of land into smaller lots, and (2) restrictive covenants, which are generally recorded along with subdivision plats to control the nature and use of the lands within the subdivision.

A. Introduction

At its core, subdivision is simply "the division of a lot, tract or parcel of land into two or more lots, tracts, parcels or other divisions of land for sale or development." *Black's Law Dictionary* (Sixth Edition, 1990), p. 1424. Legal subdivision requirements emerged over a hundred years ago as a means of facilitating more convenient conveyance of property. It has now evolved into a more comprehensive body of planning law. Subdivisions are often used in tandem with, but are distinct from, zoning regulations. (Or they may be codified as a subset of the zoning regulations.) Where zoning regulations delineate the uses and the permissible ways in which land may be developed, subdivision regulations identify the procedures for dividing land and impose requirements for providing public infrastructure and other improvements when the land is developed.

The Fourth Circuit Court of Appeals summarized the evolution of subdivision regulations as follows:

> Land use controls over subdivisions date from the late nineteenth century. The original statute took the form of land platting legislation and were intended to provide a more efficient method of conveying property. Before subdivision control, land was sold by reference to metes and bounds, an unreliable system that often resulted in confusion and overlapping titles. Subdivision regulations avoided these problems by requiring land developers to record in the local records office a 'plat,' or map, of the property. The plat, which contained precise dimensions, subdivide the land into blocks and lots and indicated the location of roads and parks. Once the plat was recorded, individual lots could then be conveyed by reference to the lot, block, and plat name, thereby avoiding the confusion inherent in the metes and bounds system.
>
> Beginning in the 1920s, subdivision control became not only a mechanism to simplify the conveyance of individual lots, but also a means through which localities could regulate urban and suburban development through

> comprehensive planning. Localities began to use subdivision regulations to prevent the construction of new streets that were not well aligned with existing roads. Subdivision control also functioned to ensure that development did not result in platted lots of unusable sizes that remained vacant, or in the splitting of large holdings suited for industrial or agricultural uses into numerous parcels that a private person could not reassemble.
>
> Following the Second World War, localities used subdivision control to implement more extensive substantive regulation. With the expansion of suburban areas, subdivision regulation turned to ensuring the provision of adequate local governmental facilities and services. Thus, such regulation mandated the construction of parks and other recreational facilities as well as schools for area residents. Comprehensive planning also became concerned with structuring development to avoid serious off-site drainage problems and to avert the negative impact of development on the local environment. Subdivision regulation also became a mechanism to ensure that streets were properly constructed and were sufficiently wide for anticipated traffic. Finally, localities required each lot to have adequate access to public services and utilities, such as water, sewage, gas, electricity, telephone, and cable television.

Gardner v. City of Baltimore Mayor and City Council, 969 F.2d 63 (4th Cir. 1992) (citations omitted).

This law review article offered this summary of the evolution of subdivision requirements:

> As originally conceived, subdivision regulations served the primary purpose of making the recordation of land titles more efficient. Subsequently, with the publication of the Standard City Planning Enabling Act in 1928, the regulations expanded to include the concept of requiring the subdivider to provide internal improvements, such as streets and open spaces. The vast increase in demand for housing after World War II, and the accompanying explosive growth of residential subdivisions, led local governments to expand the scope of regulations even

> further by requiring subdividers to contribute to off-site improvements such as parks, roads, and schools.

Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513, 1523 (2006)

B. Idaho's Subdivision Statute

The subdivision of land is governed primarily by Idaho Code §§ 50-1301 to 50-1329 within Chapter 13 entitled "Plats and Vacations."[95] This statute, adopted in 1967, predates LLUPA. 1967 Idaho Sess. Laws, ch. 429. However, LLUPA cross-references the subdivision statute. Specifically, LLUPA requires local governments to adopt local ordinances providing "for standards and for processing of applications for subdivision permits under sections 50-1301 to 50-1329." Idaho Code § 67-6513. The subdivision statute also cross-references LLUPA. Idaho Code § 50-1308.

The subdivision statute defines a "subdivision" as a "tract of land divided into five (5) or more lots, parcels or sites for the purpose of sale or building development, whether immediate or future. . . ." Idaho Code § 50-1301(17) (formerly 50-1301(15)).

This statutory definition further provides: "Cities or counties may adopt their own definition of subdivision in lieu of the above definition."[96] *Id*. Nearly all cities and counties in Idaho have done so. Some jurisdictions have broadly defined subdivisions to include nearly <u>any</u> division of land. For example, Ada County defines a subdivision as "The division of a lot or parcel of land, into two (2) or more lots for the purpose of conveyance of ownership or for building development; and the recorded plat thereof." Ada County Code § 8-1A-1. Boise City defines a subdivision as "the division of a lot, tract or parcel of land into 2 or more lots for the purpose of sale, or building development, whether immediate or future, including dedication of streets." Boise City Code § 9-20-03. Thus, for all practical purposes any division of land in Ada County or Boise City must be processed as a subdivision, unless otherwise exempted (as discussed in the following paragraph).

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[95] The platting statutes are codified in Title 50, which is the portion of the Idaho Code dealing with cities. That is because, historically, plats were mostly limited to developed land within cities. But these platting statutes are not limited to cities. They are equally operative as to unincorporated land administered by counties.

[96] Plainly, the statute allows cities and counties to adopt more restrictive definitions of "subdivision." By its own terms, the statute also authorizes them to adopt less restrictive definitions. On the other hand, an argument could be made that local governments should not be allowed to adopt a definition of "subdivision" that violates the purpose of LLUPA's requirement that they adopt a subdivision ordinance. Idaho Code § 67-6513. Perhaps, for example, defining subdivision as a tract of land with over 200 lots might be seen as not meaningfully complying with LLUPA's requirement to have a subdivision ordinance. We are aware of no case law on this subject.

Many local jurisdictions have provided for certain, limited exclusions to their subdivision ordinances. For example, Ada County's subdivision ordinance exempts the following "divisions" from its subdivision requirements:

- a property boundary adjustment;[97]
- a "one-time division" of a parcel of land that was "of record" at the Ada County Recorder's office prior to January 1, 1985;[98]
- a court decree dividing a lot or parcel into separate, distinct ownership in the distribution of property;[99]
- a division of property as a result of condemnation;
- the expansion or acquisition of street rights-of-way by a public highway agency;
- creation of one residential parcel for conveyance pursuant to an approved farm development right;[100] and
- the division of abutting parcels held under common ownership.[101]

Boise City's subdivision ordinance exempts (i) one-time divisions, (ii) property boundary adjustments, and (iii) the division of land into parcels of five (5) acres or more, so long as it does not involve the dedication of public streets. *See* Boise City Code § 9-20-04.E. A one-time division and property boundary adjustment require an application and the recordation of a formal record of survey illustrating the new division or new property boundaries. *See* Boise City Code § 9-20-04.E.1 and 2. Furthermore, the resultant parcels from a one-time division must meet the minimum requirements for area, frontage, width and depth for the existing

[97] A "property boundary adjustment" is not really a division of land. Instead, it is a process where existing property boundaries between parcels are relocated without the creation of new parcels. This process is often used to modify an existing parcel or subdivision layout without going through the formal subdivision process.

[98] The resultant parcels must comply with applicable access and dimensional requirements.

[99] If the parcels created do not meet the applicable dimensional standards for their zoning designations, the parcels will be recognized for ownership transfer purposes only and will "not be eligible for development including any building permits for renovation or repair of an existing structure." Ada County Code § 8-4A-17.

[100] This process allows qualifying parcels in Rural Preservation zones that are at least 40-acres in area to split off one parcel for residential purposes, even if the resultant parcels will be below the minimum area requirements in the Rural Preservation zone. *See* Ada County Code § 8-2A-5.

[101] This is not really a division of property, but an exception to the automatic presumption that "abutting properties held in the same ownership shall be considered one property for development purposes." Ada County Code § 8-4A-8.

zone. The resultant parcels from a property boundary adjustment must also meet the dimensional requirements of the existing zone, unless the property was an allowed nonconforming parcel and the adjusted boundaries do not result in a decrease in any noncompliant dimension.

Other jurisdictions may exempt other divisions of property from subdivision requirements. One of the more common of these is a bona fide division for agricultural purposes.

C. The "platting" process

The platting process is governed by Idaho Code §§ 50-1301 to 50-1334, which is not part of LLUPA. It is, however, connected to LLUPA's provisions for subdivision in Idaho Code § 67-6513.

Idaho law requires "every owner creating a subdivision . . . shall cause the same to be surveyed and a plat made thereof which shall particularly and accurately describe and set forth all the streets, easements, public grounds, blocks, lots, and other essential information, and shall record said plat." Idaho Code § 50-1302. The detailed technical requirements for the surveying and verification of plats are set forth in Idaho Code §§ 50-1304 to 50-1306.

Note: See *Idaho Road Law Handbook* for additional background on the platting process.

Idaho law requires local jurisdiction approval of all plats prior to recordation. All local jurisdictions must enact a subdivision ordinance, and the Local Land Use Planning Act, Idaho Code §§ 67-6501 to 67-6538 ("LLUPA"), sets forth the procedures for reviewing and approving subdivision applications. If the local jurisdiction has established a planning commission, then all plats must be submitted to the planning commission. Idaho Code § 50-1308.

If a subdivision is located within the corporate limits of a city, it must be approved by the city council prior to recordation. If the subdivision is not within the corporate limits of a city, the board of county commissioners must approve the plat. However, if the subdivision lies within an officially designated area of city impact, it must be reviewed in accordance with whichever zoning and subdivision ordinances are made applicable pursuant to the area of impact ordinances of both jurisdictions. Idaho Code § 50-1306.[102] If no area of impact has been officially adopted and the subdivision lies within one mile of the corporate limits of a city, the county must

[102] This provision was significantly amended in 1999. 1999 Idaho Sess. Laws, ch. 391. Prior to 1999, the statute purported to give the city co-equal regulatory power within the area of city impact. Had this not been amended in 1999, it would not have survived the court's decision in *Blaha v. Bd. of Ada Cnty. Comm'rs*, 134 Idaho 770, 9 P.3d 1236 (2000). Curiously, the *Blaha* court quoted the pre-1999 statute (which applied to the application), but found it unnecessary to address its validity.

transmit the application to the city for review and comment. The city must use its "subdivision ordinance and/or comprehensive plan" as "guidelines" for their comments. Idaho Code § 50-1306. The county must consider the city's comments, but is not required to adopt them. (Areas of city impact are discussed further in section 10 at page 142.)

> **Practice Tip:** As each local jurisdiction has its own requirements and procedures for the review and processing of subdivision applications, it is imperative that you become familiar with the specific requirements and processes of the local jurisdiction prior to submitting a plat application. Some local jurisdictions require pre-application conferences and neighborhood meetings prior to submission of a subdivision application.

The local jurisdiction's subdivision ordinance must specify the requirements of, and approval process for, subdivision applications. Most local jurisdictions follow a two-step process for reviewing plats – a preliminary plat review and a final plat review.[103] In addition to public notice and hearings, most local jurisdictions provide for the formal review of all plat applications by its own departments, emergency service agencies, public utilities, irrigation and drainage districts, and other governmental and quasi-governmental entities.[104] Preliminary plats generally set forth the basic information necessary for the reviewing entity to determine if the subdivision plan generally complies with the applicable requirements. Although called "preliminary," in some jurisdictions, the approval of a preliminary plat may be "final as to all matters set forth in said preliminary plat" and subject to appeal under LLUPA. Ada County Code § 8-6-3.F. In any event, if the preliminary plat approval allows the applicant to take immediate steps to permanently alter the land before final approval, the preliminary plat approval is subject to appeal under LLUPA. *Rural Kootenai Organization, Inc. v. Bd. of Comm'rs, Kootenai Cnty.*, 133 Idaho 833, 837-39, 993 P.2d 596, 600-02 (2000).

> **Practice Tip.** If the local jurisdiction's ordinance designates a preliminary plat approval to be a final decision, or allows the applicant to take steps to immediately alter the land after the preliminary plat approval, the appeal period under LLUPA begins to run after such approval.

[103] Some jurisdictions allow the preliminary and final plats to be processed simultaneously for simple subdivisions.

[104] For example, Boise City sends all plats to at least eighteen different departments and agencies for review and comment, from the Ada County Assessor's office to the applicable cable system franchisee. *See* Boise City Code § 9-20-05.C.4.

Once preliminary plat approval is obtained, the applicant may prepare the final plat in compliance with the requirements of Idaho Code and the local jurisdiction. Most local jurisdictions require the final plat to be recorded within one or two years of the preliminary plat approval. Generally, an applicant is required to construct all required subdivision improvements (*e.g.*, streets, sidewalks, utilities, etc.) prior to applying for final plat approval. Some local jurisdictions will instead allow an applicant to provide a bond or other security guaranteeing that required subdivision improvements will be constructed within a certain time. To be eligible for recordation, the final plat must contain the following certificates and approvals:

- The owner must provide a certificate containing a correct legal description of the lands included in the subdivision, a statement as to its intentions to include the described lands in the plat and make an offer to dedicate all public streets and rights-of-way shown on the plat. *See* Idaho Code § 50-1309(1).
- The professional land surveyor making the survey must certify the correctness of the plat. Idaho Code § 50-1309(1).
- A certificate by the applicable health district verifying approval of sewer and water facilities. Idaho Code §§ 50-1326 through 50-1329.
- A certificate by the person filing the plat that the property will be served by a water supply (wells or otherwise). Idaho Code § 50-1334.
- If necessary, a certificate of acceptance from the local highway district, if any, of public streets, alleys and easements for public maintenance.[105]
- A certificate of approval by the city council (usually by the city clerk), if applicable.
- A certificate by the city engineer, if applicable.
- A certificate by the county surveyor.[106]
- A certificate by the county treasurer within 30 days prior to recordation.[107]

[105] *See* Idaho Code § 50-1312. No dedications or transfer of a private road to the public can be made without the specific approval of the appropriate public highway agency accepting such private road. "No dedication or transfer of a private road to the public can be made without the specific approval of the appropriate public highway agency accepting such private road." Idaho Code § 50-1309(2).

[106] The county's surveyor must "check the plat and the computations thereon" and certify that the plat meets the requirements of state law. Idaho Code § 50-1305.

The acknowledgement and recording of a plat "is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for public streets or other public uses, or as is thereon dedicated to charitable, religious or educational purposes." Idaho Code § 50-1312 (previously codified at 49-2205). (See *Road Law Handbook* for Idaho case law on this statute, which says that, in fact, an easement is conveyed by the dedication.)

The developer may not begin to sell the individual lots indicated on the plats until the final plat is recorded. The selling, or offering for sale, of any lots before the final plat has been duly recorded violates Idaho Code § 50-1316 (with a nominal, $100 penalty per lot) and may be subject to other penalties set by the local jurisdiction. For example, selling lots in violation of the Ada County Subdivision Ordinance is a misdemeanor. *See* Idaho Code § 67-6527 and Ada County Code § 8-7-8.A.

D. Vacation of plats, public streets and rights-of-way

Idaho Code Sections 50-1317 through 50-1324 set forth the statutory procedure to vacate a plat or a portion of a plat. Local jurisdictions and highway districts may have additional procedures and requirements. *See, e.g.* Idaho Code §§ 40-203, 40-208. Easements are vacated in the same manner as plats. *See* Idaho Code § 50-1325. Land exclusive of public rights-of-way need not be vacated in order to be replatted.

To vacate a plat, road, right-of-way or easement, the interested party must file a petition with the applicable jurisdiction. *See* Idaho Code § 50-1317. If the property is inside an incorporated city, the petition must be filed with the city. The city may grant the petition "with such restrictions as they deem necessary in the public interest." Idaho Code § 50-1306A(3). If the property is not inside an incorporated city, but within one mile of an incorporated city, the petition must be filed with both the city and county. *See* Idaho Code § 50-1306A(3) and Idaho Code § 50-1306A. If the property is more than one mile from an incorporated city, the petition must be filed with the county. *See* Idaho Code § 50-1317.

Public roads and rights-of-way under the jurisdiction of a highway district or county must be filed with the highway district or county. Idaho Code § 50-1317*;* Idaho Code § 40-203(a). If the highway district is within a city, the city must consent to the application. Idaho Code §§ 50-1306A(6), 50-1306A(4). To support a vacation, the highway district or county commissioners must find that maintaining the highway or right-of-way is "in the public interest." Idaho Code § 40-203(a) & (h). The decision "shall be written and shall be supported by findings of fact and conclusions of law." Idaho Code § 40-203(h). Otherwise, the vacation is

[107] A county treasurer may withhold certification only if property taxes are due, but not paid, on property within the subdivision. *See* Idaho Code § 50-1308.

accomplished "pursuant to the provisions of chapter 13, title 50, Idaho Code." Challenges to vacations by highway districts and counties are brought pursuant to Idaho Code Section 40-208. Idaho Code § 40-203(k).

The adjacent landowners must consent to the vacation of a public street or right-of-way in writing, unless the public street or right-of-way has not been open to the public for a period of five (5) years and the non-consenting owners have access to his property from some other public street, public right-of-way or private road. *See* Idaho Code § 50-1321. Furthermore, the jurisdiction must be satisfied that the non-consenting owners have been served with notice of the proposed abandonment in the same manner as a summons in an action at law. Idaho Code § 50-1321.

Notice of the public hearing on the vacation application must be provided to the public (by newspaper notice and public posting), as well as specific written notice to all landowners within 300 feet of the affected property. *See* Idaho Code §§ 50-1317 and 50-1306A(2). Easements for utilities, drainage and slope purposes may be vacated by the recording of a new or amended plat, provided that affected easement holders consent in writing. *See* Idaho Code § 50-1306A(5).

If the petition to vacate is granted, title to the vacated property shall vest in the "rightful owner", *i.e.*, the person or entity that would otherwise have legal title. For street vacations, title to the vacated street is distributed to the adjacent landowners. *See* Idaho Code §§ 50-1320 and 50-311. For public squares or common areas, the property will vest with the local jurisdiction, who may sell the property and retain the proceeds. Idaho Code §§ 50-1320 and 50-311. The vacation of streets and alleys do not impair the rights-of-way, easements and franchise rights of any lot owner or public utility. Idaho Code §§ 50-1320 and 50-311.

An aggrieved person must file an appeal of a city's decision on a vacation application within twenty days after publication or notice. *See* Idaho Code § 50-1322. Before a vacation of a plat can be recorded, the county treasurer must certify that all taxes due are paid. *See* Idaho Code § 50-1324(1). Any action to establish adverse rights or interest in the affected property, or determine the invalidity of the vacation, must be brought within six months after recordation of the vacation with the county recorder. *See* Idaho Code § 50-1323. Appeals of highway district or county vacation decisions proceed pursuant to Idaho Code Section 40-208. These appeals must be brought within 28 days of the decision. Appeals pursuant to Section 40-208 also include different procedural steps and standards of review than appeals under the IAPA.

E. Restrictive covenants

Generally, developers will find it desirable to place restrictive covenants against the subdivided lands to maintain or enhance the land's value or desirability. Some local jurisdictions also require restrictive covenants as part of the subdivision

process. Restrictive covenants generally contain a detailed set of restrictions and covenants that control the nature of the use, development and occupancy of the lands. Restrictive covenants may also create an organization for the maintenance and operation of common facilities or amenities for the subdivision, such as private roads, clubhouses, open spaces, etc.

(1) Enforceability of restrictive covenants

Restrictive covenants are merely private contractual agreements and are generally enforced in the same manner as any contract or covenants. In *Brown v. Perkins*, 129 Idaho 189, 923 P.2d 434 (1996), the Idaho Supreme Court stated that:

> When a court interprets a restrictive covenant, it is to apply generally the same rules of construction as are applied to any contract or covenant. Where contract terms are clear and unambiguous, the interpretation of the contract's meaning is a question of law. . . . Where there is no ambiguity, there is no room for construction; the plain meaning of the language governs.

Brown v. Perkins, 129 Idaho 189, 192, 923 P.2d 434, 437 (1996) (citations omitted).

Restrictive covenants, like many contractual terms, occasionally suffer from ambiguity. When an ambiguity exists, the Court must attempt to "determine the intent of the parties at the time the instrument was drafted." *Brown*, 129 Idaho at 193, 923 P.2d at 438. A provision is ambiguous if "it is capable of more than one reasonable interpretation on a given issue," when the entire agreement is viewed as a whole. *Brown*, 129 Idaho at 192-93, 923 P.2d at 437-38. All doubts are to be resolved in favor of the free use of property. *Brown*, 129 Idaho at 192, 923 P.2d at 437. Courts will not implicitly create a limitation not clearly expressed in the language of the restrictive covenant. In general, courts decline to enforce restrictions that are not clearly expressed or where the relief sought is unreasonable or unexpected under a common sense reading of the restrictive language.

When an owner seeks enforcement of restrictive covenants, such as specific performance or injunctive relief against a prospective breach, courts will weigh the equities and "equitable principals will prevail and the rules of fair dealing and good conscience must be applied." *Smith v. Shinn*, 82 Idaho 141, 148, 350 P.2d 348, 351 (1960). The Idaho Supreme Court has found the interpretations and application of the covenants by the affected parties to be an important consideration. In *Smith v. Shinn*, 82 Idaho 141, 350 P.2d 348 (1960), the Idaho Supreme Court reversed and remanded a trial court's decision to strictly enforce a restrictive covenant where the trial court refused to consider evidence from the defendant suggesting that the restrictions at issue may have been violated by other parties. The Court stated that:

> It would be inequitable to require appellants to comply with the restriction under an interpretation or construction different from that applied to other property owners. . .

> [If those seeking to enforce the restriction] have knowingly and without objection permitted several other grantees within the subdivision to violate the restrictions which they seek to enforce . . . equity will not assist them in such enforcement. Such rule rests upon the equitable ground that, if any one who has a right to enforce the covenant and so preserve the conditions which said covenant was designed to keep unaltered shall acquiesce in material alterations of those conditions, he cannot thereafter ask a court of equity to assist him in preserving them.

Smith, 82 Idaho at 148, 892 P.2d at 351-52 (citations omitted).

Under certain circumstances, significant changes in the lands encumbered by the restrictive covenants may lead a court to refrain from enforcing restrictions that no longer benefit any owners in the manner originally envisioned. *See Ada Cnty. Highway District, by and through Silva v. Magwire*, 104 Idaho 656, 662 P.2d 237 (1940). However, external changes are not sufficient to void a covenant:

> If a particular subdivision is subject to restrictive covenants restricting its use to residential, and the subdivision itself has not changed, then changes outside of the subdivision standing alone, even though adjacent, do not invalidate the restrictions. An increase in noise or traffic in the surrounding area, or even within the subdivision itself is not enough to indicate sufficient change in the character of the neighborhood to invalidate the restrictions. The fact that a particular piece of property would increase in value if used for a different purpose than that allowed in the covenant is not enough to invalidate the covenant.

Furthermore, the conduct and interpretations of those subject to the restrictions may result in unenforceability of the restrictions, or the adoption of the interpretations actually used by the affected persons. *See Ada Cnty. Highway District, by and through Silva v. Magwire*, 104 Idaho 656, 662 P.2d 237 (1940) *and Gabriel v. Cazier*, 130 Idaho 171, 938 P.2d 1209 (1997).

(2) Drafting considerations for restrictive covenants

(a) Reasonableness

Although restrictive covenants have become commonplace, not all Americans are willing to abide by the restrictions – or at least the more onerous ones. The enforceability of such restrictions becomes more difficult, practically and legally, if

the restrictions are viewed as unreasonable or excessive. Some restrictive covenants contain strict prohibitions on the display of American flags, private speed limits, restrictions on the type and size of pets (including enforced weight restrictions), required seasonal decorations, limitations on the delivery of newspapers, limitations on the amount of time a garage door may be open, etc. The owners' association or affected neighbors must be willing to consistently and, at times, aggressively enforce the restrictions. Unreasonable or excessive restrictions may invite passive resistance or open rebellion. It is hard to identify precisely when restrictions cross the line from reasonable to unenforceable. Local custom, the character of the subdivision and the inclinations of the owners who will likely occupy the subdivision are relevant considerations. The developer must consider what kinds of restrictions will likely be palatable and desirable to his future lot owners, and therefore will be more likely to be enforced by the future lot owners.

Furthermore, most lot purchasers, especially purchasers of already completed homes, do not read the restrictive covenants without some amount of "encouragement" by the developer or owners' association. Lot owners who are not aware of, or familiar with, the restrictions will likely violate them inadvertently. A lot owner who inadvertently expends money on an improvement that violates a restrictive covenant is much more likely to fight the enforcement of the restrictions. The developer and owners' association should take steps to ensure each new owner is provided with a copy of the restrictions, preferably at or before the purchase of the lot, and becomes familiar with the restrictions.

(b) Flexibility

Restrictive covenants must be flexible enough to accommodate changes in the subdivision and changes in the preferences of lot owners. The covenants should provide for an amendment and/or variance procedure that is not unduly burdensome for lot owners. For example, some covenants contain strict architectural limitations on the type of building materials that may be used. Advancements in the building industry may create desirable building materials that are not permitted by the restrictive covenants. If the covenants do not provide an avenue for the new materials to be approved, or for the amendment of the covenants, lot owners will be prevented from taking advantages of newer and better materials.

(c) Consistency

In addition to being clear, restrictive covenants should be internally consistent and consistent with the actual development. Important terms should be carefully defined and used consistently throughout the document, and its related documents (*e.g.*, the plat and the articles of incorporation and bylaws of the owners' association).

(d) Enforcement mechanisms

Generally, the power to enforce restrictive covenants is initially vested in the developer (during the initial build-out of the subdivision) and, subsequently, vested in the owner's association. Many restrictive covenants go further and grant each owner the right to enforce the restrictions individually. The benefit of restrictive covenants can be frustrated if the enforcement provisions are inadequate, unclear or burdensome, or are only occasionally or arbitrarily enforced.

Because restrictive covenants are private, contractual rights, the enforcement remedies are private in nature. Ordinarily, a well-drafted restrictive covenant will grant the owners' association the power of self-help, and the power to fine or charge the offending lot owner and, if necessary, place liens against the offending owner's property and foreclose thereon. However, as it would be a private contractual lien, the owners' association must strictly comply with the foreclosure procedures. As most owners' associations are run by volunteer laypersons, undue difficulty, uncertainty and expense in the enforcement process will discourage its use.

13. THE PUBLIC HEARING PROCESS

A. Sequencing of development application

Depending on local requirements, development applications can be heard by a hearing examiner, a planning and zoning commission, or a city council or county commission. The process typically begins with the submission of one or more development applications to the appropriate entity. Hearings on multiple permit applications can be combined, Idaho Code § 67-6522; however, certain applications may have to be heard in sequence. For example, in *Price v. Payette Cnty. Bd. of Cnty. Comm'rs,* 131 Idaho 426, 958 P.2d 583 (1998) (Trout, C.J.), the Idaho Supreme Court invalidated the county commission's action because the commission failed to hold a hearing on a necessary comprehensive plan amendment prior to approval of a rezone which required the plan amendment as a pre-condition. In addition, cities and counties will typically sequence annexation and zoning requests so that the annexation is considered and approved prior to the zoning request, although the hearings on the two may be combined.

B. Typical hearing procedure

LLUPA requires governing boards to adopt hearing procedures that "provide an opportunity for all affected persons to present and rebut evidence." Idaho Code § 67-6534. This is commonly conducted in a "town hall" style format, which is far less formal than a trial-type format. Typically, the hearing begins with a staff presentation, followed by a developer presentation, followed by public testimony, followed by staff rebuttal, followed by developer rebuttal. This approach allows each of these affected groups an opportunity to present information and at least one opportunity to respond to information presented by opposing parties.

Some jurisdictions impose rather short time limits on testimony, particularly public testimony. An interesting question is whether these time limits violate the due process rights of affected persons. Problems in this regard are usually avoided because (1) the time limits are not strictly enforced, and (2) interested persons can supplement oral testimony with written testimony (a good idea in any case).

In *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 512, 148 P.3d 1247, 1259 (2006) (Burdick, J.), the Court found that the applicant's due process rights had not been violated because the applicant was allowed to speak at length. However, it offered this dictum: "However, although we hold that Cowan's due process rights were not violated, limiting public comment to two minutes is not consistent with affording an individual a meaningful opportunity to be heard." *Id*.

In *Whitted v. Canyon Cnty. Bd. of Comm'rs*, 137 Idaho 118, 121, 44 P.3d 1173, 1176 (2002), opponents of a subdivision complained that they were not afforded an opportunity to provide surrebuttal evidence following the applicant's rebuttal evidence. The Court did not reach the merits, ruling instead that the project

opponents failed to preserve the issue by requesting an opportunity for surrebuttal at the time of the hearing.

It would seem that the more local governments do to facilitate meaningful input and interaction, the less likely they will find themselves subject to a due process challenge. For example, they should make efforts to do the following:

- Assist the applicant and opponents to prepare for a meaningful hearing by providing a staff report sufficiently in advance of the hearing.
- Ensure that the staff report is sufficiently detailed and forthcoming to alert parties to the issues of concern.
- Provide an opportunity (and encouragement) for parties to submit written materials in advance.
- Consider employing a more iterative process (involving more than one hearing) so that parties may respond to concerns in project design and explore alternatives.
- Exercise reasonable flexibility in enforcing time limits.
- Allow a reasonable opportunity for rebuttal, particularly of newly presented information.
- Make the record available to the public as it is built, ideally through the internet.

C. Building the record

Judicial review of quasi-judicial planning and zoning decisions (as well as other administrative actions) is conducted on the record. See discussion in section 24.H at page 354.

The Idaho Administrative Procedure Act ("IAPA") sets out precisely what must be included in the agency's record.[108] Idaho Code § 67-5249. It is an inclusive list, designed to capture everything presented to or created by the agency or its staff in connection with the particular matter.

This means that, with rare exceptions, the reviewing court will be limited to consideration of the record that is built below. In addition, the local government is

[108] The IAPA specifies the type of record appropriate to each of the three types of agency action: rules, orders and statutorily imposed duties. These are listed at Idaho Code §§ 67-5201(3) and 67-5275(1). We focus here on the record appropriate to contested cases resulting in an order. Idaho Code §§ 67-5249 and 67-5275. These provisions, though designed for state agencies, are made applicable to municipal zoning bodies by LLUPA, which generally references and adopts all of the IAPA's provisions dealing with judicial review. Idaho Code §§ 67-6519 and 67-6521(1)(d).

required to base its decision on what is in the record. This does not mean that the agency may not take into account its own experience and judgment. However, the agency may not simply ignore the record and declare a result contradicted by the facts before it.

Section 67-5276 of the IAPA sets out the special circumstances in which the record may be supplemented on appeal to the district court. In all cases, leave of court must be obtained. If the party is able to demonstrate "good reasons for failure to present" the evidence before, the court may remand the matter to the agency to receive the additional information. Idaho Code § 67-5276(1)(a). If the party can point to "alleged irregularities in procedure before the agency," the court itself may hear the new evidence. Idaho Code § 67-5276(1)(b).

Because judicial review of planning and zoning decisions is conducted "on the record," creating the best possible record in the initial proceedings is critical to upholding or overturning an action in court.

Typically, land use hearings are tape-recorded. The agency should ensure that speakers identify themselves and speak clearly and audibly. *See Rural Kootenai*, 133 Idaho at 843-44, 993 P.2d at 606-07 (inaudible portions of recording did not render transcription inadequate when clarified by written testimony and minutes). Given the poor quality of recordings, a party may wish to make arrangements with the commission or council to provide a court reporter. So long as the party is willing to undertake the expense, the commission or council ought to cooperate. An accurate transcript can be a valuable asset on appeal.

The administrative record also includes written materials, including the permit application, staff reports, maps and any other information submitted into the record. These materials should become part of the record simply by submitting them to the decision-making body. However, local governments are sometimes less than meticulous in their maintenance of the record. It is a good practice to formally request inclusion in the administrative record of any material important to a matter. This may be accomplished in the forwarding cover letter or at the time of offering oral testimony.

Parties should also take care to ensure that materials offered by other parties are properly placed in the record. Such materials could be useful later, for instance, in documenting bias or extra-record communications.

Parties should make certain that the record reflects the basis of their own standing. They should also be certain to affirmatively document any irregularity or the lack thereof (depending upon their position). For instance, if there is reason to doubt that an opponent has standing, be certain to place an objection on the record and create a record showing the basis for the objection. Affirmatively invite the objection to be overcome by the person to whom it is directed. This way, if it can be

overcome, no further time is wasted on the issue. But if it is not overcome, the record will more clearly document the defect.

The commission or council also has an interest in building a solid record, in order to protect their decision on appeal. They should be careful to document that procedural rules were followed and that due process was accorded to all. In particular, they should provide for full and explicit disclosure of any bias, conflict of interest, or *ex parte* communications.

In a similar vein, if the commissioners or council members do not take the initiative to address the issues of conflict of interest, bias, and *ex parte* communication, the applicant or other interested parties should suggest that a record be made on the subject.

Testimony at a hearing should be planned, primarily to be persuasive, but also to put sufficient evidence in the record to support the position the testifying party wishes to support. A party should not accede to a perceived desire of the commissioners to "speed things up" at the expense of a complete record sufficient to sustain an appeal.

As discussed below, a decision can be overturned if it is not supported by substantial evidence in the administrative record. Therefore, it is very important to not only win enough votes, but to address each of the statutory and ordinance criteria with evidence and argument needed to support findings either of approval or denial under those criteria.

While it is important to cover each of the legal and technical bases, the successful party will also ensure that the testimony addresses the common sense side of the equation. The testifying party should paint a picture for the commissioners which is not only legally sufficient under the ordinance criteria, but also persuasive and compelling. The testimony must reach the listener and persuade her that the project is not just approvable, but genuinely good for the community, or in the case of an opponent, a genuine threat to the community. After all, the party who prevails in the administrative hearing is by far the most likely to prevail in the final result.

Presenting a persuasive case involves skill, personality, and resources. The party should think carefully about who should make the presentation, and how that presentation can be most effective. Visuals and other aids should always be employed.

The most important thing for an applicant, however, is to begin with a sound and defensible project. The party who views the planning process as legitimate, and seeks to develop the best possible project under the circumstances and constraints applicable, will fare better than the applicant whose attitude comes off as "try and make me."

D. Findings and conclusions: the "reasoned statement"

LLUPA requires that local officials support their decisions on permit applications with a written "reasoned statement" that discloses and explains the basis of the decision in a meaningful way and documents that the decision was based upon appropriate "standards and criteria."

This requirement applies to the "approval or denial of any application." Idaho Code § 67-6535(1). Obviously, this applies when a governing board (a city council or county commission) renders a decision. In most instances, it also applies to decisions rendered by a P&Z commission (with the exception of recommendations made on ordinances and land subdivisions[109]).

By tradition, the reasoned statement typically takes the form of "findings of fact and conclusions of law." The issuance of the findings and conclusions, by the way, triggers the running of the time for appeal.

LLUPA provides:

> (1) The approval or denial of any application required or authorized pursuant to this chapter shall be based upon standards and criteria which shall be set forth in the comprehensive plan, zoning ordinance or other appropriate ordinance or regulation of the city or county. Such approval standards and criteria shall be set forth in express terms in land use ordinances in order that permit applicants, interested residents and decision makers alike may know the express standards that must be met in order to obtain a requested permit or approval. Whenever the nature of any decision standard or criterion allows, the decision shall identify aspects of compliance or noncompliance with relevant approval standards and criteria in the written decision.
>
> (2) The approval or denial of any application required or authorized pursuant to this chapter shall be in

[109] As discussed in section 2.E at page 47, cities and counties have discretion to delegate certain planning and zoning functions under LLUPA to P&Z commissions. The exception is "the authority to adopt ordinances or to finally approve land subdivisions." Idaho Code § 67-6504. These final decisions may only be made by the governing board (the city or county), and any action taken by the P&Z commission would be only a recommendation. Accordingly, the Court ruled in *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 511, 148 P.3d 1247, 1257 (2006) (Burdick, J.), that the reasoned statement requirement in Idaho Code § 67-6535 does not apply to such recommendations. To be clear, other decisions by a P&Z commissions (*e.g.*, decisions on CUPs and other permits) do require a reasoned statement. These are approvals (not mere recommendations) by the P&Z commission, even though they are appealable to the governing board.

writing and accompanied by a reasoned statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record.

(a) Failure to identify the nature of compliance or noncompliance with express approval standards or failure to explain compliance or noncompliance with relevant decision criteria shall be grounds for invalidation of an approved permit or site-specific authorization, or denial of same, on appeal.

(b) Any applicant or affected person seeking judicial review of compliance with the provisions of this section must first seek reconsideration of the final decision within fourteen (14) days. Such written request must identify specific deficiencies in the decision for which reconsideration is sought. Upon reconsideration, the decision may be affirmed, reversed or modified after compliance with applicable procedural standards. A written decision shall be provided to the applicant or affected person within sixty (60) days of receipt of the request for reconsideration or the request is deemed denied. A decision shall not be deemed final for purposes of judicial review unless the process required in this subsection has been followed. The twenty-eight (28) day time frame for seeking judicial review is tolled until the date of the written decision regarding reconsideration or the expiration of the sixty (60) day reconsideration period, whichever occurs first.

(3) It is the intent of the legislature that decisions made pursuant to this chapter should be founded upon sound reason and practical application of recognized principles of law. In reviewing such decisions, the courts of the state are directed to consider the proceedings as a whole and to evaluate the adequacy of procedures and resultant decisions in light of practical considerations

> with an emphasis on fundamental fairness and the essentials of reasoned decision making. Only those whose challenge to a decision demonstrates actual harm or violation of fundamental rights, not the mere possibility thereof, shall be entitled to a remedy or reversal of a decision. Every final decision rendered concerning a site-specific land use request shall provide or be accompanied by notice to the applicant regarding the applicant's right to request a regulatory taking analysis pursuant to section 67-8003, Idaho Code. An applicant denied an application or aggrieved by a final decision concerning matters identified in section 67-6521(1)(a), Idaho Code, may, within twenty-eight (28) days after all remedies have been exhausted under local ordinance, seek judicial review under the procedures provided by chapter 52, title 67, Idaho Code. An appeal shall be from the final decision and not limited to issues raised in the request for reconsideration.

Idaho Code §§ 67-6535 (as amended in 2013).

Note that this section was not part of LLUPA as initially enacted in 1975, but was added by amendment in 1982. It was amended in 2013 to strengthen the obligation to articulate the standards and criteria and their application to the decision, and to add the reconsideration and tolling provisions discussed in section 24.P at page 435.

The requirement for such a reasoned statement is a common law principle rooted in constitutional due process requirements that predates LLUPA. In 1982, the Idaho Supreme Court held that insufficient findings are grounds to vacate the decision and remand for further proceedings. *Workman Family Partnership v. City of Twin Falls,* 104 Idaho 32, 38, 655 P.2d 926, 932 (1982) (applying the requirement as a common law principal, prior to its codification in an amendment to LLUPA in 1982).

Another common law based decision is *Love v. Bd. of Cnty. Comm'rs of Bingham Cnty.*, 105 Idaho 558, 560, 671 P.2d 471, 473 (1983). In *Love*, the Idaho Supreme Court threw out a finding by the county commission that a zoning change was consistent with the comprehensive plan because of the "Commission's failure to make findings in support of its conclusions."

In *Davisco Foods Int'l, Inc. v. Gooding Cnty.*, 141 Idaho 784, 118 P.3d 116 (2005) (Schroeder, C.J.), the Supreme Court rejected the urging of a disappointed applicant for a special use permit that the Court engage in a rigorous review of county's findings and conclusions, which the applicant contended were conclusory

and not supported by the record. Moreover, the Court ruled that it was not necessary for the county (which was sitting in an appellate capacity and which had reversed the planning and zoning commission) to say what was wrong with the planning and zoning commission's decision. Rather, the Supreme Court held, it was sufficient for the county to start from scratch in making its own findings.[110]

In *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 511, 148 P.3d 1247, 1257 (2006) (Burdick, J.), the Court reiterated, "Conclusory statements are not sufficient." However, the Court noted that the county may, if it chooses, simply adopt the findings and conclusions recommended by the planning and zoning commission.[111]

In a 2007 decision, the Supreme Court demonstrated a greater willingness to take a hard look at the findings and conclusions. Even here, however, the reversal of the city's position was technically procedural. The case of *Crown Point Dev., Inc. v. City of Sun Valley*, 144 Idaho 72, 156 P.3d 573 (2007), involved Crown Point's applications for preliminary plat approval and design review on "Phase 5" of the Crown Ranch Subdivision development. In denying the applications, the city relied on "an analysis by several individuals of existing documents [the Phase 1-4 applications] in the City's possession, but not the existing documents themselves." *Crown Point*, 144 Idaho at 77, 156 P.3d at 578. The developer sought judicial review under LLUPA.

The Court found the city's findings and conclusions were not proper findings (as required by LLUPA), but mere "recitations of evidence." *Crown Point*, 144 Idaho at 78, 156 P.3d at 579. The developer had sought review of the findings, arguing that there was no substantial evidence in the record to support them. The Supreme Court did not reach the substantial evidence issue, ruling instead that the city's findings were not findings at all. "Instead, the 'findings' merely recite portions of the record which could be used in support of a finding. . . . By reciting testimony, a court or agency does not find a fact unless the testimony is unrebutted in which case the court or agency should so state." *Crown Point*, 144 Idaho at 77, 156 P.3d at

[110] The dissent urged application of the principle announced in *Woodfield v. Bd. of Prof'l Discipline*, 127 Idaho 738, 746, 905 P.2d 1047, 1053 (1995), that a regulatory body must, at a minimum, explain what was wrong with the decision of the hearing officer. The dissent urged that the same thing is required of municipal entities under Idaho Code § 67-6535(b) (now 67-6535(2)), which requires a "reasoned statement." The majority did not address this point in its opinion, but, presumably, rejected the notion.

[111] The *Cowan* Court also ruled that the requirement to adopt a reasoned statement does not apply to the planning and zoning commission itself where it is not a decision-making body, but only a recommending body. However, this holding is limited to circumstances where the P&Z Commission is making a recommendation on a land subdivision or an ordinance. See footnote 109 at page 175.

578. Accordingly, the Court remanded the case to the city so that it could "make proper factual findings." *Crown Point*, 144 Idaho at 78, 156 P.3d at 579.

This case sends a strong message to local governments that they need to take seriously their obligation to prepare meaningful findings and conclusions. Mere regurgitation of the record is insufficient. This is still not a particularly high standard. At a minimum, however, decision makers should identify whether the evidence is conflicting or not and, if so, say at least something about why they found that evidence more compelling than the contrary evidence.

In *North West Neighborhood Ass'n v City of Boise*, 172 Idaho 607, 535 P.3d 583 (2023) (Brody, J.), the Court invalidated the City of Boise's approval of a rezone, PUD, and preliminary plat because the city failed to include an adequate "reasoned statement" under Idaho Code § 67-6535(2). The City submitted a one and a half page explanatory statement accompanied by seven pages of conditions. The Court found the statement to be conclusory. For example, the Court objected to the city's failure "to address the fire service issue in any way." *North West*, 172 Idaho at 618, 535 P.3d at 594.

The Court's recent jurisprudence stands in juxtaposition to *Davisco Foods Int'l, Inc. v. Gooding Cnty.*, 141 Idaho 784, 786-87, 118 P.3d 116, 118-19 (2005) (Schroeder, C.J.), in which the majority approved the county's land use decision. It reflects a growing willingness on the part of the Court to overturn municipal land use actions where the municipality fails to adequately explain its reasoning.

The bottom line practice point is this: In order to avoid a potential issue on appeal, it is important for a prevailing party to review the findings and conclusions, and to request changes if he or she believes the findings and conclusions are insufficient. Suggested changes should be favorably considered by the commission, as long as the changes are supported by the record and the final findings and conclusions are approved by the governing body. In contrast, a losing party usually has no motivation to fix weak findings and conclusions. He or she is probably better off appealing on the basis of defective findings and conclusions.

In any event, the failure to provide adequate findings and conclusions is a fertile source of appeals. In our experience, many findings and conclusions by land use agencies may be deficient under the criteria set out in LLUPA.

Note: LLUPA's requirements for a "reasoned statement" are in sharp contrast to the more lenient requirements for decisions by county and highway districts on road validations and vacations. "Likewise, the highway-validation statute is quite different from the Idaho Administrative Procedure Act, which requires that agency orders contain reasoned explanations of decisions and that factual findings 'shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings.' I.C. § 67-5248(1)(a). It also differs from the Local Land

Use Planning Act, which requires written decisions, reasoning, and citation to the facts relied upon in a decision." *Sopatyk v. Lemhi County*, 151 Idaho 809, 816, 264 P.3d 916, 923 (2011) (W. Jones, J.). See discussion in the *Idaho Road Law Handbook*.

E. Alternatives: requirement to explain the actions the application could take to obtain a permit

In addition to Idaho Code §§ 67-6535(1) and (2) discussed above, there is another provision in LLUPA that has bearing on the obligation to provide meaningful findings and conclusions. LLUPA also requires the decision maker to explain to the applicant how the application could be changed to make it acceptable:

> (5) Whenever a governing board or zoning or planning and zoning commission grants or denies an application, it shall specify:
>
> (a) The ordinance and standards used in evaluating the application;
>
> (b) The reasons for approval or denial; and
>
> (c) The actions, if any, that the applicant could take to obtain approval.

Idaho Code § 67-6519(5) (emphasis supplied) (previously codified to section 67-6519(4)). See also Idaho Code § 67-6520, applying a similar requirement to decisions by hearing officers. Both of these provisions have been part of LLUPA since its enactment in 1975. By its terms, section 67-6519(4)(c) applies only to "permits" (a term that LLUPA applies to subdivision approvals as well), not to zoning decisions. Section 67-6520, in contrast, applies to decisions on "a permit or zoning district boundary change."

The language of the statute strongly suggests that the decision-maker cannot simply declare that a proposed action is "not good enough." Rather, if the application is denied, the decision-maker must say what, if anything, the applicant could do to make the application acceptable. Such an explanation would be helpful not only to the applicant (and to other interested parties), but to the reviewing court. Indeed, if the decision-maker declares that there is nothing the applicant could do to make the application acceptable, that, in itself, may provide a basis for appeal. However, there are no reported appellate decisions construing this requirement.

F. Reconsideration and tolling of the appeal period

Courts punish parties for failing to exhaust administrative remedies (see section 24.L at page 376). They also have been known to punish them for exhausting "too much." This section explores when one is allowed (or required) to seek reconsideration, and whether doing so will stay the deadline for seeking judicial review.

Prior to 2013, LLUPA contained no provision for seeking reconsideration of a planning and zoning decision. (This is in contrast to the Idaho Administrative Procedure Act ("IAPA") which has long provided for reconsideration of decisions by state administrative agencies.[112]) Some local planning and zoning ordinances provide mechanisms for reconsideration; others do not.

In *Arthur v. Shoshone County,* 133 Idaho 854, 993 P.2d 617 (Ct. App. 2000) (Lansing, J.), the appeals court ruled that attempting to exhaust a remedy that is unavailable under the local ordinance does not toll the 28-day clock for seeking judicial review. In *Arthur*, the Court held that LLUPA did not adopt the reconsideration provisions in the IAPA. *Arthur,* 133 Idaho at 858-59, 993 P.2d at 621-22. Consequently, the 28-day clock on a petition for review of a LLUPA decision was not tolled while the county considered a motion for reconsideration where the county ordinance provided no express authority for reconsideration. The 28-day deadline for seeking judicial begins to run "after all remedies have been exhausted under local ordinances." Idaho Code § 67-6521(1)(d). Thus, the Court reasoned, if the local ordinance does not expressly provide for reconsideration, a request for reconsideration will not toll the appeal clock.[113] Accordingly, Mr. Arthur's petition for review, filed 30 days after the county's denial of an application for a conditional use permit, was untimely.

In sum, prior to 2013, reconsideration was neither authorized nor required by LLUPA, and seeking it where not authorized by ordinance would result in blowing the deadline for judicial review. That changed dramatically in 2013 (though the full extent of that change is debatable).

In 2013, the Legislature added new provisions to section 67-6535 of LLUPA (which addresses the requirement of a "reasoned statement"). S.B. 1138, 2013 Idaho Sess. Laws, ch. 216 (codified at Idaho Code § 67-6535(2)).

The 2013 amendment strengthened the obligation that planning and zoning decisions be based on standards and criteria expressly articulated in local ordinances and that the findings and conclusions accompanying the decision fully articulate how those standards and criteria were applied in reaching the decision.

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[112] The IAPA expressly provides that agencies may entertain motions for reconsideration. Although such motions are optional, they will stay the appeal clock. Idaho Code §§ 67-5246(4) and (5), 67-5273(2). But the IAPA applies only to state agencies, not to cities, counties, and other local governmental agencies.

[113] This decision is seemingly at odds with *Floyd v. Bd. of Comm'rs of Bonneville County*, 137 Idaho 718, 724, 52 P.3d 863, 869 (2002) ("*Floyd II*"). In that case, the Court concluded that county commissions have inherent authority under Idaho Code § 31-828 to reconsider their decisions and that such reconsideration stays the deadline for seeking judicial review under of road validation decisions under then applicable appeal statute, which has since been repealed and replaced.

The amendment also overturned *Arthur* (at least to some extent) by providing that reconsideration is not only allowed, but required, when an applicant or affected person alleges noncompliance "with the provisions of this section." Idaho Code § 67-6535(2)(b) (emphasis supplied). In other words, seeking reconsideration is now a prerequisite to some or perhaps all LLUPA appeals.

The 2013 amendment also provides that where reconsideration is sought, the 28-day deadline for seeking judicial review is tolled (until a decision on reconsideration is rendered or 60 days have passed, whichever comes sooner). Idaho Code § 67-6535(2)(b).

It bears emphasis that the statutory obligation to seek reconsideration under the 2013 amendment is not tied to a local ordinance. Rather, this is a statutorily imposed obligation to seek reconsideration, which applies irrespective of whether the local ordinance authorizes requests for reconsideration. In other words, the disappointed party must seek reconsideration whether a local ordinance authorizes it or not.[114] The 2013 amendment does not address what happens when the local ordinance does not provide for (or even precludes) requests for reconsideration. It would seem, however, that the statute overrides the local government's failure to provide for reconsideration.

Alas, determining when the reasoned statement and reconsideration/tolling provisions of the statute apply is tricky. It all comes down to two words. What does "this section" mean?

The requirement for a reasoned statement applies to "any application required or authorized pursuant to this chapter." Idaho Code § 67-6535(2) (emphasis supplied). "This chapter" refers to LLUPA, but not every time of land use decision is "required or authorized" by LLUPA. What constitutes an application required or authorized pursuant to LLUPA is discussed in section 24.E at page 337 (dealing with what actions are subject to judicial review). The judicial review provision of LLUPA employs identical language (applications "required or authorized" under LLUPA). Presumably, then, all applications that are subject to judicial review also trigger reasoned statement requirement in Idaho Code § 67-6535.

In contrast, subsection 2(b) (dealing with reconsideration and tolling of the 28-day deadline for judicial review) is more limited. It applies only when a person is "seeking judicial review of compliance with this section." Idaho Code § 67-6535(2)(b) (emphasis supplied).

[114] Thus, to the extent the party seeks to challenge "compliance with the provisions of this section [67-6535]," the 2013 amendment to the statute overrides the holding in *Arthur* (which keyed tolling of the 28-day appeal deadline to the existence of a local authorization for reconsideration).

Given that "this section" (section 67-6535) deals only with the obligation to adopt clear standards and criteria and to explain their application to the decision, a strict reading of the statute suggests that the opportunity (and obligation) to seek reconsideration (and the corresponding tolling of the 28-day deadline) comes into play only if a party challenges either the clarity of the standards and criteria in the local ordinance or the clarity of the findings and conclusions in explaining how they were applied.

In other words, because it is limited to challenges to "compliance with the provisions of this section," the reconsideration provision in section 67-6535 is not an across-the-board invitation or obligation to seek reconsideration of any planning and zoning decision. Unless the party is challenging the clarity of the local standards and criteria or the explanation of how they were applied, we are back in the land of *Arthur*. Requests for reconsideration are allowed only if authorized by local ordinance, and, as *Arthur* concluded, seeking reconsideration when not authorized to do so does not toll the 28-day deadline.

Sadly, this "legislative fix" is not much of a fix. It leaves parties facing the same conundrum that led to the harsh outcome in *Arthur*. If a party wishes to challenge a decision on procedural or substantive grounds other than compliance with the reasoned decision provisions of the Act, and there is no local ordinance authorizing reconsideration, seeking reconsideration could result in blowing the 28-day deadline.

This is a strange result. Who knows whether it was intended by the Legislature.[115] It seems hard to imagine that it was intended. Yet we are stuck with the technically unambiguous reference to "this section."

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[115] The Statement of Purpose reads in full:

> This bill responds to concerns that some decisions rendered pursuant to the Local Land Use Planning Act (LLUPA) have failed to address clearly expressed decision criteria, have caused jurisdictional conflicts with state or federal agencies and have brought about a need for expensive and time-consuming appeals. The amendments to LLUPA set forth in this legislation would require specific standards in overlay zoning districts, prohibit overlay districts from causing regulatory taking, forbid abrogation of health district, state or federal jurisdiction by local ordinance, require that written land use decisions expressly address approval decision criteria and provide an expeditious reconsideration process to allow affected persons to contest a final decision before a judicial appeal is allowed to proceed.

Statement of Purpose, RS22144 (emphasis supplied). This reference to the reconsideration provision fails to address under what circumstances reconsideration is authorized and required. Yet it broadly suggests that the goal was to facilitate reconsideration, and it does not hint at limiting reconsideration to challenges to the "reasoned decision."

The presentation by the bill sponsor in the Senate committee is equally unenlightening:

> Senator Tippets said he was approached several months ago by a group of residents in Teton County. They expressed to him their frustrations with the local land use planning process in their county.
>
> . . .
>
> Senator Tippets said landowners and developers expressed they weren't sure what they needed to do to comply with zoning requirements. He said some had gone to great expense over an extended period of time only to find they were denied permits to build, and they were left wondering exactly what they would have to do to be allowed to build – if that were even possible.

Hearing Minutes, Senate Local Government & Taxation Committee, Mar. 6, 2013, p. 3. This comment seems aimed at the portion of the legislation calling for clearer criteria and a more articulate "reasoned decision." It does not address the reconsideration/tolling provision.

The measure was further explained by Jerry Mason of the Association of Idaho Cities, which supported the measure:

> Mr. Mason said one subject that has been repeatedly addressed by permit applicants is that once a permit is approved in final decision, any affected person claiming they are aggrieved can file an appeal. The appeal can go to the district court and potentially the supreme court, which can take 18 to 30 months. While that appeal is proceeding, the property owner is in limbo. <u>The reconsideration provision in this bill is designed to say if someone has a concern about the decision made in a certain matter, it should be addressed to the local decision makers who are closest to the matter and made the decision regarding it.</u> He said now, in order to bring an appeal to the courts, one must first point out the alleged error to the people who first made the decision.
>
> . . .
>
> Vice Chairman Rice asked if this poses a burden for unsophisticated landowners who represent themselves and don't initially identify a problem with the decision and raise a different issue than they should have. That landowner then contacts an attorney to appeal to district court. He asked in a case like this, would their right to appeal be waived in this language.
>
> Mr. Mason said yes, as with anyone who does not raise a valid objection in the appropriate time, that would be the case. He said the current statute only provides 28 days, and all it takes is the cost of a complaint to be filed and a matter is locked into the courts until the matter is settled. Mr. Mason said the intent of the bill is to require that if errors are made, they need to be identified promptly.

Hearing Minutes, Senate Local Government & Taxation Committee, Mar. 6, 2013, p. 4 (emphasis supplied).

Mr. Mason's explanation (which continues for another three paragraphs) does not squarely address whether the prerequisite of seeking reconsideration is applicable only in the context of the bill's provisions requiring a clear articulation and application of the standards and criteria. However, what he says could be read to mean that reconsideration is mandated as a prerequisite to all judicial reviews.

Cities and counties who do not wish to expend legal resources fighting over such jurisdictional matters are well advised to adopt ordinances that expressly provide for and require reconsideration. Doing so would moot the debate over what this statute means.

As of this writing in 2019, there is no appellate court decision construing the 2013 amendment. In *Lagerstrom v. City Council of the City of Eagle* (4th Jud. Dist., Idaho) (No. CVOC 14-02839) (Michael McLaughlin, J.), the district court dismissed a judicial review brought by neighbors challenging a development agreement. The court ruled that petitioners had failed to seek reconsideration as required by Idaho Code § 67-6535(2)(b). The district court embraced a broader interpretation of the statute than is suggested above—concluding that the 2013 amendment mandates reconsideration in all appealable land use matters.

14. MEDIATION

In 2000, the Legislature added a new mediation provision to LLUPA. Idaho Code § 67-6510. The statute permits an applicant, an affected person, the P&Z commission, or the governing board to request mediation.

The statute provides that mediation can occur "at any point during the decision-making process or after a final decision has been made." Idaho Code § 67-6510(1). Thus, parties may employ mediation even after the decision has been rendered. If mediation occurs after a final decision, any resolution of differences must be subject to another public hearing. Idaho Code § 67-6510(1).

All relevant time frames (including, presumably, the 28-day deadline for filing a judicial appeal) are tolled during mediation. Idaho Code § 67-6510(3). Unfortunately, the statute's drafters included some awkward exceptions to the tolling provision. First, the tolling ceases when any participant in the mediation states in writing he or she no longer wishes to participate. Idaho Code § 67-6510(3). Second, the tolling ends if no mediation session is scheduled for 28 days following the initial request for mediation.[116] Idaho Code § 67-6510(3). This limitation may prove to be a trap for the unwary and may not make a lot of sense. Twenty-eight days is a very tight time schedule to get official approval of the mediation, mediators appointed, and a session scheduled. Apparently the mere passage of time, without any demand or objection from any party, causes the tolling to expire. May the parties stipulate to an extension? The Legislature should clarify this issue.

In order to avoid the risk of having to litigate the effectiveness of the tolling provisions, the parties may wish to file any necessary protective appeals, and then seek a stay of proceedings to allow the mediation to proceed.

The statute requires the applicant and affected persons to participate in at least one mediation session if the governing board orders mediation, but neither the applicant nor affected persons have any further obligation to participate in mediation. The statute does not directly address the issue, but cities and counties in our experience interpret the statute not to require them to grant a request for mediation. To our knowledge, no court has addressed this question.

The governing board selects and pays the expense for the first mediation session, but the compensation for the mediator for future sessions must be decided among the parties at the initial session.

Mediation is allowed pursuant to the authority of the statute without a local enabling ordinance, but such ordinances are allowed. Idaho Code § 67-6510(4).

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[116] The word "scheduled" in the statute is also ambiguous. Must the mediation session be scheduled for a date that falls within the first 28 days or simply scheduled (for any date) within the first 28 days. Presumably the latter is intended, but the statute could be clearer.

LLUPA provides, "The mediation process shall not be a part of the official record for the application." Idaho Code § 67-6510(5). It is not clear whether the Legislature meant by this simply that it is not required to make a tape or transcript of the hearing and include that in the record, or whether it actually meant to prohibit the inclusion of such a tape or transcript in the hearing. The former would make more sense, but the plain language seems to suggest the latter. This is somewhat problematic. After all, as a matter of due process, how can the Legislature prohibit an interested person from putting something in the record, so long as it is relevant?

Another concern is how to provide for adequate disclosure of *ex parte* communications (assuming that one or more of the decision-makers participated in the mediation) in the event of further proceedings following the mediation. One approach is for the parties to agree to provide a detailed summary of the mediation that would be made a part of the record on any remand.[117] As further insurance against procedural error, the parties could take the extra step recording the mediation process and making a tape or transcript available as a public record, but not as part of the record in the proceedings.

One of the issues that has been raised about the mediation process is whether members of the decision-making body (either the planning and zoning commission or city council or county commission) can participate in a mediation. The concern is that their participation could constitute an impermissible *ex parte* contact. In a declaratory judgment, in *Davisco Foods International v. Gooding Cnty.*, CV-01-0542 (attached as Appendix C), Judge Wood held that although such communications are, by definition, *ex parte*, there is nothing improper about the communications so long as they are fairly and fully disclosed.

The mediation provision of LLUPA does not say that mediations are exempt from the Open Meetings Act. The authors aware of no reported decision on the subject. Caution would suggest operating on the assumption that the Open Meetings Act applies to mediation.

[117] Please review the *Davisco v. Gooding Cnty.* District Court opinion at Appendix C for a reasonable way to implement this statutory directive without violating the public's due process rights.

15. RENT CONTROL AND AFFORDABLE HOUSING

In 1990, the Idaho Legislature amended Idaho Code § 55-307 (dealing with a landlord's right to change lease terms upon notice to the tenant), adding a new section (2) prohibiting local governments from enacting rent control ordinances:

> A local governmental unit shall not enact, maintain, or enforce an ordinance or resolution that would have the effect of controlling the amount of rent charged for leasing private residential property. This provision does not impair the right of any local governmental unit to manage and control residential property in which the local governmental unit has a property interest.

Idaho Code § 55-307(2). As of this writing, there are no reported decisions addressing this part of the statute.

District court cases in 2007 and 2008 overturning ordinances requiring affordable housing as a condition of the approval of entitlement applications are discussed in section 29.F on page 715.

More recently, some jurisdictions have enacted ordinances that encourage but do not require the provision of workforce housing by developers. These ordinances offer density bonuses and the like, without expressly mandating the provision of workforce housing. The authors are not aware of any legal challenges to these ordinances.

In 2022, the Legislature enacted a temporary law (effective until 2026) creating the Idaho Workforce Housing Fund, which is funded by State appropriations. Idaho Code 67-6227. The fund is designed to provide gap financing for workforce housing projects, including matching funds for local governments.

16. SMART GROWTH

In recent years, much attention has focused on improving the quality of development plans and urban planning. The term "Smart Growth" has been employed in an effort to describe these emerging principles of development. A parallel movement, "New Urbanism," combines Smart Growth principles with an additional focus on preserving traditional architectural design. What follows is a brief outline of Smart Growth concepts, implementation, and resources.

A. Principles of Smart Growth

(1) Mixed land uses

Smart Growth encourages mixed land uses where shopping, schools, recreation, transportation, and in some cases, the workplace are integrated into the same community. For example, a neighborhood may have buildings that share residential and commercial uses located near single-family homes and other business establishments.

During the industrial revolution, the first planning efforts in the United States sought to separate polluting factories from residential neighborhoods. Although this planning served its purpose, the separation of uses today has expanded to the extent that most retail establishments and schools are beyond a reasonable walking distance from residential neighborhoods. Through mixed-use development, Smart Growth can create vital neighborhoods that stand in contrast to the isolated development of modern suburban sprawl.

(2) Transportation choices

Smart Growth communities emphasize transportation choices such as riding bicycles, using public transportation, and especially walking. These communities strive to create attractive, comfortable, and safe walking environments, which enable those who desire an alternative to driving, or those who cannot drive (such as children, seniors and people with disabilities), to access daily activities on their own. Pedestrian friendly street design includes: buildings close to the street, homes with traditional front porch design, narrower streets, sidewalks separated from the curb, and hidden parking with entrances in non-critical areas. Because of these design elements, lively street frontages encourage pedestrian traffic, front porches create an opportunity to chat with neighbors, and narrower streets increase safety by slowing traffic. In addition, Smart Growth developers design streets and sidewalks in interconnected grids to reduce congestion and give walkers meaningful destinations (such as parks, shops, or the town square).

(3) Range of housing opportunities

Smart Growth communities incorporate a mix of housing types such as apartments, condominiums, townhouses, lofts, and single-family detached homes

within the same neighborhood. These communities strive to have a range of housing sizes and prices to allow for age and income bracket diversity within a neighborhood. Rather than build "low-income" housing with inferior products and design, Smart Growth promotes creating high quality, affordable alternatives such as renovating existing structures and providing housing above retail establishments. In addition, a range of housing choices in a new development can be designed to have a comparable appearance through using similar exterior materials, windows, and building forms. For example, what from the outside appears to be a high-end single family home, may in reality be a condominium or an apartment complex.

(4) Compact building design

Smart Growth communities create environments that are compactly built and use space in an efficient and aesthetic manner. The size, shape, and location of buildings, as well as the uses contained within them, create a cohesive neighborhood filled with buildings that complement each other. In addition to narrow streets and front porch design, Smart Growth communities have smaller lots with shallow front yards that spatially define the street and create a sense of enclosure. The garages are hidden in back, usually accessible by alleyways. Other parking areas are concealed from the street frontage, except for on-street parking that acts as a shield for sidewalk traffic. Overall, these design elements are aesthetically pleasing and promote pedestrian and community interaction.

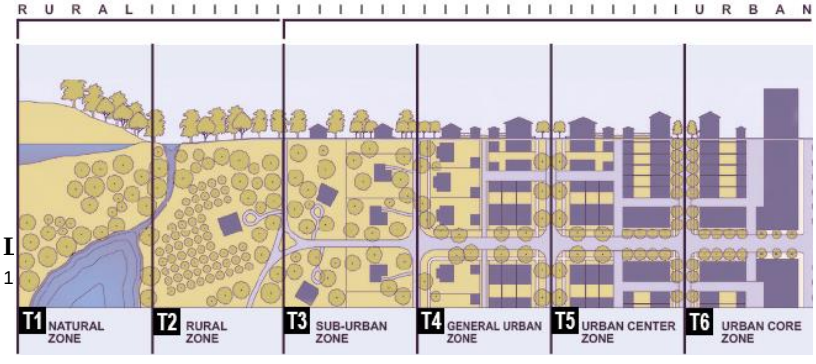
(5) Preserve Open spaces and natural resources

Smart Growth promotes the conservation of natural resources and the preservation of open space and farmland. Smart community design can help to accomplish these goals by reducing sprawl and encouraging energy efficiency and water conservation. In addition, Smart Growth also encourages alternatives to traditional farming such as Community Supported Agriculture (CSA). CSA involves a relationship of mutual support between local farmers and community members who pay an annual share fee in order to receive weekly seasonal produce. This arrangement guarantees the farmer financial support and can enable smaller scale farms to remain in business.

B. Model codes

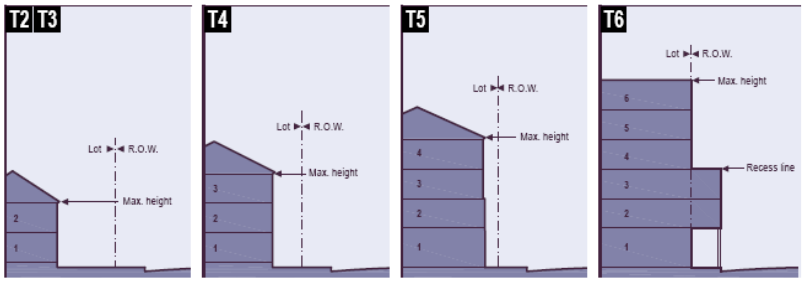
(1) SmartCode

The SmartCode is a model zoning ordinance developed in 2001 by the Florida based architectural firm of Duany Plater-Zyberk & Company. The latest version, SmartCode 7.0, was released June 2005 (http://www.dpz.com/pdf/SmartCodeV7.0-6-06-05.pdf). The SmartCode



depicts specific applications of New Urbanism based upon the concept of a "transect." The transect approach is a planning strategy that organizes and geographically allocates the elements of urbanism, such as lot size, land use, building types and streetscape, within six distinct environments or "transect zones." The zones, as depicted in Table 14 above, are arranged in a continuum that increases in urban intensity (T1-Natural Zone, T2-Rural Zone, T3-Sub-Urban Zone, T4-General Urban Zone, T5-Urban Center Zone and T6-Urban Core Zone). For example, T5 "is the equivalent of main street, including building types that accommodate retail, offices, row houses, and apartments. It is usually a tight network of streets, with wide sidewalks, steady street tree planting and buildings set close to the frontages." *See* Table 1 Transect Zone Descriptions.

The SmartCode has specific graphs and tables that detail the parking, thoroughfare, streetscape, public frontages, public lighting, street trees, private frontages, building configuration, building disposition, building function, civic space, etc., that are permitted in each of the six zones. For example, Table 8 (illustrated on the left) depicts the building configuration permitted in each zone. The SmartCode also provides general standards for environmental requirements, streetscape requirements, civic functions, building disposition, building configuration, building function & density, parking, landscape, signage, ambient, and visibility that apply to all of the Transect Zones.



The SmartCode defines four different community types (Clustered Land Development, Traditional Neighborhood Development, Regional Center Development and Transit-Oriented Development) that are comprised of different proportions of the Transect Zones. For example, a Traditional Neighborhood Development (TND) community within a controlled growth sector includes, at a minimum, 10-30 percent of zone T3, 30-50 percent of zone T4 and 10-30 percent of zone T5. *See* Table 2 Sector/Community Allocation. Accordingly, a TND will have at its center the urban and main street components of T5, with the more rural components of T3 at its outer diameter.

C. Infill versus greenfield developments

(1) Infill advantages and challenges

Infill development is the use of vacant land, or the restoration or rehabilitation of existing structures or infrastructure, in already urbanized areas where water, sewer, and other public services are in place. One of the key advantages of infill development is the ability to build within existing infrastructure, not only utilizing

the roadways and utilities but also schools and commercial areas. As a result, infill projects can bring new life into disinvested communities.

Infill projects face challenges in increasing densities due to zoning limitations and neighborhood resistance. At the outset, infill projects are more expensive than greenfield projects, primarily due to construction costs of demolishing and/or renovating existing buildings or building on small sites with little space for construction equipment.

(2) Greenfield advantages and challenges

Greenfield land is simply land that has not been developed before. Development of greenfield land is initially less expensive and involves fewer zoning complications than infill development. Greenfield development also allows the developer to design and implement Smart Growth components within a neighborhood or community at the outset of the project.

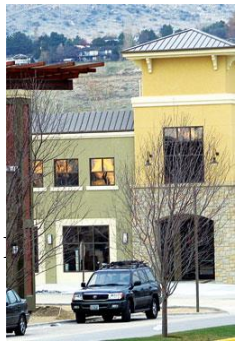
Greenfield development faces the long-term challenge of infrastructure costs as well as the consequential impact of the development. For example, greenfield development may fail to take into account the future sewage and school capacity needed for the region. In addition, greenfield communities may have fewer transportation alternatives if they are not served by a public transit system.

D. Idaho developments with Smart Growth components

(1) BoDo-Downtown Boise development

In 2003, developer Mark Rivers of BoDo Partners, LLC spearheaded a renovation project in the Eighth Street Marketplace just south of downtown Boise. The multi-million dollar project, named BoDo (abbreviation for "Boise Downtown"), is a mixed-use development that spans four city blocks and includes the construction of two three-story buildings, consisting of 240,000 square feet of retail, dining and office space, and an 11-story tower that will comprise 110,000 square feet of retail, hotel and parking space. One of the three-story structures, the Capitol Gateway Building, also includes a multiplex movie theater and the downtown offices of Colliers International. While this project makes good use of existing infrastructure and mixed land uses, its plan for only four condominium units does not by itself provide a range of housing opportunities. However, the greater downtown area, within an eight-block radius of the BoDo project, does provide for other housing options.

(2) Bown Crossing



Bown Crossing is a mixed-use development on 35 acres between ParkCenter Boulevard and Boise Avenue. When complete, Bown Crossing

will consist of high-end residential housing such as townhomes, patio homes, custom villas, and custom homes as well as a marketplace with lofts, shops, offices and retail businesses. Idaho Smart Growth gave this project an excellent smart growth neighborhood rating (see the Smart Growth Neighborhood Development Scorecard below). For a description of the development plans, visit http://www.bowncrossing.com/index.cfm.

(3) Courthouse Corridor

The Courthouse Corridor is a fourteen-acre, mixed-use project located in downtown Boise. This project is a partnership among Capitol City Development Corp. (CCDC), Ada County, and Civic Partners, a private developer. The anchor of the Courthouse Corridor is the Ada County Government Center comprised of the seven-story, 320,000-sq-ft. courthouse building with associated retail, parking, streetscape, and plaza improvements. The Center was completed in January 2002.

Another component of the Courthouse Corridor project is the Civic Plaza Apartments, completed in the summer of 2004. Civic Plaza Apartments consist of 307 units situated in two buildings and spanning approximately three acres. The apartments also offer retail space on the ground level.

The Idaho Water Center, also completed in the summer of 2004, is adjacent to the Civic Plaza Apartments. This 204,000 square foot project contains government, higher education and business offices involved in water quality and policy issues, as well as retail at the ground level. The building is owned by the Idaho State Building Authority and houses the University of Idaho, the Idaho Department of Water Resources, the U.S. Forest Service and private tenants. Overall, the Courthouse Corridor project combines commercial, retail and residential space in an urban setting. However, many of the design elements built to date may seem imposing on a human scale, which could detract from the intended pedestrian-friendly design.

(4) Crescent Rim

Boise developer Bill Clark has obtained approval from the City of Boise to build a two-to-four story, 79-unit residential condominium complex on the south side of Crescent Rim Drive between Peasley Street and Kipling Road. The complex offers spectacular views of downtown

Boise and the Boise foothills. The project includes over 60 percent open space including water features, extensive landscaping, a vista seating area, pool, and two guest suites. Neighbors objected strongly to the project based on traffic and scale concerns, and the project was reduced from an original proposal of 98 units. For further information on the Crescent Rim project, please visit http://www.crescentrim.com/.

(5) Hidden Springs

The Hidden Springs Community is located in the Dry Creek Valley, twenty minutes north of Boise. Grossman Family Properties developed Hidden Springs based on a vision of building a rural community in the tradition of Idaho's small towns, while still preserving the natural surroundings. In 2000, the National Association of Home Builders recognized Hidden Springs with the Best Smart Growth Award.

The Hidden Springs' town center offers residents shopping and a café at the Dry Creek Mercantile, as well as a post office and library. In addition, the Hidden Springs Community also provides a charter school for children from kindergarten through ninth grade. Other amenities include a fire station, sheriff's office, community pools, and miles of trails and pathways.

From a Smart Growth perspective, the project integrates various mixed uses and attractive design elements. However, questions have been raised about whether some of the later phases of the development are outside a convenient walking range of the town center. In addition, Hidden Springs may have difficulty linking with public transit due to its relatively remote location and to date has not had the necessary population base to support its retail components. A substantial expansion of Hidden Springs is planned, which may address these issues to some extent.

For more information on the Hidden Spring Community, please visit http://hiddensprings.com.

E. Planning processes affecting development patterns

(1) Blueprint for good growth

The Blueprint for Good Growth, which is currently being drafted, is designed to coordinate transportation and land use planning within Ada County. The Blueprint will compare two alternative land use scenarios (one of which includes smart growth

principles) and analyze their impact on growth related demands for water, wastewater, open space and parks, housing and other public facilities and services. The Blueprint will serve as a tool for determining necessary changes to growth plans, zoning ordinances and planning policies that the cities within Ada County must make to ensure that growth is fiscally responsible and preserves quality of life as much as possible. The Blueprint is projected to be completed and implementation begun by mid-2006. For further information on the Blueprint, please visit http://www.blueprintforgoodgrowth.com/.

(2) Communities in motion

The Blueprint will work in concert with the COMPASS Long-Range Transportation Plan (Communities in Motion), also currently being drafted. Communities in Motion is a regional transportation plan through the year 2030 for the Treasure Valley, including Ada, Boise, Canyon, Elmore, Gem & Payette Counties. This plan also compares alternative land use scenarios and their impact on transportation needs. For further information on the plan, please visit http://www.communitiesinmotion.org/.

(3) Idaho's Joint Legislative Environmental Common Sense Committee, Subcommittee on Servicing Communities

At the initiative of Idaho's Joint Legislative Environmental Common Sense Committee (ECSC), a special subcommittee was established to address environmental area of impact issues in Idaho. The goal of the Subcommittee on Servicing Communities is to develop recommendations on how local governments can improve sharing of infrastructure and services to ensure protection of the environment and the public health and safety of Idaho citizens. The subcommittee is investigating the potential for sharing infrastructure and services in Idaho and researching methods used by other states. This committee has not been active during 2005. More information on this committee is available at http://www.deq.idaho.gov/water/prog_issues/waste_water/impact_main.cfm.

F. Other resources

(1) Environmental Protection Agency

In 2004, the Environmental Protection Agency (EPA) agency announced the release of its coordinated Smart Growth Strategy. This Strategy is designed to promote the revitalization of brownfields and reduce the impact of development on air and water quality. The Strategy focuses on five target areas: (1) promote infill and redevelopment; (2) catalyze smart growth transportation solutions; (3) partner for innovative development and building regulations; (4) support state Smart Growth initiatives; and (5) ensure EPA policies recognize the environmental benefits of Smart Growth. The EPA plans to address these target issues through a variety of

projects including an education and outreach campaign, building regulations and development review technical assistance, State Smart Growth initiatives and an infill and transit-oriented development initiative. For more information on the EPA's strategy to encourage smart growth and their proposed projects, please visit http://www.epa.gov/smartgrowth/.

(2) Smart Growth America

Smart Growth America's coalition of national organizations works to support citizen-driven planning that coordinates the development, transportation, and revitalization of older areas and the preservation of open space and the environment. For further information on Smart Growth America as well as other Smart Growth resources, please visit http://www.smartgrowthamerica.org/.

(3) Idaho Smart Growth

The mission of Idaho Smart Growth is to build the capacity of Idahoans to shape the future of their communities as they envision it, to increase public awareness of the links between land use, transportation, and the quality of life, and to promote thoughtful long range planning at local, regional, and state levels.

Idaho Smart Growth plans to accomplish its mission by helping individuals, citizen groups and public officials meet the concurrent challenges of enhancing community livability, protecting the environment, promoting economic vitality and accommodating growth. Idaho Smart Growth also provides education, promotes public discourse on growth management issues, and advocates for citizen participation and better planning. For further information, please visit http://www.idahosmartgrowth.org/.

G. Smart Growth Development Scorecards

Idaho Smart Growth developed the following scorecards to rate commercial and neighborhood development projects. They are also currently drafting an infill development scorecard.

Smart Growth Commercial Development Scorecard
Rate each criteria on a scale of 0 to 4. Give the development in question a zero if it does not meet the criteria in any way and four if it meets the criteria perfectly.

Land Use Criteria		**Score**
1	The plan involves redevelopment, rehabilitation, or infill in a previously developed area.	
2	The project is integrated with existing and planned surrounding uses, not disconnected from them.	

3	The site is located in an area designated for commercial or mixed uses in the city's comprehensive plan (max. pts.) or is part of a master planned development.	
4	There is more than one use in the project. More uses in the project (or within ¼ mile of project) = higher score; *e.g.* retail, service, office, civic, residential.	
5	The ratio in height of buildings and trees to street width creates an "outdoor room" or sense of enclosure.	
6	Signs are in the field of vision of pedestrians, typically at window or awning height.	
7	The project creates or contributes to a compact center or district, rather than a commercial strip.	
8	The project includes ground floor windows across more than 50% of building frontages.	
9	Building heights transition or step down where mixed use or commercial buildings are next to or across the street from single family residential.	
10	Physical features and layout promote natural surveillance, maximizing the ability to see throughout the site.	
11	At least 10% of the site area is devoted to usable open space, such as plazas, small parks, and outdoor dining areas (not including landscape).	
12	10% of surface area devoted to off street parking for 10 or more cars is landscaped and includes canopy trees, (5% of parking areas for less than 10 cars).	
13	Building facades include human-scale details and modulation for aesthetic appeal, pedestrian comfort & compatibility with the design of the surrounding area.	
14	The project retains existing natural amenities, including tress, or includes constructed natural amenities, and they are accessible to pedestrians.	
15	The project approximates pre-development drainage conditions and reduces water pollution potential by using measures such as on-site biofiltration.	
16	The buildings use sustainable, energy efficient materials, appliances and design.	

17	Outdoor lighting is shielded to minimize light pollution. Lighting in walkable areas is at human scale.	
Land Use Criteria Subtotal		

Transportation Criteria		**Score**
18	There are attractive sidewalks and/or pathways leading to and through the site to promote comfortable safe walking between all destinations within the project.	
19	Streets are well connected within the project and to existing and planned adjacent street. Blocks are short (<400'). Streets integrate all modes of transportation.	
20	The site is currently served by transit or is planned to be served by transit. Protected transit waiting areas are provided and are dignified, dry and conveniently located.	
21	There is on-street parking on both sides of streets. Surface parking lots are shared by multiple uses.	
22	Parking and vehicle drives are located away from building entrances and not between entrances and the street, and don't inhibit direct pedestrian access to entrances.	
23	Parking is located behind or to the side of buildings and never at corners and is generally buffered by landscaping or walls with little street visibility.	
24	Streets have a 5-10' planter strip with shade trees planted an average of 30' on center, or sidewalks are >10' wide and have shade trees in tree wells.	
25	Driveway consolidation reduces vehicle-pedestrian conflicts and reduces impacts on roadway access.	
Transportation Criteria Subtotal		
Land Use Criteria Subtotal		
Grand Total (Land Use + Transportation Criteria)		

Now add up all of the scores and then add the subtotals to get a grand total. The highest possible score of 100 means the development meets smart growth principles 100%.

80-100 pts. — Congratulations. This is an excellent smart growth neighborhood.
50-79 pts. — Good effort, look for small modifications that might increase the score.
25-49 pts. — Needs major improvement to meet smart growth principles.
0-24 pts. — This is not a smart growth development.

Smart Growth Neighborhood Development Scorecard

Rate each criteria on a scale of 0 to 4. Give the development in question a zero if it does not meet the criteria in any way and four if it meets the criteria perfectly.

Land Use Criteria		**Score**
1	The project is inside city limits or will be annexed (4), is inside an area of city impact (2-3), is outside existing planning areas (0-1).	
2	The project defines a neighborhood(s) that is roughly a ten-minute walk from edge to edge (approx. ½ mile).	
3	Buildings are zoned by compatibility of building type first, use second; *e.g.* single family/home office or apartment/office are compatible if building form is similar.	
4	Street trees, sidewalks, front porches and front doors dominate streetscapes, not garage doors and driveways.	
5	There are a variety of housing types and sizes that at least two income levels can afford.	
6	Most lots are less than 70 feet wide. There is rear alley garage access.	
7	There is an elementary school with pedestrian access within one mile of the neighborhood.	
8	There is a variety of housing density and housing density is higher the closer you get to the neighborhood center.	
9	Small green spaces and playgrounds are located within a ¼ mile walk of every residential unit.	
10	Building setbacks are shallow, generally not more than one quarter the lot width, with a maximum of no more than 20'.	

Land Use Criteria		Score
11	There is a neighborhood center with retail (best), office, a public meeting space, and/or a park or other green space within ½ mile of all residents (may/may not be part of project).	
12	Commercial buildings front directly on the sidewalk with parking to the side or rear, and/or a park or other green spaces/parks are fronted by roadways rather than behind backyards.	
13	On street parking is encouraged. Parking lots are generally located behind street walk and buildings with little street visibility.	
14	The project works with the natural topography and minimizes grading. Most natural amenities are retained, or new amenities constructed.	
15	The project approximates pre-development drainage conditions and reduces water pollution potential by using measures such as on-site biofiltration.	
16	The buildings use sustainable, energy efficient materials, appliances and design.	
17	The site is developed to preserve as many existing trees as possible, especially specimen trees.	
Land Use Criteria Subtotal		

Transportation Criteria		Score
18	Streets integrate all modes of transportation, with safe and comfortable sidewalks and pathways throughout. The project has transit access (or access is planned).	
19	Streets are organized in a connected network internally and are connected to existing or planned adjacent streets. Blocks are short (<400').	
20	Cul-de-sacs are avoided except where absolutely necessary due to natural conditions.	
21	Traffic calming measures such as curb bulb-outs are incorporated.	

Transportation Criteria		Score
22	Roadways are relatively narrow (*e.g.* 29' from curb to curb for local residential streets) and parking is allowed on both sides of streets.	
23	Sidewalks are 4-5' wide and detached, or > 10' wide at the neighborhood center. 5-10' tree planter strips have shade trees planted an average of 30' on center.	
24	Buildings front on to collectors. Street section design of collectors and arterials is sensitive to the surrounding land use and usable by all transportation modes.	
25	There is a dry, dignified place to wait for transit in the neighborhood center.	

Transportation Criteria Subtotal	
Land Use Criteria Subtotal	
Grand Total (Land Use + Transportation Criteria)	

Now add up all of the scores and then add the subtotals to get a grand total. The highest possible score of 100 means the development meets smart growth principles 100%.

80-100 pts. — Congratulations. This is an excellent smart growth neighborhood.
50-79 pts. — Good effort, look for small modifications that might increase the score.
25-49 pts. — Needs major improvement to meet smart growth principles.
0-24 pts. — This is not a smart growth development.

17. PRIVATE RIGHT OF ACTION (OR CAUSE OF ACTION)

A. A plaintiff or petitioner must identify a cause of action

A cause of action (aka "private right of action") is a statute, constitutional provision, or common law that authorizes a particular type of suit. Statutes and constitutional provisions authorizing suits against the government also have the effect of waiving sovereign immunity for such a suit. [118]

A threshold question in every lawsuit alleging violation of a statute or the Constitution is whether there is a cause of action (or private right of action) allowing private parties to seek judicial redress. In other words, just because a statute says "the government shall do thus and so" that does not, in itself, authorize someone to bring a lawsuit when the government violates the statutory mandate. To put it bluntly, in some instances the government may violate a statue with impunity.

As the Idaho Supreme Court noted in 1915 that "the question whether or not the breach of a statutory duty gives a private right of action in any case must always depend upon the object and language of the particular statute." *State, for Use of Miles v. American Surety Co. of New York*, 26 Idaho 652, 672-73, 145 P. 1097, 1103 (1915).

For example, in *Middlesex Cnty. Sewerage Authority v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981), the Court found that the federal Clean Water Act creates no private right of action outside of its citizen suit provisions, and that the act preempts the common law of nuisance,[119] thereby leaving the plaintiffs without a remedy. It bears emphasis, however, that the Clean Water Act provides extensive citizen suit provisions. The only question in *Sea Clammers* was whether the Act also created other, implicit private rights of action.

Even in cases where the underlying statute provides no explicit or implicit private right of action, judicial review may be premised under the federal Administrative Procedure Act. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) ("The 'right of action' in such cases is expressly created by the Administrative Procedure Act . . . ."). This did not work in the *Sea Clammers* case, because the case was not framed as a judicial review of government decision-making. Instead, plaintiffs sought injunctive and monetary relief in an action against dischargers of sewage and other waste, alleging violation of federal

[118] The federal Administrative Procedure Act (which authorizes judicial review of agency action) contains a waiver of sovereign immunity. 5 U.S.C. § 702. However, that section makes the waiver inapplicable if another statute limits jurisdiction. The interaction of the waiver in the APA and the waiver in the QTA (and its limitation as to tribal lands) is discussed in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012) (Kagan, J.).

[119] The preemption issue had been address previously in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

permits under the Clean Water Act. The case also included claims against EPA and the Corps of engineers, which the Court described as "not clear." *Sea Clammers*, 453 U.S. at 12. Whatever they were, they were not APA actions.

B. The federal APA and IAPA provide a private right of action.

Unlike *Sea Clammers*, most environmental challenges to federal action arise under the APA. For example, in *Lujan v. Nat'l Wildlife Fed'n* ("*Lujan I*"), 497 U.S. 871 (1990) (Scalia, J), environmental plaintiffs alleged both substantive violations of the Federal Land Policy Management Act of 1976, 43 U.S.C. §§ 1701-1787 ("FLPMA") and procedural violations of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4370h. The Court observed, as a preliminary matter, that neither FLPMA nor NEPA[120] provide a private right of action.[121] Instead, the federal APA provides a private right of action for aggrieved parties harmed by "final agency action" in violation of FLPMA or NEPA. *Lujan I*, 497 U.S. at 882. The APA also waives sovereignty immunity.[122] Nevertheless, the Court rejected the lawsuit on standing grounds.

One commentator summarized the interaction between NEPA and the APA this way:

> NEPA contains no provisions providing either an explicit cause of action against federal agencies for alleged noncompliance with the statute or a basis for subject matter jurisdiction over such claims. It is therefore well

[120] Most NEPA litigation is APA-based judicial review of the agency action. In other instances, plaintiffs have sought to use NEPA as a private right of action to enforce conditions or promises made by developers during the course of NEPA review. This has not worked. NEPA is a procedural statute and does not contain a private right of action for this purpose. *E.g., Noe v. Metropolitan Atlanta Rapid Transit Authority*, 644 F.2d 434 (5th Cir. 1981); *City of Blue Ash v. McLucas*, 596 709 (6th Cir. 1979); *Kyle v. Texas Dep't of Trans.*, 2006 WL 3691204 (W.D. Tex 2006); Maria Gillen, *NEPA: Not a Federal Private Nuisance Statute*, 24 Natural Resources & Env't 52 (2010).

[121] Another frequently litigated federal statute that does not contain its own private right of action is the National Forest Management Act ("NFMA"). Scott v. United States, 2009 WL 482893 (D. Idaho 2009); *see Native Ecosystems Council v. United States*, 418 F.3d 953, 960 (9th Cir. 2005). In recent years, this act has given rise to a number of challenges to "travel plans" (road access decisions) issued by the various National Forests.

[122] "The Administrative Procedure Act, 5 U.S.C. § 702, waives immunity only for claims alleging that an official's actions "were unconstitutional or beyond statutory authority." *Hou Hawaiians v. Cayetano*, 183 F.3d 945, 947 (9th Cir. 1999) (citing *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir.1996)). "The APA generally waives the Federal Government's immunity from a suit 'seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.' 5 U.S.C. § 702." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2204 (2012) (Kagan, J.).

> established that NEPA provides no private right of action for violation of its provisions. As a result, a plaintiff alleging NEPA noncompliance must base the cause of action on the Administrative Procedure Act. The availability of review under the APA is based on a provision stating that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved within the meaning of a relevant statute, is entitled to judicial review thereof."

Daniel R. Mandelker, *NEPA Law and Litigation*, § 3:3.1 (2009) (footnotes omitted).

Note that while the federal Administrative Procedure Act waives sovereign immunity and creates a private right of action, it does not confer subject-matter jurisdiction. 2 Am. Jur. 2d, *Administrative Law* § 389 (2014). In federal court, jurisdiction is typically founded on the general federal-question jurisdiction of federal courts. 2 Am. Jur. 2d, *Administrative Law* §391 (2014).[123]

Note also that the federal Civil Rights Act (aka § 1983) provides an express private right of action. *Maine v. Thiboutot*, 448 U.S. 1 (1980). See discussion in section 24.CC at page 453 regarding use of § 1983 actions in land use cases.

The federal Declaratory Judgment Act, 28 U.S.C. § 2201 does not create a private right of action. *North Cnty. Communications Corp. v. California Catalog & Technology*, 594 F.3d 1149, 1154 (9th Cir. 2010); *Nationwide Mut. Ins. Co. v. Liberatore*, 408 F.3d 1158, 1161 (9th Cir. 2005).

The differences between the concepts of "jurisdiction," "cause of action," and "standing" were summarized in a footnote by the U.S. Supreme Court:

> Thus it may be said that jurisdiction is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case, *see Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 384, 4 S. Ct. 510, 512, 28 L. Ed. 462 (1884); *Montana-Dakota Utilities Co. v. Northwestern Public Serv. Co.*, 341 U.S. 246, 249, 71 S. Ct. 692, 694, 95 L. Ed. 912

[123] "Although the waiver of sovereign immunity found in the APA does not provide an independent grant of subject matter jurisdiction in the federal courts, the general federal-question jurisdictional statute, § 1331 of title 28 of the United States Code, confers authority upon the District Courts to review federal agency action, unless some other statute mandates exclusive jurisdiction in another forum." Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 Geo. Wash. L. Rev. 602, 617 (2003). In contrast, the Tucker Act and Little Tucker act waive sovereign immunity and grant jurisdiction (with respect to certain money claims against the United States), but do not create a cause of action.

> (1951); standing is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction, *see Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 2204, 45 L.Ed.2d 343 (1975); cause of action is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and relief is a question of the various remedies a federal court may make available. A plaintiff may have a cause of action even though he be entitled to no relief at all, as, for example, when a plaintiff sues for declaratory or injunctive relief although his case does not fulfill the "preconditions" for such equitable remedies. *See Trainer v. Hernandez*, 431 U.S. 434, 440-443, 97 S. Ct. 1911, 1916-1917, 52 L.Ed.2d 486 (1977).

Davis v. Passman, 442 U.S. 228, 239 n.18 (1979).

C. Deadline for seeking judicial review under the federal APA.

Unlike the Idaho Administrative Procedure Act (which requires that judicial review be sought within 28 days), the federal APA does not specify a deadline. "Where no time limit is specified in the applicable statute, the time for seeking review is subject only to the doctrine of laches." 2 Am. Jur. 2d, *Administrative Law* §508 at 467-68 (2014).

D. The ITCA does not provide a cause of action.

Fortunately, the issue does not arise often in the context of land use challenges in Idaho. First, Idaho courts have broad subject matter jurisdiction. Second, LLUPA expressly provides a private cause of action. Idaho Code §§ 67-6519(4) and 67-6521(1)(d). If that were not enough, the Idaho Administrative Procedure Act ("IAPA"), Idaho Code §§ 67-5201 to 67-5292, also provides a private right of action to persons challenging "agency" actions.

This private right of action issue would emerge, however, in the context of constitutional challenge to an allegedly illegal tax or fee that was not brought in the context of LLUPA or the APA. The Idaho Supreme Court has not addressed this, but it appears likely that there is an implied cause of action directly under the state Constitution, just as there is under the federal Constitution.

Although the ITCA waives sovereign immunity for tort claims, it does not create a new cause of action. Rather, the act simply removes the barrier to bringing otherwise valid tort claims against the government or a government employee. "The

Plaintiffs, then, must assert a tort under the common law or created by a separate statute in order to be eligible for relief. I.C. § 6–903(f)." *Stoddart v. Pocatello School Dist. #25*, 149 Idaho 679, 239 P.3d 784 (2010) (Horton, J.) (citing Idaho Code § 6-903(f) (now 6-903(6)) ("Nothing in this act shall enlarge or otherwise adversely affect the liability of an employee or a governmental entity.")).[124] In any event, it only applies to tort claims.

Likewise, Idaho Code § 50-219 (which expands the tort claim notice requirement to all damage claims against cities) does not create a cause of action. It is merely imposes a notice requirement.

Some specialized statutes authorize particular types of challenges.[125] But those statutes are not broad enough to support most constitutional taking claims based on allegedly illegal fees and taxes. Federal constitutional claims, of course, may be presented under § 1983.[126] But what about state constitutional challenges? To the authors' knowledge, the Idaho Supreme Court has not discussed this, particularly in the context of constitutional claims against cities.

In any event, what is clear is that illegal fee and tax cases are routinely litigated. So there must be a cause of action.

Many of these claims arise under LLUPA, the IAPA, or both. As noted, each of those statutes provide a cause of action against the government. In some instances, however, illegal fees and taxes are challenged in civil lawsuits rather than under the judicial review provisions of LLUPA and the IAPA.

There is, presumably, an implied cause of action for such claims under the Idaho Constitution itself. This would be a state counterpart to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). *Bivens* actions are actions brought directly under the U.S. Constitution, without any

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[124] The operative provision reads in pertinent part:

> Except as otherwise provided in this act, every governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment or duties . . . .

Idaho Code § 6-903(1) (emphasis supplied).

[125] For instance, the plaintiff in *Greenwade v. Idaho State Tax Comm'n*, 119 Idaho 501, 504-05, 808 P.2d 420, 423-24 (Ct. App. 1991) (Silak, J.) relied on Idaho Code § 63-3074, which authorizes certain actions against the Idaho State Tax Commission.

[126] If a party to a land use decision has been denied rights under the laws or Constitution of the United States by an entity acting under color of state law, he or she may bring an action under the Civil Rights Act of 1871, generally known as a "§ 1983 action." Section 1983 refers to the Civil Rights Act of 1871 also known as the Ku Klux Klan Act, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983). See discussion in section 24.CC at page 453 regarding use of § 1983 actions in land use cases.

authorizing legislation. In *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 314-15 (1987), the Court noted that federal taking claims may be brought directly under the Constitution.

Citing *First English* (which it referred to as *First Lutheran*), the Idaho Supreme Court recognized the principle that the takings clause of the Constitution is self-executing and impliedly provides a cause of action. *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 175 n.2, 108 P.3d 315, 322 n.2 (2004) (Eismann, J.). That observation, however, appears to be in the context of the federal taking claim. Presumably a similar principle authorizes suits under Idaho's constitutional provisions limiting the authority of local governments to tax.

The closest the Idaho Supreme Court appears to have gotten to the issue of whether the Idaho Constitution provides a cause of action is *Koch v. Canyon Cnty.*, 145 Idaho 158, 177 P.3d 372 (2008) (Eismann, C.J.). In *Koch*, the Court rejected an argument that plaintiffs lacked standing to challenge county's violation of a constitutional debt limitation: "For over one-hundred years this Court has entertained taxpayer or citizen challenges based upon that constitutional provision." *Koch*, 145 Idaho at 162, 177 P.3d at 376. "If this Court were to hold that taxpayers do not have standing to challenge the incurring of indebtedness or liability in violation of that specific constitutional provision, we would, in essence, be deleting that provision from the Constitution." *Koch*, 145 Idaho at 162, 177 P.3d at 376. Although this discussion arose in the context of standing, it would appear that, if the plaintiffs had standing, they also had a cause of action. (See further discussion of *Koch* in the chapter on taxpayer standing (section 18.E(1)(a)(ii) at page 216).

18. STANDING: WHO MAY BRING AN ACTION

A. The standing focuses on the person, not the merits of the claim.

Standing is a prerequisite of judicial review or other judicial action. While other legal doctrines address when to bring an appeal,[127] the law of "standing" addresses the question of who may initiate the litigation. "The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Miles v. Idaho Power Co.*, 778 P.2d 757, 763 (Idaho 1989) (Johnson, J.).[128] Another body of law dealing with "who" may litigate is the law of intervention.[129]

B. The federal constitutional foundation.

The federal law of standing derives from Article III of the federal constitution. Article III establishes federal courts, but these are not courts of general jurisdiction. Rather, the Constitution provides federal court jurisdiction that is limited to a list of specifically enumerated "Cases" and "Controversies." U.S. Const. art. III, § 2. Over the years, the federal courts have fashioned a complex body of constitutional law and prudential restraints describing the reach of this grant of judicial authority.

C. The Idaho Supreme Court has adopted principles of Article III standing notwithstanding that Idaho has no "case or controversy" provision.

Article III applies only to federal courts. Consequently, it is curious that the federal law of standing would apply at all in Idaho. Indeed, the U.S. Supreme Court consistently has stated that Article III limitations do not apply to state courts.[130]

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[127] For instance, the doctrines of exhaustion of administrative remedies, finality, primary jurisdiction and ripeness, all deal with "when" judicial review should occur.

[128] This is an oft-quoted statement. *E.g., Gifford v. West Ada Joint School Dist. #2*, 498 P.3d 1206, 1211 (2021) (Moeller, J.).

[129] The law of standing and the law governing the right to intervene both deal with the question of who may litigate. However, the two bodies of law are distinct. *Doe v. R*oe, 134 Idaho 760, 764, 9 P.3d 1226, 1230 (2000) (law of standing is "irrelevant" to determination of whether a statutory right of conditional intervention exists).

[130] "We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute." *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989) (Kennedy, J.).

The *ASARCO* plaintiffs were taxpayers and teachers challenging an Arizona statute that allows school lands to be leased for less than their full appraised value in violation of the Mexico-Arizona Enabling Act and Arizona's Constitution. They lacked Article III standing under long-

The question, then, is whether Idaho's Constitution contains a limitation of state court jurisdiction similar to Article III. It does not. Unlike federal courts, Idaho's courts are courts of general jurisdiction.[131] Accordingly, Idaho's Constitution contains no "case or controversy" limitation. Nevertheless, Idaho courts have embraced the federal jurisprudence of standing.[132] (This conclusion has been sharply criticized, without effect.[133])

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standing taxpayer-standing precedent because the injury they suffered was not particularized and was speculative. The U.S. Supreme Courts found that plaintiffs were not required to meet Article III standing, and affirmed the Arizona Supreme Court's ruling that the state statute violated federal law and the state Constitution.

[131] Idaho Const. art. V, § 2 ("judicial power of the state shall be vested in . . . a Supreme Court, district courts, and such other courts . . . ."); Idaho Const. art. V, § 20 ("The district court shall have original jurisdiction in all cases . . . ."); Idaho Const. art. V, § 1 ("Feigned issues are prohibited . . . .").

> Notably, Idaho's Constitution has no "case and controversy" clause like the federal Constitution. Rather, Idaho's Constitution speaks generally of the "judicial power," without defining its limits. Idaho Const. art. V, § 2. Furthermore, the Idaho Constitution empowers this Court to review any decision of the district courts. Idaho Const. art. V, § 9. And, the Legislature, exercising its limited authority to constitute inferior courts under Idaho Const. art. V, § 13, has directed the district courts to "hear [ ] and determin[e] all matters and causes arising under the laws of this state." I.C. § 1–701.

Wasden v. State Bd. Of Land Comm'rs ("*Wasden II*"), 153 Idaho 190, 280 P.3d 693 (2012) (J. Jones, J) (brackets original).

[132] "Idaho has adopted the constitutionally based federal justiciability standard." *State v. Philip Morris*, Inc., 158 Idaho 874, 881, 354 P.3d 187, 194 (2015) (Horton, J.) (quoting *ABC Agra, LLC v. Critical Access Grp., Inc.*, 156 Idaho 781, 783, 331 P.3d 523, 525 (2014)) (and citing *Koch v. Canyon Cnty*., 145 Idaho 158, 161, 177 P.3d 372, 375 (2008) ("When deciding whether a party has standing, we have looked to decisions of the United States Supreme Court for guidance.")).

The Idaho Supreme Court has cited such federal standing cases as *Valley Forge College v. Americans United*, 454 U.S. 464 (1982) (Rehnquist, J.) (cited in *Miles v. Idaho Power Co*., 778 P.2d 757, 763 (Idaho 1989) (Johnson, J.) and in *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002) (Trout, C.J.)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (Scalia, J.) (cited in *Young* at 105, 44 P.3d at 1159 and in *Boundary Backpackers v. Boundary Cnty.*, 128 Idaho 371, 383, 913 P.2d 1141,1153 (1996) (Johnson, J.)); *United States v. Students Challenging Regulatory Agency Procedures ("SCRAP")*, 412 U.S. 669 (1973) (Stewart, J.) (cited in *Miles* at 764); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978) (Burger, C.J.) (cited in *Miles*, 116 Idaho at 641, 778 P.2d at 763, in *Boundary Backpackers*, 128 Idaho at 382, 913 P.2d at 1152 (dissent by J. Schroeder), and in *Student Loan Fund of Idaho, Inc. v. Payette Cnty.*, 125 Idaho 824, 826, 875 P.2d 236, 238 (Ct. App. 1994) (Lansing, J.)).

[133] Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 340-41 (1993); Melinda K. Harm, "*Was The Lorax A Professional Outfitter and Guide? A Shift In Idaho's Standing Doctrine: Boundary*

Some decisions have spoken of standing as if the requirement were inherent in the judicial power.[134] More recently, the Idaho Supreme Court has come to describe its adoption of federal standing law as a "self-imposed constraint."

> When determining whether a party has standing, this Court has looked to United States Supreme Court decisions for guidance. *Koch v. Canyon Cnty.*, 145 Idaho 158, 161, 177 P.3d 372, 375 (2008). In fact, the origin of Idaho's standing is a self-imposed constraint adopted from federal practice, as there is no "case or controversy" clause or an analogous provision in the Idaho Constitution as there is in the United States Constitution.

Coeur d'Alene Tribe v. Denney, 161 Idaho 508, 513, 387 P.3d 761, 766 (2015) (Burdick, J.).[135]

The Court reaffirmed its embrace of federal standing law in *Tidwell v. Blaine County*, 2023 WL 6450936 (Idaho 2023) (Bevin, C.J.), over a strong dissent by Justices Stegner and Trout.

On the other hand, the Idaho courts have departed from some federal precedent that limits the standing of litigants. For example, the Idaho courts apparently have not embraced the zone of interests test (discussed in section 18.S at page 258). The only Idaho case to address the zone of interests test is *Idaho Branch Inc. of Associated Contractors of America, Inc. v. Nampa Highway Dist. No. 1*, 123

Backpackers v. Boundary Cnty. and Selkirk-Priest Basin Ass'n v. State," 1997 Idaho L. Rev 127 (1997).

[134] "It is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's jurisdiction must have standing." *Van Valkenburg v. Citizens for Term Limits*, 135 Idaho 121, 124, 15 P.3d 1129, 1132 (2000) (Silak, J.) (quotation repeated in *Young v. City of Ketchum*, 137 Idaho 102, 44 P.3d 1157 (2002) (Trout, C.J.) and *Haight v. Idaho Dep't of Transportation*, 163 Idaho 383, 391, 414 P.3d 205, 213 (2018) (Bevan, J.); "Standing is a fundamental prerequisite to invoking this Court's jurisdiction." *Noh v. Cenarrusa*, 137 Idaho 798, 800, 53 P.3d 1217, 1219 (2002). One of the few early decisions to acknowledging that Idaho's Constitution is different from Article III, is *Glengary-Gamlin Protective Ass'n v. Bird*, 106 Idaho 84, 675 P.2d 344 (Ct. App. 1983) (Burnett, J.). In that case, the Idaho Court of Appeals acknowledged that Idaho has no "case or controvery" provision, but proceeded to apply federal standing law anyway. "Although some elements of standing in the federal system are colored by the peculiar requirements of a 'case' or 'controversy' under the federal constitution, nevertheless, the Supreme Court's analyses of organizational standing are instructive here." *Glengary-Gamlin*, 106 Idaho at 87, 675 P.2d at 347.

[135] This description of standing as a "self-imposed constraint" that may be relaxed in rare cases has been repeated in *Employers Resource Management Co. v. Ronk*, 162 Idaho 774, 777, 405 P.3d 33, 36 (2017) (Horton, J.), *Westover v. Idaho Counties Risk Management Program*, 164 Idaho 385, 389, 430 P.3d 1284, 1288 (2018) (Horton, J.), and *Regan v. Denney*, slip op., (Idaho Feb. 5, 2019) (Burdick, C.J.).

Idaho 237, 242, 846 P.2d 239, 244 (Idaho App. 1993) (Swanstrom, J.), in which the Court of Appeals concluded that the Idaho Supreme Court has not adopted that prudential test.

Because the application of Article III precedent is a self-imposed constraint in Idaho, it may be relaxed or waived altogether in cases of constitutional import. See discussion of the "*Koch* exception" in section 18.F at page 240.

D. Standing is decided as a preliminary matter, without looking to the merits.

As a general principle, the law of standing does not look to the merits of the case.

"A party's standing to bring an action is an issue that is entirely separate from the issue of whether the party will prevail on the merits of the action." *Bagley v. Thomason*, 149 Idaho 799, 802, 241 P.3d 972, 975 (2010). "Standing is a preliminary question to be determined by this Court before reaching the merits of the case." *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). "The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Miles v. Idaho Power Co.*, 778 P.2d 757, 763 (Idaho 1989) (quoted in *Gifford v. West Ada Joint School Dist. #2*, 498 P.3d 1206, 1211 (2021)).

> The common background of these procedural questions is clear. Article III standing is treated as an issue of subject-matter jurisdiction. All of the sensitivities that surround subject-matter jurisdiction are evident. The tie to subject-matter jurisdiction also means that in most circumstances standing should be decided without asking whether a plaintiff has stated a valid claim on the merits, although the questions blend into one when the question is whether the plaintiff states a claim within the "zone of interests" protected by a statute.

Wright & Miller, *Raising the Issue*, 13B Fed. Prac. & Proc. Juris. § 3531.15 (3rd ed.) (footnotes omitted).

E. The basic constitutional requirements: Injury in fact, causation, and redressability

Justice Douglas once said, "Generalizations about standing to sue are largely worthless as such." *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970). The Idaho Supreme Court has observed that "the doctrine is imprecise and difficult to apply." *Young v. City of Ketchum*, 44 P.3d 1157, 1159 (Idaho 2002) (Trout, C.J.). "While the doctrine is easily stated, it is imprecise and

difficult in its application." *Miles v. Idaho Power Co.*, 778 P.2d 757, 763 (Idaho 1989) (Johnson, J.). While these cautionary notes are true, there are some basic principles that meaningfully can be articulated.

The constitutional requirements for standing boil down to three requirements: injury in fact, causation, and redressability.

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection . . . Third, it must be "likely," as opposed to "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife ("*Lujan II*"), 504 U.S. 555, 560 (1992) (Scalia, J.) (citations and footnotes omitted).

This statement or some variation of it is now recited at the outset of countless standing cases in Idaho.

> Under the traditional standing analysis, "the plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'like[lihood]' that the injury 'will be redressed by a favorable decision.'"

Tucker v. State, 162 Idaho 19, 394 P.3d 54 (2017) (Burdick, C.J.) (quotation marks original) (citing *State v. Philip Morris*, Inc., 158 Idaho 874, 881, 354 P.3d 187, 194 (2015) (Horton, J.)).

(1) Injury-in-fact

The underlying principle of standing and the core of the injury-in-fact requirement is that only those with a concrete stake in the outcome of a contest should be allowed to challenge agency action. Mere bystanders, no matter how emotionally involved or concerned they may be with the principles at stake, are not proper litigants. The Idaho Supreme Court (quoting the U.S. Supreme Court) summarized it this way:

> The essence of the standing inquiry is whether the party seeking to invoke the court's jurisdiction has "alleged such a personal stake in the outcome of the controversy as to assure the concrete adversariness which

> sharpens the presentation upon which the court so depends for illumination of difficult constitutional questions." As refined by subsequent reformation, this requirement of "personal stake" has come to be understood to require not only a "distinct palpable injury" to the plaintiff, but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct.

Miles v. Idaho Power Co., 778 P.2d 757, 763 (Idaho 1989) (Johnson, J.) (quoting *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72 (1978) (Burger, C.J.).

In *Martin v. Camas Cnty. ex rel. Bd. of Comm'rs.*, 150 Idaho 508, 513, 248 P.3d 1243, 1248 (2011) (Burdick, J.), the Court quoted the definition of "palpable" from *Black's Law Dictionary*: "'Palpable' is defined as '[e]asily perceptible, plain, obvious, readily visible, noticeable, patent, district, manifest."

"Injury in fact requires the injury to be 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical." *Employers Resource Management Co. v. Ronk*, 162 Idaho 774, 777, 405 P.3d 33, 36 (2017) (Horton, J.) (internal quotation marks omitted).

This oft-quoted statement encompasses two tests: (1) that the injury be particularized and (2) that it already has occurred or is imminent. These are discussed in turn below.

(a) The injury must be particularized

To be "concrete and particularized," the injury also must be different from that felt by the community at large. "But even if a showing can be made of an injury in fact, standing may be denied when the asserted harm is a generalized grievance shared by all or a large class of citizens." *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002) (Trout, C.J.).

The concept of particularized injury arises in many other contexts (*e.g.*, taxpayer standing, environmental injury, land use matters, etc.). These are discussed in the sections below.

(i) Proximity

In land use cases, the issue sometimes comes down to how close the plaintiff lives (or owns property) from the affected property.[136] Not surprisingly, the Idaho

[136] Local ordinances often include notice requirements for landowners within a set distance from the proposed action. These provisions should not be confused with standing requirements; they

Supreme Court has laid down no rule of thumb. However, the Court has made clear that proximity matters.

The role of proximity was summarized nicely by the Idaho Supreme Court in 2003:

> Proximity is a very important factor. . . . However, this Court will not look to a predetermined distance in deciding whether a property owner has, or does not have, standing to seek judicial review of a LLUPA decision.

Evans v. Teton Cnty., 139 Idaho 71, 75, 73 P.3d 84, 88 (2003) (Kidwell, J.).

In *Bopp v. City of Sandpoint*, 110 Idaho 488, 716 P.2d 1260 (1986) (Bakes, J.), the plaintiff challenged the city's vacation of a road, which facilitated construction of a shopping mall. The Court found that the plaintiff lacked standing because he owned no property adjacent to the road. "In this case if the appellant Bopp can be said to have suffered some injury, it is one which is not special or peculiar to him; rather, it is one generally shared by all residents of the City of Sandpoint alike." *Bopp*, 110 Idaho at 490, 716 P.2d at 1262.

In *Butters v. Hauser* ("*Butters II*"), 131 Idaho 498, 501, 960 P.2d 181, 184 (1998) (Walters, J.), the Court found that this homeowner had standing to challenge approval of a cell tower because "she owns land in close proximity to the tower; the tower looms over her land; and its physical invasiveness affects here enjoyment of her property." *Butters II*, 131 Idaho at 501, 960 P.2d at 184.

While proximity is important, proximity alone is not sufficient to confer standing. In *Rural Kootenai Organization, Inc. v. Bd. of Comm'rs, Kootenai Cnty.* ("*RKO*"), 133 Idaho 833, 841, 993 P.2d 596, 604 (2000) (Schroeder, J.), a homeowners group challenged the approval of a preliminary plat for a residential subdivision. Among other things, the homeowners complained that the Board's failure to provide notice of two meetings violated their due process rights. The Court held the homeowners lacked standing to raise this particular issue.

> Simply because RKO's members may own property near the proposed subdivision, the location of their property alone does not confer standing. . . .
>
> . . . RKO has not presented any evidence that any of its members are abutting or otherwise affected real property owners. RKO has failed to present any evidence of a peculiarized harm. Thus, RKO lacks standing to raise this issue.

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neither confer nor demarcate who has standing to litigate. *See*, *Evans v. Teton Cnty.*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003) (Kidwell, J.) (describing the county's 300 foot rule as "arbitrary.")

RKO, 133 Idaho at 841, 993 P.2d at 604.

RKO is a head-scratcher. The Court found that RKO lacked standing to raise one procedural issue, but allowed it to pursue all other issues. In denying standing, the Court relied on Idaho Code § 67-6509(b), which deals with comprehensive plan approvals and has no bearing on these proceedings. The Court appears to have acted *sua sponte*. The briefing makes no reference either to standing or to section 67-6509(b).

In *Davisco Foods Int'l, Inc. v. Gooding Cnty.*, 141 Idaho 784, 786-87, 118 P.3d 116, 118-19 (2005) (Schroeder, C.J.), the Court ruled that potential odor impacts from a wastewater treatment facility on a homeowner three and a half miles from the site could give rise to standing. This case, however, did not deal with judicial standing, but with the standing requirement imposed by a county ordinance for an appeal from the planning and zoning commission to the county commission. The dissent commented on the remarkable degree of deference accorded to the county by the majority: "Read as the Board and majority have read it, practically any allegation a landowner might advance would bestow the right to appeal a decision, whether or not the landowner has shown any reasonable factual basis for the allegation." *Davisco*, 141 Idaho at 793, 118 P.3d at 125. In *Davisco*, the landowners offered no evidence other than a mere expression of their fears that odors might result. The county commission and the Court found sufficient evidence of standing in the applicant's own expert testimony that odors could be detected at that distance only under theoretical, melt-down circumstances coupled with a failure of to enforce each of the rigorous special conditions to which the applicant had agreed to ensure there would be no detectible odors. It is unclear whether the Court will apply this reasoning to judicial standing cases. If it does, the proximity factor will be liberalized considerably.

In *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 148 P.3d 1247 (2006) (Burdick, J.), the Court held that a next door neighbor had standing to challenge a subdivision approval because his property value might be affected by the development of the subdivision.

> The Board argues that Cowan has failed to allege a distinct palpable injury or particularized harm he has suffered, but has instead only alleged generalized grievances. . . . In response, Cowan points out that he has demonstrated his land will be adversely affected and presented evidence that the proposed development would adversely impact his property rights and diminish his property value. This, he argues, is enough to demonstrate standing pursuant to *Evans v. Teton County*, 139 Idaho 71, 73 P.3d 84 (2003).

> Cowan has standing. In *Evans* this Court determined that in land use decisions, a party's standing depends on whether his or her property will be adversely affected by the land use decision. *See Evans*, 139 Idaho at 75, 73 P.3d at 88. This Court held "[t]he existence of real or potential harm is sufficient to challenge a land use decision." *Id*. at 76, 73 P.3d at 89. Like the appellants in *Evans* whose rural homes might be adversely affected by the development of a large resort development adjacent to their properties, Cowan's property might be adversely affected by the construction of Eagle's Nest adjacent to his property. Therefore, Cowan has standing to pursue his claims.

Cowan, 143 Idaho at 509-10, 148 P.3d at 1255-56 (quoting *Evans v. Teton Cnty.*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003) (Kidwell, J.)).

In *Ciszek v. Kootenai Cnty. Bd. of Comm'rs*, 151 Idaho 123, 254 P.3d 24 (2011) (J. Jones, J.), the Court found that property owners suffered particularized harm and therefore had standing to challenge a zoning change allowing additional mining adjacent to their property. "Like *Butters*, Ciszek lives on, and owns, property located adjacent to property that has been approved for activities that are substantially different from those which previously existed on the Agricultural Lots." *Ciszek*, 151 Idaho at 129, 254 P.3d at 30.

(ii) Taxpayers and ratepayers

The requirement of a particularized injury leads consistently to the conclusion that taxpayers may not challenge the legislative actions of government where the only injury is impact on the level of taxation.[137] *Thomson v. City of Lewiston*, 137 Idaho 473, 476-77, 50 P.3d 488, 491-92 (2002) (Trout, C.J.) (taxpayer lacked standing to challenge urban renewal plan); *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002) (Trout, C.J.) (taxpayers lacked standing to challenge city's payments to the Chamber of Commerce); *Greer v. Lewiston Golf and Country Club, Inc.*, 81 Idaho 393, 342 P.2d 719 (1959) (Taylor, J.) (taxpayers lacked standing to challenge disannexation of golf course). In such cases where the burden is "shared by a large class of citizens" is that the "taxpayer's remedy is through the political process." *Gallagher v. State*, 141 Idaho 665, 668, 115 P.3d 756, 759 (2005) (Burdick, J.) (cigarette smoker lacks standing to challenge cigarette tax).

In the seminal case of *Miles v. Idaho Power Co.*, 778 P.2d 757, 763 (Idaho 1989) (Johnson, J.), the Court articulated the requirement that the injury may not be a

[137] The Idaho cases discussed here are consistent with federal precedent finding that taxpayers lack standing. The seminal federal case is *Frothingham v. Mellon*, 262 U.S. 447 (1923).

"generalized grievance shared in substantially equal measure by all or a large class of citizens." The Court went on to find that Idaho Power Company ratepayers, though a large class, were sufficiently distinct from the general population to have standing to challenge the Swan Falls Agreement. "This is more than a generalized grievance. It is a specialized and peculiar injury, although it may affect a large class of individuals. The political process obviously will be more unkind to injured ratepayers seeking to change legislation affecting the whole state of Idaho than to injured citizens and taxpayers." *Miles*, 116 Idaho at 642, 778 P.2d at 764.

The *Miles* decision was followed a year later in *Alpert v. Boise Water Corp.*, 118 Idaho 136, 795 P.2d 298 (1990) (Boyle, J.). In *Alpert*, the Court found that customers of the water company had standing to challenge a franchise fee imposed by the City of Boise on the water company. Relying on *Miles*, the Court recognized that the class of ratepayers is nearly as large as the class of taxpayers in general, but nonetheless found standing. "To deny standing to persons who are in fact injured simply because many others are also injured would mean that the most injurious and widespread Government actions could be questioned by nobody." *Alpert*, 118 Idaho at 139, 795 P.2d at 301 (quoting *Miles*, 116 Idaho at 642, 778 P.2d at 764, which in turn was quoting *United States v. SCRAP*, 412 U.S. 699, 687-88 (1973)).[138]

Note, however, that the outcome can be different if the statute at issue gives standing to taxpayers. This was addressed in the related cases of *Fox v. Bd. of Cnty. Comm'rs, Boundary Cnty.*, 114 Idaho 940, 763 P.2d 313 (Ct. App. 1991) ("*Fox I*"), and *Fox v. Bd. of Cnty. Comm'rs, Boundary Cnty.*, 121 Idaho 686, 827 P.2d 699 (Ct. App. 1991) ("*Fox II*"). In those cases, a taxpayer's standing was expressly granted by Idaho Code § 31-1509[139] authorizing taxpayer challenges to liquor license decisions. The Court specifically held that the requirement that the plaintiff show a harm "peculiar to himself and different from that experienced by other taxpayers" was overridden by the statute. *Fox II*, 121 Idaho at 689, 827 P.2d at 702.

In *V-1 Oil Co. v. State Tax Comm'n*, 98 Idaho 140, 559 P.2d 756 (1977) (Bakes, J.), retail and wholesale gas dealers challenged a motor fuel excise tax,

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[138] In SCRAP, the U.S. Supreme Court said that it no bar to standing that many suffer the same injury: "[T]he challenged agency action in this case is applicable to substantially all of the Nation's railroads, and thus allegedly has an adverse environmental impact on all the natural resources of the country. . . . But we have already made it clear that standing is not to be denied simply because many people suffer the same injury. . . . To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion." *SCRAP*, 412 U.S. at 687-88 (quoted with approval by the majority in *Massachusetts v. EPA*, 549 U.S. 497, 527 n.24 (2007)).

[139] The statute then in effect was Idaho Code § 31-1509. It was entirely replaced in 1993. 1993 Idaho Sess. Laws, ch. 103, § 2. It was amended in 1994. Idaho Sess. Laws, ch. 241, § 1. In 1995, it was recodified to Idaho Code § 31-1506. 1995 Idaho Sess. Laws, ch. 61, § 11.

contending that the State Tax Commission imposed the tax three months before the authorizing statute became effective. The Court held that both the retail and wholesale dealers had standing to seek summary judgment on the legality of the tax. However, only the wholesale dealer had standing to seek a refund of the tax because, under the terms of the statute, it was the wholesale dealer upon whom the tax was imposed. Standing was not affected by whether that dealer then passed along the tax to the next purchaser by increasing the price of the good. In other words, standing is not a function of which party bears the ultimate economic burden of the excise tax. All that matters is where the legislature initially places the tax. Note that this case did not discuss the limitation on standing known as the "taxpayer standing" rule (which sometimes precludes taxpayers from challenging a tax). Rather, the decision took as a given that the persons paying the tax had standing to challenge it and receive a refund of illegal taxes.

In *Brewster v. City of Pocatello*, 768 P.2d 765 (Idaho 1988) (Shepard, J.), the Court allowed citizen taxpayers to challenge the constitutionality of a street fee imposed on all property owners. The Court's conclusion on standing was based entirely on pragmatic considerations:

> We further note that the intervenors' argument of standing, if adopted, would prevent any judicial review unless and until an occupier or owner of property would refuse to pay the "fee" and collection was sought to be enforced by the city in a collection action. In any event, we view the decision of the district court on the standing issue as meritorious. Under the peculiar factual circumstances of the instant case it is in the interest of both the city and the plaintiffs-respondents that the question be resolved. Otherwise judicial review of a vexing question to both the city and the plaintiffs-respondents will be avoided with the only likely resolution being in the form of collection actions which will eventually require the resolution of the same question presented in the case at bar. Hence, we hold that in the instant case, and its unusual circumstances, justice is best served by resolution of the question.

Brewster v. City of Pocatello at 766.

In so ruling, the *Brewster* Court both substantially relaxed the requirement of particularized injury and navigated around the general rule that injuries common to all citizens in the community are not sufficient to confer jurisdiction.

Brewster was distinguished in *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002) (Trout, C.J.). In *Young*, a group of taxpayer-citizens in

Ketchum sought a judicial declaration that the City's payment of proceeds from a local option tax to the local Chamber of Commerce in connection with a professional services contract was unconstitutional and in violation of statute. "Plaintiffs have made no allegations that such an injury is any different or distinct from any other citizen or property owner in the Ketchum area." *Young*, 137 Idaho at 105, 44 P.3d at 1160. The *Young* Court contrasted the Ketchum taxpayers with the Pocatello fee payers in *Brewster*. "The plaintiffs in Brewster could show a distinct palpable injury because the various fees were assessed against them personally." *Young*, 137 Idaho at 105, 104, 44 P.3d at 1160.

(iii) Business competition alone is insufficient to confer standing

In *Ameritel Inns, Inc. v. Greater Boise Auditorium Dist.*, 141 Idaho 849, 119 P.3d 624 (2005) (Eismann, J.), a hotel company who paid hotel taxes and a group of citizen taxpayers challenged advertising expenditures by the Greater Boise Auditorium District in support of a bond to expand the downtown auditorium. The Court found that the ordinary taxpayer-citizens had no standing to challenge the expenditures. "A citizen or taxpayer may not challenge a governmental enactment where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction." *Ameritel Inns*, 141 Idaho 849, 852, 119 P.3d at 627 (citing *Thomson v. City of Lewiston*, 137 Idaho 473, 50 P.3d 488 (2002) (Trout, C.J.). The Court also found inapplicable the special situation presented in *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 15 P.3d 1129 (2000) (Silak, J.) dealing with elections, because "[t]here is no allegation that the Auditorium District did anything that would invade the privacy and sanctity of the voting booth." *Ameritel Inns*, 141 Idaho 849, 852, 119 P.3d at 627.

However, the Court found that Ameritel Inns did have standing. It found that the hotel owner "is one of a limited number of taxpayers." *Ameritel Inns*, 141 Idaho 849, 853, 119 P.3d at 628 (citing *Miles v. Idaho Power Co.*, 778 P.2d 757, 763 (Idaho 1989) (Johnson, J.) and *Alpert v. Boise Water Corp.*, 795 P.2d 298 (Idaho 1990) (Boyle, J.). It found that the allegation that the expanded convention center would compete with the hotels' meeting facilities was "an allegation of a particularized injury that is not suffered alike by all citizens within the boundaries of the Auditorium District." *Ameritel Inns*, 141 Idaho 849, 852-53, 119 P.3d at 627-28. And it found that it made no difference that the hotels passed the tax on to their guests. "That fact does not mean that Ameritel is not the taxpayer. . . . The statute authorizing the Auditorium District to impose the tax does not require a hotel or motel to increase their prices by the amount of the tax. Therefore, the legal incidence of the tax falls upon the hotels and motels within the Auditorium District." *Ameritel Inns*, 141 Idaho 849, 853, 119 P.3d at 628 (citing *V-1 Oil Co. v. State Tax Comm'n*, 98 Idaho 140, 559 P.2d 756 (1977)).

In *Martin v. Camas Cnty. ex rel. Bd. of Comm'rs.*, 150 Idaho 508, 248 P.3d 1243 (2011) (Burdick, J.), the Court explained and distinguished *Ameritel Inns*. Martin urged that *Ameritel Inns* stood for "the proposition that an increase in competition may constitute particularized injury." *Martin*, 150 Idaho at 514, 248 P.3d at 1249. The *Martin Court* admonished: "This Court has never held that increased competition alone is sufficient to confer standing." *Martin*, 150 Idaho at 514, 248 P.3d at 1249. Instead, the *Martin* Court explained, Ameritel had standing because two other factors were aggregated with the increased competition (which, alone, would have been insufficient): "(1) Ameritel's status as a taxpayer whose tax funds were being used to advocate in favor of approving the bond, and (2) the imminent and certain increase in the taxes Ameritel would be subjected to if the bond were passed." *Martin*, 150 Idaho at 514, 248 P.3d at 1249 (emphasis original).

Again, in *Coeur d'Alene Tribe v. Denney*, 161 Idaho 508, 513, 387 P.3d 761, 766 (2015) (Burdick, J.), the Court found that the Tribe lacked Article III standing because "increased competition alone" (from historical horse-racing gambling machines) is an insufficient to confer standing. The Court nonetheless ruled on the merits of the matter, essentially waiving the standing requirement where relief is sought on a matter of significant constitutional importance and no other party would have standing to bring the claim.

(iv) "Dog in the manger" or "no dog in the fight" cases

Aesop's fable of the dog in the manger tells the tale of a jealous dog who has no use for something—oats or barley in Aesop's tale[140]—but spitefully prevents other animals from having it. A number of standing cases fit this story (though they may also fit other boxes, such as business competition or speculative causation).

In *State v. Philip Morris, Inc.*, 158 Idaho 874, 354 P.3d 187 (2015), the Court never reached the merits of Idaho's claim. Rather, it found that Idaho lacked standing because, based on the facts, in had no dog in the fight (to mix metaphors). In that case, Idaho complained that an arbitration panel improperly gave some tobacco settlement money to some other states. The Idaho Supreme Court affirmed the District Court's finding that "Idaho does not allege and cannot demonstrate that it has or will suffer any injury as a result of the Partial Award's implementation of the post–2003 provisions of the Term Sheet." *Philip Morris*, 158 Idaho at 879, 354 P.3d at 192. The Court found that Idaho had no standing to complain that another state was getting too much tobacco money, when that had no impact on how much Idaho would receive. "[T]here is no threat to Idaho's claim to its share of funds in the

[140] "People frequently begrudge something to others that they themselves cannot enjoy. Even though it does them no good, they won't let others have it." The story of the envious dog, Steinhöwel's *Esopus* (1476) (a collection of Aesop's Fables). The parable is alluded to in Saying 102 of the apocryphal Gospel of Thomas in the New Testament.

DPA. . . . Simply put, the State's failure to receive funds to which it is not entitled to under the MSA does not constitute injury." *Philip Morris*, 158 Idaho at 882-83, 354 P.3d at 195-96.[141]

Another "dog in the manger" case is *Martin v. Camas Cnty. ex rel. Bd. of Comm'rs*, 150 Idaho 508, 509, 248 P.3d 1243, 1244 (2011). Like many standing cases, *Martin* is a business competition case. It involved a landowner/developer challenged zoning ordinances that upzoned neighboring properties. The Court found that Martin lacked standing because the upzoning of someone else's property did not impair his ability to develop his own property. "Martin has failed to show that he has suffered or is likely to suffer any injury; he merely speculates that increased competition will decrease the future value of his property. . . . Martin offers no argument that any neighboring properties which have been upzoned are being developed in such a way that Martin will be injured." *Martin*, 150 Idaho at 515, 248 P.3d at 1250.

(v) Injury based on environmental harm

In *Boundary Backpackers v. Boundary Cnty.*, 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996) (Johnson, J.), three environmental groups and 18 individuals sued the county challenging an ordinance that purported to extent control over public lands by requiring federal agencies to comply with a county land use policy. The Court rejected standing by all twenty-one of the plaintiffs save one, a commercial outfitter and guide. The guide's affidavit asserted that the challenged county ordinance, if enforced, would deprive him of access to a substantial portion of the open space he used for his guiding business. With little explanation (other than the observation that this qualified as an expert opinion), the Court declared that this affidavit was "an ample foundation to support Krmpotich's concluding statement of the injury he will suffer from the enforcement of the ordinance." *Boundary Backpackers*, 128 Idaho at 375, 913 P.2d at 1145. The Court offered no explanation as to what was inadequate about the other plaintiffs' standing. One is left to guess that they may have relied on mere aesthetic enjoyment, a conclusion that seems to have been confirmed in litigation involving the Selkirk-Priest Basin Association.

In *Selkirk-Priest Basin Ass'n v. State ex rel. Andrus* ("*Selkirk I*"), 127 Idaho 239, 241, 899 P.2d 949, 951 (1995) (McDevitt, C.J.), two environmental groups[142] sued the State Land Board over a timber sale in the Trapper Creek watershed above Priest Lake. They asserted standing based on (1) the interest held by their children and grandchildren in the school land trusts created by Idaho Const. art. IX, §§ 4, 8

[141] We offer no opinion as to whether Idaho's claim deserved the treatment it received. What is clear is that the Court perceived that Idaho had nothing to gain by overturning the award to the other states.

[142] The two groups were Selkirk-Priest Basin Association, Inc. ("SPBA") and Idaho Environmental Council ("IEC").

and (2) their environmental interest in the public trust in navigable waters. The Court found the environmental groups had no standing as to the first, because only schools and school districts are beneficiaries of those constitutional trusts.[143] In contrast, the Court found the environmental groups survived summary judgment in establishing standing to enforce the public trust based on a showing of environmental injury to waters below the high water mark.

The only injury asserted under the environmental groups' Article IX constitutional claim was that of injury to their members as parents and grandparents of school children.[144] They might have asserted environmental injury as a basis for standing in their constitutional challenge, too. But, for some reason, they did not. Their assertion of environmental injury was made only with respect to their public trust argument.[145] The Court found this assertion of injury to the public trust in submerged lands was sufficient.[146]

Selkirk-Priest Basin Ass'n v. State el rel. Batt ("*Selkirk II*"), 128 Idaho 831, 834, 919 P.2d 1032 (1996) (Silak, J.) concerned a different timber sale on state endowment lands.[147] SPBA challenged two recently adopted statutes aimed at restricting judicial review of timber sales. It also sued under the IAPA alleging procedural and substantive violations, among them the Land Board's "failure to

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[143] "Neither environmental group represents a single school or school district. Consequently, the district court correctly ruled that the environmental groups lack the standing necessary to challenge the administration of school endowment lands trust assets." *Selkirk I*, 127 Idaho at 242, 899 P.2d at 952.

[144] "SPBA and IEC assert associational standing on behalf of their members as beneficiaries of the common school lands trust established by art. IX, § 8 of the Idaho Constitution." Opening Brief in *Selkirk I*, 1994 WL 16179832, at *18.

[145] "The public trust doctrine applies to this case because Trapper Creek is a navigable stream. This Court has consistently recognized the standing of environmental groups or associations of users of public lands to bring an action to protect public trust resources." Opening Brief in *Selkirk I*, 1994 WL 16179832, at *46.

[146] "Accordingly, we reverse the district court's ruling granting summary judgment in favor of the Land Board on the environmental groups' claim brought under the public trust doctrine only as it relates to public trust resources below the natural high water mark of Trapper Creek." *Selkirk I*, 127 Idaho at 245, 899 P.2d at 955.

Curiously, the *Selkirk I* decision contained no discussion of whether the environmental injury to SPBA and IEC was a particularized or a generalized injury. Indeed, the associations' affidavits showed only (1) the stream was navigable and (2) it was environmentally damaged. The affidavits quoted by the Court offered no claim that members of the associations were affected by the environmental damage. For some reason, that was sufficient in *Selkirk I*, while even more specific affidavits were not sufficient in *Selkirk II*.

[147] In *Selkirk I*, there were two plaintiffs, SPBA and IEC. Only SPBA participated in *Selkirk II*. In *Selkirk I*, the environmental groups challenged the Lower Green Bonnet timber sale in the Trapper Creek drainage. In *Selkirk II*, SPBA challenged the Bugle Ridge timber sale. Both were in the vicinity of Priest Lake.

manage endowment lands for long-term forest productivity and maximum long-term financial return." SPBA's Opening Brief in *Selkirk II*, 1995 WL 17199658 at *8. This is the same Article IX constitutional claim pressed in *Selkirk I*.

Plaintiffs in *Selkirk I* were represented by different counsel than represented SPBA in *Selkirk II*, and they took different approaches to standing. In *Selkirk II*, SPBA abandoned its contention that it had standing as a school lands beneficiary and instead asserted standing on grounds of environmental injury.[148]

In *Selkirk-Priest Basin Ass'n v. State el rel. Batt* ("*Selkirk II*"), 128 Idaho 831, 834, 919 P.2d 1032 (1996) (Silak, J.), an environmental group, Selkirk-Priest Basin Association ("SPBA"), challenged a different timber sale on state endowment lands.[149] SPBA challenged two recently adopted statutes aimed at restricting judicial review of timber sales. It also sued under the IAPA alleging procedural and substantive violations, among them the Land Board's "failure to manage endowment lands for long-term forest productivity and maximum long-term financial return." SPBA's Opening Brief in *Selkirk II*, 1995 WL 17199658 at *8. This is the same constitutional claim pressed in *Selkirk I*. This time, however, SPBA set up its assertion of standing solely on grounds of environmental injury.[150]

The *Selkirk II* Court rejected the environmental injury grounds for standing on the basis that injury was too generalized.[151]

> The injury suffered by SPBA's members is at best a generalized grievance distinguishable from the injury suffered by the professional guide in *Boundary Backpackers*. SPBA's affidavits do not establish a

[148] "[The *Selkirk I*] opinion establishes that the lower court properly denied standing on that [trust beneficiary] basis. Yet SPBA also alleged standing on other grounds as well, including injury to its members' recreational and aesthetic uses of the area." Opening Brief in *Selkirk II*, 1995 WL 17199658, at *11.

[149] In *Selkirk I*, there were two plaintiffs, SPBA and the Idaho Environmental Council. Only SPBA participated in *Selkirk II*. In *Selkirk I*, the environmental groups challenged the Lower Green Bonnet timber sale in the Trapper Creek drainage. In *Selkirk II*, SPBA challenged the Bugle Ridge timber sale. Both were in the vicinity of Priest Lake in north Idaho. Plaintiffs in *Selkirk I* were represented by different counsel than represented SPBA in *Selkirk II*, and they took different approaches to standing.

[150] "[The *Selkirk I*] opinion establishes that the lower court properly denied standing on that [trust beneficiary] basis. Yet SPBA also alleged standing on other grounds as well, including injury to its members' recreational and aesthetic uses of the area." SPBA's Opening Brief in *Selkirk II*, 1995 WL 17199658, at *11.

[151] Oddly, the *Selkirk II* Court made no attempt to reconcile its characterization of SPBA's injury as "generalized" with the holding in *Selkirk I* that the same environmental injury was sufficient to establish standing for purposes of the public trust, at least at the summary judgment stage.

> peculiar or personal injury that is different than that suffered by any other member of the public. The affidavits indicate the members use the area for hiking and berry-picking and that such use is occasional at best, with the most regular contact being one member who visits the area two weeks out of the year. We do not believe that the members' occasional use of the area for recreational or aesthetic enjoyment creates a particularized injury such that SPBA's members have a "distinct palpable injury" not shared in substantially equal measure by all or a large class of citizens.

Selkirk II, 128 Idaho at 834, 919 P.2d at 1035.[152]

Boundary Backpackers and *Selkirk II* set a particularly high bar for environmental groups, and a lower one for those who base standing on economic impact.[153] Their message seems to be that occasional use of public land for mere aesthetic enjoyment—something that, apparently, everybody does—is too generalized of an interest on which to base standing.

The Idaho standard established by the *Boundary Backpackers* and *Selkirk* cases stands in sharp contrast to the federal standard. Cases like *Lujan v. Nat'l Wildlife Fed'n* ("*Lujan I*"), 497 U.S. 871 (1990) (Scalia, J) and *Lujan v. Defenders of Wildlife* ("*Lujan II*"), 504 U.S. 555, 560 (1992) (Scalia, J.) (see discussion in section 18.E(1)(a)(x) at page 230) require environmental plaintiffs to provide considerable specificity in their affidavits of injury. (For example, affidavits showing stating that members recreate "in the vicinity" of the affected area is insufficiently precise. *Lujan I*.) However, so long as that evidentiary foundation is laid that members regularly use the affected land for recreational purposes, the federal courts have not tossed out environmental plaintiffs simply because their injury is shared by many. Yet that is what the Idaho courts have done. This is a strange Idaho aberration.[154]

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[152] The *Selkirk II* Court then rejected the associations' two remaining standing theories. First, it said the broad grant of judicial review under the IAPA, Idaho Code § 67-5270, is foreclosed by another statute expressly precluding judicial review of timber sales. Second, it said that Idaho's Declaratory Judgment Act does not confer standing.

[153] The decision was thoughtfully and forcefully criticized in Melinda K. Harm, "*Was The Lorax A Professional Outfitter and Guide? A Shift In Idaho's Standing Doctrine: Boundary Backpackers v. Boundary Cnty. and Selkirk-Priest Basin Ass'n v. State*," 1997 Idaho L. Rev 127 (1997).

[154] The *Boundary Backpackers* and *Selkirk* decisions do not even mention these federal cases (though *Lujan II* is discussed in Justice Schroeder's dissent to *Boundary Backpackers*).

(vi) Injury in endowment land cases

Two cases arising in the 1990s dealt with challenges by environmental groups to timber sales, each alleging violations of the fiduciary duties of the Land Board. *Selkirk-Priest Basin Ass'n v. State ex rel. Andrus* ("*Selkirk I*"), 127 Idaho 239, 241, 899 P.2d 949, 951 (1995) (McDevitt, C.J.) and *Selkirk-Priest Basin Ass'n v. State el rel. Batt* ("*Selkirk II*"), 128 Idaho 831, 834, 919 P.2d 1032 (1996) (Silak, J.). These cases are discussed above.

Here is the important part: Even though SPBA's claim of standing as a trust beneficiary was rejected in *Selkirk I* and abandoned in *Selkirk II*, the *Selkirk II* Court entertained the environmental injury standing allegation. Indeed, it did so even though SPBA continued to press its substantive argument that the timber sale violated the constitutional mandate to maximize long-term financial return.[155] Although the Court ultimately found that this plaintiff's environmental injury was too generalized to support standing, the decision shows that the proper plaintiff could establish standing to mount a constitutional challenge to the administration of the endowment trust lands on grounds other than being a trust beneficiary.[156] In other words, *Selkirk II* makes clear that, even though SPBA failed to show a sufficiently particularized injury, it is possible to establish standing to challenge violations of the Idaho Const. art. IX, § 8 by showing a particularized injury other than being a trust beneficiary.

It is hardly surprising that standing may be established for injuries unrelated the purpose of the constitutional or statutory violation. Consider the Idaho Supreme

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[155] The retention of the constitutional claim is evident in the decision itself. "[I]n this case we are asked to determine whether the alleged injury to SPBA's members' recreational and aesthetic use of land confers upon them standing to challenge the administration of the endowment trust lands." *Selkirk II*, 128 Idaho at 833, 919 P.2d at 1034.

"SPBA appeared before the Land Board challenging the sale's compliance with trust duties and various environmental laws." *Selkirk II*, 128 Idaho at 831, 919 P.2d at 1033. This constitutional claim is also identified in SPBA's briefing. "The third cause of action sets forth SPBA's challenges to the Bugle Ridge sale under the Idaho APA. . . . The substantive claims center on the Defendants' . . . failure to manage endowment lands for long-term forest productivity and maximum long-term financial return." SPBA's Opening Brief in *Selkirk II*, 1995 WL 17199658 at *8.

[156] This holding in *Selkirk II* is not at odds with the holding in *Selkirk I*. In *Selkirk I*, the Court rejected the environmental plaintiffs' standing based their status as trust beneficiaries, but allowed them to pursue their public trust claim based on environmental injury. Why weren't they allowed to pursue both claims based on environmental injury? Because they did not frame their case that way. For unknown reasons, they *Selkirk I* lawyers (who are different than the *Selkirk II* lawyer) alleged standing for their constitutional challenge solely on the plaintiffs' trust beneficiary status, while alleging separate standing grounds for their public trust claim. It was not until *Selkirk II* (and new legal counsel) that SPBA suggested that standing for its "maximum financial return" constitutional challenge could be premised on environmental injury.

Court's ruling in *AmeriTel Inns, Inc. v. Greater Boise Auditorium Dist*., 141 Idaho 849, 119 P.3d 624 (2005) (Eismann, J.). In that case, the Court found that a hotel company who paid hotel taxes had standing to challenge advertising expenditures by the Greater Boise Auditorium District ("GBAD") in support of a bond to expand its downtown auditorium. AmeriTel contended that this use of funds was a violation of GBAD's responsibility to use its funds solely for authorized purposes. AmeriTel was not an intended beneficiary of statutory constraints imposed on GBAD. Its injury was based on business competition—unrelated to the legislative constraints on GBAD's spending. That, combined with other factors, was sufficient to establish standing.[157] In other words, being a beneficiary of a trust or other obligations is one way to establish standing. But it is not the only way. The particularized injury need may or may not be related to the statutory or constitutional violation alleged.

(vii) Injury in political cases

In *Van Valkenburg v. Citizens for Term Limits*, 135 Idaho 121, 125, 15 P.3d 1129, 1133 (2000) (Silak, J.) the Court distinguished *Selkirk II* (with little explanation). In *Van Valkenburg*, four individuals challenged an Idaho statute, Idaho Code § 34-907B, that required the Secretary of State to note on the ballot whether Idaho candidates for U.S. Congress had or had not signed a term limits pledge. Idaho's Secretary of State challenged the standing of the petitioners on the grounds that any injury they suffered was no different from the injury suffered by any other Idaho citizen. The Court disagreed. It found that the petitioners suffered a "distinct injury" because "[t]hose who support the specific term limits pledge contained in the law are not injured by the use of the ballot legend, and it in fact benefits those who support the term limits pledge by increasing the likelihood their candidates will be elected." *Van Valkenburg*, 135 Idaho at 125, 15 P.3d at 1133.

Troutner v. Kempthorne, 142 Idaho 389, 128 P.3d 926 (2006) is seemingly at odds with *Van Valkenburg*. In *Troutner*, the Court ruled that two members of the Democratic Party lacked standing to challenge the appointment of a Republican to the Idaho Judicial Council. The plaintiffs complained that the appointment of a fourth Republican violated a statutory requirement that no more than three members of the council be of the same party. The Court found: "Neither of the Plaintiffs had asked to be nominated to the Judicial Council vacancy filled by Reberger. . . . Even if a court removed Reberger, there is no requirement that the Governor consider the Plaintiffs or any other Democrat for the position." *Troutner*, 142 Idaho at 392, 128 P.3d at 929. If the Court's point was that the plaintiffs' injury was speculative, that

[157] In *Martin v. Camas Cnty. ex rel. Bd. of Comm'rs.*, 150 Idaho 508, 514, 248 P.3d 1243, 1249 (2011) (Burdick, J.), the Court explained that Ameritel had standing because two other factors were aggregated with the increased competition (which, alone, would have been insufficient): "(1) Ameritel's status as a taxpayer whose tax funds were being used to advocate in favor of approving the bond, and (2) the imminent and certain increase in the taxes Ameritel would be subjected to if the bond were passed."

would make sense. The Court confused the matter, however, by describing this as a "lack of any distinct and palpable injury." *Troutner*, 142 Idaho at 393, 128 P.3d at 930.[158]

(viii) Injury based on procedural violations

Where the injury asserted is procedural in nature, such as a violation of NEPA, the rules are not fundamentally different:

> We have recognized that our analysis of Article III standing is "not fundamentally changed" by the fact that a petitioner asserts a "procedural," rather than a "substantive" injury. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004). In a "procedural injury" case:
>
> > to show a cognizable injury in fact, [a plaintiff] must allege ... that (1) the [agency] violated certain procedural rules; (2) these rules protect [a plaintiff's] concrete interests; and (3) it is reasonably probable that the challenged action will threaten their concrete interests.
>
> *Id*. (quoting *Citizens for Better Forestry v. U.S. Dept. of Agric*., 341 F.3d 961, 969-70 (9th Cir. 2003)) (alterations in original). "[A] cognizable procedural injury exists when a plaintiff alleges that a proper EIS has not been prepared under [NEPA] when the plaintiff also alleges a 'concrete' interest-such as an aesthetic or recreational interest-that is threatened by the proposed action." *Id*. (citing *Sierra Club v. Morton*, 405 U.S. 727, 738, 92 S. Ct. 1361, 31 L.Ed.2d 636 (1972)). The "concrete interest" test has been described "as requiring a 'geographic nexus' between the individual asserting the claim and the location suffering an environmental impact." *Ashley Creek Phosphate Co. v. Norton*, 420

[158] A concurring opinion by Justice Jim Jones pointed out that the plaintiffs missed the boat by framing the standing argument in terms of being denied the chance to serve on the council (which was speculative). The injury they should have alleged was the frustration of the statute's goal of preventing "a concentration of power by any one party." *Troutner*, 142 Idaho at 397, 128 P.3d at 934. "Any of those [minority] parties would obviously have a dog in this fight and would have standing to pursue it." Justice Jim Jones and the majority agreed, however, that the lawsuit lacked merit because one of the four Republican appointees no longer counts himself a member of that party.

> F.3d 934, 938 (9th Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3545 (U.S. Jan. 19, 2006) (No. 05-1209) (quoting *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001)).

Nuclear Information and Resource Service v. NRC, 457 F.3d 941, 949-50 (9th Cir. 2006).

A special case arises, however, where the plaintiff is a local governmental entity. In *Douglas Cnty. v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the Ninth Circuit found that a county had "zone of interests" standing based on a provision according procedural rights to local agencies:

> The County has been "accorded a procedural right" because NEPA provides that "local agencies, which are authorized to develop and enforce environmental standards" may comment on the proposed federal action. 42 U.S.C. § 4332(2)(C). The County is such a local agency because an Oregon Statute authorizes counties to "[p]repare, adopt, amend, and revise" land management plans that contain environmental standards. Or. Rev. Stat. § 197.175 (1993); see also Or. Admin. R. 660-06-000.

Douglas County, 48 F.3d at 1501.

(ix) A plaintiff is not required to submit proof of standing unless standing is challenged or the court requires further clarity or evidence.

The law governing when further evidence or clarification of standing allegations may be required was summed up in *Glengary-Gamlin Protective Ass'n, Inc. v. Bird*, 106 Idaho 84, 88, 675 P.2d 344, 348 (Ct. App. 1983) (Burnett, J.).

> In determining whether these tests have been satisfied, a court should examine the pleadings and any supplementary materials filed by the organization.
>
> For purposes of ruling on a motion to dismiss [a complaint] for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. [Citation omitted.] At the same time, it is within the trial court's power to allow or to require the

> plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.

Glengary-Gamlin, 106 Idaho at 88, 674 P.2d at 348 (brackets original) (quoting *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975)).

Two years later, in *Lujan v. Defenders of Wildlife* ("*Lujan II*"), 504 U.S. 555 (1992) (Scalia, J.), the Supreme Court summarized the rules governing the increasing evidentiary showing required at each stage of the proceeding:

> Since they [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial."

Lujan II, 504 U.S. at 561 (first brackets added; second brackets original) (quoting *Lujan v. Nat'l Wildlife Fed'n* ("*Lujan I*"), 497 U.S. 871, 889 (1990)).[159]

[159] A federal district court took *Lujan II* a step further:

> Plaintiff is correct that extra-record declarations may be used and, indeed, are required at the summary judgment stage to establish standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992) (noting that, at the summary judgment stage, a plaintiff 'must set forth by affidavit or other evidence specific facts' to demonstrate standing). Although

(x) How much specificity (geographic nexus) is required in pleading and affidavits

Sierra Club v. Morton, 405 U.S. 727 (1972), was the first Supreme Court case to address the question of how specific the plaintiff's allegations must be to survive a standing challenge. Sierra Club challenged a ski development in the Mineral King Valley in the Sierra Nevada Mountains, but premised its complaint on the club's general interest and involvement in the issue, specifically declining to make specific allegations that its members used the area.[160] The Court found this was not enough. "But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club*, 405 U.S. at 734-35. "It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. But a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." *Sierra Club*, 405 U.S. at 739. Ever since, plaintiffs have been careful to plead standing. This section addresses procedural questions regarding how the sufficiency of such pleadings and supporting affidavits may be challenged.

Having established that the plaintiff must demonstrate its use of the resource at issue, the question becomes how specifically that must be pled and how specifically it must be supported by evidence. The latter depends on the stage of the proceeding. A defendant may challenge a plaintiff's standing at the pleading stage by moving to dismiss or by motion for summary judgment. "In either case, the court

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> neither Defendants nor the Miners have contested Plaintiff's standing, to the extent that the Soto Declaration serves to establish standing, it is permissible. *Id.*

Karuk Tribe of California v. U.S. Forest Serv., 379 F. Supp. 2d 1071, 1088 (N.D. Cal. 2005), *rehearing en banc granted*, 658 F.3d 953 (9th Cir. 2011)

Both *Lujan I* and *Lujan II* dealt with motions for summary judgment filed by federal defendants challenging the standing of plaintiff environmental groups. Although the plaintiffs carried the burden of proof and were obligated to respond to these motions with affidavits (or declarations) showing their standing, there is no requirement that they anticipate such a motion and file affidavits in advance of a challenge. Indeed, Rule 56 and *Lujan I*, 487 U.S. at 894-98, make very clear that timely affidavits or declarations may, and must be, filed in response to such a motion for summary judgment. The federal district court's conclusion in *Karuk Tribe* that plaintiffs are entitled to file declarations attesting to their standing in the absence of a standing challenge does not follow from any rule or precedent and makes no sense. It may be that such voluntary declarations are harmless (and perhaps they were in *Karuk Tribe*), but the perceived "right" to file them should not serve to overcome limitations of supplementing the record on appeal.

[160] This was a test in case in which Sierra Club tested the limits of standing and lost. It could easily have plead specific facts regarding how its members used the particular area at issue. But it refused to do so, hoping to establish the general principle that concern with an environmental problem, rather than specific use of the resource, is the test. The strategy backfired.

must construe the facts alleged in the complaint that support standing in favor of the plaintiff, but the question is how specific the plaintiff's pleading must be." Daniel R. Mandelker, *NEPA Law and Litigation*, § 4:10 (2009).

In *United States v. Students Challenging Regulatory Agency Procedures ("SCRAP")*, 412 U.S. 669 (1973) (Stewart, J.),[161] the Court held that in a motion to dismiss on standing grounds, the allegations will be taken as true. The Court said that if the federal defendant believed the pleadings were a "sham," it should have taken steps to show this. "If the railroads thought that it was necessary to take evidence, or if they believed summary judgment was appropriate, they could have moved for such relief." *SCRAP*, 412 U.S. at 690 n. 15.[162] In other words, the plaintiff may rest on a well-pleaded complaint in response to a motion for summary judgment, but may be required to provide greater specificity as well as supporting evidence at summary judgment.

Such was the case in *Lujan v. Nat'l Wildlife Fed'n* (*"Lujan I"*), 497 U.S. 871 (1990) (Scalia, J.).[163] In this case, the Court rejected NWF's standing because the affidavits supporting standing were insufficiently specific. NWF had challenged the Bureau of Land Management's "land withdrawal review program" in which the government removed restrictive classifications on million acres of public land

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[161] In *SCRAP*, the plaintiff organization was formed by five law students who sought to challenge an order by the Interstate Commerce Commission allowing railroads to raise their rates. SCRAP contended that the rate increase would discourage recycling (by increasing shipping costs) thus harming forests, rivers, and the air used by members of SCRAP. SCRAP alleged that the order was defective because the government failed to prepare an EIS on the rate increase.

[162] In subsequent cases, the Supreme Court repeated and elaborated on the point first made in *SCRAP*. "Such a complaint withstood a motion to dismiss, although it might not have survived challenge on a motion for summary judgment." *Simon v. Kentucky Welfare Rights Organization*, 426 U.S. 26, 45, n. 25 (1976). In 1988, the Ninth Circuit cited back to the *SCRAP* footnote quoted above as well as the *Simon* case: "But in a critical footnote, the *SCRAP* court acknowledged that on a motion for summary judgment plaintiff might have had to show injury with greater specificity, *i.e.*, to name the specific forests that it uses and enjoys that would be affected by the challenged action. And the Court has since reiterated that SCRAP indeed might have come out differently had it been decided on a motion for summary judgment. In sum, while a motion to dismiss may be decided on the pleadings alone, construed liberally in favor of the plaintiff, a motion for summary judgment by definition entails an opportunity for a supplementation of the record, and accordingly a greater showing is demanded of the plaintiff." *Sierra Club v. Marsh*, 701 F. Supp. 886 (D. Me. 1988) (citations to *SCRAP* and *Simon* omitted).

[163] This case has a convoluted history. Initially, the federal defendant filed a motion to dismiss for lack of standing. Both the district court and the court of appeals found that NWF's pleadings and two affidavits were sufficient to survive the motion to dismiss. On remand, the district court took up a pending motion for summary judgment, also challenging standing. This time the district court found the two affidavits were insufficient (and refused to allow additional affidavits). The court of appeals reversed, and the matter then went to the Supreme Court on a writ of certiorari.

opening them up to mining claims and oil and gas leasing.[164] The Court ruled that when a plaintiff is defending a summary judgment standing challenge, he or she must show specific facts to establish standing. The affidavits here fell short because they only alleged that the individuals used lands somewhere in the vicinity of the lands affected by the government's action.[165] In one of the affidavits, for example, the National Wildlife Federation member claimed use "in the vicinity" of an area that itself covered 5.5 million acres. *Lujan I*, 497 U.S. at 887.[166]

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[164] In the first round of litigation, the district court granted a preliminary injunction and rejected the government's motion to dismiss on standing grounds. *Nat'l Wildlife Fed'n v. Burford*, 676 F. Supp. 271 (1985). On appeal, the court of appeals affirmed. *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305 (1987). Because the issue, at that time, was framed by the government's motion to dismiss, the appeals court applied a standard generous to the plaintiff in which all allegations are accepted as true and the complaint is construed in favor of NWF. The appeals court did mention, however, that two affidavits filed by NWF subsequent to issuance of the preliminary injunction reinforced the conclusion on standing. On remand, NWF sought a permanent injunction, and both parties filed motions for summary judgment. This time the district court applied a different standard, noting that in a motion for summary judgment (where the court may weigh the evidence to some extent necessary to determine whether material facts are in dispute), the plaintiff "might have to show injury with greater specificity." *Nat'l Wildlife Fed'n v. Burford*, 699 F. Supp. 327, 329 (1988). The district court found the two affidavits offered by NWF were insufficiently specific, because they merely recited that members of the organization used lands "in the vicinity" of those affected by the government's actions. The court of appeals reversed. *Nat'l Wildlife Fed'n v. Burford*, 878 F.2d 422 (1989). The U.S. Supreme Court reversed again, siding with the district court. In a motion for summary judgment, the Court said the burden shifts to the plaintiff to show "specific facts" to controvert the claim of no standing. The Court both distinguished and criticized *SCRAP*: "The *SCRAP* opinion, whose expansive expression of what would suffice for § 702 [APA] review under its particular facts has never since been emulated by this Court, is of no relevance here, since it involved not a Rule 56 motion for summary judgment but a Rule 12(b) motion to dismiss on the pleadings. The latter, unlike the former, presumes that general allegations embrace those specific facts that are necessary to support the claim." *Lujan I*, 497 U.S. at 889 (quoted in *Lujan v. Defenders of Wildlife* ("*Lujan II*"), 504 U.S. 555, 561 (1992) (Scalia, J.)).

[165] *Lujan I* was framed as a zone of interests test. *Lujan I*, 497 U.S. at 882-83. However, it did not probe the reach of that test, because the parties conceded and the Court accepted that if the plaintiff's members actually used the specific lands affected by the governmental action, their injuries would be within the zone of the interests protected by the relevant legislation. "The only issue, then, is whether the facts alleged in the affidavits showed that those interests *of Peterson and Erman* were actually affected." *Lujan I*, 497 U.S. at 886 (emphasis original). In other words, plaintiff's problem was not that its injury fell outside the zone of interests; its problem was that it didn't specifically describe its injury to demonstrate that it satisfied the zone of interests requirement.

[166] There was also a dispute over whether NWF should be allowed to submit additional affidavits later than called for under Rule 56. The Supreme Court found that the district court did not abuse its discretion in rejecting the untimely affidavits. *Lujan I*, 497 U.S. at 894-98. On the other hand, it is clear that a plaintiff may submit timely affidavits (or declarations) in response to a motion for summary judgment, and is not required to submit them at the outset of the case in anticipation of a standing challenge.

Two years later, in *Lujan v. Defenders of Wildlife* ("*Lujan II*"), 504 U.S. 555 (1992) (Scalia, J.), the Supreme Court summarized the rules governing the increasing evidentiary showing required at each stage of the proceeding. See discussion in section 18.E(1)(a)(ix) on page 228.

In *Lujan II*, the Court continued to ratchet down on the specificity with which environmental plaintiffs must demonstrate standing. This case involved plaintiffs' challenge to the Secretary of Interior's rescission of a rule requiring federal agencies to consult under the Endangered Species Act ("ESA") when their actions abroad might affect listed species.[167]

Affidavits were submitted showing that plaintiffs' members had visited such places as Egypt and Sri Lanka in order to see endangered species threatened by water projects in which the United States was involved, and that and "hoped" to return when conditions permitted. The Court concluded that the affidavits were insufficient to establish "injury in fact":

> They plainly contain no facts, however, showing how damage to the species will produce 'imminent' injury to Mses. Kelly and Skilbred. . . . Such "some day" intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the "actual and imminent" injury that our cases require.

Lujan II, 504 U.S. at 564 (emphasis original). In other words, even if species were extirpated as a result of unlawful federal action, the Court was not persuaded by the affidavits that the two women would ever get back to these countries to witness the loss. The Court went on to say that the affidavits fell short of meeting the redressability prong of the constitutional standing test. *Lujan II*, 504 U.S. at 568.

The distinction in the level of specificity required by the Court in *SCRAP* and *Lujan II* makes sense, by the way, if comparing a motion to dismiss under Rule 12(b)(6) with a Rule 56 motion for summary judgment, as the former is based on the pleadings and the latter allows affidavits. (See discussion in section 24.L(11) at page 405.) Indeed, the Court made this very point:

> Respondent places great reliance, as did the Court of Appeals, upon our decision in *United States v. Students*

[167] Unlike *NWF*, which addressed standing under the zone of interests test, In *Defenders*, plaintiffs' standing was challenged under Article III. As the court of appeals decision explained, *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988), the suit was brought under the ESA's citizen suit provisions (which waived any zone of interests requirement) and under the APA (whose zone of interests test plaintiffs easily met). So the only question was whether plaintiffs adequately pled and supported their constitutional standing.

> *Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S. Ct. 2405, 37 L.Ed.2d 254 (1973). The *SCRAP* opinion, whose expansive expression of what would suffice for § 702 review under its particular facts has never since been emulated by this Court, is of no relevance here, since it involved not a Rule 56 motion for summary judgment but a Rule 12(b) motion to dismiss on the pleadings. The latter, unlike the former, presumes that general allegations embrace those specific facts that are necessary to support the claim. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-102, 2 L.Ed.2d 80 (1957).

Lujan I, 497 U.S. at 889.

Motions to dismiss on Article III standing, however, are raised under Rule 12(b)(1) which, unlike Rule 12(b)(6), allows development and probing of the evidence where the challenge is "factual" as opposed to "facial." Thus, a factual challenge under Rule 12(b)(1) would seem to demand the same (higher) level of specificity by the non-moving plaintiff. In contrast, a facial standing challenged under Rule 12(b)(1) would be subject to the rule in SCRAP and would be tested on the basis of the pleadings alone.

On the other hand, Rule 12(b)(1) would not seem to be the proper vehicle to for a challenge based on "prudential," as opposed to jurisdictional, standing grounds. It would seem that the court should convert a prudential challenge made under Rule 12(b)(1) to a Rule 12(b)(6) motion,[168] which, in turn, could be converted by the court to a Rule 56 summary judgment motion if extrinsic facts were offered. Curiously, neither the opinions nor the briefs in SCRAP or subsequent cases talking about SCRAP mention whether the motion to dismiss was under Rule 12(b)(1) or 12(b)(6).

In *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009), the U.S. Supreme Court continued to hammer away at the requirement for specificity in the affidavits. In contrast to *Lujan I*, *Summers* (like *Lujan II*) considered the matter under the rubric of Article III. In *Summers*, the environmental plaintiffs challenged a specific timber sale and the regulations applicable to that sale. After winning a preliminary injunction barring the sale, they settled that portion of the case. With the specific controversy eliminated, the federal defendants pointed out that the plaintiffs lacks standing to pursue their generic challenge to the regulations.

[168] "Provided no prejudice is caused, courts often excuse a mislabeling of a Rule 12(b)(1) motion as a Rule 12(b)(6) failure to state a claim motion, and vice versa. In such an instance, the court will merely apply the appropriate legal standard and rule accordingly." Baicker-McKee, Janssen & Corr, *Federal Civil Rules Handbook*, at 417 (2007).

The Court agreed, ruling that once the plaintiffs settled the portion of the lawsuit dealing with a particular timber sale, they could no longer rely on affidavits relating to that timber sale. If they wished to pursue the portion of the lawsuit generically challenging the lawfulness of the regulation, they must produce affidavits showing a particular member of the environmental group who had concrete plans to visit an area that would be affected by the regulation. The Court then ruled that an affidavit of a member who "want[s] to go there" cannot meet the Article III standard for injury-in-fact. *Summers*, 129 S. Ct. at 1150 (internal quotation marks omitted). "This requirement of naming the affected members has never been dispensed with in light of statistical probabilities, but only where *all* the members of the organization are affected by the challenged activity." *Summers*, 129 S. Ct. at 1152 (emphasis original). The Court also noted that where standing is premised on a procedural wrong (here, a regulation that deprived them of the opportunity for notice and comment), the plaintiff must nonetheless point to "some concrete interest that is affected by the deprivation." *Summers*, 129 S. Ct. at 1151.

(b) The injury must be actual or imminent, not conjectural or hypothetical

The "actual or imminent" component of the injury-in-fact requirement means it is <u>not</u> required that the injury already has occurred. "Standing may be predicated upon a threatened harm as well as a past injury." *Schneider v. Howe*, 142 Idaho 767, 772, 133 P.3d 1232, 1237 (2006) (Burdick, J.). If the injury has not already occurred, it must be "imminent, not conjectural or hypothetical." *State v. Philip Morris*, Inc., 158 Idaho 874, 881, 354 P.3d 187, 194 (2015) (Horton, J.) (quoting *Lujan v. Defenders of Wildlife* ("*Lujan II*"), 504 U.S. 555, 560 (1992) (Scalia, J.)).

On several occasions, the Court has offered this explanation:

> This Court has explained that a justiciable controversy is distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot . . . . The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests . . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Philip Morris, Inc., 158 Idaho 874, 881, 354 P.3d 187, 194 (2015) (Horton, J.) (quoting *Davidson v. Wright*, 143 Idaho 616, 620, 151 P.3d 812, 816 (2006)) (quoting in turn *Weldon v. Bonner Cnty. Tax Coal.*, 124 Idaho 31, 36, 855 P.2d 868,

873 (1993), overruled on other grounds by City of Boise City v. Keep the Commandments Coal., 143 Idaho 254, 141 P.3d 1123 (2006)).

In *Student Loan Fund of Idaho, Inc. v. Payette Cnty.*, 125 Idaho 824, 875 P.2d 236 (Ct. App. 1994) (Lansing, J.), an owner of farm land (the Fund) brought a declaratory action to challenge an agreement between a city and a county calling for establishment of an area of city impact ("ACI") and the designation an "agriculture preservation zone" in the comprehensive plan. The Court of Appeals found that a landowner lacked standing to object to But this case does not stand for the proposition that ACIs may never be challenged. In fact, it stands for the opposite conclusion.

First, the court recognized that a challenge could be brought by way of a declaratory action.

> The Fund's action is for declaratory relief. Idaho's courts are authorized to determine by declaratory judgment the validity of contracts and municipal ordinances and the rights and status of persons thereunder. I.C. §§ 10–1201 and 10–1202.

Student Loan Fund, 125 Idaho at 825, 875 P.2d at 237.

Second, the court found that a landowner affected by a restrictive future land use designation might be able to demonstrate injury, but this plaintiff failed to plead facts showing injury.

> The deficiency in the Fund's status is not that its injury is undifferentiated from that suffered by the general populous of Payette County, but rather, that it has shown no injury at all.

Student Loan Fund, 125 Idaho at 828, 875 P.2d at 240.

Specifically, the problem was that the new designation (agriculture preservation) was essentially the same as the existing zoning (agriculture or rural zone). *Student Loan Fund,* 125 Idaho at 827, 875 P.2d at 239. And, more importantly, the Fund failed to allege any plans to develop the property. *Student Loan Fund*, 125 Idaho at 827 n.3, 875 P.2d at 239 n.3. In short, this was a pleading failure.

In *Martin v. Camas Cnty. ex rel. Bd. of Comm'rs.*, 150 Idaho 508, 512-13, 248 P.3d 1243, 1247-48 (2011) (Burdick, J.), a landowner/developer challenged zoning ordinances that upzoned neighboring properties, thereby increasing competition for development. The Court found that Martin lacked standing notwithstanding that he

owned property in the affected area, because his claim was based on speculative injury.

> Martin argues that the reasoning of *Butters* should be applied to his situation, since he is in the business of land development and property near the property that he owns was upzoned, while Martin's was not. This argument is unpersuasive; the plaintiff in Butters alleged that she suffered specific and palpable harm as a result of a conditional use permit that was issued under the challenged zoning ordinance. Martin has failed to show that he has suffered or is likely to suffer any injury; he merely speculates that increased competition will decrease the future value of his property. Martin states that "Martin, like Butters owns land that suffers a distinct injury, unlike that of the public generally", but fails to explain what that distinct injury is, merely offering an argument that Martin's property is "uniquely situated". Martin offers no argument that any neighboring properties which have been upzoned are being developed in such a way that Martin will be injured.

Martin, 150 Idaho at 514-15, 248 P.2d at 1249-50 (emphasis supplied).

In finding that Martin lacked standing, the Court also distinguished its holdings in *Ameritel Inns* and *Koch*. The *Martin* Court explained that a combination of factors supported Ameritel's standing. Business competition alone in insufficient. The *Martin* Court said *Koch* (which allows waiver of standing in some instances) was distinguishable because

> *Koch* has only been applied where failure to find that the appellants in question had standing would have resulted in no party having standing. Here, a party whose property had been downzoned by the 2008 zoning amendments would unquestionably have standing to bring this action, as would a property owner who could show a specific palpable harm that he would incur from the imminent development of an upzoned neighboring property.

Martin, 150 Idaho at 515, 248 P.3d at 1250.

It should be noted that this was not just a failure to prove, but a failure to plead: "Martin has not pled facts to support his contention that he cannot develop his

properties in the same manner that he could have prior to the 2007 and 2008 zoning amendments." *Martin*, 150 Idaho at 516, 248 P.3d at 1251.

In *Paslay v. A&B Irrigation Dist.*, 162 Idaho 866, 406 P.3 878 (2017) (Brody, J.), several farmers sued the irrigation district that provided water to them. For many years, the irrigation district served some of its members with surface water and others with ground water. The plaintiffs received surface water (which was a more reliable supply). As ground water supplies declined, the district undertook an expensive project to bring surface water to some of the farmers within the district that historically had received only ground water. The plaintiffs complained that the project would "dilute" the limited surface supply by expanding the number of users it served, thus diminishing the supply they historically had enjoyed. The Court found this was not "a current or future harm, [but] merely the fear of one if the District abuses its discretion and mismanages water resources outside the boundaries of the law." *Paslay*, 162 Idaho at 870, 406 P.3d at 882. The Court explained that while it is intuitive that some dilution of supply would result, it was not willing also to assume the following would occur:

> . . . second, in the case where there is less surface water available, the amount will be substantial enough to threaten Appellants' allotment; third, in such a case, the District will still allocate some surface water to newly-converted Unit B farms during a season in which it provides less than the full allotment to Unit A farms.

Paslay, 162 Idaho at 870, 406 P.3d at 882. "This Court cannot decide based on such conjecture." *Id.*

(2) Causation and redressability

The requirements of causation and redressability boil down to requiring the litigant to show that the case is not an academic exercise: the injury suffered may be traced to actions of the defendant, and the relief requested is likely to lessen that injury.

As a practical matter, in most cases, the causation and redressability requirements are easily met. Moreover, the latter two tests may be relaxed to some extent in some circumstances.[169] Accordingly, much of the litigation over standing (and much of this chapter) focuses on the first requirement: injury in fact.

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[169] "To establish Article III standing, a plaintiff must also show causation and redressability; however, '[o]nce a plaintiff has established injury in fact under NEPA, the causation and redressability requirements are relaxed.' Instead, they 'need only establish the reasonable probability of the challenged action's threat to [their] concrete interest.'" *Nuclear Information and Resource Service v. NRC*, 457 F.3d 941, 950 (9th Cir. 2006) (citations and internal quotation marks omitted). "In NEPA cases, causation requirements are relaxed but still a constitutional necessity;

In *Knox v. State ex rel. Otter*, 148 Idaho 324, 223 P.3d 266 (2009), the Court found the plaintiffs lacked standing to challenge statutes authorizing video gaming machines at Fort Hall Indian Reservation. Even if the statutes were found unconstitutional, the machines would not be removed because the Tribe was immune from suit to remove the machines.

In *Ciszek v. Kootenai Cnty. Bd. of Comm'rs*, 151 Idaho 123, 254 P.3d 24 (2011) (J. Jones, J.), the Court found that property owners suffered particularized harm and that their injury was redressable. The county argued that there was no redressability because even if the Court overturned the zoning that allowed new mining activity, the plaintiffs would still be subject to mining activities on other nearby properties. The Court rejected this argument: "However, the BOCC provides no case law to support the proposition that a person who lives next to a property where mining activity already is taking place has no grounds for complaint where an adjoining property owner seeks to obtain approval for additional mining activity on additional land. Nor does the BOCC show how an increase in mining activity could not create new or heightened injuries that could be remedied in a declaratory judgment action." *Ciszek*, 151 Idaho at 129, 254 P.3d at 30.

In *Tucker v. State*, 162 Idaho 11, 394 P.3d 54 (2017) (Burdick, C.J.), criminal defendants sued various state defendants alleging Idaho's public defense system violated the state and federal constitutions. The Court found they had standing as to the State and the Public Defense Commission. It provided this helpful overview of causation and redressability, emphasizing that it is not necessary to prove redressability with certainty.

> Causation requires the injury to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court."

Tucker, 162 Idaho at 21, 394 P.3d at 64 (emphasis, brackets, and parenthetical are original) (citing *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (Scalia, J.)).

> Standing's redressability element ensures that a court has the ability to order the relief sought, which must create a substantial likelihood of remedying the harms alleged. *See Ciszek v. Kootenai Cnty. Bd. of Comm'rs*, 151 Idaho 123, 129, 254 P.3d 24, 30 (2011); *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982). Redressability requires a showing that "a favorable decision is <u>likely</u> to redress [the] injury, not that a

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[the plaintiff] must show a 'reasonable probability' that the alleged injury is caused by the challenged action." *Bell v. BPA*, 340 F.3d 945, 951 (9th Cir. 2003).

> favorable decision will inevitably redress [the] injury." *Beno v. Shalala*, 30 F.3d 1057, 1065 (9th Cir. 1994). However, it cannot be only speculative that a favorable decision will redress the injury. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.* (TOC), Inc., 528 U.S. 167, 181, 120 S.Ct. 693, 704, 145 L.Ed.2d 610, 627 (2000).
>
> Redressability and causation often overlap. *See, e.g., Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013). The concepts "are distinct insofar as causality examines the connection between the alleged misconduct and injury, whereas redressability analyzes the connection between the alleged injury and requested judicial relief. Redressability does not require certainty, but only a substantial likelihood that the injury will be redressed by a favorable judicial decision." *Id*. (citations omitted).

Tucker, 162 Idaho at 26, 394 P.3d at 69 (emphasis and brackets are original).

In *Employers Resource Management Co. v. Ronk*, 162 Idaho 774, 777, 405 P.3d 33, 36 (2017) (Horton, J.), a company sued the Idaho Department of Commerce challenging a state law that grants tax incentives for companies coming to Idaho. The Idaho Supreme Court found company demonstrated injury in fact (meeting the "competitor standing" test) as well as causation and redressability.

F. Relaxation or waiver of standing (from *Koch* to *Regan*)

As discussed above, Article III standing requirements are merely a "self-imposed constraint" in Idaho. As a consequence, standing constraints may be relaxed or waived altogether when deemed necessary. On several occasions, the Idaho Supreme Court has recognized that it may proceed to the merits, setting aside standing requirements, even where the plaintiff or petitioner plainly lacks Article III standing. This typically occurs in cases presenting important questions of constitutional law.

This began with a relatively narrow exception to restrictions on taxpayer standing. It has evolved to a more broadly articulated waiver of standing requirements where important constitutional questions are presented and no other potential parties have standing to raise them.

The seminal case for relaxation of standing requirements is *Koch v. Canyon Cnty.*, 145 Idaho 158, 177 P.3d 372 (2008) (Eismann, C.J.). *Koch* involved a non-appropriation lease challenged by taxpayers as violating Idaho Const. art. VIII, § 3. Although the Court ultimately found the case moot and did not reach the merits, the Court first established that taxpayers and citizens have standing to challenge alleged

violations of Idaho Const. art. VIII, § 3 notwithstanding the absence of particularized injury that would ordinarily deny them standing.[170]

The Court began by noted the general rule on taxpayer standing:

> As a general rule, a citizen or taxpayer, by reason of that status alone, does not have standing to challenge governmental action. "An interest, as a concerned citizen, in seeing that the government abides by the law does not confer standing."

Koch, 145 Idaho at 160, 177 P.2d at 374 (quoting *Troutner v. Kempthorne*, 142 Idaho 389, 391, 128 P.3d 926, 928 (2006)).

From there, the Court turned to the exceptions:

> In appropriate circumstances, however, taxpayers do have standing to challenge governmental action. . . . A party can also have standing even when the injury is indirect and is shared by a large group.

Koch, 145 Idaho at 161, 177 P.2d at 375.

> Even though standing is jurisdictional and may be raised at any time, including on appeal, *Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 130 P.3d 1138 (2006), this Court has never questioned the standing of a taxpayer to challenge expenditures that allegedly violate Article VIII, § 3.
>
> If this Court were to hold that taxpayers do not have standing to challenge the incurring of indebtedness or liability in violation of that specific constitutional provision, we would, in essence, be deleting that provision from the Constitution. The County acknowledged during oral argument that nobody would have standing. Other than a political subdivision invoking the provision when it does not want to pay for

[170] In a subsequent decision, the Court did reach the merits in a challenge involving this constitutional provision. *Greater Boise Auditorium Dist. v. Frazier* ("*GBAD*"), 159 Idaho 266, 360 P.3d 275 (2015) (W. Jones, J.; Eismann, J., concurring). The decision does not mention standing, presumably because standing to challenge a constitutional violation was established in *Koch*. The Auditorium District's brief acknowledged that the challenger had standing: "*Koch v. Canyon Cnty*., 145 Idaho 158, 177 P.3d 372 (2008) (Eismann, C.J.) also involved a non-appropriation lease, but the Court found the case moot and did not reach the merits. The *Koch* decision, however, established that taxpayers and citizens have standing to challenge alleged violations of Idaho Const. art. VIII, § 3." Appellant's Opening Brief in *GBAD*, 2015 WL 4151671, n.3 at *6.

> what it has received, *e.g., McNutt v. Lemhi Cnty.*, 12 Idaho 63, 84 P. 1054 (1906), there would be nobody who could require that political subdivisions comply with this constitutional provision.

Koch, 145 Idaho at 162, 177 P.2d at 376. Accordingly, the Court "carved out a narrow exception against the general prohibition against taxpayer standing." *Koch*, 145 Idaho at 161, 119 P.2d at 375.[171]

> The United States Supreme Court has held that a taxpayer has standing to challenge a congressional appropriation that violated a specific constitutional limitation upon the congressional taxing and spending power. There is no logical difference between making an appropriation that is specifically prohibited by the Constitution and incurring an indebtedness or liability that is specifically prohibited by the Constitution. We therefore hold that the Plaintiffs, who are electors and taxpayers of the County, have standing to challenge whether the lease agreement violated Article VIII, § 3.

Koch, 145 Idaho at 162-63, 177 P.2d at 376-77.

In *Coeur d'Alene Tribe v. Denney*, 161 Idaho 508, 513, 387 P.3d 761, 766 (2015) (Burdick, J.), the Court moved beyond taxpayer standing and recognized that any standing requirements may be relaxed in the appropriate case. In this case, the Tribe sought a writ of mandamus requiring the Secretary of State to recognize as law a gaming statue that was tardily vetoed by the Governor. The statute effectively eliminated a competitor to the Tribe's gambling operation. The Court found that the Tribe lacked Article III standing because "increased competition alone" (from historical horse-racing gambling machines) is an insufficient to confer standing. The Court nonetheless ruled on the merits of the matter, essentially waiving the standing requirement where relief is sought on a matter of significant constitutional importance and no other party would have standing to bring the claim. The Court said:

> *Beem* [*v. Davis*, 31 Idaho 730, 733, 175 P. 959, 960 (1918)] is consistent with this Court's willingness to relax ordinary standing requirements in other cases where: (1) the matter concerns a significant and distinct constitutional violation, and (2) no party could otherwise have standing to bring a claim. *See Koch*, 145 Idaho at

[171] The *Koch* Court based this exception on federal standing caselaw, citing *Flast v. Cohen*, 392 U.S. 83 (1968) and *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007).

> 162, 177 P.3d at 376; *see also State ex rel. Miller v. State Bd. of Educ.*, 56 Idaho 210, 217, 52 P.2d 141, 143 (1935). For instance, in *Koch*, this Court held that Canyon County taxpayers had standing to litigate whether Canyon County had incurred indebtedness or liability in violation of article VIII, section 3, of the Idaho Constitution. 145 Idaho at 162, 177 P.3d at 376. The Court recognized that if it held otherwise, it would essentially "be deleting that provision from the Constitution" because no party would have standing to enforce it. *Id*.
>
> . . .
>
> The public has a significant interest in the integrity of Idaho's democratic government, and a writ of mandamus is a remedy by which public officials may be held accountable to the citizens for their constitutional duties. If the Tribe does not have standing to bring this writ, the question would then become, who does?

Coeur d'Alene, 161 Idaho at 514, 387 P.3d at 767.

In *Tucker v. State*, 162 Idaho 11, 26, 394 P.3d 54, 69 (2017) (Burdick, C.J.), the Court once again recognized its authority to "relax ordinary standing requirements." In *Tucker*, criminal defendants sued various state defendants alleging Idaho's public defense system violated the state and federal constitutions. The Court found they had standing as to the State and the Public Defense Commission, but nevertheless explored their argument in the alternative they the "relaxed" standing analysis should apply. The Court found that "violations of right to counsel constitute significant and distinct constitutional violations" thus satisfying the first prong of the relaxed standing principle. *Tucker*, 162 Idaho at 26, 394 P.3d at 69. However, the Court found the criminal defendants did not meet the second requirement. In contrast to *Coeur d'Alene Tribe*, "Appellants are not the only ones who could bring this lawsuit. . . . "Because any one of those thousands of indigent defendants could bring this lawsuit." *Tucker*, 162 Idaho at 26-26, 394 P.3d at 69-70 (internal quotation marks omitted).[172]

In *Regan v. Denney*, ___ Idaho ___, ___ P.3d ___ (2019) (Burdick, C.J.), the Court, took a more direct approach. (This case involved a constitutional challenge to voter-approved initiative to expand the availability of Medicaid.) Rather than

[172] In addition to addressing the relaxation of standing requirements, the *Tucker* Court joined a number of sister states in carving out a waiver of sovereign immunity in constitutional challenges. The underlying reasoning is much the same: "Were we to accept Respondents' position that sovereign immunity shields the State from suit in this instance, we would leave parties unable to vindicate constitutional rights against the State. This we decline to do." *Tucker*, 162 Idaho at 18, 394 P.3d at 61.

lowering the bar for standing, the *Regan* Court waived the requirement outright, noting the urgency of the constitutional question. Citing *Koch* and *Coeur d'Alene*, the Court declared:

> However, even though Regan cannot demonstrate a distinct palpable injury sufficient to confer standing, due to the urgent nature of the alleged constitutional violations, we will relax the traditional standing requirements and consider Regan's petition.

Regan, ___ Idaho at ___, ___ P.3d at ___.

G. Legislative control over standing

Although the law of standing is rooted in the Constitution, the U.S. Supreme Court has recognized that Congress may affect through legislation the question of who has standing, at least to some extent. "Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions, or to entertain 'friendly' suits, or to resolve 'political questions,' because suits of this character are inconsistent with the judicial function under Art. III. But where a dispute is otherwise justiciable, the question of whether the litigant is a 'proper party to request an adjudication of a particular issue is one within the power of Congress to determine." *Sierra Club v. Morton*, 405 U.S. 727 (1972) (citations omitted). More recently, the Court has recognized that legislative bodies have the power to waive the non-constitutional, prudential tests for standing, as Congress did under the Endangered Species Act. *Bennett v. Spear*, 520 U.S. 154 (1997) (Scalia, J.). "Congress has the authority to waive application of these prudential requirements, even though it may not waive any of the constitutional standing requirements." Daniel R. Mandelker, *NEPA Law and Litigation*, § 4:9 (2009).

Justice Kennedy has noted in two concurrences that Congress, to some extent, can create standing: "In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Lujan v. Defenders of Wildlife* ("*Lujan II*"), 504 U.S. 555, 560 (1992) (Scalia, J.) (citations omitted) (this section referenced in *Earth Island Institute*, 129 S. Ct. 1142, 1153 (2009)). This is consistent with the Court's teaching in the seminal standing case, *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (Powell, J.) ("Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains . . . .").

The law on standing in Idaho is firmly rooted in the constitutional judicial power, and it is the Constitution that ultimately sets its bounds. "[T]he legislature

cannot, by statute, relieve a party from meeting the fundamental constitutional requirements for standing." *Evans v. Teton Cnty.*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003) (Kidwell, J.).[173] Thus, the Idaho courts treat the issue of standing as one of constitutional law, even though the Idaho Constitution does not, in its own words, limit courts to hearing cases and controversies, as does the federal Constitution.[174]

The Idaho Supreme Court's statement in *Evans* that the law of standing is based on the Constitution should not be understood to take away all power of the legislature to control standing. Indeed, two earlier decisions of the Idaho Court of Appeals held that a statute could remove some barriers to standing. See discussion of the *Fox I* and *Fox II* in section 18.E(1)(a)(ii) at page 216 ("Taxpayers and Ratepayers"). The *Evans* decision, however, does not mention *Fox I* or *Fox II*.

H. Standing under Idaho statutes

In *Ashton Urban Renewal Agency v. Ashton Memorial, Inc.*, 155 Idaho 309, 311, 311 P.3d 730, 732 (2013) (Burdick, C.J.), Fremont granted a hospital a significant tax exemption, the result of which was to significantly reduce tax revenue shared with the urban renewal agency. The agency challenged the exemption. The hospital challenged the agency's standing under the statute authorizing tax appeals. This was not a constitutional standing case. Rather, the case dealt with "standing under a statute." Specifically, it addressed whether the urban renewal agency was a "person aggrieved" in the context of Idaho Code § 63-511 (authorizing appeals to the Idaho Board of Tax Appeals). The hospital (whose tax exemption was challenged by the urban renewal agency) contended that the agency had no property interest in the taxes it would have received but for the exemption, and, hence, was not a "person aggrieved." The Court rejected that argument. It found that it was sufficient for the agency to show that it had a "pecuniary interest" (not a property interest) in the lost tax revenues.

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[173] Speaking of federal standing law, the U.S. Supreme Court has declared that the prudential standards may be changed by Congress, "unlike their constitutional counterparts [which cannot] be modified or abrogated by Congress." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (Scalia, J.). This echoes the same statement made in the seminal zone of interests test. "Congress can, of course, resolve the question [of prudential standing] one way or the other, save as the requirements of Article III dictate otherwise. *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970) (quoted in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 394 n.7 (1987)).

[174] In *Thomson v. City of Lewiston*, 137 Idaho 473, 478, 50 P.3d 488, 493 (2002), one of the parties argued that the law of standing had been altered by a particular statute. The Court found that the statute in question did not alter the law of standing—which the court referred to as "common law." The Court did not address whether the Legislature has the power to relax or eliminate the law of standing (though its discussion of the legislation seems to assume such power). Such an implication, however, is plainly at odds with the court's plain holding to the contrary in *Evans v. Teton Cnty.*

By the way, this case has nothing whatsoever to do with organizational standing. It does not address the question of whether an organization (which does not have a pecuniary interest) may bring a tax appeal on behalf of its members (who do have a pecuniary interest).

I. The Uniform Declaratory Judgment Act does not confer standing

The Uniform Declaratory Judgment Act, Idaho Code §§ 10-1201 to 10-1217, authorizes persons to seek declaratory relief. The Act provides authority for courts of record to declare rights, status and other legal relations. Idaho Code § 10-1201. Another section provides:

> Any person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Idaho Code § 12-1202.

Note that the term "person" is broadly defined in Idaho Code § 10-1213 to include "municipal or other corporation of any character whatsoever." Curiously, that definition does not include the state for federal government.

"[T]he Declaratory Judgment Act does not relieve a party from showing that it has standing to bring the action in the first instance." *Martin v. Camas Cnty. ex rel. Bd. of Comm'rs.*, 150 Idaho 508, 512-13, 248 P.3d 1243, 1247-48 (2011) (Burdick, J.) (quoting *Schneider v. Howe*, 142 Idaho 767, 772, 133 P.3d 1232, 1237 (2006)).

> Idaho courts are empowered to declare the rights, status and legal relations of persons affected by municipal ordinances. I.C. §§ 10–1201 & 1202. However, a court's power to make such determinations "does not relieve a party from showing that it has standing to bring the action in the first instance." *Schneider v. Howe*, 142 Idaho 767, 772, 133 P.3d 1232, 1237 (2006). "In order to satisfy the requirement of standing, the petitioners must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Id.* (internal quotation

omitted). A plaintiff can also meet this showing when a threatened or past harm is the basis of the injury. *Id*.

Ciszek v. Kootenai Cnty. Bd. of Comm'rs, 254 P.3d 24, 29, 151 Idaho 123, 128 (2011) (J. Jones, J.).

J. Standing under LLUPA, the IAPA, and other state statutes

The law of standing has also been codified, to some extent, in both the Idaho Administrative Procedure Act ("IAPA"), Idaho Code §§ 67-5201 to 67-5292, and the Local Land Use Planning Act ("LLUPA"), Idaho Code §§ 67-6501 to 67-6538. (See discussion of the Legislature's authority to do so in section 18.G at page 244.)

The IAPA provides that a "person aggrieved by final agency action . . . is entitled to judicial review . . . ." Idaho Code § 67-5270(2). The IAPA also provides that a "party aggrieved by final order . . . is entitled to judicial review . . . ." Idaho Code § 67-5270(3). This limitation to persons "aggrieved" appears to be little more than a legislative recognition of the law of standing.

LLUPA also provides a broad, but not unlimited, definition of who has standing. Under LLUPA, only an "affected person" may bring an appeal of a planning or zoning matter. Idaho Code § 67-6521(1)(d). An affected person is defined as "one having a bona fide interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development." Idaho Code § 67-6521(1)(a).

In sum, both LLUPA and the IAPA seem to embody the basic concepts of standing: Anyone who has a real stake in the decision may bring a challenge; it is insufficient that a person simply "believe" that a zoning decision is wrong, no matter how strongly that view is held. The only apparent departure from the traditional law of standing is the requirement under LLUPA that the challenger have an interest in real property (which presumably includes a tenancy). No appellate cases have explored the authority of the Legislature to impose this additional hurdle on litigants.[175]

Other provisions of the IAPA and LLUPA reinforce the idea that courts should not entertain appeals based on mere trifles. The IAPA states: "[A]gency action shall be affirmed unless substantial rights of the appellant have been prejudiced." Idaho Code § 67-5279(4). In a similar vein, LLUPA provides: "Only those whose challenge to a decision demonstrates actual harm or violation of fundamental rights, not the mere possibility thereof, shall be entitled to a remedy or

[175] In *Johnson v. Blaine Cnty.*, 2009 WL 540695 (2009), the court found that an adjacent landowner was an "affected person" within the meaning of the Act. The Court did not have occasion to address the question of whether the legislature has the power to restrict judicial review to landowners.

reversal of a decision." Idaho Code § 67-6535(3). See discussion in section 24.I(8)(b) at page 370.

LLUPA, however, appears to go beyond the law of constitutional standing by requiring that a challenger have an interest in real property that may be adversely affected by the land use decision. Idaho Code § 67-6521(1)(a). Thus, there is an argument that a non-property holder whose only interest in the land use decision is its impact on public recreational or environmental values would lack standing under the statute. While the Idaho Supreme Court held in *Evans* that the Legislature may not remove constitutional barriers to courts, perhaps it has the authority to add additional standing hurdles—as it apparently has done in LLUPA. To our knowledge, no Idaho court has been called upon to explore this question.

The CAFO statute (which is part of LLUPA) establishes an even stricter standing requirement. It provides: "Only members of the public with their primary residence within a one (1) mile radius of a proposed site may provide comment at a hearing. However, this distance may be increased by the board." Idaho Code § 67-6529(2). This provision has been upheld by at least one district court, but it has not yet been evaluated in a reported appellate decision.

In *City of Ririe v. Gilgen*, 170 Idaho 619, 515 P.3d 255 (2022) (Bevan, C.J.), the Court held that the city did not have standing under LLUPA (i.e., it did not fall within the meaning of and "affected person") to challenge a decision by Jefferson County granting a conditional use permit for a mobile home to a private landowner. The subject property fell within the city's area of city impact.

> However, LLUPA only provides for judicial review of the approval or denial of a land use application by an affected person aggrieved by a final decision. I.C. § 67-6521(1)(d). . . .
>
> . . .
>
> . . . LLUPA limits judicial review to "affected person[s]." I.C. § 67-6521(1)(d). LLUPA defines an affected person as "one having a bona fide interest in real property" which could be adversely impacted by a land-use decision. I.C. § 67-6521(1)(a); *see also* I.R.C.P. 84(a)(3)(D) (a "petitioner" must be a "person."). . . .
>
> . . .
>
> . . . We agree that cities can be significantly affected by what happens in an AOI. But that concern alone does not transform the City into an "affected person" for purposes of LLUPA. . . .
>
> . . . This Court has previously concluded "[a] city's exercise of jurisdiction in an impact area lying

> beyond a city's limits is inconsistent with the constitutional limitations placed on a city's powers by Article XII, § 2 of the Idaho Constitution." *Reardon v. City of Burley*, 140 Idaho 115, 119, 90 P.3d 340, 344 (2004), *overruled on other grounds by City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012); *see also Blaha v. Bd. of Ada County Comm'rs*, 134 Idaho 770, 777, 9 P.3d 1236, 1243 (2000); *Boise City v. Blaser*, 98 Idaho 789, 791, 572 P.2d 892, 894 (1977).
>
> A logical extension of these principles is that a city cannot have "a bona fide interest in real property" outside of its city limits because that is by definition property over which it has no jurisdiction.

Ririe, 170 Idaho at 626, 515 P.3d at 262 (emphasis original).

K. Standing in allegedly illegal fee and tax cases falls on those who bear the "incidence" of the fee or tax.

When an allegedly illegal fee or tax is paid, the payer often passes along the cost to the purchaser of the home or product. This raises the question, who has standing to challenge the fee or tax?

As Justice Jim Jones noted in his concurrence in *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 87, 343 P.3d 1086, 1094 (2015) (Eismann, J.; J. Jones, concurring), Idaho case law establishes that the "party must show that it bears the incidence of the tax in order to have standing." Intuitively, one would think that if a tax or fee is passed on to the purchaser through in increase in the sale price, the purchaser bears the "incidence" of the tax. That intuition logical, but it does not correspond to the law.

Barring a statute that says otherwise, the person or entity that initially paid the fee or tax has standing. It makes no difference that the burden of the fee or tax was shifted to someone else.

In *V-1 Oil Co. v. State Tax Comm'n*, 98 Idaho 140, 559 P.2d 756 (Bakes, J.), the Idaho Supreme Court found that only a gasoline wholesale dealer who paid an excise tax has standing to challenge the tax, notwithstanding the fact that the tax is passed onto the retail dealer who, in turn, passes it along to the consumer. The same result obtained in *Ameritel Inns, Inc. v . Greater Boise Auditorium District*, 141 Idaho 849, 119 P.3d 624 (2005) (Eismann, J.), in which hotel operators who paid a tax had standing to challenge it, not the guests who ultimately paid a higher hotel room charge. Another Idaho Supreme Court reaching the same decision is *Gallagher v. State*, 141 Idaho 665, 115 P.3d 756 (2005) (Burdick, J.) ,in which the plaintiff who purchased cigarettes challenged a cigarette tax paid by the wholesaler. The plaintiff

urged the Court to reconsider its prior rulings, but the *Gallagher* Court declined to do so. It concluded: "Individuals who are legislatively required to pay the tax (bearing the incident of tax) have standing. Even if the tax is passed on to another consumer (bearing the economic burden of the tax) those consumers lack standing." *Gallagher*, 141 at 668, 115 P.3d at 759.

These cases deal with taxes, not fees. But the authors are aware of no reason or precedent suggesting the same analysis would not apply to an illegal fee. Indeed, fees are often challenged as disguised taxes.

The result would be different if (1) there were a statute providing that the fee/tax payer must pass the fee/tax along to the purchaser or (2) a statute expressly authorizes refunds to the purchaser or current owner.

For example, there is a provision in the Idaho Development Impact Fee Act ("IDIFA"), Idaho Code 67-8211, authorizing refunds to the current landowner for certain IDIFA impact fees. But that provision would only apply to impact fees imposed pursuant to IDIFA.

Although standing to seek a refund is limited as described above, standing is broader with respect to those who may seek declaratory relief (seeking prospective relief to declare a statute or ordinance unlawful). The *V-1* case expressly provides that even if a plaintiff is not entitled to a refund, it may still have standing to seek a declaratory judgment.

The issue of who bears the ultimate burden of an allegedly illegal fee or tax may also be raised in contexts other than standing. For example, a municipality could raise an equitable defense noting that the payers of an allegedly unlawful building permit subsequently sold the properties and transferred the cost of the fees to the purchasers. Thus, if the fee payers were to be paid damages, they would be paid twice. And the homeowners would have to pay twice—once when they bought the property and again through higher taxes to satisfy the judgment. This may or may not be a meritorious defense, but it is not a standing defense and is thus permissible to make.

L. Associational standing (aka organizational standing)

(1) Federal law

A separate body of law governs the right of associations or organizations to litigate, either on behalf of their members or in their own right. This is referred to associational or organizational standing. We employ the latter term, as it seems more straightforward.

The seminal federal case on organizational standing is *Warth v. Seldin*, 422 U.S. 490 (1975) (Powell, J.).

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members. . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Warth at 511 (citations omitted).

Warth was followed by another important organizational standing case, *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). *Hunt* established a three-part test in which organizational standing may be established if "(a) [one or more of the organization's] members would otherwise have standing to sue in their own right; (b) the interests [the organization] seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

The three-part test first articulated in Idaho by *Hunt* was repeated more recently by the United States Supreme Court. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 181 (2000).

In *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996), the Supreme Court ruled that, while the first two parts of the *Hunt* test of organizational standing are constitutionally based, the third part is prudential and may be eliminated by statute, as it was here in a statute allowing unions to sue for damages on behalf of their members.

The third requirement under *Hunt* (no need for participation by individual members) means that associations typically may not obtain standing in damage cases. This is because damages are tailored to the individual. Thus, associational standing is generally limited to forward-looking claims seeking declaratory or injunctive relief.

A note in the *Virginia Law Review* provided this helpful commentary on the third test:

> The third prong of the *Hunt* test is often the most substantial barrier to associational standing. Under this prong, "neither the claim asserted nor the relief requested [can] require[] the participation of individual members in the lawsuit." . . .
>
> But such participation is often required when the relief requested is in the form of damages. Indeed, the nature of the relief requested is an important factor in determining whether associational standing is appropriate. As the *Warth* Court stated:
>
> > If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.
>
> *[Warth v. Seldin*, 422 U.S. 490, 515 (1975).]
>
> The Court then distinguished instances in which an association seeks damages: "[W]hatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof." [*Warth*, 422 U.S. at 515-16.] Because "damages claims usually require significant individual participation, which fatally undercuts a request for associational standing," as a practical matter, the third prong of the Hunt test has largely limited associational standing to claims for prospective relief. [*Pa. Psychiatric Soc'y v. Green Spring Health Serv., Inc.*, 280 F.3d 278, 284 (3d Cir. 2002).] Indeed, a number of courts have noted that no federal court has held that an association has standing to pursue damages claims on behalf of its members.

Christopher J. Roche, Note, *A Litigation Association Model to Aggregate Mass Tort Claims for Adjudication*, 91 Va. L. Rev. 1463, 1498-99 (2005) (footnote citations provided in brackets; other footnotes omitted; other brackets original).[176]

(2) Associational standing in Idaho

The seminal organizational standing case in Idaho is *Glengary-Gamlin Protective Ass'n, Inc. v. Bird*, 106 Idaho 84, 675 P.2d 344 (Ct. App. 1983) (Burnett, J.), in which the Court concluded that a citizens group had standing to oppose a conditional use permit for an air strip. In reaching its decision, the Idaho Court of Appeals relied primarily on the federal law of organizational standing.

> Our research has not disclosed a previously reported Idaho decision enumerating the elements of organizational standing. However, this task has been undertaken repeatedly during the past decade by the United States Supreme Court. Although some elements of standing in the federal system are colored by the peculiar requirements of a 'case' or 'controversy' under the federal constitution, nevertheless, the Supreme Court's analyses of organizational standing are instructive here."

Glengary, 106 Idaho at 87, 675 P.2d at 347. The Idaho court summarized and adopted the federal law of organizational standing, quoting from the three-part test set out in *Hunt*. *Glengary*, 106 Idaho at 87-88, 675 P.2d at 347-48 (quoting *Hunt* at 343).

The Idaho Supreme Court has continued to apply *Glengary* as the basis of organizational standing analysis.[177]

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[176] See also, Wright, Miller, Cooper, Freer, Steinman, Struve & Amar, 13A Federal Practice and Procedure, Jurisdiction § 3531.9.5 (3d ed. 2012) ("Organizational standing is particularly apt to be denied if damages are requested.")

[177] "In Idaho, the elements of associational standing are derived from the United States Supreme Court's analysis of this issue. *Bear Lake Educ. Ass'n v. Belnap*, 116 Idaho 443, 448, 776 P.2d 452, 457 (1989) (Huntley, J.) (citing *Glengary*). "The rule in Idaho, mirroring that laid down by the United States Supreme Court, is that an association may have standing to seek judicial relief not only to protect its own interests, but also those of its members." *Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 603, 130 P.3d 1138, 1141 (2006) (Burdick, J.) (with citations to *Bear Lake*, *Warth*, and *Hunt*). Both *Glengary* and *Bear Lake* are cited with approval in *Selkirk-Priest Basin Ass'n v. State, ex rel. Andrus* ("*Selkirk I*"), 127 Idaho 239, 241, 899 P.2d 949, 951 (1995) (McDevitt, C.J.) (environmental group lacked standing to challenge land board's decision to sell timber). *See also*, *Selkirk-Priest Basin Ass'n v. State, ex rel. Batt* ("*Selkirk II*"), 128 Idaho 831, 919 P.2d 1032 (1996) Silak, J.), dealing with another timber sale; this was an organizational standing

In *Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 603, 130 P.3d 1138, 1141 (2006) (Burdick, J.), the Idaho Supreme Court grappled with the third prong of the *Hunt* test. The *Beach Lateral* Court found that associations seeking only prospective relief (declaratory or injunctive relief) generally have little difficulty with the third prong, but that to quiet title it is necessary to have the affected individual members of the association as parties.

> When an association seeks some form of prospective relief, such as a declaration or an injunction, its benefits will likely be shared by the association's members without any need for individualized findings of injury that would require the direct participation of its members as named parties. . . .
>
> . . .
>
> The third element, that "neither the claim asserted, nor the relief requested, require the participation of individual members in the lawsuit," presents a greater difficulty. Although the Association avoided making any claim for damages, it did not restrict itself to a request for injunctive relief. . . . [T]he Association requested and received not only injunctive relief but also an order quieting title in the easement to the Association itself.
>
> . . . Because under these facts the Association's request to quiet title required the participation of the its individual members, the Association's request is unable to satisfy the third factor of the Hunt test and the Association lacked standing to bring that claim. The portion of the district court's ruling that quieted title in the ditch easement to the Association itself is consequently reversed.

Beach Lateral, 142 Idaho at 604, 130 P.3d at 1143.

It bears emphasis that the problem in *Beach Lateral* was that the association sought to quiet title in its own members. Perhaps, for example, an association would have standing to quiet title in one party (*e.g.*, the government) versus another party (*e.g.*, a mining company). So long as the government and the mining company were litigants, it would seem there would be no need for the association's members to be parties.

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case, too. However, it did not focus so much on the organization's standing as the lack of particularized injury of its individual members.

M. Standing may not be based on speculation

The Court has declared that anticipated harm (as opposed to harm that has already occurred) may be sufficient to confer standing. "The existence of real or potential harm is sufficient to challenge a land use decision." *Evans v. Teton Cnty.*, 139 Idaho 71, 76, 73 P.3d 84, 89 (2003) (Kidwell, J.). "We recognize that standing may be predicated not only upon a past injury but also upon a threatened harm." *Student Loan Fund of Idaho, Inc. v. Payette Cnty.*, 125 Idaho 824, 827, 875 P.2d 236, 239 (Ct. App. 1994).

However, this does not throw the courthouse doors open to litigate any harm one can conjure up. A purely speculative injury is insufficient to confer standing. As both the U.S. Supreme Court and the Idaho Supreme Court have said, the harm may be "actual or imminent, [but] not conjectural." *Lujan v. Defenders of Wildlife* ("*Lujan II*"), 504 U.S. 555, 560 (1992) (Scalia, J.). "Abstract injury is not enough. . . . [S]peculation is insufficient to establish the existence of a present, live controversy." *Los Angeles v. Lyons*, 461 U.S. 95, 101, 105 (1983) (no standing where injury was based on assumption that law would be violated). As the U.S. Supreme Court said over twenty years ago, "It is the reality of the threat . . . that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." *Lyons*, 461 U.S. at 107 n.8 (fear that police will break the law is insufficient to confer standing absent evidence that this may actually occur). Likewise, "mere 'general averments' and 'conclusory allegations'" were found inadequate to support standing in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 184 (2000) (citizens had standing to enforce Clean Water Act upon showing that one of them lived half mile from facility and had used river now being polluted by defendant).

In *Boundary Backpackers v. Boundary Cnty.*, 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996) (Johnson, J.), various environmental groups and individuals sued the county challenging an ordinance that purported to extent control over public lands by requiring federal agencies to comply with a county land use policy. The Court rejected standing by all twenty-one of the plaintiffs save one, a professional guide who asserted that the challenged county ordinance would deprive him of access to a substantial portion of the open space he used for his guiding business. The Court found that his opinion to this effect qualified as an expert opinion, "and, therefore, does not constitute speculation." *Boundary Backpackers*, 128 Idaho at 375, 913 P.2d at 1145.[178] The Court also ruled that the matter was ripe for judicial review, despite the fact that the ordinance had not yet been applied. The Court went on to invalidate the county ordinance on the basis of federal preemption.

[178] The case contains a strong dissent by Justice Schroeder who described the plaintiff's statement as a non sequitur that was hardly strengthened by being labeled an expert opinion. *Boundary Backpackers*, 128 Idaho at 381, 913 P.2d at 1151.

In contrast, where the impact is real and immediate, the courts have readily found standing. For instance, in *Glengary-Gamlin Protective Ass'n v. Bonner Cnty. Bd. of Comm'rs,* 106 Idaho 84, 88-89, 675 P.2d 344, 348-49 (Ct. App. 1983) (Burnett, J.), landowners whose airspace would be physically invaded by low-flying aircraft from a proposed commercial air base were found to have standing.

The Court's decision in *Davisco Foods Int'l, Inc. v. Gooding Cnty.,* 141 Idaho 784, 118 P.3d 116 (2005) (Schroeder, C.J.), casts some doubt on its commitment to principles of non-speculation. As noted above, however, that case did not deal with judicial standing. If the *Davisco* case is followed in the judicial standing context, it will erase traditional standing limitations. As the dissent noted: "In the judicial standing context, the court has indicated that the degree of likelihood of harm is a relevant factor in deciding whether a person 'may be adversely affected.'" *Davisco*, 141 Idaho at 793, 118 P.3d at 125. In *Davisco*, the record was undisputed: there was no possibility that the proposed facility would cause odors three and a half miles away, absent a complete breakdown both technology and in county and state odor enforcement. The majority nonetheless upheld the county's determination that odors could be detected under remote circumstances. That was sufficient to confer standing under the applicable county ordinance.

In *Noh v. Cenarrusa*, 137 Idaho 798, 53 P.3d 1217 (2002), the Court ruled that four petitioners lacked standing to challenge Indian Gaming Initiative, a voter referendum that would facilitate gambling on Indian reservations. The petitioners described various types of injury that would result if the initiative passed, ranging from increased bad checks to decline in moral values. The Court disposed of these alleged injuries noting: "The Petitioners have not alleged an injury in fact at this point. Proposition One may not pass. Any injury suffered is speculative. At this time it is not possible to determine the accuracy of the alleged future injuries. Under traditional standards for determining standing, the petitioners do not have standing." *Noh*, 137 Idaho at 800, 53 P.3d at 1219.

N. Justiciability

Our Supreme Court has stated on more than one occasion: "The doctrine of standing is a subcategory of justiciability." *Young v. City of Ketchum*, 44 P.3d 1157, 1159 (Idaho 2002) (citing *Miles v. Idaho Power Co*., 778 P.2d 757, 761 (Idaho 1989) (Johnson, J.). In *State v. Rhoades*, 820 P.2d 665 (Idaho 1991), the Court stated, "Justiciability is a question of the jurisdiction of the court over the matter at issue. It is axiomatic that a lack of jurisdiction may not be cured by means of stipulation or waiver by the parties." *Rhoades* at 672. Taken together, *Young*, *Miles* and *Rhoades* necessarily imply that a standing argument cannot be waived. Thus, in Idaho, a standing argument or objection may be raised at <u>any</u> stage in the proceedings. That is, it is not necessary to raise the issue before the agency whose action is being challenged.

O. Zoning ordinances

Finally, litigants should pay attention to the local land use ordinances pursuant to which they seek review. These ordinances vary greatly. Some of them, however, speak directly or by implication to the issue of standing.

P. Standing of agency employee to bring appeal

In *Cnty. of Ada v. Henry*, 105 Idaho 263, 267, 668 P.2d 994, 998 (1983), a landowner challenged the right of a member of the zoning staff to file an appeal of a P&Z determination to the county commission. The dissent referred to the person as "a disgruntled employee of the planning and zoning commission" who "snatched away" the landowner's permit. *Henry*, 105 Idaho at 268, 668 P.2d at 999. For procedural reasons, the Court did not rule on the issue. However, the Court noted "the potentially serious policy problems inherent in such a purported party's being permitted to file an appeal." *Id.*

Q. Standing of the prosecutor or attorney general to bring or defend actions on behalf of the people

In *State v. Fox*, 100 Idaho 140, 594 P.2d 1093 (1979), the Idaho Supreme Court found that a county prosecutor had standing to bring an action on behalf of the people of the State of Idaho to establish public rights in privately owned beachfront property on Lake Coeur d'Alene. The Court said that Idaho Code § 31-2604(1) (providing for the duties of the prosecuting attorney) constituted a "legislative grant of authority to the prosecuting attorney to prosecute actions in which the 'people are interested.'" *Fox*, 100 Idaho at 143, 594 P.2d at 1096. In so ruling, the Court distinguished the narrower grant of authority to the Attorney General in Idaho Code § 67-1401(1), which only authorizes the Attorney General to bring or defend actions on behalf of the State (or other entities) in their official capacity. This statute has since been amended, but not in a way that appears to change that result.

R. Standing to attack contract

In *Bentel v. Cnty. of Bannock*, 104 Idaho 130, 135-36, 656 P.2d 1383, 1388-89 (1983), the Court found that private landowners had no standing to challenge as ultra vires a contract entered into between a city and a county. "[P]laintiffs have not satisfactorily established a standing to assert the invalidity of the contract entered into by the City of Pocatello and thereby to mount what is essentially an indirect attack on the County's grant to the City of the right to construct the underground pipeline in the easement area . . . ." *Bentel*, 104 Idaho at 136, 656 P.2d at 1389.

S. Prudential standing

(1) Origins and basis of the zone of interests test

Note: Idaho courts apparently have not embraced the zone of interests test (discussed below). The only Idaho case to address the zone of interests test is *Idaho Branch Inc. of Associated Contractors of America, Inc. v. Nampa Highway Dist. No. 1*, 123 Idaho 237, 242, 846 P.2d 239, 244 (Idaho App. 1993) (Swanstrom, J.), in which the Court of Appeals concluded that the Idaho Supreme Court has not adopted that prudential test.

In addition to the constitutional limitations undergirding the law of standing, federal courts have imposed their own "prudential" limits on which parties should have access to the courts. Although there are other prudential rules, the one that receives the most attention is the so-called "zone of interests" test.[179] As noted above, however, the Idaho courts have not embraced the zone of interests test (see section 18.B at page 208).

The seminal zone of interests case is *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). In this case, a data processing trade group challenged a ruling by the Comptroller of the Currency allowing banks to provide data processing services to other banks and to their customers. The Court began by noting that the data processing companies were plainly "injured" economically by the rule allowing greater competition, thus passing the constitutional standing test of injury in fact. The Court went on, however, to say that the litigant must establish not only constitutional "injury in fact" standing, but must establish "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing*, 397 U.S. at 153. In this case, the Court created a new test, but found that the plaintiffs passed the test, because the banking statutes were aimed, at least in part, at protecting others from competition by banks. This conclusion was based, very simply, on the Court's reference to section 4 of the relevant statute, which provided: "No bank service corporation may engage in any activity other than the performance of bank services for banks." *Data Processing*, 397 U.S. at 155. The Court stated that it was unnecessary to probe the exact purpose and meaning of this statutory provision, because that goes to the merits. Instead, the

[179] "Supplementing these constitutional requirements, the prudential doctrine of standing has come to encompass 'several judicially self-imposed limits on the exercise of federal jurisdiction.' See *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324, 82 L.Ed.2d 556 (1984); see also *Flast v. Cohen*, 392 U.S. 83, 97, 88 S. Ct. 1942, 1951, 20 L.Ed.2d 947 (1968)." *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 552 (1996). *Local Food* dealt with the third prong of the test for organizational standing, which it found was prudential and therefore could be eliminated by Congress. See discussion of organizational standing in section 18.L at page 250.

Court concluded, "We do not put the issue in those words, for they implicate the merits. We do think, however, that § 4 arguably brings a competitor within the zone of interests protected by it." *Data Processing*, 397 U.S. at 156.

Note that the Court's ruling did not come in the form of greater restriction on access to the courts, but, rather, as a rejection of earlier restrictions that demanded that the plaintiff demonstrate the invasion of a "legal right."[180] *Data Processing*, 397 at 829-30. Although the Court replaced the "legal right" test with a new "zone of interests" test for litigants, the Court emphasized that the new test was not a high hurdle. "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action." *Data Processing*, 397 U.S. at 154. Noting the "generous review provisions" of the APA, the Court observed that "we have construed that Act not grudgingly but as serving a broadly remedial purpose." *Data Processing*, 397 U.S. at 156. It is ironic that the zone of interest test has been used by subsequent lower courts to re-impose the very bar to suits by business competitors in NEPA cases that *Data Processing* eliminated in the context of banking regulation. (*E.g.*, *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934 (9th Cir. 2005), discussed below.)

In 1987, the Supreme Court carefully reviewed the holding in *Data Processing*, concluding:

> In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

Clarke v. Securities Industry Ass'n, 479 U.S. 388, 399-400 (1987) (emphasis supplied) (holding securities brokers had standing to challenge ruling allowing banks to establish discount brokerages). The *Clarke* Court continued: "The Court

[180] The *Data Processing* Court attributed the "legal right" test to cases such as *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939), which disallowed competing power producers from challenging the TVA. This was an arcane standing case which found business competitors of an allegedly illegal and unconstitutional government-created corporation may suffer economic, but the harm is "damnum absque injuria" (or loss without injury). Although the *Tennessee Electric* case employed the term "standing" in discussing the legal right test, this was not standing in the modern sense of the word. The *Data Processing* Court swept away this arcane analysis and placed standing in the modern context of Article III plus a prudential zone-of-interests test.

approved the 'trend . . . toward [the] enlargement of the class of people who may protest administrative action." *Clarke*, 479 U.S. at 397. *Clarke* also noted that the evaluation of the "relevant statute" should occur "broadly"—observing that in *Data Processing* the zone of interests into which plaintiffs fell was not apparent on the face of the statute under which they sued, but was found only in legislative history to a different and subsequent statute. *Clarke*, 479 U.S. 378-879.[181]

If the zone of interests test is not especially demanding, who was it intended to exclude? Alas, as the Supreme Court has noted, "The 'zone of interest" formula in *Data Processing* has not proved self-explanatory." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 396 (1987). In *Clarke*, said, "The Court struck a balance in a manner favoring review, but excluding those would-be plaintiffs not even 'arguably within the zone of interests to be protected or regulated by the statute." *Clarke*, 479 U.S. at 397.

Lujan I provides this helpful hypothetical. "Thus, for example, the failure of an agency to comply with a statutory provision requiring 'on the record' hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be 'adversely affected within the meaning' of the statute." *Lujan I*, 497 U.S. 871, 883 (1990).

Where the plaintiff alleges violation of a federal statute that does not provide a private cause of action,[182] he or she may rely instead on the federal Administrative Procedure Act ("APA"), which provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (Section 10 the APA).[183]

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[181] The Ninth Circuit, too, has noted how low this standard is: "[The plaintiff] need only show that its interests share a 'plausible relationship' to the policies underlying each statute. Prudential standing is satisfied unless [the plaintiff's] 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 861 (2005) (holding that an environmental group easily met this test) (quoting *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987).

[182] Neither NEPA nor the National Forest Management Act ("NFMA") contain their own provisions for judicial review. See discussion under "private right of action" in section 13 at page 171.

[183] Nearly all of the zone of interests cases discuss this prudential standard in the context of the second half of section 702 ("adversely affected or aggrieved"). In *Kingman Reef Atoll Investments*, L.L.C. v. U.S. DOI, 195 F. Supp. 2d 1178, 1183-85 (D. Hawaii 2002), the district court concluded that the zone of interests test is equally applicable if the plaintiff premises its case under

This APA provision, however, simply loops back to the "relevant statute" (*e.g.*, NEPA) for purposes of the zone of interests analysis. "Rather, we have said that to be 'adversely affected or aggrieved . . . within the meaning' of a statute, the plaintiff must establish that the injury he complains of (his aggrievement, or the adverse effect upon him) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan I*, 497 U.S. 871, 883 (1990).

The Ninth Circuit explained it this way:

> Because NEPA does not provide for a private right of action, plaintiffs challenging an agency action based on NEPA must do so under the Administrative Procedure Act ("APA"). To meet the statutory requirements for standing under the APA, a plaintiff must establish (1) that there has been a final agency action adversely affecting it, and (2) that, as a result, it suffers legal wrong or that its injury falls within the zone of interests of the statutory provision the plaintiff claims was violated.

Nuclear Information and Resource Service v. NRC, 457 F.3d 941, 949-50 (9th Cir. 2006) (citations and internal quotation marks and brackets omitted).

At the end of the day, "the question [is] whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

There is considerable federal case law on the question of whether commercial interests have standing under the zone of interests test to challenge federal actions alleged to violate the National Environmental Policy Act ("NEPA") and/or the Endangered Species Act ("ESA"). Obviously, this line of cases is not relevant to matters litigated in Idaho under LLUPA. This discussion is included here, however, because development projects occasionally encounter these federal statutes.

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the first prong of section 702 ("legal wrong"—that is, where its legal interests are the direct object of the government action).

(2) The zone of interests test in NEPA and ESA cases

Note: The materials in this section have been complied in connection with litigation now underway and on appeal to the Ninth Circuit. We include them in this handbook in the hope that these authorities cited may be of use to the reader. The reader is cautioned, however, that the commentary reflects the authors' viewpoint and advocacy on an issue that remains in very much in contention.

There is a long line of Ninth Circuit cases limiting access to courts by commercial clients challenging NEPA violations. It began with *Port of Astoria v. Hodel*, 595 F.2d 467, 475 (9th Cir. 1979), in which the Port sued BPA for failure to prepare an EIS on a power supply contract for a new aluminum plant located in another part of the state. If the new plant went forward, the Port stood to lose tax and other financial benefits from an older aluminum plant within the Port. The Ninth Circuit found the Port lacked standing because its "alleged injuries represent only pecuniary losses and frustrated financial expectations that are not coupled with environmental considerations." *Port of Astoria*, 595 F.2d at 475. In contrast, the court ruled that a concerned citizens group that was a co-plaintiff did have standing because they "advanced economic and social injuries that are directly brought into play by the plant's possible closing." In other words, "economic and social injuries" are sufficient to fall within the zone of interests protected by NEPA, but only if they are coupled with environmental considerations that would be addressed by the EIS.

The case of *Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713 (9th Cir. 1993), contains the most sweeping anti-standing language of all appellate decisions. This case was brought by a group of ranchers who held grazing leases on Forest Service land. When the Forest Service adopted a management plan reducing grazing in the Toiyabe National Forest, they sued contending the EIS on the plan was deficient. In a mere three paragraphs, the Ninth Circuit summarily dismissed the NEPA claim because "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA." *Nevada Land*, 8 F.3d at 716.

The U.S. Supreme Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997) (Scalia, J.) appears to reflect a seismic shift in the zone of interests law,[184] bringing it

[184] Daniel R. Mandelker, *NEPA Law and Litigation*, § 4:23 (2009) ("Whether the courts will grant standing based on economic injury in NEPA cases will depend on how they interpret the Supreme Court case of *Bennett v. Spear*."); William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After Bennett v. Spear*, 49 Admin. L. Rev. 763, 766 (1997) ("The end result of *Bennett* is a standing inquiry playing field that is tilted to the advantage of regulatory targets [businesses]. Regulatory beneficiaries [environmentalists] have likely lost the 'zone of interests' inquiry advantage and now face a more challenging set of constitutional standing requirements."); Todd W. Roles, Note, *Has the Supreme Court Armed Property Owners in Their Fight Against Environmentalists? Bennett v. Spear and Its Effect on*

back to its foundational principals. *Bennett* dealt with standing under the Endangered Species Act ("ESA"), not NEPA. But its reasoning would seem to apply equally to NEPA. In *Bennett*, the Court ruled, unanimously, that in applying the zone of interests test, courts must look not just to the overall goal of the statute (e.g. to protect the environment) but to the specific provision of the statute that allegedly was violated:

> Whether a plaintiff's interest is "arguably . . . protected . . . by the statute" within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question (here, species preservation), but by reference to the particular provision of law upon which the plaintiff relies. It is difficult to understand how the Ninth Circuit could have failed to see this from our cases.

Bennett, 520 U.S. at 175-76 (emphasis supplied). The effect of *Bennett* is to widen substantially the types of interests protected. In *Bennett*, the effect was to grant standing to ranch operators and irrigation districts challenging a decision involving an endangered fish. Although plaintiffs' interests in that case were purely economic, those purely economic interests were encompassed within the ESA's instruction to use the best commercial and scientific data available.

Although *Bennett* was an ESA case, the analogy to NEPA is obvious. *Nevada Land* boiled NEPA down to a single-minded purpose. "The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions." *Nevada Land*, 8 F.3d at 716.[185] *Bennett* turned this around, declaring the overarching purpose of the statute irrelevant to the zone of interests test. Instead, *Bennett* announced, the zone of interests test keys into the particular statutory provisions at issue in the litigation. In a NEPA case like this one, that provision is the requirement to prepare an EIS that explores "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity." NEPA § 102(2)(C)(iv), 42 U.S.C. § 4332(2)(C)(iv). Any doubt about the breadth of this requirement and its inclusion of social and economic,

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Environmental Litigation, 41 Ariz. L. Rev. 227 (1999) ("Perhaps the most encouraging effect of *Bennett* will be the ability of both sides, property owners and environmental groups alike, to have equal access to the courts. After years of frustrating inability to effectively challenge agency regulations, property owners rejoice at the judicial access provided in *Bennett*.").

[185] *Nevada Land*'s single-purpose view of NEPA is difficult to reconcile with the broader goals of NEPA recognized by the Supreme Court and more recent Ninth Circuit decisions. "The goal of NEPA is two-fold: (1) to ensure that the agency will have detailed information on significant environmental impacts when it makes decisions; and (2) to guarantee that this information will be available to a larger audience." *Neighbors of Cuddy Mtn. v. Alexander*, 303 F.3d 1059, 1065 (9th Cir. 2002) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

as well as environmental, impacts is resolved by the Council on Environmental Quality's ("CEQ") implementing regulations.[186]

The Ninth Circuit has considered *Bennett* in two recent NEPA cases relevant here. Although it rejected the plaintiff's standing in those cases, it did so on far narrower grounds than employed in *Nevada Land*.

In *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934 (9th Cir. 2005), the Ninth Circuit found that a phosphate company in Utah had no standing to challenge the adequacy of an EIS prepared for a competitor's mine expansion near Soda Springs, Idaho. The court found that "Ashley Creek has no environmental stake in the phosphate mining project at issue, which is some 250 miles from the phosphate Ashley Creek controls. Indeed, its only interest is an economic one: if the project does not go forward, Ashley Creek speculates that it might become an alternate supplier of phosphate." *Ashley Creek*, 420 F.3d at 936. The case addressed both constitutional and prudential standing issues. As for the zone of interests test, the court held: "The bottom line is that Ashley Creek's interest in the EIS analysis is purely financial. NEPA, on the other hand, is directed at environmental concerns, not business interests." *Ashley Creek*, 420 F.3d at 939. That sounds like the old *Nevada Land* mantra. The court went on, however, to offer this key distinction:

> Under this long-standing rule against purely economic interests falling within NEPA's zone of interests, Ashley Creek fails to establish prudential standing. Rather, Ashley Creek has never claimed to be protecting an interest that is even remotely intertwined

[186] The broad scope of NEPA is evident in three CEQ regulations: "Effects include ecological . . ., aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8(b). "*Human environment* shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment." 40 C.F.R. § 1508.14 (italics original). "This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27(a). The Supreme Court emphasized in *Clarke* that the evaluation of the "relevant statute" should occur "broadly"—observing that in *Data Processing* the zone of interests into which plaintiffs fell was not apparent on the face of the statute under which they sued, but was found only in legislative history to a different and subsequent statute. *Clarke*, 479 U.S. 378-879. Given this, it is difficult to understand the reluctance of the Ninth Circuit to look to the CEQ regulations. This is particularly perplexing in light of the deference owed to agency interpretations of their own statutes as reflected in their regulations. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In any event, the Ninth Circuit stopped short of ruling that the CEQ regulations were not relevant to the zone of interests analysis, ruling instead that "courts should not use regulations to expand the zone of interests beyond what Congress intended." *Ashley Creek*, 420 F.3d at 944 n.4. The CEQ regulations simply codify well-settled NEPA law. The authors do not understand how the court in *Ashley Creek* then concludes that these regulations "demonstrate that purely economic considerations are not within that zone." *Ashley Creek*, 420 F.3d at 944.

> with the environment. Ashley Creek's sole interest is in selling phosphate to Agrium; Ashley Creek has not linked its pecuniary interest to the physical environment or to the environmental impacts of the project evaluated in the EIS. As the district court noted, Ashley Creek conceded as much, stating in its brief before that court that it "does not have an interest in the local Idaho environment."

Ashley Creek, 420 F.3d at 940 (emphasis supplied).

The Eighth Circuit held in *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.2d 1115 (8th Cir. 1999), that *Bennett* compels recognition of a broader zone of interests in a challenge to the adequacy of an EIS than in a challenge for failure to prepare an EIS at all. But in *Ashley Creek*, the Ninth Circuit declined to follow the Eighth Circuit's lead. The Ninth Circuit acknowledged the Supreme Court's instruction in *Bennett* to look at every part of the statute, not just the overarching purpose. And it noted the requirement in section 102 of NEPA that the EIS must consider "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity." But the Ninth Circuit found that this reference to "balance" and "productivity" does not give carte blanche to plaintiffs with purely economic concerns:

> While the use of the word "productivity" in subsection (iv) might be construed as requiring agencies to consider economic concerns, that provision requires a statement, not of all economic interests, but rather of the relationship between uses of the environment and productivity. It does not require a discussion of the impacts on productivity that are not intertwined with the environment. In short, nothing in the text of § 102(2)(C) suggests that an EIS must address an economic concern that is not tethered to the environment.

Ashley Creek, 420 F.3d at 943 (emphasis supplied). The court concluded that section 102 of NEPA embraces "consideration of economic interests that are *interrelated* with the environmental effects of an action." *Ashley Creek*, 420 F.3d at 944 n.4 (emphasis original).

The nuanced interpretation of *Bennett* in *Ashley Creek* is consistent with another Ninth Circuit decision issued five days earlier, *Ranchers Cattlemen Action Legal Fund, v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1102 (9th Cir. 2005). Here again the Ninth Circuit stepped away from the sweeping "only environmentalists can bring NEPA claims" concept of *Nevada Land*. In *Ranchers*, the court explained, "A plaintiff can, however, have standing under NEPA even if his or her interest is primarily economic, as long as he or she also alleges an environmental interest or

economic injuries that are 'causally related to an act within NEPA's embrace.'" *Ranchers*, 415 F.3d at 1103.[187] "If a harm does not have a sufficiently close connection to the physical environment, NEPA does not apply." *Ranchers*, 415 F.3d at 1103 (citing *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 778 (1983)).

There are a few other district court decisions in the Ninth Circuit addressing the impact of *Bennett* on *Nevada Land*. A judge in Arizona applied a particularly narrow reading of *Bennett* in *Arizona Cattle Growers' Ass'n v. Cartwright*, 29 F. Supp. 2d 1100 (D. Az. 1998). The district court brushed aside the Supreme Court's powerful message in *Bennett*, concluding that "if *Bennett* altered *Nevada Land* in any way, it did so merely by altering the manner in which the court will likely reach the same result." *Arizona Cattle*, 29 F. Supp. 2d at 1108. The court found that since NEPA (unlike the ESA) is a procedural statute, every provision in it has the same goal: "The purpose is one and the same: protection of the environment." *Arizona Cattle*, 29 F. Supp. 2d at 1109. Indeed, the Ninth Circuit agreed with *Arizona Cattle* on this one point. *Ashley Creek*, 420 F.3d at 945.[188] However, the Ninth Circuit did not embrace the more sweeping declaration in *Arizona Cattle* that *Bennett* changes nothing and a plaintiff whose interests are solely economic can never bring a NEPA challenge. To the contrary, *Ashley Creek* and *Ranchers* offer a more careful reading of *Bennett* which bars NEPA claims by commercial plaintiffs only where they cannot demonstrate that their economic interests are not intertwined with the environmental issues in the EIS.

The U.S. Supreme Court touched on the issue of prudential standing again in *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2754 (2010). This case involved a challenge to the Department of Agriculture brought by various environmental groups and organic and conventional alfalfa farmers, collectively "organic farmers." They sued to challenge the government's approval of a petition brought by Monsanto its licensee to deregulate Roundup Ready Alfalfa (a variety of

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[187] The "causally related" reasoning from *Ranchers Cattlemen* was embraced by Judge Winmill in a recent unpublished decision. *Scott v. United States*, 2009 WL 482893 (D. Idaho 2009). *Scott* is consistent with the new, broader view of standing reflected in the Ninth Circuit's more recent decisions and is readily distinguishable from the case at bar. As the court noted, "Indeed Scott's complaint does not even cite NEPA or mention any adverse environmental impacts of the closure order. Scott's NEPA challenge—first fully articulated in his summary judgment brief—does not seem calculated to protect the environment from an inadequate NEPA analysis in issuing the closure order over five years ago. Rather, Scott's NEPA challenge appears to be a last-ditch effort to invalidate the closure order on procedural grounds unrelated to his interests." *Scott* at *5 (emphasis supplied). Moreover, as Judge Winmill expressly noted, *Scott* was a summary judgment case. Rather than being limited to the pleadings like the case at bar, Scott was obligated to submit evidence, which he failed to do.

[188] The authors suggest that, in so holding, the district court and the Ninth Circuit have missed the point of *Bennett* altogether.

alfalfa that is tolerate of Monsanto's Roundup herbicide). They feared that the new genetically modified alfalfa would transmit its genetic immunity to other conventional alfalfa and to weeds that compete alfalfa. The action was brought on the basis of the agency's failure to prepare an EIS.

The district court ruled in favor of the environmentalists and requested the parties to submit proposed forms of judgment. At that point Monsanto and its licensee sought and were allowed to intervene in the remedial phase of the litigation. Ultimately the district court vacated the government's action deregulating the new alfalfa (which had the effect of making its use illegal) and issued a permanent injunction prohibiting use of the new strain (except in very limited circumstances involving farmers who had already planted it) until an EIS was prepared. The federal government and Monsanto appealed the injunction but, arguably at least, not the vacatur. The Ninth Circuit affirmed. *Geertson Seed Farms v. Johanns*, 570 F.3d 1130 (9th Cir. 2009). Then, Monsanto and its licensee alone sought certiorari.[189]

Since no one challenged the lower courts' conclusion that the agencies violated NEPA, the appeal was focused on the appropriateness of the injunctive relief that implemented the district court's decision. Ultimately, the Court reached the merits, ruling that the injunction was inconsistent with the standard four-part test for injunctive relief and inappropriately tied the hands of the agency on remand. [190] The effect of vacatur was to make any planting of the genetically modified alfalfa illegal. The government should be allowed, or remand, to decide whether or not some partial deregulation in advance of a full-blown EIS was appropriate. The district court essentially got out in front of itself be providing guidance prematurely on how the government should act in the interim.

Before reaching the merits, however, the Court address dueling standing challenges raised by both sides. Monsanto contended that the plaintiffs lacked standing to seek injunctive relief (apparently conceding that they had standing to bring the original NEPA challenge).[191] The Court rejected this argument. As for Article III standing, the Court found that at least some of the farmers would have been affected by increased risk of gene flow and that an injunction would remedy that risk. The Court then turned to the zone of interests test.

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[189] The government participated and argued as "Federal Respondents Supporting Petitioners" are also listed as "Federal Respondents in Opposition."

[190] The Court noted that, since *Winter v. Natural Resources Defense Council, Inc*., 555 U.S. 7 (2008), this test has been applied to NEPA cases. *Winter* overturned prior decisions which held that injunctive relief was more or less automatic in NEPA cases.

[191] The Court agreed that this is an appropriate question, citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing separately for each form of relief sought.") (internal quotation marks omitted).

> Petitioners appear to suggest that respondents fail to satisfy the "zone of interests" test we have previously articulated as a prudential standing requirement in cases challenging agency compliance with particular statutes. See Reply Brief for Petitioners 12 (arguing that protection against the risk of commercial harm "is not an interest that NEPA was enacted to address"); *Bennett v. Spear*, 520 U.S. 154, 162-163, 117 S. Ct. 1154, 137 L.Ed.2d 281 (1997). That argument is unpersuasive because, as the District Court found, respondents' injury has an environmental as well as an economic component. See App. to Pet. for Cert. 49a. In its ruling on the merits of respondents' NEPA claim, the District Court held that the risk that the RRA gene conferring glyphosate resistance will infect conventional and organic alfalfa is a significant environmental effect within the meaning of NEPA. Petitioners did not appeal that part of the court's ruling, and we have no occasion to revisit it here. Respondents now seek injunctive relief in order to avert the risk of gene flow to their crops—the very same effect that the District Court determined to be a significant environmental concern for purposes of NEPA. <u>The mere fact that respondents also seek to avoid certain economic harms that are tied to the risk of gene flow does not strip them of prudential standing.</u>

Monsanto, 130 S. Ct. at 2756. While this discussion falls short of a thorough probing of the issue, it does seem to be at odds with the simplistic view that NEPA litigation is unavailable to those whose predominant interest is economic. Indeed, it is interesting to note that no one questioned whether Monsanto could pass the zone of interests test. How is it that Monsanto, whose sole interest in the matter was its desire to make money by selling a product that arguably harms the environment, passes the test set out in *Nevada Land*?

Although the *Monsanto* Court did not address Monsanto's prudential standing, it did address its Article III standing. This arose in the most peculiar context owing to the fact that Monsanto failed to challenge the vacatur directly. (In other words, Monsanto had standing at the outset, but arguably lost it.) Environmentalists argued that the failure to challenge the vacatur essentially mooted the debate over the injunctive relief because planting would be illegal regardless of whether the injunction remained or was lifted. The Court rejected the argument. First, it ruled that technically Monsanto and its licensee had "adequately preserved their objection" despite failing to challenge the vacatur directly. Second, the Court ruled that, in any event, Monsanto had standing to challenge the forward-looking part of the injunction

that went beyond the vacatur itself and prohibited the agency from undertaking a new partial deregulation during the course of completing the EIS review. These rulings have no particularly notable jurisdictional import. As noted above, the more interesting thing is that no one questioned Monsanto's prudential standing.

It may help to step back and view the issue more broadly. Some court decisions—particularly in the Ninth Circuit, blithely recite that NEPA is a one-sided statute for the sole benefit of environmentalists—as if that is a perfectly sensible way of applying the zone of interests test. But this does not square with how we think about the zone of interests test in other contexts. For instance, if a narrow view of the zone of interests test were applied to the mining laws—which were enacted for the benefit of miners and the economic development of the nation—then environmentalists would not have standing to challenge violations of those laws. We know that is not the case.

Another example can be found in a recent First Amendment case, *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009). In this case, pharmacists challenged a rule requiring them to dispense the morning-after abortion pill. The Ninth Circuit ruled that they fell within the pharmacy statute's zone of interests, despite the fact that the statute was not designed to help pharmacists, but rather to help their customers. The myopic "us versus them" concept reflected in some of the Ninth Circuit decisions departs from how standing is analyzed in these examples. It ignores the fact that when Congress enacted NEPA it was not trying to help one side and hurt the other. A fair reading of the Act (and the CEQ regulations) makes it clear that its purpose is to foster free and open discussion by all impacted parties who have an interest in the subject. *Bennett* and recent Ninth Circuit decisions certainly point in this direction.

Another interesting standing case is *Diamond v. Charles*, 476 U.S. 54 (1986). In this case, a group of abortion doctors challenged an Illinois law tightening abortion restrictions. Another group of anti-abortion doctors ("Diamond") were allowed to intervene. The case dealt primarily with the issue of whether intervenors must demonstrate standing on appeal when no other party appeals. The Court held the anti-abortion doctors could not appeal, because they could not demonstrate standing. The anti-abortion doctors were nothing more than a well-intentioned and deeply concerned bystanders. The Court noted, "[T]he decision to seek review . . . is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond*, 476 U.S. at 63 (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973) (Stewart, J.). Notably, however, the Court found that the pro-abortion doctors (the plaintiffs) did have Article III standing because they "faced possible criminal prosecution." *Diamond*, 476 U.S. at 65.

This case dealt only with Article III standing, not prudential standing. It is interesting, however, that no prudential standing challenge was raised. If it had been,

how could it be said that abortion doctors fall within the zone of interests to be protected by a statute restricting the availability of abortions? Are the abortion doctors not analogous to business interests challenging a NEPA violation?

Perhaps the explanation is that the zone of interests test was never intended to address people like those in *Diamond*. The zone of interests test was intended to exclude plaintiffs who, despite meeting the Article III standing test, really have no dog in the fight being addressed by the legislation. Both pro- and anti-abortion doctors clearly have a dog in this fight (though one group lacks Article III standing). Thus, the zone of interests test, properly applied, should exclude persons whose interests are peripheral to the policy questions address by the legislation.

Thus, for instance, perhaps the landlord of an abortion clinic would lack prudential standing. At some point, as in the court reporter hypothetical offered by *Lujan*, the plaintiff's interests are simply too remote—that is, they are not within the zone of interests addressed by the legislation.

Where the Ninth Circuit and others got off on a wrong track was thinking that the zone of interests test was aimed at preferring one class of plaintiff over another based on whether their interests were aligned with the interests that the legislation sought to protect or promote. In other words, these courts ignored part of the underlined part of test set out in *Data Processing*: "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing*, 397 U.S. at 153 (emphasis supplied). The zone of interests test is not about looking for the party whose interests are in line with or favored by the legislation at issue. Rather, the test protects parties both "pro" and "con"—that is, "protected" or "regulated." Properly understood, the core of the test is not which side the plaintiff is on, but whether the plaintiff has a dog in the fight addressed by the legislation. Thus, the proverbial "little old lady" is excluded from the courtroom because she lacks Article III standing—she may be mad as hell about what she read in the newspaper, but she is not injured. The zone of interests gets at a similar but slightly different problem—the plaintiff who is injured, but suffers a kind of injury (like *Lujan*'s court reporter) whose injury is peripheral to the battleground addressed by the legislation.

T. Burden of proof is on plaintiff

The burden is on the party asserting standing to demonstrate that the tests have been met. "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defenders of Wildlife* ("*Lujan II*"), 504 U.S. 555, 561 (1992) (Scalia, J.).

Where, for instance, the plaintiff is the entity seeking a permit, standing is usually self-evident. "If he is [the object of the governmental action], there is ordinarily little question that the action or inaction has caused him injury, and that a

judgment preventing or requiring the action will redress it." *Lujan II* at 561-62. However, where the plaintiff is a person challenging the issuance of a permit to another, proof of standing can be a significant hurdle. As both the U.S. Supreme Court and the Idaho Supreme Court said: "Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan II* at 562, *quoted in Young v. City of Ketchum*, 44 P.3d 1157, 1160, 137 Idaho 102, 105 (2002) (Trout, C.J.).

U. "Foot in the door" standing – the right to litigate and pursue other issues in the case

Once a plaintiff establishes standing with respect to one issue in the case, may that party pursue other aspects of the case? In the context of NEPA, at least, that seems to be the case, according to a noted commentator. "Plaintiffs who do show an injury in fact sufficient to confer standing may challenge other NEPA violations on which they do not have standing to sue." Daniel R. Mandelker, *NEPA Law and Litigation*, § 4:9 (2018) (footnote with citations omitted[192]).

On the other hand, in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (internal quotation marks omitted), the Court said, "[A] plaintiff must demonstrate standing separately for each form of relief sought." This statement was quoted with approval (but no analysis) in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153 (2010) (Alito, J.).

The U.S. Supreme Court recently explained that once a plaintiff settles the part of a lawsuit where he has established standing, he may not continue to pursue the rest of the lawsuit in which standing cannot be separately established. "We know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action (here, the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests." *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1149-50 (2009).

In *Selkirk-Priest Basin Ass'n v. State ex rel. Andrus* ("*Selkirk I*"), 127 Idaho 239, 241, 899 P.2d 949, 951 (1995) (McDevitt, C.J.), the Court held that environmental groups have standing to raise their public trust claim but lacked standing to challenge violation of constitutional requirements respecting endowment

[192] The footnote reads: *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978); *Citizens Committee Against Interstate Route 675 v. Lewis*, 542 F. Supp. 496 (S.D. Ohio 1982). *See Duke Power Co. v. Carolina Environmental Study Group, Inc*., 438 U.S. 59 (1978). *Cf. Vermont Public Interest Research Group v. U.S. Fish & Wildlife Service*, 247 F. Supp. 2d 495, 513 (D. Vt. 2002) (even though plaintiffs only showed that proposed release of lampricides would injure their use of one creek, they could challenge entire lampricide program for which FWS prepared a programmatic environmental impact statement).

lands. That may be because the plaintiffs premised their standing as to the constitutional claims solely on the basis of representing members whose children attended public school. It is unclear why standing for the endowment claim could not also have been premised on environmental impact. Doing so might present a prudential "zone of interests" issue, but not an Article III standing issue. As discussed elsewhere, Idaho has not adopted the zone of interests test.

V. "Foot in the door" standing – multiple plaintiffs

If one of the plaintiffs establishes standing, the Court will not require the other plaintiffs to establish standing (at least so long as they are not raising new issues). *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).[193] The *Bowsher* case did not analyze the principle, but simply declared that because one plaintiff had Article III standing "[w]e therefore need not consider the standing issue as to the Union or Members of Congress." *Bowsher*, 478 U.S. at 721.

In *Boundary Backpackers v. Boundary Cnty.*, 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996) (Johnson, J.), the Court analyzed standing separately for separate plaintiffs. Three environmental groups and 18 individuals sued the county challenging an ordinance that purported to extent control over public lands by requiring federal agencies to comply with a county land use policy. The Court rejected standing by all twenty-one of the plaintiffs save one, a commercial outfitter and guide. The guide's affidavit asserted that the challenged county ordinance, if enforced, would deprive him of access to a substantial portion of the open space he used for his guiding business. With little explanation (other than the observation that this qualified as an expert opinion), the Court declared that this affidavit was "an ample foundation to support Krmpotich's concluding statement of the injury he will suffer from the enforcement of the ordinance." *Boundary Backpackers*, 128 Idaho at 375, 913 P.2d at 1145. The Court offered no explanation as to what was inadequate about the other plaintiffs' standing. One is left to guess that they may have relied on mere aesthetic enjoyment, a conclusion that seems to have been confirmed in litigation involving the Selkirk-Priest Basin Association.

The Idaho Supreme Court made an oblique comment on this principle in a case holding that where different parties may have standing as to different parts of a case, all may be argued together in one brief. "All issues may be heard even if an

[193] *See also*, *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) ("only one of the petitioners needs to have standing to permit us to consider this petition for review."); *Sec'y of the Interior v. California*, 464 U.S. 312, 319 n. 3 (1984) (no need to consider standing of environmental groups to sue under the Coastal Zone Management Act where the State of California was a party and it clearly had standing); *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 44-45 (1974) (no need to evaluate organizational standing of banking association when an individual bank was also a litigant and it clearly had standing); *Southern Utah Wilderness Alliance v. BLM*, 425 F.3d 735, 744 (10th Cir. 2005) (no need to evaluate standing of environmental group because BLM is a party and it clearly has standing).

individual issue may only relate to one appellant. That all appellants may not have standing to all issues in a brief written on behalf of all appellants is of no consequence if at least one appellant, as is the case, has standing for each issue argued." *Farrell v. Bd. of Cnty. Comm'rs of Lemhi Cnty.*, 138 Idaho 378, 383, 64 P.3d 304, 309 (2002) (Schroeder, J.).

W. Standing on appeal

A party must satisfy standing requirements to pursue an appeal. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("The standing Article III requires must be met by the persons seeking appellate review, just as it must be met by persons appearing in courts of the first instance.")

See also discussion below of *Diamond v. Charles*, 476 U.S. 54 (1986) (intervenors may "piggyback" if other parties appeal, but they must establish Article III standing if they are the only ones to appeal).

X. Federal intervention

(1) The governing rules

Intervention as of right is governed by Fed. R. Civ. P. 24(a), which provides:

> On timely motion, the court must permit anyone to intervene who:
> . . .
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a). "Rule 24 traditionally receives liberal construction in favor of applicants for intervention." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (citing *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)).

Permissive intervention is governed by Fed. R. Civ. P. 24(b). Under Rule 24(b), a district court may allow anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Permissive intervention lies within the sound discretion of the court. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110-11 (9th Cir. 2002). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). In addition, the Ninth Circuit has held that "a court may grant permissive intervention where the applicant for intervention shows (1) independent grounds for

jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Northwest Forest Res. Council*, 82 F.3d at 839.

(2) Standing requirements for intervenors

There is some uncertainty in the law as to whether an intervenor (who can satisfy the requirements of intervention as of right or permissive intervention) must also satisfy the requirements Article III standing. On the other hand, it is clear that intervenors must establish standing on appeal if they are the only ones bringing the appeal. No case of which we are aware addresses whether intervenors must also meet prudential standing tests.

In *Diamond v. Charles*, 476 U.S. 54 (1986), a group of abortion doctors challenged an Illinois law tightening abortion restrictions. Another group of anti-abortion doctors ("Diamond") were allowed to intervene. When the state statute was struck down, the state declined to pursue the appeal to the U.S. Supreme Court. Instead, the anti-abortion doctors brought an appeal.[194] Because the case dealt with standing on appeal, the Court found it unnecessary to address what it acknowledged as a split in the circuits over whether intervenors must demonstrate standing at the district court level. *Diamond*, 476 U.S. at 68-69. Nevertheless, the Court expressed no great concern with "this ability to 'piggyback' on the State's undoubted standing." *Diamond*, 476 U.S. at 65. Moreover, the Court noted that as an intervenor, Diamond could have participated in an appeal brought by the defendant State of Illinois. The problem was that the State did not appeal. Thus, the issue in the case was whether Diamond, acting alone, could pursue the appeal to the Supreme Court. The Court held the anti-abortion doctors could not, because they could not demonstrate standing. "Diamond's status as an intervenor below, whether permissive or as of right, does not confer standing sufficient to keep the case alive in the absence of the State on this appeal. Although intervenors are considered parties entitled, among other things, to seek review by this Court, an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond*, 476 U.S. at 68 (citation omitted).[195]

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[194] Due to the posture of the case, this was pursued by an appeal, not by petition for writ of a *certiorari*.

[195] This case was not cited by the Court in *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010). However, it was cited by the respondents in their brief, and it appears to form the basis of the Court's determination that it was necessary for Monsanto and the other petitioners to establish their standing on appeal. Due to its peculiar posture, this case did not present the issue of whether an intervenor must demonstrate standing at the district court level. Here, Monsanto clearly had Article III standing at that stage. It was only due to its failure to appeal a portion of the district court's decision that it arguably lost its standing on appeal. Curiously, no one in the case raised the question of whether Monsanto met the prudential standing requirements—despite the fact that Monsanto itself

As noted above, the Court in *Bowsher v. Synar*, 478 U.S. 714, 721 (1986), held that it will not analyze whether each individual plaintiff has standing to bring a claim, so long as one of them plainly does. The so-called Bowsher doctrine was extended to intervenors in *McConnell v. FEC*, 540 U.S. 93, 233 (2003), in which the Court noted, simply: "It is clear, however, that the Federal Election Commission (FEC) has standing, and therefore we need not address the standing of the intervenor-defendants, whose position here is identical to the FEC's." *McConnell*, 540 U.S. 93 at 233. One might think that would be the end of it, but the circuit courts have continued to be inconsistent and uncertain with their application of this rule.

In *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989), the Ninth Circuit held that intervenors need only meet the test for intervention and need not also demonstrate standing.[196] "The plaintiffs urge us to find that a party seeking to intervene must have standing, as the D.C. Circuit has held. However, we in the past have resolved intervention questions without making reference to standing doctrine." *Portland Audubon*, 866 F.2d at 308 n.1 (citation omitted). Yet in *Prete v. Bradbury*, 438 F.3d 949, 955 n.8 (9th Cir. 2006), the Ninth Circuit said it has not yet settled the issue of "whether an intervenor-applicant must independently establish Article III standing to intervene as of right." *Prete* cites eight cases and authorities, but ignores *McConnell*.

In 2009 the Ninth Circuit noted that the issue is still up in the air:

> We have yet to decide whether putative intervenors must satisfy standing independently of the parties to the case. The circuits are split on this issue. See *Prete*, 438 F.3d at 956 n. 8 (citing cases). In any event, because the district court correctly denied the Campaign's motion to intervene under Rule 24, we do not consider standing here. See *id*. (noting that "we need not reach [the issue of standing] because ... the district court erred in granting intervenor-defendants' motion to intervene on grounds other than whether intervenor-defendants had independent standing"); *see also Portland Audubon Soc. v. Hodel*, 866 F.2d 302, 308 n. 1 (9th Cir. 1989) (noting

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challenged the prudential standing of its organic farmer opponents. Very possibly the environmentalists did not raise prudential standing because it was apparent that it would have been a two-edged sword, eliminating both petitioners and some of the respondents whose interests in this NEPA case were fundamentally economic.

[196] Aside from the standing issue, the *Portland Audubon* case set up a very restrictive "federal defendant" rule for intervenors in NEPA cases. That rule was abandoned by the Ninth Circuit, siting *en banc*, in *The Wilderness Society v. U.S. Forest Serv.*, 2011 WL 117627 (9th Cir. 2011).

> that "we in the past have resolved intervention questions without making reference to standing doctrine").

Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 950 n.2 (9th Cir. 2009).

The application of the Bowsher Doctrine in the context of intervention in the various circuits is analyzed in Elizabeth Zwickert Timmermans, Note, *Has the Bowsher Doctrine Solved the Debate?: The Relationship Between Standing and Intervention as of Right*," 84 Notre Dame L. Rev. 1411 (2009). The authors note that the circuits have largely ignored *McConnell* in analyzing standing requirements for intervenors.

As lower courts continue to struggle with the question, all of decisions we have encountered pose the question in terms of whether the intervenor-applicant must possess Article III standing. We have not encountered a case dealing with whether a would-be intervenor who has Article III standing but does not fall within the statute's zone of interests (*e.g.*, an "economic" interest in a NEPA case) may intervene. It would seem, however, even if the intervenor were required to have Article III standing (notwithstanding *McConnell*), there is ample reason to believe that the zone of interests test, at least, should be disposed of since it has been replaced by the requirements under Rule 24. It would seem that such an argument might resonate particularly in the Ninth Circuit. "Commentators argue that the Ninth Circuit is the most liberal circuit with regard to allowing intervention." Timmermans, at 1433.

(3) Intervention in NEPA cases – the demise of the "federal defendant only" rule.

The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h and the law of intervention are huge topics beyond the scope of this Handbook. However, we mention one recent and notable case dealing with intervention in NEPA cases. This case addresses the now abandoned "federal defendant only" rule, which has some interesting parallels to the prudential standing concept in NEPA cases. The federal defendant only rule categorically prohibited parties from intervening of right during the merits phase (i.e., the determination of liability) in NEPA litigation. A more relaxed approach to intervention then applied during the remedy phase, if a NEPA violation was established.

The federal defendant rule may be traced to the holding in *Portland Audubon Society v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989), which denied intervention to industry groups and others holding that "NEPA provides no protection for . . . purely economic interests." Accordingly, the court held, the would-be intervenors lacked a "significantly protectable interest" in the matter. In *Churchill Cnty. v. Babbitt*, 150 F.3d 1072, 1082, *as amended by* 158 F.3d 491 (9th Cir. 1988) and other cases, the rule was expressed in terms of a categorical rule that only the federal government

could be a defendant in the merits phase of a NEPA challenge (although others are allowed to intervene in the remedial phase).

In *The Wilderness Society v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011), *remanded to* 2001 WL 1743781 (D. Idaho 2011), the Ninth Circuit, sitting *en banc* in a unanimous decision, abandoned the federal defendant rule. The case involved the Forest Service's adoption of a travel management plan designating roads and trails available for motorized use in the Sawtooth National Forest. Two conservation groups sued the Forest Service for NEPA violations. Three pro-road recreation groups then sought to intervene as defendants. The district court applied the federal defendant rule to deny intervention as of right to the pro-road groups. (It also denied permissive intervention on other grounds including failure to adequately participate in the administrative process.) The Ninth Circuit reversed, announcing that it was abandoning the federal defendant rule because it was inconsistent with the intervention statute itself and the broader body of intervention law:

> We now abandon the "federal defendant" rule. When considering motions to intervene of right under Rule 24(a)(2), courts need no longer apply a categorical prohibition on intervention on the merits, or liability phase, of NEPA actions. To determine whether putative intervenors demonstrate the "significantly protectable" interest necessary for intervention of right in a NEPA case, the operative inquiry should be whether the "interest is protectable under some law" and whether "there is a relationship between the legally protected interest and the claims at issue." [*Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993).] A putative intervenor will generally demonstrate a sufficient interest for intervention of right in a NEPA action, as in all cases, if "it will suffer a practical impairment of its interests as a result of the pending litigation." [*California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006).]

Wilderness Society, 630 F.3d at 1180.

It is unclear to what extent the court's rejection of *Portland Audubon* may have on similar statements (about NEPA providing no protection for purely economic interests) made in the context of standing cases. See discussion in section 18.S(2) at page 262.

On remand, the district court then allowed the pro-road groups to intervene. *The Wilderness Society v. U.S. Forest Serv.*, 2001 WL 1743781 (D. Idaho 2011).

(4) Permissive intervention and the "independent jurisdictional grounds" rule

In 2011 the Ninth Circuit clarified the limited applicability of the first test. "We therefore clarify that the independent jurisdictional grounds requirement does not apply to proposed intervenors in federal-question cases when the proposed intervenor is not raising new claims. *Freedom from Religion Foundation, Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011). The court explained its reasoning as follows:

> This [independent jurisdictional grounds] requirement stems, however, from our concern that intervention might be used to enlarge inappropriately the jurisdiction of the federal courts. See Fed. R. Civ. P. 82. This concern manifests itself most concretely in diversity cases where proposed intervenors seek to use permissive intervention to gain a federal forum for state-law claims over which the district court would not, otherwise, have jurisdiction.
>
> The jurisdictional requirement also prevents permissive intervention from being used to destroy complete diversity in state-law actions.
>
> But in federal-question cases, the identity of the parties is irrelevant and the district court's jurisdiction is grounded in the federal question(s) raised by the plaintiff. See 28 U.S.C. § 1331. The jurisdictional requirement, therefore, prevents enlargement of federal jurisdiction in such cases only where a proposed intervenor seeks to bring new state-law claims. Where the proposed intervenor in a federal-question case brings no new claims, the jurisdictional concern drops away.

Freedom from Religion, at 843 (two internal citations omitted; emphasis added). Accordingly, the court held that, because the plaintiff's case was based on federal question jurisdiction and the proposed intervenor was not bringing any additional claims, the proposed intervenor "is not required to make any further showing that his intervention is supported by independent jurisdictional grounds." *Freedom from Religion*, at 844.

Y. Article III's standing requirement does not apply to agencies.

In *Central Freight Lines v. ICC*, 899 F.2d 413 (5th Cir. 1990), a trucking company petitioned for and obtained a declaratory order from the ICC favorable to its position regarding anticipated future shipments. Another trucking company challenged the ICC order in court, and the State of Texas intervened. Texas

contended that, because the shipments had not yet begun the opinion was advisory. Accordingly, Texas contended the matter did not constitute a case or controversy under Article III of the federal Constitution, and the ICC therefore had no jurisdiction to issue the order.

The Fifth Circuit found rejected the argument, noting that the law of standing does not apply to agencies. "It is also well established that the case or controversy requirement of Article III 'does not restrict an agency's authority to issue declaratory rulings under 5 U.S.C. § 554(e) [the federal APA].'" *Central Freight*, 899 F.2d at 417 (quoting *Texas v. United States*, 866 F.2d 1546, 1551 (5th Cir. 1989)).

The sponsors of section 5(d) of the APA noted that agencies would "be as free to act irrespective of the technical rules of case or controversy as courts are." McCarran, Administrative Procedure Act—Legislative History, S. DOC. NO. 248, 79th Cong., 2d Sess. 204 (1946).

19. SOVEREIGN IMMUNITY

A. Basis of sovereign immunity

Note: See discussion in section 33.K on page 812 regarding waiver of sovereign immunity in condemnation of governmental property.

Under common law, the federal government and state governments are cloaked with sovereign immunity,[197] meaning that they may not be sued for money damages (or anything else) unless sovereign immunity is waived. *Block v. North Dakota*, 461 U.S. 273, 280 (1983).

"It has been settled since at least the mid-nineteenth century that the United States may not be sued without its consent. . . . The Constitution does not refer to sovereign immunity, and the rules pertaining to the defense are judge made." 14 Fed. Prac. & Proc. Juris. § 3654 (2016).

Ordinarily, sovereign immunity is waived by statute, e.g., the state and federal quiet title acts, or by constitutional provisions. In rare instances, the court itself will declare sovereign immunity inapplicable as a matter of common law. See discussion in section 19.D (In Idaho, sovereign immunity does not apply to suits alleging constitutional violations.) on page 282. Sovereign immunity may also be waived by contract or other actions.

B. Idaho's recognition of sovereign immunity

Idaho recognizes the State's sovereign immunity.

> That a people in their collective capacity, exercising the rights, privileges, duties, and obligations of sovereignty, cannot be sued except by their consent, is a principle too well established to require discussion.

Hollister v. State, 9 Idaho 8, 71 P. 541, 542 (1903) (Ailshie, J.).

> The following propositions appear to be well recognized by both parties to this appeal: (1) The State of Idaho cannot be sued without its express consent, *Hollister v. State*, 9 Idaho 8, 71 P. 541 (1903); *Thomas & Faris v. State*, 16 Idaho 81, 100 P. 761 (1909); (2) This consent must be found in constitutional or statutory provisions, *Pigg v. Brockman*, 79 Idaho 233, 314 P.2d 609 (1957); (3) A statute authorizing suit against the state

[197] See section 19.F on page 284 for a discussion of protections accorded to local governments.

> is in derogation of sovereignty and therefore must be strictly construed, *Pigg v. Brockman*, *supra*.

Petersen v. State, 393 P.2d 585, 586 (Idaho 1964) (McQuade, J.). The real question is whether Idaho has consented to be sued. See discussions in the sections that follow and in section 33.K ("Condemnation of government property (waiver of sovereign immunity)") on page 812.

C. Criticism of the doctrine

One may wonder why we fought a revolutionary war against the King, and then subjected ourselves to the same royalty-based limitations the King had imposed his subjects.

> The concept of sovereign immunity originates in the English common law principle that the English courts were created by, and therefore had no jurisdiction over, the King: "The King can do no wrong." This legal doctrine was known to lawyers in colonial America. How it came to be applied in the United States is a mystery, given that government in America existed at the pleasure of the people.

Sean Gray, Note, *Declaratory Relief and Sovereign Immunity in Oregon: Can Someone Tell Me If I Turned Square Corners?*, 40 Willamette L. Rev. 563, 568 (2004) (footnotes omitted).

> A doctrine derived from the premise that "the King can do no wrong" deserves no place in American law. The United States was founded on a rejection of a monarchy and of royal prerogatives. American government is based on the fundamental recognition that the government and government officials can do wrong and must be held accountable. Sovereign immunity undermines that basic notion.

Erwin Chemerinsky, *Against Ssovereign Immunity*, 53 Stanford L. Rev. 1201, 1202 (2001) (footnote omitted).

Although firmly part of Idaho law, the doctrine has been criticized by Idaho's own Supreme Court.

> The doctrine of sovereign immunity has its roots in the ancient common law which theorized that the king can do no wrong. But it was acknowledged that the king

> as the fountain of justice and equity, could not refuse to redress wrongs when petitioned to do so by his subjects.
>
> It was well recognized in the thirteenth century and later that while the king was not directly subject to the law, and that though ordinary writs did not lie against him in his court, he was morally bound to do the same justice to his subjects as they could be compelled to do to one another. In fact the Court of Exchequer had jurisdiction of equitable claims against the king. Concerning the history and effect of the doctrine of sovereign immunity, the California Supreme Court speaking through Chief Justice Traynor in the case of *Muskopf v. Corning Hospital District*, 55 Cal.2d 211, 11 Cal.Rptr. 89, 359 P.2d 457 (1961), had this to say:
>
> > '* * * At the earliest common law the doctrine of 'sovereign immunity' did not produce the harsh results it does today. It was a rule that allowed substantial relief. I t began as the personal prerogative of the king, gained impetus from sixteenth century metaphysical concepts, may have been based on the misreading of an ancient maxim, and only rarely had the effect of completely denying compensation. How it became in the United States the basis for a rule that federal and state governments did not have to answer for their torts has been called 'one of the mysteries of legal evolution.' * * *.' 55 Cal.2d 211 at 214, 11 Cal.Rptr. 89 at 90-91, 359 P.2d 457 at 458, 459 (1961).

Smith v. State, 473 P.2d 937, 941 (Idaho 1970) (Donaldson, J.) (footnotes omitted) (asterisks original).

D. In Idaho, sovereign immunity does not apply to suits alleging constitutional violations.

In *Tucker v. State*, 394 P.3d 54 (Idaho 2017) (Burdick, C.J.), the Court considered the State's claim that sovereign immunity protected it from a challenge to Idaho's public defender system. The Court acknowledged the general common law principle of sovereign immunity. "It is the general rule that, under the doctrine of sovereign immunity, a governmental unit can only be sued upon its consent." *Tucker* at 60-61 (quoting *Bott v. Idaho State Bldg. Auth.*, 917 P.2d 737, 748 (Idaho 1996)

(McDevitt, C.J.)). The Court then joined a number of sister states in carving out an exception for constitutional challenges.

> Though we have never addressed the issue, we have recognized that because sovereign immunity is a common law doctrine, the judiciary has the power to modify it. Were we to accept Respondents' position that sovereign immunity shields the State from suit in this instance, we would leave parties unable to vindicate constitutional rights against the State. This we decline to do. Accordingly, aligning with our sister jurisdictions identified above, we hold that sovereign immunity is inapplicable when constitutional violations are alleged.

Tucker, 162 Idaho at 18, 394 P.3d at 61.

Tucker was cited and followed in *Planned Parenthood Great Northwest v. State*, 522 P.3d 1132, 1158 (Idaho 2023) (Brody, J.) (allowing a suit challenging the abortion ban, but denying relief on the merits).

E. Section 1983 does not waive sovereign immunity

Although § 1983 provides a cause of action for certain violations of the federal law by those acting under color of state law (see discussion in section 24.CC at page 453), it does not waive sovereign immunity.

As discussed below, this is a complicating factor only in suits against states. A discussion of this subject is found in Nick Daum, Case Comment, *Section 1983, Statutes, and Sovereign Immunity, Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (en banc)*, 112 Yale L.J. 353 (2002).

> The key point, for Eleventh Amendment purposes, is the legal fiction that § 1983 suits against individual officers are not suits against a state. They thus do not, in theory, raise Eleventh Amendment issues at all. The state, although it serves as the "deep pocket," is liable only indirectly, usually through an indemnification contract or policy in which the state implicitly or explicitly agrees to reimburse monetary judgments against its officers. In this way, the courts have permitted what amounts to a modified regime of tort liability for state governments that violate federal law.

Daum, *Section 1983* at 355.

F. Local governments do not enjoy sovereign immunity

Sovereign immunity is an issue only in the context of suits against a State or the United States. Local governments do not enjoy sovereign immunity.[198] The U.S. Supreme Court reaffirmed this in 2006:

> This Court's cases have recognized that the immunity of States from suit "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden v. Maine*, 527 U.S. 706, 713, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999); see *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55–56, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–323, 54 S.Ct. 745, 78 L.Ed. 1282 (1934). Consistent with this recognition, which no party asks us to reexamine today, we have observed that the phrase " 'Eleventh Amendment immunity' . . . is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden*, 527 U.S. at 713, 119 S.Ct. 2240.
>
> A consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit is that only States and arms of the State possess immunity from suits authorized by federal law. See *id*., at 740, 119 S.Ct. 2240; *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Accordingly, this Court has repeatedly refused to extend sovereign immunity to counties. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979); *id*., at 401, n. 19, 99 S.Ct. 1171 (gathering cases); *Workman v. New York City*, 179 U.S. 552, 565, 21 S.Ct. 212, 45 L.Ed. 314 (1900); *Lincoln County v. Luning*, 133 U.S. 529, 530, 10 S.Ct. 363, 33 L.Ed. 766 (1890). See also *Jinks v. Richland County*, 538 U.S. 456,

[198] This is true notwithstanding sometimes over-broad language found in appellate decisions. *E.g.*, *Bott v. Idaho State Bldg. Auth.*, 128 Idaho 580, 591, 917 P.2d 737, 748 (1996) (McDevitt, C.J.) ("It is the general rule that, under the doctrine of sovereign immunity, a governmental unit can only be sued upon its consent.").

> 466, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit"). This is true even when, as respondent alleges here, "such entities exercise a 'slice of state power.'" *Lake Country Estates, supra*, at 401, 99 S.Ct. 1171.

Northern Ins. Co. of New York v. Chatham County, 547 U.S. 189, 193 (2006) (Thomas, J.).

That said, local governments benefit from some protections that are similar to sovereign immunity, particularly in the context of tort claims.

> The fortunes of municipal immunity over the last two centuries have been closely tied to common-law sovereign or governmental immunity, even though strictly speaking municipalities, unlike states, are not sovereigns. "Sovereign immunity" is the historic immunity derived from the state's status as a sovereign and protects the state from suit, whereas "governmental immunity," "legislative immunity," or "judicial immunity" are defenses where as a matter of policy, the courts have foreclosed liability. In fact, counties, which predate the existence of the state and are considered direct political subdivisions of it, enjoy the same sovereign immunity as the state itself. So, simply put, the state's immunity is referred to as sovereign immunity, while that of political subdivisions of the State is referred to as governmental immunity. Local governmental immunity is comprised of immunity from both suit and liability: "immunity from liability" protects entities from judgments while "immunity from suit" deprives courts of jurisdiction over suits against entities unless the Legislature has expressly consented.

McQuillin, *The Law of Municipal Corporations* (3d. ed.), § 53.5 (2022) (footnotes omitted).

20. IDAHO TORT CLAIM ACT ("ITCA")

A. Grant of authority to sue for torts

The Idaho Tort Claims Act ("ITCA"), Idaho Code §§ 6-901 to 6-929, contains a broad waiver of sovereign immunity, authorizing persons to sue the State or any political subdivision thereof for certain actions sounding in tort.[199]

The key provisions of the ITCA read:

> A "claim" means any written demand to recover money damages from a governmental entity . . . ."

Idaho Code § 6-902(7).

> All claims against a political subdivision [subdivision] arising under the provisions of this act and all claims against an employee of a political subdivision for any act or omission of the employee within the course or scope of his employment shall be presented to and filed with the clerk or secretary of the political subdivision within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later.

Idaho Code § 6-906.

> All claims presented to and filed with a governmental entity shall accurately describe the conduct and circumstances which brought about the injury or damage, describe the injury or damage, state the time and place the injury or damage occurred, state the names of all persons involved, if known, and shall contain the amount of damages claimed, together with a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six (6) months immediately prior to the time the claim arose. If the claimant is incapacitated from presenting and filing his claim within the time prescribed or if the claimant is a minor or if the claimant is a nonresident of the state and is absent during the time within which his claim is required to be filed, the claim may be presented and filed

[199] The ITCA is modeled on its federal counterpart, the Federal Tort Claims Act ("FTCA"), 26 U.S.C. §§ 1346(b), 2671-2680). For a comparison of how the federal and state court have interpreted these acts, see Michael S. Gilmore, *Olson and Rees: A Tale of Two Tort Claims Acts*, 50 Advocate (Idaho) 13 (2007).

> on behalf of the claimant by any relative, attorney or agent representing the claimant. A claim filed under the provisions of this section shall not be held invalid or insufficient by reason of an inaccuracy in stating the time, place, nature or cause of the claim, or otherwise, unless it is shown that the governmental entity was in fact misled to its injury thereby.

Idaho Code § 6-907.

> No claim or action shall be allowed against a governmental entity or its employee unless the claim has been presented and filed within the time limits prescribed by this act.

Idaho Code § 6-908.

> Within ninety (90) days after the filing of the claim against the governmental entity or its employee, the governmental entity shall act thereon and notify the claimant in writing of its approval or denial. A claim shall be deemed to have been denied if at the end of the ninety (90) day period the governmental entity has failed to approve or deny the claim.

Idaho Code § 6-909.

In short, the ITCA requires the injured party to file a "claim" (which is really a notice of a claim) with the local governmental entity within 180 days of the injury or damage (the date the claim arose or should have been discovered). This operates much like a six-month statute of limitations. The local governmental entity must then act on the claim within 90 days. Only then, if it is denied or not acted upon, may the injured party bring suit. A separate statute of limitations discussed below requires that the lawsuit be filed within two years.

The ITCA "abrogates the doctrine of sovereign immunity" but preserves immunity "in certain specific situations." *Teurlings v. Larson*, 156 Idaho 65, 70, 320 P.3d 1224, 1229 (2014) (Horton, J.) (quoting *Lawton v. City of Pocatello*, 126 Idaho 454, 458, 886 P.2d 330, 334 (1994)). Specifically, it provides for suits for "money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course of and scope of their employment or duties . . . ." Idaho Code § 6-903(a).

The ITCA applies to all local governments, including cities. However, another statute, Idaho Code § 50-219, makes the ITCA's notice requirement

applicable for all damage claims (not just torts) against cities. This is discussed further below.

The ITCA does not provide a cause of action. See discussion in section 17.D at page 205.

B. The ITCA does not apply to federal claims

Note that while state law claims are barred by failure to comply with the ITCA, federal claims are not. In *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 175-76, 108 P.3d 315, 322-23 (2004) (Eismann, J.), the Court found that the ITCA's damage claim requirement is preempted as to federal taking claims.[200] In so ruling, the Court relied on its earlier ruling to this effect in *Sweitzer v. Dean*, 118 Idaho 568, 572-73, 572-73, 798 P.2d 27, 31-32 (1990) (Boyle, J.) and on the U.S. Supreme Court's decision in *Felder v. Casey*, 487 U.S. 131 (1988) (Brennan, J.).[201] Accordingly, the federal taking claim survived. In *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.), the Court followed this approach, applying the ITCA only to state constitutional claims.

In *BHA II*, the Court threw out the state law claims by the party who failed to file a timely notice of claim, but allowed that party to pursue its federal takings claim. In *BHA II*, neither the Court nor the parties addressed *Williamson County* and its progeny, which holds (under prong two) that failure to pursue an available state remedy results in forfeiture of the federal taking claim. This argument was presented in *N. Idaho Bldg. Contractors Ass'n v. City of Hayden*, 164 Idaho 530, 432 P.3d 976 (2018) ("*NIBCA II*") (Bevan, J.), but the Court rejected it without analysis, treating the matter as having been settled in *BHA II*.

C. Exceptions to waiver of sovereign immunity (Idaho Code §§ 6-940, 6-904A)

While the ITCA broadly waives sovereign immunity for most tort claims against governmental entities, it carves out various exceptions whereby the government retains its immunity from suit. *E.g.*, Idaho Code § 6-904.

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[200] The plaintiff's failure in *BHA II* to effectively pursue its inverse compensation claim (by failing to file a notice under the ITCA) probably should have resulted in loss of its federal takings claim under prong two of *Williamson County*. That argument was not presented by the parties, and the Court did not raise it *sua sponte*. Indeed, *Williamson County* is not mentioned in the *BHA II* opinion.

[201] In other contexts, failure to file a notice of claim might result in loss of the state law claim which, in turn, could result in forfeiture of the federal claim. This result occurs under prong two of *Williamson County*, as held in *Pascoag, et al*. That analysis was not applicable here, and did not block the federal claim. This is because *Williamson County* only applies to federal takings claims. *Felder* did not involve a takings claim.

A seemingly broad imposition of immunity with respect to illegal tax claims is found in section 6-904A:

> A governmental entity and its employees . . . shall not be liable for any claim which:
> Arises out of the assessment or collection of any tax or fee.

Idaho Code § 6-904A(1).

Standing alone, that provision reads like a blanket protection against lawsuits seeking damages for any unlawfully imposed taxes or fees. However, the Idaho Supreme Court has ruled that the exception only applies where the cause of action sounds in tort. The Idaho Supreme Court reasoned that the imposition of liability must be read in the context of the definition of the word "claim":

> Our interpretation of I.C. § 6–904A must be undertaken within the context of the ITCA. The word "claim" as used in I.C. § 6–904A must be interpreted in accordance with the definition section of the ITCA, I.C. § 6-902, which provides that "claim"
>
> > . . . means any written demand to recover money damages from a governmental entity or its employee which any person is legally entitled to recover under this act as compensation for the negligent or otherwise wrongful act or omission of a governmental entity or its employee when acting within the course or scope of his employment.
>
> I.C. § 6–902(7). The term "claim," as used in the ITCA, describes claims for damages arising from tortuous conduct. Greenwade's claim for the return of property erroneously or illegally seized for the payment of taxes does not appear to fit the definition of a claim for tort damages, and thus would not be barred by I.C. § 6–904A.

Greenwade v. Idaho State Tax Comm'n, 119 Idaho 501, 504-05, 808 P.2d 420, 423-24 (Ct. App. 1991) (Silak, J.).[202]

[202] The Court made the same point (that waiver is granted only as to tort claims) in the context of another exception to the ITCA. "In considering a motion for summary judgment requesting dismissal of a complaint against a governmental entity and its employees under the Idaho Tort Claims Act, the trial court must answer whether tort recovery is allowed under the laws of Idaho; and, if so, whether an exception to liability found in the tort claims act shields the alleged misconduct from liability . . . ." *Harris v. State, Dep't of Health & Welfare*, 123 Idaho 295, 298 n.1,

In other words, because the ITCA only waives sovereign immunity for claims sounding in tort, the exceptions only provide immunity for tort claims falling within the exception. In *Greenwade*, the Court found the exception inapplicable to the government's allegedly unlawful seizure of an automobile for the payment of taxes, which the Court said "does not appear to fit the definition of a claim for tort damages, and would not be barred by I.C. § 6-904A." *Greenwade*, 119 Idaho at 505, 808 P.2d at 424. Because the plaintiff's claim arose under the Idaho Income Tax Act, which provides for a "cause of action that does not sound in tort," and because the definition of a claim under the ITCA is limited to tort claims, the ITCA is not applicable and could not be used by the State Tax Commission to avoid liability. *Greenwade*, 119 Idaho at 506, 808 P.2d at 425.

This conclusion is not altered by Idaho Code § 50-219[203] (discussed below), which expands the applicability of the notice requirement to all damage claims in suits against cities. Section 50-219 does not expand the waiver of liability under the ITCA or create new causes of action against cities. It simply imposes a new notice requirement for actions that may be brought under existing law. Accordingly, it does not alter or expand the immunity from liability provided in Idaho Code § 6-904A.[204]

Because section 6-904A only provides sovereign immunity for tax and fee claims sounding in tort, local governments remain subject to taking claims based on allegedly unconstitutional taxes and fees. One might ask, what tax and fee claims sound in tort? Presumably, that would include a claim for conversion, which is a tort.[205] In any event, the exception appears to be quite narrow.

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847 P.2d 1156, 1059 n.1 (1992) (McDevitt, J.) (emphasis supplied). *See also, Sherer v. Pocatello School Dist. No. 25*,143 Idaho 486, 490, 148 P.3d 1232, 1236 (2006) (Schroeder, C.J.) ("A plaintiff seeking to recover on a tort claim against a governmental entity must survive three stages of analysis. First, the plaintiff must state a cause of action for which tort recovery would be allowed under the laws of Idaho, that is, whether there is such a tort under Idaho law.") (citing *Carrier v. Lake Pend Orielle School Dist.*, 142 Idaho 804, 806-07, 134 P.3d 655, 657-58 (2006) (Burdick, J.)); *Farner v. Idaho Falls Sch. Dist. No. 91*, 135 Idaho 337, 341, 17 P.3d 281 (2000) (Trout, C.J.) ("The ITCA, however, only applies to tort claims.").

[203] "All damage claims against a city must be filed as prescribed by chapter 9, title 6, Idaho Code." Idaho Code § 50-219.

[204] In *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.), the Court ruled that section 50-219 embraces both section 6-906 (the 180-day notice requirement) and section 6-908 (barring claims where notice not timely filed). That makes sense, because 50-219 adopts the "filing" provisions the ITCA. Nothing in *Alpine Village* suggests that section 50-219 expands the scope of other provisions of the ITCA, such as section 6-904A.

[205] "An action for trespass to either chattels or land is a tort, as is an action for trover and conversion. When these torts are allegedly committed by a government employee acting within the course or scope of his employment, they fall within the purview of the ITCA." *Greenwade*, 119 Idaho at 503, 808 P.2d at 422 (footnote omitted).

In *Hill-Vu Mobile Home Park v. City of Pocatello*, 402 P.3d 1041 (Idaho 2017) (Eismann, J.), the Court took an entirely different tack on this. Facing a challenge to its water and sewer charges, the City argued that it was immune from damage claims under Idaho Code § 6-904A(1). The Court rejected the defense, but not on the basis that section 6-904A is limited to challenges that sound in tort. Instead, the Court ruled more broadly that the statute cannot stand in the way of the protection of a constitutional right:

> To hold that an unlawful fee or charge is a "tax" as that term is used in section 6-904C would create a conflict between the statute and the Constitution. A statute cannot limit the right to recover for the taking of property in violation of the Constitution.

Hill-Vu at 1047. The Court's reasoning is difficult to follow,[206] but the conclusion is clear enough: Section 6-904A(1) is no defense to a claim of illegal fees or taxes.

D. Tort claim notice must be filed within 180 days

A litigant claiming damages against a local government is obligated to file a notice of tort claim with the secretary or clerk of the political subdivision. Idaho Code § 6-906. (A separate provision applies to actions against the State. Idaho Code § 6-905.) Such claims must be filed within 180 days of when the claim arose or reasonably should have been discovered. *Gibson v. Ada Cnty.*, 142 Idaho 746, 752, 133 P.3d 1211, 1217 (2006), *cert. denied*, 549 U.S. 994 (2006), *rehearing denied*, 549 U.S. 1159 (2007). Requirements for the filing of the claim are set out in Idaho Code § 6-907.

If a timely claim is not filed, the litigant loses its right to sue:

> The ITCA mandates that if a claimant does not provide the government with timely notice of its claim, it loses the right to assert the claim. I.C. § 6–908. Timely and adequate notice under the ITCA "is a mandatory condition precedent to bringing suit, the failure of which is fatal to a claim, no matter how legitimate."

Allied Bail Bonds, Inc. v. Cnty. of Kootenai, 151 Idaho 405, 410, 258 P.3d 340, 345 (2011) (Horton, J.) (quoting *McQuillen v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741, 744 (1987)).

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[206] The Court goes on at length to make the point that the City's fee cannot be called a tax because it is illegal. But that ignores the fact that the statute immunizes cities from claims for the collection not just of taxes, but of "any fee or tax." Perhaps the Court is saying that section 6-904A(1) only immunized cities from charging legal fees and taxes. If that is what it meant, it could have said that more clearly.

Once the claim is filed, the governmental entity then has 90 days to notify the claimant of the approval or denial of the claim. Idaho Code § 6-909. Claims filed prematurely may be dismissed. *See, Farnworth v. Femling*, 125 Idaho 283, 288-89, 869 P.2d 1378, 1383-84 (1994). Thus, the act operates as a sort of cooling off period during which the governmental entity is given an opportunity to resolve the matter short of litigation.

In the case of county governments, the tort claim act applies only to claims sounding in tort. Constitutional taking claims are not torts. Thus, plaintiffs are not required to comply with the tort claim act for taking claims directed to counties. In *Allied Bail Bonds, Inc. v. Cnty. of Kootenai*, 151 Idaho 405, 409-10, 258 P.3d 340, 344-45 (2011), the Court dismissed the plaintiff sued the county alleging that the sheriff wrongfully diverted Allied's potential customers away from its bail bond business. The Idaho Supreme Court affirmed the dismissal of the action, finding that the "essence" of the claim sounded in tort (tortuous interference with business) despite the fact that the plaintiff also pled a violation of an obscure state constitutional provision dealing with debts of local governments.

In *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 174-76, 108 P.3d 315, 321-23 (2004) (Eismann, J.), plaintiffs brought an action for "taking of its property without just compensation in violation of the United States and Idaho Constitutions." *BHA II*, 118 Idaho at 172, 108 P.3d at 319. The issue in this case was whether plaintiffs' tort claim notice was timely. One of the plaintiffs (Splitting Kings)[207] filed a tort claim notice more than two years after paying the transfer fee. That plaintiff contended that it should be excused from the notice requirement under Idaho Code § 50-219 until the case law became more clear "because they could not reasonably have known they had a claim until January 30, 2003, when we issued our opinion in *BHA I*." *BHA II*, 141 Idaho at 174, 108 P.3d at 321. The Court rejected the argument that ignorance of a claim eliminates (or delays) the notice requirement: "That opinion did not create a cause of action where none previously existed. The phrase 'reasonably should have been discovered' refers to knowledge of the facts upon which the claim is based, not knowledge of the applicable legal theory upon which a claim could be based." *Id*. Accordingly, the Court threw out the state takings claim (as well as a state unjust enrichment claim). *BHA II*, 141 Idaho at 174, 108 P.3d at 321.

E. ITCA's notice requirement is made applicable to all damage claims against cities by section 50-219.

As discussed above, the ITCA imposes a 180-day notice requirement for claims sounding in tort for which immunity is waived under the act. A separate

[207] *BHA II* involved consolidated cases. The plaintiffs in *BHA I* filed timely damage claim notices; the new plaintiffs in *BHA II* did not.

statute, enacted in 1983, expands the scope of this notice requirement where the defendant is a city.[208] Idaho Code § 50-219 requires: "All claims for damages against a city must be filed as prescribed by chapter 9, title 6, Idaho Code [the Idaho Tort Claims Act, Idaho Code §§ 6-901 to 6-929]." The effect of this is that, all damage claims (not just tort claims) against cities are subject to the 180-day rule in Idaho Code § 6-906. *Turner v. City of Lapwai*, 157 Idaho 659, 662, 339 P.3d 544, 547 (2014) (J. Jones, J.); *Sweitzer v. Dean*, 118 Idaho 568, 571-73, 798 P.2d 27, 30-32 (1990) (Boyle, J.)[209]; *Scott Beckstead Real Estate Co. v. City of Preston*, 147 Idaho 852, 216 P.3d 141 (2009) (Eismann, C.J.).

This includes taking claims. *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 174-76, 108 P.3d 315, 321-23 (2004) (Eismann, J.).

In Brown v. City of Twin Falls, 124 Idaho 39, 40-41, 855 P.2d 876, 877-78 (1993), the Court noted that the trial court reached a contrary conclusion (that taking claims against cities are not subject to the ITCA's notice requirement because they are not torts). This trial court's ruling was plainly incorrect, because it overlooks Idaho Code § 50-219. However, the Idaho Supreme Court decided the case on the merits and expressly withheld any ruling on the Idaho Tort Claims Act.

In *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.), the plaintiff argued that, while Idaho Code § 50-219 imposes the notice requirement under Idaho Code § 6-906 on all damage claims against cities, it does not make applicable Idaho Code § 6-908 (barring claims where notice was not timely provided). In essence, the plaintiff argued that while it was required to file a timely claim under Idaho Code § 6-906, there was no consequence for its failure to

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[208] From 1967 until 1983, Idaho Code § 50-219 was a stand-alone notice requirement requiring 60-days notice to cities prior to filing suit. In 1983, it was amended to link it to the notice provision in the ITCA. 1993 Idaho Sess. Laws, ch. 93. Thus, prior to 1983, the notice requirement had no connection to the ITCA and would not have triggered the two-year statute of limitations provision in the ITCA.

[209] Mr. Sweitzer worked for the City of Post Falls as maintenance worker in the cemetery. He claimed that he suffered various ailments owing to the fact that that family and friends were buried there. He sued the city alleging that he was constructively discharged. The ITCA then provided a 120-day deadline. His notice of claim was filed ten months after the claim arose. Sweitzer contended that because section 50-219 referred to the entire ITCA, rather than just the 120-day rule, "the legislature in effect substituted the entire tort claim act for § 50-219" thereby limiting its notice requirement to tort claims. *Sweitzer*, 118 Idaho at 571, 798 P.2d at 30. The Idaho Supreme Court (and the district court) rejected this argument. The Court found the language of section 50-219 clear on its face. "Applying the plain meaning of the language contained in I.C. § 50-219 clearly demonstrates that the legislature's intent was to incorporate the notice requirements contained in chapter 9, title 6 so as to make the filing procedures for all claims against a municipality uniform, standard and consistent. To construe the language to mean that the Tort Claims Act is substituted for I.C. § 50-219 would render I.C. § 50-219 meaningless and essentially null." *Sweitzer*, 118 Idaho at 572, 798 P.2d at 31.

do so. It also argued that the notice of claim requirement is not jurisdictional and that McCall should be estopped from asserting the statute as a bar. The plaintiffs made no headway with Idaho Supreme Court.

First, the Court confirmed that, for actions against a city, Idaho Code § 50-219 encompasses Idaho Code § 6-908, thus making it applicable to the broader range of claims (*e.g.*, taking claims) encompassed by Idaho Code § 50-219. *Alpine Village*, 154 Idaho at 935, 303 P.3d at 622.

It also held that while the notice of claim requirement is not jurisdictional (in the sense of depriving courts of jurisdiction), it is nonetheless mandatory absent some "applicable exception." *Alpine Village*, 154 Idaho at 936, 303 P.3d at 623. The Court addressed two such possible exceptions (equal protection and quasi-estoppel), but found that neither were applicable.

The Court agreed with the City that the claim arose no later than the signing of a development agreement between the parties (which mandated contributions challenged in the suit), which occurred years before the notice of claim was filed. The Court concluded, "We hold that because Alpine's claims were filed more than 180 days after their cause of action accrued, the claims are untimely under I.C. § 50–219." *Alpine Village*, 154 Idaho at 936, 303 P.3d at 623. The effect of this is that the 180-day deadline operates, in practical effect, just like a statute of limitations at to state law claims. See discussion of statutes of limitation in section 22.D at page 303.

F. The ITCA's two-year statute of limitation

The ITCA's 180-day requirement operates, in practical effect, like a statute of limitations cutting off claims older than 180 days. In other words, the notice may only reach back to claims that are less than 180 days old.

In addition, the ITCA contains its own two-year statute of limitation. Idaho Code § 6-911. Thus, as to any claims that are properly noticed within 180 days, the plaintiff is still subject to the two-year statute of limitations as a deadline to file the action. See discussion of statutes of limitation in section 22.D at page 303.

G. Is failure to file a jurisdictional defect?

In *Madsen v. Idaho Dep't of Health and Welfare*, 116 Idaho 758, 761, 779 P.2d 433, 436 (Ct. App. 1989) (Walters, J.), the Idaho Court of Appeals held that a plaintiff's failure to file a notice of claim in accordance with the provisions of the ITCA, which was a mandatory condition precedent to maintaining an action, meant that the district court lacked subject matter jurisdiction over the action. "Because the action could not be maintained without compliance with the Tort Claims Act, the Court lacked subject matter jurisdiction and properly dismissed the action as to the Department." *Id*.

Likewise, in *McQuillen v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741, 744 (1987) (Bakes, J.), the Idaho Supreme Court held: "Compliance with the Idaho Tort Claims Act notice requirement is a mandatory condition precedent in bringing suit, the failure of which is fatal to a claim, no matter how legitimate." This statement was quoted with approval in *Banks v. University of Idaho*, 118 Idaho 607, 608, 798 P.2d 452, 453 (1990) (ITCA applied to the university).

In *Stevens v. Fleming*, 116 Idaho 523, 527, 777 P.2d 1196, 1200 (1989) (Huntley, J.), the Idaho Supreme Court held that notice "is prerequisite to maintaining a claim" and failure to file a timely notice means that "the claim against the Grimes failed for lack of jurisdiction."

In *Greenwade v. Idaho State Tax Comm'n*, 119 Idaho 501, 503, 808 P.2d 420, 422 (Ct. App. 1991) (Silak, J.), the district court found that plaintiff's failure to comply with the ITCA deprived it of jurisdiction. The Court of Appeals construed section 6-905, the corollary to section 6-906 applicable to state government. The district court ruled that plaintiff's failure to comply with the ITCA deprived the Court of jurisdiction. The Idaho Supreme Court affirmed. It said, "The language of this statute is mandatory. When it is read together with I.C. § 6–908, it is clear that failure to comply with the notice requirement bars a suit." *Greenwade*, 119 Idaho at 503, 808 P.2d at 422.

In 2009, the Court of Appeals cited *Greenwade* and observed again: "The language of this section [6-905] is mandatory and when it is read together with I.C. § 6–908, it is clear that failure to comply with the notice requirement bars a suit regardless of how legitimate it might be." *Driggers v. Grafe*, 148 Idaho 295, 297, 221 P.3d 521, 523 (Ct. App. 2009) (footnote omitted).

In *Allied Bail Bonds, Inc. v. Cnty. of Kootenai*, 151 Idaho 405, 409-10, 258 P.3d 340, 344-45 (2011) (Horton, J.), the district court ruled that plaintiff's failure to provide notice under the ITCA of its constitutional and other claims deprived it of subject matter jurisdiction. This Court affirmed, quoting the "condition precedent" language from *McQuillen*.

The federal district court, applying Idaho law, is in accord. *Community Housing, Inc. v. City of Boise*, 2008 WL 2857458 (D. Idaho 2008).

In *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.), the Court drew a semantic distinction with respect to jurisdiction. It is not correct to say that a court lacks jurisdiction to hear a claim when the plaintiff fails to meet ITCA's notice requirement. Technically, the court is not deprived of jurisdiction. However, even if the ITCA does not present a jurisdictional bar, it presents a procedural bar. The bottom line is that the claim is barred, whatever you call it. *Alpine Village*, 154 Idaho at 936, 303 P.3d at 623.

H. Content of claim

The ITCA requires that the notice of claim be "filed with the clerk or secretary of the political subdivision." Idaho Code § 6-906.

This is not a flexible requirement. In *Turner v. City of Lapwai*, 157 Idaho 659, 662, 339 P.3d 544, 547 (2014) (J. Jones, J.), the Court held that communications directed to "an independent auditing firm, the then-Mayor of Lapwai, and a single member of the Lapwai city council" did not satisfy the requirement that the notice be filed with the clerk or secretary. "That section does not state that a claim may alternatively be filed with any higher ranking official or with any official who is in a position to resolve the dispute at issue. By requiring the filing of claims with a particular party, the Legislature eliminated a difficult case-by-case inquiry into whether a communication with one official or another provided adequate notice to the political subdivision." *Id*.

"A 'claim' means any written demand to recovery money damages from a governmental entity . . . ." Idaho Code § 6-902(7).

The notice of claim must be more that a letter to the city raising concerns or complaining about something. The act specifically requires the claimant to set out the following items or descriptions, to the extent known:

- the conduct and circumstances which brought about the injury or damage
- the injury or damage
- the time and place the injury or damage occurred
- the names of all persons involved
- the amount of damages claimed
- the actual residence of the claimant at the time of presenting and filing the claim and for a period of six (6) months immediately prior to the time the claim arose

Idaho Code § 6-907.

In *Turner v. City of Lapwai*, 157 Idaho 659, 663, 339 P.3d 544, 548 (2014) (J. Jones, J.), the Court rejected an argument that communications with the city that failed to meet the technical requirements of the notice should suffice because "the City was not misled or prejudiced by such deficiencies." "Furthermore, this Court has held that the failure to file a claim in accordance with Section 6–906 bars that claim even if the relevant political subdivision was not prejudiced by the failure." *Turner*, 157 Idaho at 664-65, 339 P.3d at 549-50 (citing *Blass v. Cnty. of Twin Falls*, 132 Idaho 451, 974 P.2d 503 (1999)).

> In *Wickstrom v. North Idaho College*, 111 Idaho 450, 725 P.2d 155 (1986), we held that a demand letter sent by plaintiffs' counsel was insufficient to serve as a notice of claim under the statute because it did not include the plaintiffs' names and addresses. We stated, "The demand letter of August 21, 1984 failed to serve as notice of a claim pursuant to the I.T.C.A., since it failed to state the names and addresses of the claim-ants, the amounts of claimed damages and the nature of the injury claimed. The claim is, therefore, barred."

BHA II, 118 Idaho at 175, 108 P.3d at 322.

21. MANDATORY CLAIMS STATUTES FOR COUNTIES (IDAHO CODE §§ 31-1501 AND 63-1308(2))

An Idaho statute applicable to counties requires that claims against a county be presented within one year:

> The board of commissioners must not hear or consider any claim against the county unless accompanied by a receipt or documentation giving all items of the claim, duly certified by the authorized county official that the amount claimed is justly due or services were rendered. No claim shall be paid if not presented to the board within a year from the date the bill was generated.

Idaho Code § 31-1501.[210]

Note that the one-year deadline is for presentation of the claim to the county; this section does not set a deadline for filing suit. However, Idaho Code § 31-1506 makes the 28-day deadline under the Idaho Administrative Procedure Act applicable for "judicial review of any final act, order or proceeding of the board." Presumably, this would provide the mechanism and the deadline for challenging denial of any claim presented to the county.

Another provision, Idaho Code § 63-1308(2), provides an alternative procedure in the case of a taxpayer who makes a payment under protest. Under this statute, the taxpayer must file suit within 60 days after such payment.

Both provisions were discussed in *In the Matter of Certified Question of Law – White Cloud v. Valley Cnty.*, 156 Idaho 77, 320 P.3d 1236 (2014) (J. Jones, J.), which involved a challenge to a road development fee which the plaintiffs alleged was an illegal tax.

Relying on *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 176, 108 P.3d 315, 323 (2004) (Eismann, J.), the *White Cloud* Court held that "the payment under protest requirement does not apply to an illegal fee." *White Cloud*, 156 Idaho at 83, 320 P.3d. at 1242. Thus, because payment under protest is not required to challenge an allegedly illegal tax masquerading as a fee, section 63-1308(2) does not come into play (unless the payer elects to pay under protest). But the one-year deadline for filing documentation of a claim, is applicable.

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[210] This provision may be traced to territorial law. 1869 Idaho Terr. Sess. Laws § 12, p. 100. Its current codification at Idaho Code § 31-1501 dates to 1995. 1995 Idaho Sess. Laws, ch. 61 § 6. In 1919 it was codified to section 3506 of chapter 150, Idaho Compiled Statutes. It was later codified to Idaho Code Ann. § 30-1105. In 1973 it was codified to Idaho Code § 31-1506. 1973 Idaho Sess. Laws, ch. 288 § 1. In 1995, it was amended and re-codified to Idaho Code § 31-1501. 1995 Idaho Sess. Laws, ch. 61 § 5.

"However, I.C. § 31–1501 does apply to counties and imposes a one year cut-off for claims against the county." *White Cloud*, 156 Idaho at 84, 320 P.3d. at 1243.

Section 31-1501 does not say what "claims" are subject to the one-year requirement. The statute refers to claims in the context of "the amount . . . due or services . . . rendered" and "the date the bill was generated." Thus, one might think that the presentation requirement is limited to claims based on contract terms or similar obligations. Indeed, many of the cases arise in the context of amounts owed to service providers, county officers, and other contract holders. The decision, in *White Cloud*, however, makes clear that the statute applies more broadly than this.

Initially, the Court observes that "Idaho Code § 31-1501 applies to general claims asserted against the county." *White Cloud*, 156 Idaho at 83, 320 P.3d. at 1242. The Court then concludes: "It all boils down to this: a person wishing to challenge an allegedly illegal tax must either pay the tax under protest and then bring a cause of action in court within sixty days or file a claim with the board of county commissioners within a year." *White Cloud*, 156 Idaho at 84, 320 P.3d. at 1243. If this requirement applies to claims based on allegedly illegal taxes, presumably it applies, as well, to any taking claim. Indeed, the broad language of section 31-1501 ("No claim shall be paid") may be read to require timely presentation of <u>any</u> claim for money against a county.

In other words, this provision may be seen as a counterpart (applicable to <u>counties</u>) to the Idaho Tort Claim Act's requirement (applicable to <u>cities</u>) that notice of damage claims be filed within 180 days. Idaho Code §§ 6-901 to 6-929.[211] Indeed, the Court in *White Cloud* drew that very analogy:

> These seemingly short limitations provisions are not unreasonable when considered in context. This Court recently held that a developer requesting a refund of what was determined to be an illegal city tax had to file a claim for the refund within 180 days from the date the claim arose in order to pursue recovery. *Hehr*, 155 Idaho at 96, 305 P.3d at 540. . . .
> . . . Of course, I.C. § 50–219 does not apply to claims against counties. However, I.C. § 31–1501 does apply to counties and imposes a one year cut-off for claims against the county.

[211] The Idaho Tort Claim Act applies to all local governments, including cities. However, its scope is limited to tort claims, not other damage claims. Another statute, Idaho Code § 50-219, expands the applicability of the notice requirement in the tort claim act to all damage claims against cities. Thus, notice of taking claims against cities must be filed within 180 days. *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.).

White Cloud, 156 Idaho at 84, 320 P.3d. at 1243.

It bears emphasis that the one-year deadline in section 31-1501 may be eclipsed by the even shorter 28-day deadline to appeal under LLUPA, if that statute is applicable. Because the *White Cloud* case reached the Idaho Supreme Court via a narrow certified question from the federal district court, the Idaho Court was constrained not to answer the related question of whether the one-year deadline is preempted by LLUPA's 28-day deadline. Nevertheless, the Idaho Supreme Court strongly hinted (essentially in dictum) that this was the case. It repeatedly noted the applicability of the 28-day rule, even providing a pinpoint citation to its decision in *Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 493-94, 300 P.3d 18, 25-26 (2013) (J. Jones, J.).[212]

Following the Idaho Supreme Court's decision, the *White Cloud* plaintiffs dropped their federal case, stipulating that their claims should be dismissed with prejudice. Consequently, there was no federal court ruling on the question, and the prior intermediate decisions of the federal court in that case are without precedential value.

Prior to *White Cloud*, the Idaho Supreme Court applied the mandatory county claim statute in only a handful of cases, none of which provide much guidance on the statute's scope or application. In 1983 the Court noted: "A board of commissioners is forbidden to pay a claim asserted against it until certain procedures are followed." *Bingham Cnty. Comm'n v. Interstate Electric Co.*, 105 Idaho 36, 41, 665 P.2d 1046, 1051 (1983) (Bakes, J.) (applying predecessor statute, Idaho Code § 31-1506). In *Guiles v. Kellar*, 68 Idaho 400, 195 P.2d 367 (1948) (Givens, J.), the Court applied the predecessor statute, Idaho Code Ann. § 30-1105, to preclude recovery when no claim was filed against the county.

On other occasions, the Idaho Supreme Court found exceptions to the claim requirement. In 1924, the Court found the claim requirement "does not apply to a case where the liability and its extent are so clearly fixed by positive provisions of the statutory law that the question becomes purely one of law, leaving nothing for the

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[212] "Because we have not been requested to address the issue of exhaustion of remedies under LLUPA, we have further revised the question to make it clear that we do not opine on that issue." *White Cloud*, 156 Idaho at 80, 320 P.3d. at 1239. "Because the answer we give to the narrow question addressed to us depends on certain legal assumptions including but not limited to: . . . whether or not the fee should have been challenged in the zoning and planning process—it is important for this Court to state what we are not deciding." *White Cloud*, 156 Idaho at 81, 320 P.3d. at 1240. "We have not been asked to address the County's contention that the Plaintiffs failed to exhaust their administrative remedies under the LLUPA. We addressed the exhaustion issue in *Buckskin* (154 Idaho at 493-94, 300 P.3d at 25-26) but decline the County's invitation to address it here." *White Cloud*, 156 Idaho at 82, 320 P.3d. at 1241. "As previously mentioned, we decline to address how Plaintiffs' claim may be affected by the provisions of LLUPA." *White Cloud*, 156 Idaho at 84 n.6, 320 P.3d. at 1243 n.6.

commissioners to pass upon, and no room for the exercise of discretion." *Drainage Dist. No. 2 of Ada Cnty. v. Ada Cnty.*, 38 Idaho 778, 226 P. 290 (1924) (McCarthy, J.) (applying a predecessor statute, Idaho Compiled Stat. § 3506) (citing *Boise Valley Traction Co. v. Ada Cnty.*, 38 Idaho 350, 363, 222 P. 1035, 1039 (1923)). Given that the Court found section 31-1501 applicable in *White Cloud* (which involved the allegation that the County imposed a tax prohibited by the Idaho Constitution), it would seem that these exception cases should be narrowly applied and do not provide a ready escape hatch for taking claims.

The bottom line is that claims based on actions to which judicial review is available under LLUPA must be brought within 28 days. If LLUPA judicial review is not available or is excused under some exception, documentation of the claim must be presented to the county within one year and suit must be filed within 28 days after denial of the claim. Alternatively, if payment was made under protest, suit must be filed within 60 days of payment. These deadlines are applicable to counties. Cities, in contrast, are subject to the 180-day deadline for filing a tort claim notice. In short, even if a plaintiff is allowed an "end run" around LLUPA, that action must happen promptly.

22. STATUTES OF LIMITATION

A. Potentially applicable statutes of limitations

Statute	Time period	Subject
Idaho Code § 5-202	10 years	actions brought by Idaho governmental entities, "people of the state," involving title to state land
Idaho Code §§ 5-203, 5-204, 5-207, 5-210[213]	20 years (5 years before 2006)	adverse possession and prescriptive use
Idaho Code § 5-216	5 years	written contract
Idaho Code § 5-217	4 years	oral contract
Idaho Code § 5-218(2)	3 years	trespass on real property
Idaho Code § 5-219(4)	2 years	actions against officers, for statutory penalties, libel, slander, professional malpractice, or personal injury torts (federal precedent makes this personal injury statute applicable to federal taking claims under § 1983)
Idaho Code § 5-221	6 months	actions against county for claims rejected by board
Idaho Code § 5-224	4 years	catch-all limitation applicable to (i) state taking claims and (ii) non-personal injury tort actions, including tortious interference with contract
Idaho Code § 6-911	2 years	tort claims against governmental entity (ITCA)

Note also the requirement under the Idaho Tort Claims Act to file a claim with the governmental entity within 180 days, Idaho Code § 6-906. This is not a statute of limitations, but has a similar effect.

B. The policy underlying the statute of limitations

"'The policy behind statutes of limitations is protection of defendants against stale claims, and protection of the courts against needless expenditures of resources.' *Johnson v. Pischke*, 108 Idaho 397, 402, 700 P.2d 19, 25 (1985). Statutes of limitation are designed to promote stability and avoid uncertainty with regards to

[213] The change from five to 20 years was made in each of these statutes. Only the first is a statute of limitations. The others are substantive provisions describing the requirements of adverse possession. "Idaho Code section 5-210 is not a statute of limitations." *Schoorl v. Lankford*, 389 P.3d 173, 175 (Idaho 2017) (Eismann, J.). The *Schoorl* Court held that the change from 5 to 20 years in 2006 is applicable to adverse possession claims that have not vested and does not constitute retroactive legislation.

future litigation." *Wadsworth v. Idaho Dep't of Transportation*, 128 Idaho 439, 442, 915 P.2d 1, 4 (1996).

C. The statute of limitations may bar constitutional claims.

Occasionally plaintiffs bringing untimely suits have contended that the Legislature lacks the power to bar a constitutional claim (such as an inverse condemnation) based on a statute of limitations. The Idaho Supreme Court has rejected this argument. *Wadsworth v. Idaho Dep't of Transportation*, 128 Idaho 439, 441-42, 915 P.2d 1, 3-4 (1996).

D. State-law inverse condemnation claims are subject to Idaho's catch-all four-year statute of limitations (Idaho Code § 5-224) if no other statute of limitations is applicable.

There is no Idaho statute of limitations specifically addressing inverse condemnation claims (*i.e.*, taking claims). Accordingly, Idaho's four-year "catch all" inverse condemnation statute, Idaho Code § 5-224, will apply to state-law inverse condemnation claims where no other statute of limitations is applicable.[214]

Thus, for example takings claims against counties and highway districts are subject to the four-year statute of limitations. "The limitations period for inverse condemnation claims is contained in I.C. § 5-224 which is the statute of limitations for all actions not specifically provided for in another statute." *McCuskey v. Canyon Cnty. Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 216, 912 P.2d 100, 103 (1996) (Trout, J.). See also *C & G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 75 P.3d 194 (2003) (Kidwell, J.).

Likewise, the four-year statute of limitations applies to entities of the State. *Wadsworth v. Idaho Dep't of Transportation*, 128 Idaho 439, 442, 915 P.2d 1, 4 (1996) (Schroeder, J.); *Harris v. State, ex rel. Kempthorne*, 148 Idaho 401, 404, 210 P.3d 86, 89 (2009) (Burdick, J.).

For claims arising prior to 1983 (when Idaho Code § 50-219 was amended to make the ITCA applicable to all damage claims against cities, see footnote 208 at page 293.), the four-year statute of limitation was applicable to cities as well. *Intermountain West, Inc. v. Boise City*, 111 Idaho 878, 880, 728 P.2d 767, 769 (1986) (Donaldson, C.J.)[215]; *Harkness v. City of Burley*, 110 Idaho 353, 359-60, 715 P.2d 1283, 1289-90 (1986) (Bistline, J.).

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[214] See discussion in section 22.I at page for the limitation period applicable to federal inverse condemnation actions.

[215] The *Intermountain West* Court correctly applied the four-year statute of limitations to the state-law inverse condemnation claim, which arose before 1983. Inexplicably, the Court made no reference to Idaho Code § 50-219, which, even prior to 1983, should have barred the state-law claims under the 60-day notice requirement that had been in effect since 1967. The Court failed to draw any

E. State-law inverse condemnation cases against cities are subject to the two-year statute of limitations in the ITCA.

There is a strong argument that the more specific two-year statute of limitations in the ITCA applies in state-law takings or other damage cases brought against cities subsequent to 1983. As noted, that is when Idaho Code § 50-219 was amended to make the ITCA applicable to all damage claims against cities. (See footnote 208 at page 293.)

The plain language of Idaho Code § 50-219 broadly applies all of the ITCA's requirements governing the filing of damage actions against cities: "All claims for damages against a city must be filed as prescribed by chapter 9, title 6, Idaho Code."

The ITCA sets out its own two-year statute of limitations. Idaho Code § 6-911. In addition, the 180-day notice of claim requirement also operates, in practical effect, like a statute of limitations. Both are applicable, but work a little differently. All claims (older than 180 days) are barred if a notice of claim is not filed within 180 days of accrual of the claim. As to any claims that are properly noticed (within 180 days of accrual), the plaintiff is still subject to the two-year statute of limitations as a deadline to file the action.[216]

In other words, the plaintiff has six months (180 days) to file the notice of claim and two years to file the complaint, both running from the date of accrual. For example, if a plaintiff waited until the last day to file the notice of claim, and the governmental entity took another three months (90 days) to deny the claim, the plaintiff would then have roughly another 15 months to file the lawsuit in order to meet the two-year statute of limitations.

Thus, it would appear from the plain language of the statute that the two-year statute of limitations in the ITCA supersedes other statutes of limitations, making the catch-all four-year statute of limitations inapplicable.

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distinction between the statute of limitations applicable to state and federal inverse condemnation claims. Indeed, the Court failed to mention whether the claims arose under state or federal law.

[216] *See Noak v. Idaho Dep't of Correction*, 152 Idaho 305, 310, 271 P.3d 703, 708 (2012) (J. Jones, J.) (tort claim notice timely filed, but action not filed within two years of tort).

In *Harkness v. City of Burley*, 110 Idaho 353, 359-60, 715 P.2d 1283, 1289-90 (1986) (Bistline, J.), the plaintiff argued that he was not subject to what was then a 60-day notice requirement in Idaho Code § 50-219, because a separate four-year statute of limitations applicable to oral contracts (Idaho Code § 5-219) was more specific. The Idaho Supreme Court rejected this argument saying that the notice requirement is different from and in addition to any applicable statute of limitations. The *Harkness* Court did not mention the two-year statute of limitations at Idaho Code § 6-911. It would seem that if any statute of limitations would be applicable, it would be the two-year s statute, not the four-year statute. But the Court did not address that point, since any such statute was trumped by the 180-day notice requirement.

This is confirmed in *Noak v. Idaho Dep't of Correction*, 271 P.3d 703, 708 (Idaho 2012) (J. Jones, J.). Although this case did not involve a city, the suit was brought under the ITCA. The Court found that the two-year statute of limitations in the ITCA was applicable.

The case of *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 136 P.3d 310 (2006) (J. Jones, J.) is not contrary to this conclusion. It applied the four-year statute of limitations, but the case dealt only with a federal taking claim.[217]

In *Alpine Village Co. v. City of McCa*ll, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.), the City of McCall urged that the ITCA's two-year statute of limitations overrides the four-year statute of limitations applicable to condemnation actions, but the Court found it unnecessary to address the issue because the plaintiff also missed the 180-day deadline.

Another ruling in *Alpine Village*, though not directly on point, shows that section 50-219 incorporates more than the notice requirement.

> Alpine argues that I.C. § 50–219 only incorporates I.C. §§ 6-906 and 6-907, as they are the two subsections of chapter 9, title 6 that specifically address filing claims. However, this position ignores that I.C. § 6–908 outlines the ramifications for failing to timely file a claim, a function that would clearly bring it within the scope of I.C. § 50–219. Therefore, Alpine's claims must be timely as contemplated in I.C. §§ 6-906 and 6-908 or they will not be allowed under I.C. § 50-219.

Alpine Village, 154 Idaho at 935, 303 P.3d at 622. Thus, it is clear that section 50-219 incorporates more than the notice requirement. They must also be timely. It is difficult to fathom and difficult to reconcile with the plain words of section 50-219 (requiring that claims be "filed as prescribed by" the ITCA) how the act would demand timeliness as to the ITCA's notice requirement but not timeliness as to the ITCA's statute of limitations.[218]

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[217] As discussed elsewhere, it is unclear why the Court did not conclude that the federal claim was subject to Idaho's two-year statute of limitations.

[218] Nothing in *Sweitzer v. Dean*, 118 Idaho 568, 798 P.2d 27 (1990) (Boyle, J.) is to the contrary. In that case, the City of Post Falls argued that the reference in section 50-219 to the ITCA did not expand the notice requirement to all damage claims, but was limited to the language in the ITCA to the tort actions. The Court rejected that argument. "Applying the plain meaning of the language contained in I.C. § 50-219 clearly demonstrates that the legislature's intent was to incorporate the notice requirements contained in chapter 9, title 6 so as to make the filing procedures for all claims against a municipality uniform, standard and consistent. To construe the language to mean that the Tort Claims Act is substituted for I.C. § 50-219 would render I.C. § 50-219 meaningless and essentially null." *Sweitzer*, 118 Idaho at 572, 798 P.2d at 31. That holding has

F. The clock starts when a substantial interference with the plaintiff's property becomes apparent.

The words of the catch-all statute of limitations are: "An action for relief not hereinafter provided for must be commenced within four (4) years after the cause of action shall have accrued." Idaho Code § 5-224. Thus, in the words of the statute, the key question is: when did the cause of action accrue? In seven cases, the Idaho Supreme Court has found that claims of inverse condemnation run from the time that a substantial interference with the subject property becomes apparent.

The seminal case is *Tibbs v. City of Sandpoint*, 100 Idaho 667, 603 P.2d 1001 (1979) (Thomas, J. pro tem.). In this case, the plaintiffs alleged a taking based on the city's expansion of an airport and the adverse effects of increased air traffic on plaintiffs' property. The Court stated:

> The actual date of taking, although not readily susceptible to exact determination, is to be fixed at the point in time at which the impairment, of such a degree and kind as to constitute a substantial interference with plaintiffs' property interest, became apparent.

Tibbs, 100 Idaho at 671, 603 P.2d at 1005. This statement is often quoted and cited in cases dealing with the statute of limitations and the date of accrual.[219]

The first case to quote *Tibbs* was *Rueth v. State* ("*Rueth II*"), 103 Idaho 74, 79, 644 P.2d 1333, 1338 (1982) (McFadden, J.). Like *Tibbs*, *Rueth II* was an inverse condemnation case in which evaluating the extent of damages was at issue. And, like *Tibbs*, *Rueth I* did not deal with the statute of limitations. Both cases, however, dealt with the question of when the taking occurs and, hence, have laid the foundation for determining when statute of limitations begins to run.

In *Rueth II*, the plaintiffs operated a dairy farm whose land had gradually become saturated due to a water diversion structure built by the Idaho Department of Fish and Game. The Court recited the guidelines set out in *Tibbs* and concluded that it was appropriate for the trial court to select the date of a meeting in which the parties recognized "the severity of the problem":

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nothing to do with question of whether section 50-219 also incorporates the ITCA's statute of limitations.

[219] Curiously, the *Tibbs* case did not actually involve the statute of limitations. The case was an action for inverse condemnation where the impact on the neighboring property was gradual. The question in the case was how to value the decline in property value, and the reference to when the case arose was in the context of fixing the dates for determination of "the difference in the value of the property before and after the destruction or impairment of the access." *Tibbs*, 100 Idaho at 670, 603 P.2d at 1004.

> Because of the gradual nature of the taking in this case, and because of the character of a taking through a rising groundwater table, it would have been impossible to pick a specific date on which it could be said clearly that the taking occurred. Nonetheless, the agreement of the Department of October 4, 1974, to remove the boards from the irrigation check structure represents a recognition of the severity of the problem, and the evidence supports this date as a reasonable one for purposes of fixing the date of actual taking.

Rueth II, 103 Idaho at 79, 644 P.2d at 1338 (emphasis supplied).

The next case to quote *Tibbs* was *Intermountain West, Inc. v. Boise City*, 111 Idaho 878, 880, 728 P.2d 767, 769 (1986) (Donaldson, C.J.). This is the first time that the *Tibbs* guidance was applied in the context of the statute of limitations. The *Intermountain West* case was a downzoning case involving annexation in which a developer sued the city for issuing stop work orders. The Court rejected the inverse condemnation damage claims on the merits (it was a mere downzoning that did not amount to a taking) and under the statute of limitations. As to the latter, the Court said:

> In any event, it is clear that appellant's claim in inverse condemnation is barred by the statute of limitations. Guidelines expressed by this Court in *Tibbs v. City of Sandpoint*, 100 Idaho 667, 603 P.2d 1001 (1979) tell us that a cause of action in an inverse condemnation case accrues "after the full extent of the plaintiff's loss of use and enjoyment of [the premises] become[s] apparent." *Id*. at 671 (quoting *Aaron v. United States*, 311 F.2d 798, 802, 160 Ct. Cl. 295 (Ct. Cl. 1963)). The accrual of this action commenced no later than July 30, 1975, when the court issued an injunction against Intermountain.

Intermountain West, Inc. v. Boise City, 111 Idaho at 880, 728 P.2d at 769.[220] In other words, the Court found that the interference with the property was certainly apparent by the time the city secured an order requiring *Intermountain West* stop work. Note that the Court said that the cause of action accrued "no later" than that date. There was no need for the Court to trace back the accrual date any further.

A decade later, in *Wadsworth v. Idaho Department of Transportation*, 128 Idaho 439, 443, 915 P.2d 1, 5 (1996) (Schroeder, J.), the Court quoted the *Tibbs*

[220] The quotation of *Tibbs* by the Court in *Intermountain West* was slightly inaccurate, but of no consequence.

guidance once again. *Wadsworth* involved a cross-claim for inverse condemnation filed by a landowner against the Department of Transportation alleging that the agency's gravel excavation many years earlier caused his island to erode.

The Court quoted *Tibbs*, highlighting the words "becomes apparent":

> This Court has stated that a cause of action in an inverse condemnation case "accrues after the full extent of the Plaintiff's loss of use and enjoyment of [the premises] becomes apparent." *Tibbs v. City of Sandpoint*, 100 Idaho 667, 671, 603 P.2d 1001, 1005 (1979). "The actual date of taking, although not readily susceptible to exact determination, is to be fixed at the point in time at which the impairment, of such a degree and kind as to constitute a substantial interference with plaintiff's property interest, *becomes apparent*." 100 Idaho at 671, 603 P.2d at 1005 (emphasis added).

Wadsworth, 128 Idaho at 442, 915 P.2d at 4 (emphasis added by *Wadsworth*).

The *Wadsworth* Court also reiterated its holding in *Rueth II*: "This Court held that a meeting between the parties was a 'recognition of the severity of the problem,' and fixed that date as the date of the actual taking." *Wadsworth*, 128 Idaho at 442-43, 915 P.2d at 4-5.

The Court concluded that, while Wadsworth may not have been aware of the impact of the excavation when it occurred 1962, the impact on his property must have been apparent when he filed a tort claim alleging specific damages in 1983—seven years before he filed suit. The Court summed up saying that the statute begins to run "when the impairment was of such a degree and kind that substantial interference with Wadsworth's property interest became apparent." *Wadsworth*, 128 Idaho at 443, 915 P.2d at 5.

In *McCuskey v. Canyon Cnty. Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 217-19, 912 P.2d 100, 104-06 (1996) (Trout, J.), the Idaho Supreme Court repeatedly cited to *Tibbs*. In *McCuskey II*, the plaintiff claimed a temporary taking from the time Canyon County issued a stop work order to the time the Idaho Supreme Court voided the controlling ordinance in *McCuskey v. Canyon Cnty.* ("*McCuskey I*"), 123 Idaho 657, 851 P.2d 953 (1993) (Bistline, J.). In *McCuskey II*, the Court explained that the statute began to run from the day the county interfered with his property, not the day the Court ruled the interference was illegal.

> In determining when the cause of action for an inverse condemnation claim accrues we note that while a taking is typically initiated when government acts to condemn property, the doctrine of inverse condemnation is

> predicated on the proposition that a taking may occur without such formal proceedings. In such an informal taking this Court has decided that damages for inverse condemnation should be assessed at the time the taking occurs. The time of taking occurs, and hence the cause of action accrues, as of the time that the full extent of the plaintiff's loss of use and enjoyment of the property becomes apparent. In this case, McCuskey was fully aware of the extent to which Canyon County interfered with his full use and enjoyment of the property in question on November 13, 1986, the date that McCuskey was notified, via issuance of a stop-work order, that he could not build the convenience store.

McCuskey II, 128 Idaho at 216-17, 912 P.2d at 103-04 (citations omitted).[221]

McCuskey had contended that the statute did not begin to run until the Court had ruled the county's zoning action illegal, because only then did he know the full extent of damages for the temporary taking. The Court rejected this argument, explaining that the lack of quantification of the loss is not an excuse for delay in filing the lawsuit:[222]

> Moreover, it is well settled that uncertainty as to the amount of damages cannot bar recovery so long as the underlying cause of action is determined. Besides, although McCuskey may not have known the full extent of his damages at the time the stop-work order was issued, he would have known with certainty what they were once a taking had been finally adjudicated.

McCuskey II, 128 Idaho at 218, 912 P.2d at 105 (citation omitted). Thus, the Court's earlier quoted reference to knowing "the full extent of the plaintiff's loss" should be understood to mean that the clock begins to run when interference with plaintiff's property is sufficiently apparent that a cause of action has arisen, regardless of whether the full extent of damages is then known.

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[221] The Court also noted in a footnote that the claim was probably barred by res judicata because it should have been raised in the prior litigation. *McCuskey II*, 128 Idaho at 216 n.1, 912 P.2d at 103 n.1. The Court further noted, "It appears in this case that, under our rule, the County's downzoning of the subject property to rural residential was, in all probability, not a taking." *McCuskey II*, 128 Idaho at 216 n.2, 912 P.2d at 103 n.2.

[222] Thus, in *McCuskey II*, the Court traced the starting point back earlier than the issuance of the stop work injunction in *Intermountain West*. The cases are not inconsistent, however. As noted above, it was not necessary for the Court in *Intermountain West* to look back any earlier than the stop work injunction.

The *Tibbs* guidance was applied again in *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 846, 136 P.3d 310, 317 (2006) (J. Jones, J.). In this case, the city filed suit seeking an injunction requiring a landowner to remove fences on lakefront property. The landowner counterclaimed under § 1983 for inverse condemnation. The Court found that the landowner's counterclaim was timely, despite the fact that the applicable ordinance had been on the books for more than four years. The Court explained that it was not the enactment of the ordinance but its application to the landowner that triggered the statute of limitations:

> A claim for inverse condemnation "accrues after the full extent of the impairment of the plaintiffs' use and enjoyment of [the property] becomes apparent." *Tibbs v. City of Sandpoint*, 100 Idaho 667, 671, 603 P.2d 1001, 1005 (1979) (quoting *Aaron v. United States*, 160 Ct. Cl. 295, 311 F.2d 798, 802 (1963)). In *Palazzolo* [*v. Rhode Island*, 533 U.S. 606, 608-09 (2001)], the United States Supreme Court held that a regulatory takings claim does not become ripe upon enactment of the regulation; indeed, it remains unripe until the landowner takes the reasonable and necessary steps to allow the regulating agency to consider development plans and issue a decision, thereby determining the extent to which the regulation actually burdens the property.

Simpson, 142 Idaho at 846, 136 P.3d at 317.[223]

The *Simpson* Court concluded that the cause of action did not begin to run until the city initiated an enforcement action against the landowners. "More important, however, is the fact that the City brought this action in 1998 to require removal of the fences constructed by the Simpsons in 1997. The issue was joined at that time." *Simpson*, 142 Idaho at 846, 136 P.3d at 317. This makes sense in this context, where the city initiates an enforcement action under an ambiguous statute involving prosecutorial discretion. Thus, it would seem that while it is true that mere enactment of an unconstitutional ordinance does not start the statute of limitations

[223] Curiously, *Palazzolo* does not even deal with the statute of limitations. Rather, it applied the specialized ripeness test in *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (Blackmun, J.). *Palazzolo* sets out the basic premise that *Williamson County* ripeness requires that the landowner go through proceedings resulting in a final decision. *Palazzolo* also created, however, a futility exception making this unnecessary where the ordinance leaves no room for discretion. "While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Palazzolo*, 53 U.S. at 620.

running, the statute could begin to run where a landowner initiated an application process under a statute that absolutely (facially) required a taking in every instance.

The *Tibbs* guidance was quoted once again in *Harris v. State, ex rel. Kempthorne*, 147 Idaho 401, 405, 210 P.3d 86, 90 (2009) (Burdick, J.). This case grew out of confusion over whether the State of Idaho owned mineral rights to sand and gravel on the Harris's property in Latah County. In 1983, the State Land Board determined that the State owned the mineral rights, informed the Harrises, and required them to enter into a mineral lease under which they made payments to the State for sand and gravel removed. In 1999, the Idaho Supreme Court determined in an unrelated case that the State did not own the rights. The State then promptly informed the Harrises that it was disclaiming any interest in the property. The Harrises sued in inverse condemnation demanding reimbursement for payments made under the lease. The Harrises contended that the statute of limitations should be suspended during that time because the State had misinformed them as to the ownership of the mineral rights. The Idaho Supreme Court affirmed the district court's ruling that there is no such exception. The Court then ruled that the statute of limitations on inverse condemnation ran from the day the plaintiffs first entered into the mineral lease with the State, not the time they made payments to the State under the lease. It said:

> We affirm the district court's determination that the full extent of the Harrises' loss of use and enjoyment of the property became apparent when they entered into the Mineral Lease. At that point in time, the impairment constituted a substantial interference with their property interest because they signed an agreement promising to pay royalties and rents on the sand and gravel. Therefore, the Harrises are barred from recovering under their inverse condemnation claim by I.C. § 5-224.

Harris, 147 Idaho 405, 210 P.3d 90. Since they signed the lease 16 years before bringing suit, there was no need for the Court to explore whether the statute might have begun to run even earlier (such as when they were first informed of the State's ownership). The Court found that the mineral lease, in any event, was sufficient to satisfy the *Tibbs* standard that the interference with their property "became apparent." *Harris*, 147 Idaho at 405, 210 P.3d at 90 (quoting *Tibbs*).

A federal court has observed: "Under established federal law, a taking occurs when an option to take an easement is granted, not when the option is exercised." *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 383 (9th Cir. 2002), *cert. denied*, 537 U.S. 973.

G. "Project completion rule" for government construction projects

Note that a special rule applies in the case of certain physical takings resulting from government construction projects. There, the statute does not begin to run until the construction project is complete. *C & G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 75 P.3d 194 (2003) (Kidwell, J.).

This is referred to as the "project completion rule."[224] This rule makes sense where a government construction project will physically invade a person's property. In that situation (unlike an exaction case), the landowner does not have the ability to stop the government from the taking. In such cases, the key issue is the extent of damages. Consequently, it makes sense to wait until the project is completed. But in exaction cases, courts have the power to stop the exaction before it takes place. Hence, there is no need to know the exact dollar value of the exaction, and no reason to delay the accrual of a cause of action.

Indeed, the *C & G* court specifically noted: "This analysis should not be taken as a reversal of *McCuskey* where this Court refused to apply *Farber*'s project completion rule to determine when an inverse condemnation claim accrues." *C & G*, 139 Idaho 144, 75 P.3d 198.

H. Nuisance actions are subject to the four-year statute of limitation.

"It is well settled in Idaho that the four-year statute of limitations provided for by Section 5–224 applies to nuisance actions. *See Idaho Gold Dredging Corp. v. Boise Payette Lumber Co.*, 52 Idaho 766, 22 P.2d 147 (1933)."[225] *Aetna Casualty & Surety Co. v. Gulf Resources & Chemical Corp.*, 600 F. Supp. 797 (D. Idaho 1985). See discussion in J. Walter Sinclair, *The Laws of Nuisance and Trespass as They Impact Animal Containment Operations in Idaho*, 30 Idaho L. Rev. 485, 499 (1994).

[224] The lead opinion mentioned physical takings but spoke mostly about the role applying in the context of a "government construction project." The concurring opinion suggests more strongly that the holding may be applicable in any direct physical taking by the government. "I concur in the lead opinion of this Court. Adopting the 'project completion' rule puts Idaho in line with the majority of courts called upon to determine the time the statute of limitations begins to run in a direct physical taking/inverse condemnation case." *C & G*, 139 Idaho at 146, 75 P.3d at 200.

[225] Although the *Idaho Gold* declares that section 5-224 applies to nuisance actions, the claim referred to as nuisance in that case actually appears to be more in the nature of trespass, particularly in light of the fact that this was a damage case. Be that as it may, it makes sense that the catch-all statute of limitations would apply to nuisance actions, and there appears to be no authority to the contrary.

In *Cobbley v. City of Challis* ("*Cobbley I*"), 138 Idaho 154, 59 P.3d 959 (2002) (Walters, J.), the Court held that actions involving separate, recurring events are treated like continuing torts for statute of limitations purposes.

> In the analogous circumstances of applying the statute of limitation to a nuisance claim, a continuing nuisance is treated like a continuing tort for which the limitations period begins to run anew for each repetition of the nuisance.

Cobbley I, 138 Idaho at 158, 59 P.3d at 963.

I. Two-year statute of limitations in § 1983 actions (including taking claims)

(1) Section 1983 actions are subject to the Idaho's statute of limitations for personal injury.

As discussed in section 24.CC(4) at page 459, federal taking claims must be brought pursuant to § 1983. Section 1983 does not contain its own statute of limitations. Accordingly, the determination of the appropriate statute of limitations is a matter of common law.

Federal law dictates which statute of limitations is applicable to federal claims and when that statute will begin to run. *Wallace v. Kato*, 549 U.S. 384, 387-88 (2007); *McCabe v. Craven*, 145 Idaho 954, 957, 188 P.3d 896, 899 (2008); 51 Am. Jur. 2d. *Limitation of Actions* § 121 (2000) ("If an action is brought in a state court on a federally created cause of action and there is an applicable federal limitation period, the state courts apply the federal period and any existing federal rules on tolling and other ancillary matters.")

In the case of § 1983, this led to confusion and uncertainty, as various courts applied various state statutes of limitation, by analogy, depending on the nature of the federal constitutional claim. Then, in 1985, the U.S. Supreme Court declared that all § 1983 actions should be subject to the state's statute of limitations for personal injury (aka torts) as opposed to the tort claims act, the general residual statute of limitation, or any other statute of limitations. *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). This bright-line rule was reaffirmed in *Owens v. Kure*, 488 U.S. 235, 249-50 (1989) and *Wallace v. Kato*, 549 U.S. 384, 387 (2007).

The *Wilson* decision was summarized thusly:

> Finally, in 1985 the Supreme Court seized the opportunity to put an end to the "uncertainty and time-consuming litigation that is foreign to the central purposes of section 1983." In *Wilson v. Garcia*, the

> Court, affirming a decision of the Court of Appeals for the Tenth Circuit, decided that henceforth all section 1983 claims are to be characterized as personal injury actions for statute of limitations purposes, regardless of the underlying cause of action.

Robert M. Jarvis, *The Continuing Problem of Statutes of Limitations in Section 1983 Cases: Is the Answer Out at Sea?*, 22 J. Marshall L. Rev. 285, 287 (1988).

The rule established in *Wilson* was dictated (at least implicitly) by the Civil Rights Act itself. 42 U.S.C. § 1988; *Wilson* at 267. However, other courts have recognized that *Wilson* is not limited to § 1983 actions. See discussion in section 22.I(4) at page 319.

The *Wilson* Court dealt with a § 1983 claim in federal court. However, the *Wilson* decision was based on the simple premise that the selection of the statute of limitations is a matter for federal law. Thus, the *Wilson* rule applies equally to § 1983 cases brought in state court.

Wilson made quite clear that this one-size-fits-all approach applies even where the State's highest court has ruled that some other state statute of limitations should apply to the particular type of § 1983 action. In *Wilson*, the Court brushed aside a decision of the New Mexico Supreme Court holding that New Mexico's two-year limit in its tort claims act was the statute of limitations most analogous to § 1983 actions.[226]

On numerous occasions, Idaho courts have applied *Wilson* and held that Idaho's two-year statute of limitations (Idaho Code § 5-219(4)) applies to all federal damage claims actionable under § 1983. *Henderson v. State*, 110 Idaho 308, 310-11, 715 P.2d 978, 980-81 (1986) (Huntley, J.)[227]; *Herrera v. Conner*, 111 Idaho 1012, 1016, 729 P.2d 1075, 1079 (Ct. App. 1987) (Walters, C.J.)[228]; *Mason v. Tucker and*

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[226] This rule applies even where the state courts have ruled that some other statute of limitations applies to the specific alleged violation. *Banks v. City of Whitehall*, 344 F.3d 550, 553 (6th Cir. 2003) (applying Ohio's two-year statute of limitations for personal injuries to takings claim notwithstanding contrary Ohio law); *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651 (9th Cir. 2003) (applying California's statute of limitations for personal injury torts to plaintiff's takings claim under § 1983).

[227] "In view of the holding in *Wilson*, 42 U.S.C. § 1983 actions in Idaho must now meet the two-year Idaho statute of limitations for personal injury actions, I.C. § 5-219(4)." *Henderson*, 110 Idaho at 311, 715 P.2d 981.

[228] In *Herrera*, the court noted: "Accordingly, the Idaho Supreme Court has held that § 1983 actions must meet the two-year statute of limitation for personal injury actions, I.C. § 5–219(4)." *Herrera*, 111 Idaho at 1016, 729 P.2d at 1079 (citing *Henderson*).

Assoc., 125 Idaho 429, 436, 871 P.2d 846, 853 (Ct. App. 1994) (Lansing, J.)[229]; *Idaho State Bar v. Tray*, 128 Idaho 794, 798, 919 P.2d 323, 327 (1996) (Schroeder, J.)[230]; *Osborn v. Salinas*, 131 Idaho 456, 458, 958 P.2d 1142, 1144 (1998) (Schroeder, J.)[231]; *Gibson v. Ada Cnty.*, 142 Idaho 746, 756, 133 P.3d 1211, 1221(2006), *cert. denied*, 549 U.S. 994 (2006), *rehearing denied*, 549 U.S. 1159 (2007) (Schroeder, C.J.)[232]; *McCabe v. Craven*, 145 Idaho 954, 957, 188 P.3d 896, 899 (2008) (W. Jones, J.), [233] *N. Idaho Bldg. Contractors Ass'n v City of Hayden* ("*NIBCA II*"), 164 Idaho 530, 432 P.3d 976 (2018) (Bevin, J.).[234]

The federal court for the District of Idaho also has ruled that Idaho's two-year statute governs § 1983 actions. *White Cloud v. Valley County*, 2011 WL 4583846 (D. Idaho Sept. 30, 2011) (Lodge, J.).

Despite this strong line of precedent, there has been some inconsistency in Idaho as to whether the two-year or the four-year statute of limitations applies to federal taking claims. Some Idaho cases inexplicably have applied the four-year statute of limitations to federal takings claims. They all do so as a matter of rote,

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[229] In *Mason*, the court explained: "Congress provided no federal statute of limitation for an action brought under 42 U.S.C. § 1983 or § 1985. However, the United States Supreme Court has held that, because Section 1983 actions are analogous to actions for injuries to personal rights, they are subject to the state statute of limitation for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). The pertinent Idaho statute is I.C. § 5–219(4), which provides a two-year statute of limitation for actions based on personal injury." *Mason*, 125 Idaho at 436, 871 P.2d at 853.

[230] In *Tway*, the Idaho Supreme Court upheld the suspension of a lawyer's license based on his failure to recognize that § 1983 actions are subject to a two-year statute of limitations, as held in *Hendersion*.

[231] In *Osborn*, the Court stated: "Following the United States Supreme Court's decision in *Wilson*, Idaho courts have held that § 1983 actions must meet the two-year statute of limitations for personal injury actions set forth in I.C. § 5–219(4)." *Osborn*, 131 Idaho at 458, 958 P.2d at 1144 (citing *Henderson* and *Herrera*).

[232] In the *Gibson* case, the Court said: "In Idaho there is a two-year statute of limitations on all § 1983 claims similar to personal injury actions. I.C. § 5-219(4) (2004)." Elsewhere in the decision, the Court clarified that the two-year statute of limitations applies to not just those "similar to personal injury actions" but to all § 1983 claims. "Idaho has a two-year statute of limitations on all 42 U.S.C. § 1983 claims." *Gibson*, 142 Idaho at 756, 133 P.3d at 1221.

[233] In *McCabe*, the Court observed: "In a 42 U.S.C. § 1983 case, the applicable statute of limitations is found in Idaho Code § 5-219(4) above." *McCabe*, 145 Idaho at 957, 188 P.3d 899 (citing *Henderson*).

[234] In *NIBCA II*, the Idaho Supreme Court recited the district court's ruling that "any federal claims arising before the two-year statute of limitation (June 4, 2010) were barred." *NIBCA II*, 164 Idaho at 534, 432 P.3d at 980. NIBCA filed a cross appeal in that case, but did not challenge the two-year statute of limitations.

without addressing the controlling federal precedents or the Idaho cases following *Wilson* and its progeny.

An example of the Court's inconsistency is *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 136 P.3d 310 (2006) (J. Jones, J.). In *Simpson*, the Court noted that the district court applied the 4-year statute of limitations to this § 1983 case. The Court never addressed which statute to apply, however, because it did not matter. (The Court found that the cause of action accrued in the same year the action arose, so any statute of limitations was satisfied.) Other examples are set out in the footnote.[235]

With the exception of *Simpson*, none of the cases applying a four-year statute of limitations to federal takings claims reference § 1983. It may be that they were allowed to proceed outside of § 1983 (which would be incorrect, see discussion in section 24.CC(4) at page 459). In any event, the Court did not address the federal claims in terms of § 1983, and it is the federal common law applying § 1983 that causes the two-year statute of limitations to apply. The bottom line is that these cases are anomalies. They do not offer a sound basis for departing from the settled rule that all § 1983 actions in Idaho are subject to a two-year statute of limitations.

(2) When the statute begins to run

While state law supplies the statute of limitations for a § 1983 case, federal law determines when that state statute begins to run. Under federal law, the statute of limitations begins to run when the constitutional wrong becomes or should have become apparent. "Although state law governs the limitations period in this case, federal law determines when the limitations period begins to run." *Trotter v. International Longshoremen's & Warehousemen's Union*, 704 F.2d 1141, 1143 (9th Cir. 1983). "Federal law, however, determines when the state limitations period begins for a claim under 42 U.S.C. § 1983. A federal claim is generally considered to accrue when the plaintiff 'knows or has reason to know of the injury which is the

[235]In *McCuskey v. Canyon Cnty. Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 216, 912 P.2d 100, 103 (1996) (Trout, J.), the Court held that the four-year statute of limitations (Idaho Code § 5-224) applies to federal takings claims. The Court offered no explanation or analysis for this conclusion, other than a citation to *Intermountain West, Inc. v. Boise City*, 111 Idaho 878, 880, 728 P.2d 767, 769 (1986) (Donaldson, C.J.). Likewise, *Intermountain West* applied the four-year statute of limitations to "the inverse condemnation claim." The *Intermountain West* Court drew no distinction between the statute of limitations applicable to state and federal inverse condemnation claims. Indeed, the Court failed to mention whether the claims arose under state or federal law or both. Moreover, the Intermountain West Court's statements with respect to the statute of limitations were dicta, because the Court rejected the taking claim(s) on its merits. Similarly, in *C & G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 75 P.3d 194 (2003) (Kidwell, J.), the Court applied a four-year statute of limitations based on to a reference to *McCuskey*.

basis of the action.'" *Norco Construction, Inc. v. King Cnty.*, 801 F.2d 1143, 1145 (9th Cir. 1986) (citations omitted).[236]

Ignorance of the right to sue is no excuse. "Her tardiness therefore was due not to the lack of a viable cause of action, but rather to an ignorance of her right to sue. Such ignorance is not a legally sufficient excuse for a delay in filing a claim." *Moore v. Exxon Transportation Co.*, 502 F. Supp. 583 (E.D. Ver. 1980) (dealing with tardy amendment of complaint; statute of limitations applied by analogy; not barred by laches due to lack of prejudice). "The phrase "reasonably should have been discovered" refers to knowledge of the facts upon which the claim is based, not knowledge of the applicable legal theory upon which a claim could be based." *BHA Investments, Inc. v. City of Boise* ("*BHA II*") (Eismann, J.), 141 Idaho 168, 174 108 P.3d 315, 321 (2004) (Eismann, J.) (in context of notice required under tort claims act). See also, *McCuskey II*, 128 Idaho at 218, 912 P.2d at 105, in which the Idaho Supreme Court rejected the plaintiff's contention that the statute of limitations for temporary takings did not begin to run until the court declared that the zoning action was unconstitutional.

In those jurisdictions where direct actions (independent of section 1983) are allowed, the suit is nevertheless subject to the personal injury statute of limitations. This is discussed further in section 22.I(4) at page 319.

(3) When does the federal cause of action accrue if it is unripe under *Williamson County*?

Note: On June 21, 2019, *Williamson County* was overruled in a five to four decision by *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019) (Roberts, C.J.).

The question of when the statute of limitations begins to run is complicated, however, by *Williamson County* As discussed in section 28.H(1) at page 616, *Williamson County* held that the federal claim is not ripe (at least in federal court as to prong two) until the plaintiff (1) obtains a final determination from the local authorities and (2) brings and loses a state inverse condemnation action. Accordingly, the Ninth Circuit has held that the statute of limitations does not begin to run if those tests are applicable and have been met.

> The conclusion that a claim is premature for adjudication controls as well the determination that the claim has not accrued for purposes of limitations of actions. In suits for

[236] *Norco*, however, was a special case. A temporary takings case based on delay in action on an application. The statute of limitations did not begin to run until later when the county finally granted the application.

> wrongful deprivation of property under 42 U.S.C. § 1983, the same considerations that render a claim premature prevent accrual of a claim for limitations purposes, and the claim does not accrue until the relevant governmental authorities have made a final decision on the fate of the property. *McMillan v. Goleta Water District*, 792 F.2d 1453 (9th Cir. 1986).

Norco Construction, Inc. v. King Cnty., 801 F.2d 1143, 1146 (9th Cir. 1986).

"We further held in *Levald* that the date of accrual is either (1) the date compensation is denied in state courts, or (2) the date the ordinance is passed if resort to state courts is futile." *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003), *cert. denied*, 543 U.S. 1041 (2004 and 2005) (two petitions for certiorari denied) (citing *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993)).[237] On the other hand, if resort to state courts would be futile, bringing an inverse condemnation action would not be required and the statute of limitations would begin to run immediately upon the allegedly wrongful action. Thus, the plaintiff's action is subject either one bullet or the other. "Thus, . . . Hacienda's claim . . . will either fail because it is not ripe, or, if it is ripe, it will be barred by the statute of limitations." *Hacienda*, 353 F.3d at 655.

As discussed elsewhere, however, *San Remo* holds that a claim that is unripe in federal court under prong two may be brought in state court concurrently with the state inverse condemnation action. Thus, if the claim is viable in state court, the statute of limitations must be running. Thus, the conundrum described in *Hacienda* would not appear to be applicable when the federal claim is brought in state court pursuant to *San Remo*.

In other words, if a plaintiff could have brought a timely state inverse action claim, the statute of limitations was running in state court from the outset, even if the case is premature in federal court. While the state statute of limitations was running, the federal claim would not be ripe in federal court. However, if the plaintiff misses the statute of limitations for the state claim, the plaintiff has thereby forfeited the federal claim. At that point, it would seem that the claim is ripe in federal court, but

[237] In *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993), the court of appeals first determined that the two *Williamson County* ripeness tests were inapplicable. (The first prong was inapplicable, because this was a facial challenge. The second prong was inapplicable, because, at the time, California did now allow inverse condemnation actions on regulatory takings, thus making resort to state court futile. *Levald*, 998 F.2d at 686.) With *Williamson County* out of the way, the Court then turned to the statute of limitations. It held that the statute of limitations on a federal takings claim in federal court does not ordinarily begin to the plaintiff has first sought recovery in state court and been denied. Here, however, resort to state court would have been futile, because, at the time, California did not allow inverse condemnation actions for regulatory takings. Thus, the statute had run and the facial claim was dismissed.

defective, and the federal court would have subject matter jurisdiction to dismiss it for having failed to timely file a state inverse condemnation action.

In *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87 (1st Cir. 2003), *cert. denied*, 540 U.S. 1090 (2003), the Court rejected the plaintiff's argument that ripening the federal claim by first bringing a state takings claim would have been futile because the claim was barred by the statute of limitations.[238]

No court that we are aware of has addressed the interaction of prong one ripeness and the statute of limitations. It would seem that if the plaintiff failed to obtain a final decision in the sense of prong one but that it is now too late to cure, the federal claim would be not unripe but forfeited.

(4) Statutes of limitations in *Bivens* actions

Bivens actions are actions brought directly under the U.S. Constitution, as in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). Virtually every court in the nation, including those of the Ninth Circuit, have held that *Bivens* actions are subject to the same state statute of limitation for personal injury as are § 1983. *Bieneman v. City of Chicago*, 864 F.2d 463, 469 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989) (direct takings claim subject to two-year statute); *Van Strum v. Lawn*, 940 F.2d 406 (9th Cir. 1991) (James A. Redden, J.) (expressly adopting the *Bieneman* approach in the Ninth Circuit); *Chin v. Bowen*, 833 F.2d 21 (2nd Cir. 1987) (action brought directly under 14th Amendment); *S.W. Daniel, Inc. v. Urea*, 715 F. Supp. 1082, 1085 (N.D. Ga. 1989) ("The court therefore concludes, as has virtually every appellate court addressing the issue, that the teachings of *Wilson* should be applied to *Bivens* actions as well.") (footnote citations omitted); *McSurely v. Hutchinson*, 823 F.2d 1002 (6th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988). The only contrary case we are aware of is *Gibson v. United States*, 781 F.2d 1334, 1342 n. 5 (9th Cir. 1986) (declining the invitation to apply *Wilson*), but this precedent seems to have been overruled by the express embrace of *Bieneman* in *Van Strum*.

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[238] In *Pascoag*, the State of Rhode Island sued to quiet title to land and lake access on a privately owned reservoir based on adverse possession. When the State prevailed, the reservoir owner turned around and sued the state in federal court alleging a federal taking (among other claims). The First Circuit dismissed the claim under *Williamson County* for failure to ripen the case via a state action. Here, the court was focused on the plaintiff's failure to allege in state court a state takings claim under Rhode Island's Constitution. *Pascoag*, 337 F.3d at 93. The First Circuit found it unnecessary to resolve the question of whether adverse possession can give rise to a right of compensation. The author of this section of the Handbook would opine that such a claim is ludicrous and contrary to the whole idea of adverse possession. For a contrary view, see Martin J. Foncello [Comment], *Adverse Possession and Takings Seldom Compensation for Chance Happenings*, 35 Seaton Hall L. Rev. 667 (2005).

In *Bieneman*, the Seventh Circuit explained why it made sense to apply *Wilson* to *Bivens* cases, too:

> These considerations apply with equal force to claims invoking the Constitution directly. Actions under § 1983 and those under the principal fount of direct suits, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971), are identical save for the replacement of a state actor (§ 1983) by a federal actor (Bivens). No wonder the only two courts of appeals that have addressed questions concerning limitations under *Bivens* have held that the rules used for § 1983 suits will be applied in full force to Bivens cases. *Chin v. Bowen*, 833 F.2d 21, 23–24 (2d Cir. 1987); *McSurely v. Hutchison*, 823 F.2d 1002, 1004–05 (6th Cir. 1987). When the defendant is a state actor, § 1983 and direct litigation may be interchangeable, the choice between them adventitious. There is no reason to have a different period of limitations, and a strong reason not to: any difference would give the plaintiff an incentive to pick whichever jurisdiction provided the longer period, recreating the uncertainty that the Supreme Court sought to eliminate. We conclude, therefore, that there should be a single period of limitations for all suits in which the Constitution supplies the remedy..

Bieneman, 864 F.2d at 469.

Thus, in the event that an Idaho court declined to follow *Azul-Pacifico* and found that there is a direct cause of action under the U.S. Constitution for takings, the federal claims would nevertheless be subject to Idaho's two-year statute of limitations. Indeed, *Bieneman* is directly on point, because this Seventh Circuit decision assumed that *First English* allowed for takings challenges directly under the Constitution,[239] and found them nevertheless subject to the same state statute of limitations as dictated for § 1983 cases in *Wilson*. *Bieneman* was expressly adopted by the Ninth Circuit in *Van Strum*, 940 F.2d at 410.

[239] "Bieneman attempts to avoid that outcome [application of a shorter statute of limitations] by insisting that the takings claim rests on the Constitution rather than § 1983. . . . We know from *First English Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 2386 n.9, 96 L.Ed.2d 250 (1987), that takings suits may be filed directly under the Constitution. It follows, Bieneman contends, that we should use as the limitations period the most analogous period drawn from state law—which, he submits, is the 20-year time allowed to bring adverse possession actions, a period applied to inverse condemnation suits against governmental units." *Bieneman*, 864 F.2d at 468.

There is a question, however, as to when the two-year statute would begin to run. Assuming that the *Williamson County* ripeness tests apply even in a takings challenge brought directly under the U.S. Constitution (which follows from the fact that the ripeness tests derive from the theory of federal takings, not anything in § 1983), it would seem that the statute of limitations would not begin to run until the case was ripe. (This was the result dictated in the context of § 1983 in *Hacienda Valley* and *Norco*, described above). On the other hand, in *Bieneman*, the Seventh Circuit said that the statute begins to run from the original date of the "wrong."[240] Then again, *Bieneman* did not even mention *Williamson County*; it may have been unaware of those ripeness tests.

In any event, under *San Remo*, it is clear that the federal taking claim is ripe in state court. Thus, the statute of limitations will begin to run as to such an action from the outset.

In the case of a federal constitutional challenge not based on takings (for example, a due process challenge), it would seem clear that Idaho's two-year statute of limitations runs from the day the plaintiff becomes aware of the constitutional infringement. *Norco*, 801 F.2d at 1145 (quoting *Trotter v. International Longshoremen's & Warehousemen's Union*, 704 F.2d 1141, 1143 (9th Cir. 1983)). Presumably, this would be the case whether brought under § 1983 or not.

[240] "So pleading this case as a claim directly under the Takings Clause leaves Bieneman exactly where pleading it under § 1983 would have left him: with five years from the wrong, or two years from *Wilson*, whichever is less, to file the complaint. Bieneman missed the time by three years, and the district court properly granted summary judgment for the defendants." *Bieneman v. City of Chicago*, 864 F.2d 463, 470 (7th Cir. 1988).

By the way, the court's reference to two years derives from the state's personal injury statute of limitations. The reference to five years was the rule under prior law, before *Wilson v. Garcia*, 471 U.S. 261 266-67 (1985). Recognizing reliance plaintiffs may have placed on prior precedent, the court essentially allowed the statute to restart on the date of *Wilson*. It would have been more logical for the court to have said "two years from the date of the wrong or *Wilson*, whichever is longer."

23. STATUTES OF REPOSE

Statutes of limitation and statutes of repose both operate to set time limits on when a lawsuit may be brought.[241] Such statutes are typically geared toward a particular category of lawsuits. For example, Idaho has separate statutes of limitations for torts, malpractice, contract claims, etc. Statutes of limitation provide a fixed number of years during which a lawsuit may be filed after the date of "accrual." The date of accrual—that is, the date when a lawsuit comes to life—is sometimes defined in the statute, but is also governed by case law. The accrual date typically does not arise until damages are incurred.

Many states also have enacted statutes of repose which also set an outer limit on particular types of lawsuits. In other states, statues of repose operate independently of the statute of limitation, typically setting a deadline for initiating litigation after a specified event, such as completion of construction—irrespective of when the cause of action accrues.

Idaho's version of a statute of repose governing improvements to real property, Idaho Code § 5-241, achieves the same result, but operates a little differently. Rather than operate as a stand-alone statute setting its own deadline, section 5-241 modifies the applicable statute of limitation to cause the date of accrual to be triggered within a fixed time. Given that section 5-241 is codified within the title setting out statutes of limitation and that it operates on the accrual date of a statute of limitation, one might say that it is not really a separate statute of repose. However, on at least one occasion, the Idaho Supreme Court has described it as a statute of repose. *West v. El Paso Products Co.*, 122 Idaho 133, 134, 832 P.2d 306, 307 (1992) (Bistline, J.).

Idaho has a number of statutes that are described as statutes of repose. For example, Idaho's product liability statute contains a provision expressly described in the statute itself as a statute of repose, Idaho Code § 6-1403. It sets a presumption as to the useful life of a product.

[241] The term "statute of repose" is not well defined or consistently used. Sometimes, it is used as a broad catch-all term for any statute the places limits on when a lawsuit may be filed, including statutes of limitation. For example, the Court in *Balivi Chemical Corp. v. Indus. Ventilation, Inc.*, 131 Idaho 449, 451 n.5, 958 P.2d 606, 608 n.5 (Ct. of App. 1998) (Schwartzman, J.), described Idaho's statute of limitations on oral contracts, Idaho Code § 5-217, as "a four-year statute of repose." More commonly, however, "statutes of limitation" and "statutes of repose" are given different meanings.

24. JUDICIAL REVIEW AND CIVIL ACTIONS

A. Statutes authorizing judicial review.

Judicial review is available only where authorized by statute.[242] Numerous Idaho statutes provide authorization for judicial review of particular governmental actions. Here are notable examples:

- The Idaho Administrative Procedure Act ("IAPA"), Idaho Code §§ 67-5270 to 67-5277 and 67-5279, authorizes review of actions by state agency.
- The Local Land Use Planning Act ("LLUPA")), Idaho Code §§ 67-6519(4) and 67-6521(1)(d), authorizes review of specified municipal land use decisions.
- The Annexation Statute, Idaho Code § 50-222(6), authorizes judicial review of Category B and C annexations.
- A separate judicial review provision (analogous to the IAPA) is applicable to all county decisions not addressed by other judicial review provisions, Idaho Code § 31-1506.[243] (See discussion in section 24.DD at page 464.)
- See the *Idaho Road Law Handbook* for a discussion of judicial review of road validation and vacation proceedings under Idaho Code § 40-208.

[242] The Idaho Constitution allows the legislature to delimit the district courts' appellate jurisdiction. Idaho Const. art. V, § 20. Without an enabling statute, the district court lacks subject matter jurisdiction. In addition, an Idaho court rule declares that actions by state agencies are not subject to judicial review unless expressly authorized by statute. I.R.C.P. 84(a)(1). See, *e.g.*, *In re Williams*, 149 Idaho 675, 678–79, 239 P.3d 780, 783–84 (2010) (dismissing a petition for review for lack of jurisdiction because no statute authorized an appeal); *Taylor v. Canyon Cnty. Bd. of Comm'rs*, 147 Idaho 424, 431–32, 210 P.3d 532, 539–40 (2009) (same); *cf. Regan v. Kootenai Cnty.*, 140 Idaho 721, 726, 100 P.3d 615, 620 (2004) (holding that a reviewable final order is necessary for subject matter jurisdiction); *Laughy v. Idaho Dep't of Transportation*, 149 Idaho 867, 870, 243 P.3d 1055, 1058 (2010) (W. Jones, J); *Stafford v. Kootenai Cnty.*, 150 Idaho 841, 847, 252 P.3d 1259, 1265 (2011) ("To obtain judicial review of final action under LLUPA, there must be a statute granting the right of judicial review.").

[243] In *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner II*"), 150 Idaho 559, 249 P.3d 358 (2011) (Horton, J.), the Idaho Supreme Court found that section 31-1506(1) does not provide an independent right to judicial review of matters governed by LLUPA. In essence, the Court determined that LLUPA's judicial review provisions are more specific and override the broader authorization contained in section 31-1506(1).

- A variety of other statutes provide for judicial review as well.[244]

Note that the mechanism for resolving overlapping area of city impact (ACI) boundaries may culminate in a declaratory action, but not in judicial review. Idaho Code § 67-6526(c).

In rare instances, statutes expressly take away the right of judicial review that would otherwise be available. *E.g.*, Idaho Code § 58-405 (eliminating judicial review under the IDAPA for decisions of the Idaho Board of Land Commissioners with respect to certain timber sales).

B. Judicial Review under the IAPA.

The IAPA applies to actions of Idaho agencies, not to local governments (except, as discussed below, to the extent other statutes, such as LLUPA, adopt its some of its provisions).

The IAPA authorizes judicial review of rules, orders in contested cases, and other agency actions. The provision authorizing judicial review is Idaho Code § 67-5270. Subsection 67-5270(3) authorizes judicial review by "a party aggrieved by a final order in a contested case." This excludes judicial review by interested persons and other non-parties who have failed to intervene. Subsection 67-5270(2) authorizes judicial review by "a person aggrieved by final agency action" (*i.e.*, it is not limited to parties). It applies in all other instances, *i.e.*, to judicial review of rules and of agency actions that are not orders in contested cases.

The term "agency action" is defined in Idaho Code § 67-5201. It expressly includes both actions and the failure to act. Subsections (a) and (b) cover rules and orders. Subsection (c) is the catch-all for everything else: "an agency's performance of, or failure to perform, any duty placed on it by law." An example falling into this third category (agency action that is neither a rule nor an order) is "the obligation [of the Idaho Department of Transportation] to adopt a uniform system of traffic-control devices." *Laughy v. Idaho Dep't of Transportation*, 149 Idaho 867, 871, 243 P.3d 1055, 1059 (2010) (W. Jones, J) (referring to Idaho Code § 49-201(3), which requires the Department to issue a manual and specifications for such a system).

Most practitioners tend to think of a "contested case" as a formal administrative proceeding.[245] In *Laughy*, a divided Idaho Supreme Court ruled that

[244] Some statutes reference the IAPA and some do not. Some are very narrow and specific, such as Idaho Code § 72-1368 (the Employment Security Law). Idaho's water code provides numerous authorizations for judicial review, the most notable being Idaho Code § 42-1701A. Decisions by the Idaho Board of Land Commissioners with respect to encroachment permits (for docks) is found in Idaho Code § 58-1306(c).

[245] Various statutes address contested cases. For example, the IAPA contains these provisions: Idaho Code § 67-5201(6) (definition of "contested case"); Idaho Code § 67-5240 to

any action by a state agency resulting in any determination of "the legal rights, duties, privileges, immunities, or other legal interests of one or more persons" is an order in a contested case, irrespective of whether any formal proceedings were initiated. *Laughy*, 149 Idaho at 871, 243 P.3d at 1059.[246] Thus, it appears, every request for a permit results in a contested case, even if the permit is issued based on purely informal, unopposed proceedings. The Court's conclusion is grounded in the language of the IAPA, which defines contested case as "a proceeding which results in the issuance of an order." Idaho Code § 67-5201(6). See also Idaho Code § 67-5240 ("A proceeding by an agency [excepting two agencies] that may result in the issuance of an order is a contested case . . . ."). This definition is repeated in various agency rules, *e.g.*, IDAPA 04.11.01.005.06 (applicable to the Attorney General and all agencies that do not adopt their own rules). For example, the rules of the Idaho State Board of Land Commissioners define contested case as "[a] proceeding which results in the issuance of an order." IDAPA 20.01.01.005.07.

C. Overview: Availability of judicial review under LLUPA

The issue of judicial review under the Local Land Use Planning Act ("LLUPA"), Idaho Code §§ 67-6501 to 67-6538, presents two fundamental questions: (1) Is judicial review under LLUPA, Idaho Code §§ 67-6519(5)[247] and 67-6521(1), available? (2) If so, is judicial review the exclusive means of seeking redress? The discussion in the following sections begins with the first question, turning to the second later.

Every law student has heard Professor Prosser's maxim that for every wrong, the law provides a remedy.[248] That has a nice ring, but it is not entirely true. Not

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67-5254 (contested case proceedings). Idaho Code § 58-122 sets out procedures for contested cases before the Idaho Department of Lands.

[246] In *Laughy v. Idaho Dep't of Transportation*, 149 Idaho 867, 876-77, 243 P.3d 1055, 1064-65 (2010) (W. Jones, J), the Court ruled that even informal permit-issuing activities by state agencies are contested cases and therefore not subject to review under Idaho Code § 67-5270(2) (for agency actions other than contested cases, review of which may be by any aggrieved person). Instead, they must be reviewed pursuant to Idaho Code § 67-5270(3) (for contested cases, review of which is limited to parties). In this case, however, the Court had no jurisdiction because there was no final agency order and the person filing the petition for judicial review had not obtained party status below. The message of this case is that if a person plans to challenge the issuance of a permit, it is insufficient merely to submits comments in opposition to the issuance of the permit. Rather, one must take steps to obtain formal party status and seek issuance of a final decision either by the agency head or a preliminary order meeting the statutory definition thereof.

[247] The judicial review provision in Idaho Code § 67-6519(5) was formerly codified to section 76-6519(4).

[248] "It is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury it's [sic] proper redress." 1 William Blackstone, *Commentaries on the Laws of England* 23. *See also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162-163 (1803).

every statutory violation gives rise to a private cause of action. Nor does every potential litigant have standing. In addition, many procedural hurdles have been placed in the path of litigants, such as tort claim notices, statutes of limitation, and deadlines for judicial review. If that were not enough, there is the challenge of selecting the proper forum—a task that under LLUPA is fraught with danger. Before filing a lawsuit, the litigant must carefully consider whether relief should be sought by way of judicial review under LLUPA or by a separate civil action (such as an action for declaratory relief or an inverse condemnation seeking damages). Many an Idaho land use litigant has found his or her case thrown out when the lawyer chose the wrong means of judicial redress.

In broad brushstrokes, LLUPA provides a limited remedy for correction of certain land use decisions in the form of judicial review. Judicial review is an on-the-record appeal from the administrative body to the district court. The court's review is limited to the record below. Discovery is rarely allowed. The standard of review favors the administrative agency or municipal decision maker. Remedies are limited and damages are not among them. (In the ordinary case, the unavailability of damages of not of much consequence because relief is sought at the outset, before the damage occurs.) Appeal deadlines are very strict (28 days).

LLUPA does not set out the standards for judicial review. Instead, it incorporates the judicial review provisions set out in the Idaho Administrative Procedure Act ("IAPA"), thereby bringing into play the familiar "substantial evidence" and "arbitrary and capricious" tests. In addition, a party may raise violations of law (ordinance, statute, or constitution) in LLUPA reviews.

Ordinarily (subject to some important exceptions discussed below), judicial review under LLUPA is not only available but is the exclusive means of review of such administrative actions. Judicial review under LLUPA is not available, however, for every type of action undertaken pursuant to LLUPA. Accordingly, a good deal of land use litigation occurs via declaratory actions and other mechanisms instead of or in addition to judicial reviews. For example, there are occasions when parties wish to challenge the constitutionality of an ordinance even before it is applied to them. Under proper circumstances, this is appropriate. There are other actions taken pursuant to LLUPA that are simply not covered by the judicial review provisions of LLUPA, for example challenges to a comprehensive plan or to an enforcement action.

From 1980 until 2008, the Idaho Supreme Court decided what was reviewable under LLUPA on the basis of whether the matter is quasi-judicial (and thus reviewable under LLUPA) or legislative (and thus reviewable only by some other means). This quasi-judicial / legislative distinction pre-dates LLUPA, is part of a much broader common law found in all jurisdictions, and also has important

implications for certain constitutional claims. *E.g.*, due process and *ex parte* claims arise only in the context of quasi-judicial actions.

In 2008, however, the Court took an abrupt turn. The Court announced in a series of cases beginning with *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner I*"), 145 Idaho 630, 181 P.3d 1238 (2008) (Eismann, J.) and *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008) (Eismann, J.), that the availability of judicial review under LLUPA turns on the words of the statute itself, not on the court-created quasi-judicial/legislative distinction.

In *Giltner I*, the Court ruled unanimously that LLUPA authorizes appeals only of the issuance or denial of "permits" as that term was used in the act at that time,[249] therefore denying judicial review of an amendment to a comprehensive plan map (which is not a permit).[250] The Court went on to name five types of permits that are subject to judicial review under LLUPA. *Giltner I*, 145 Idaho at 633, 181 P.3d at 1241. The Court might have noted that section 67-6519(4) was inapplicable for another reason: It only authorizes appeals by applicants. Here the appeal was brought by a neighbor. The Court, however, did not mention this. Nor did the Court mention that adoption of a comprehensive plan map involves legislative (not quasi-judicial) action. In other words, there was no need to change the law in order to reach the result. But the Court did change the law, and dramatically so.

In these cases, the Court tossed aside a quarter century of jurisprudence on the legislative versus quasi-judicial distinction in favor of a simple, if not simplistic, evaluation of what constitutes a "permit" under LLUPA. Under *Giltner I* and its progeny, the Court applied this simple rule of thumb: LLUPA authorizes judicial review of five and only five types of permits (variances, conditional use permits, subdivisions, PUDs, and building permits[251]). (As discussed below, this list is no

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[249] At the time of *Giltner I*, LLUPA defined an affected person as "one having a bona fide interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development." Idaho Code § 67-6521(1)(a). At that time, LLUPA did not list which permits were appealable. However, as discussed below, the *Giltner I* Court itself identified which permits were appealable. Subsequent amendments to LLUPA, also discussed below, now identify a specific list of reviewable actions (and they do not exactly match those listed in the *Giltner I* decision).

[250] This conclusion was reiterated in *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008) (Eismann, J.). In *Highlands*, the dissent urged a broader reading of section 67-6519(4), noting that it authorized judicial review to an "applicant denied a permit or aggrieved by a decision." The majority, however, found no merit in this distinction, noting that the thrust of the provision is to allow review only of instances involving "the granting or denial of a permit authorizing the development." *Highlands*, 145 Idaho at , 188 P.3d at .

[251] Although building permits are identified in *Giltner I* and *Highlands* as among the five types of permits subject to judicial review under LLUPA, the dissent in *Highlands* cautions that the majority's logic would allow judicial review only of a narrow class of building permits "for development on any lands designated upon the future acquisitions map." *Highlands*, 145 Idaho at

longer accurate due to subsequent amendments to LLUPA.) If the local government's action is not one of these, then it must be challenged via some other form of action, typically a complaint for declaratory judgment.

Since deciding *Giltner I* in 2008, the Idaho Supreme Court consistently has followed this approach of parsing the words of LLUPA to determine jurisdiction. *E.g.*, *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008); *Johnson v. Blaine Cnty.*, 146 Idaho 916, 204 P.3d 1127 (2009); *Taylor v. Canyon Cnty. Bd. of Comm'rs* ("*Taylor II*"), 147 Idaho 424, 210 P.3d 532 (2009) (Burdick, J.); *Burns Holdings, LLC v. Madison Cnty. Bd. of Cnty. Comm'rs* ("*Burns Holdings I*"), 147 Idaho 660, 214 P.3d 646 (2009); *Noble v. Kootenai Cnty.*, 148 Idaho 937, 940, 231 P.3d 1034, 1037 (2010) (Burdick, J.); *Terrazas v. Blaine Cnty. ex rel. Bd. of Comm'rs*, 147 Idaho 193, 197, 207 P.3d 169, 173 (2009); *Stafford v. Kootenai Cnty.*, 150 Idaho 841, 848, 252 P.3d 1259, 1266 (2011).

Although *Giltner I* reflected a fundamental change in jurisprudence, the practical difference was not as great as one might expect. Indeed, the only major difference was that judicial review of rezones was no longer available. That was a significant matter, however, because rezones are so important in land use planning. The effect, however, was softened by court's decision in *Taylor v. Canyon Cnty. Bd. of Comm'rs* ("*Taylor II*"), 147 Idaho 424, 210 P.3d 532 (2009) (Burdick, J.), discussed below, which found that a conditional rezone coupled with a development agreement to be functionally identical to a conditional use permit, and therefore reviewable under LLUPA.

The 2010 the Legislature reacted to the *Giltner I* and *Taylor* cases with an amendment broadening judicial review somewhat. House Bill 605, 2010 Idaho Sess. Laws, ch. 175, effective March 31, 2010. This legislation did not attempt to restore the prior quasi-judicial versus legislative distinction.[252] Instead, it simply adopted its own set of reviewable actions. Thus, determining whether or not judicial review is available under LLUPA remains, even after 2010, a more-or-less mechanical evaluation of whether the action is on the list or not, rather than, as it was prior to *Giltner I*, a functional analysis of the nature of the governmental action.

964-65, 188 P.3d at 906-07 (Justice Jim Jones dissenting). In a subsequent case, after the statute was amended in 2010, the Court ruled that building permits do not fall within the list of land use actions subject to judicial review under LLUPA. *Arnold v. City of Stanley* ("*Arnold II*"), 162 Idaho 115, 394 P.3d 1160 (2017) (w. Jones, J.).

[252] Curiously, some of the commentary in the legislative history suggests that the measure was intended to restore judicial review to quasi-judicial decisions. The legislation did so, however, not by making judicial review turn on whether the action was quasi-judicial or not. Instead, the legislation maintained the rigid, list-based approach to judicial review first embraced by the court in *Giltner*, but expanded the list to include a few quasi-judicial actions (and and one legislative one, initial zones) that the drafters apparently thought were important.

First, the 2010 amendment restored judicial review of rezones. Then, it codified the rule in *Taylor* allowing judicial review of conditional rezones. Next, it allowed judicial review of initial zoning actions upon annexation. Idaho Code § 67-6521(1)(a). This went beyond even pre-*Giltner I* law, which viewed initial zones as non-reviewable legislative actions. Today, under the 2010 amendment, the list of what is reviewable consists of: (1) applications for subdivision permits, (2) applications for variances, (3) applications for conditional use permits (aka special use permits), (4) applications for similar permits under LLUPA presumably including planned unit developments, (5) initial zoning ordinances, (6) applications to rezone, and (7) applications for conditional rezones pursuant to section 67-6511A.

In *Arnold v. City of Stanley* ("*Arnold II*"), 162 Idaho 115, 394 P.3d 1160 (2017) (W. Jones, J.), the Court ruled that the catch-all "and such other similar applications require or authorized pursuant to this chapter" (Idaho Code § 67-6521(1)(a)) does not include building permits. The Court concluded that "LLUPA does not authorize or require building permits." *Arnold II*, 162 Idaho at 117, 394 P.3d at 1162. It noted that building permits are referenced only once in LLUPA and then only in the context of "future acquisition maps" that designate land proposed for acquisition by a public agency. *Arnold II*, 162 Idaho at 117, 394 P.3d at 1162.

The tables on the following pages summarize actions deemed reviewable and non-reviewable under the various regimes. Note that since *Giltner I*, the quasi-judicial versus legislative distinction is no longer determinative of whether judicial review is available. But whether an action is quasi-judicial or not remains relevant for determining whether due process considerations (such as *ex parte* communication and bias rules) attach. The distinction is also relevant to conflict of interest evaluations under Rule 1.7(b)(4). See the *Idaho Ethics Handbook*.

Note that LLUPA does not address judicial review of annexations. Under a separate statute, Category B and C annexations are subject to judicial review under the IAPA. See discussion in section 24.X at page 444.

Pre-*Giltner I* (1980-2008)	
Legislative	**Quasi-Judicial**
Initial zoning (including zoning upon annexation)[253] Comprehensive plan (adoption or amendments)[254] Comprehensive plan map[255] Moratorium (issuance or lifting) Annexations (annexations do not fall within LLUPA's judicial review provisions, but category B & C annexations are subject to IAPA review under a separate statute)[256]	Rezoning (both downzoning and upzoning)[257] Variance[258] Conditional use permits (aka special use permits)[259] Subdivision[260] Planned unit development[261] Building permit?[262]

[253] *Burt v. City of Idaho Falls*, 105 Idaho 65, 665 P.2d 1075 (1983).

[254] *Burt v. City of Idaho Falls*, 105 Idaho 65, 665 P.2d 1075 (1983).

[255] *Giltner I, LLC v. Jerome Cnty.*, 145 Idaho 630, 181 P.3d 1238 (2008).

[256] *Crane Creek Country Club v. City of Boise*, 121 Idaho 485, 826 P.2d 446 (1992). Although annexations are deemed "legislative" for due process purposes, Category B and C annexations are subject to judicial review under the IAPA as of 2002. See discussion in section 24.X at page 444. See, *City of Boise v. Bastian* (unpublished district court decision) (2006) (holding Category B annexation to be legislative and therefore not subject to *ex parte* communication prohibition). *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008) (Eismann, J.), dealt with annexation (under the prior Annexation Statute) and initial zoning, finding no LLUPA review available.

[257] The following cases have recognized judicial review of rezones: *Brower v. Bingham Cnty. Comm'rs (In re The Application for Zone Change)*, 140 Idaho 512, 96 P.3d 613 (2004); *Evans v. Teton Cnty.*, 139 Idaho 71, 73 P.3d 84 (2003) (Kidwell, J.); *Grubb & Associates v. Hailey*, 127 Idaho 576, 903 P.2d 741 (1995) (*"Sprenger Grubb I"*) (Silak, J.); *Taylor v. Bd. of Cnty. Comm'rs, Cnty. of Bonner*, 124 Idaho 392, 860 P.2d 8 (Ct. App. 1993); *Balser v. Kootenai Cnty. Bd. of Comm'rs*, 110 Idaho 37, 39, 714 P.2d 6, 8 (1986); *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 34, n.1, 655 P.2d 926, 928, n.1 (1982); *Cooper v. Ada Cnty. Comm'rs*, 101 Idaho 407, 614 P.2d 947 (1980); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984).

[258] "[T]he pertinent governing body enacts a land use ordinance in its legislative capacity, but it considers a variance in a quasi-judicial capacity." *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 846, 136 P.3d 310, 317 (2006) (J. Jones, J.). *Blaha v. Bd. of Ada Cnty. Comm'rs*, 134 Idaho 770, 773, 9 P.3d 1236, 1239 (2000) (Walters, J.) (reviewing subdivision and variance under LLUPA). *Highlands* and *Giltner I* list variance permits among the five types of permits subject to judicial review under LLUPA.

[259] *Taylor v. Canyon Cnty. Bd. of Comm'rs*, 147 Idaho 424, 435, 210 P.3d 532, 543 (2009); *Dry Creek Partners, LLC v. Ada Cnty. Comm'rs*, 148 Idaho 11, 17, 217 P.3d 1282, 1288 (2009),

In the post-*Giltner I*, pre-2010 amendment era, judicial review turned on whether the decision involved a "permit." The following table summarizes actions were reviewable under *Giltner I*, prior to the 2010 amendment.

Highlands Dev. Corp. v. City of Boise, 145 Idaho 958, 961, 188 P.3d 900, 903 (2008) (Eismann, J.) and *Giltner I, LLC v. Jerome Cnty.*, 145 Idaho 630, 633, 181 P.3d 1238, 1241 (2008) (Eismann, J.) all list special use permits (aka conditional use permits) among the five types of permits subject to judicial review under LLUPA. Other examples of CUPs being challenged under LLUPA's judicial review provisions are *Ralph Naylor Farms v. Latah Cnty. ("Naylor Farms")*, 144 Idaho 806, 808, 172 P.3d 1081, 1083 (2007); *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1994); *Angstman v. City of Boise*, 128 Idaho 575, 578, 917 P.2d 409, 412 (Ct. App. 1996) (Walters, C.J.). In *Payette River Property Owners Ass'n v. Bd. of Comm'rs of Valley Cnty.*, 132 Idaho 551, 976 P.2d 477 (1999) (Trout, J.), the court held that a conditional use permit is a final decision subject to judicial review even though no final plat had yet been issued (distinguishing *Bothwell v. City of Eagle*, 130 Idaho 174, 938 P.2d 1212 (1997), which held that issuance of a preliminary plat is not final and not subject to judicial review).

[260] *Curtis v. City of Ketchum*, 111 Idaho 27, 32-33, 720 P.2d 210, 215-16 (1986); *Blaha v. Bd. of Ada Cnty. Comm'rs*, 134 Idaho 770, 773, 9 P.3d 1236, 1239 (2000) (Walters, J.) (reviewing subdivision and variance under LLUPA). *Highlands* and *Giltner I* list subdivision permits among the five types of permits subject to judicial review under LLUPA. If the preliminary plat approval allows the applicant to take immediate steps to permanently alter the land before final approval, the preliminary plat approval is subject to appeal under LLUPA. *Rural Idaho Organization, Inc. v. Bd. of Comm'rs, Kootenai Cnty.*, 133 Idaho 833, 837-39, 993 P.2d 596, 600-02 (2000).

[261] *Highlands* and *Giltner I* list planned unit development permits among the five types of permits subject to judicial review under LLUPA.

[262] Building permits are plainly quasi-judicial. However, the authors are not aware of any pre-*Giltner* appellate authority addressing whether they are reviewable under LLUPA. Although quasi-judicial in nature, they are largely non-discretionary and rarely result in the development of an administrative record.

Post-*Giltner I*, but pre-amendment (2008-2010)	
Not Subject to LLUPA Review	**Subject to LLUPA Review**
Rezoning (with an exception for conditional rezones)[263] Initial zoning (including zoning upon annexation)[264] Comprehensive plans (adoption or amendments) Comprehensive plan maps[265] Moratoriums (issuance or lifting) Enforcement actions[266] Annexations (annexations do not fall within LLUPA's judicial review provisions, but category B & C annexations are subject to IAPA review under a separate statute)[267]	Conditional rezones coupled with development agreements[268] Variance Conditional use permits (aka special use permits) Subdivision[269] Planned unit development Building permits[270]

[263] In *Burns Holdings, LLC v. Madison Cnty. Bd. of Cnty. Comm'rs* ("*Burns Holdings I*"), 147 Idaho 660, 214 P.3d 646 (2009), the court held that a rezone was not a permit and therefore was not reviewable under LLUPA.

[264] *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008) (Eismann, J.), dealt with annexation (under the prior Annexation Statute) and initial zoning, finding no LLUPA review available.

[265] *Giltner I, LLC v. Jerome Cnty.*, 145 Idaho 630, 181 P.3d 1238 (2008), dealt with a comprehensive plan map amendment, finding that no LLUPA review was available.

[266] Applying the pre-2010 version of LLUPA, the court held in *Stafford v. Kootenai Cnty.*, 150 Idaho 841, 848, 252 P.3d 1259, 1266 (2011), "The legislature has not granted the right of judicial review of administrative enforcement proceedings under local planning and zoning ordinances."

[267] *Crane Creek Country Club v. City of Boise*, 121 Idaho 485, 826 P.2d 446 (1992). Although annexations are deemed "legislative" for due process purposes, Category B and C annexations are subject to judicial review under the IAPA as of 2002. See discussion in section 24.X at page 444. See, *City of Boise v. Bastian* (unpublished district court decision) (2006) (holding Category B annexation to be legislative and therefore not subject to *ex parte* communication prohibition). *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008) (Eismann, J.), dealt with annexation (under the prior Annexation Statute) and initial zoning, finding no LLUPA review available.

[268] In *Taylor v. Canyon Cnty. Bd. of Comm'rs*, 147 Idaho 424, 210 P.3d 532 (2009), the Court found that conditional rezones were in that nature of a conditional use permit and therefore reviewable under LLUPA.

The table below summarizes reviewable and non-reviewable actions under LLUPA today, following the 2010 amendment.

[269] *Terrazas v. Blaine Cnty. ex rel. Bd. of Comm'rs*, 147 Idaho 193, 197, 207 P.3d 169, 173 (2009) ("The decision regarding a subdivision application is a decision granting a permit, I.C. § 67–6513, and is therefore subject to judicial review. *Johnson v. Blaine Cnty.*, 146 Idaho 916, 920–21, 204 P.3d 1127, 1131–32 (2009)"); *Noble v. Kootenai Cnty.*, 148 Idaho 937, 940, 231 P.3d 1034, 1037 (2010) (Burdick, J.) (citing *Terrazas*).

[270] Although building permits are identified in *Giltner I* and *Highlands* as among the five types of permits subject to judicial review under LLUPA, the dissent in *Highlands* notes that building permits are only mentioned in Idaho Code § 67-6517 dealing with the future acquisitions map. Justice Jim Jones then cautioned that the majority's logic arguably would allow judicial review only of a narrow class of building permits "for development on any lands designated upon the future acquisitions map." *Highlands*, 145 Idaho at 964-65, 188 P.3d at 906-07 (Justice Jim Jones dissenting). The Court's confusion is understandable because Section 67-6517 does not make sense in the context of building permits. These permits rarely if ever are addressed by "the zoning or planning and zoning commission or the governing board" in the words of Section 67-6517 to occasion a request to stop processing an application for lands on the future acquisitions map. Review of a building permit decision was allowed (but not allowed to be combined with a complaint) in *Euclid Ave. Trust v. City of Boise*, 146 Idaho 306, 193 P.3d 853 (2008) (J. Jones, J.). The list including building permits was set out again in *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008) (Eismann, J.).

See footnote 274 on page 334 regarding post-2010 treatment of building permits.

Post-amendment (2010-present)	
Not Subject to LLUPA Review	**Subject to LLUPA Review**
Comprehensive plans (adoption or amendments) Comprehensive plan maps Moratoriums (issuance or lifting) Enforcement actions[271] Annexations (annexations do not fall within LLUPA's judicial review provisions, but category B & C annexations are subject to IAPA review under a separate statute)[272] Rezoning of large areas?[273] Building permits[274] Design review approval or denial[275]	Idaho Code § 67-6521(1)(a)(i): Subdivision[276] Variance Conditional use permit (aka special use permit) "Other similar applications required or authorized" under LLUPA. Planned unit developments[277] Idaho Code § 67-6521(1)(a)(ii): Initial zoning following annexation Rezoning of specific parcels or sites pursuant to section 67-6511 Idaho Code § 67-6521(1)(a)(ii): Conditional rezoning pursuant to section 67-6511A

[271] Applying the pre-2010 version of LLUPA, the court held in *Stafford v. Kootenai Cnty.*, 150 Idaho 841, 848, 252 P.3d 1259, 1266 (2011), "The legislature has not granted the right of judicial review of administrative enforcement proceedings under local planning and zoning ordinances." The 2010 amendment would not appear to change this outcome.

[272] *Crane Creek Country Club v. City of Boise*, 121 Idaho 485, 826 P.2d 446 (1992). Although annexations are deemed "legislative" for due process purposes, Category B and C annexations are subject to judicial review under the IAPA as of 2002. See discussion in section 24.X at page 444. See, *City of Boise v. Bastian* (unpublished district court decision) (2006) (holding Category B annexation to be legislative and therefore not subject to *ex parte* communication prohibition). *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008) (Eismann, J.), dealt with annexation (under the prior Annexation Statute) and initial zoning, finding no LLUPA review available.

[273] Under the 2010 amendment, rezoning of "specific parcels or sites" is subject to judicial review. Does that mean that rezoning of a larger area including many parcels and sites is not subject to judicial review? The authors are not aware of any precedent or commentary addressing this.

D. Interaction between LLUPA and IAPA

A common mistake of litigants is to confuse judicial review under LLUPA with judicial review under the Idaho Administrative Procedure Act ("IAPA"), Idaho Code §§ 67-5201 to 67-5292.[278] Both LLUPA and the IAPA provide a private right of action to challenge violations of the statute. (See discussion in section 13 at page 171.) However, the IAPA authorizes judicial review only of "agency" actions, which are defined in the IAPA as actions of state agencies. (See definition of "Agency" at

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[274] In *Arnold v. City of Stanley* ("*Arnold II*"), 162 Idaho 115, 394 P.3d 1160 (2017) (W. Jones, J.) (after LLUPA had been amended to specifically list which permits are appealable), the Court ruled that the catch-all "and such other similar applications require or authorized pursuant to this chapter" (Idaho Code § 67-6521(1)(a)) does not include building permits. The Court concluded that "LLUPA does not authorize or require building permits." *Arnold II*, 162 Idaho at 117, 394 P.3d at 1162. It noted that building permits are referenced only once in LLUPA and then only in the context of "future acquisition maps" that designate land proposed for acquisition by a public agency. *Arnold II*, 162 Idaho at 117, 394 P.3d at 1162. See discussion in footnote 270 on page 332 regarding pre-2010 decisions on building permits.

[275] Many cities have adopted ordinances requiring "design review approval" in connection with land use approvals. LLUPA may implicitly authorize such requirements, but the Act does not expressly "require or authorize" design review. We are aware of no decision addressing the issue. But it may be that, like the building permit in *Arnold II*, decisions on design review approval are not subject to judicial review.

[276] The subdivision statute defines subdivision as a "tract of land divided into five (5) or more lots . . . ." Idaho Code § 50-1301(17). The statute also allows cities and counties to adopt their own definition. This presents the question: If a jurisdiction allows informal divisions of land (e.g., lot splits) that fall outside the definition of subdivision, are those actions subject to judicial review? Specifically, do such lot splits fall within the catch-all "such other similar applications." They are similar in that both involve divisions of land. But they are also different. Lot splits are often ministerial matters that produce little or no record for judicial review. Some may be approved by staff; some do not even require approval of or notice to the local governmental entity. Thus, one could argue that lot splits are more similar to building permits, which are not reviewable (see *Arnold v. City of Stanley* ("*Arnold II*"), 162 Idaho 115, 394 P.3d 1160 (2017) (W. Jones, J.)). On the other hand, if a landowner employed multiple lot splits to avoid meeting the definition of subdivision, that might cut the other way.

[277] Arguably, a decision on a planned unit development falls within the "other similar applications" catch-all. Unlike building permits, planned unit developments are specifically authorized by LLUPA.

[278] The IAPA authorizes judicial review of final rules, orders, and other agency actions. Idaho Code §§ 67-5270, 67-5273. The third category (other "agency action") is broadly defined to include an "agency's performance of, or failure to perform, any duty placed on it by law." Idaho Code § 67-5201(3)(c). The time for filing a petition for judicial review of final rules, final orders, and other final agency actions is set out in Idaho Code § 67-5273.

Idaho Code § 67-5201(2).[279]) Accordingly, the IAPA itself provides no basis for jurisdiction for judicial review of local land use decisions.

As discussed below, LLUPA authorizes judicial review of certain land use decisions. Rather than setting out its own judicial review procedures and standards, however, LLUPA simply incorporates by reference the judicial review provisions of the IAPA. LLUPA, Idaho Code §§ 67-6519(4) and 67-6521(1)(d).[280] Thus, a litigant under LLUPA does not rely on the IAPA as the basis for the action, but does rely on parts of the IAPA which are incorporated by reference by LLUPA.

The IAPA's standards for judicial review applicable to on-the-record review are found at Idaho Code § 67-5279(3). LLUPA does not identify particular sections of the IAPA that are made applicable to LLUPA review. Instead, LLUPA simply authorizes the injured party to "seek judicial review under the procedures provided by chapter 25, title 67, Idaho Code [the IAPA], Idaho Code § 67-6519(4), or to "seek judicial review as provided by chapter 25, title 67, Idaho Code [the IAPA], Idaho Code § 67-6519(4). [281] Presumably this reference includes the IAPA's judicial review provisions, Idaho Code §§ 67-5270 to 67-5277 and 67-5279.

However, LLUPA does not incorporate other provisions of the IAPA, such as the provision authorizing motions for reconsideration (Idaho Code §§ 67-5246(4) and (5)). *Arthur v. Shoshone Cnty.*, 133 Idaho 854, 860, 993 P.2d 617, 623 (Ct. App. 2000) (Lansing, J.) ("Nothing in § 67–6521(1)(d) suggests a legislative intent to incorporate into LLUPA portions of the APA authorizing state agency proceedings

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[279] "By the plain language of this statute only state government entities are agencies. A local government entity, such as a county board of commissioners, is not included. The Idaho Supreme Court so held in *Petersen v. Franklin Cnty.*, 130 Idaho 176, 938 P.2d 1214 (1997) . . . ." *Arthur v. Shoshone Cnty.*, 993 P.2d 617, 622 (Idaho Ct. App. 2000) (Lansing, J.). "Counties and city governments are considered local governing bodies rather than agencies for purposes of IAPA." *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner I*"), 181 P.3d 1238, 1240 (Idaho 2008) (Eismann, C.J.). This is one of many cases that have so held. *E.g.*, *Highlands Dev. Corp. v. City of Boise*, 188 P.3d 900 (Idaho 2008); *Petersen v. Franklin Cnty.*, 938 P.2d 1214, 1220 (Idaho 1997); *Allen v. Blaine Cnty.*, 953 P.2d at 578, 580 (Idaho 1998). However, other statutes, such as LLUPA, make the IAPA's judicial review provisions applicable to local governments. *Neighbors for a Healthy Gold Fork v. Valley Cnty.*, 145 Idaho 121, 126, 176 P.3d 126, 131 (2007).

[280] A parallel provision is found in Title 31 (Counties and County Law). It provides that all decisions of the board of county commissioners are reviewable pursuant to the IAPA. Idaho Code § 31-1506(1).

[281] When first enacted, LLUPA did refer to specific judicial review provisions of the IAPA, but this was changed in 1993 when the IAPA was amended. In any event, the judicial review provisions of the IAPA are now found in sections 67-5270 to 67-5277 and 67-5279. Section 67-5279 contains the provisions governing the standard of review. In addition to LLUPA and the IAPA, judicial review is governed by Idaho R. Civ. P. 84. However, Rule 84 does not set out any new substantive standard of review. *Roberts v. Bd. of Trustees, Pocatello, School Dist. No. 25*, 134 Idaho 890, 892-93, 11 P.3d 1108, 1110-11 (2000).

that occur prior to the initiation of judicial review."). Thus, the judicial review provisions of the IAPA (but not the rest of the IAPA) applies to those local planning and zoning decisions that are subject to review under LLUPA.

Note, by the way, that all other decisions of counties are also made reviewable under the IAPA by virtue of Idaho Code § 31-1506(1). 2011

E. LLUPA's judicial review provisions today

(1) As amended in 2010, LLUPA identifies specific actions that are subject to judicial review.

LLUPA contains two authorizations for judicial review: Idaho Code §§ 67-6519(4) and 67-6521(1). The operative terms are found in section 67-6521(1):

> (1)(a) As used herein, an affected person shall mean one having a bona fide interest in real property which may be adversely affected by:
>
> (i) The approval, denial or failure to act upon an application for a subdivision, variance, special use permit and such other similar applications required or authorized pursuant to this chapter;
>
> (ii) The approval of an ordinance first establishing a zoning district upon annexation or the approval or denial of an application to change the zoning district applicable to specific parcels or sites pursuant to section 67-6511, Idaho Code; or
>
> (iii) An approval or denial of an application for conditional rezoning pursuant to section 67-6511A, Idaho Code.
>
> . . .
>
> (d) . . . Any affected person aggrieved by a final decision concerning matters identified in section 67-6521(1)(a), Idaho Code, may within twenty-eight (28) days after all the remedies have been exhausted under local ordinances seek judicial review as provided by chapter 52, title 67, Idaho Code [the IAPA].

Idaho Code § 67-6521(1) (emphasis supplied).

This provision is cross-referenced by the seemingly redundant provision in Idaho Code § 67-6519(4), which authorizes judicial review for the applicant.[282] It

[282] An applicant, it would seem, is an affected person, so it is unclear why the legislature saw fit to provide two separate judicial review provisions. This distinction dates back to the enactment of

provides that judicial review is available when "[a]n applicant [is] denied an application or aggrieved by a final decision concerning matters in section 67-6521(1)(a), Idaho Code." Thus, the scope of section 67-6519(4) (which is applicable only to applicants for permits) is identical to section 67-6521(1).

In sum, under the current version of LLUPA, the only land use actions are subject to judicial review are the following:

- Initial zoning following annexation (Idaho Code § 67-6521(1)(a)(ii)).
- Rezoning of specific parcels or sites pursuant to section 67-6511 (Idaho Code § 67-6521(1)(a)(ii)).
- Conditional rezoning pursuant to section 67-6511A (Idaho Code § 67-6521(1)(a)(iii)).
- Applications for subdivision (Idaho Code § 67-6521(1)(a)(i)) (but see footnote 276 on page 334 re certain lot splits).
- Applications for variance (Idaho Code § 67-6521(1)(a)(i)).
- Applications for conditional use permit (aka special use permit) (Idaho Code § 67-6521(1)(a)(i)).
- "Other similar applications authorized or approved pursuant to this chapter" (Idaho Code § 67-6521(1)(a)(i)). Arguably, this includes planned unit developments, which are authorized by LLUPA (see footnote 277 on page 334). It does not include building permits (footnote 274 on page 334). Arguably it does not include design review decisions (see footnote 275 on page 334). Nor does it include comprehensive plans, comprehensive plan maps, moratoriums, enforcement actions, or annexations, none of which are "applications" and, hence, do not fall within the catch-all for similar applications.

Anything not on this list is not subject to judicial review under LLUPA. A challenge to those actions must occur by some collateral action, such as a civil suit. Note that while LLUPA does not provide for judicial review of annexations, a separate Annexation Statute provides that Category B and C annexations (but not Category A annexations) are subject to judicial review under the IAPA. See discussion in section 24.X at page 444.

LLUPA in 1975, 1975 Idaho Sess. Laws, ch. 188, and has been carried forward in various amendments for no apparent reason.

(2) Enforcement actions are not reviewable under LLUPA.

The non-availability of judicial review for enforcement actions was taken up in *Stafford v. Kootenai Cnty.*, 150 Idaho 841, 252 P.3d 1259 (2011). The *Stafford* dispute began when the county issued a notice of violation to the Staffords informing them that the landscaping at their home violated the county's ordinance requiring a 25-foot natural vegetation buffer adjacent to lakes and rivers. The Staffords appealed to the county commission, which rejected their arguments and ordered them to submit a remediation plan.[283] The Staffords then sought judicial review under LLUPA. Although the Court was clearly sympathetic with the Staffords, it threw out the judicial review on jurisdictional grounds that it raised *sua sponte*. The Court explained:

> The agency action in this case does not involve the denial or granting of a permit. In the order appealed from, the Board of Commissioners determined that the Staffords had violated the site disturbance ordinance by landscaping their property without first obtaining a permit. The Staffords have not appealed the denial of a permit or the conditions attached to a permit. Although the denial of the certificate of occupancy was involved in this case, that certificate neither is a permit under LLUPA nor was it addressed in the agency order appealed from. Therefore, the Staffords did not have the right to seek judicial review of that agency action under either former Idaho Code § 67–6519(4) or former Idaho Code § 67–6521(1)(d). <u>The legislature has not granted the right of judicial review of administrative enforcement proceedings under local planning and zoning ordinances.</u> Therefore, the district court did not have jurisdiction to rule on the merits of the petition for judicial review, and this Court does not have jurisdiction on the appeal.

Stafford, 150 Idaho at 848, 252 P.3d at 1266 (emphasis supplied).[284] This reasoning follows the Court's analysis in *Giltner I* and subsequent cases: Only the issuance or

[283] The Court also discussed the county's refusal to issue a certificate of occupancy for an addition to the Staffords' property. The Court addressed that issue, apparently in dictum, despite the fact that this action of the county was not part of the order from which judicial review was sought. In any event, the court made clear that the county had no authority to deny the certificate of occupancy. It also made clear that the county was misinterpreting its own ordinance, and that the ordinance did not apply to the Staffords to the extent that the land was previously disturbed.

[284] The *Stafford* case is discussed in 63 Planning & Envtl. L. 261 (2011) ("[T]he court lacked jurisdiction. The site disturbance ordinance was enacted under the Local Land Use Planning Act,

denial of permits are reviewable. Enforcement actions are not permits. So enforcement actions are not reviewable under LLUPA.

Although the *Stafford* case was decided after the 2010 amendment to LLUPA, the Court expressly applied the pre-2010 version of LLUPA. *Stafford*, 150 Idaho at 847, 252 P.3d at 1265. There appears to be nothing in the 2010 amendments, however, that would change the outcome. As discussed above, the 2010 amendment expanded the availability of judicial review under LLUPA to certain governmental actions (initial zoning actions, rezones, and conditional rezones). However, the language in effect today still limits judicial review to "approval, denial or failure to act upon an application" for certain identified actions as well as "similar applications." Idaho Code § 67-6521(1)(a)(i). Thus the distinction identified by the Court in *Stafford* between the issuance or denial of permits (which are reviewable) and enforcement actions involving permits (which are not reviewable) remains intact despite the amendment's expansion of the list of reviewable actions.

F. The law prior to the 2010 amendment

(1) Prior to *Giltner I* in 2008, reviewability turned on whether the action was legislative or quasi-judicial.

Prior to *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner I*"), 145 Idaho 630, 181 P.3d 1238 (2008), the Supreme Court all but ignored the language of LLUPA in determining whether judicial review was available.[285] Instead of asking, "What did the Legislature mean when it limited judicial review to permits?" the Court

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Idaho Code §§ 67-6501 to 67-6538, which provides for judicial review of actions on a 'permit.' . . . There is no statute permitting judicial review of administrative enforcement actions.")

[285] Over the years, prior to *Giltner*, the court said rather little about how judicial review relates to the statutory language of LLUPA. A footnote to *Cooper* mentioned that judicial review of quasi-judicial actions of zoning boards lies under the judicial review provisions of LLUPA (which, in turn, reference the IAPA). *Cooper v. Ada Cnty. Comm'rs*, 101 Idaho 407, 411 n.1, 614 P.2d 947, 951 n.1 (1980).[285] The Court repeated this conclusion (again without discussion) in *Walker-Schmidt Ranch v. Blaine Cnty.*, 101 Idaho 420, 422, 614 P.2d 960, 962 (1980). The Court said so once again in *Hill v. Bd. of Cnty. Comm'rs of Ada Cnty.*, 101 Idaho 850, 851, 623 P.2d 462, 463 (1981). In a special concurrence, Justice Bakes admitted to the court's lack of reflection on the subject:

> I concur with the action of the majority, which necessarily follows given the fact that the Court's dictal footnote in *Cooper* was elevated to law, with little discussion, in *Walker-Schmidt*. There is no language in the Local [Land Use] Planning Act of 1975 which expressly requires application of Idaho Code §§ 67-5215(b) through (g) and 67-5216 [references to former IAPA judicial review provisions before 1991 amendments] to rezone applications. Given that fact, it would have been better if sometime we had analyzed this issue before assuming that the appeal provisions of the Administrative Procedure Act applied to rezoning applications.

Hill, 101 Idaho at 852, 623 P.2d at 464 (citations omitted) (concurring opinion).

constructed its own common law paradigm—one which completely ignores the statutory authorizations for judicial review.

This discussion or pre-*Giltner I* and pre-2010 amendment law is retained in the handbook to assist the reader in understanding the development of the case law. Moreover, whether an action is quasi-judicial or not remains relevant for determining whether due process considerations (such as *ex parte* communication and bias rules) attach. The distinction is also relevant to conflict of interest evaluations under Rule 1.7(b)(4). See the *Idaho Ethics Handbook*.

Under the pre-*Giltner I* regime, the Court declared that the question of judicial review turns on whether the particular planning and zoning exercise was "quasi-judicial" or "legislative" in nature. (See cases discussed in section 24.F(4) at page 344.[286]) Direct judicial review under LLUPA is allowed as to quasi-judicial planning and zoning functions of cities and counties, but was unavailable with respect to their legislative planning and zoning functions. Instead, only collateral attacks (that is, legal actions outside of the judicial review process) were permitted with respect to actions deemed legislative.

The "legislative vs. quasi-judicial" distinction is sensible enough. The only thing curious about it is that it is not a distinction found in LLUPA. Nor was it modeled directly on the distinction drawn in the IAPA between legislative actions (rulemaking) and adjudicative actions (contested cases).[287] Instead, the distinction is traceable to early zoning decisions pre-dating either LLUPA or the IAPA. Indeed, the legislative/quasi-judicial distinction was drawn from the common law of other states (Washington, Oregon and Illinois). This is not to say that the standard does any violence to LLUPA. The Court might have looked at LLUPA and the IAPA and concluded that the legislative/quasi-judicial distinction is consistent with, or at least not offensive to, the language of the statute. However, the Court did not do so.

Thus, prior to *Giltner I*, the rule was simple: if the action is quasi-judicial (including rezoning, variances, conditional use permits, and subdivision), then it is subject to review under LLUPA. If instead the action is legislative (including

[286] Note that the same distinction governs the rules of bias, *ex parte* communications, and views of the property.

[287] The IAPA's "legislative vs. adjudicative" distinction is closely analogous to the "legislative vs. quasi-judicial" distinction drawn by the court. Indeed, the IAPA could easily serve as the statutory basis for the distinction, complete with its detailed breakdown of the proper standards of review for each type of action, but for the failure of LLUPA to more fully integrate with the IAPA. Instead of making everything appealable under the IAPA, LLUPA's judicial review provisions are limited to review of permit actions. Thus, the IAPA's provisions for review of legislative functions are simply not applicable to planning and zoning matters. Recall that, but for LLUPA's limited incorporation by reference, the IAPA applies to state agencies, not to municipal bodies. *Arthur v. Shoshone Cnty.*, 133 Idaho 854, 859, 993 P.2d 617, 622 (Ct. App. 2000) (Lansing, J.) (ruling that the IAPA applies only to state agencies, not local governments).

comprehensive planning, annexation, and initial zoning), then is falls outside of LLUPA's judicial review.

(2) The basis for the legislative versus quasi-judicial distinction

The law draws a sharp distinction between how judges act and how legislators go about their jobs and how they interact with their communities. Judges are expected to be detached neutrals. Except in limited circumstances, their opinions on matters of public policy should play no role in their rulings. Judges reach their decisions simply by applying the law to the facts—even if they disagree with the policy underlying the law. Legislators, in contrast, are actively engaged in shaping public policy. They have opinions on these matters which they freely express and upon which they are freely judged by the electorate.

There are also differences when it comes to what may be considered in reaching the decision. Judges are expected to consider the matters before them solely on the basis of the record. Parties appearing before a judge have a right to hear and see everything that is considered by the court, and to respond to it. These are fundamental due process rights under the state and federal constitutions.

In contrast, the process of influencing legislation, by necessity, is much looser. People may meet one-on-one with their legislators, in private, to discuss pending legislation. It would be unthinkable for a plaintiff or defendant to approach the judge to have such a private communication, but this is done as a matter of course with legislators in our American democratic system, and, overall, it has worked well. Unlike judges, legislators are policy makers, and our democratic system depends on our legislators having broad and unfettered access to public opinion. Accordingly, the due process constraints prohibiting private communications with judges simply do not apply to private communications with legislators.

When dealing with judges and legislators, the rules are clear. A judge only wears one hat. Everything he or she does is judicial and is subject to strict due process rules. Likewise, everything a legislator does is legislative and subject to very limited restrictions (*e.g.*, for conflicts of interest).

Planning and zoning decisions arise in various contexts—sometimes legislative and sometimes judgelike (aka "quasi-judicial). It becomes necessary to know which "hat" the decision makers are wearing. Some decisions are similar to legislative actions, such as comprehensive planning and city-wide zoning. Other actions are more judge-like, such as a decision on an application for a planned unit development, conditional use permit, or building permit.

The courts have long recognized these distinctions, categorizing the former as "legislative" action and the latter as "quasi-judicial." These distinctions, in turn, guide the analysis of other issues including the rules governing bias, *ex parte*

contacts, "views" of the subject property, and—until *Giltner I*—the availability of judicial review.

(3) Until 1980, all zoning actions were viewed as legislative.

In the early years after the decision upholding zoning actions in *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926), courts struggled with challenges to both the merits and legitimacy of zoning decisions. Characterizing these zoning decisions as "legislative" gave the courts a way to limit their role while upholding the local zoning decisions. The first reference we have found in Idaho to the proposition that zoning actions are legislative in character is found in *City of Idaho Falls v. Grimmett*, 63 Idaho 90, 117 P.2d 461 (1941). In this decision, which affirmed the very authority of a city to engage in zoning, the Court declared:

> It must be conceded that, where a given situation admittedly presents a proper field for the exercise of the police power, the extent of its invocation and application is a matter which lies very largely in legislative discretion. Every presumption is to be indulged in favor of the exercise of that discretion, unless arbitrary action is clearly disclosed.

Grimmett, 63 Idaho at 92, 117 P.2d at 463 (emphasis supplied) (citations and quotation marks omitted). This case dealt with the availability of judicial review. *Grimmett* thus upheld the lawfulness of zoning and, on a more practical level, insulated it from probing judicial review.

Another pre-LLUPA case reinforced the idea of the legislative nature of zoning ordinances:

> It is fundamental that the enactment of a zoning ordinance constitutes the exercise of a legislative and governmental function. The reason upon which this principle is based is that zoning is essentially a political, rather than a judicial matter, over which the legislative authorities have, generally speaking, complete discretion. It is an exercise of legislative power residing in the state and delegated to a municipal corporation.

Harrell v. City of Lewiston, 95 Idaho 243, 247, 506 P.2d 470, 474 (1973) (quoting 8 McQuillin, *Law of Municipal Corporations*, § 25.54, pp. 134-135 (1965)).[288]

[288] In a similar vein see *Dawson Enterprises, Inc. v. Blaine Cnty.*, 98 Idaho 506, 511, 567 P.2d 1257, 1262 (1977) (Bistline, J.) ("Zoning is essentially a political, rather than a judicial matter, over which the legislative authorities have generally speaking, complete discretion."); *Ready-To-*

Dawson Enterprises, Inc. v. Blaine Cnty., 98 Idaho 506, 567 P.2d 1257 (1977) (Bistline, J.) (discussed below in section 24.M(5) at page 430), allowed a declaratory judgment action challenge to an initial zoning decision.

Indeed, until 1980, it was generally thought that every action undertaken by a planning and zoning board is legislative in nature and subject to only very limited judicial review. "The district court—following what had been a well-established line of Idaho decisions—held that all actions of zoning authorities were presumptively valid, and that the scope of judicial review was limited to looking for capriciousness, arbitrariness or discrimination." *Gay v. Cnty. Comm'rs of Bonneville Cnty.*, 103 Idaho 626, 627-28, 651 P.2d 560, 561-62 (Ct. App. 1982) (noting that this was the law until *Cooper* was decided in 1980).

(4) Idaho Supreme Court classifies actions into quasi-judicial and legislative categories

The first Idaho case to draw the distinction between legislative and quasi-judicial actions of zoning boards was decided in 1980.

> It is clear there is a pressing need in Idaho for established standards and procedures by which particularized land use regulation is to be administered. To allow the discretion of local zoning bodies to remain virtually unlimited in the determination of individual rights is to condone government by men rather than government by law. Accordingly, we adopt the rule which distinguishes between legislative and quasi-judicial actions of local zoning bodies and hold that the decision of the board in this case was quasi-judicial. Our prior cases, to the extent they are inconsistent with our holding today, are overruled.

Cooper v. Ada Cnty. Comm'rs, 101 Idaho 407, 411, 614 P.2d 947, 951 (1980). Note that while *Cooper* references recently adopted LLUPA, *Cooper*, 101 Idaho at 411 n.1, 614 P.2d at 951 n.1, the case was actually appealed under a prior statute, as explained in the concurrence, *Cooper*, 101 Idaho at 411, 614 P.2d at 954.

In *Cooper*, the Court held that the rezoning of a particular parcel of land (unlike the adoption of the initial zoning ordinance) is quasi-judicial in nature, therefore entitling the applicant to due process protections.

Pour, Inc. v. McCoy, 95 Idaho 510, 514, 511 P.2d 792, 796 (1973) (as legislative actions, zoning actions are presumed valid and upheld unless shown to be "confiscatory, arbitrary, unreasonable and capricious.")

> Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its propriety is subject to an altogether different test.
>
> Basically, this test involves the determination of whether action produces a general rule or policy which is applicable to an open class of individuals, interests, or situations, or whether it entails the application of a general rule or policy to specific individuals, interests, or situations. If the former determination is satisfied, there is legislative action; if the latter determination is satisfied, the action is judicial.

Cooper, 101 Idaho at 410, 614 P.2d at 950 (quoting and citing *Fasano v. Bd. of Cnty. Comm'rs*, 507 P.2d 23, 27 (1973)) (internal quotations and ellipses omitted).

The basic idea is that when municipalities take actions that affect a broad number of people, the action is like that of a legislative body. The remedy is political, not judicial. "Legislative action is shielded from direct judicial review by its high visibility and widely felt impact, on the theory that appropriate remedy can be had at the polls." *Burt v. City of Idaho Falls*, 105 Idaho 65, 68, 665 P.2d 1075, 1078 (1983) (Donaldson, C.J.). In contrast, decisions that are focused on particular individuals or parcels of land are more in the nature of judicial actions. These "quasi-judicial" actions, the Idaho Supreme Court says, are subject to direct judicial review under LLUPA and the IAPA.

Cooper was followed by *Walker-Schmidt Ranch v. Blaine Cnty.*, 101 Idaho 420, 614 P.2d 960 (1980); *Hill v. Bd. of Cnty. Comm'rs of Ada Cnty.*, 101 Idaho 850, 723 P.2d 462 (1981); *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 655 P.2d 926 (1982); *Gay v. Cnty. Comm'rs of Bonneville Cnty.*, 103 Idaho 626, 651 P.2d 560 (Ct. App. 1982); *Bone v. City of Lewiston*, 107 Idaho 844, 849, 693 P.2d 1046, 1051 (1984);[289] *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho

[289] In *Bone v. City of Lewiston*, 107 Idaho 844, 849, 693 P.2d 1046, 1051 (1984), the Court admonished the plaintiff for bringing a declaratory judgment action and trying to "bypass" the IAPA review standards. The Court declared that LLUPA "is the exclusive source of appeal for adverse zoning actions." *Bone*, 107 Idaho at 848, 693 P.2d at 1050. This case involved an application by a landowner for an upzone, which had been denied by the city. The Court did not discuss the case in the context of legislative versus quasi-judicial distinction, but simply cited LLUPA's judicial review provisions, saying, "We find no evidence that the legislature intended other avenues of appeal . . . ."

115, 118, 867 P.2d 989, 992 (1994); *Sprenger, Grubb & Associates v. Hailey* (*"Sprenger Grubb I"*), 127 Idaho 576, 903 P.2d 741 (1995) (Silak, J.); and *Sprenger, Grubb & Associates v. City of Hailey* (*"Sprenger Grubb II"*), 133 Idaho 320, 986 P.2d 343 (1999) (Walters, J.), each of which reaffirmed that rezoning actions are quasi-judicial. *Sprenger Grubb I and II* involved a downzoning, which, of course, is simply a form of rezoning.[290]

In *Curtis v. City of Ketchum*, 111 Idaho 27, 720 P.2d 210 (1986) (Bakes, J.), the Court ruled that the city's denial of a subdivision application is quasi-judicial and therefore exclusively subject to review under LLUPA and the IAPA. "Appellant's arguments are nothing more than a challenge of the city council's quasi-judicial action denying his subdivision application." Curtis, 111 Idaho at 32-33, 720 P.2d at 215-16.

In 1983, the Idaho Supreme Court decided *Burt v. City of Idaho Falls*, 105 Idaho 65, 665 P.2d 1075 (1983) (Donaldson, C.J.), a case involving the annexation of a 69-acre parcel of land which the county has zoned single family residential. The city amended it comprehensive plan, annexed the land, and zoned it commercial. Dissatisfied with the commercial zoning, neighbors of the annexed property filed a petition for judicial review under LLUPA. The Court found that the city's actions were legislative in nature and not subject to review under LLUPA. It declared: "Applying the test adopted in *Cooper*, we hold that in the annexation of land, the subsequent amendment of the comprehensive plan and the zoning of the annexed land, the City council acted in a legislative manner and that such actions are not subject to direct judicial review." *Burt*, 105 Idaho at 68, 665 P.2d at 1078. (Note that in 2002 the Legislature amended the Annexation Statute to make Category B and C annexations subject to judicial review under the IAPA.) Although the land had previously been zoned by the county, the Court declared that the new zoning applied by the city upon annexation was "initial zoning" not a rezone. *Burt*, 105 Idaho at 67, 665 P.2d at 1077. In a vigorous dissent, Justice Bakes contended that the majority elevated form over substance. The dissent pointed out that this was a site-specific decision, not a broad, legislative-style zoning action. The majority, however, stuck to its guns, noting that the "ownership of the annexed land was diverse and the papers filed by appellant Burt (representing more than 800 others) evidence that this was a general land use decision impacting a large number of people." *Burt*, 105 Idaho at

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Bone, 107 Idaho at 847, 693 P.2d at 1049. Nor did the Court recognize that there are other types of zoning actions (*e.g.*, initial zoning) that are not reviewable under LLUPA. This case is discussed further in the section dealing with alternative forms of judicial review. We include the case here because it is authority that LLUPA and the IAPA are the proper means of review for zone changes.

[290] In the *Sprenger Grubb* cases, the court did not discuss the quasi-judicial action issue, but simply declared that the matter was subject to review under the contested case provisions of the IAPA. The only way to get to the IAPA, however, would be by way of LLUPA, and the only way for LLUPA's judicial review provisions to apply was for this to be a quasi-judicial action.

68, 665 P.2d at 1078. Thus, there seems to be a black letter rule: Annexation, initial zoning, and comprehensive plan matters are legislative, while rezones are quasi-judicial.[291] On the other hand, the Court left the door open to future litigants to argue that initial zoning that does not involve multiple properties and wide-ranging impacts on neighbors might be quasi-judicial. To date, however, no Court has questioned the broad holding in *Burt*. Moreover, the decision in *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008) (Eismann, J.), appears to reinforce the outcome (but not the analysis) in *Burt*.

In *Crane Creek Country Club v. City of Boise*, 121 Idaho 485, 826 P.2d 446 (1992), the country club filed a petition for a writ of prohibition to restrain the city from annexing its property. The Court ruled, without analysis: "While it is true that city councils on occasion act in a quasi-judicial capacity, annexation is not such an occasion. Rather, annexation is a legislative act of city government accomplished by the amendment of an ordinance." *Crane Creek*, 121 Idaho at 487, 826 P.2d at 448 (citation and footnote omitted). Because the action was legislative, the Court said, it was not subject to a writ of prohibition, which only constrains quasi-judicial actions. As in *Burt*, the fact that *Crane Creek* dealt with a single parcel of land (the country club) was not controlling. What was controlling, apparently, was the nature of the action. The majority opinion offered no guidance as to how the plaintiff should have framed the case. However, it appears that the proper approach would have been a declaratory action such at that employed in an annexation challenge in *City of Lewiston v. Bergamo*, 119 Idaho 221, 224, 804 P.2d 1352, 1355 (Ct. App. 1990).[292] Also note that the statute governing judicial review of annexations was changed in 2002, providing for review of Category B and C annexations under the IAPA. See discussion in section 24.X at page 444.

Not surprisingly, conditional use permits (also known as special use permits), which apply to specific parcels, are deemed quasi-judicial. *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho 115, 867 P.2d 989 (1994) (conditional use permit for baseball field was a quasi-judicial action triggering due process); *Angstman v. City of Boise*, 128 Idaho 575, 578, 917 P.2d 409, 412 (Ct. App. 1996) (Walters, C.J.) ("Due process safeguards apply to quasi-judicial proceedings, such as those

[291] This formalistic approach to distinguishing legislative and quasi-judicial actions has been criticized by some commentators. Some have gone so far as to suggest that the entire distinction between legislative and quasi-adjudicative decision-making is bogus. D.S. Pensley (Note), *Real Cities, Ideal Cities: Proposing a Test of Intrinsic Fairness for Contested Development Exactions*, 91 Cornell L. Rev. 699, 704 (2006) ("in all practicality legislative and adjudicative land use decisions are indistinguishable").

[292] On the other hand, a concurrence by two justices says, "therefore the proceedings in the district court should have been a judicial review." *Crane Creek*, 121 Idaho at 487, 826 P.2d at 448. Yet this conclusion contradicts the court's holding in *Burt v. City of Idaho Falls*, 105 Idaho 65, 665 P.2d 1075 (1983), which held that annexations may not be reviewed under LLUPA.

conducted by zoning boards in considering whether to grant a conditional use permit.").

In *Castaneda v. Brighton Corp.*, 130 Idaho 923, 950 P.2d 1262 (1998), the Court approved without comment judicial review under LLUPA of the City of Eagle's approval of the developer's preliminary plat (subdivision), rezoning, and annexation relating to a proposed subdivision. The case contains no substantive discussion of jurisdiction, because these issues were not presented on appeal and the Court did not raise the issue *sua sponte*. In any event, allowing an annexation ordinance to be reviewed under LLUPA appears to be inconsistent with the Court's determination in *Crane Creek* and *Burt*.[293]

In 2000, the Supreme Court, without discussion, allowed review of variances and a subdivision under LLUPA, thus recognizing these actions to be quasi-judicial. *Blaha v. Bd. of Ada Cnty. Comm'rs*, 134 Idaho 770, 773, 9 P.3d 1236, 1239 (2000) (Walters, J.).

(5) In *Giltner I* and subsequent cases the Court ruled that only "permits" may be challenged under LLUPA.

In 2008, the Court handed down two decisions that displaced the legislative versus quasi-judicial distinction altogether. It is not the outcome of the cases that was surprising. In each case (until *Burns Holdings, LLC v. Madison Cnty. Bd. of Cnty. Comm'rs* ("*Burns Holdings I*"), 147 Idaho 660, 214 P.3d 646 (2009), discussed below), the outcome was entirely predictable based on well-established precedent. But the Court did not rely on precedent in reaching its decisions. It ignored the distinction between quasi-judicial and legislative functions that had controlled since 1980. Instead, it decided what is reviewable under LLUPA based on the definition of "permit" in the statute. There is nothing wrong in that. That would be fine, if the Court had explained that it was setting aside the prior cases and embarking on a new line of analysis. Oddly, however, the Court (despite prodding by dissents) did not address what appears to be a sea change in its thinking.

First, in *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner I*"), 145 Idaho 630, 181 P.3d 1238 (2008) (Eismann, J.), the Court found no judicial review under LLUPA of a change in the county's land use map associated with its comprehensive plan. Three months later, in *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008) (Eismann, J.), the Court found that LLUPA does not authorize juridical review of an initial zoning decision. Both outcomes were fully predictable and in line with the authorities discussed above because comprehensive plan development and initial zoning are traditionally viewed as legislative functions (*Burt v. City of Idaho Falls*, 105 Idaho 65, 665 P.2d 1075 (1983)). What is remarkable is the *Giltner I* court did not even mention the quasi-judicial versus legislative distinction in its

[293] However, IAPA review of Category B and C annexations was authorized in 2002.

analysis.[294] Instead, the Court decided the cases based on a formulaic evaluation of what constitutes a "permit" under LLUPA. We discuss each below.

In *Giltner I*, the Court ruled than an amendment to a comprehensive plan map is not subject to judicial review under LLUPA. When the county approved a change in the map sought by the developer, a neighboring dairy sought judicial review. The Idaho Supreme Court upheld the district court's determination that the lower court was without jurisdiction to hear the appeal. The Court first found that there was no jurisdiction under the IAPA, because it authorizes appeals only of agency actions, and counties are not agencies. *Giltner I*, 145 Idaho at 632, 181 P.3d at 1240. That was hardly news. The Court then turned to LLUPA's two judicial review provisions. The Court found no jurisdiction under Idaho Code § 67-6521, because that provision authorizes review of "permits authorizing the development" and the "ordinance amending the comprehensive plan map does not authorize any development." *Giltner I*, 145 Idaho at 632, 181 P.3d at 1240. Thus, the Court seemed to focus on the words "authorizing development" rather than the word "permit." It is unclear why the Court did not simply state that a map is not a permit, and end the discussion there. The Court then turned its attention to LLUPA's other judicial review provision, Idaho Code § 67-6519(4). It is unclear why *Giltner I* did not simply toss out review under section 67-6519(4) on the basis that the plaintiff was not an "applicant." Instead, it focused on the word "permit." It ruled that section 67-6519(4) applies only to review of permit decisions (*i.e.*, conditional use / special use permits, subdivision permits, planned unit development permits, variance permits, and building permits). In the decisions that followed *Giltner I*, this "permit only" interpretation became the main focus and guiding principle (and rule of thumb) for both section 67-6519(4) and section 67-6521(1).

In *Highlands*, a developer (Highlands) filed an "annexation/rezone application" with the city (which the Court noted was really an initial zoning).[295] Boise approved the annexation request, but zoned the property more restrictively than the developer wished. Highlands then sought judicial review of both the annexation and the initial zoning action under the IAPA. *Highlands*, 145 Idaho at 960, 188 P.3d

[294] The majority made no mention of the legislative versus quasi-judicial distinction. But the dissent did: "Not every zoning decision, however, is subject to judicial review. This Court has historically drawn a line between decisions that are legislative in nature and those that are quasi-judicial in nature, only allowing review of the latter category." *Highlands*, 145 Idaho at 965, 188 P.3d at 907 (Justice Jim Jones dissenting).

[295] As the court said, "The term 'initial zoning' means the City's act in zoning the properties in conjunction with the annexation. A city has no authority to zone property in the county, and vice versa. Although the properties had been zoned by Ada County prior to the annexation by the City, the county zoning ordinance ceased to apply once the land in question was removed from the county's jurisdiction by annexation." *Highlands*, 145 Idaho at 960, n.3, 188 P.3d at 902, n.3. This is consistent with an earlier statement to that effect in *Burt v. City of Idaho Falls*, 105 Idaho 65, 67, 665 P.2d 1075, 1077 (1983) (Donaldson, J).

at 902. Premising jurisdiction on the IAPA, of course, was a mistake—the same mistake made by the dairy in *Giltner I* (see footnote 279 at page 330). The Court made quick work of that contention, despite the fact that the city did not even raise an objection to jurisdiction.[296]

The Court dismissed the annexation appeal, noting that the pre-2002 Annexation Statute makes no provision for judicial review.[297] The Court then analyzed whether the LLUPA authorized judicial review of the initial zoning.

First, the Court applied its holding in *Giltner I* (handed down less than three months earlier) that section 67-6519(4) authorizes judicial review of only of five specified "permits" and that an initial zoning is not a permit. The majority rejected an argument pressed in the dissent that section 67-6519 allows review of both "permits" and "decisions." The Court found they were one and the same (that is, "decisions" refers to decisions as to permits not to all manner of decisions). The Court also rejected the dissent's suggestion that the term "permit" should be read broadly to include a broader range of zoning actions. Instead, the Court noted that there were five and only five types of permits mentioned in LLUPA: conditional use (aka special use) permits, subdivision permits, planned unit development permits, variance permits, and building permits. *Highland Development*, 145 Idaho at 961, 188 P.3d at 903.

The Court then turned to section 67-6521 (the judicial review portion of LLUPA), finding that it, too, is unavailable: "LLUPA also grants the right of judicial review to persons having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing development. This case does not involve the granting or denial of a permit authorizing development." *Highlands*, 145 Idaho at 961, 188 P.3d at 903 (citing Idaho Code § 67-6521). Here, apparently, the Court was keying in on the word "permit" rather than "affecting development"; unlike the map amendment in *Giltner I*, this action did authorize development. Thus, under *Highlands*, both section 67-6519 and 67-6521 boil down to the same test: Is it a permit?

The dissent in *Highlands* (written by Justice Jim Jones and joined in by Justice Burdick) warned that this simple rule would have the effect of barring judicial review of all rezone decisions. "I dissent from the Court's opinion because it will effectively

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[296] The district court raised the jurisdictional issue *sua sponte*. *Highlands*, 145 Idaho at 960, 188 P.3d at 902.

[297] Judicial review was not available under the Annexation Statute, Idaho Code § 50-222, because the judicial review provisions added to that statute in 2002 were not in effect at the time of the annexation in 2001. Even if the 2002 amendments had been in effect, however, they provide for judicial review only of Category B and C annexations, and this would have been a voluntary Category A annexation. Presumably, then, the only proper means of challenging the annexation would have been by declaratory action. See discussion in section 24.X at page 444.

foreclose review of quasi-judicial zoning decisions under the [IAPA]. The opinion will prevent property owners from obtaining judicial review of decisions downzoning their property and preclude unhappy neighbors from challenging decisions to upzone adjacent property." *Highlands*, 145 Idaho at 962, 188 P.3d at 904 (Justice Jim Jones, dissenting).

The *Highlands* majority responded to the dissent's concern that the decision will cut off judicial review: "It will not. As we recognized in *McCuskey v. Canyon Cnty. Comm'rs* [*"McCuskey II"*], 128 Idaho 213, 912 P.2d 100 (1996), such landowners can seek relief in an independent action." *Highlands*, 145 Idaho at 962, 188 P.3d at 904. Thus, the Court affirmed, once again, the principle that the absence of judicial review does not preclude other forms of judicial challenge.[298]

In *Johnson v. Blaine Cnty.*, 146 Idaho 916, 204 P.3d 1127 (2009), the Court upheld the right of an adjoining landowner to seek judicial review of the granting of a final plat for a planned unit development. In so ruling, the Court confirmed that judicial review under Idaho Code § 67-6521 is based on whether or not the application was for a "permit." The Court noted that the three matters before the Court (a planned unit development, subdivision, and conditional use permit) were all "permits." Thus, jurisdiction under both section 67-6519 and section 65-1921 turn on the same question—whether a permit is involved. Thus, we are left with a remarkably simple analysis: If the decision does not involve one of the five types of permit referenced above, LLUPA review is not available.

Any doubt about where the Court was headed was resolved in the case of *Burns Holdings, LLC v. Madison Cnty. Bd. of Cnty. Comm'rs* ("*Burns Holdings I*"),

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[298] The Court cited *McCuskey II*, which was a follow-on to *McCuskey I*. Both decisions support the Court's conclusion that, notwithstanding the unavailability of judicial review, "landowners can seek relief in an independent action." *Highlands*, 145 Idaho at 962, 188 P.3d at 904.

In *McCuskey I*, the landowner was successful in obtaining a declaratory judgment invalidating a downzone of his property that occurred years earlier without his knowledge. In so ruling, the *McCuskey I* Court repeated the oft-quoted language from *Burt* ("While we hold that a legislative zoning decision is not subject to direct judicial review, it nonetheless may be scrutinized by means of collateral actions such as declaratory actions.") *McCuskey I*, 123 Idaho at 660, 851 P.2d at 956 (quoting *Burt v. City of Idaho Falls*, 105 Idaho 65, 66 n.2, 665 P.2d 1075, 1076 n.2 (1983)).

After winning in *McCuskey I*, the landowner brought an inverse condemnation action (*McCuskey II*) seeking compensation for a temporary taking. (Takings are discussed in section 27 at page 566.) The Court recognized that such a claim could be brought. This one, however, was brought too late—past the four-year statute of limitations which began to run when the county issued a stop work order. *McCuskey II*, 128 Idaho at 216-17, 912 P.2d at 103-04. The Court also suggested in dictum that the inverse condemnation claim was barred by res judicata because it could have been presented in *McCuskey I*. *McCuskey II*, 128 Idaho at 216 n.1, 912 P.2d at 103 n.1. Finally, the Court suggested, in dictum, that the temporary taking claim would likely fail on the merits. "It appears in this case that, under our rule, the County's downzoning of the subject property to rural residential was, in all probability, not a taking." *McCuskey II*, 128 Idaho at 216 n.2, 912 P.2d at 103 n.2.

147 Idaho 660, 214 P.3d 646 (2009). Here, the landowner sought approvals to build a concrete batch plant in an agricultural and residential area near Rexburg. The company filed an application for a comprehensive plan text and map amendment and rezone. The county denied the comprehensive plan amendment and declined to act on the rezone, thus effectively denying it. The applicant sought judicial review under LLUPA. The Supreme Court, in a 3-2 decision, ruled that the applicant had no right to judicial review because neither the comprehensive plan or the rezone applications involved "permits." The Court followed its line of cases beginning with *Giltner I*, applying a rigid, text-based analysis of what is reviewable under LLUPA. The rejection of the appeal for the comprehensive plan was, of course, no surprise. *Burns Holdings I*, however, was the first post-*Giltner I* decision to confront directly the question of judicial review of a rezone application. The *Burns Holdings I* Court made quick work of that. If the applicant is not seeking a "permit," judicial review is not available under LLUPA, period—without any discussion of whether the action is legislative or quasi-judicial. The decision provoked a strong dissent by Justice Jim Jones and Justice Burdick who pointed out that the decision ignores 25 years of jurisprudence.

The majority in *Burns Holdings I*, noted that, while there is no judicial review of a rezone available, there is still the option of a declaratory judgment action. "While we hold that a legislative zoning decision is not subject to direct judicial review, it nonetheless may be scrutinized by means of collateral actions such as declaratory actions." *Burns Holdings I*, 147 Idaho at 664, 214 P.3d at 650 (quoting *Burt v. City of Idaho Falls*, 105 Idaho 65, 66 n.2, 665 P.2d 1075, 1076 n.2 (1983)). Note that *Burt* involved an annexation and an initial zoning (a legislative action), not a rezone (a quasi-judicial action). Be that as it may, the message was clear: If one wishes to challenge a rezone, it must be done through a declaratory action. (That clear message was followed by an amendment to LLUPA in 2010 allowing appeals of rezones).

The availability of declaratory actions where judicial review is unavailable was confirmed in *Ciszek v. Kootenai Cnty. Bd. of Comm'rs*, 151 Idaho 123, 254 P.3d 24 (2011) (J. Jones, J.) (allowing a rezone to be challenged by declaratory action). In a footnote, the Court noted that judicial review of rezones was unavailable per *Burns Holdings I*. *Ciszek*, 151 Idaho at 126, n.2, 254 P.3d at 27 n.2. The Court did not mention that LLUPA had been amended in 2010 to allow such judicial review. Presumably the Court felt it was apparent that the statutory change was not retroactive and did not apply to this case.

In any event, where a declaratory judgment action is the only available avenue for challenging a land use action, the question is presented: what the basis for such an action? It may be that there is some technical violation of law or procedure. Challenged to the decision itself are difficult to mount where the decision is

legislative in nature. See discussion of declaratory actions in section 24.M at page 414.

In *Taylor v. Canyon Cnty. Bd. of Comm'rs* ("*Taylor II*"), 147 Idaho 424, 210 P.3d 532 (2009) (Burdick, J.), the developer of an eight-acre parcel in Canyon County sought and received a rezone of his property with conditions imposed pursuant to a development agreement. He also sought and received an amendment to the comprehensive plan map in effect at the time of his application. When neighbors appealed under LLUPA, the Court rejected the portion of the appeal dealing with the map amendment, based on *Giltner I*. However, the Court found that—notwithstanding the holding in *Giltner I* that only "permits" may be appealed under LLUPA—a conditional re-zone coupled with a development agreement is the functional equivalent of a conditional use permit, and therefore was appealable. This decision was codified by the 2010 amendment to LLUPA.

The *Taylor* case partially re-opened the door to judicial review of rezones. However, it would appear to work only as to up-zones (where the developer is seeking the rezone, and thus can be packaged together with a development agreement and labeled a "conditional rezone.") Down-zones are imposed unilaterally against the wishes of the landowner, so it is highly unlikely that there would be a development agreement.

Packaging the upzone with a development agreement in order to facilitate judicial review cuts both ways for the developer. If the developer wins, as in *Taylor*, he subjects himself to challenges by neighbors. But if he loses, he at least preserved the opportunity to appeal himself. *Taylor* does not appear to offer any means of judicial review of a downzone, which, presumably, would not be characterized as conditional. Nor did the Court in *Taylor* offer any suggestions to litigants as to what means of judicial challenge might be appropriate where LLUPA review is unavailable.

All of this is now mooted, however, by the legislative change in 2010 allowing judicial review of all re-zones.

G. Burden of proof in challenging an ordinance

"The burden of proving that the ordinance is invalid rests upon the litigant who attacks the validity of the ordinance." *Dawson Enterprises, Inc. v. Blaine Cnty.*, 98 Idaho 506, 511-12, 567 P.2d 1257, 1262-63 (1977) (Bistline, J.).

> A presumption of validity is accorded to the decisions of a municipal zoning board. The burden of proof is placed upon the party attacking the zoning decision to show that the zoning ordinance, as applied to the property in question, was confiscatory, arbitrary, unreasonable and void. If the presumption is overcome,

> by evidence tending to show that the ordinance in question has been unreasonably applied to the property, the burden then shifts to the city to come forward with evidence to rebut and show that the ordinance was valid.

Sprenger, Grubb & Associates v. Hailey (*"Sprenger Grubb I"*), 127 Idaho 576, 586, 903 P.2d 741, 751 (1995) (Silak, J.) (citations omitted). In this case, the plaintiff's initial burden was met with evidence of other zoning actions that, on their face, appeared to be inconsistent with the challenged action. Ultimately, the city prevailed by showing each of its actions were consistent with the comprehensive plan.

H. Judicial review is limited to the record

Judicial review of planning and zoning decisions (as well as other administrative actions) is conducted on the record created by the administrative decision-maker.[299] This applies both to the decision by the local body and to judicial review. (See discussion in section 13.C at page 172 for a practical discussion about building the hearing record.)

This limitation to the record is not spelled out in LLUPA (except for the requirement of a transcribable record, Idaho Code § 67-6536). Instead, it is found in the IAPA judicial review provisions broadly referenced by LLUPA at Idaho Code §§ 67-6519(4) and 67-6521(1)(d).

Since 1991, the IAPA has expressly provided that review of orders in contested cases is limited to the record:

> Judicial review shall be conducted by the court without a jury.[300] Unless otherwise provided by statute, judicial review of disputed issues of fact must be confined to the agency record for judicial review as defined in this chapter, supplemented by additional evidence taken pursuant to section 67-5276.

IAPA, Idaho Code § 67-5277.[301]

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[299] In contrast to the rules applicable to contested cases, a "rulemaking record" is compiled when agencies promulgate rules. Idaho Code § 67-5225. However, the agency's rulemaking decision need not be based exclusively on this record. Idaho Code § 67-5225(3).

[300] There is no constitutional right to trial by jury in administrative review cases. *Brady v. Place*, 41 Idaho 747, 750-51, 242 P. 314, 315 (1925).

[301] This provision was added to the IAPA when it was overhauled in 1992. Prior to 1992, courts sometimes engaged in de novo review of agency actions. For instance, in *Cooper v. Ada Cnty. Comm'rs*, 101 Idaho 407, 409, 614 P.2d 947, 949 (1980), the district court undertook a de novo review of a decision by Ada County to deny a rezone request.

This principle is reiterated elsewhere in the IAPA:

> Except to the extent that this chapter or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in contested cases under this chapter or for judicial review thereof.

Idaho Code § 67-5249(3). See also Idaho R. Civ. P. 84(b)(2), 84(j), 84(k) and 84(l).

The case law strongly reinforces the conclusion that judicial review is limited to the record.[302]

Coincident with the concept of record review is the mandate that "[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." IAPA, Idaho Code § 67-5279(1).

There are limited exceptions for extra-record evidence spelled out in Idaho Code § 67-5276.[303]

Thus, with a few exceptions, the only evidence before the Court is the evidence that was before the planning and zoning commission and city council or county commission. The law on this subject was reinforced in 2007 by the Idaho Supreme Court's decision in *Crown Point Dev., Inc. v. City of Sun Valley*, 144 Idaho 72, 156 P.3d 573 (2007). This case involved Crown Point's applications for preliminary plat approval and design review on "Phase 5" of the Crown Ranch Subdivision development. In denying the applications, the city relied on "an analysis by several individuals of existing documents [the Phase 1-4 applications] in the City's possession, but not the existing documents themselves." *Crown Point*, 144 Idaho at 77, 156 P.3d at 578. The developer sought judicial review under LLUPA. Although, LLUPA provides for on the record review, the developer persuaded the district court that it should allow the record to be augmented with the Phase 1-4 applications, in order to demonstrate factual errors upon which the city's findings were premised. The Supreme Court reversed the district court, noting that none of LLUPA's exceptions allowing augmentation of the record applied here. "Instead, Crown Point merely argued that the City should not be allowed to rely on what it characterizes as unreliable facts in the place of documents to which it had access. This argument fails." *Crown Point*, 144 Idaho at 76, 156 P.3d at 577. The Court also

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[302] "The commissioners, in reaching their decision, must confine themselves to the record as established at the public hearing." *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1994) (citing *Cooper v. Ada Cnty. Comm'rs*, 101 Idaho 407, 411, 614 P.2d 947, 951 (1980)). "A quasi-judicial officer must confine his or her decision to the record produced at the public hearing." *Eacret v. Bonner Cnty.*, 139 Idaho 780, 786-87, 86 P.3d 494, 500-01 (2004).

[303] The IAPA allows the record on appeal to the district court to be augmented on a showing of either "good reasons" for not presenting it below or "alleged irregularities in procedure." Idaho Code § 67-5276(1).

noted that the fact that the documents are part of the "public" record does not make them part of this record. *Crown Point*, 144 Idaho at 76, 156 P.3d at 577. Finally, the Court noted that there was no showing of a procedural irregularity that would have justified augmentation of the record. *Crown Point*, 144 Idaho at 77, 156 P.3d at 578.

The message here is a simple one: LLUPA's concept of record-based review means what it says. Even if the extra-record evidence is in the "public record" and even if that additional evidence would show that the decision-making is flawed, it is too late to bring this up on appeal. The applicant must build the record at before the original decision maker, or live with the consequences.

The federal courts subscribe to the same principles of record-only review in the context of challenges brought under the federal Administrative Procedure Act ("APA"). *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996); *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988).[304]

Under certain circumstances, however, a reviewing court may expand its scope of review beyond the record. *Id.* Specifically, the Ninth Circuit recognizes four scenarios that allow for extra-record evidence:

> (1) if admission is necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) if the agency has relied on documents not in the record, (3) when supplementing the record is necessary to explain technical terms or complex subject matter, or (4) when plaintiffs make a showing of agency bad faith.

Lands Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005) (quoting *Sw. Ctr.*, 100 F.3d at 1450) (internal quotation marks omitted); *Nw. Envtl. Advocates v. Nat'l*

[304] This issue often arises in NEPA cases. As a general matter, judicial review of an agency's decision under NEPA is limited to the record before the agency at the time the decision was made. *See, e.g., Asarco, Inc. v. EPA*, 616 F.2d 1153, 1159 (9th Cir. 1980) ("A number of rules governing the scope of judicial review of agency action emerge from these cases. Predominant is the rule that agency action must be examined by scrutinizing the administrative record at the time the agency made its decision."); *Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1144 (9th Cir. 2006) ("We have held that review of agency action under NEPA is limited to the administrative record and may only be expanded beyond the record to explain agency decisions. Accordingly, administrative review disfavors consideration of extra-record evidence." (citations omitted)). In other words, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 141 (1973). "Consideration of the evidence to determine the correctness or wisdom of the agency's decision is not permitted, even if the court has also examined the administrative record." *Asarco*, 616 F.2d at 1160.

Marine Fisheries Serv., 460 F.3d 1125, 1145 (9th Cir. 2006) (quoting same language).

These exceptions are "narrowly construed and applied." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2004).[305] And they must be. The Ninth Circuit has explained that, if liberally applied, the exceptions would swallow the rule. "The scope of these exceptions permitted by our precedent is constrained, so that the exception does not undermine the general rule. Were the courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in effect, de novo rather than with the proper deference to agency processes, expertise, and decision-making." *Id*. at 1030.

In addition, federal courts will accept extra-record evidence to resolve disputes over its jurisdiction, such as in standing challenges. *See, Nw. Envtl. Defense Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997) (in which the court considered supplemental declarations "not in order to supplement the administrative record on the merits, but rather to determine whether petitioners can satisfy a prerequisite to this court's jurisdiction.")[306] See discussion in section 24.L(11) at page 405.

I. Standard of review under the IAPA

(1) "Preponderance of the evidence" standard applies at the administrative stage.

Before turning to the standard of review applicable on judicial review, we offer a word about the standard of proof required at the administrative level.

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[305] One district court in the Ninth Circuit has suggested that there is a common practice of allowing extra-record evidence in NEPA cases: "[T]he admission of extrinsic evidence on the issue of adequacy of an EIS appears to be the normal practice in the Ninth Circuit." *No Oilport! v. Carter*, 520 F. Supp. 334, 346 (W.D. Wash. 1981). But in the decades since *No Oilport!*, the Ninth Circuit has consistently affirmed the rule that extra-record evidence is generally not admissible. It has clarified the four established exceptions to this rule. And, it has directly contradicted the assertion that extra-record evidence should be "routinely or liberally" admitted. *Lands Council v. Powell*, 395 F.3d at 1030.

[306] In *Arizona Cattle Growers' Ass'n v. Cartwright*, 29 F. Supp. 2d 1100 (D. Az. 1998) (footnote omitted), the federal district court said: "As a general rule, when reviewing an agency decision the court's review is limited to the administrative record. *Northcoast Environmental Ctr. v. Glickman*, 136 F.3d 660, 665 (9th Cir.1998); *citing Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir.1988) (modified in 867 F.2d 1244). Only limited circumstances justify considering extraneous material. The Ninth Circuit characterized these circumstances in four categories: (1) material necessary to determine whether the agency considered all relevant factors and adequately explained its decision; (2) circumstances where the agency relied on extraneous documents; (3) when the extraneous material is necessary to explain technical terms or complicated subject matter; and (4) where Plaintiffs have shown bad faith by the agency. *Id*."

There is little (if any) case law in Idaho addressing the burdens and standards of proof applicable at the administrative stage in a land use permit proceeding. However, general principles of administrative law suggest the following. The applicant for a permit carries the burden of showing that he or she is entitled to the permit. Facts necessary to establish must be shown by a preponderance of the evidence.[307] "Absent an allegation of fraud or a statute or court rule requiring a higher standard, administrative hearings are governed by a preponderance of the evidence standard." *Northern Frontiers, Inc. v. State*, 129 Idaho 437, 439, 926 P.2d 213, 215 (Ct. App. 1996) (citing 2 Am. Jur. 2d, *Administrative Law* § 363 (1994)).

The preponderance of the evidence standard is a tougher one than the substantial evidence standard that will apply on judicial review.[308] But it is more lenient than the clear and convincing evidence standard. The clear and convincing evidence standard is a heightened evidentiary standard applicable in special cases such as abandonment,[309] forfeiture,[310] fraud,[311] and prescription[312]—cases where the outcome is disfavored in the law).

(2) The statutory framework – applicable standards of review

LLUPA adopts by reference the judicial review provisions of the IAPA, Idaho Code §§ 67-5201 through 67-5292.[313] The IAPA's standards for judicial review are found at Idaho Code § 67-5279. LLUPA's reference to the IAPA is found in Idaho Code §§ 67-6519(4) and 67-6521(1)(d). Both references are to the IAPA as a whole, not to any specific section.

This section of the IAPA contains two categories of judicial review, one for review of legislative matters such as rulemaking (not based exclusively on a record), Idaho Code § 67-5279(2), and one for review of contested cases (aka adjudicative

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[307] "A 'preponderance of the evidence' is evidence that, when weighed with that opposed to it, has more convincing force and from which results a greater probability of truth." *Harris v. Electrical Wholesale*, 141 Idaho 1, 3, 105 P.3d 267, 269 (2004) (quoting *Cook v. W. Field Seeds, Inc.*, 91 Idaho 675, 681, 429 P.2d 407, 413 (1967)).

[308] "Substantial and competent evidence is less than a preponderance of the evidence, but more than a mere scintilla." *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 456, 180 P.3d 487, 495 (2008) (J. Jones, J.).

[309] *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 388-89, 647 P.2d 1256, 1260-61 (l982).

[310] *McCray v. Rosenkrance*, 135 Idaho 509, 515, 20 P.3d 693, 699 (2001).

[311] *Sowards v. Rathbun*, 134 Idaho 702, 706, 8 P.3d 1245, 1249 (2000).

[312] *Baxter v. Craney*, 135 Idaho 166, 173, 16 P.3d 263, 270 (2000).

[313] These references to the IAPA were not changed by the 2010 amendments to these provisions, 2010 Idaho Sess. Laws, ch. 175, §§ 1, 3.

decision-making, which is based on a record), Idaho Code § 67-5279(3).[314] (The only difference between the two, by the way, is that contested cases are subject to a substantial evidence standard for fact finding, while legislative fact finding is subject to an arbitrary and capricious standard. This is discussed below in sections 24.I(6) and 24.I(7) beginning on page 362.)

Because judicial review of quasi-judicial actions of local land use entities is record-based, subsection (3) governs.[315] It provides that, in order to reverse the decision of the municipal planning and zoning body, the court must find that the underlying decision was:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) not supported by substantial evidence on the record as a whole; or
> (e) arbitrary, capricious, or an abuse of discretion.

Idaho Code § 67-5279(3). Each of these standards is discussed in turn below.

(3) Presumption of validity

(See also discussion under "Construction of Ordinances" in section 24.EE at page 466.)

From the outset, judicial review of agency action is tilted in favor of the agency. "A strong presumption of validity favors the actions of zoning authorities when applying and interpreting their own zoning ordinances." *Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 39, 981 P.2d 1146, 1149 (1999). "A strong presumption of validity favors an agency's actions." *Young Electric Sign Co., v. State*, 135 Idaho 804, 25 P.3d 117 (2001). "[J]udicial review under the IAPA begins with a presumption of regularity." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner,* 30 Idaho L. Rev. 273, 357 (1993).

The Idaho Supreme Court summed up this presumption on many occasions. Two follow.

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[314] Actually, the two are identical, except that subsection (3) (for record-based decisions) contains an additional standard (the substantial evidence test) not applicable to review of rules.

[315] One might guess that subsection (2) would govern the review of legislative-type actions, such as the adoption of zoning ordinances. This would make perfect sense. But it is not the case. The IAPA does not govern review of such actions. Instead, subsection (2) applies only to the review of "rules" adopted by state agencies.

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

Evans v. Teton Cnty., 139 Idaho 71, 74-75, 73 P.3d 84, 87-88 (2003) (Kidwell, J.) (citations omitted).

> First, there is a strong presumption favoring the validity of the actions of zoning boards, and we have upheld the validity of their actions whenever they are free from capriciousness, arbitrariness or discrimination.

South Fork Coal. v. Bd. of Comm'rs of Bonneville Cnty. ("South Fork II"), 117 Idaho 857, 860, 792 P.2d 882, 885 (1990).

An excellent summary of the issues affecting the standard of review was set out by the Idaho Supreme Court in this 2000 decision:

> Where a district court acts in its appellate capacity pursuant to the Idaho Administrative Procedure Act (IAPA), this Court reviews the agency record independently of the district court's decision. The Court will defer to the agency's findings of fact unless those findings are clearly erroneous and unsupported by evidence in the record. This Court may not substitute its judgment for that of the agency as to the weight of the evidence on factual matters.
>
> A strong presumption of validity favors an agency's actions. The agency's actions may be set aside, however, if the agency's findings, conclusions, or decisions: (a) violate constitutional or statutory provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record as a whole; or (e) are arbitrary, capricious, or an abuse of discretion. In addition, this Court will affirm an agency action unless a substantial right of the appellant has been prejudiced.

Cooper v. Bd. of Prof'l Discipline, 134 Idaho 449, 454, 4 P.3d 561, 566 (2000) (citations omitted).

(4) Judicial review of legal determinations

The IAPA authorizes courts to overturn actions of planning and zoning entities where they are "in violation of constitutional or statutory provisions" or "in excess of the statutory authority of the agency." Idaho Code §§ 67-5279(3)(a) and (b). In other words, the courts may second-guess the legal pronouncements of planning and zoning entities.

Unlike review of fact-finding, the district court reviews these law-declaring functions *de novo*. Idaho Code §§ 67-5279(3)(a) and (b); Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner,* 30 Idaho L. Rev. 273, 359-60 (1993). (See discussion below regarding deference to the municipality's interpretation of its own ordinance.)

The distinction between law-making and the exercise of discretion (which is subject to the much more limited "arbitrary and capricious" standard discussed below) is subtle but important:

> It is important to distinguish these questions from another recurrent situation that arises from an agency's interpretation of a statute: to the extent that the statute accords the agency discretion, the issue increasingly becomes one of exercising the discretion granted to the agency by the legislature. Such discretionary decisions are reviewed under the "arbitrary, capricious, or abuse of discretion" standard.
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> The traditional analysis of "questions of law" tends to conflate these two separate and sequential functions. Separating them can help to clarify the process of judicial review by shifting the focus: while the court's law-declaring function requires it first to determine de novo if the agency interpretation is "in violation of . . . statutory provisions [or] excess of . . . statutory authority" once it has determined that the agency's interpretation is not illegal, the applicable scope of review then becomes whether the agency's decision is "arbitrary, capricious, or an abuse of discretion."

Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner,* 30 Idaho L. Rev. 273, 360 (1993).

(5) Judicial review of procedural error

The action of a zoning and planning board may be set aside if it was "made upon unlawful procedure." Idaho Code § 67-5279(3)(c). This incorporates all of the procedural requirements found elsewhere in LLUPA or the governing ordinance. As

with other questions of law, the courts freely review whether procedural error has occurred. On the other hand, where the procedural violation is found in the ordinance, some deference may be accorded to the municipality's interpretation of its own ordinance. See discussion in section 24.EE at page 466.

Procedural errors probably provide the most fertile area for judicial review. Despite the fact that the courts have carved out a purportedly vigorous review of quasi-judicial actions, the reality is that even these are often given a "soft look" by the court with respect to the underlying factual findings. With very few exceptions, cities and counties have prevailed on the merits of land use disputes on appeal. However, Idaho courts have tended to be rather strict on procedure, overturning both legislative and quasi-judicial decisions upon a showing of any defect in process.

(6) Judicial review of fact-finding (the substantial evidence / clearly erroneous test)

When an agency finds facts in an adjudicative context, the proper standard of review is whether the decision was "supported by substantial evidence on the record as a whole." Idaho Code § 67-5279(3)(d).[316]

At the outset, it is important to note that this standard applies only in an adjudicative context. In the context of agency rulemaking (a legislative function), the "arbitrary and capricious / abuse of discretion" standard is used to review both discretion and fact-finding. Idaho Code § 67-5279(2)(e). In the context of adjudicative decision-making, however, the "arbitrary and capricious / abuse of discretion" standard applies only to the exercise of discretion, while fact-finding is reviewed under the substantial evidence test. Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner,* 30 Idaho L. Rev. 273, 363-65 (1993).

The reason for this distinction is that adjudicative decision-making is based on a fixed record; where there is a record, the court is obligated to probe that record to determine whether there is "substantial evidence" to support it. In legislative decision-making, there is no clearly-defined record, so the substantial evidence test does not make sense. In the end, however, the distinction is more semantic than real. Both tests ("substantial evidence" and "arbitrary and capricious") boil down to whether the decision was reasonable or not. Indeed, it is often hard to say whether particular decision is fact finding (subject to the substantial evidence test) or the exercise of discretion (subject to the arbitrary and capricious / abuse of discretion test). Courts seem to apply which ever test suits their fancy.

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[316] This contrasts with judicial review under the IAPA of facts in the rulemaking context, which is governed by the "arbitrary and capricious test." Idaho Code § 67-5279(2)(e); Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner,* 30 Idaho L. Rev. 273, 362-63 (1993).

The "substantial evidence" test is synonymous with the "clearly erroneous" test. "To hold that a finding is not clearly erroneous, there must be substantial evidence in the record to support the finding." *Pace v. Hymas*, 111 Idaho 581, 588, 726 P.2d 693 700 (1986). Indeed, the Supreme Court often refers to the "clearly erroneous" standard when describing review of fact-finding under the IAPA. *Evans v. Teton Cnty.*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003) (Kidwell, J.).

"The 'substantial evidence rule' is said to be a 'middle position' which precludes a *de novo* hearing but which nonetheless requires a serious review which goes beyond the mere ascertainment of procedural regularity." *Pace v. Hymas*, 111 Idaho 581, 588, 726 P.2d 693 700 (1986).

Thus, under the substantial evidence standard, the court may not substitute its judgment for that of the agency. This point is reiterated in the IAPA itself: "The court shall not substitute its judgment for that of the agency as to the evidence on questions of fact." Idaho Code § 67-5279(1). Rather, the reviewing court must uphold the agency's decision unless it finds there is no reasonable factual basis in the record taken as a whole to support the agency's decision.

On the other hand, the substantial evidence test is a less stringent one than the preponderance of the evidence standard that applies in civil litigation and at the administrative level.[317] "Substantial and competent evidence is less than a preponderance of the evidence, but more than a mere scintilla." *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 456, 180 P.3d 487, 495 (2008) (J. Jones, J.). Indeed, when a court reviews a matter *de novo*, it applies a preponderance of the evidence standard, meaning that the factual assertion must be shown to be more likely true than not. *Bd. of Education of the Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1982).

Gilmore and Goble explained the substantial evidence standard with an analogy to a motion for a directed verdict:

> The thousands of words that are written annually on the meaning of "substantial evidence" may actually do more to confuse than to clarify. The best that can be hoped for is some corralling of the idea: substantial evidence means more than a mere scintilla, more than simply some evidence supporting the agency's decision. It does not mean, however, that the court is to engage in *de novo* review or to substitute its judgment on the weight of the

[317] "A 'preponderance of the evidence' is evidence that, when weighed with that opposed to it, has more convincing force and from which results a greater probability of truth." *Harris v. Electrical Wholesale*, 141 Idaho 1, 3, 105 P.3d 267, 269 (2004) (quoting *Cook v. W. Field Seeds, Inc.*, 91 Idaho 675, 681, 429 P.2d 407, 413 (1967)).

> evidence for that of the agency. The standard has been likened to that applicable to motions for a directed verdict: if the evidence in the record would support a refusal to direct a verdict in a jury trial, the evidence is "substantial." Thus – to say the same thing yet again – the standard requires the reviewing court to consider all of the record and to determine on the basis of that record whether the agency's fact finding is reasonable.[318]

Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 362-63 (1993). In other words, in order to overturn an agency, city, or county's decision, the challenging party must show that the evidence supporting the agency's decision was so weak that the agency would not have survived a motion for directed verdict, had this been a jury trial. The challenger need not show that there was zero evidence supporting it (that is, the challenger need not show that the evidence supporting the challenge is uncontradicted), but the challenger must show that the evidence supporting the decision was so weak that any reasonable person would have been unconvinced by it.[319]

As a practical matter, courts rarely overturn planning and zoning decisions on the basis of the substantial evidence test. Most successful challenges are based on

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[318] In ruling on a motion for directed verdict, the court "must determine whether, admitting the truth of the adverse evidence and drawing every legitimate inference most favorably to the opposing party, there exists substantial evidence to justify submitting the case to the jury. A directed verdict will only be granted in favor of the moving party if the evidence presented is so clear that "all reasonable minds would reach only one conclusion: that the moving party should prevail." *Melichar v. State Farm Fire and Casualty Co.*, 143 Idaho 716, 720, 152 P.3d 587, 591 (2007) (citation and internal quotes omitted).

[319] The Idaho Supreme Court explained the standard for directed verdicts and judgments notwithstanding the verdict (known as "judgment N.O.V.," based on the Latin phrase, non obstante veredicto) in a key 1974 case:

> By substantial, it is not meant that the evidence need be uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds could conclude that the verdict of the jury was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds must conclude, only that they could conclude. Therefore, if the evidence is so weak that reasonable minds could not reach the same conclusion the jury has, the motion for judgment n.o.v. is properly granted.

Mann v. Safeway Stores, Inc., 95 Idaho 732, 736, 518 P.2d 1194, 1198 (1974). This was an ordinary jury trial, not a judicial appeal. But the court explained that the standard for evaluating both motions (directed verdict and n.o.v.) is based on the presence or absence of "substantial evidence." This reinforces the idea that these trial motions are good analogies to help understand the substantial evidence test in the IAPA.

procedural defects. The difficulty of mounting a successful substantial evidence challenge is demonstrated in *Davisco Foods Int'l, Inc. v. Gooding Cnty.*, 141 Idaho 784, 118 P.3d 116 (2005) (Schroeder, C.J.), in which the Court declined to wade into a technically complex but utterly lopsided record that contained scant evidence to support the county's decision to deny a special use permit for a state-of-the-art wastewater treatment facility.[320] Absent a technical flaw, appellate courts in Idaho are disinclined to second-guess decisions of local planning entities—particularly when those decisions appear to be based on environmental protection grounds.

(7) Judicial review of discretion (the arbitrary and capricious / abuse of discretion test)

Much of what planning and zoning boards do involves the exercise of judgment and discretion. Such decisions may be challenged as "arbitrary, capricious, or an abuse of discretion." Idaho Code § 67-5279(3)(e).

Note also that the "arbitrary and capricious / abuse of discretion" test is a single standard, not two or three. In other words, the courts do not break down the analysis into what is arbitrary, what is capricious, and what is an abuse of discretion. It is just one test, with a lot of words that could have been boiled down to one: "unreasonable." As the Idaho Supreme Court said in 2007, "A city's actions are considered an abuse of discretion when the actions are arbitrary, capricious or unreasonable. . . . The City's interpretation of their code is unreasonable and therefore an abuse of discretion . . . ." *Lane Ranch Partnership v. City of Sun Valley* (*"Lane Ranch II"*), 145 Idaho 87, 91, 175 P.3d 776, 780 (2007) (citing *Enterprise, Inc. v. Nampa City*, 96 Idaho 734, 739, 536 P.2d 729, 734 (1975)).

Two distinguished commentators summed up the test this way:

> This standard is often phrased in the negative: an agency decision would be arbitrary, capricious, or an abuse of discretion if it were not based on those factors that the

[320] The dissent urged that the court at least should require the county to explain why it departed from the planning and zoning commission's approval of the project. "Despite the P & Z's extensive fact finding and comprehensive proposed permit, the Board offered no explanation for its reversal and summarily decided there was nothing Jerome Cheese could do to obtain a permit. Such conclusory decisions do not inspire confidence in the decision-making process." *Davisco, 141 Idaho at* 795, 118 P.3d at 127 (Justice Jim Jones, dissenting). The majority, however, was unmoved, proclaiming, "It is not the role of the reviewing court to weigh the evidence." *Davisco, 141 Idaho at* 790, 118 P.3d at 122. The *Davisco* Court held, in essence, that so long as the record establishes that odors are a matter of concern, the decision of the local government with respect to odors will not be disturbed, no matter how strongly the evidence establishes that odors will not be a problem. The Idaho Court's unwillingness to "weigh the evidence" departs from jurisprudence under the federal Administrative Procedure Act, which demands at least enough weighing of the evidence to determine whether, measured not in isolation but against the record as whole, it is sufficient to support a reasoned judgment. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

> legislature thought relevant, ignored an important aspect of the problem, provided an explanation that ran counter to the evidence before the agency, or involved a clear error of judgment. The focus of this inquiry is on the methods by which the agency arrived at its decision: for example, did the agency not only consider all the right questions, did it consider some wrong ones? Does the relationship between the facts found and the conclusion reached reveal gaps in the logic of the reasoning process? Again, the question of judicial review largely devolves into a question of whether the agency was reasonable.

Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 365 (1993). The factors Gilmore and Goble mention are set out in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."). Another seminal case on the subject is *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) ("To make this finding [arbitrary and capricious] the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.").

As discussed above, the standard of review for facts (substantial evidence) is different from the standard of review for exercises of discretion (arbitrary, capricious, and abuse of discretion). As a practical matter, however, the line between facts and discretion tends to blur.[321] In the end, it probably does not make much difference. At their core, both standards are aimed at determining whether the agency's decision was reasonable.[322]

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[321] To give a hypothetical example, suppose an ordinance established a design standard calling for developments in an overlay district to employ earth tones. Then suppose that the board rejected an application because the project was "too red." Would a challenge to that decision be one based on fact or discretion? This is hard to say.

[322] "[The substantial evidence] standard requires the reviewing court to consider all of the record and to determine on the basis of that record whether the agency's fact finding is reasonable." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 363 (1993) (emphasis supplied). "Again, the question of judicial review [of agency discretion] largely devolves into a question of whether the agency was reasonable." *Id*. at 365 (emphasis supplied).

(8) Harmless error / substantial rights

(a) "Substantial rights": Section 67-5279(4)

The Administrative Procedure Act provides what has been called a two-tiered requirement. First, the party appealing an administrative decision must demonstrate a violation based on one of the standards of review under section 67-5279(3) (unlawful procedure, not supported by substantial evidence, etc.). Second, the party must show that "substantial rights of the appellant have been prejudiced." Idaho Code § 67-5279(4).

A good example of harmless error is presented in *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 513, 148 P.3d 1247, 1259 (2006) (Burdick, J.). There, the Court found no prejudice when the county failed to provide proper public notice, yet the complaining party heard about and attended the hearing anyway.

Another example is offered by a 2002 case dealing with an improper "view" of the property by the county commissioners.[323] The Court concluded that this error did not prejudice the appellants for three reasons: there were no facts in dispute, the county was not acting in its appellate capacity, and there was substantial evidence demonstrating that the same decision would have been reached in any event. *Evans v. Bd. of Comm'rs of Cassia Cnty.*, 137 Idaho 428, 433, 50 P.3d 443, 448 (2002).

In *Noble v. Kootenai Cnty.*, 148 Idaho 937, 231 P.3d 1034 (2010) (Burdick, J.), the Idaho Supreme Court rejected a developer's appeal of the denial of a subdivision application on the basis that the developer failed to provide base flood elevation ("BFE") data required by the local ordinance. The Court also declared a site visit improper because the board failed to allow members of the public to get close enough to hear what was being said. However, the Court found that while the site visit was improper, it did not prejudice the substantial rights of the applicant in light of the fact that applicant failed to submit the required information and applicants "have no right to approval of a subdivision application that does not meet the requirements of the governing ordinances." *Nobel*, 148 Idaho at 943, 231 P.3d at 1040. Moreover, the application was not denied with prejudice and the applicant retained the opportunity to submit the required BFE information in the course of a subsequent subdivision application.

In another case, the Court of Appeals rejected a due process claim of a party appealing a conditional use permit because his claim amounted to a complaint that he had been given too much process. *Angstman v. City of Boise,* 128 Idaho 575, 578, 917 P.2d 409, 412 (Ct. App. 1996) (Walters, C.J.) ("Angstman's contention does not demonstrate that he was denied due process, but rather, that he was subjected to too much process."). This decision is frequently cited in the boilerplate judicial review

[323] Not every improper view is harmless error. See discussion in section 25.D at page 558.

summary in land use cases. *E.g., Price v. Payette Cnty. Bd. of Cnty. Comm'rs,* 131 Idaho 426, 429, 958 P.2d 583, 586 (1998) (Trout, C.J.).

In other cases, the courts have rejected arguments that a procedural or substantive error should be overlooked because no one was prejudiced. In a 2003 case, Bonner County urged that its failure to hold a hearing when it reviewed the P&Z's action impaired no substantial rights. The Court flatly rejected this contention:

> Bonner County also argues that Plaintiffs' substantial rights have not been prejudiced by the dismissal of their appeal. It contends that the district court could simply have heard the appeal based upon the record of the proceedings before the Planning and Zoning Commission. . . . Thus, the summary dismissal deprived the Plaintiffs of their right, under the ordinance, to a public hearing at which additional information could be presented, after which the County Commissioners must decide the matter as if it were originally presented to them. The summary dismissal of their appeal clearly prejudiced the Plaintiffs' substantial rights.

Cnty. Residents Against Pollution from Septage Sludge (CRAPSS) v. Bonner Cnty., 138 Idaho 585, 587, 67 P.3d 64, 66 (2003).

A similar result was reached in a 2002 case. In *Sanders Orchard v. Gem Cnty.,* 137 Idaho 695, 702, 52 P.3d 840, 847 (2002), the Idaho Supreme Court found that the county based its decision on a factual finding which was supported by no evidence in the record.[324] The Court found this finding (one of seven) was "material to the Board's decision" because it was referenced in one of the Board's conclusions of law. Accordingly, the Court determined that the erroneous finding prejudiced the substantial rights of the applicant. *Id.*

These cases and the language of the statute itself suggest that this statute is, in essence, a "harmless error" exception allowing the courts to overlook technical errors where no real harm was done.

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[324] Gem County denied a developer's subdivision application because it did not provide for a central water and sewer system. Although the Idaho Supreme Court found that the county had discretion to require such infrastructure, there was no factual basis for the county's conclusion that "it is projected that development of central sewer system and water lines will be extended to that area in the reasonably near future." *Sanders Orchard*, 137 Idaho at 702, 52 P.3d at 847. The Court reached this conclusion despite the fact that there was some opinion testimony in the record regarding when water and sewer service might be extended. The Court was rigorous in looking past these "opinions" and "feelings", emphasizing that there were no facts in the record to support the county's finding.

In 2011, the Idaho Supreme Court decided *Hawkins v. Bonneville Cnty. Bd. of Comm'rs*, 151 Idaho 228, 254 P.3d 1224 (2011) (W. Jones, J.). This case took a somewhat different tack on the substantial rights issue. The plaintiff here was a neighbor (Senator Stan Hawkins) who challenged the decision of the county in approving variances allowing his neighbors to reconstruct two homes that were in disrepair. The plaintiff and variance applicants had been in a long-running battle over road access. (The plaintiff's neighbors used a road across plaintiff's property to access the homes.) It is safe to surmise that the dispute over the home reconstruction was motivated by the dispute over access. Reading between the lines, one is left with the impression that Court felt that the plaintiff was using LLUPA to advance issues that were not germane to variances. The holding, however, was not based on germaneness and is more complex.

First, the *Hawkins* Court disposed of the threshold issue of standing—not Article III standing, but standing under LLUPA.[325] The plaintiff had standing, the Court concluded, because he had identified potential harm resulting from the home reconstruction (increased road use resulting in escaping livestock and fire risk). There was nothing startling about the ruling on standing. It follows directly from cases like *Davisco Foods Int'l, Inc. v. Gooding Cnty.*, 141 Idaho 784, 786-87, 118 P.3d 116, 118-19 (2005) (Schroeder, C.J.), which the Court cited. In short, the Court has tended to give the benefit of the doubt to litigants on LLUPA standing, so long as they own real estate somewhere in the area.

Next, the Court tackled the "substantial rights" issue under Idaho Code § 67-5279. This was a trickier issue. At the outset, the Court rejected the plaintiff's argument that his substantial rights were impaired based on the county's allegedly incorrect application of legal standards in granting the variances. That would be a sufficient argument for the applicant to make, said the Court, but it was insufficient for a person opposing the issuance of a permit. "Since a party *opposing* a landowner's request for a development permit has no substantial right in seeing someone else's application adjudicated correctly, he or she must therefore show something more." *Hawkins*, 151 Idaho at 233, 254 P.3d at 1229 (emphasis original). At first, this seems unfair, but on reflection it makes sense. This is the proverbial "little old lady" issue. Someone who is not affected by governmental decision should not be allowed read something in the newspaper, conclude it was wrongly decided, and sue the government. Thus, the Court ruled, "The petitioner opposing a permit must be in jeopardy of suffering substantial harm if the project goes forward, such as

[325] The *Hawkins* case arose under Idaho Code § 67-6521(1)(a) apparently before it was amended in 2010. The amendment added the modifier "bona fide" to describe the type of interest one must have in real property to be an affected person (i.e., to have standing). It is unclear what effect, if any, this word change will have. Applicants for land use permits may also secure standing under Idaho Code § 67-6519(4). This was not applicable here because Hawkins was not the applicant for the variance.

a reduction in the opponent's land value or interference with his or her use or ownership of the land." This makes sense, but is sounds a lot like standing. It is different approach from the cases described above in which the Court focused on the causal link between the defect complained of (*e.g.*, bad notice or an improper viewing) and the decision that was reached.

The Court went on to address additional arguments offered by the plaintiff—which turned out to be the same ones he used to show he had standing (involving increased use of the road and possible fire risk because the road was not public). While these were sufficient to establish standing, they fell short of showing substantial prejudice, the Court ruled unanimously. "We acknowledge that it is possible for the Meyers to begin using the spur road more often now that they have variances allowing them to construct new houses. Hawkins, however, cannot show prejudice to a substantial right because no court has adjudicated the easement rights the Meyers might have in the spur road." *Hawkins*, 151 Idaho at 233-34, 254 P.3d at 1229-30. The Court does not explain how this conclusion fits with its earlier observation that "the petitioner must still show, not merely allege, real or potential prejudice to his or her substantial rights." *Hawkins*, 151 Idaho at 233, 254 P.3d at 1229 (emphasis supplied). It is apparent from the decision that the Court was deeply skeptical of the plaintiff's assertion that the road used by the applicants across the plaintiff's property was a private road with no easement rights. It seems odd, however, that the lack of proof on the road access issue amounts to failure to show potential prejudice. The take-away message here is that facts matter, sometimes more than law.

A concurrence by Justice Eismann noted that the issue was properly reached by the Idaho Supreme Court because it was raised at the district court level. The Chief Justice pointed out that if the "substantial rights" issue is not raised below, it may not be raised on a subsequent appeal. The concurrence cited *Kirk-Hughes Development, LLC v. Kootenai Cnty. Bd. of Cnty. Comm'rs*, 149 Idaho 555, 237 P.3d 652 (2010), dealing with failure to properly plead the substantial rights issue on the subsequent appeal. *Kirk-Hughes* is discussed further in section 24.R at page 536.

(b) "Actual harm or violation of fundamental rights": Section 67-6535(3)

In a similar vein, the Idaho Legislature added the following new section to LLUPA in 1999. Overall, the section seems to call for a less technical and more common-sense-based approach to review of land use decisions:

> (3) It is the intent of the legislature that decisions made pursuant to this chapter should be founded upon sound reason and practical application of recognized principles of law. In reviewing such decisions, the courts of the state are directed to consider the proceedings as a

> whole and to evaluate the adequacy of procedures and resultant decisions in light of practical considerations with an emphasis on fundamental fairness and the essentials of reasoned decision making. Only those whose challenge to a decision demonstrates actual harm or violation of fundamental rights, not the mere possibility thereof, shall be entitled to a remedy or reversal of a decision. Every final decision rendered concerning a site-specific land use request shall provide or be accompanied by notice to the applicant regarding the applicant's right to request a regulatory taking analysis pursuant to section 67-8003, Idaho Code. An applicant denied an application or aggrieved by a final decision concerning matters identified in section 67-6521(1)(a), Idaho Code, may, within twenty-eight (28) days after all remedies have been exhausted under local ordinance, seek judicial review under the procedures provided by chapter 52, title 67, Idaho Code. An appeal shall be from the final decision and not limited to issues raised in the request for reconsideration.

Idaho Code § 67-6535(3) (emphasis supplied) (formerly codified to Idaho Code § 67-6535(c)).[326]

In a 2000 decision, the Idaho Supreme Court seemingly brushed aside the language of section 67-6535: "These two standards [section 67-5279(3) and 67-6535] are not in conflict; but because we deem the later statute to be less specific, we apply the well-established APA standard to the review requested herein." *Blaha v. Bd. of Ada Cnty. Comm'rs*, 134 Idaho 770, 774, 9 P.3d 1236, 1240 (2000) (Walters, J).

Three years later, the Court declared that section 67-6535 does not limit (or apparently have anything to do with) the law of standing. "The language in I.C. § 67-6535(c) [now 67-6535(3)] . . . cannot be construed as a standing requirement. The existence of real or potential harm is sufficient to challenge a land use decision." *Evans v. Teton Cnty.*, 139 Idaho 71, 76, 73 P.3d 84, 89 (2003) (Kidwell, J.). The Court went on, however, to declare "I.C. § 67-6535(c) [now 67-6535(3)] requires a demonstration of actual harm or violation of a fundamental right in order to be entitled to a remedy in cases disputing a LLUPA decision." *Evans*, 139 Idaho 71, 76, 73 P.3d 84, 89. This language is consistent with the view that statute authorizes the courts to decline to provide relief where the violation is purely technical—in other words, harmless error.

[326] This section was amended in 2003, adding the last sentence regarding taking analysis.

In *Terrazas v. Blaine Cnty.*, 147 Idaho 193, 207 P.3d 169 (2009), the Idaho Supreme Court relied on section 67-6535(c) (now 67-6535(3)) in determining that an improper site visit by one county commissioner did not merit overturning the county's decision.

J. Standard of review applicable to governing board review of a P&Z decision

Plainly, review of quasi-judicial planning and zoning decisions by the district court is appellate in nature. But what about review by a county or city of its own planning and zoning commission? Is that also appellate?

That is entirely up to the city or county. First, municipalities are not even required to have a planning and zoning commission. If a municipality chooses to create one, it must first decide whether to provide for any review of the P&Z's decisions.[327] Whether a city or county retains any review authority over P&Z decisions is entirely up to it. It may choose to give the P&Z the final say-so, with direct appeal to district court. Idaho Code § 67-6521(1)(d). Or it may elect to retain review authority over P&Z decisions. If so, that review may be broad (*de novo*) or narrow (appellate). Of course, a municipality may also create an in-between hybrid. Doing so, however, is probably ill advised because it is likely to lead to confusion and courts will not know how to interpret it.

In deciding which of these models to adopt, each Idaho municipal body must weigh countervailing goals. *De novo* review obviously gives the county a freer hand and more control. That comes at a price, however. The easier it is for a county to revisit and second-guess the determinations of the P&Z, the more likely it is that every controversial decision will have to be re-evaluated and re-decided by the county. This can undermine the very purpose of having a P&Z in the first place.[328] Under LLUPA, municipal entities are allowed to weigh the benefits and burdens of various modes of review, and decide just how much appellate review is right for them. Once that decision is made, however, they are bound by their own ordinances.

If the municipality decides to provide limited, appellate-type review of the P&Z's decisions, what is the effect of this decision?

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[327] The delegation authority is expressly stated. Idaho Code § 67-6504. The right to reserve review authority is implicit. Idaho Code § 67-6519 (referring to the decision of the P&Z as a "recommendation or decision").

[328] One of the major policy considerations in creating a planning and zoning commission is to reduce the workload of the governing board. If a workload reduction is to occur, the governing board must be able delegate its full approval authority. Otherwise, no permit could be finally approved without some sort of blessing from the governing board. Further, anything less than a full delegation completely dis-empowers the planning and zoning commission as a practical matter because both applicants and opponents can treat the planning and zoning commission hearing as a risk-free "dry run" and obtain a second bite at the apple in an appeal.

Plainly, it affects what the municipality may do at the time of the appeal. It means that the city or county may not take new evidence, but is limited to the record created by the P&Z. Moreover, the municipality may not freely substitute its judgment for that of the P&Z. Instead, it may overturn the P&Z's decision solely on the basis of ordinary appellate-type criteria: arbitrary & capricious or lack of substantial evidence.

One might also imagine that it affects the nature of the judicial review by the district court. It would seem that the focus of the district court's review would not be on the municipality's decision, but on the P&Z's decision. Thus, it would seem that the appeal to the municipality would simply be the first in a series of appeals, and that any subsequent reviewing courts would look not to the correctness of the first appellate decision (by the municipality), but to the correctness of the underlying decision (by the planning and zoning commission), just as the Supreme Court looks past the district court's decision back to the agency decision.[329] This argument was presented in *Davisco Foods Int'l, Inc. v. Gooding Cnty.*, 141 Idaho 784, 118 P.3d 116 (2005) (Schroeder, C.J.), but the issue was not reached because the Court found that the review by the county of the planning and zoning commission's decision was *de novo*, not appellate in nature. Thus, the question as to which decision the reviewing court looks where the ordinance provides for appellate review (to the planning and zoning commission's or the municipality's) remains an open one in Idaho. On the other hand, language in *Dawson Enterprises, Inc. v. Blaine Cnty.*, 98 Idaho 506, 512, 567 P.2d 1257, 1263 (1977) (Bistline, J.) may be read to suggest that the reviewing court looks only to the decision of the governing body, not the planning and zoning commission: "When the decision by the planning and zoning commission is reviewed by the board of zoning appeals, the determination made by the latter is presumed valid. The same presumption is accorded the subsequent decision of the county commissioners upon their review of the determination of the appeals board."

In any event, if a municipality adopts an appellate-type review process, and proceeds to take new evidence or patently substitute its judgment for that of the P&Z, the municipality's decision is subject to challenge.

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[329] "When the district court acts in an appellate capacity, on appeal this [Supreme] Court can review the record independently of the district court's decision." *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho 115, 116, 867 P.2d 989, 990 (1994). "In a case such as this, the Idaho Supreme Court reviews the record independently of the district court's appellate decision. Nonetheless, this Court's review is limited to a determination whether the zoning authority's findings and conclusions are supported by substantial, competent evidence." *Howard v. Canyon Cnty. Bd. of Comm'rs*, 128 Idaho 479, 480, 915 P.2d 709, 710 (1996). "In a subsequent appeal from the district court's decision where the district court was acting in its appellate capacity under IDAPA, the Supreme Court reviews the agency record independently of the district court's decision." *Evans v. Bd. of Comm'rs of Cassia Cnty.*, 137 Idaho 428, 430-31, 50 P.3d 443, 445-46 (2002).

The difficulty is that many local planning and zoning ordinances do not make clear whether *de novo* or appellate-type review is contemplated when matters are appealed to the city or county level. Moreover, ordinances often contain elements of each. In *Davisco Foods Int'l, Inc. v. Gooding Cnty.*, 141 Idaho 784, 118 P.3d 116 (2005) (Schroeder, C.J.), the Court was asked to consider an ordinance that provides for on the record review by the county of the planning and zoning commission, an appellate-type feature. The Court, however, found this was not dispositive. The Court deferred to and upheld the county's interpretation of its ordinance as providing for *de novo* review. The Court noted, in particular, that the ordinance allowed the county to "uphold, uphold with conditions, or overrule the Commission." *Davisco*, 141 Idaho at 788, 118 P.3d at 120. The Court's decision makes clear that municipal governments have considerable leeway in interpreting their own ordinances. In the long run, one hopes that governments will adopt ordinance provisions that say clearly what standard of review applies. Today, few do, creating confusion or parties and decision-makers alike.

K. Standard of review on appeal from district court to appellate court

(1) No deference to the district court.

As noted above, the district court operates in an appellate capacity when it reviews agency action. If that decision is appealed, the appellate court does not defer to the district court. Rather, it takes a fresh (or independent) look at the record, as if this were the first appeal:

> In a subsequent appeal from a district court's decision in which the district court was acting in its appellate capacity under the Administrative Procedure Act (APA), the Supreme Court reviews the agency record independently of the district court's decision.

Eacret v. Bonner Cnty., 139 Idaho 780, 784, 86 P.3d 494, 498 (2004) (Burdick, J.).

(2) Supreme Court applies the same deferential standard as the district court.

As to the facts, the Supreme Court (or Court of Appeals) reviews them in the same manner as did the district court, that is, with deference. "The standards governing judicial review in a case involving the LLUPA provide that this Court does not substitute its judgment for that of the agency as to the weight of the evidence presented." *Fischer v. City of Ketchum*, 141 Idaho 349, 532,109 P.3d 1091, 1094 (2005) (quotations and citations omitted).

As to the facts, the Idaho Supreme Court applies a clearly erroneous standard: "Rather, this Court defers to the agency's findings of fact unless they are clearly erroneous." *Fischer*, 141 Idaho at 352, 109 P.3d at 1094.

(3) The denial of a motion for summary judgment is not appealable.

There is no standard of review applicable to review of a denial of a motion for summary judgment, because such an order is not appealable.

> "It is well settled in Idaho that '[a]n order denying a motion for summary judgment is an interlocutory order from which no direct appeal may be taken.'" *Garcia v. Windley*, 144 Idaho 539, 542, 164 P.3d 819, 822 (2007) (alteration in original) (quoting *Dominguez v. Evergreen Res., Inc.*, 142 Idaho 7, 13, 121 P.3d 938, 944 (2005)); see I.A.R. 11. "[A]n order denying a motion for summary judgment is not subject to review—even after the entry of an appealable final judgment." *Dominguez*, 142 Idaho at 13, 121 P.3d at 944; see also *Lewiston Indep. Sch. Dist. No. 1 v. City of Lewiston*, 151 Idaho 800, 808, 264 P.3d 907, 915 (2011) (explaining that this Court does not review denials of summary judgment after judgment is rendered on the merits); *Hunter v. State, Dep't of Corr.*, 138 Idaho 44, 46, 57 P.3d 755, 757 (2002) ("An order denying a motion for summary judgment is not an appealable order itself, nor is it reviewable on appeal from a final judgment.").

Am. Bank v. BRN Dev., Inc., 159 Idaho 201, 205–06, 358 P.3d 762, 766–67 (2015) (Horton, J.).

In *Garcia v. Windley*, 144 Idaho 539, 542, 164 P.3d 819, 822 (2007) (Burdick, J.), the Court declined to carve out an exception for circumstances in which the trial court ruled strictly on a point of law thus preventing the losing party from presenting evidence. The Court explained that such an exception would undermine the underlying purpose of the rule:

> [B]y entering an order denying summary judgment, the trial court merely indicates that the matter should proceed to trial on its merits. The final judgment in a case can be tested upon the record made at trial, not the record made at the time summary judgment was denied. Any legal rulings made by the trial court affecting that final judgment can be reviewed at that time

> in light of the full record. This will prevent a litigant who loses a case, after a full and fair trial, from having an appellate court go back to the time when the litigant had moved for summary judgment to view the relative strengths and weaknesses of the litigants at that earlier stage. Were we to hold otherwise, one who had sustained his position after a fair hearing of the whole case might nevertheless lose, because he had failed to prove his case fully on the interlocutory motion.

Garcia 144 Idaho at 542, 164 P.3d at 822 (alteration in original) (quoting *Miller v. Estate of Prater*, 141 Idaho 208, 211, 108 P.3d 355, 358 (2005) (J. Jones, J.)).

L. Timing of judicial review: ripeness, exhaustion, and primary jurisdiction

(1) Generally, timing issues are prudential, not jurisdictional

The doctrines of exhaustion of administrative remedies, finality, primary jurisdiction, and ripeness are prudential, not jurisdictional, limitations.[330] "The

[330] "However, we have not treated the [exhaustion] doctrine as one depriving a court of jurisdiction over the subject matter." *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 628, 586 P.2d 1068, 1072 (1978). "[W]e have not treated the [exhaustion] doctrine as one depriving a court of jurisdiction over the subject matter." *White v. Bannock Cnty. Comm'rs*, 139 Idaho 396, 400, 80 P.3d 332, 336 (2003) (citing *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 628, 586 P.2d 1068, 1072 (1978). "It [ripeness] is generally considered a prudential limitation on judicial action, although the Supreme Court has occasionally hinted that ripeness derives from the 'cases' and 'controversies' language of Article III." However, the Idaho Supreme Court has not been entirely consistent on this point. In *Park v. Banbury*, 143 Idaho 576, 582, 149 P.3d 851, 857 (2006), the Court found that plaintiffs' failure to exhaust deprived the district court of subject matter jurisdiction. "As a general rule, the Court has not treated the doctrine of exhaustion of administrative remedies as one depriving the court of jurisdiction over the subject matter." *Regan v. Kootenai Cnty.*, 140 Idaho 721, 726, 100 P.3d 615, 620 (2004). Despite this general rule, the *Regan* court concluded that in that case, "Regan's failure to exhaust their administrative remedies deprived the district court of subject matter jurisdiction over their claim for declaratory relief." *Regan*, 140 Idaho at 726, 100 P.3d at 620.

Marla E. Mansfield, *Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers*, 68 N.D. Law Rev. 1, 68 (1992). *But see*, Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. Chicago L. Rev. 153 (1987) (arguing that the federal courts have erred in "constitutionalizing" the law of ripeness).

Unlike the federal Constitution, the grant of judicial power in the Idaho Constitution is a general grant and contains no "cases" and "controversies" limitation. "The constitutional prohibition on advisory opinions is based on the language of Article III, not on the due process clause. Consequently, the rule against advisory opinions applies only to the federal courts." Ronald D. Rotunda & John E. Nowak, 1 *Treatise on Constitutional Law—Substance and Procedure* § 2.13(a) (2008). Also see, Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A*

timing doctrines are not jurisdictional because they are not concerned with whether the petitioner is ever entitled to judicial review, but only with when review is available." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 342 (1993) (emphasis original, citations omitted). Accordingly, the courts are free to fashion exceptions to these rule in the interest of justice.[331] Indeed, the discretionary nature of the exhaustion requirement is codified in the IAPA, which provides this exception to the exhaustion requirement: "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy." Idaho Code § 67-5271. The existence of statutory provisions for declaratory action further reduces the need for strict application of ripeness rules in Idaho.[332]

On the other hand, the Court said (somewhat circularly) that failure to exhaust is jurisdictional where none of the exceptions apply. *Regan v. Kootenai Cnty.*, 140 Idaho 721, 726, 100 P.3d 615, 620 (2004) (Schroeder, J.) ("The Regans' failure to exhaust their administrative remedies deprived the district court of subject matter jurisdiction over their claim for declaratory relief."); *Fairview Development Co. v. Bannock Cnty.*, 119 Idaho 121, 804 P.2d 294 (1990).

(2) In contrast, the IAPA's 28-day deadline for judicial review is jurisdictional.

The deadline for appealing a final order in a contested case before a state agency subject to the Idaho Administrative Procedure Act ("IAPA") is 28 days.[333]

Primer for the Practitioner, 30 Idaho L. Rev. 273, 336 (1993) (citing Idaho cases saying that Article III restraints do not apply in Idaho). Thus, the law of ripeness is necessarily prudential, not jurisdictional, in Idaho.

[331] The Legislature, too, has recognized rules to the exhaustion requirement. "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy." Idaho Code § 67-5271(2).

[332] "The potential applicability of the [ripeness] doctrine to judicial review of agency action in Idaho is substantially reduced by the provision of § 67-5278 authorizing the use of declaratory judgment actions to determine the 'validity or applicability of a rule.' . . . [T]he APA overrides much of the federal doctrine's traditional scope." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 343-44 (1993), and in *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 627, 586 P.2d 1068, 1071 (1978). The referenced APA judicial review provision is limited to challenges to agency rules, and is not applicable to land use matters. Nevertheless, it would seem that the commentators' basic point would be equally applicable to, for example, a declaratory judgment action challenging the validity of a land use ordinance.

[333] Idaho Code § 67-5273(2) was amended in 2010 to provide that the period for filing a petition for judicial review begins to run on the date of service of the final order or service of the decision on a motion for reconsideration. This overturns earlier cases interpreting the clock to begin running on the date of issuance.

Idaho Code § 67-5273(2). The IAPA's judicial review provision is applicable only to state agencies (and to Idaho counties[334]). LLUPA, however, sets its own 28-day deadline for judicial review of certain land use decisions of cities and counties. Idaho Code §§ 67-6519(4) and 67-6521(1)(d). (Both LLUPA provisions expressly state a 28-day deadline, but then refer to and incorporate by reference the procedures for judicial review set out in the IAPA.)

The Idaho Rules of Civil Procedure expressly provide that the deadlines for filing a petition for judicial review are jurisdictional:

> **(b) Filing Petition for Judicial Review.**
>
> (1) Unless a different time or procedure is prescribed by statute, a petition for judicial review from an agency to district court must be filed with the appropriate district court within twenty-eight (28) days after the agency action is ripe for judicial review under the statute authorizing judicial review, but the time for filing a petition for judicial review is extended as provided in the next sentence. When the decision to be reviewed is issued by an agency with authority to reconsider its decision, the running of the time for petition for judicial review is suspended by a timely motion for reconsideration, and the full time for petition for judicial review commences to run and is computed from the date of any decision on reconsideration, the date of any decision denying reconsideration, or the date that reconsideration is deemed to be denied by statute by inaction on a petition for reconsideration. Judicial review is commenced by filing a petition for judicial review with the district court, and the petitioner shall concurrently serve copies of the notice of petition for judicial review upon the agency whose action will be reviewed and all other parties to the proceeding before the agency (if there were parties to the proceeding). Proof of service on the agency and all parties shall be filed with the court in the form required by Rule 5(f).
>
> . . .
>
> **(n) Effect of Failure to Comply With Time Limits**. The failure to physically file a petition for judicial review or cross-petition for judicial review with the district court

[334] Idaho Code § 31-1506(1) makes "any final act, order or proceeding" of a board of county commissioners reviewable "within the same time and in the same manner as provided in chapter 25, title 67, Idaho Code, for judicial review of actions."

> within the time limits prescribed by statute and these rules shall be jurisdictional and shall cause automatic dismissal of the petition for judicial review upon motion of any party, or upon initiative of the district court. Failure of a party to timely take any other step in the process for judicial review shall not be deemed jurisdictional, but may be grounds only for such other action or sanction as the district court deems appropriate, which may include dismissal of the petition for review.

Idaho R. Civ. P. 84.

Note that the reference to "agency" in subsection 84(b)(1) is not limited to state agencies. Unlike the narrower definition of the term "agency" in the Idaho Administrative Procedure Act, Idaho Code § 67-5201(2), the definition of "agency" in the court rule is all encompassing. It omits the key limiting adjective "state" (found in the IAPA) and applies to "any non judicial board . . . or officer for which statute provides for the district court's judicial review of agency action." Idaho R. Civ. P. 84(a)(2)(B) (emphasis supplied). This is confirmed by the holding in *Arthur v. Shoshone Cnty.*, 133 Idaho 854, 860, 993 P.2d 617, 623 (Ct. App. 2000) (Lansing, J.) in which the Idaho Court of Appeals held that the rule "specifically governs judicial review of a local government action."

In *Arthur*, the Idaho Court of Appeals relied on Idaho R. Civ. P 84(b)(1) (which was then codified as rule 84(e)(1)) in holding that a petition for judicial review filed 30 days after the county denied an application for a conditional use permit was too late. In *Arthur*, the petitioner was tardy because he had filed a motion to reconsider and waited for that to be rejected before filing his petition for judicial review. That did not toll the deadline, said the Court, because, unlike the IAPA, LLUPA does not provide for motions for reconsideration. (Note, in contrast, that the Idaho road statutes do provide for reconsideration. Idaho Code§ 40-208.)

In *Horne v. Idaho State University*, 69 P.3d 120, 123 (Idaho 2003), the Court noted: "The filing of a petition for judicial review within the time permitted by statute is jurisdictional." This case dealt with a separate statute dealing with review of personnel decisions, but it has been cited by the Idaho Supreme Court in the context of judicial review under the IAPA (*Erickson v. Idaho Bd. of Registration of Prof'l Engineers and Professional Land Surveyors*, 203 P.3d 1251, 1253 (Idaho 2009)).

In *Erickson v. Idaho Bd. of Registration of Prof'l Engineers and Professional Land Surveyors*, 203 P.3d 1251 (Idaho 2009), the Idaho Supreme Court found that the 28-day deadline in the IAPA (Idaho Code § 67-5273(2)) is jurisdictional and that the Court had no jurisdiction to hear an appeal filed two days late. In so ruling, the Court cited the jurisdictional statement in Idaho R. Civ. P. 84(n).

Relying on *Erickson*, the Idaho Supreme Court ruled in *City of Eagle v. Idaho Dep't of Water Resources*, 150 Idaho 449, 247 P.3d 1037 (2011) (Burdick, J.) that the district court properly dismissed the water right applicant's petition for judicial review as untimely. The Court ruled that the IAPA's 28-day deadline is jurisdictional and began to run from the date the Idaho Department of Water Resources issued its order on reconsideration—not from the date of service.[335] "The failure to file a timely petition for judicial review is jurisdictional and causes automatic dismissal of the petition. I.R.C.P. 84(n)." *City of Eagle*, 150 Idaho at 451, 247 P.3d at 1039.

The outcome was not changed by the fact that the agency initially failed to serve the order on the city and corrected the error 13 days later. When finally served, the order was accompanied by a letter from the agency stating that the deadline for judicial review was 28 days after service, naming the later date (13 days later) as the date of service. The Court ruled that the city was not entitled to rely on this incorrect advice.

> While that letter purported to extend the appeal period, this Court explained in *Quesnell Dairy* that while the Commissioners have the power to determine when a decision is final and appealable, they do not have the power to set the time frame for appeal in excess of twenty-eight days. . . . While IDWR made legally erroneous statements concerning the running of the appeal period, we find that IDWR clearly stated that the issuance for the Order on Reconsideration was July 3, 2008.

City of Eagle, 150 Idaho at 453-54, 247 P.3d at 1041-42 (citing *In re Quesnell Dairy*, 143 Idaho 691, 694, 152 P.3d 562, 565 (2007)). Nor did equitable or estoppel principles change the result. "Estoppel is not appropriate where jurisdiction is at issue. . . . The failure to file a timely petition for judicial review is jurisdictional and causes automatic dismissal of the petition." *City of Eagle*, 150 Idaho at 454, 247 P.3d at 1042.

Buckskin Properties, Inc. v. Valley Cnty., 154 Idaho 486, 300 P.3d 18 (2013) (J. Jones, J.) was the first Idaho case to apply LLUPA's 28-day jurisdictional deadline in the context of impact fees imposed on a conditional use permit.[336] In

[335] The IAPA was amended in 2010 to provide that the period for filing a petition for judicial review begins to run on the date of service, but this amendment did not apply to this case.

[336] The argument also was presented as a defense by the City of McCall in *Hehr v. City of McCall*, 155 Idaho 92, 305 P.3d 536 (2013) and *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013), but the Idaho Supreme Court decided those cases in the city's favor on other grounds never reaching the issue of the defendants' failure to seek judicial review.

Buckskin, the Idaho Supreme Court ruled that failure to seek judicial review bars a collateral attack on a permit condition mandating payment of fees that are alleged to be unconstitutional taxes:

> As the County points out, Buckskin failed to seek judicial review of the requirement in its CUP that the CCA [Capital Contribution Agreement] received the County Board's approval. If Buckskin truly was aggrieved by this requirement, it had the ability to seek judicial review. By failing to do so, it cannot now complain. Buckskin states that the CCA and RDA [Road Development Agreement] are not "permits" and therefore were not reviewable under LLUPA. Indeed, the agreements are not permits but voluntary agreements entered into by the parties. However, the requirement that the CCA receive Board approval is a condition attached to the CUP and is a matter that could have been challenged on judicial review. It is obvious that Buckskin made no such challenge and therefore did not exhaust its administrative remedies.
>
> Buckskin's claim that judicial review would not have provided the relief it sought is also without merit. Had Buckskin truly objected to the CUP condition, and had it successfully challenged the condition and the validity of the CCA on judicial review, it might have been able to avoid paying the road impact charges for all six phases of The Meadows.

Buckskin, 154 Idaho at 493-94, 300 P.3d at 25-26.

Buckskin's discussion of the 28-day rule was referenced by the Court again in *In the Matter of Certified Question of Law – White Cloud v. Valley Cnty.*, 156 Idaho 77, 320 P.3d 1236 (2014) (J. Jones, J.).

The Court reached the same conclusion in *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.), albeit in the context of ripeness requirements under *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (Blackmun, J.). The Court said:

> In response, McCall argues that state law provides Alpine with a means of challenging a taking through judicial review under the Local Land Use Planning Act (LLUPA) and that Alpine failed to use it. Additionally, McCall argues that any plaintiff that fails to timely file a state

takings claim can never satisfy this prong of *Williamson County*.

The Local Land Use Planning Act (LLUPA) provides an avenue to evaluate certain proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property:

> Upon the written request of an owner of real property that is the subject of such action, such request being filed with the clerk or the agency or entity undertaking the regulatory or administrative action not more than twenty-eight (28) days after the final decision concerning the matter at issue, a state agency or local governmental entity shall prepare a written taking analysis concerning the action.

I.C. § 67–8003; *see also Buckskin Properties, Inc. v. Valley County*, 154 Idaho 486, 496, 300 P.3d 18, 28 (2013). Alpine did not seek judicial review under this statute. Alpine correctly notes an exception in I.C. § 67–6521(2)(b) which allows a legal action under Article I, Section 14 of the Idaho Constitution. But this exception requires "a final action restricting private property development" and as discussed above there was no final action in this matter. Therefore, we hold that the second prong of the *Williamson County* ripeness test has not been satisfied and that Alpine's federal claims are not ripe.

Alpine Village, 154 Idaho at 939, 303 P.3d at 626 (emphasis supplied).

(3) The federal view of jurisdictional deadlines is somewhat more liberal than Idaho's.

The United States Supreme Court has taken a modestly more liberal view of the subject of jurisdictional deadlines. In *Sebelius v. Auburn Regional Medical Center*, 133 S. Ct. 817 (2013) the Court expressed caution toward the recognition of jurisdictional deadlines:

> With these untoward consequences in mind, "we have tried in recent cases to bring some discipline to the use" of the term "jurisdiction." *Hendersen*[*v. Shinseki*], 562 U.S. at ____, 131 S. Ct. 1197, 1202 [(2011)]; see also *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90, 118 S. Ct. 1003, 140 L.Ed.2d 210 (1998) (jurisdiction

> has been a "word of many, too many, meanings" (internal quotation marks omitted)).
> To ward off profligate use of the term "jurisdiction," we have adopted a "readily administrable bright line" for determining whether to classify a statutory limitation as jurisdictional. [Citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006).] We inquire whether Congress has "clearly state[d]" that the rule is jurisdictional; absent such a clear statement, we have cautioned, "courts should treat the restriction as nonjurisdictional in character."

Sebelius, 133 S. Ct. at 824.

In *Sebelius*, a hospital challenged an agency's determination regarding payments for Medicare coverage. The applicable statute set the deadline for such appeals at 180 days. A longstanding regulation implementing the statute liberalized this, providing that, for good cause, a tardy appeal could be entertained, but not one more than three years after the administrative decision. The hospital filed its appeal more than a decade late, contending that its tardiness was excused by equitable tolling of the statute. The Supreme Court held that, as a matter of statutory construction, the 180 day deadline was not jurisdictional. "The language Congress used hardly reveals a design to preclude any regulatory extension. . . . This provision does not speak in jurisdictional terms." *Sebelius*, 133 S. Ct. at 824 (internal quotation marks omitted). Thus, the regulation extending the deadline up to three years was a permissible interpretation. But the Court did not buy the hospital's equitable tolling argument. The Court noted that "procedural rules requiring timely filings are indispensable devices for keeping the machinery of the reimbursement appeals process running smoothly." *Sebelius*, 133 S. Ct. at 826. The regulation, it said, was entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). In rejecting the hospital's argument for equitable tolling notwithstanding the three-year limit in the regulation, the Court placed emphasis on Congress' acquiescence in the rule:

> Congress amended [the appeal statute] six times since 1974, each time leaving untouched the 180-day administrative appeal provision and the Secretary's rulemaking authority. At no time did Congress express disapproval of the three-year outer time limit set by the Secretary for an extension upon a showing of good cause. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846, 106 S. Ct. 3245, 92 L.Ed.2d 675 (1986) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or

> repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." (internal quotation marks omitted)).

Sebelius, 133 S. Ct. at 827-28.

Sebelius, of course, dealt with federal deadlines and does not control the interpretation by Idaho courts of the jurisdictional status of Idaho appeal provisions. But, if the reasoning of *Sebelius* were applied, it would not seem to change the outcome with respect to the jurisdictional nature of the 28-day deadline for judicial review. This is because Idaho's interpretation of the jurisdictional status is longstanding and "codified" in Idaho R. Civ. P. 84(n). The Idaho Legislature has repeatedly amended the IAPA and LLUPA's judicial review provisions, but has never liberalized the well-established jurisdictional rule.

Sebelieus has been followed by the Ninth Circuit. *Kwau Fun Wong v. Beebe*, 732 F.3d 1030 (9th Cir. 2013) (overruling *Marley v. United States*, 567 F.3d 1030 (9th Cir. 2008)).

(4) Exhaustion of administrative remedies

(a) In general

Exhaustion principles require litigants to utilize available administrative remedies before seeking judicial review. This is codified in the IAPA[337] as well as LLUPA[338] (whose provisions are quoted below). Exhaustion typically applies where the plaintiff cuts short an ongoing administrative proceeding by initiating a lawsuit before exhausting available administrative appeals (or after missing the deadline for such appeals). Thus, the question presented is whether seeking judicial relief in such cases constitutes an improper end run around the administrative process.

Note that the term "exhaustion" is sometimes employed (somewhat confusingly) to describe the obligation of a party to pursue designated judicial review remedies (such as a judicial review under LLUPA) rather than pursuing a declaratory judgment action or a § 1983 claim. Indeed, courts often float back and forth between a discussion of the law of exhaustion and the law barring collateral attacks when available judicial review remedies are not utilized. *E.g.*, *Regan v. Kootenai Cnty.*, 140 Idaho 721, 724-25, 100 P.3d 615, 618-19 (2004) (Schroeder, J.).

It is typically necessary to appeal from the P&Z commission to the city or county commission before a judicial appeal may be filed. The aggrieved party needs to pay close attention to the deadlines for such appeals because the appeals often have very short triggers for filing (often just 10 or 15 days). Failure to exhaust in

[337] Idaho Code § 67-5271(1).

[338] Idaho Code §§ 67-6521(1)(d) and 67-6519(5) (previously codified to section 67-6519(4)).

such situations is not just a matter of timing or sequencing; it may result in foreclosing judicial review altogether.

The exhaustion requirement is grounded in principles of good government and judicial economy. In an oft-quoted statement, the Idaho Supreme Court explained why exhaustion matters: "As we have previously recognized, important policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative processes established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body." *White v. Bannock Cnty. Comm'rs*, 139 Idaho 396, 401-02, 80 P.3d 332, 337-38 (2003).

The starting point is a black letter rule: The requirement that a party must exhaust administrative remedies before pursuing a judicial review of a quasi-judicial land use action is reflected in numerous court decisions and is codified in the IAPA:

> (1) A person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter.
> (2) A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy.

Idaho Code § 67-5271 (emphasis added).

The exhaustion rule is also stated in LLUPA: "An affected person aggrieved by a decision may within twenty-eight (28) days after all remedies have been exhausted under local ordinances seek judicial review as provided by chapter 52, title 67, Idaho Code [the IAPA]." Idaho Code § 67-6521(1)(d). A virtually identical provision is found in another section of LLUPA. Idaho Code §§ 67-6519(5) (previously codified to section 67-6519(4)).

As discussed further in section 24.L(2) on page 377, failure to exhaust is jurisdictional. Idaho R. Civ. P. 84(n).

Watch out, however, for so-called black letter rules. Three times the Idaho Supreme Court has repeated these words of caution from Professor Davis' treatise:

> The statement the courts so often repeat in their opinions—that judicial relief must be denied until administrative remedies have been exhausted—is seriously at variance with the holdings . . . .
> The law embodied in the holdings clearly is that sometimes exhaustion is required and sometimes not. No

> court requires exhaustion when exhaustion will involve irreparable injury and when the agency is palpably without jurisdiction; probably every court requires exhaustion when the question presented is one within the agency's specialization and when the administrative remedy is as likely as the judicial remedy to provide the wanted relief. In between these extremes is a vast array of problems on which judicial action is variable and difficult or impossible to predict.

Sierra Life Ins. Co. v. Granata, 99 Idaho 624, 627, 586 P.2d 1068, 1071 (1978) (quoting 3 Kenneth Davis, *Administrative Law Treatise* § 20.01 (1958)) (*quoted again in Fairway Development Co. v. Bannock Cnty.*, 119 Idaho 121, 125, 804 P.2d 294, 298 (1990); *Regan v. Kootenai Cnty.*, 140 Idaho 721, 726, 100 P.3d 615, 620 (2004) (Schroeder, J.); *Park v. Banbury*, 143 Idaho 576, 581, 149 P.3d 851, 856 (2006)).

(b) Under LLUPA

A classic example of the exhaustion requirement is found in *South Fork Coalition v. Bd. of Comm'rs of Bonneville Cnty.* ("*South Fork I*"), 112 Idaho 89, 730 P.2d 1009 (1986). In this case, Bonneville County provided preliminary approval of a planned unit development application for a residential and golf course development project near the South Fork of the Snake River, the first step toward final approval under the applicable ordinance. Without waiting for final approval, the South Fork Coalition sued the county. The Idaho Supreme Court ruled that the district court had no jurisdiction to hear the appeal because there was no "final decision on the application, and all administrative remedies have not been exhausted." *South Fork I*, 112 Idaho at 90, 730 P.2d at 1010.[339]

The case of *Palmer v. Bd. of Cnty. Comm'rs of Blaine Cnty.*, 117 Idaho 562, 790 P.2d 343 (1990), is another classic exhaustion case. Palmer received a stop work order from the county when it learned that he was constructing a home 500 feet from an airport runway in violation of a zoning ordinance. Palmer brought a tort claim against the city seeking damages. The Court ruled that Palmer should have first sought a special use permit under local ordinances. In other words, Palmer not only failed to exhaust his administrative remedies, he did not even initiate them. Notably, the Court did not limit Palmer to judicial review of the special use permit, if it was denied, but noted that Palmer would then be free to file a complaint for damages as well. *Palmer*, 117 Idaho at 565, 790 P.2d at 346. It simply said he needed to seek

[339] In so ruling, the court cited to the requirement for a "final decision in" IAPA's review provision, then codified at Idaho Code § 67-5215(a), now codified at Idaho Code § 67-5270(2) (referring to "final agency action"). For some reason, the court did not cite the exhaustion requirements in LLUPA.

the special use permit first. Moreover, the Court observed, "Here, there is no challenge to the validity of [the applicable ordinance]," *Palmer*, 117 Idaho at 564, 790 P.2d at 345, thus recognizing that rules of exhaustion do not apply to facial challenges. These exceptions are discussed in the following section.

In *Rollins v. Blaine Cnty.*, 147 Idaho 729, 215 P.3d 449 (2009), the Idaho Supreme Court cited *Palmer* in rejecting an appeal on exhaustion grounds. Rollins purchased a parcel of land intending to build a home. He received a written determination from the P&Z Administrator that the property was not within the Mountain Overlay District ("MOD") and that no site alteration permit was required. Rollins proceeded with site preparation. He later obtained two permits (presumably from the P&Z Commission), one to build a retaining wall and another to construct the home. A neighbor appealed these permits to the Board, and the Board determined that the site was within the MOD and that a site alteration permit was required. Rollins filed a judicial appeal. The Idaho Supreme Court ruled, *sua sponte*, that the appeal was premature because Rollins had not exhausted his administrative remedies by seeking a site alteration permit.

(c) Under IAPA

For challenges to agency action outside of LLUPA, the exhaustion provisions of the IAPA apply.

As noted above, the issue is jurisdictional. Idaho R. Civ. P. 84(n).

In *A&B Irrigation Dist. v. IDWR*, Case No. CV-42-2015-2452 (Idaho 5th Jud. Dist. Dec. 14, 2015) (Wildman, J), the court ruled that a party to an IDWR water right proceeding is not required to file "exceptions" to a preliminary order (which became a final order by operation of law) in order to exhaust administrative remedies.[340] Judge Wildman noted that Idaho Code § 67-5273(2) provides for judicial review of "a preliminary order that has become final when it was not reviewed by the agency head." Accordingly, he ruled that filing exceptions to the agency head is not necessary for an order to become final and, hence, reviewable.

Judge Wildman's decision did not address whether filing a petition for reconsideration is required in order to exhaust administrative remedies. Indeed, the decision does not say whether reconsideration was sought.

[340] The term "exceptions" refers to a petition asking the agency head to review a preliminary or recommended order issued by a hearing officer. IDAPA 37.01.01.720 and 37.01.01.730. Judge Wildman's decision did not use the term "exceptions." Instead, he spoke in terms of whether it was necessary "to motion the Director to review the hearing officer's Preliminary Order." *A&B* at page 5. IDWR's new procedural rules (expected to be promulgated in 2022) are expected to add a definition for the term "exceptions."

However, the language of the IAPA strongly suggests that filing a petition for reconsideration is optional and not necessary in order to exhaust administrative remedies. The exhaustion provision of the IAPA provides: "A person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter." Idaho Code § 67-5271(1) (emphasis added). This raises the question: What administrative remedies are required under the IAPA? The IAPA expressly authorizes petitions for reconsideration. Idaho Code §§ 67-5243(3), 67-5245(3), 67-4246(4) &(5), 67-5248(1)(b), 67-5249(g), and 67-5273(2). However, none of these state or even imply that a petition for reconsideration is "required."

The optional nature of a petition for reconsideration is also evident in the IAPA's provision setting the deadline for judicial review:

> A petition for judicial review of a final order or a preliminary order that has become final when it was not reviewed by the agency head . . . must be filed within twenty-eight (28) days of the service date of the final order [or] the date when the preliminary order became final . . . , or, if reconsideration is sought, within twenty-eight (28) days after the service date of the decision thereon. . . .

Idaho Code § 67-5373(2) (emphasis added). The fact that the deadline depends on whether or not a petition for reconsideration has been filed must mean that a petition for judicial review is optional. Otherwise, the only deadline would be the one for after disposal of the petition for reconsideration.

(5) Exceptions to the exhaustion requirement

The Idaho Supreme Court has recognized two exceptions to the general rule requiring exhaustion.

> As a general rule, a party must exhaust administrative remedies before resorting to the courts to challenge the validity of administrative acts. We have recognized exceptions to that rule in two instances: (a) when the interests of justice so require, and (b) when the agency acted outside its authority.

KMST, LLC v. Cnty. of Ada, 138 Idaho 577, 583, 67 P.3d 56, 62 (2003) (Eismann, J.) (citation omitted). The Court has repeated these exceptions frequently. *E.g.*, *Regan v. Kootenai Cnty.*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004) (Schroeder, J.); *Arnzen v. State*, 123 Idaho 899, 906, 854 P.2d 242, 249 (1993).

In *Park v. Banbury*, 143 Idaho 576, 149 P.3d 851 (2006) (Schroeder, J.), the Court described the exceptions this way: "Styled differently, courts will not require exhaustion 'when exhaustion will involve irreparable injury and when the agency is palpably without jurisdiction.'" *Park*, 143 Idaho at 581, 149 P.3d at 856 (quoting *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 627, 586 P.2d 1068, 1071 (1978)).

The rule and its principal exceptions may be traced as far back as 1958 in Idaho:

> While as a general rule administrative remedies should be exhausted before resort is had to the courts to challenge the validity of administrative acts, such rule is not absolute and will be departed from where the interests of justice so require, and the rule does not apply unless the administrative agency acts within its power."

Bohemian Breweries v. Koehler, 80 Idaho 438, 332 P.2d 875 (1958).

In 1990, the Idaho Court of Appeals offered this formulation of the exceptions:

> Illustrative of the circumstances which require an exception to the exhaustion doctrine include: (1) where resort to administrative procedures would be futile; (2) where the aggrieved party is challenging the constitutionality of the agency's actions or of the agency itself; or (3) where the aggrieved party has no notice of the initial administrative decision or no opportunity to exercise the administrative review procedures.

Peterson v. City of Pocatello, 117 Idaho 234, 236, 786 P.2d 1136, 1138 (Ct. App. 1990) (citations omitted); *discussed in* Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 347 (1993). This appears to be an earlier formulation of the modern two-exception test. The first and third exceptions in *Peterson* would seem to fall under the rubric of "interests of justice," while the second *Peterson* exception seems to fall under the rubric of action outside of an agency's jurisdiction.

Another statutory exception to the exhaustion requirement is the "no adequate remedy" provision codified in the IAPA: "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy." Idaho Code § 67-5271(2). This, too, seems to fall within the "interests of justice" exception. Indeed, these interests of justice tests are often blurred together. "The standard may also be satisfied by showing that the agency lacks power to grant the requested relief, i.e., that exhaustion would be futile." *Park v. Banbury*, 143 Idaho 576, 581, 149 P.3d 851, 856 (2006)).

Note that the IAPA also contains what sounds like an exception to exhaustion requirements for declaratory actions challenging agency rules. Idaho Code § 67-5278. However, the Court ruled that "the 'threatened application' language in I.C. § 67-5278 is there to permit standing to challenge a rule, but does not eliminate the need for completion of administrative proceedings for an as applied challenge." *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 871-72, 154 P.3d 433, 442-43 (2007).

(a) The interests of justice (irreparable injury, futility, and bias)

In *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 106 P.3d 455 (2005), the Idaho Supreme Court noted an exception where the decision maker is biased. "One such exception to the exhaustion requirement applies where bias or prejudgment by the decision maker can be demonstrated. This is because '[t]he due process clause entitles a person to an impartial and disinterested tribunal.' Actual bias on the part of a decision maker is 'constitutionally unacceptable.' The constitutional requirement that an adjudicator be free from bias applies equally to the courts and to state administrative agencies. To require a litigant to exhaust his administrative remedies before a biased decisionmaker would also be futile." *Owsley*, 141 Idaho at 135-36, 106 P.3d at 461-62 (citations omitted).

The *Owsley* Court relied on *Peterson v. City of Pocatello*, 117 Idaho 234, 786 P.2d 1136 (1990). In *Peterson*, the Court of Appeals held that exhaustion is not required "where resort to administrative procedures would be futile." *Peterson*, 117 Idaho at 236, 786 P.2d at 1138.

In *Park v. Banbury*, 143 Idaho 576, 149 P.3d 851 (2006), the Court found that neither exception applied to a challenge to taxing decisions by the county board of equalization. Addressing the first of these exceptions, the *Park* court said:

> The Property Owners claim that the interests of justice required immediate judicial intervention. Typically this situation occurs where irreparable harm results from the administrative process itself. See *Sierra Life*, 99 Idaho at 629, 586 P.2d at 1073 (excusing failure to exhaust where the subject matter of the action involved alleged proposed unlawful action by the agency that would cause irreparable harm to the plaintiff); *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 135, 106 P.3d 455, 461 (2005) (recognizing an exception to the exhaustion requirement "where bias or prejudgment by the decisionmaker can be demonstrated" because due process entitles a person to an impartial tribunal and requiring exhaustion before a biased decision maker would be futile). The standard

> may also be satisfied by showing that the agency lacks power to grant the requested relief, i.e., that exhaustion would be futile.

Park, 143 Idaho at 581, 149 P.3d at 856. In this case, however, the Court found that the agency did have the power to correct the alleged error, so pursuit of administrative remedies was not futile and the interests of justice exception did not apply.

Another example of the interests of justice exception is found in *McVicker v. City of Lewiston*, 134 Idaho 34, 995 P.2d 804 (2000). In *McVicker*, the Court ruled that a city employee's failure to forward a protest letter excused the plaintiffs' failure to timely exhaust their administrative remedies. (The Court did not recite the exceptions, but this circumstance would appear to fall within the interests of justice exception.)

(b) Where the agency acts outside of its jurisdiction (including facial constitutional challenges to an ordinance)

The second exception to the rule requiring exhaustion of administrative arises where the agency acted outside its authority, that is, "when the agency is palpably without jurisdiction.'" *Park*, 143 Idaho at 581, 149 P.3d at 856 (quoting *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 627, 586 P.2d 1068, 1071 (1978)). For example, if a planning and zoning entity were to declare an applicant's water rights invalid, such action would plainly be beyond its jurisdiction and could be challenged without exhaustion of administrative remedies.

Exhaustion also is not required where the authorizing statute (as opposed to an implementing ordinance) is being challenged as unconstitutional. "An administrative agency cannot pass on the constitutionality of the legislation under which it acts so that a party seeking review of the constitutionality of an agency's enabling legislation need not exhaust its administrative remedies. Exhaustion of administrative remedies also may not be required where an agency ordinance or rule is attacked as unconstitutional on its face." 2 Am. Jur. 2d *Administrative Law* § 479 at 406 (2004).

In *McCuskey v. Canyon Cnty.* ("*McCuskey I*"), 123 Idaho 657, 660, 851 P.2d 953, 956 (1993) (Bistline, J.), the Idaho Supreme Court ruled that a party challenging an ordinance itself (rather than contesting an administrative decision) is not required to exhaust administrative or judicial review remedies. Other cases have made clear that this exception is limited to facial challenges. (See further discussion of this case in section 24.M beginning on page 414.)

Indeed, the Idaho Supreme Court has made clear that facial challenges to the validity of an ordinance do not require exhaustion of administrative remedies, but challenges to the application of an ordinance (even where the constitutional claims

are raised) do require exhaustion. This is consistent with commentary by Michael Gilmore and Professor Goble in their seminal article on the subject. "As the *Robinson* case demonstrates, exhaustion is not required when the issue is a facial constitutional challenge to the agency." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 347 (1993) (referencing *Idaho Mutual Benefit Ass'n v. Robinson*, 65 Idaho 793, 154 P.2d 156 (1944), a challenge to the constitutionality of the statute relied on by the agency).

In *Park v. Banbury*, 143 Idaho 576, 149 P.3d 851 (2006) (Schroeder, J.), landowners in Valley County challenged sharp increases in property assessments as violative of the Article VII, Section 5 of the Idaho Constitution (requiring that "taxes shall be uniform upon the same class of subjects"). The homeowners appealed the assessments to the Board of County Commissioners, which denied the appeal. Rather than appealing that decision to the Board of Tax Appeals, they filed a complaint in district court. The key question in the case was whether plaintiffs' failure to exhaust their administrative remedies should preclude this action. The Court noted two exceptions to the exhaustion requirement (interests of justice and agency action outside of its authority). *Park*, 143 Idaho at 580, 149 P.3d at 855. The latter, said the Court, could be described as "when the agency is palpably without jurisdiction." *Park*, 143 Idaho at 581, 149 P.3d at 856. The property owners contended that this exception applied because they had raised a constitutional challenge. The Idaho Supreme Court rejected this argument:

> The Property Owners' cross appeal alleges that various methods used by the Assessor violate the constitutional rule requiring that tax assessments be uniform. Even if these claims are interpreted as a constitutional challenge to the validity of a statute or rule, it does not follow that exhaustion is waived. Although facial challenges to the validity of a statute or ordinance need not proceed through administrative channels, as-applied challenges may be required to do so. In *McCuskey*, the Court recognized an exception where the property owner was challenging the validity of the zoning ordinance itself rather than a decision of the zoning authority. 123 Idaho at 660, 851 P.2d at 956; cf. *Regan*, 140 Idaho at 725, 100 P.3d at 619 (finding an adequate administrative remedy where the party was challenging the interpretation rather than the constitutionality of the statute at issue). In *White* the Court suggested that even a due process claim should be addressed first at the administrative level to avoid courts interfering with the subject matter jurisdiction of another tribunal. 139 Idaho at 400, 80 P.3d at 336

> ("Whether or not Monroc's request for a conditional use permit met the requirements of the statute or satisfied due process is an issue which should have been pursued before the county zoning authorities under the procedures of the [zoning] ordinance and [the governing statute], and not by the district court through a collateral attack."). Where the possibility exists that an alleged constitutional violation might be remedied on other than constitutional grounds, requiring exhaustion of administrative remedies is not futile.

Park, 143 Idaho at 581-82, 149 P.3d at 856-57 (emphasis supplied, brackets original). Thus, while facial challenges to a local ordinance are excused from exhaustion, as-applied challenges generally are not.

The Court reached the same conclusion in *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 870-72, 154 P.3d 433, 441-43 (2007) (Trout, J).

> Historically, this Court has not permitted a party to seek declaratory relief until administrative remedies have been exhausted, unless the party is challenging a rule's facial constitutionality. . . . A district court should not rule that a statute is unconstitutional "as applied" to a particular case until administrative proceedings have concluded and a complete record has been developed.

American Falls, 143 Idaho at 871, 154 P.3d at 442.[341]

Later in the opinion the Court noted that there are exceptions to the exhaustion requirement, even for as-applied challenges. "There are two exceptions to the rule that an as applied analysis is appropriate only if all administrative remedies have been exhausted: when the interests of justice so require and when an agency has acted outside of its authority." *American Falls*, 143 Idaho at 872, 154 P.3d at 443. The Court explained, however, that the second exception (action outside of agency authority) is not triggered simply by alleging a constitutional violation. That would provide an easy way out for any litigant.

> Although a district court has jurisdiction to decide constitutional issues, administrative remedies generally must be exhausted before constitutional claims are raised. *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 134, 106 P.3d 455, 460 (2005). Other jurisdictions have also

[341] See *American Falls, 143 Idaho at 870-72, 154 P.3d at 441-43*, for a good discussion of the difference between facial and as-applied challenges under Idaho law.

> refused to excuse a party from exhausting administrative remedies merely because the party raises a constitutional issue that no official in the proceeding is authorized to decide, reasoning that "to hold otherwise would mean that a party whose grievance presents issues of fact or misapplication of rules or policies could nonetheless bypass his administrative remedies and go straight to the courthouse by the simple expedient of raising a constitutional issue." *Foremost Ins. Co. v. Public Serv. Comm'n*, 985 S.W.2d 793, 795 (Mo. Ct. App. 1998). Thus, raising a constitutional challenge does not alleviate the necessity of establishing a complete administrative record.

American Falls, 143 Idaho at 871, 154 P.3d at 442.

The Court explained that trying to figure out whether an agency acted outside its authority is essentially a circular argument (except in those rare cases where the agency had no authority over the subject matter at all). Thus, a plaintiff may not avoid the exception merely by alleging that the agency's action is unlawful and therefore beyond the scope of its authority. That would be "a circuitous analysis," and exhaustion would never be required when challenging agency action. *American Falls*, 143 Idaho at 872, 154 P.3d at 443.

Accordingly, it concluded that it makes sense to apply this simple rule of thumb: "Thus, the exception for when an agency exceeds its authority does not apply unless the CM [Conjunctive Management] Rules are facially unconstitutional." *American Falls*, 143 Idaho at 872, 154 P.3d at 443.

In sum, if an agency acts in a manner entirely outside its regulatory authority (for instance, if a city or county sought to rule on the validity of a person's water rights), then the municipal action could be challenged without exhaustion—even in the context of an "as applied" challenge. But where the governmental entity has regulatory authority to act on the subject matter and the only question is whether it has exercised that authority properly in a particular "as applied" action, then exhaustion is required.

The conclusion that exhaustion is required (and the exceptions do not apply) in "as applied" constitutional challenges finds strong support in *White v. Bannock Cnty. Comm'rs*, 139 Idaho 396, 80 P.3d 332 (2003) (Burdick, J). In *White*, the Court rejected an end run around LLUPA by a neighbor challenging the issuance of a conditional use permit for an asphalt plant. Rather than pursuing an administrative appeal to Bannock County, Mr. White filed suit raising various as applied due process challenges to the zoning approval. The county sought dismissal for failure to

exhaust. The Court recognized that there are exceptions to the exhaustion requirement, but said they did not apply.

> Whether or not Monroc's request for a conditional use permit met the requirements of the statute or satisfied due process is an issue which should have been pursued before the county zoning authorities under the procedures of the ordinance and LLUPA, I.C. § 67-6501 et seq., and not by the district court through a collateral attack.

White, 139 Idaho at 400, 80 P.3d at 336. The Court continued:

> We also conclude that the recognized exceptions to the exhaustion doctrine do not apply to the present case where the question of a conditional use permit "is one within the zoning authority's specialization and when the administrative remedy is as likely as the judicial remedy to provide the wanted relief."

White, 139 Idaho at 402, 80 P.3d at 338 (citing *Fairway Development Co. v. Bannock Cnty.*, 119 Idaho 121, 124, 804 P.2d 294, 297 (1990)).

The *White* court did not discuss the exceptions or explain why they did not apply. Given that was an as-applied constitutional challenge (as opposed to a challenge to the ordinance itself), the implication is that the exceptions to exhaustion simply did not apply. Or, put differently, the exception for an agency acting outside its authority is not satisfied by an as-applied constitutional challenge. This conclusion is confirmed by the Court's citation and quotation of the *White* decision in *Park*, 143 Idaho at 582, 149 P.3d at 857, which drew a sharp distinction between facial and as-applied constitutional challenges.

The following cases have excused failure to exhaust. Each involved a facial challenge.

In *Service Employees Int'l Union, Local 6 v. Idaho Dep't of Health & Welfare*, 106 Idaho 756, 683 P.2d 404 (1984), an employee challenged his dismissal as a violation of equal protection. The Court threw out this "as applied" challenge on exhaustion grounds. "Our disposition of this case makes it unnecessary for us to address appellant's constitutional claims. Exhaustion of administrative remedies is generally required before constitutional claims are raised." *Service Employees*, 106 Idaho at 762, 683 P.2d at 410. Although the Court did not explain its reasoning, the

decision lends implicit support for the conclusion that the exceptions to exhaustion do not apply to as applied challenges.[342]

Likewise, the Court noted in *Palmer v. Bd. of Cnty. Comm'rs of Blaine Cnty.*, 117 Idaho 562, 564, 790 P.2d 343, 345 (1990): "This Court has frequently announced that except in unusual circumstances parties must exhaust their administrative remedies before seeking judicial recourse." No exception applied because "[h]ere, there is no challenge to the validity of Ordinance 77-5." *Id.* This, too, suggests that the exception applies only to facial challenges.

(c) Section 67-6521(2)(b) (exhaustion exception for "public use" challenges)

In 1996, the Legislature amended the judicial review provision of LLUPA to add a new exception to the exhaustion requirement. As further amended in 2010,[343] the provision reads:

> (2)(a) Authority to exercise the regulatory power of zoning in land use planning shall not simultaneously displace coexisting eminent domain authority granted under section 14, article I, of the constitution of the state of Idaho and chapter 7, title 7, Idaho Code.
>
> (b) An affected person claiming "just compensation" for a perceived "taking," the basis of the claim being that a final action restricting private property development is actually a regulatory action by local government deemed "necessary to complete the development of the material resources of the state," or necessary for other public uses, may seek a judicial determination of whether the claim comes within defined provisions of section 14, article I, of the constitution of the state of Idaho relating to eminent domain. Under

[342] Another case holding that exhaustion is required in constitutional challenges is *Cnty. of Ada v. Henry*, 105 Idaho 263, 266-67, 668 P.2d 994, 997-98 (1983). In this case, the Supreme Court rejected a § 1983 counterclaim (in an enforcement action initiated by the county) alleging that Ada County's zoning and subdivision ordinances violated due process and equal protection and constituted a taking of property. The Court declared that the plaintiffs failed to appeal an earlier County decision, concluding that "[s]uch exhaustion is required in a zoning matter." *Henry*, 105 Idaho at 267, 668 P.2d at 998. Despite this statement, the court proceeded to address the merits of the constitutional challenges, rejecting each of them. Thus, the court seems to have contradicted its own statement about requiring exhaustion—not to mention overlooking the fact that exhaustion rules do not apply to § 1983 actions.

[343] The provision was added in 1996, 1996 Idaho Sess. Laws, ch. 199, and amended slightly in 2010, 2010 Idaho Sess. Laws, ch. 175. The 2010 amendment was not substantive. It simply conformed the language to changes made elsewhere in LLUPA dealing with judicial review.

> these circumstances, the affected person is exempt from the provisions of subsection (1) of this section and may seek judicial review through an inverse condemnation action specifying neglect by local government to provide "just compensation" under the provisions of section 14, article I, of the constitution of the state of Idaho and chapter 7, title 7, Idaho Code [dealing with eminent domain].

Idaho Code § 67-6521(2).

The effect of the statute is to exempt from the judicial review provisions in section 67-6521(1) (including, presumably, the 28-day deadline) a party who alleges a taking and seeks a "determination of whether the claim comes within the defined provisions of section 14, article I, of the constitution of the state of Idaho relating to eminent domain." The referenced constitutional provision authorizes governmental entities and even private parties to condemn the property of others for any "use necessary to the complete development of the material resources of the state," which uses are "declared to be a public use." This sweeping power—which may be exercised by one private person against the property of another—has been recognized since 1906. *Potlatch Lumber Co. v. Peterson*, 12 Idaho 769, 88 P. 426 (1906); *Blackwell Lumber Co. v. Empire Mill Co.*, 28 Idaho 556, 155 P. 680 (1916), appeal dismissed, 244 U.S. 651. Constitutional provisions like this, allowing private property to be taken for other seemingly private uses (such as private development touted as urban renewal), have become increasingly controversial across the nation in the last few decades, culminating in the celebrated case of *Kelo v. City of New London*, 545 U.S. 469 (2005) (Stevens, J.). The Idaho statute, which pre-dates *Kelo*, was enacted at a time of growing public alarm over what is perceived by many as use of eminent domain to promote private, rather than public, goals.

The language of the statute is convoluted and difficult to parse, and its purpose and effect are not intuitively apparent. Accordingly, resort to legislative history would appear to be appropriate.

Thankfully, the legislative history is much clearer than the statute itself in showing that the measure is aimed at and limited to challenges based on the allegation that a governmental taking is not for a valid public purpose. The sponsor of the measure, Rep. Jim D. Kempton, provided testimony on the measure to the House State Affairs Committee on January 30, 1996. His testimony on House Bill 628 was summarized in the record as follows, "This proposed legislation amends local government land use planning statutes to the extent that administrative remedies need not be exhausted prior to judicial review if a taking claim involves court determination of public use under provisions of eminent domain." Virtually identical statements were made by Rep. Kempton before the same committee on February 13,

1996, and on March 1, 1996 to the Senate Local Government and Taxation Committee. This language also corresponds, word for word, to the official statement of purpose for the bill (H.B. 628). At the March 1, 1996 hearing, Rep. Kempton also handed out a packet of information including a copy of Idaho Const. art. I, § 14, with the relevant language underlined, as well as an exchange of correspondence with the Office of the Idaho Attorney General discussing this constitutional language. That is the extent of the legislative history. Thus the legislative history is consistent with the language of the statute itself which limits the new exhaustion exception to those rare situations in which a landowner contends that a regulatory action is not for a legitimate "public use." This conclusion is further reinforced by the agenda heading for the hearing on March 1, 1996, which said that the bill "[p]rovides remedy for zoning action was in essence an eminent domain action."

Plainly, then, the scope of the legislation is quite narrow. It applies to an "affected person" who asserts that his or her property is being taken for something other than a public purpose. This would include, for example, the property owner who is the target of an eminent domain proceeding facilitating a private development. Presumably, it would also include a neighboring property owner affected by a new development facilitated through eminent domain. But that is all it does. It does not provide a blanket exemption from the exclusive judicial review provisions of LLUPA for anyone alleging a regulatory taking in the context of their own development.

The fact that a similar exemption was not included in LLUPA's other judicial review provision, Idaho Code § 67-6519(4)—which applies to the permit applicant—reinforces the idea that this measure is intended to protect those on the receiving end of eminent domain proceedings—people like Susette Kelo whose home was demolished to make way for Pfizer—not to protect the developers themselves by providing an end-run around LLUPA. Indeed, the absence of a corresponding exemption from section 67-6519(4) presents at least an argument that "applicants" for permits under section 67-6519(4) are not covered, and that the exemption applies only to other "affected persons" under section 67-6521(2).

The Idaho Supreme Court touched briefly on this provision in *KMST, LLC v. Cnty. of Ada*, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003) (Eismann, J.). In *KMST*, the plaintiff (an applicant for a development permit) argued that this provision exempted it from exhaustion requirements. The Court quoted the statute in full and then concluded: "By its terms, that statute has no application to the impact fees imposed in this case. It only applies if the basis of the inverse condemnation claim is that a specific zoning action or permitting action restricting private property development is actually a regulatory action by local government deemed necessary to complete the development of the material resources of the state, or necessary for other public uses." *KMST*, 138 Idaho at 583, 67 P.3d at 62 (internal quotations omitted).

The Court also mentioned the provision in *Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 494, 300 P.3d 18, 26 (2013) (J. Jones, J.), noting that the plaintiff had not raised the issue.

(d) Section 1983 claims

Note that exhaustion is not required in § 1983 claims,[344] which are sometimes employed to challenge to land use decisions. While exhaustion is not required, a special form of ripeness (that seems much like exhaustion) is required. See discussion in section 24.CC at page 453.

(6) Waiver of constitutional rights: When must due process issues be raised below?

See also discussion in section 24.KK(1) at page 483.

A critical part of building the record is ensuring that objections that one intends to raise on appeal are presented to the decision maker below. "It is well established in Idaho that review on appeal is limited to those issues raised before the lower tribunal and that an appellate court will not decide issues presented for the first time on appeal." *Neighbors for a Healthy Gold Fork v. Valley Cnty.*, 145 Idaho 121, 131, 176 P.3d 126, 136 (2007) (rejecting a neighbor's complaint about violations of bulk and placement restrictions that had not been presented in the hearing below). This point was reiterated in *Johnson v. Blaine Cnty.*, 146 Idaho 916, 204 P.3d 1127 (2009).

The requirement that issues must be presented first to decision-making body makes sense where those issues relate to the substance of what is being decided. It is not so clear whether participants in public hearings must raise due process objections at the time of the hearing. Two cases suggest that such objections must be presented first to the city or county. In *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 148 P.3d 1247 (2006) (Burdick, J.), a developer received plat approvals from the county for a subdivision near Island Park Reservoir. A neighbor, Cowan, brought a judicial review appeal under LLUPA alleging, among other things, that the county violated his due process rights. Before addressing the merits, the Court noted that Cowan had presented his due process claims to the county, so that they were not waived. *Cowan*, 143 Idaho at 510-11, 148 P.3d at 1256-57. Note that in *Cowan*, it was not the applicant, but a neighbor, who complained of due process violations.

Cowan cited *Butters v. Hauser ("Butters I")*, 125 Idaho 79, 82, 867 P.2d 953, 956 (1993), for the proposition that "constitutional issues not raised before a board of commissioners will not be considered on appeal." *Cowan*, 143 Idaho at 511, 148 P.3d at 1257. This sweeping statement overlooks the fact that *Butters I* did not deal

[344] Section 1983 refers to the Civil Rights Act of 1871, 17 Stat. 13, now codified at 42 U.S.C. § 1983.

with due process violations, but rather with constitutional issues (such as the Supremacy Clause and the validity of controlling law) that went to the merits of the county commissioners'' decision and, obviously, should have been presented to them first. The second case that contains sweeping language suggesting that due process claims must be presented first to the county is *Floyd v. Bd. of Comm'rs of Bonneville Cnty.*, 137 Idaho 718, 52 P.3d 863 (2002). Here, too, the Court found that the complaining party in fact had presented the issue of bias to the board, and was therefore properly presented on appeal. *Floyd*, 137 Idaho at 725, 52 P.3d at 870.

Cowan and *Floyd* do not address the practical consideration that it may not be realistic to demand that parties raise challenges based on bias and the like to the very decision-makers who will be acting on the matter. Unlike judicial proceedings, there is no ready mechanism to deal with disqualification, nor any means to replace disqualified decision-makers. They also appear to be inconsistent with the discussion of exceptions to the exhaustion requirement discussed in section 24.L(5) at page 388.

Nor can *Cowan* and *Floyd* be reconciled with other cases in which due process claims have been decided on appeal without any mention of a requirement that they be raised first before the city or county. For example, *Eacret v. Bonner Cnty.*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004) (Burdick, J.) contains an extensive analysis of due process claims, concluding that due process was violated, without any apparent requirement that the issues be first presented at the administrative level. Likewise, in *Neighbors for a Healthy Gold Fork v. Valley Cnty.*, 145 Idaho 121, 131, 176 P.3d 126, 136 (2007), the Court analyzed and rejected various due process claims without any suggestion that they must first be presented to the county.

Failure to exhaust by failing to present a due process claim to the city or county decision maker may be thought of as a waiver. There is a powerful history of case law cautioning against waiver of constitutional rights. This jurisprudence may be traced to the U.S. Supreme Court's pronouncement, in *Smith v. United States*, 337 U.S. 137, 150 (1949), that "[w]aiver of constitutional rights, however, is not lightly to be inferred." That statement in *Smith* was quoted again by the Court in *Emspak v. United States*, 349 U.S. 190, 197 (1955). Our Supreme Court, too, has noted that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Abercrombie v. State*, 91 Idaho 586, 593, 428 P.2d 505, 512 (1967).

Much of the law of waiver arises in the context of criminal prosecutions. But it applies as well in the context of land use matters. Our Court of Appeals cited *Emspak* as support for this statement: "As a general rule, constitutional rights—including the right to due process—may be waived. However, the waiver of any fundamental constitutional right is never presumed. Rather the waiver must be affirmatively demonstrated." *Glengary-Gamlin Protective Ass'n v. Bird*, 106 Idaho 84, 90, 675 P.2d 344, 350 (Ct. App. 1983) (Burnett, J.) (citations omitted). In

Glengary, the Court emphasized that Bonner County could not assume, based on the developer's application for a conditional use permit for an expanded use of the prior non-conforming use, that it intended to waive its right to continue a prior non-conforming use.

(7) Preliminary plat is an appealable "final" decision

In *Johnson v. Blaine Cnty.*, 146 Idaho 916, 204 P.3d 1127 (2009), the Court dismissed an appeal by a neighboring landowner of a final plat approving a conditional use permit and planned unit development. The landowner failed to appeal the decision at the preliminary plat stage when the conditional use permit and planned unit development were first approved, subject to conditions. The Court found that the earlier decision was a final appealable decision under LLUPA. "[W]here preliminary plat approval and the issuance of permits places a developer in a position to take immediate steps to permanently alter the land before final approval, the decision is final for purposes of challenging the authorized action that permits the material alteration and can be reviewed on appeal." *Johnson v. Blaine Cnty.*, 146 Idaho at 924-25, 204 P.3d at 1135-36 (quoting *Stevenson v. Blaine Cnty.*, 134 Idaho 756, 760, 9 P.3d 1222, 1226 (2000)). Since the preliminary plat approval authorized the developer to construct three model homes, the decision was appealable. Having failed to appeal at that stage, the neighboring landowner could not appeal the final plat approval and the court has "no jurisdiction to review determinations made" in the unappealed decision. *Johnson v. Blaine Cnty.*, 146 Idaho at 926, 204 P.3d at 1137.

(8) Ripeness

Ripeness and standing both have to do with the extent that courts will entertain lawsuits dealing with "hypothetical" issues. It is easy enough to understand the difference between ripeness and standing. "'Standing' deals with the 'who' of a lawsuit; 'ripeness' deals with the 'when.'" Marla E. Mansfield, *Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers*, 68 N.D. Law Rev. 1, 68 (1992).

Telling the difference between ripeness and exhaustion, however, is trickier.[345] Sometimes courts seem to use the terms interchangeably.[346] In other instances,

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[345] "Both the requirement of ripeness and the requirement of exhaustion of administrative remedies are concerned with the timing of judicial review of administrative actions, but the two requirements are by no means the same. The ripeness focus is upon the nature of the judicial process—upon the types of functions that courts should perform. The exhaustion focus is upon the relatively narrow question of whether a party should be required to pursue an administrative remedy before going to court." Kenneth Culp Davis, *Ripeness of Governmental Action for Judicial Review*, 68 Harvard L. Rev. 1122, 1122 (1955).

[346] For example, in *Canal/Norcrest/Columbia Action Committee v. City of Boise* (*"Canal I"*), 136 Idaho 666, 671-72, 39 P.3d 606, 610-11 (2001) (emphasis supplied), the court said: "The

courts draw fine distinctions between the two. *E.g.*, *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (Blackmun, J.), in which the Court recognized that exhaustion does not apply to § 1983 actions but ripeness does. See discussion in section 28.H(1) at page 616.

As our Supreme Court has cautioned, the law of ripeness is "not subject to a mechanical standard." *Noh v. Cenarrusa*, 137 Idaho 798, 800, 53 P.3d 1217, 1219 (2002) (quoting *Harris v. Cassia Cnty.*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984)).

The U.S. Supreme Court outlined the law of ripeness in a 2003 decision:

> Ripeness is a justiciability doctrine designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149, 87 S. Ct. 1507, 18 L.Ed.2d 681 (1967); accord, *Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726, 732-733, 118 S. Ct. 1665, 140 L.Ed.2d 921 (1998). The ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction," *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57, n. 18, 113 S. Ct. 2485, 125 L.Ed.2d 38 (1993) (citations omitted), but, even in a case raising only prudential concerns, the question of ripeness may be considered on a court's own motion. *Ibid*. (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138, 95 S. Ct. 335, 42 L.Ed.2d 320 (1974)).
>
> Determining whether administrative action is ripe for judicial review requires us to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. *Abbott Laboratories, supra*, at 149, 87 S. Ct. 1507. "Absent [a statutory provision providing for immediate judicial

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issue before the Court is whether the approval of the conditional use permit of the planned unit development is final action by the City, and thus ripe for review. The district court held that until the design review was completed, the approval could not be deemed final because of a failure by CNC to exhaust all administrative remedies."

> review], a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the [Administrative Procedure Act (APA)] until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately ... .)" *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891, 110 S. Ct. 3177, 111 L.Ed.2d 695 (1990).

National Park Hospitality Ass'n v. DOI, 538 U.S. 803, 807-08 (2003).

The two-part test described above (fitness and hardship) is broken down further by the Supreme Court in *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998):

> In deciding whether an agency's decision is, or is not, ripe for judicial review, the Court has examined both the "fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." [*Abbott Laboratories v. Gardner*, 387 U.S.] at 149, 87 S. Ct., at 1515. To do so in this case, we must consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.

This three-part test is routinely followed by the federal courts. *E.g., San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1046 (10th Cir. 2011).

Frankly, the courts have been somewhat erratic in their application of the ripeness doctrine.[347] Any effort to sort out the precedent into neat and consistent principles will fail.

[347] "[T]he Supreme Court has fluctuated over an exceedingly wide range. In many cases the Court had decided issues which seem clearly abstract or hypothetical or remote, and in even more cases the Court has refused to decide issues which are real and present." Kenneth Culp Davis, *Ripeness of Governmental Action for Judicial Review*, 68 Harvard L. Rev. 1122, 1122 (1955). "While the general ripeness principle is not disputed, its application by the Supreme Court has resulted in a line of cases with seemingly inconsistent rulings. At least the grounds distinguishing

At its core, however, ripeness is a comprehensible and practical doctrine. "The basic principle of ripeness is easy to state: Judicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or remote." Kenneth Culp Davis, *Ripeness of Governmental Action for Judicial Review*, 68 Harvard L. Rev. 1122, 1122 (1955). As Idaho's Supreme Court has summarized it, "Ripeness asks whether there is any need for court action at the present time." *Boundary Backpackers v. Boundary Cnty.*, 128 Idaho 371, 376, 913 P.2d 1141, 1146 (1996) (Johnson, J.).

"[T]he Idaho case law suggests a two-part test: whether the issues are suitable for judicial resolution without the additional facts that would become available if adjudication were delayed and whether delay will itself be beneficial or detrimental." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 350 (1993).

The Idaho Supreme Court ruled that issuance of a conditional use permit is final agency action and ripe for review, despite the fact that the permit set out conditions requiring the holder to obtain other governmental approvals. *Canal/Norcrest/Columbia Action Committee v. City of Boise* (*"Canal I"*), 136 Idaho 666, 671-72, 39 P.3d 606, 610-11 (2001).

(9) Primary jurisdiction

The common law doctrine of primary jurisdiction applies where a plaintiff is entitled either to bring a lawsuit or to pursue administrative remedies, and chooses to pursue the lawsuit. Courts sometimes exercise their discretion not to hear such a case on the basis that where jurisdiction overlaps, the agency should have "primary jurisdiction." This doctrine is typically applied where the court determines that the agency has expertise on the question presented. By deferring to the agency, the courts encourage uniformity of administrative decisions based on agency expertise.

This doctrine is explored more fully in Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 343-44 (1993), and in *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 627, 586 P.2d 1068, 1071 (1978).

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them are too subtle for the commentators to appreciate." Ronald D. Rotunda & John E. Nowak, 1 *Treatise on Constitutional Law—Substance and Procedure*, § 2.13(d)(i) (2008). "Unfortunately, the doctrine of ripeness as interpreted by the courts has evolved into a confused morass of conflicting dogma that often leaves the landowner and government agencies with uncertainty about whether a case for damages is ripe." James S. Burling, *When Is a Claim Against the Government Ripe? Takings, Equal Protection, Due Process, and First Amendment Challenges*, ALI-ABA Course of Study at 37 (Apr. 22-24, 2004).

The doctrine of primary jurisdiction is related to, but technically different that the requirement of exhaustion. The distinction, however, is subtle.[348] Indeed, courts sometimes speak of the two in the same breath.[349] The doctrine doctrine's role appears to be waning, having been largely supplanted by the rule of exhaustion. Yet it continues to pop up from time to time. *E.g.*, *Grever v. Idaho Telephone Co.*, 94 Idaho 900, 499 P.2d 1256 (1972); *White v. Bannock Cnty. Comm'rs*, 139 Idaho 396, 400, 80 P.3d 332, 336 (2003).

(10) Mootness

The Ninth Circuit rejected an argument that a utility group's challenge to federal curtailment amendment was moot because at least one of the curtailment amendments had been fully performed. "Nonetheless, Bell's challenge is live because it is capable of repetition, yet evading review." *Bell v. BPA*, 340 F.3d 945, 948 (9th Cir. 2003) (citing *Energy Resources Conservation and Development Comm'n v. BPA*, 754 F.2d 1470, 1473 (9th Cir. 1985)).

(11) Motions to dismiss (Rule 12(b)) and motions for summary judgment (Rule 56)

This section explores how parties may raise and respond to threshold jurisdictional defenses such as standing, ripeness, exhaustion, and mootness. This discussion is based on the Federal Rules Civil Procedures and federal case law. However, Idaho's rules of civil procedure are essentially identical. This discussion is not applicable to a judicial review in Idaho state court. It is applicable to judicial review in federal court and to non-judicial review litigation in both state and federal court.

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[348] As noted above, the issue of primary jurisdiction arises where both the court and the agency has jurisdiction, but the plaintiff chooses to proceed with a lawsuit. The doctrine of exhaustion of administrative remedies, in contrast, arises where the plaintiff initially appeared before an administrative agency or local government, and now seeks judicial review of the entity's action. The doctrine of exhaustion (and its statutory codification in Idaho Code § 67-5271) poses the question of whether the plaintiff should have spent more time exhausting administrative remedies before seeking judicial review. "Primary jurisdiction thus is concerned with *initial* jurisdiction, while exhaustion focuses on when *review* of an agency action may be had." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 345 (1993) (emphasis original).

"The Court distinguished the doctrine of exhaustion, which governs the timing of judicial review of administrative action, from the doctrine of primary jurisdiction, which determines whether the court or agency should make the initial determination." *White v. Bannock Cnty. Comm'rs*, 139 Idaho 396, 401, 80 P.3d 332, 337 (2003).

[349] For example, in *Pounds v. Denison*, 115 Idaho 381, 383, 766 P.2d 1262, 1264 (1988), the court described the primary jurisdiction doctrine as a "corollary" to the exhaustion doctrine.

The defendant must plead all legal and factual defenses and objections in the first responsive pleading (typically, the answer).[350] At the responding party's option, however, seven defenses enumerated in Rule 12(b) may be raised earlier by motion before the first responsive pleading. If the party elects to file such a motion, it must be filed prior to the answer or other responsive pleading and the party must include all enumerated defenses and objections (except subject matter jurisdiction, which is never waived, or failure to state a claim, which may be raised at trial). Rule 12(g)(2) and (h). In addition, jurisdictional defenses may be addressed later in the proceeding through a Rule 12(c) motion for judgment on the pleadings or, except for defenses going to the court's subject matter jurisdiction, through a Rule 56 motion for summary judgment.

Rule 12(h) mandates that the defenses identified in Rule 12(b)(2) through (5) must be raised either in a 12(b)(1) motion or in the answer or other responsive pleading. Lack of subject-matter jurisdiction, however, is non-waivable and may be raised at any time and failure to state a claim may be raised at trial.[351] As for how a tardy but permissible defense of lack of subject matter jurisdiction may be presented, Wright and Miller offer this:

> A motion to dismiss an action for lack of subject matter jurisdiction under Rule 12(b)(1) is but one of the many ways the defense may be presented. For example, in a significant number of cases, federal courts have permitted a defending party to raise a lack of subject matter jurisdiction on a Rule 12(c) motion for judgment on the pleadings or on a Rule 12(f) motion to strike. And, in keeping with the policy set forth in Rule 12(h)(3) of preserving the defense throughout the action, it has long been well-established that the court's lack of subject

[350] Rule 8(b)(1)(A) requires that a party must state each of its defenses in its answer to a complaint. Rule 8(c) expressly identifies 19 affirmative defenses, requiring that these and any other "avoidance or affirmative defense" be plead in responding to any pleading.

[351] The Supreme Court contrasted the handling of tardy 12(b)(1) and 12(b)(6) motions: "The objection that a federal court lacks subject-matter jurisdiction, see Fed. Rule Civ. Proc. 12(b)(1), may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment. Rule 12(h)(3) instructs: 'Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.' See *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S. Ct. 906, 157 L.Ed.2d 867 (2004). By contrast, the objection that a complaint 'fail[s] to state a claim upon which relief can be granted,' Rule 12(b)(6), may not be asserted post-trial. Under Rule 12(h)(2), that objection endures up to, but not beyond, trial on the merits: 'A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading . . . or by motion for judgment on the pleadings, or at the trial on the merits.' *Cf. Kontrick*, 540 U.S., at 459, 124 S. Ct. 906." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506-07 (2006).

> matter jurisdiction may be asserted at any time by any interested party, either in the answer or in the form of a suggestion to the court prior to final judgment. After judgment a lack of subject matter jurisdiction may be interposed as a motion for relief from the judgment under Rule 60(b)(4).
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> . . .
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> However, some procedures occasionally employed to raise the Rule 12(b)(1) defense have been held to be improper. Federal courts have concluded that both a Rule 12(e) motion for more definite statement and, in most circumstances, a Rule 56 motion for summary judgment are inappropriate methods for challenging the district court's subject matter jurisdiction. Inasmuch as the first of these motions is designed to go to the comprehensibility of the challenged pleading and the second tests the merits of the plaintiff's actions and the Rule 12(b)(1) motion involves a matter in abatement, these decisions are technically correct, although perhaps somewhat restrictive. A more fruitful approach would be to treat the motion for summary judgment as a "suggestion" of lack of subject matter jurisdiction, a path that has been followed by several courts.

5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §1350 at 114-119, 134-37 (3rd ed. 2004) (footnotes omitted).[352]

[352] "The government's motion was framed as a Fed. R. Civ. P. 12(b)(1) motion to dismiss. Because that motion was made after the government's responsive pleading, it was technically untimely. The matter of subject matter jurisdiction, however, may be raised by the parties at any time pursuant to Fed. R. Civ. P. 12(h)(3), and the government's motion was thus properly before the court as a Rule 12(h)(3) suggestion of lack of subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3); *Csibi v. Fustos*, 670 F.2d 134, 136 n. 3 (9th Cir.1982); Wright & Miller § 1350, at 544-45, 548." *Augustine v. United States*, 704 F.2d 1074, 1075 n.3 (9th Cir. 1983). "The government's motion was framed as a Fed. R. Civ. P. 12(b) (1) motion to dismiss. Because that motion was made after the government's responsive pleading, it was technically untimely. The matter of subject matter jurisdiction, however, may be raised by the parties at any time pursuant to Fed. R. Civ. P. 12(h)(3), and the government's motion was thus properly before the court as a Rule 12(h)(3) suggestion of lack of subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3); *Csibi v. Fustos*, 670 F.2d 134, 136 n. 3 (9th Cir.1982); Wright & Miller § 1350, at 544–45, 548." *Kern Cnty. Farm Bureau v. Badgley*, 2002 WL 34236869, *18 n.3 (E.D. Cal. 2002). Note that Rule 12(h)(3) was amended in 2007 and no longer contains a reference to a "suggestion" by a party. The rule change, however, was without substantive effect. 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §1341 at 4 (3rd ed. 2011 pocket part)

We discuss two of the seven Rule 12(b) motions here: Rule 12(b)(1) provides for a motion to dismiss based on lack of subject matter jurisdiction. Rule 12(b)(6) authorizes a motion to dismiss based on failure to state a claim upon which relief can be granted. For most defenses, it is fairly clear which of these two would apply. Moreover, in many instances, picking the correct motion is not of any particular consequence.[353] On the other hand, as discussed below, there are differences in the way that factual assumptions are treated. Accordingly, labeling of the motion may make a difference in some circumstances.

Rule 12(b)(6) is reserved for defenses, other than those going to the court's jurisdiction, that appear on the face of the complaint. (Indeed, Rule 12(d) provides that if matters outside the pleadings are presented, the motion must be treated a Rule 56 motion for summary judgment.) Thus, a 12(b)(6) motion is appropriate where, even though the court has jurisdiction, it is evident on the face of the complaint that even if the plaintiff's allegations are true, they afford the plaintiff no relief under any legal theory. This conclusion might be based on an affirmative defense, such as the statute of limitations, but only if the facts giving rise to the defense are evident in the complaint.

In a Rule 12(b)(6) motion, "(1) the complaint is construed in the light most favorable to plaintiff, (2) its allegations are taken as true, and (3) all reasonable inferences that can be drawn from the pleading are drawn in favor of the pleader." 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §1357 at 417 (3rd ed. 2004) (footnote omitted). However, only "material allegations" and "well-pleaded facts" must be taken as true. The Court is not bound to accept the plaintiff's "legal conclusions" or "unwarranted inferences." Wright & Miller, § 1357 at 463-531.

Rule 12(b)(1) is the proper vehicle for noting the court's lack of subject matter jurisdiction. All Article III challenges fall plainly within this category, including Article III standing, mootness,[354] ripeness,[355] and sovereign immunity.[356] In contrast,

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[353] "Provided no prejudice is caused, courts often excuse a mislabeling of a Rule 12(b)(1) motion as a Rule 12(b)(6) failure to state a claim motion, and vice versa. In such an instance, the court will merely apply the appropriate legal standard and rule accordingly." Baicker-McKee, Janssen & Corr, *Federal Civil Rules Handbook*, at 417 (2007).

[354] "Because standing and mootness pertain to a federal court's subject-matter jurisdiction under Article III, they are properly raised in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), not Rule 12(b)(6)." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

[355] Typically, ripeness challenges arise under Article III and are properly addressed by Rule 12(b)(1). "Whether a claim is ripe for adjudication goes to a court's subject matter jurisdiction under the case or controversy clause of article III of the federal Constitution. Like other challenges to a court's subject matter jurisdiction, motions raising the ripeness issue are treated as brought under Rule 12(b)(1) even if improperly identified by the moving party as brought under Rule 12(b)(6). Unlike a Rule 12(b)(6) motion, a Rule 12(b)(1) motion can attack the substance of a complaint's

it appears that failure to exhaust administrative remedies should be raised by a 12(b)(6) motion, at least if the failure is evident on the face of the complaint.[357] *See Jones v. Bock*, 549 U.S. 199, 216 (2007).

The harder question is whether a challenge based on prudential standing (such as the zone of interests test) is properly raised under Rule 12(b)(1) or 12(b)(6). As noted by the Ninth Circuit in footnote 354, Rule 12(b)(1) pertains to subject matter jurisdiction under Article III. By negative implication, a prudential standing challenge, which is not based on Article III jurisdiction, should be brought under Rule 12(b)(6), not Rule 12(b)(1).

A 2004 decision reached a similar conclusion in a case where Congress had not granted standing:

> If a plaintiff has suffered sufficient injury to satisfy the jurisdictional requirement of Article III but Congress has not granted statutory standing, that plaintiff cannot state a claim upon which relief can be granted. See *Steel Co.*, 523 U.S. [83] at 97, 118 S. Ct. 1003 (statutory standing is not a jurisdictional question of whether there is case or controversy under Article III); *Guerrero v. Gates*, 357 F.3d 911, 920-21 (9th Cir. 2003) (where plaintiffs lacked standing under RICO, affirming district court's dismissal under Federal Rule of Civil Procedure 12(b)(6)). In that event, the suit should be dismissed under Rule 12(b)(6). *Guerrero*, 357 F.3d at 920-21.

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jurisdictional allegations despite their formal sufficiency, and in so doing rely on affidavits or any other evidence properly before the court. It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction. The district court obviously does not abuse its discretion by looking to this extra-pleading material in deciding the issue, even if it becomes necessary to resolve factual disputes." *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989) (citations omitted).

Note, however, that in addition to Article III ripeness requirements, the courts have created certain prudential ripeness requirements, such as those set out in *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), for federal taking claims. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 n.7 (1997). "The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction, but, even in a case raising only prudential concerns, the question of ripeness may be considered on a court's own motion." *National Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 808 (2003) (citation and internal quotations marks omitted).

[356] Likewise, sovereign immunity is a jurisdictional issue properly addressed by Rule 12(b)(1). Wright and Miller, Federal Practice and Procedure, § 1350 at 195-96.

[357] See discussion of whether exhaustion is jurisdictional in footnote 330 at page 376.

The Cetacean Community v. Bush, 386 F.3d 1169, 1175 (9th Cir. 2004) (Note that the *Guerrero* opinion was replaced by *Guerrero v. Gates*, 442 F.3d 697 (9th Cir. 2006)). The Second Circuit seems to be of the opposite view, however. *Thompson v. Cnty. of Franklin*, 15 F.3d 245 (2d Cir. 1994).

As noted above, in a Rule 12(b)(6) motion, the complaint's allegations are taken as true and the court may not consider evidence outside the complaint. (If evidence outside the pleadings is offered, the effect is to convert the motion to a Rule 56 motion.) In contrast, evidence outside the pleadings may sometimes be considered in conjunction with a Rule 12(b)(1) motion. Indeed, offering such evidence cannot convert the motion to a Rule 56 motion because "[i]f the court has no subject matter jurisdiction, it has no power to grant summary judgment or any other motion going to the merits of the action." *Federal Civil Procedure Before Trial* (Rutter Group), § 1423 at 14-8 (2011).

This is not always the case with a Rule 12(b)(1) motion. In the case of a 12(b)(1) motion, the answer depends on whether the jurisdictional attack is "facial" or "factual." Facial attacks under Rule 12(b)(1) mirror challenges under Rule 12(b)(6); they are limited to the pleadings which are taken as factually true. In contrast, in factual jurisdictional challenges under Rule 12(b)(1), the court may gather additional evidence and weigh it.[358] "The case law permits the defendants to challenge the truth and sufficiency of the jurisdictional allegations in a 12(b)(1) motion on a standard similar to that used for summary judgment." *Public Lands for the People, Inc. v. U.S.D.A.*, 2010 WL 3069934 at *24 (E.D. Cal. 2010).

> In *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004), we explained the difference between facial and factual attacks as follows: "In a facial attack, the

[358] "Rule 12(b)(1) jurisdictional attacks can be either facial or factual. . . . With a factual Rule 12(b)(1) attack, however, a court may look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment. It also need not presume the truthfulness of the plaintiffs' allegations." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (citing 2 *Moore's Federal Practice*, ¶ 12.30[4], at 12-38 (1999); other citations omitted) (finding nonetheless that the plaintiffs had standing to challenge HUD's actions involving public housing). Conversely, in the case of "factual (or substantive) subject matter jurisdiction attacks, the court will *not* presume that plaintiff's factual allegations are true, and will not accept conclusory allegations as true but may instead weight the evidence before it and find the facts, so long as this fact finding does not involve the merits of the dispute. In so doing, the court enjoys broad discretion. The court may receive and consider extrinsic evidence. The court must permit the pleader to respond with supporting evidence and, where necessary, may convene an evidentiary hearing or plenary trial to find the facts." Baicker-McKee, Janssen & Corr, *Federal Civil Rules Handbook*, at 415-16 (2007). *Accord, Thornhill Publ'g Co., Inc. v. General Telephone & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) (in a factual, aka "speaking motion," Rule 12(b)(1) challenge, no presumption of truthfulness attaches to the plaintiff's allegations, the court may investigate the merits of disputed facts going to jurisdiction, and the plaintiff has the burden of proving that jurisdiction exists).

> challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id*. at 1039. If the moving party converts "the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Id*. (quoting *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003), *cert. denied*, 541 U.S. 1009, 124 S. Ct. 2067, 158 L. Ed. 2d 618 (2004)).
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> In this case, the defendants argue that the allegations in Wolfe's complaint are insufficient on their face to establish subject matter jurisdiction. Whether subject matter jurisdiction exists therefore does not depend on resolution of a factual dispute, but rather on the allegations in Wolfe's complaint. We assume Wolfe's allegations to be true and draw all reasonable inferences in his favor.

Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004).

These standards for facial versus factual challenges to jurisdiction under Rule 12(b)(1) are summarized in a 2010 district court decision out of the Ninth Circuit:

> The party seeking to invoke the jurisdiction of the federal court has the burden of establishing that jurisdiction exists. *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278, 57 S. Ct. 197, 81 L. Ed. 183 (1936); *Assoc. of Medical Colleges v. United States*, 217 F.3d 770, 778-79 (9th Cir. 2000). On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), the standards that must be applied vary according to the nature of the jurisdictional challenge.
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> If the challenge to jurisdiction is a facial attack, *i.e.*, the defendant contends that the allegations of jurisdiction contained in the complaint are insufficient on their face to demonstrate the existence of jurisdiction, the plaintiff is entitled to safeguards similar to those applicable when a Rule 12(b)(6) motion is made. See Sea *Vessel Inc. v. Reyes*, 23 F.3d 345, 347 (11th Cir. 1994), *Osborn v.*

> *United States*, 918 F.2d 724, 729 n. 6 (8th Cir. 1990); see also 2-12 Moore's Federal Practice-Civil § 12.30 (2009). If the challenge to jurisdiction is made as a "speaking motion" attacking the truth of the jurisdictional facts alleged by the plaintiff, a different set of standards must be applied. *Thornhill Pub. Co., Inc. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Where the jurisdictional issue is separable from the merits of the case, the district court is free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983); *Thornhill*, 594 F.2d at 733. "In such circumstances '[n]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.' " *Augustine*, 704 F.2d at 1077 (quoting *Thornhill*, 594 F.2d at 733).
>
> > However, where the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial.
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> *Id*. (citing *Thornhill*, 594 F.2d at 733-35 and 5 C. Wright & A. Miller, Federal Practice & Procedure § 1350, at 558 (1969 & Supp. 1987)). On a motion going to the merits, the court must employ the standard applicable to a motion for summary judgment. *Farr v. United States*, 990 F.2d 451, 454 n. 1 (9th Cir. 1993), *cert. denied*, 510 U.S. 1023, 114 S. Ct. 634, 126 L.Ed.2d 592 (1993).

Public Lands for the People, Inc. v. U.S.D.A., 2010 WL 3069934 at *4-5 (E.D. Cal. 2010).

An example may help in understanding the difference between a facial and a factual challenge. Suppose a plaintiff alleged Article III standing on the basis that her property taxes are likely to rise as a result of defendant's action. If the defendant challenged plaintiff's standing on the basis that this is a mere generalized injury insufficient to confer standing, that would be a facial challenge. The Court would presume that defendant's actions would result in increased property taxes and proceed to determine whether this afforded standing. In contrast, if defendant

challenged plaintiff's standing on the basis that she did not actually own the property in question, the court, in its discretion, might allow additional evidence, and even discovery, to determine whether plaintiff's ownership allegation was true.

Note also that where the factual issue both establishes jurisdiction and determines the merits of the case, a special rule applies. In that circumstance, the case should not be dismissed on Rule 12(b)(1) grounds. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039-40 (9th Cir. 2004) (whether grass burning constituted illegal disposal of solid waste went to both the court's jurisdiction and the merits of the RCRA claim).

Thus, in defending a standing challenge, under Rule 12(b)(1), a plaintiff would seek, if possible, to characterize the challenge as facial, in order to limit extrinsic evidence and require the court to accept the plaintiff's factual allegations as true. If the defendant's challenge were based solely on prudential standing, the plaintiff might contend that the motion should be treated as a Rule 12(b)(6) motion, in which case the factual allegations also would be accepted as true. While a court may convert a Rule 12(b)(6) motion to a Rule 56 motion (pursuant to Rule 12(d)), this ordinarily happens only when matters outside the pleadings are presented (typically in the form of affidavits attached to the motion to dismiss). See discussion in section 18.E(1)(a)(x) at page 230 regarding the differing treatment of factual matters in standing challenges brought under Rule 12(b) versus Rule 56.

M. Declaratory actions and the rule of "exclusive" review under LLUPA.

Note: The reader should also see the discussion of exceptions to the exhaustion requirement in section 24.L(4) beginning on page 384.[359]

(1) The general rule is that collateral attacks are not allowed where judicial review is available under LLUPA.

A separate statute (not part of LLUPA or IAPA) authorizes actions for declaratory judgment.[360] Uniform Declaratory Judgment Act, Idaho Code §§ 10-

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[359] The authors, by the way, find it confusing to discuss the permissibility of collateral attack under the rubric of exhaustion. Both federal and Idaho courts, however, employ the term "exhaustion" in discussing not only the obligation to exhaust administrative remedies, but also judicial remedies. Thus, they sometimes will speak of failure to exhaust when a collateral attack (*e.g.*, via declaratory judgment action) is initiated in lieu of a judicial review of a completed administrative action.

For instance, in *McCuskey v. Canyon Cnty.* ("*McCuskey I*"), 123 Idaho 657, 661, 851 P.2d 953, 957 (1993), Justice Bistline described the failure "to appeal certain adverse zoning decisions" under LLUPA in the context of the law of exhaustion. The Court did so again in *Park v. Banbury*, 143 Idaho 576, 149 P.3d 851 (2006). That case involved parties who, having missed the deadline for a judicial review, launched a collateral attack on a decision of the county commission sitting as a board of equalization. Apparently, the court considers the petition for judicial review itself one of the administrative remedies that must (in some cases) be exhausted. Indeed, the court said as much in *Blanton v. Canyon Cnty.*, 144, 148 Idaho 718, 170 P.3d 383, 387 (2007) ("We held [in *Park*] that their action must be dismissed for failure to exhaust their administrative remedy of direct appeal to the district court."). Likewise, *Monroe v. Pape*, 365 U.S. 167 (1961), and its progeny dealing with the non-applicability of the exhaustion requirement to § 1983 actions uses the term "exhaustion" to describe state judicial remedies, not just administrative remedies.

[360] The IAPA also contains two authorizations for administrative "declaratory rulings" by the agency. Idaho Code § 67-5232 (with respect to the applicability of statutes and rules); Idaho Code § 67-5255 (with respect to the applicability of orders).

Declaratory rulings are final agency action subject to judicial review. Idaho Code §§ 67-5232(3) and 67-5255(3). Accordingly, the rulings are *res judicata* as to the issues addressed and are binding on the parties to the proceeding. However, as to non-parties, they are precedential only (similar to the effect of other contested cases). Declaratory rulings "do not have the force and effect of law on the general public." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 285 n.52 (1993).

In addition to its provisions for declaratory rulings (by agencies), the IAPA contains its own authorization for judicial declaratory relief actions seeking a determination as to the "validity or applicability of a rule." Idaho Code § 67-5278. Of course, planning and zoning decisions are not "rules" and are not issued by "agencies." It is not necessary to explore whether the ambiguous judicial review provisions of LLUPA (Idaho Code §§ 67-6517(4) and 67-6521(1)(d)) incorporate the declaratory action authority in the IAPA and make it applicable municipal land use decisions. The availability of the stand-alone authority for declaratory actions (Idaho Code §§ 10-1201 to 10-1217) moots the question. A terse *per curium* decision in *Shobe v. Bd. Of Comm'rs of Ada Cnty., Idaho,*

1201 to 10-1217. See also Idaho R. Civ. P. 57 (declaratory judgments). (Note that this act does not confer standing. See discussion in 18.I at page 246.)

Despite the existence of the Uniform Declaratory Judgment Act, the judicial review provisions of LLUPA and IAPA are viewed as the exclusive means of review of quasi-judicial land use decisions (in the absence of special circumstances). Thus, declaratory actions and special writs[361] are not ordinarily available to parties disappointed by land use decisions.

One might ask, by the way, why anyone would want to do an end run around LLUPA. Those who bring independent actions typically do so for one of the following reasons: (1) they missed the 28-day deadline for filing a LLUPA action, (2) broader discovery is available outside of LLUPA, or (3) they seek damages (which are not available under LLUPA) or other specialized claims such as takings or § 1983.

In *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984) (Bistline, J.), Mr. Bone filed an application to re-zone his property to allow commercial use, noting that the land use map designated the area as commercial. The city denied the application, finding that commercial use would be incompatible with surrounding uses and that Lewiston already had an over-abundance of commercial properties. Rather than appeal the denial under LLUPA, Mr. Bone filed a civil action seeking declaratory relief and a writ of mandamus. (The decision does not indicate that Mr. Bone missed the deadline for judicial review. Indeed, it suggests that he did not, because ultimately the matter was remanded for further proceedings thus allowing the plaintiff to pursue the matter via judicial review.)

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126 Idaho 654, 655, 889 P.2d 88, 89 (1995) states: "Moreover, we find no procedural mechanism in either the indigency statutes or the Administrative Procedures Act which permits the Commissioners to issue a declaratory ruling on a legal issue." As noted, there are provisions in the IAPA authorizing declaratory rulings. It would have been helpful if the Court had noted this and then explained that the IAPA does not apply to counties (see footnote 279 at page 334).

Idaho's statutory provisions on declaratory rulings have counterparts in the federal APA, 5 U.S.C. § 554(e), as well as in most states. For example, Utah's statute (which uses the terminology "declaratory orders") is considerably more comprehensive. Utah Code § 63G-4-503.

[361] Noted commentators Michael Gilmore and Prof. Dale Goble have stated: "The APA explicitly authorizes two forms of review: a petition for review and a declaratory judgment. The Act is not intended to preclude other forms of review such as common law prerogative writs of certiorari, mandamus, and prohibition." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 351 (1993) (footnotes omitted). That may be true for review of other agency actions. However, as noted below, this is not the case for challenges to quasi-judicial actions authorized under LLUPA. Generally speaking, if judicial review is authorized under LLUPA, that is the exclusive remedy. Other forms of review are available only to fill in the gap when LLUPA does not provide judicial review.

The Court admonished the plaintiff for trying to "bypass" the IAPA review standards, declaring that LLUPA "is the exclusive source of appeal for adverse zoning actions." *Bone*, 107 Idaho at 848, 693 P.2d at 1050. The Court explained:

> We find § 67-5215(b-g) [the former judicial review provisions of IAPA incorporated by LLUPA] to be a complete, detailed, and exhaustive remedy upon which an aggrieved party can appeal an adverse zoning decision. We also find that the legislature's intent in outlining the scope of review and the bases upon which a court may reverse a governing body's zoning decision to be clear. We find no evidence that the legislature intended other avenues of appeal to be available or that bases for reversal or the scope of review should be broader than that found in § 67-5215(b-g). Thus, we hold that § 67-5215(b-g) is the exclusive source of appeal for adverse zoning decisions. To hold otherwise would render the mandate of § 67-5215(b-g) meaningless, for it would allow an applicant to bypass § 67-5215(b-g) by seeking different avenues of appeal with different levels of judicial scrutiny.

Bone, 107 Idaho at 847-48, 693 P.2d at 1049-50.

Bone did not directly address the exceptions allowing collateral attack of a zoning decision. This is probably because the Court analyzed the matter mechanically under the prior IAPA, rather than as a common law exhaustion case. Nevertheless, the Court recognized implicitly the exception for a challenge to the validity of a statute. Mr. Bone had argued that he was not appealing the adverse rezone, but was bringing an independent declaratory judgment action seeking an interpretation of the statute. The Court disagreed, declaring: "Such an argument exalts form over substance. The fact is that Mr. Bone applied for a rezoning." *Bone*, 107 Idaho at 849, 693 P.2d at 1051. The Court concluded that the essence of his case is "appealing the City's decision." *Id.* Despite this ruling, the Court went on to reach the merits of the case, offering guidance on the nature and role of comprehensive plans in zoning decisions and remanding the matter for further proceedings.

The Court reached same result in *Curtis v. City of Ketchum*, 111 Idaho 27, 720 P.2d 210 (1986) (Bakes, J.). There a subdivision applicant missed the deadline for filing a LLUPA appeal and instead brought an inverse condemnation action against the city.[362] Citing *Bone*, the Court declared:

[362] The case is procedurally complicated. The lawsuit was filed within the deadline (60 days at the time) for a LLUPA appeal, challenging denial of a subdivision application issued on

> Appellant's arguments are nothing more than a challenge of the City's quasi-judicial action denying his subdivision. As such, the express provisions of I.C. §§ 67–6519, -6521(d), limit appellant's remedy to seeking judicial review of the city council's action pursuant to I.C. § 67–5215(b)-(g). Both I.C. §§ 67–6519 and 67–6521(d) require that such review be sought within 60 days [now 28 days] of the city council's action. In *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984), we held that I.C. § 67–5215(b)-(g) provided parties aggrieved by a zoning commission or city council's decision relative to zoning issues with a "complete, detailed, and exhaustive remedy . . . ." *Bone v. City of Lewiston*, 107 Idaho at 847, 693 P.2d at 1049.

Curtis, 111 Idaho at 32-33, 720 P.2d at 215-216 (ellipses original). As in *Bone*, the *Curtis* Court approached the matter as one of statutory construction, finding that the Legislature intended that LLUPA review would be the exclusive means of challenging the merits of a quasi-judicial action. The *Curtis* court noted that constitutional questions (such as inverse condemnation) could be raised in a LLUPA appeal, and therefore must be:

> Indeed, one of the express bases upon which review may be had pursuant to I.C. § 67–5215 is that the governing body's actions (e.g., the city council's decision) are "in violation of constitutional . . . provisions." I.C. § 67–5215(g)(1). Again, as stated in Bone: "We find no evidence that the legislature intended other avenues of appeal to be available . . . . [Therefore,] we hold that § 67–5215(b)-(g) is the exclusive source of appeal for adverse zoning decisions." *Bone v. City of Lewiston*, 107 Idaho at 847, 848, 693 P.2d at 1049, 1050.

Curtis, 111 Idaho at 33, 720 P.2d at 216.

November 6, 1978. The case was filed by way of complaint seeking damages and writ of mandate, rather than petition for judicial review, but that seems not to have been an issue for either the trial court or the appellate court, both of which treated it as a judicial review. See, *e.g.*, *Curtis*, 111 Idaho at 32 n.10, 720 P.2d at 215 n.10. The "heart of appellant's case," however, dealt with a subsequent subdivision application that was denied in 1982, which was not challenged within 60 days. *Id*. It was this subsequent challenge which the court rejected based on failure to seek timely judicial review under LLUPA. That application was denied on the basis of a new zoning ordinance (adopted while the litigation was pending, but before the 1982 subdivision application) prohibiting construction on slopes exceeding 25 percent. The plaintiff alleged this constituted an inverse condemnation of his property.

The Court's unwillingness to allow end-runs around LLUPA review is reinforced by the decision in *Regan v. Kootenai Cnty.*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004) (Schroeder, J.). This case dealt primarily with exhaustion of administrative remedies, but also touched on failure to utilize judicial review under LLUPA.

In *Regan*, the plaintiffs constructed a private airstrip on their property, in violation of the zoning ordinance. Shortly thereafter, the Kootenai County Planning and Zoning Department sent them a letter informing them that the airstrip was not a permitted use. The letter set out three options, one of which was an administrative appeal of the Planning Director's conclusion, pursuant to the County's zoning ordinance. That, in turn, would have been reviewable under LLUPA (under then-existing law) as a quasi-judicial action. Instead, the Regans immediately filed suit seeking declaratory relief. The trial court ruled on the merits in favor of the county and issued an order prohibiting the Regans from using the airstrip.

On appeal, the Idaho Supreme Court raised the issue of exhaustion of administrative remedies *sua sponte*. *Regan*, 140 Idaho at 723, 100 P.3d 617. It then ruled that it lacked jurisdiction to hear the matter.

Though the opinion focused on exhaustion of administrative remedies and the exceptions thereto (which it found not to be applicable), it also drew on and reinforced the teaching of *Bone*.

> In *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984), this Court concluded that Bone had improperly bypassed the exclusive source of appeal for adverse zoning decisions by seeking a declaratory judgment and writ of mandamus. Similarly, the Regans have attempted to bypass the administrative process for reviewing the Planning Director's interpretation of the Kootenai County zoning ordinance. While the Regans' complaint for declaratory relief sought an interpretation of the zoning ordinance rather than judicial review of the Planning Director's interpretation, such a distinction "exalts form over substance." See *Bone*, 107 Idaho at 849, 693 P.2d at 1051.

Regan, 140 Idaho at 725, 100 P.3d at 619. Thus, the Court appears to be saying that the Regans should not only have exhausted their administrative remedies but their judicial remedies under LLUPA.

The exclusivity of judicial review is not unique to LLUPA. In *Cobbley v. City of Challis* ("*Cobbley II*"), 143 Idaho 130, 133-34, 139 P.3d 732, 735-36 (2006) (J. Jones, J.), the Court held that a petition for judicial review pursuant to Idaho Code

§ 40-208 (the public road statute) is the exclusive means to challenge a county's decision concerning the validation of a road. Citing *Bone*, the Court concluded that a properly filed petition for judicial review is the sole means of challenging a road validation decision.[363]

In *Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 300 P.3d 18 (2013) (J. Jones, J.), the Idaho Supreme Court ruled that failure to seek judicial review bars a collateral attack on a permit condition mandating payment of fees that are alleged to be unconstitutional taxes.

> As the County points out, Buckskin failed to seek judicial review of the requirement in its CUP that the CCA [Capital Contribution Agreement] received the County Board's approval. If Buckskin truly was aggrieved by this requirement, it had the ability to seek judicial review. By failing to do so, it cannot now complain. Buckskin states that the CCA and RDA [Road Development Agreement] are not "permits" and therefore were not reviewable under LLUPA. Indeed, the agreements are not permits but voluntary agreements entered into by the parties. However, the requirement that the CCA receive Board approval is a condition attached to the CUP and is a matter that could have been challenged on judicial review. It is obvious that Buckskin made no such challenge and therefore did not exhaust its administrative remedies.

Buckskin, 154 Idaho at 493, 300 P.3d at 25.

Buckskin was the first Idaho case to apply this jurisdictional deadline in the context of impact fees imposed on a conditional use permit, but courts in other jurisdictions have done so before.[364] In *Sold, Inc. v. Town of Gorham*, 868 A.2d 172

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[363] In *Cobbley II*, the Court was called upon to untangle a procedural mess created by *pro se* plaintiffs in a road case. The Cobbleys had sued the City of Challis contending that the City owned and was required to maintain a road outside of the City in front of their home. Meanwhile, the County undertook validation proceedings on the road, in which the Cobbleys participated. In the validation proceeding, the County concluded that the County, not the City, owned the road. The Cobbleys failed to properly appeal the validation decision. Instead, they mistakenly filed a pleading in their ongoing lawsuit with the City challenging the County's decision. It was in this context that Court ruled that a properly filed petition for judicial review is "the exclusive means by which a validation decision can be challenged." *Cobbley II*, 143 Idaho at 133, 139 P.3d at 735.

[364] The argument also was presented as a defense by the City of McCall in *Hehr v. City of McCall*, 155 Idaho 92, 305 P.3d 536 (2013) and *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013), but the Idaho Supreme Court decided those cases in the city's favor on other grounds never reaching the issue of the defendants' failure to seek judicial review.

(Maine 2005), the Supreme Judicial Court of Maine considered a declaratory judgment action brought by a group of developers who had paid impact fees under an allegedly illegal ordinance (alleging an unconstitutional taking among other things). The Court held that the action was barred by the plaintiffs' failure to challenge the city's approval of their subdivisions, which included the payment of the impact fees as a condition, within 30 days as provided under state law. "When the time to file an appeal expired, the conditional approvals, including the impact fee requirements, became final, and were not subject to challenge." *Sold Inc.* at 176 (citation omitted).

Similarly, in *James v. Cnty. of Kitsap*, 115 P.3d 286 (Wash. 2005), the Washington Supreme Court, addressed claims from developers who sought refunds of impact fees paid during the time that the county's ordinances were not in compliance with state law. (Unlike *Sold*, this case did not include a takings claim.) In *James*, the county appealed from a summary judgment that awarded the developers more than three million dollars in refunds arguing, inter alia, that the developers' claims were barred by their failure to challenge the fees within 21 days of when the permits were issued, as required under Washington's Land Use Petition Act ("LUPA"). The *James* Court agreed with the county. "[W]e find that the imposition of impact fees as a condition on the issuance of a building permit is a land use decision and is not reviewable unless a party timely challenges that decision within 21 days of its issuance." *James* at 292. The Court rejected the developers' argument that the superior court had original jurisdiction to hear their claims:

> The Developers here were provided, by statute, with several avenues to challenge the legality of the impact fees imposed by the County and comply with the procedural requirements under chapter 82.02 RCW and LUPA. . . . However, rather than complying with either of these procedures provided by statute, the Developers waited almost three years before challenging the legality of the impact fees imposed by the County. The Developers have not complied with the procedures provided under LUPA and RCW 82.02.070(4) and are barred under LUPA from challenging the legality of the fees imposed.

James at 293-94. The *James* court went on to describe the public policy considerations that supported limiting challenges to land use decisions to the procedures available under the statute.

> As we stated in [*Chelan Cnty. v.*] *Nykreim*, this court has long recognized the strong public policy evidenced in LUPA, supporting administrative finality in land use decisions. 146 Wash.2d at 931–32, 52 P.3d 1. The

> purpose and policy of the law in establishing definite time limits is to allow property owners to proceed with assurance in developing their property. Additionally, and particularly with respect to impact fees, the purpose and policy of chapter 82.02 RCW in correlation with the procedural requirements of LUPA ensure that local jurisdictions have timely notice of potential impact fee challenges. Without notice of these challenges, local jurisdictions would be less able to plan and fund construction of necessary public facilities. Absent enforcement of the requirements under chapter 82.02 RCW and LUPA, local jurisdictions would alternatively be faced with delaying necessary capacity improvements until the three-year statute of limitations for challenging impact fees had run.

James at 294.

(2) Exception: Challenges to the validity of the ordinance

Declaratory judgment actions may also be employed to challenge the validity of the underlying zoning ordinance, even in a quasi-judicial setting. Early cases, dating at least to 1953, established this principle in the context of challenges to property tax assessments.[365] More recently, the Court has addressed the exception to the exhaustion requirement in the context of land use decisions.

In *Jerome Cnty. v. Holloway*, 118 Idaho 681, 799 P.2d 969 (1990) (McDevitt J.), a dairy operator applied for a special use permit to operate a dairy. The permit was issued by the planning and zoning commission (following an earlier

[365] In *Security Abstract & Title Co. v. Leonardson*, 74 Idaho 528, 264 P.2d 1027 (1953), the court allowed a collateral attack against the assessment of property taxes by the Ada County tax assessor. Ada County insisted that the case should be dismissed because the taxpayer had not exhausted administrative remedies, but the court responded: "If the respondent assessor had no authority under the conditions presented and complained of, to make an ad valorem assessment against appellant's property, then the tax is void and can be challenged in the manner here done." *Security Abstract* at 531, 264 P.2d at 1028-29.

In *V-1 Oil Co. v. Cnty. of Bannock*, 97 Idaho 807, 810, 554 P.2d 1304, 1307 (1976), a taxpayer sought a declaratory judgment that the county's tax assessment was excessive. The Court dismissed the suit, explaining: "Actions for declaratory judgment are not intended as a substitute for a statutory procedure and such administrative remedies must be exhausted." That is the general rule. But the court also took pains to explain why the general rule applied and the exception did not: "Those allegations simply allege excessive payments on appellant's personal property. There is no contention that the assessor lacked authority to assess the property in some amount and we have repeatedly held such questions must be pursued in the statutory administrative process designed for that purpose prior to seeking relief in the district court by way of a declaratory judgment or refund." *V-1 Oil* 97 Idaho at 809, 554 P.2d at 1306 (emphasis supplied).

appeal by the neighbor and remand) with a restriction prohibiting placement of the dairy within 1,000 feet of other property owners based on an ordinance amended two years earlier. This time the dairy operator appealed to the County, contending that the ordinance imposing the 1,000 foot rule was void because it was adopted without proper notice. Rather than act on the appeal, the county filed a civil action seeking a declaratory order respecting the validity of the ordinance amendment. The district court invalidated the amended ordinance and went on to rule that the prior ordinance (which was applicable to the dairy operator) does not require the 1,000 foot setback and should be issued.

The Idaho Supreme Court upheld the challenge to the ordinance, but held that it was beyond the Court's jurisdiction to rule on the permit itself (which was still pending). "While the district court had jurisdiction to issue its declaratory judgment regarding the validity of the 1985 amendment to the zoning ordinance, '[i]t is the county through its planning and zoning commission and the county commission that should make the decision whether a special use permit should be issued. Only after the exhaustion of remedies provided under [LLUPA] and under local ordinances may an unsuccessful applicant or an affected person seek judicial review.'" *Holloway,* 118 Idaho at 685, 799 P.2d at 973 (quoting *Palmer v. Bd. of Cnty. Comm'rs*, 117 Idaho 562, 565, 790 P.2d 343, 346 (1990).

The holding in *Holloway* was reiterated in *Foster v. City of St. Anthony*, 122 Idaho 883, 887-88, 841 P.2d 413, 417-18 (1992). The *Foster* case involved consolidated challenges to actions by the city in leasing a city-owned hospital to the State of Idaho for use as a correctional facility. Some of the parties, referred to collectively as Zundel, brought a declaratory judgment action and request for injunctive relief challenging the city's comprehensive plan and zoning ordinance. Zundel had not been a party to an earlier special use permit proceeding and had not appealed from it. The city contended that Zundel therefore had failed to exhaust his administrative remedies. The Idaho Supreme Court disagreed, explaining that "the district court has jurisdiction to entertain a declaratory judgment action challenging the validity of the enactment of amendments to zoning ordinances, even though the party challenging the validity has not exhausted administrative remedies." *Foster*, 122 Idaho at 887-88, 841 P.2d at 417-18.

In *McCuskey v. Canyon Cnty.* ("*McCuskey I*"), 123 Idaho 657, 660, 851 P.2d 953, 956 (1993) (Bistline, J.), the Idaho Supreme Court drew heavily on the *Holloway* case in a decision that reinforced the principle that a challenge to the validity of the zoning ordinance may be pursued by a separate civil action.

McCuskey dealt with a downzone of property. When the landowner discovered that the county had rezoned land including his property some years earlier without providing notice to him, he filed a "petition for clarification of zoning status." The county shortly thereafter issued a stop work order, saying that its earlier

issued building permit for a Circle K had been issued in error. In response, the landowner withdrew his petition to clarify and filed a civil action seeking declaratory judgment and writ of mandate, based on the fact that the downzone ordinance (which was adopted in 1979) was void because McCuskey had received no notice (as required by LLUPA, Idaho Code § 67-6511(b)). The Court of Appeals, citing *Bone v. City of Lewiston*, 107 Idaho 844, 847, 693 P.2d 1046, 1049 (1984), ruled that LLUPA was the exclusive means of review available to McCuskey.[366] The Idaho Supreme Court reversed, distinguishing *Bone*, saying that the case was more like *Holloway*:

> In this case, McCuskey is challenging the *enactment* of the 1975 comprehensive plan and the 1979 zoning ordinance. Thus, he is not arguing that the authorities made the wrong zoning decision, but rather he challenges the validity of the zoning ordinance.

McCuskey I, 123 Idaho at 660, 851 P.2d at 956 (emphasis original).

In so ruling, the Court relied on *Holloway* for the proposition that challenges to the validity of an ordinance are appropriate in a civil action, but "appeals involving the issuance of a particular permit should be reviewed under the procedures established by the Local Planning Act." *McCuskey I*, 123 Idaho at 660, 851 P.2d at 956 (citing *Holloway*, 118 Idaho at 685, 799 P.2d at 973).

The *McCuskey I* Court went on to quote from *Burt*:

> While we hold that a legislative zoning decision is not subject to direct judicial review, it nonetheless may be scrutinized by means of collateral actions such as declaratory actions.

McCuskey I, 123 Idaho at 660, 851 P.2d at 956 (quoting *Burt v. City of Idaho Falls*, 105 Idaho 65, 66 n.2, 665 P.2d 1075, 1076 n.2 (1983)).

This quotation suggests that the rule is not so much an exception to the principle of exclusive review under LLUPA, but that collateral actions are limited to those situations where review is not available under LLUPA. Recall that, at the time, the availability of review under LLUPA turned on whether the challenged decision was legislative or quasi-judicial. The *McCuskey I* Court did not explore this further. In any event, that principle would not seem to apply in *McCuskey I* because that case involved a quasi-judicial challenge (a building permit and a re-zone). Thus, notwithstanding the quotation from *Burt*, the *McCuskey I* case appears to set out an

[366] The Court of Appeals raised this issue *sua sponte*.

exception to the requirement for exclusive review under LLUPA where the nature of the challenge is to the ordinance itself. [367]

As these cases make clear, if the action is properly framed as one for declaratory relief challenging the validity of ordinance, then it is not necessary to exhaust administrative remedies or to pursue judicial review. As the Court said in *McCuskey I*, 123 Idaho at 661, 851 P.2d at 957, "Accordingly, there are no administrative procedures to exhaust." *Accord, Foster v. City of St. Anthony*, 122 Idaho 883, 887-88, 841 P.2d 413, 417-18 (1992) ("the district court has jurisdiction to entertain a declaratory judgment action challenging the validity of the enactment of amendments to zoning ordinances, even though the party challenging the validity has not exhausted administrative remedies."); *Jerome Cnty. v. Holloway*, 118 Idaho 681, 685, 799 P.2d 969, 973 (1990) (McDevitt J.). The subject of exhaustion is treated further in section 24.L(4) at page 384.[368]

In *Park v. Banbury*, 143 Idaho 576, 149 P.3d 851 (2006), landowners in Valley County challenged sharp increases in property assessments as violative of the Article VII, Section 5 of the Idaho Constitution (requiring that "taxes shall be uniform upon the same class of subjects"). The homeowners appealed the assessments to the Board of County Commissioners, which denied the appeal. Rather than appealing that decisions to the Board of Tax Appeals, they filed a complaint in district court. The key question in the case was whether plaintiffs' failure to exhaust their administrative remedies should preclude this action. The Court noted two exceptions to the exhaustion requirement (interests of justice and agency action outside of its authority). *Park*, 143 Idaho at 580, 149 P.3d at 855. The latter, said the Court, could be described as "when the agency is palpably without jurisdiction." *Park*, 143 Idaho at 581, 149 P.3d at 856. The property owners contended that this exception applied because they had raised a constitutional challenge. The Idaho Supreme Court rejected this argument:

> The Property Owners' cross appeal alleges that various methods used by the Assessor violate the constitutional

[367] *McCuskey I* was followed by *McCuskey v. Canyon Cnty. Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 218, 912 P.2d 100, 105 (1996) (Trout, J.). In *McCuskey II* the Idaho Supreme Court threw out a temporary taking claim based on the invalidation of the ordinance in *McCuskey I*. That case was disposed of under the four-year statute of limitations. The issue of exclusive review under LLUPA did not arise, because the court had ruled in *McCuskey I* that the exception applied. Instead, the court noted that the inverse condemnation claim could have been raised in *McCuskey I*, and, in any event, must have been raised within four years of the stop work order.

[368] The conclusion that exhaustion rules do not apply, by the way, tracks the provision in IDAPA stating that declaratory judgment actions challenging agency rules are not subject to exhaustion requirements. Idaho Code § 67-5278(3). The Court noted in *Bone*, 107 Idaho at 848, 693 P.2d at 1050, that this provision (referred to there at its former codification, Idaho Code § 67-5215(a)), is unavailable in a quasi-judicial review setting.

> rule requiring that tax assessments be uniform. Even if these claims are interpreted as a constitutional challenge to the validity of a statute or rule, it does not follow that exhaustion is waived. Although facial challenges to the validity of a statute or ordinance need not proceed through administrative channels, as-applied challenges may be required to do so. In *McCuskey*, the Court recognized an exception where the property owner was challenging the validity of the zoning ordinance itself rather than a decision of the zoning authority. 123 Idaho at 660, 851 P.2d at 956; cf. *Regan*, 140 Idaho at 725, 100 P.3d at 619 (finding an adequate administrative remedy where the party was challenging the interpretation rather than the constitutionality of the statute at issue). In *White* the Court suggested that even a due process claim should be addressed first at the administrative level to avoid courts interfering with the subject matter jurisdiction of another tribunal. 139 Idaho at 400, 80 P.3d at 336 ("Whether or not Monroc's request for a conditional use permit met the requirements of the statute or satisfied due process is an issue which should have been pursued before the county zoning authorities under the procedures of the [zoning] ordinance and [the governing statute], and not by the district court through a collateral attack."). Where the possibility exists that an alleged constitutional violation might be remedied on other than constitutional grounds, requiring exhaustion of administrative remedies is not futile.

Park, 143 Idaho at 581-82, 149 P.3d at 856-57 (emphasis supplied, brackets original).

This limitation on *McCuskey* to situations involving challenges to the ordinance itself is reinforced by cases addressing the question in the context of exhaustion of administrative remedies. These are discussed in section 24.L(5) beginning on page 388.

(3) Challenges involving questions of law applicable to quasi-judicial decisions

Declaratory judgment actions may also be brought to resolve questions of law other than the validity of an ordinance. For example, in *Lane Ranch Partnership v. City of Sun Valley* (*"Lane Ranch I"*), 144 Idaho 584, 166 P.3d 374 (2007), the

developer of Lane Ranch brought a lawsuit with multiple counts.[369] One count was for a declaratory judgment repudiating the city's conclusion that a development agreement precluded Lane Ranch from seeking a zoning change. Another count was for judicial review under LLUPA challenging the city's denial of its requested zoning change and subdivision applications. The city did not object to the declaratory judgment action on exhaustion or any other grounds (other than the merits), so the question of its appropriateness was not put into question. The Court, however, had no trouble with the two actions, ruling in Lane Ranch's favor on both.

(4) Actions not subject to judicial review may be challenged by way of declaratory judgment or other civil action.

The principle that judicial review must be employed if available does not apply, obviously, if judicial review is not available. Thus, land use decisions that are not reviewable under LLUPA may be challenged in an action for declaratory judgment. Likewise, judicial review is unavailable in the context of a forward-looking relief. (Judicial review addresses past actions of cities and agencies; it does not afford an opportunity to prohibit unlawful actions in the future.) In either situation (judicial review is not authorized or does not fit the circumstances) a declaratory action serves as a sort of gap-filler.

The first post-*Giltner Dairy* case to address annexation was *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 960, 188 P.3d 900, 902 (2008) (Eismann, J.), which applied to a pre-2002 annexation. It found judicial review of annexations is unavailable under the IAPA (because cities are not state agencies).

However, Highlands expressly noted that the absence of judicial review does not bar other forms of relief:

> The dissent also argues that this opinion "will prevent property owners from obtaining judicial review of decisions downzoning their property." It will not. As we recognized in *McCuskey v. Canyon County Commissioners*, 128 Idaho 213, 912 P.2d 100 (1996), such landowners can seek relief in an independent action.

Highlands, 145 Idaho at 962, 188 P.3d at 904. (The dissent also noted that other civil actions challenging annexations have long been allowed. *Highlands*, 145 Idaho at 969, 188 P.3d at 911.)

In *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner II*"), 249 P.3d 358 (Idaho 2011) (Horton, J.) the dairy farmer sought judicial review of the rezone of a

[369] The Idaho Supreme Court's decision suggests that these were separate lawsuits that were later consolidated. In fact, there was one lawsuit with multiple counts.

neighboring property allowing residential development next to the dairy. The ill-starred farmer had failed before in (in *Giltner I*) in an attempted judicial review based on LLUPA. Rather than bring a declaratory action (as he should have), he pinned his next lawsuit on an obscure judicial review statute, Idaho Code § 31-1506(1), found in the part of the code dealing with county finances. This Court rejected that, too, essentially saying the obscure provision in Title 31 was preempted by the more specific judicial review provision in LLUPA.

More importantly, Justice Jones explained in his concurrence:

> It appears that Giltner jumped on the wrong horse—I.C. § 31-1506—to obtain judicial review under the Administrative Procedure Act and doggedly continued to ride it even after the Legislature amended I.C. § 67-6521 in its 2010 session to reinstate judicial review of zoning decisions. It is unfortunate for Giltner that its appeal arose during the time that judicial review was made unavailable for zoning decisions but, rather than trying to obtain judicial review under a statutory provision that did not really fit, Giltner could have sought relief in a declaratory judgment action.

Giltner II at 361-62 (emphasis added) (citing *Burns Holdings*). In other words, the absence of judicial review (under either LLUPA or section 31-1506(1)) did not prevent Giltner from pursuing a declaratory action.

In *Burns Holdings, LLC v. Madison Cnty. Bd. of Cnty. Comm'rs* ("*Burns Holdings I*"), 147 Idaho 660, 214 P.3d 646 (2009), the majority noted that, when there is no judicial review available, there is still the option of declaratory action. "While we hold that a legislative zoning decision is not subject to direct judicial review, it nonetheless may be scrutinized by means of collateral actions such as declaratory actions." *Burns Holdings I*, 147 Idaho at 664, 214 P.3d at 650 (quoting *Burt v. City of Idaho Falls*, 105 Idaho 65, 66 n.2, 665 P.2d 1075, 1076 n.2 (1983)). This conclusion was reiterated in *Ciszek v. Kootenai Cnty. Bd. of Comm'rs*, 151 Idaho 123, 254 P.3d 24 (2011) (J. Jones, J.) (allowing a rezone to be challenged by declaratory action).[370] By the time *Ciszek* was decided, LLUPA had been amended to allow judicial review of rezones, however this had not occurred at the time the action was filed, so the declaratory action was appropriate at that time.

[370] In *Ciszek*, the operator of an open pit mine sought and received zoning approval allowing mining on an adjacent parcel. Neighboring property owners challenged the approval contending, among other things, that packaging two zoning requests in a single application violated LLUPA. The Court rejected the neighbors' form over substance argument along with due process and other arguments.

The Idaho Supreme Court has frequently recognized the availability of collateral attack to challenge legislative actions:

> While we hold that a legislative zoning decision is not subject to direct judicial review, it nonetheless may be scrutinized by means of collateral actions such as declaratory actions.

Burt v. City of Idaho Falls, 105 Idaho 65, 66 n.2, 665 P.2d 1075, 1076 n.2 (1983) (Donaldson, C.J.) (citations omitted); *cf.*, *Bone v. City of Lewiston*, 107 Idaho 844, 848, 693 P.2d 1046, 1050 (1984) (holding that a decision on a quasi-judicial rezone application may not be challenged by declaratory action), a decision that was implicitly overruled by *Burns Holdings I*, which nevertheless quoted *Burt* and said this rule applies to rezones.

In *Student Loan Fund of Idaho, Inc. v. Payette Cnty.*, 125 Idaho 824, 875 P.2d 236 (Ct. App. 1994), the Court of Appeals recognized that landowners could bring a declaratory judgment action to challenge an unlawful area of city impact designation ("ACI"). "The Fund's action is for declaratory relief. Idaho's courts are authorized to determine by declaratory judgment the validity of contracts and municipal ordinances and the rights and status of persons thereunder. I.C. §§ 10–1201 and 10–1202." *Student Loan Fund*, 125 Idaho at 825, 875 P.2d at 237. However, in this case, the plaintiff failed to plead sufficient facts to establish injury, and was thrown out on standing grounds. (See discussion in section 18 (Standing) beginning on page 208.)

In 2006, the Idaho Supreme Court again reiterated the availability of declaratory relief: "While legislative actions by counties are subject to collateral actions such as declaratory judgments, they cannot be attacked by a petition for judicial review." *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 509, 148 P.3d 1247, 1255 (2006) (Burdick, J.) (finding that the Court had no jurisdiction to consider a challenge to an appeals fee ordinance in the context of a LLUPA judicial review).

In *Scott v. Gooding Cnty.*, 137 Idaho 206, 208, 46 P.3d 23, 25 (2002), the Court rejected a petition for review filed under the IAPA on the grounds that the challenged action (lifting a moratorium and issuing a special use permit for a confined animal feeding operation) was legislative in nature. (This was a pre-*Giltner Dairy* decision.) The entire basis for the Court's decision is that the lawsuit was framed as a petition for judicial review and not as a declaratory action. Thus, by necessary implication, it would have been judicially cognizable had it been filed as a civil action.

Actions for declaratory judgment may be brought to challenge all manner of legislative actions, including initial zoning upon annexation, the adoption and

amendment of comprehensive plans, Category A annexations,[371] and moratorium decisions. Parties may also employ declaratory judgment actions to engage in a facial challenge to the validity of the underlying ordinance, at least where the challenges goes to the heart of the agency's authority to act.

Comprehensive plans are rarely challenged in stand-alone lawsuits. More typically, the comprehensive plan is attacked in the context of a judicial appeal of the grant or denial of an application for a zoning, subdivision, or other site-specific application. For example, in *Sprenger, Grubb & Associates v. Hailey* ("*Sprenger Grubb II*"), 133 Idaho 320, 322, 986 P.2d 343, 345 (1999) (Walters, J.), the Court invalidated Hailey's comprehensive plan because it did not contain a land use map. That action, however, was a standard LLUPA appeal of the city's downzoning of the landowner's property.

McCuskey v. Canyon Cnty. ("*McCuskey I*"), 123 Idaho 657, 660, 851 P.2d 953, 956 (1993) (Bistline, J.) dealt with a downzone of property. When the landowner discovered that the county had rezoned land including his property some years earlier without providing notice to him, he filed a "petition for clarification of zoning status." The county shortly thereafter issued a stop work order, saying that its earlier issued building permit for a Circle K had been issued in error. In response, the landowner withdrew his petition to clarify and filed a civil action seeking declaratory judgment and writ of mandate, based on the fact that the downzone ordinance (which was adopted in 1979) was void because McCuskey had received no notice (as required by LLUPA, Idaho Code § 67-6511(b)). The Court of Appeals, citing *Bone v. City of Lewiston,* 107 Idaho 844, 847, 693 P.2d 1046, 1049 (1984), ruled that LLUPA was the exclusive means of review available to McCuskey.[372] The Idaho Supreme Court reversed. In so ruling, the Court went on to quote from another case: "While we hold that a legislative zoning decision is not subject to direct judicial review, it nonetheless may be scrutinized by means of collateral actions such as declaratory actions." *McCuskey I*, 123 Idaho at 660, 851 P.2d at 956 (quoting *Burt v. City of Idaho Falls*, 105 Idaho 65, 66 n.2, 665 P.2d 1075, 1076 n.2 (1983)). This quotation suggests that the rule is not so much an exception to the principle of exclusive review under LLUPA, but that collateral actions are limited to those situations where review is not available under LLUPA. Recall that, at the time, the availability of review under LLUPA turned on whether the challenged decision was legislative or quasi-judicial. The *McCuskey I* Court did not explore this further. In any event, that principle would not seem to apply in *McCuskey I* because that case involved a quasi-judicial challenge (a building permit and a re-zone). Thus, notwithstanding the quotation from *Burt*, the *McCuskey I* case appears to set out an

[371] Note the special judicial review provision for annexation discussed in section 24.X at page 444.

[372] The Court of Appeals raised this issue *sua sponte*.

exception to the requirement for exclusive review under LLUPA where the nature of the challenge is to the ordinance itself.

(5) What standard of review applies to an action challenged by declaratory action?

Since the 2010 amendment to LLUPA, initial zoning actions are subject to LLUPA review. Previously, there were not, but could be challenged by way of declaratory action.

In 1977 the Court dealt with a challenge to the reasonableness of an initial zoning action. The Court recognized that this was a legislative matter (unlike a rezone), and adopted a deferential standard of review:

> This Court has frequently stated, and it is now beyond dispute, that a local legislative body has the right to enact zoning ordinances. However, since the power to zone derives from the police power of the state, Idaho Constitution, art. 12, § 2, the zoning ordinance must bear a reasonable relation to goals the state may properly pursue under its police power. This limitation was made clear in *Cole-Collister* where the Court quoted the following language approvingly: "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."
>
> In making the determination [whether the zoning ordinance can be upheld], however, we note that our review of decisions of zoning authorities is limited. Zoning is essentially a political, rather than a judicial matter, over which the legislative authorities have, generally speaking, complete discretion. Since the local governmental bodies are most familiar with the problems of their particular jurisdictions, their legislative determinations come before us with a strong presumption of validity. Such presumption can only be overcome by a clear showing that the ordinance as applied is confiscatory, arbitrary, unreasonable and capricious. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control and the court may not

> substitute its judgment for that of the zoning authority. It is not the function of this Court or of the trial courts to sit as super zoning commissions. The burden of proving that the ordinance is invalid rests upon the litigant who attacks the validity of the ordinance.

Dawson Enterprises, Inc. v. Blaine Cnty., 98 Idaho 506, 511-12, 567 P.2d 1257, 1262-63 (1977) (Bistline, J.) (citations omitted) (emphasis supplied).[373]

Although the Court has employed the words "arbitrary, unreasonable and "capricious," it is presumably not referring to the same arbitrary and capricious standard applied in appeals under LLUPA. Indeed, these words date back to cases pre-dating LLUPA review. For example, in *Ready-to-Pour, Inc. v. McCoy*, 95 Idaho 510, 511 P.2d 792 (1973), the Court used this same string of adjectives, but focused on the confiscatory nature of the ordinance—essentially ruling that it was an unauthorized taking of property.

Thus, it is an open question whether the party challenging a zoning ordinance via an action for declaratory judgment will be required to demonstrate that the ordinance bears no "substantial relation to the public health, safety, morals, or general welfare" – a nearly impossible standard. After *Burns Holdings I* and *Arnold II*, we can expect to see more litigation by means of actions for declaratory action. Perhaps the courts will allow the development of a more robust standard of review – focusing on the words "arbitrary, unreasonable and capricious" also employed by *Dawson* – that comes closer to the sort of review available under the IAPA.

Dawson, by the way, was an initial zoning case – that is, a legislative action. Would the same standard apply to a rezone challenge – which is a quasi-judicial action? *Burns Holdings I* implies that the answer is yes. In *Burns Holdings I*, the Court quoted from *Burt* (an initial zone challenge) in explaining that a litigant challenging a rezone should follow the same path. "While we hold that a legislative zoning decision is not subject to direct judicial review, it nonetheless may be scrutinized by means of collateral actions such as declaratory actions." *Burns Holdings I*, 147 Idaho at 664, 214 P.3d at 650 (quoting *Burt v. City of Idaho Falls*, 105 Idaho 65, 66 n.2, 665 P.2d 1075, 1076 n.2 (1983)).

N. Stays and the effective date of action

LLUPA does not address the question of when the action of a planning and zoning entity becomes final. However, as discussed above, LLUPA incorporates the

[373] In *Burt v. City of Idaho Falls*, 105 Idaho 65, 66 n.2, 665 P.2d 1075, 1076 n.2 (1983) (Donaldson, J), the court cited *Dawson* with approval, noting: "In such instances the decision will not be disturbed absent a clear showing that it is confiscatory, arbitrary, unreasonable or capricious."

judicial review provisions of the IAPA for review of quasi-judicial matters such as actions on special use permits. Presumably, this includes Idaho Code § 67-5274.[374]

The IAPA provides that final actions are effective at once, unless provided otherwise by local ordinance, order of the governing body, or a reviewing court. "The filing of the petition for review does not itself stay the effectiveness or enforcement of the agency action. The agency may grant, or the reviewing court may order, a stay upon appropriate terms." Idaho Code § 67-5274. This is reiterated in the nearly identical Idaho R. Civ. P. 84(m), providing that stays are not automatic in the judicial review actions.

Land use actions not reviewable under LLUPA (and incorporated provisions of the IAPA) are governed instead by general principles of municipal law. In most instances, such actions would be effective at once (unless otherwise provided by local ordinance or order).

Although the IAPA and Idaho R. Civ. P. 84(m) expressly authorize issuance of a stay, neither articulates any governing standards. No Idaho appellate authority is directly on point.[375] However, it is a settled rule of administrative law that a court should apply the same factors to the analysis of a stay as it would to the consideration of a request for a preliminary injunction. To wit:

> Factors to be considered by the court on motion for stay.
>
> Four criteria are relevant in considering whether to issue a stay of an order of a district court or of an administrative agency pending appeal:
>
> - the likelihood of success on the merits
> - irreparable injury if a stay is denied
> - substantial injury to the party opposing a stay if one is issued
> - the public interest
>
> These four considerations are factors to be balanced, not prerequisites to be met, and in order for the reviewing court to adequately balance these factors, the party seeking a stay must address each of the factors regardless of its strength and provide the court with facts and affidavits supporting these assertions. In determining

[374] LLUPA references and incorporates all of the judicial review provisions of the IAPA. Idaho Code §§ 67-6519(4) and 67-6521(1)(d). LLUPA does not identify particular sections of the IAPA, but refers generally to the judicial review provisions under the IAPA, those being Idaho Code §§ 67-5270 to 67-5279. However, LLUPA does not incorporate other provisions of the IAPA, such as the provision authorizing motions for reconsideration (Idaho Code §§ 67-5246(4) and (5). *Arthur v. Shoshone Cnty.*, 133 Idaho 854, 858-59, 993 P.2d 617, 621-22 (Ct. App. 2000) (Lansing, J.).

[375] Case law under Idaho Appellate Rule 13 (stay of proceedings upon appeal) may provide a useful general analogy. However, in contrast to the IAPA, the appellate rule provides an automatic stay of 14 days upon filing of an appeal.

> whether a stay on agency action is warranted, no one factor is determinative, and the court should balance a movant's showings regarding the four factors on a sliding scale. Irreparable harm to warrant a stay of agency action is a high standard wherein the alleged injury must be certain and great, and mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay are not enough.

2 Am. Jur. 2d *Administrative Law* § 530 (2018) (footnotes omitted). See also, 5 Am. Jur. 2d *Appellate Review* § 470 (1995).

O. Other technical issues regarding the 28-day rule

As noted elsewhere, LLUPA contains two (seemingly redundant) authorizations for judicial review. Idaho Code §§ 67-6519(4) and 67-6521(1)(d).[376] Both require the petition for review to be filed within 28 days "after all remedies have been exhausted under local ordinances."[377] (The deadline was 60 days until LLUPA was amended in 1993 as part of a major revamping of the IDAPA. 1993 Idaho Sess. Laws, ch. 216 §§ 111, 113.)

In *White v. Bannock Cnty. Comm'rs,* 139 Idaho 396, 399-400, 80 P.3d 332, 335-36 (2003), the Court held that a decision (in this case, the decision of the lower planning and zoning entity) becomes final for purposes of review when the agency adopts findings and conclusions, not on the day it reached the decision. Until the written findings and conclusions are issued, the time for filing an appeal is tolled. *Id*. This is an important clarification that makes the time for filing appeals more certain. It may be described as dictum, however, because the case dealt with an improperly filed complaint that was dismissed for failure to exhaust administrative remedies.

The dictum, however, was confirmed in 2005. "It has been previously held that the date on which the decision is made corresponds to the date of the written findings, conclusions and order, which starts the clock for filing an appeal." *Fischer v. City of Ketchum*, 141 Idaho 349, 355, 109 P.3d 1091, 1097 (2005) (citing *White v. Bannock Cnty.*). Like *White*, *Fischer* dealt with the timing of the appeal from the planning and zoning commission to the decision-making body. Presumably, however, the same principle would apply to the timing of the decision by the city or county.

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[376] A parallel provision found in Title 31 (Counties and County Law), provides that all decisions of the board of county commissioners are reviewable pursuant to the IAPA. Idaho Code § 31-1506(1).

[377] In Idaho Code § 67-6519(4) the word "ordinance" is singular; in Idaho Code § 67-67-6521(1)(d) it is plural.

In *In re Quesnell Dairy*, 143 Idaho 691, 694, 152 P.3d 562, 565 (2007), the Idaho Supreme Court held while a city or county has no authority to extend the 28-day appeal period, it does have "the authority to determine when a decision is final and appealable." In this case, the county's statement in its findings and conclusions that the appeal period ran to July 29, 2002 was dispositive, despite the fact that this was 30 days beyond the date appearing on the face of the findings and conclusions. There was some ambiguity as to whether the date on the findings and conclusions was correct, and the public was entitled to conclude that they did not become final and effective until the following Monday. Although the Court does not say so in so many words, it is apparent that the starting date is the date that the findings and conclusions become final, not the date of the hearing at which the decision was made.

The time for filing a judicial appeal is stayed "during the pendency of the petitioner's timely attempts to exhaust administrative remedies, if the attempts are clearly not frivolous or repetitious." Idaho Code § 67-5273(3). Of course, it is important not to let the 28-day judicial appeal period run while pursuing administrative appeals that might be considered untimely, frivolous, or repetitious. The statute does not offer black-letter tests as to any of these criteria.

Note that the regulatory taking analysis statute contains its own tolling provision. "During the preparation of the taking analysis, any time limitation relevant to the regulatory or administrative actions shall be tolled. Such tolling shall cease when the taking analysis has been provided to the property owner." Idaho Code § 67-8003(4). Presumably this has the effect of tolling the judicial review clock.

One should make certain that the petition for judicial review is properly filed in the proper court. In *Cobbley v. City of Challis* ("*Cobbley II*"), 143 Idaho 130, 139 P.3d 732 (2006), litigants seeking to judicial review of a road validation had their case thrown out when they filed their "petition" in the course of a remand of another tort case against the city, rather than as a new lawsuit.

In *Erickson v. Idaho Bd. of Registration of Prof'l Engineers and Professional Land Surveyors*, 146 Idaho 852, 203 P.3d 1251 (2009), the Idaho Supreme Court found that the 28-day deadline in the Idaho Administrative Procedure Act is jurisdictional and that it had no jurisdiction to hear an appeal filed two days late. Since the judicial review was filed under the IAPA, rather than LLUPA, the appeal clock was tolled by a motion for reconsideration. The issue in the case was whether the new 28-day period begins on the day the order resolving the motion for reconsideration is signed or served. The Court ruled that the clock begins when it is signed (and the same is true for the clock that begins running when the earlier final order is issued). Presumably, the same rule (applicable to the original final order – that is, the "findings and conclusions") would apply in the LLUPA context.

P. Tolling of the appeal period during reconsideration

Due to the interaction between reconsideration and the reasoned statement requirement, this discussion has been moved from the judicial review chapter to the chapter on the public hearing process (section 13.F at page 180).

Q. Cities and counties except from appeal bonding

An appeal of a judgment does not automatically stay execution of the judgment below.[378] Thus, the appealing party must file a motion with the district court seeking to stay execution until the appeal is resolved. Idaho Code § 12-202. Ordinarily, the party seeking the stay may be required to post a supersedeas bond (aka appeal bond), thus providing assurance that the respondent will be fully compensated in the event the appeal fails. Idaho R. Civ. P. 62; Idaho R. App. P. 13(b)(8), (14) & (15); Fed. R. Civ. P. 62(d), Fed. R. App. P. 8(b).

An important exception to the bonding requirement is found in Idaho Code § 12-615, which provides that cities, counties, and the state are except from bonding requirements. This exception is reflected in Idaho R. Civ. P. 62(e).

A similar rule exempts the United States from appeal bonding requirements in federal court. Fed. R. Civ. P. 62(e).

R. Relief from error: vacation or reversal, followed by remand

In a judicial review under LLUPA, if the party contesting the city or county's decision prevails, the relief is ordinarily to remand to the agency for further proceedings:

> In a given situation involving a conditional use permit, if there were a procedural error, or error of law, the commissioners' decision would need to be reversed; thereafter, the case would also need to be remanded to the commissioners to grant or deny the permit <u>because the reviewing court does not grant or deny conditional use permits</u>. Although this is not a case where a reversal was necessary, the district court's decision indicates it properly vacated the commission's decision and remanded the case for further proceedings.

Chambers v. Kootenai Cnty. Bd. of Comm'rs, 125 Idaho 115, 119, 867 P.2d 989, 993 (1994). Thus, while the reviewing court does not have authority to issue a permit

[378] Idaho R. Civ. P. 62(d) sets out what appears to be a broad, automatic grant of stay. However, it says that the stay is "as provided by the Idaho Appellate Rules." Those rules provide only an automatic 14-day stay. Idaho R. App. P. 13(a).

itself,[379] it may vacate or even reverse the decision of the city or county and remand with instructions to act in accordance with that action. Depending on the nature of the case, the city or county may then have broad discretion to reconsider the matter, or its discretion may be tightly constrained (or even eliminated) by the court's decision.

This is in accord with the prior decision of the Idaho Court of Appeals in *Lowery v. Bd. of Cnty. Comm'rs for Ada Cnty.* (*"Lowery I"*), 115 Idaho 64, 67, 764 P.2d 431, 434 (Ct. App. 1988).[380] In *Lowery I*, the district court reversed a decision of the Ada County Board of County Commissioners to issue a conditional use permit and zoning certificate. The county did not contest the decision on the merits, but insisted that the district court erred in outright denying the permit and certificate rather than remanding to the county for further proceedings consistent with the district court's legal rulings. The Court of Appeals agreed:

> Our review of the full text of the court's decision reveals nothing in support of the Board's speculation that if there were a change in circumstances, or in the ordinance, the county would be precluded from relying upon any part of its record or decision that has not been set aside in this case. Nevertheless, the county is right insofar as it contends that the district court's role was to determine the propriety of the county's motion, but not to displace the county by "denying" the certificate and permit directly. See generally 2 AM.JUR.2d Administrative Law § 765. Therefore, we uphold the court's decision on the merits but we modify the decision to provide that the case is remanded to the county for action consistent with the court's ruling on the question of law presented in the appeal.

Lowery I, 115 Idaho at 67, 764 P.2d at 434.

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[379] The authors are not aware of any authority addressing this question, but it might be that under extraordinary circumstances (such as bad faith by the city or county) the court might direct the governmental entity to take a particular action, such as to issue or deny a permit.

[380] *Lowery v. Bd. of Cnty. Comm'rs for Ada Cnty.* (*"Lowery II"*), 117 Idaho 1079, 793 P.2d 1251 (1990) was a separate but related appeal. The trial court awarded attorney fees against both the county and another respondent, the private party who obtained the CUP. Both appealed separately. Those appeals ended up at the Idaho Court of Appeals and, for some reason, were never consolidated. The appeal by the county resulted in *Lowery I* issued by the Court of Appeals. The appeal by the CUP holder resulted in *Lowery II* issued by the Idaho Supreme Court. *Lowery II* dealt only with attorney fees, essentially overturning the ruling in *Lowery I*. See discussion of Idaho Code § 12-121 under section 24.G beginning on page 525.

S. Vesting (aka grandfathering): ordinances and plans in effect at time of application govern.

Changes in ordinances while an application is pending may not be applied to the pending application. "Although a majority of courts from other jurisdictions have adopted that line of reasoning and held that a change in the law following an application for a building permit will be applied to the application, Idaho law is well established that an applicant's rights are determined by the ordinance in existence at the time of filing an application for the permit." *South Fork Coal. v. Bd. of Comm'rs of Bonneville Cnty. ("South Fork II")*, 117 Idaho 857, 865-86, 792 P.2d 882, 885-86 (1990) (footnote omitted).

"It is well established that an applicant's rights are determined by the ordinance in existence at the time of filing an application for the permit." *Chisholm v. Twin Falls County*, 139 Idaho 131, 134-35, 75 P.3d 185, 1988-89 (2003). "Idaho law is well established that an applicant's rights are determined by the ordinance in existence at the time of filing an application." *Urrutia v. Blaine Cnty.*, 134 Idaho 353, 359, 2 P.3d 738, 744 (2000) (citing *Payette River Property Owners Ass'n v. Bd. of Comm'rs of Valley Co.*, 132 Idaho 551, 555, 976 P.2d 477, 481 (1999)).

The same applies to the comprehensive plan. *Urrutia*, 134 Idaho at 359-60, 2 P.3d at 744-45. This principal is often referred to as "vesting."

The principle was upheld again in *Taylor v. Canyon Cnty. Bd. of Comm'rs* ("*Taylor II*"), 147 Idaho 424, 436, 210 P.3d 532, 544 (2009) (Burdick, J.). Indeed, this case went a step further, holding that even though a comprehensive plan and map were repealed and replaced during the pendency of a rezone application, the county could amend the repealed plan and map, at the request of the applicant, in order to approve the application.

T. Retroactive legislation

(1) Overview

From time to time, legislation modifying (or preserving) property rights has been challenged as unconstitutional retroactive legislation. *E.g., Lummi Indian Nation v. State*, 241 P.3d 1220 (Wash. 2010); *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179 (Ariz. 1999).

The Idaho Constitution contains a provision prohibiting certain types of retroactive legislation. Idaho Const. art. XI, § 12. Idaho courts have read this legislation quite narrowly, however. See *Idaho Attorney General Opinion No. 91-2*, at 7 (Feb. 14, 1991) ("There are a number of cases construing this clause and they suggest that retroactive legislation for the benefit of the public does not violate this section.").

The Idaho law governing retroactive legislation is summarized in a 2016 decision:

> Idaho Code section 73–101 provides, "[n]o part of these compiled laws is retroactive, unless expressly so declared." I.C. § 73–101. In *Guzman v. Piercy*, this Court addressed statutory interpretation related to retroactivity as follows:
>
> > In general, legislation acts prospectively. *Ben Lomond, Inc. v. City of Idaho Falls*, 92 Idaho 595, 601, 448 P.2d 209, 215 (1968). "Retrospective or retroactive legislation is not favored." *Winans v. Swisher*, 68 Idaho 364, 367, 195 P.2d 357, 359 (1948). As such, "a well-settled and fundamental rule of statutory construction" is to construe statutes to have a prospective rather than retroactive effect. *Id.* "Consonant with this view, I.C. § 73–101 states that '[n]o part of these compiled laws is retroactive, unless expressly so declared.'" *Univ. of Utah Hosp. ex. rel. Harris v. Pence*, 104 Idaho 172, 174, 657 P.2d 469, 471 (1982) (alteration in original) (quoting I.C. § 73–101). "Thus, in Idaho, a statute is not applied retroactively unless there is 'clear legislative intent to that effect.'" *Gailey v. Jerome Cnty.*, 113 Idaho 430, 432, 745 P.2d 1051, 1053 (1987) (quoting *City of Garden City v. City of Boise*, 104 Idaho 512, 515, 660 P.2d 1355, 1358 (1983)).
>
> 155 Idaho 928, 937–38, 318 P.3d 918, 927–28 (2014). Accordingly, statutory amendments are not deemed to be retroactive unless there is an express legislative statement to the contrary. *Id*. (citing *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 614, 747 P.2d 18, 23 (1987)).

State v. Leary, 160 Idaho 349, 353, 372 P.3d 404, 408 (2016) (W. Jones, J.).

A particularly instructive and detailed discussion of the law of retroactivity is found on *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) (Stewart, J.). This seminal decision has been cited over ten thousand times. The Court notes that there is an inherent tension between competing canons, but the tension is resolved in favor of retroactivity if the legislature makes its intent clear:

> It is not uncommon to find "apparent tension" between different canons of statutory construction. . . . [The] federal courts have labored to reconcile two seemingly contradictory statements found in our decisions concerning the effect of intervening changes in the law. Each statement is framed as a generally applicable rule for interpreting statutes that do not specify their temporal reach. The first is the rule that "a court is to apply the law in effect at the time it renders its decision," Bradley, 416 U.S., at 711, 94 S.Ct., at 2016. The second is the axiom that "[r]etroactivity is not favored in the law," and its interpretive corollary that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Bowen, 488 U.S., at 208, 109 S.Ct., at 471. . . . We found it unnecessary in Kaiser to resolve that seeming conflict "because under either view, where the congressional intent is clear, it governs," and the prejudgment interest statute at issue in that case evinced "clear congressional intent" that it was "not applicable to judgments entered before its effective date." 494 U.S., at 837–838, 110 S.Ct., at 1577.

Landgraf at 263-64.

"A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf* at 269-70 (citation omitted).

(2) Procedural or remedial legislation is not deemed retroactive.

In *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner II*"), 150 Idaho 559, 249 P.3d 358 (2011) (Horton, J.), the Court rejected a judicial review of a rezone that was improperly premised on Idaho Code § 31-1506 (appeals by counties) and an earlier version of Idaho Code § 67-6521 (LLUPA appeals). *Giltner II* arose when rezones were not subject to judicial review. LLUPA was amended during the course of the litigation making rezones subject to judicial review, but Giltner Dairy failed to argue that the 2010 amendments applied. The concurrence by Justice Jim Jones chastised counsel for its narrow approach to the litigation. The dairy could have obtained judicial relief either by framing the matter as a declaratory action or, after the 2010 amendments, requesting that they be applied retroactively:

> Had Giltner embraced the amended version of I.C. § 67–6521, I believe it would have been appropriate to apply the same to Giltner's appeal, permitting judicial review of the County's decision. Although the Legislature did not include language in the 2010 amendment to make it retroactive (see 2010 Idaho Sess. Laws, ch. 175, § 5), the amendment was procedural or remedial in nature and thus could have been applied retroactively. *Bryant v. City of Blackfoot*, 137 Idaho 307, 313, 48 P.3d 636, 642 (2002). "[A] statute is remedial if it does not create, enlarge, diminish or destroy any substantive rights, but merely alters the remedy available for enforcing pre-existing rights." *State ex rel. Wasden v. Daicel Chem. Indus., Ltd.*, 141 Idaho 102, 105, 106 P.3d 428, 431 (2005). This Court noted in Floyd v. Bd. of Comm'rs of Bonneville County:
>
> > Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.
>
> 131 Idaho 234, 238, 953 P.2d 984, 988 (1998) (quoting *State v. Currington*, 108 Idaho 539, 541, 700 P.2d 942, 944 (1985)). This principle applies to amendments as well as the underlying statute. *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 614, 747 P.2d 18, 23 (1987). In this case, the amendment merely reinstated the right of judicial review for zoning decisions, relieving aggrieved parties of the necessity of challenging the decision in a declaratory judgment action. Since the reinstated review mechanism was procedural or remedial in nature, the amended statute could have been applied here, had the Court properly been asked to do so. Failing that request, the Court has correctly disposed of this matter.

Giltner II, 150 Idaho at 563, 249 P.3d at 362.

In *Floyd v. Bd. of Comm'rs of Bonneville Cnty.* ("*Floyd I*") (Silak, J.), 131 Idaho 234, 953 P.2d 984 (1998), which held that procedural rules governing validation proceedings may be applied retroactively. That case involved changing

the standard of review in judicial review of road validations from *de novo* to a more deferential standard.

In a footnote to a 2015 decision, the Idaho Supreme Court reached the opposite conclusion. In *Flying "A" Ranch, Inc. v. Cnty. Comm'rs of Fremont Cnty.* ("*Flying A*"), 157 Idaho 937, 940 N.2, 342 P.3d 649, 652 n.2 (2015) (Horton, J.)), the Court held, without explanation, 2013 amendments to standard of review in the very same section 40-208 do not apply retroactively. It appears that the Court spoke on this issue without benefit of briefing. The only appellate brief in that case that is available on Westlaw does not even mention the 2013 legislation, much less discuss its retroactivity. See further discussion of this case in the *Idaho Road Law Handbook.*

"We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf* at 274.

(3) Retroactive legislation and vested rights

In *Cooper v. Ada Cnty. Comm'rs*, 101 Idaho 407, 412, 614 P.2d 947, 952 (1980) (Donaldson, C.J.), the Idaho Supreme Court held that land use applications (an application for a zone change in this case) must be evaluated on the basis of the law, ordinances, and comprehensive plan in effect at the time of application.

In *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981) (Donaldson, J.), the Court distinguished *Cooper*, finding that a newly enacted "local public interest" statute (enacted during the course of the IDWR administrative proceeding) could be applied to an applicant for a water right permit because an applicant for a permit has not yet acquired a vested property right in the use of water.

Our Supreme Court has explained that only substantive law changes that affect "vested or already existing rights" are deemed retroactive.

> Generally a statute will not be applied retroactively in the absence of clear legislative intent to that effect. I.C. § 73–101. *Johnson v. Stoddard*, 96 Idaho 230, 526 P.2d 835 (1974). However, it also is the rule in Idaho that retroactive legislation is only that which affects vested or already existing rights. *Hidden Springs Trout Ranch, Inc., v. Allred*, 102 Idaho 623, 624, 636 P.2d 745, 746 (1981); *Buckalew v. City of Grangeville*, 100 Idaho 460, 600 P.2d 136 (1979).
>
> Remedial or procedural statutes which do not create, enlarge, diminish or destroy contractual or vested rights are generally held to operate retrospectively. *Ohlinger v. U.S.*, 135 F. Supp. 40 (D.C. Idaho 1955).

City of Garden City v. City of Boise, 104 Idaho 512, 660 P.2d 1355 (1983) (Huntley, J.).

Our Supreme Court has said that it will apply a statute retroactively (if doing so does not raise constitutional problems) where the Legislature "refers to the past as well as to the future":

> "[A] statute should be applied retroactively only if the legislature has clearly expressed that intent or such intent is clearly implied by the language of the statute." *Kent v. Idaho Pub. Utils. Comm'n*, 93 Idaho 618, 621, 469 P.2d 745, 748 (1970). The Legislature does not need to "use the words, 'this statute is to be deemed retroactive,' " however. *Peavy v. McCombs*, 26 Idaho 143, 151, 140 P. 965, 968 (1914).
>
> > [I]t is sufficient if the enacting words are such that the intention to make the law retroactive is clear. In other words, if the language clearly refers to the past as well as to the future, then the intent to make the law retroactive is expressly declared within the meaning of [I.C. § 73–101].
>
> *Id*.

Guzman v. Piercy, 155 Idaho 928, 938, 318 P.3d 918, 928 (2014) (Schroeder, pro tem.) (brackets original, emphasis supplied).

U. Summary judgment not available in an IAPA/LLUPA appeal

In Idaho, summary judgment is not available in a proceeding initiated by a petition for judicial review.[381] The reasons are two-fold. First, the nature of review is appellate. Second, review is limited to the record, and summary judgment motions are typically accompanied by affidavits.

> Generally, summary judgment is not the appropriate procedure for resolving a petition for judicial review. The district court is not permitted to receive evidence on appeal except in two limited circumstances, neither of which applies in this case. Plaintiffs' petition for judicial review should have been heard simply as an appellate

[381] In contrast, motions for summary judgment are employed in federal Administrative Procedure Act cases.

> proceeding, with oral argument, as provided in Rule 84 of the Idaho Rules of Civil Procedure.

Cnty. Residents Against Pollution from Septage Sludge (CRAPSS) v. Bonner Cnty., 138 Idaho 585, 587, 67 P.3d 64, 66 (2003) (footnote omitted). In that case, however, the Court ruled that the district court's consideration of a motion for summary judgment did not prejudice the other party. In other cases, the Idaho Supreme Court has allowed summary judgment in IAPA cases. *E.g.*, *Allen v. Blaine Cnty.*, 131 Idaho 138, 140, 953 P.2d at 578, 580 (1998).

In contrast, federal courts routinely allow motions for summary judgment in cases under the federal Administrative Procedures Act.

V. Selection and identification of proper parties

Most civil lawsuits are initiated by the filing of a complaint by the plaintiff against a defendant. In contrast, a challenge to a special use permit (or other quasi-judicial zoning action) brought under LLUPA and the IAPA is denominated a "petition for judicial review."[382] The party filing the petition is the "petitioner" or "appellant." The municipal entity whose decision is challenged is the "respondent."

Often, there is at least one other interested party—either an opponent of the application or the applicant (if the petition was filed by a project opponent). The law is fuzzy as to whether such "third persons" must be named.

Plainly, they may intervene of their own accord if they are not named. In such a case, they would be denominated an "intervenor-petitioner" or "intervenor-respondent," depending on which side they took.

In some cases where the "third person" has not been named, the respondent has been successful in persuading the district court that the third person was a necessary party who should be joined. In order to avoid such procedural side-shows, it is probably the better practice for the petitioner either to join known interested parties at the outset, or, at a minimum, to document that they were advised of the litigation and made aware of their right to intervene.

[382] In *Scott v. Gooding Cnty.*, 139 Idaho 206, 208, 46 P.3d 23, 25 (2002), the review was initiated by filing a "Notice of Appeal – Petition for Review" with the filing party denominated "Appellant."

W. Disqualification of the judge

Litigants in civil actions and judicial reviews[383] are allowed to disqualify one district court judge "without cause" (meaning that the litigant does not need to identify a basis for the disqualification. Idaho R. Civ. P. 40(d)(1).

In addition, a judge may be disqualified for cause (such as bias or conflict of interest), but that is extraordinarily rare.

X. Judicial review of municipal annexation

Annexation is governed by Idaho Code § 50-222. (See discussion in section 9 at page 113.) Historically, annexations were not subject to judicial review under the IAPA, but instead could be challenged by way of declaratory actions. See discussion in section 24.M(4) (Actions not subject to judicial review may be challenged by way of declaratory judgment or other civil action.) on page 426. In 2002 the Legislature made Category B and C annexations subject to judicial review under the IAPA. Idaho Code § 50-222(6). S.B. 1391, 2002 Idaho Sess. Laws, ch. 333 (codified at Idaho Code § 50-222(6)). Declaratory actions remain available to challenge a Category A annexation.

(1) Review prior to 2002

Historically, annexations were not subject to judicial review under. In earlier decades, the availability of judicial review for land use decisions turned on whether the governmental action was deemed "legislative" or "quasi-judicial." *Cooper v. Ada Cnty. Comm'rs*, 101 Idaho 407, 411, 614 P.2d 947, 951 (1980) (Donaldson, C.J.). Annexation decisions were deemed "legislative," and, hence, not subject to judicial review. "Legislative action is shielded from direct judicial review by 'its high visibility and widely felt impact, on the theory that appropriate remedy can be had at the polls.'" *Burt v. City of Idaho Falls*, 105 Idaho 65, 68, 665 P.2d 1075, 1078 (1983) (Donaldson, C.J.) (quoting *Cooper v. Ada Cnty. Comm'rs*, 101 Idaho 407, 410, 614 P.2d 947, 950 (1980)).

Basing jurisdiction on the legislative/quasi-judicial distinction ended with *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner I*"), 145 Idaho 630, 632, 181 P.3d 1238, 2140 (2008), after which the availability of judicial review turned on the express words of statutes authorizing such review. After *Giltner I*, however, judicial review remained unavailable because the IAPA authorizes judicial review of actions

[383] Previously, disqualification without cause was limited to civil actions. *Arthur v. Shoshone Cnty.*, 133 Idaho 854, 857, 993 P.2d 617, 620 (Ct. App. 2000) (Lansing, J.). The rule was amended in approximately 2012 to apply equally in the context of judicial reviews.

by state "agencies," not cities and counties. *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 960, 188 P.3d 900, 902 (2008) (Eismann, J.).[384]

Thus, the rule today is simple: without a statute specifically authorizing judicial review, none is available. LLUPA, for example, authorizes judicial review of certain planning and zoning action. But, until 2002, Idaho's Annexation Statute contained no such provision.

But that did not mean that annexation decisions were immune from legal challenge. Although judicial review was not available, unlawful annexation actions could be challenged by bringing a civil action (typically for declaratory judgment) against the city, seeking to have an annexation ordinance declared void or invalid. *E.g.*, *Hendricks v. City of Nampa*, 93 Idaho 95, 96, 456 P.2d 262, 263 (1969) (Donaldson, J.) (allowing "an action against the [City] to have declared void [the City's annexation ordinance]").[385] See discussion in section 24.M(4) (Actions not subject to judicial review may be challenged by way of declaratory judgment or other civil action.) on page 426.[386]

(2) The test of reasonableness

The annexation decision itself has long been viewed as "legislative" in nature. Hence, the Idaho Supreme Court has allowed second-guessing by the court only in rather extreme circumstances. This is reflected in the "test of reasonableness" standard.

An annexation must not only satisfy the procedural and substantive requirements of Section 50-222, but must also pass judicially-imposed the "test of reasonableness." *Hendricks v. City of Nampa*, 93 Idaho 95, 98, 456 P.2d 262, 265

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[384] Although *Highlands* was decided in 2008, it dealt with an annexation occurring prior to the 2002 amendment to the Annexation Statute allowing judicial review of Category B and C annexations. *Highlands*, 145 Idaho at 961, 188 P.3d at 903.

[385] The *Hendricks* case cited many more examples of annexations properly challenged by civil actions. *Finucane v. Village of Hayden*, 86 Idaho 199, 384 P.2d 236 (1963); *Batchelder v. City of Coeur D'Alene*, 85 Idaho 90, 375 P.2d 1001, (1962); *Oregon Short Line Railroad Co. v. Village of Chubbuck*, 83 Idaho 62, 357 P.2d 1101 (1960); *Potvin v. Village of Chubbuck*, 76 Idaho 453, 284 P.2d 414 (1955); *Hillman v. City of Pocatello*, 74 Idaho 69, 256 P.2d 1072 (1953); *Boise City v. Baxter*, 41 Idaho 368, 238 P. 1029 (1925); *Boise City v. Boise City Dev. Co.*, 41 Idaho 294, 238 P. 1006 (1925); *cf. State v. Frederic*, 28 Idaho 709, 155 P. 977 (1916).

[386] The *Highlands* case left the door open for attacking an unlawful annexation through other means, such as declaratory action. "The dissent also argues that this opinion "will prevent property owners from obtaining judicial review of decisions downzoning their property." It will not. As we recognized in *McCuskey v. Canyon County Commissioners* [*"McCuskey II"*], 128 Idaho 213, 912 P.2d 100 (1996), such landowners can seek relief in an independent action." *Highlands*, 145 Idaho at 962, 188 P.3d at 904.

(1969). (Presumably this pre-2002 case law is still applicable, despite the changes in judicial review provisions. However, the Supreme Court has not yet spoken to this.)

In *Batchelder v. City of Coeur d'Alene*, 85 Idaho 90, 95, 375 P.2d 1001, 1004 (1962), *Batchelder*, the Idaho Supreme Court excluded a drive-in movie theater from an otherwise proper annexation because the annexation boundary bisected several buildings on the property. This resulted in, among other things, the snack bar and generator being inside the city while the rest rooms and other equipment remained outside the city.

> Such manner of division of the physical plant of Lee's business would create problems and result in confusion in the matter of assessment and levy of taxes for county and municipal purposes, as well as in management problems by the municipality of the properties, if allowed to be so divided. We therefore hold that the division of appellants Lee's property on the basis shown is unreasonable; and until and unless such property is divided in a reasonable manner so as not to bisect the buildings and assets of the business there conducted, that such tract must be excluded.

Batchelder, 85 Idaho at 96, 375 P.2d at 1004. The test of reasonableness also requires that a court view the annexation as a whole in determining whether it was reasonable:

> the total portion annexed is to be considered as an entirety, and even though some parts might have been left out or other areas might have been included, nevertheless, if the entire portion sought to be annexed comes reasonably within the purposes for which annexation may be made it will not be considered that the city has abused its discretion.

Hendricks, 93 Idaho at 98, 456 P.2d at 265.

The legislative intent expressed in Section 50-222 indicates that "the purposes for which an annexation may be made" are those "reasonably necessary to assure the orderly development of Idaho's cities," to allow "efficient and economically viable provision of tax-supported and fee-supported municipal services," enable "the orderly development of private lands which benefit from the cost-effective availability of municipal services in urbanizing areas," and to "equitably allocate the costs of public services in management of development on the urban fringe." Idaho Code § 50-222(1). *Batchelder*, *Hendricks*, and *Boise City Development Company* thus suggest that the statutorily authorized annexation of a particular tract will be

found reasonable if the annexation that included the tract was, as a whole, "reasonably necessary" for the orderly and economical development of the city, unless the annexation results in patently unreasonable results on the tract in question, such as in *Batchelder*.

Idaho courts have not defined the parameters of what makes an annexation "reasonably necessary" for the orderly and economical development of a city. The Idaho Supreme Court indicated in *Boise City Development* that courts generally should defer to the city's judgment in this regard:

> Many reasons might be advanced from the standpoint of the city why certain property immediately contiguous should nevertheless not be a part of the city and, while the city under the statute under consideration may annex all of the adjacent and contiguous tracts, it is not unreasonable and illogical to hold that the city council may exercise their best judgment as to what should be annexed.

Boise City Development Co., 41 Idaho 294, 309, 238 P. 1006, 1011 (1925).

This is consistent with the fact that annexation is a legislative act, not a judicial one. *Crane Creek Country Club v. City of Boise*, 121 Idaho 485, 487, 826 P.2d 446, 448 (1992). Furthermore, challenges to the validity of an annexation generally are viewed from the perspective of the city's needs, not from that of the individual landowner. *See Oregon Shortline Railroad Co. v.* City *of Chubbuck*, 93 Idaho 815, 817, 474 P.2d 244, 246 (1970) ("The record is replete with evidence that the railroads do not need the municipality . . . . There is, however, no proof and indeed no discussion as to whether the city needs to annex the railroad land in pursuit of an orderly development of the city. Respondent railroads have thus failed to carry their burden of proof and the presumption of the validity of the duly enacted municipal ordinance continues to prevail."); *see also Boise City Development Co.*, 42 Idaho at 309, 238 P. at 1011 (stating that the question was not whether the tract in question, considered separately, should have been annexed, but whether the annexation should be sustained in view of the conditions confronting the municipal authorities at the time).

Idaho courts thus probably will not disturb a city's determination that the annexation of certain lands is reasonably necessary to ensure the orderly and economical development of the city and the surrounding urbanizing areas, absent a *Batchelder*-like scenario or unless an annexation is in some other regard plainly unreasonable or unnecessary on its face. As previously discussed, the test of reasonableness therefore might, in theory, limit a statutorily authorized but geographically over-reaching annexation. It appears that no reported Idaho case

addresses this question, however, and such an annexation probably would have to be very over-reaching indeed to be invalidated on reasonableness grounds.

An argument could be made that statutorily sound but geographically over-reaching annexation does not reasonably come within the purposes for which an annexation may be made, and amounts to an abuse of discretion. As will be discussed, however, such an annexation likely would have to be extremely large to constitute an abuse of discretion.

(3) Review after 2002

When the Legislature re-wrote the Annexation Statute in 2002, it expressly authorized judicial review of Category B and Category C annexations under the IAPA (including the standards set forth in Section 67-5279). S.B. 1391, 2002 Idaho Sess. Laws, ch. 333 (codified at Idaho Code § 50-222(6)).[387]

In *Black Labrador Investing, LLC v. Kuna City Council*, 147 Idaho 92, 205 P.3d 1228 (2009), the Court held that the act authorizes judicial review only of Category B and C annexations. However, the Court also appears to hold that, even as to Category B and C annexations, judicial review is authorized only to challenge an affirmative decision by the city to annex the property. In other words, there is no judicial review if the city determines to deny the annexation request. *Black Labrador*, 147 Idaho at 97, 205 P.3d at 1233.

Section 50-222 does not expressly prohibit direct actions by way of complaint against a city in regard to a Category B or Category C annexation ordinance, but it seems unlikely a court would allow such an action in light of the new judicial review provision. In contrast, the statute does not subject Category A annexations to IAPA judicial review, and presumably direct actions against a city may still be brought in regard to that category of annexations.

The broad reference to the IAPA judicial review provisions (Idaho Code § 67-5279) is ambiguous. Did the Legislature mean for review to be governed by the contested case provisions (section 67-5279(3)) or the provisions for review of rulemakings and other informal matters that that are not based on a record (section 67-5279(2))? Presumably, the Legislature intended the former. This would make the findings and conclusions required to be made under Category B and C annexations subject to the same level of scrutiny that courts apply to factual findings in quasi-judicial proceeding.

[387] Any such petition for judicial review must be filed in the district court within twenty-eight days of the publication of the annexation ordinance. Idaho Code § 50-222(6). The court is to hear any such petition "at the earliest practicable time" if a question as to the validity of the annexation ordinance may arise. Idaho Code § 50-222(6).

As noted, annexations have been viewed as legislative, not quasi-judicial. Whether the 2002 statute converts Category B and C annexations into quasi-judicial actions for purposes of due process has not been addressed by an appellate court. However, an Idaho district court found that Category B annexations remain legislative and therefore not subject to *ex parte* communication rules. *City of Boise v. Bastian* (unpublished district court) (2006). See discussion of legislative versus quasi-judicial actions in section 13.F at page 136.

Meanwhile, Category A annexations presumably remain subject to only limited judicial challenge via declaratory action. In *Steele v. City of Shelley (In re Annexation to the City of Shelley)*, 151 Idaho 289, 255 P.3d 1175 (2011), the Court followed *Black Labrador* and confirmed that there is no judicial review of Category A annexations. The Court did not discuss whether the parties could have instead obtained relief via a declaratory action. See discussion of *Steele* in section 9.E(6) at page 121.

In addition to whatever other standards of review may be applicable, keep in mind that annexations are subject to challenge on the basis of the "test of reasonableness" (see discussion in section 24.X(2) at page 445).

Y. The *Euclid Avenue* case: Supreme Court prohibits the combination of judicial review and civil actions.

In *Euclid Avenue Trust v. City of Boise*, 146 Idaho 306, 193 P.3d 853 (2008) (J. Jones, J.), the Idaho Supreme Court declared that it is improper for a litigant to combine a judicial review with a civil action for declaratory and/or monetary relief in a single complaint. Although this case arose in the context of a land use decision, the Court made clear that the same result would apply in other contexts. Indeed, it quoted from a prior case dealing with road validation. *Euclid Avenue*, 146 Idaho at 308, 193 P.3d at 855 (quoting from *Cobbley v. City of Challis*, 143 Idaho 130, 133, 139 P.3d 732, 735 (2006) (J. Jones, J.)).

The more complete discussion is *Cobbley* explains that judicial review is a different kind of animal that a civil action:

> The district court's ruling is correct: a petition for judicial review of a road-validation decision of a local governing board is a distinct form of proceeding and cannot be brought as a pleading or motion within an underlying civil lawsuit. A board of county commissioners' authority over highways derives from the Legislature's delegation of its authority over roads and highways. See I.C. § 40–201. The Legislature has provided the method by which certain persons, or the board having jurisdiction over the particular highway

> system, may initiate proceedings to validate a road. I.C. § 40–203A. "Judicial review" is defined by our Rules of Civil Procedure as "the district court's review pursuant to statute of actions of agencies...." Idaho R. Civ. P. 84(a)(2)(C). Judicial review of an administrative decision is wholly statutory; there is no right of judicial review absent the statutory grant.

Cobbley, 143 Idaho at 133, P.3d at 735.

The *Euclid Avenue* Court noted, however, that Rule 84(a)(1) of the Idaho Rules of Civil Procedure does allow petitions for judicial review to be combined with petitions for writs of mandate, prohibition, quo warranto, certiorari, or other common law or equitable writs. *Euclid Avenue*, 146 Idaho at 309, 193 P.3d 856.

In the face of improperly combined claims, the Court did not simply throw out the entire case. Instead it allowed the case civil action alone to proceed on the basis of the "fee category" stated on the face of the complaint.[388]

Z. Injunctive relief

In addition to seeking declaratory relief, plaintiffs may also seek injunctive relief prohibiting enforcement of an unlawful zoning ordinance. *Cole-Collister Fire Protection Dist. v. City of Boise*, 93 Idaho 558, 562, 468 P.2d 290, 294) (1970).

Likewise, a city or county may enforce its zoning ordinances by way of injunction. *Wyckoff v. Bd. of Cnty. Comm'rs of Ada Cnty.*, 101 Idaho 12, 15, 607 P.2d 1066, 1069 (1980).

AA. Writs

Idaho statutes authorize three extraordinary writs:

A writ review (formerly writ of certiorari) may be issued to an inferior tribunal, board, or officer exercising judicial functions in a manner that exceeds its authority. Idaho Code §§ 1-201 to 1-208.

A writ of mandate (formerly writ of mandamus) may be issued to an inferior tribunal, corporation, board, or person to compel the performance of an act that the entity has a duty to perform. Idaho Code §§ 1-301 to 1-314.

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[388] "Euclid's initial filing in district court indicated a fee category of A1 and, thus, the Court will take Euclid at its word and consider the appeal as an appeal of a civil action. Had the filing category been designated as R2, we would again take Euclid at its word and determine the matter as an administrative appeal. It is likely the district court viewed the case as a civil action because it determined the claims under the summary judgment standard. We will do likewise." *Euclid Avenue*, 146 Idaho at 309, 193 P.3d at 856.

The writ of prohibition is the negative counterpart of the writ of prohibition. It may be issued to a tribunal, corporation, board, or person engaged in proceedings without or in excess of its jurisdiction. Idaho Code §§ 1-401 to 1-404.

Writs of mandate and prohibition come in either of two forms. An "alternative writ" is one issued to the party with an instruction to perform some act or, in the alternative, show cause why the act has not been done. A "peremptory writ" contains no show cause alternative, and would be issued after a hearing.

Under rare circumstances these extraordinary writs may be available to review certain forms of planning and zoning actions.

The courts will not allow parties to end-run LLUPA by seeking a writ of mandate. In *Brady v. City of Homedale*, 130 Idaho 569, 944 P.2d 704 (1997), which involved a challenge to a building permit, the Court cited *Bone v. City of Lewiston*, 107 Idaho 844, 850, 693 P.2d 1046, 1052 (1984), for the proposition that LLUPA and the IAPA ordinarily establish the exclusive means of judicial review, but that in this case the plaintiff was entitled to pursue a writ of mandate because she was unable to exhaust administrative remedies under LLUPA after she was denied a hearing. Thus, this case seems to hold that absent such extraordinary circumstances, a writ of mandate would not be available to challenge actions reviewable under LLUPA.

The Court reached the same result in *McVicker v. City of Lewiston*, 134 Idaho 34, 995 P.2d 804 (2000), where the Court ruled that a city employee's failure to forward a protest letter excused the plaintiffs' failure to timely exhaust their administrative remedies. In *McVicker*, however, Court declared that "the McVickers are entitled to a hearing before the Lewiston planning and zoning commission, as they were denied that opportunity and prevented from exhausting administrative remedies. *McVickers*, 134 Idaho at 38, 995 P.2d at 808. Apparently the Court contemplated a remand for further administrative proceedings and declined to reach the plaintiffs' request for a writ of mandate and declaratory judgment.

The Idaho Supreme Court has declared that actions reviewable under LLUPA are not subject to review under the writ of prohibition. In *Crane Creek Country Club v. City of Boise*, 121 Idaho 485, 826 P.2d 446 (1992), the Court ruled that a writ of prohibition lies for review of a city's quasi-judicial actions, not its legislative functions, and annexation is legislative in nature. The Court did not say what the litigant should have done in this case, merely observing: "Unfortunately, because Crane Creek erred in its choice of tools, we are unable to reach the merits of the case." *Crane Creek*, 121 Idaho at 486, 826 P.2d at 447. Presumably, a declaratory judgment action would have been the proper vehicle. On the other hand, a concurrence by two justices says, "[T]herefore the proceedings in the district court should have been a judicial review." *Crane Creek*, 121 Idaho at 487, 826 P.2d at 448. The concurrence says: "As the majority opinion correctly states, '[p]rohibition

is primarily concerned with jurisdiction and is not available to review errors committed in the exercise of jurisdiction.'" *Crane Creek*, 121 Idaho at 487, 826 P.2d at 448. The fact that the concurrence then suggests that the proper vehicle for review should have been judicial review suggests that maybe a discrete, single-parcel annexation is quasi-judicial after all. The bottom line is that the Court has never pinned this down, and it is now largely mooted by the 2002 amendments to the annexation law allowing judicial review of Category B and C annexations.

In *McCuskey v. Canyon Cnty.* ("*McCuskey I*"), 123 Idaho 657, 663-64, 851 P.2d 953, 959-60 (1993) (Bistline, J.), the Court issued a declaratory order striking down a zoning ordinance as void on procedural grounds. Nevertheless, the Court determined that the plaintiff was not entitled to a writ of mandate directing the commissioners to issue a permit under the prior ordinance:

> It is well established that a writ of mandate will not issue to compel the performance of a discretionary act. As I.C. § 67-6519 [LLUPA] gives counties the discretion to grant or deny an application for a permit authorized by the Local Planning Act of 1975, a writ of mandate is not available to compel the issuance of such a permit.

McCuskey I, 123 Idaho at 663, 851 P.2d at 959.

Where proceedings under a writ of mandate are allowed, the standard is a difficult one. "A writ of Mandate will lie to require administrative action in zoning matters only when the party seeking the writ has a clear legal right to have the act performed . . . and . . . the act be ministerial and not require the exercise of discretion." *Wyckoff v. Bd. of Cnty. Comm'rs of Ada Cnty.*, 101 Idaho 12, 14, 607 P.2d 1066, 1068 (1980) (internal quotation marks omitted); *accord*, *Tranmer v. Helmer*, 126 Idaho 88, 878 P.2d 787 (1994) (denying petition for writ of mandate to compel approval of plat, where ordinance did not absolutely mandate approval of plat).

In *Butters v. Hauser ("Butters II")*, 131 Idaho 498, 501, 960 P.2d 181, 184 (1998), the Court allowed a party to pursue an action for declaratory judgment challenging a zoning ordinance, but declined to issue a writ of mandamus to abate the issuance of a conditional use permit issued pursuant to the challenged ordinance. The Court noted that the same party was simultaneously pursuing a judicial review of the permit and thus had other adequate remedies.

Where the proper form of proceeding is unclear, the better approach may plead each of them in the alternative (but mindful of the requirement in *Euclid Avenue* not to mix judicial review and civil actions). *M.K. Transp., Inc. v. Grover*, 101 Idaho 345, 350, 612 P.2d 1192, 1197 (1980), cited with approval in *McCuskey v. Canyon Cnty. Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 218, 912 P.2d 100, 105

(1996) (Trout, J.) (modern pleading rules allow parties to seek alternative types of relief regardless of inconsistency).

BB. Damages under state law

LLUPA and the IAPA provide limited relief—overturning the governmental action. If the party wishes to obtain damages against the governmental entity that wrongfully denied an entitlement, it is necessary to bring an appropriate civil action. This would include claims for taking, inverse condemnation (a form of taking), unlawful conversion, unjust enrichment, or other state law remedy. In addition, a federal cause of action under § 1983 may be available. This is discussed below.

Some claims, however, are subject to the Idaho Tort Claims Act. For counties, this is limited to claims sounding in tort. In the case of cities, all state law damage claims are subject to the procedural requirements of the Idaho Tort Claims Act. See discussion under that heading.

CC. Section 1983 actions

(1) Scope of § 1983 actions

If a party to a land use decision has been denied rights under the laws or Constitution of the United States by an entity acting under color of state law, he or she may bring an action under the Civil Rights Act of 1871, generally known as a "§ 1983 action."[389] This includes allegations of violations of the Fifth Amendment's protection against uncompensated takings[390] and the Fourteenth Amendment's promises of due process[391] and equal protection.[392]

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[389] Section 1983 refers to the Civil Rights Act of 1871 also known as the Ku Klux Klan Act, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983). It provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." A separate provision enacted in 1976, 42 U.S.C. § 1988(b), authorizes the award of attorney fees to successful litigants under § 1983.

[390] "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Fifth Amendment is applicable to the states via the due process clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1. *Cnty. of Ada v. Henry*, 105 Idaho 263, 265, 668 P.2d 994, 996 (1983).

[391] "[N]or shall any state deprive a person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

"That statute does not confer any substantive rights.[393] It is a vehicle for vindicating rights secured by the United States Constitution or federal law."[394] *Bryant v. City of Blackfoot*, 137 Idaho 307, 314, 48 P.3d 636, 643 (2002). "Thus, § 1983 provides a uniquely federal remedy against incursions upon rights secured by the Constitution and laws of the Nation, and is to be accorded a sweep as broad as its language." *Felder v. Casey*, 487 U.S. 131, 140 (1988) (Brennan, J.) (citations, internal quotation marks, and ellipses omitted).

Damages, as well as equitable and declaratory relief are available. 15 Am. Jur. 2d *Civil Rights* §§ 164, 169 (2000). Trial by jury is available if the "essential character" of the action is one for damages.[395]

A § 1983 claim may be brought as a stand-alone action in state[396] or federal court.[397] Until *Euclid Avenue Trust v. City of Boise*, 146 Idaho 306, 193 P.3d 853

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[392] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

[393] "[Section 1983] only fashions a remedy, and is not a jurisdictional statute, and persons asserting claims thereunder must look to other authority to obtain jurisdiction in federal courts. 28 U.S.C.A. § 1343(a)(3) confers jurisdiction of 42 U.S.C.A. § 1983 actions on federal courts." 15 Am. Jur. 2d *Civil Rights* at § 136 (2000). 28 U.S.C. § 1343(a)(3) is a statute dealing specifically with § 1983 claims.

[394] Not all violations of federal law may be vindicated by § 1983. "However, § 1983 may not be used to enforce a right secured by a particular federal act if the remedial devices provided in that act are sufficiently comprehensive to demonstrate that congress intended to preclude the remedy of suits under § 1983." *Bryant v. City of Blackfoot*, 137 Idaho 307, 314, 48 P.3d 636, 643 (2002) (citing *Middlesex Cnty. Sewerage Authority v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1(1981).

[395] "[A]n action under § 1983 for legal relief is an action at law to which the Seventh Amendment guarantee of the right to jury trial applies. However, the fact that a plaintiff in an action under § 1983 has sued for damages as part of the relief sought does not automatically entitle him to a jury trial of the action; the essential character of the action as legal or equitable, as shown by the allegations of the petition, determine whether a particular action is one at law to be tried to a jury or in equity to be tied to a court." 15 Am. Jur. 2d *Civil Rights* at § 160 (2000) (footnotes omitted).

[396] "[S]tate courts . . . possess concurrent jurisdiction over [§ 1983] actions." *Felder v. Casey*, 487 U.S. 131, 140 (1988). "Accordingly, we have held that a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy . . . ." *Felder* at 140.

[397] The U.S. Supreme Court recognized early on that "the federal courts are the chief—though not always the exclusive—tribunals for enforcement of federal rights." *McNeese v. Bd. of Education for Community Unit School Dist. 187, Cahokia, Illinois*, 373 U.S. 668, 672 (1963). This extension of federal jurisdiction by the Civil Rights Act was particularly significant in 1871, because federal courts did not gain broad "arising under" jurisdiction until 1975. *McNeese* at 672 n.2. In *Patsy v. Bd. of Regents of the State of Florida*, 457 U.S. 496, 506 (1982), the Court said that the purpose of § 1983 was "to provide dual or concurrent forums I the state and federal systems, enabling the plaintiff to choose the forum in which to seek relief."

(2008), they were often brought as a separate count in a single lawsuit including a judicial review.

Section 1983 only applies to actions taken under color of state law, not federal law.[398]

The U.S. Supreme Court and the Idaho Supreme Court each have recognized that § 1983 actions lie against municipal governments. *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Gibson v. Ada Cnty.*, 142 Idaho 746, 752, 133 P.3d 1211, 1217 (2006), , *cert. denied*, 549 U.S. 994 (2006), *rehearing denied*, 549 U.S. 1159 (2007); *Bryant v. City of Blackfoot*, 137 Idaho 307, 314, 48 P.3d 636, 643 (2002).

In contrast, States are immune from suit under the Eleventh Amendment and are not "persons" subject to suit under § 1983. *Arnzen v. State*, 123 Idaho 899, 903-04, 854 P.2d 242, 246-47 (1993), *cert. denied*, 510 U.S. 1071(1994).

> The immunity of the states from suit in the federal courts, as guaranteed by the Eleventh Amendment, is not overridden by 42 U.S.C.A. § 1983. . . . State agencies or governmental entities which have been found to partake of the state's Eleventh Amendment immunity from § 1983 actions include state courts, state public defender systems, departments of education, departments of correction, departments of environmental management, and state universities. . . . Counties and county officials, school districts, school boards, and municipalities have been held not covered by the Eleventh Amendment immunity against § 1983 actions. . . .
> An action in federal court under 42 U.S.C.A. § 1983 brought against a state official in his individual capacity, rather than his official capacity, is not barred by the Eleventh Amendment. This is so even though the state may ultimately reimburse the official with respect to any judgment paid by him.

15 Am. Jur. 2d *Civil Rights* §§ 99, 100 (2000) (footnotes omitted).

Section 1983 actions are subject to state statutes of limitations (see discussion in section 22 at page 302). However, state notice-of-claim restrictions are

[398] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 399 n.1 (1971) (explained in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 409 F.2d 718, 720 n.1 (2nd Cir. 1969)); 15 Am. Jur. 2d *Civil Rights* § 75 (2000) ("One acting under color of federal law cannot be held liable under 42 U.S.C.A. § 1983 for his or her acts.").

preempted, even when the § 1983 action is raised in state court. *Felder v. Casey*, 487 U.S. 131, 140-41 (1988) (Brennan, J.).[399]

See discussion of attorney fee recoveries in § 1983 actions in section 24.P at page 536.

(2) No exhaustion required under § 1983.

As discussed in section 24.L(4) at page 384, litigants must exhaust their administrative remedies before pursuing a judicial review of a land use decision. Exhaustion, however, is not required for § 1983 actions.

The U.S. Supreme Court first articulated the rule that exhaustion principles do not apply to § 1983 actions in *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled on other grounds by Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658 (1978). There the Court said, "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe* at 183.

This conclusion was reiterated in *McNeese v. Bd. of Education for Community Unit School Dist. 187, Cahokia, Illinois*, 373 U.S. 668 (1963). "We have previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy." *McNeese* at 671.

The U.S. Supreme Court said it a third time in *Patsy v. Bd. of Regents of the State of Florida*, 457 U.S. 496 (1982). There the Court concluded that exhaustion was inconsistent with the original purpose of the statute and with more recent legislative indications of intent.[400] The dissent characterized this as "a flat rule

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[399] *Felder* contains some very broad language. "Finally, the notice provision operates, in part, as an exhaustion requirement, in that it forces claimants to seek satisfaction in the first instance from the governmental defendant. We think it plain that Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries." *Felder*, 487 U.S. at 143. This pro-plaintiff decision seems difficult to reconcile with the far harsher approach taken with respect to takings plaintiffs in *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (Blackmun, J.). No one, by the way, has ever suggested that the 28-day judicial review deadlines in the IAPA and LLUPA are preempted by § 1983.

[400] The Court found three themes that strongly suggested that exhaustion of state administrative remedies would be inconsistent with the purpose of the statute: (1) the assignment to the federal courts of the paramount role in protecting constitutional rights, (2) the belief that state authorities had been unable or unwilling to protect the constitutional rights of individuals or punish the violators, and (3) the recognized dual or concurrent forums that allowed a plaintiff to choose whether to file in state or federal court. *Patsy*, 457 U.S. at 503-07. The Court further observed that Congress had explicitly included an exhaustion requirement under § 1983 for federal prisoners in subsequent legislation (the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 et. seq.),

without exception." *Patsy* at 534 (J. Powell, dissenting, characterizing the majority's holding). This characterization was quoted the following year by the Ninth Circuit, which said that Justice Powell's "flat rule" summary accurately described the state of the law. *Heath v. Cleary*, 708 F.2d 1376 (9th Cir. 1983) (eliminating various exceptions previously recognized by the federal courts).

The Idaho Supreme Court, too, has recognized that exhaustion is not required in § 1983 cases. "The U.S. Supreme Court and several federal circuits have held that it is not a prerequisite to filing a § 1983 claim that a party must exhaust all state administrative claims." *Gibson v. Ada Cnty.*, 142 Idaho 746, 753, 133 P.3d 1211, 1218 (2006), *cert. denied*, 549 U.S. 994 (2006), *rehearing denied*, 549 U.S. 1159 (2007). The Court recognized that while the exhaustion requirement did not apply, the ripeness requirement did.[401] The ripeness issue, by the way, arose obliquely in the context of a possible defense to the statute of limitations.[402] The take home point from this somewhat confusing opinion is that our Court has recognized that exhaustion does not apply to § 1983 actions.

An earlier Idaho case, *Cnty. of Ada v. Henry*, 105 Idaho 263, 668 P.2d 994 (1983), contains language that might be misunderstood as establishing a procedural exhaustion requirement (in contradiction of the U.S. Supreme Court's very clear holdings on this issue). A careful reading of the decision, however, shows that this was not the Court's holding. In this case the plaintiffs built a home on illegally subdivided property "despite repeated warnings and restraining orders." *Henry*, 105 Idaho at 264, 668 P.2d at 995. The county moved for an order to show cause, and the Henrys counterclaimed under § 1983 claim alleging that Ada County denied them due process and equal protection and constituted a taking. The Court rejected the due process claim, observing that they could hardly complain of a lack of due process

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thus demonstrating Congress' "approach of carving out specific exceptions to the general rule that federal courts cannot require exhaustion under § 1983." *Patsy* at 512.

[401] "[T]here must be at least some definitive administrative or institutional determination before an action may arise." *Gibson*, 142 Idaho at 753, 133 P.3d at 1218 (emphasis, internal quotation marks, and brackets omitted). *Gibson's* conclusion that ripeness, not exhaustion, is required is consistent with federal case law. See discussion of the ripeness requirement in § 1983 actions articulated in *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), in section 28.H(1) at page 616. For unknown reasons, the *Gibson* Court did not cite *Williamson County*, but instead cited earlier lower federal court decisions for the same proposition.

[402] This case involved an action by a Sheriff's Department clerk who was fired for accepting duplicate pay vouchers. She filed a § 1983 action (among other claims). Meanwhile, she pursued a separate administrative appeal. The Idaho Supreme Court ruled that she missed the deadline for filing the § 1983 action under the applicable two-year statute of limitations, and that the time for filing was not tolled by virtue of the separate ongoing administrative action. The Court found that the § 1983 action was ripe at the time it was filed despite the ongoing administrative proceeding, and therefore time barred.

when they had not bothered to appear at their own hearings:[403] "The Henrys had ample opportunity to argue their claim that they were entitled to a building permit, but did not participate in several hearings . . . ." *Henry*, 105 Idaho at 266, 668 P.2d at 997. Given that the Henrys "chose not to appear, and they further chose not to exhaust their remedies," they should not now be allowed to "collaterally attack the ordinances." *Henry*, 105 Idaho at 266-67, 668 P.2d at 997-98. This reference to exhaustion should be read in context; it is not as a contradiction of the well-established rule that exhaustion is not required in 1983 actions. The Court's decision was a rejection on the merits of the due process claim.[404] The case does not establish a procedural or jurisdictional requirement of exhaustion as a prerequisite to hearing a § 1983 action. The Henrys' due process claim was heard and rejected.

The nonapplicability of the exhaustion rule is also evident in *Puckett v. City of Emmett*, 113 Idaho 639, 747 P.2d 48 (1988). In that case, the Court recognized that a plaintiff could elect to proceed, first, with a federal court § 1983 action and then (when that failed) with a state law claim in a separate action. (The issue in the Idaho case was whether res judicata precluded the second action. It did not.) The Idaho Court noted that the federal court could have heard both claims—thus recognizing that there is no requirement that the § 1983 claim await the resolution of the state law remedy. *Puckett*, 113 Idaho at 642, 747 P.2d at 51.

(3) Ripeness is required for § 1983 claims based on takings

Although exhaustion does not apply to § 1983 claims, ripeness may be required. *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). The applicability of the ripeness requirement to § 1983 claims based on takings is discussed in section 28.H(1) at page 616.

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[403] Apparently the Henrys' attorney advised them "that any effort to protest the injunction [at the hearings] would be useless" so they did not bother to appear. *Henry*, 105 Idaho at 264, 668 P.2d at 995.

[404] "We hold there to be an absence of merit in any of those claims." *Henry*, 105 Idaho at 266, 668 P.2d at 997 (emphasis supplied). Essentially, the court found that the Henrys were not denied due process, because they declined to take advantage of the process afforded them. "We reject the Henrys' assertion that they had been denied due process." *Henry*, 105 Idaho at 267, 668 P.2d at 998. In addition to rejecting the § 1983 due process claim on the merits, the court also rejected the Henrys' § 1983 equal protection claim. "[T]here is a lack of any indication that the Henrys' property is the only property affected by the ordinance or that there was herein any type of discrimination." *Henry*, 105 Idaho at 267, 668 P.2d at 998. In addition, the court rejected the takings claim on the merits, citing federal precedent. *Henry*, 105 Idaho at 266, 668 P.2d at 997.

(4) Section 1983 is the exclusive means of raising federal takings claims (exception for *Bivens* actions not applicable)

Section 1983 provides a means of challenging constitutional violations. The question arises: Where § 1983 is available, is it the exclusive means of pursuing a federal constitutional violation? The quick answer is "yes."

In limited circumstances, courts have recognized the right of plaintiffs to seek relief for constitutional violations in the absence of any statutory authority. In essence, a cause of action may be derived from the Constitution itself. In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971), the U.S. Supreme Court found that the Constitution itself "gives rise to a cause of action for damages consequent upon [the] unconstitutional conduct [of federal agents]." Thus, the absence of a statutory cause of action is no bar to a damage action for an unlawful search and seizure by federal agents.[405]

Subsequent authority has limited *Bivens* to situations in which no other statutory cause of action is available:

> Since *Bivens*, the Court has applied a two-prong test to determine whether an implied cause of action is necessary. According to this test, a *Bivens* action is permissible unless either (1) special factors counsel hesitation or (2) Congress has provided an alternative remedy intended to be an equally effective substitute for the Bivens claim.

David C. Nutter, *Two Approaches To Determine Whether an Implied Cause of Action Under the Constitution Is Necessary: The Changing Scope of the Bivens Action*, 19 Georgia L. Rev. 683, 683-84 (1985).

The § 1983 remedy was unavailable in *Bivens* because that case involved a constitutional violation by federal agents. Section 1983 provides a remedy where the unlawful actor is an official acting under color of state law. The Ninth Circuit has

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[405] *Bivens* was followed by *Davis v. Passman*, 442 U.S. 228 (1979), which held that a congressional staffer could sue her employer, a U.S. Congressman, for an alleged violation of the Fifth Amendment (gender discrimination). Here, too, § 1983 was unavailable because no state actor was involved, as the court noted in a footnote. *Davis*, 442 U.S. at 239 n.16. Thus, *Davis* and *Bivens* are consistent in recognizing a direct cause of action for constitutional deprivation under facts where no other cause of action is available. Neither is inconsistent with *Azul-Pacifico* and other authorities holding that § 1983 displaces direct constitutional challenges when § 1983 is available. See also, *United States v. Clarke*, 445 U.S. 253, 257 (1980) (Rehnquist, J.) (describing "the self-executing character of the constitutional provision with respect to compensation."). This was an action against the federal government, so, as in *Bivens*, § 1983 was not available.

consistently ruled that § 1983 supplants any *Bivens*-style implied cause of action and is the exclusive basis for a federal court challenge to actions by local planning and zoning officials that are alleged to violate the U.S. Constitution. "Plaintiff has no cause of action directly under the United States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983." *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992), *cert. denied*, 506 U.S. 1081 (1993). "For these reasons, we have held that a plaintiff may not sue a state defendant directly under the Constitution where section 1983 provides a remedy, even if that remedy is not available to the plaintiff." *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1382 (9th Cir 1998).[406] "Taking claims must be brought under § 1983." *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003), *cert. denied*, 543 U.S. 1041 (2004 and 2005) (two petitions for certiorari denied).

Some confusion on this point has been introduced by *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 314-15 (1987). The case contains some remarkably broad language regarding taking claims: "We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation.'" *First English*, 482 at 315 (internal quotation marks omitted). However, this sweeping statement was offered as a background premise explaining the substantive issue in the case (temporary takings)—which the Court never reached—and not as a repudiation of the limitations on *Bivens* recognized by the Ninth Circuit and other courts. Indeed, *First English* does not address the question of whether taking claims may be brought directly under Constitution independent of § 1983.[407]

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[406] An attempt to evade this result by asserting that *Azul-Pacifico* applies only to damage-based taking claims and not claims seeking injunctive relief was rejected by the Ninth Circuit in *Golden Gate Hotel Ass'n v. City and Cnty. of San Francisco*, 76 F.3d 386 (list of unpublished decisions), 1996 WL 26944 at *1 (9th Cir. 1996).

[407] The opinion does not even mention § 1983, and the dissent mentions it only in another context. Nor do the parties' briefs. Nor does the case on remand, *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 210 Cal.App.3d 1353, 258 Cal. Rptr. 893 (1989). This may be explained by the peculiar posture of the case. It was brought in state court pursuant to a complaint that alleged only violations of the state constitution. Somehow, in an apparent afterthought, the federal takings claim was introduced at the state appellate level. The U.S. Supreme Court said that was good enough to allow the case to be brought under 28 U.S.C. § 1257. *First English*, 482 U.S. at 313 n.8. Nor does the case cited by the Court for this proposition, *United States v. Clarke*, 445 U.S. 253, 257 (1980) (Rehnquist, J.) have anything to do with the *Bivens* exception issue; *Clarke* involved a federal actor. Owing to the peculiar posture of the case, it appears that no one thought to ask whether a statutory cause of action was available. In any event, the Court did not address the question.

Given that § 1983 was not discussed, it is fair to say that *First English* is not on point. Nevertheless, a few courts have assumed that *First English* offers a way for inverse condemnation cases to proceed around § 1983. *E.g., Bieneman v. City of Chicago,* 864 F.2d 463, 468 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989); *287 Corporate Center Associates v. Township of Bridgewater,* 101 F.3d 320 (3d Cir. 1996). These cases, however, dispose of the claims on other grounds (statute of limitations) and do not engage on the issue of independent causes of action against state actors under the Fifth or Fourteenth Amendments. The only case we have encountered that expressly addresses and rejects *Azul-Pacifico*, albeit in dictum, is *Lawyer v. Hilton Head Public Service Dist. No. 1*, 220 F.3d 298 (4th Cir. 2000): "Other courts, however, have held, in apparent conflict with *First English*, that a violation of the Takings Clause can only be redressed through a claim under § 1983." *Lawyer* at 303 n.4.

The Idaho Supreme Court has not yet grappled with the question. In a footnote in *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 176 n.2, 108 P.3d 315, 323 n.2 (2004) (Eismann, J.), the Court noted in passing that the plaintiffs in that case brought their action directly under the federal Constitution and that doing so was permissible under *First English* (which it called *First Lutheran*).[408] However, the fact that the plaintiff failed to plead § 1983 was not raised as an issue by the parties or the Court, and, in any event, the Court made no mention of Ninth Circuit and other authority to the contrary. The reason it was mentioned at all had to do only with the non-applicability of the tort claims act to federal causes of action. The Court noted that prior Idaho precedent on this point arose in the context of § 1983, but said that made no difference. In other words, no tort claim notice is required for federal claims regardless whether they are pled under § 1983 or otherwise. That is certainly true, and that is the only holding that can be found in *BHA II* on the subject of § 1983. The rest is dictum that is in direct conflict with Ninth Circuit precedent.

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[408] The Idaho Supreme Court said in a footnote:

> The Takings Clause is self-executing, and a takings claim may be based solely upon it, *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107 S. Ct. 2378, 96 L.Ed.2d 250 (1987), or it may be brought as an action under 42 U.S.C. § 1983, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L.Ed.2d 882 (1999). The *Felder* case was based upon a state notice-of-claim law that "place[d] conditions on the vindication of a federal right," 487 U.S. at 147, 108 S. Ct. at 2311, 101 L.Ed.2d at 143 not upon a state law that conflicted with the procedure provided by § 1983. One advantage to bringing a federal takings claim under § 1983 is the availability of an award of attorney fees under 42 U.S.C. § 1988.

BHA II, 141 Idaho at 176 n.2, 108 P.3d at 323 n.2.

Commentators have recognized that *First English* is not definitive. "In the wake of *Monell* and the provision of a remedy under § 1983 there is a split in authority as to whether a right of action based on the Fourteenth Amendment provides a claim for relief sufficient to invoke the federal question jurisdiction of the federal courts." Kenneth B. Bley, *Use of the Civil Rights Acts to Recover Damages in Land Use Cases*, ALI-ABA, § III(B) (2001) (available on Westlaw at SF64 ALI-ABA 435) (citing *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978)).

The cases and commentary overwhelmingly support the rule established in the Ninth Circuit by *Azul-Pacifico* and other cases.[409] For example:

> Although § 1983 provides express authorization for the assertion of federal constitutional claims against state actors, the Supreme Court has endorsed the view, expressed in several circuit court decisions, that limitations which exist under § 1983 may not be avoided by assertions of *Bivens*-type claims against state and local defendants. [Footnote citing *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 735 (1989).] Thus, the availability of the § 1983 remedy precludes reliance upon the *Bivens* doctrine.
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> . . .
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> Whether § 1983 preempts an alternative constitutional or statutory claim depends upon congressional intent.
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> . . . As discussed below, it is settled that § 1983 operates to preempt alternative *Bivens*-type claims asserted directly under the federal Constitution.
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> . . .

[409] Cases from other jurisdictions reaching the same conclusion as *Azul-Pacifico* include the following: *Smith v. Dep't of Public Health*, 410 N.W.2d 749, 787 (Mich. 1987) ("Thus, both *Chappell* and *Bush* signal a retrenchment from the broad remedial scope evident in the Court's earlier *Bivens*, *Davis*, and *Carlson* opinions. Both *Chappell* and *Bush* suggest greater caution and increased willingness on the part of the court to defer to Congress on the question whether to create damages remedies for violations of the federal constitution."); *Kelley Property Development, Inc. v. Town of Lebanon*, 627 A.2d 909, 921 (Conn. 1993) ("In its current configuration, the *Bivens* line of United States Supreme Court cases thus appears to require a would be *Bivens* plaintiff to establish that he or she would lack any remedy for alleged constitutional injuries if a damages remedy were not created. It is no longer sufficient under federal law to allege that the available statutory or administrative mechanisms do not afford as complete a remedy as a *Bivens* action would provide."); *Wax 'n Works v. City of St. Paul*, 213 F.3d 1016, 1019 (8th Cir. 2000) (Plaintiff asserted claim directly under Fourteenth Amendment; court treated it as under § 1983 and denied relief on exhaustion/ripeness grounds); *Thomas v. Shipka*, 818 F.2d 496, 499 (6th Cir. 1987), *vacated on other grounds & remanded*, 488 U.S. 1036 (1989) (when § 1983 action is precluded by statute of limitations, plaintiff may not bring separate action directly under the Constitution).

> The federal courts have consistently adhered to the principle that § 1983 preempts *Bivens*-type remedies against those who acted under color of state law. [Footnote citing *Azul-Pacifico* among others.]

Martin A. Schwartz, *Section 1983 Litigation Claims and Defenses*, § 1.05 (2010) (available on Westlaw as SNETLCD s 1.05). There is substantial secondary authority on this point.[410] All of these authorities are post-*First English*.

Indeed, *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 735 (1989), it would seem, should put to rest the suggestion that *First English* provides a basis for an end run around § 1983. It held:

> We hold that the express "action at law" provided by § 1983 for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor.

Jett, 491 U.S. at 735. *Jett* dealt with the question of whether plaintiffs can evade limitations on respondeat superior under § 1983 by bringing direct, *Bivens*-type claims. The Court said they may not. "Since our decision in *Monell*, the Courts of Appeals have unanimously rejected the contention, analogous to petitioner's argument here, that the doctrine of respondeat superior is available against a municipal entity under a *Bivens*-type action implied directly from the Fourteenth Amendment." *Jett*, 491 U.S. at 735.

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[410] Another hornbook on § 1983 notes a variety of federal cases reaching the same conclusion, concluding, "The Ninth Circuit asserted that Fourteenth Amendment actions for damages against state defendants are precluded by the availability of § 1983." Sheldon Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983*, § 6:59 (2010) (available on Westlaw at CIVLIBLIT § 6:59). Another law professor concludes:

> Under *Bivens*, the courts are to refrain from a *Bivens*-type action for damages only when Congress has created an alternative remedy. Originally, the Court withheld a *Bivens* damages remedy, because unnecessary, only when the remedy provided by Congress was equally effective. Since *Bivens*, however, the Court has retreated from that principle and now refuses a damages action whenever Congress has made available some relief even if not equal to the damages remedy.

Alan R. Madry, Private Accountability and the Fourteenth Amendment; State Action, Federalism and the Courts, 59 Missouri L. Rev. 499, 551 (1994) (footnote cites David C. Nutter, Note, Two Approaches to Determine Whether an Implied Cause of Action under the Constitution is Necessary: The Changing Scope of the Bivens Action, 19 Ga. L. Rev. 683 (1985)).

Escaping § 1983 may matter for purposes of respondeat superior, but apparently it does not matter for the statute of limitations. See discussion in section 22 at page 302.

In the end, getting around *Azul-Pacifico* and escaping § 1983 may not matter. Even if there is a direct cause of action that gets the plaintiff into court, the federal claims would still be subject to the two-year statute of limitations applicable to § 1983 claims (see discussion in section 22 at page 302) as well as the *Williamson County* defenses (discussed in section 28.H at page 616).

Nor may a plaintiff may not escape the restrictions of § 1983 by arguing that the federal Declaratory Judgment Act accords an independent cause of action. "The Declaratory Judgment Act (28 USC §2201, above) creates a federal *remedy*. It is *not* an independent basis for federal jurisdiction. Before declaratory relief can be granted, federal subject matter jurisdiction requirements must be satisfied. . . . [D]eclaratory relief is a remedy, not a cause of action." *Federal Civil Procedure Before Trial* (Rutter Group – 9th Circuit Edition), § 10:14 at 10-5 (2010).

In *White Cloud v. Valley County*, 2011 WL 4583846 (D. Idaho Sept. 30, 2011) (Lodge, J.); *White Cloud v. Valley County*, 2012 WL 13018504 (D. Idaho Aug. 8, 2012) (Lodge, J.), the federal district court confirmed in an Idaho case that where § 1983 is available it is exclusive. Accordingly, the court dismissed the plaintiffs' federal taking claim for failure to present it under § 1983.

DD. Separate judicial review provision for counties: Section 31-1506(1)

In addition to LLUPA, another statute provides an independent basis for judicial review of county decisions. It is contained within a chapter of the Idaho Code and appears under the heading "County Finances and Claims Against Counties." It provides:

> (1) Unless otherwise provided by law, judicial review of any final act, order or proceeding of the board as provided in chapter 52, title 67, Idaho Code, shall be initiated by any person aggrieved thereby within the same time and in the same manner as provided in chapter 52, title 67, Idaho Code, for judicial review of actions.
> (2) Venue for judicial review of final board actions shall be in the district court of the county governed by the board.

Idaho Code § 31-1506.[411]

In *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner II*"), 150 Idaho 559, 249 P.3d 358 (2011) (Horton, J.), the Idaho Supreme Court found that section 31-1506(1) does not provide an independent right to judicial review of matters governed by LLUPA. In essence, the Court determined that LLUPA's judicial review provisions are more specific and override the broader authorization contained in section 31-1506(1).

> This Court has given an expansive reading to I.C. § 31-1506, notwithstanding the fact that the provision is included in a chapter that addresses county finances. *See, e.g., In re Bennion*, 97 Idaho 764, 554 P.2d 942 (1976) (decision approving property development); *Rural High Sch. Dist. No. 1 v. Sch. Dist. No. 37*, 32 Idaho 325, 182 P. 859 (1919) (order changing school district boundaries); *Village of Ilo v. Ramey*, 18 Idaho 642, 112 P. 126 (1910) (order incorporating a village); *Latah County v. Hasfurther*, 12 Idaho 797, 88 P. 433 (1907) (order opening a private road). However, the prior holdings by this Court do not address the question whether, by providing specific judicial review provisions in LLUPA, the legislature has "otherwise provided" that those provisions are the sole avenues for judicial review.

Giltner II, 150 Idaho at 561, 249 P.3d at 360.

> We conclude that LLUPA's judicial review provisions comprise a comprehensive scheme for judicial review and indicate that the legislature has "otherwise provided" a system for review for decisions made under LLUPA.

Giltner II, 150 Idaho at 562, 249 P.3d at 361.

Thus, if the action being challenged is a planning and zoning matter governed or addressed by LLUPA, judicial review is available if and only if LLUPA provides

[411] This statute may be traced back at least to 1887. Rev. Stat. of Idaho Terr. § 1776 (1887). It was amended many times over the years, the first in 1895. 1895 Idaho Sess. Laws, S.B. 39 at 50-52. From then until 1993, the statute provided a 20-day deadline for judicial review (initially referred to as an appeal). In 1993 the Legislature repealed the statute and replaced it with an entirely new one similar to the current law (referencing the 28-day period for judicial review in the IAPA). 1993 Idaho Sess. Laws, ch. 103, § 2. At that time and for many years prior, the statute was codified at Idaho Code § 31-1509. It was amended in 1994, substituting the word "shall" for "may." 1994 Idaho Sess. Laws, ch. 241, § 1. In 1995, it was recodified (without amendment) to Idaho Code § 31-1506. 1995 Idaho Sess. Laws, ch. 61, § 11. It was amended again in 2013. 2013 Idaho Sess. Laws, ch. 282 § 1.

judicial review, and section 31-1506 may not be used to fill in gaps in judicial review intentionally built into LLUPA by the Legislature.

In *Giltner II*, the dairy sought judicial review of a rezone of a neighboring property. (Presumably, the dairy was concerned that if a housing development was constructed adjacent to the dairy, there would be odor complaints about the dairy.) Recall that in *Giltner I*, the dairy failed in its effort to obtain judicial review of a change to the comprehensive plan map. This time the dairy premised jurisdiction in part on Idaho Code § 31-1506(1). The Idaho Supreme Court affirmed the district court's decision that LLUPA's judicial review provisions are an instance in which the Legislature has "otherwise provided by law" thus making section 31-1506(1) inapplicable to planning and zoning matters. The Court said that it is not necessary for the Legislature to expressly state in LLUPA that section 31-1506 is unavailable. Instead, by analogy to the law of preemption, the Court will look to the overall legislative scheme and will find that the LLUPA judicial review provisions reflect legislative action "in such a pervasive manner that it must be assumed that it intended to occupy the entire subject." *Giltner II*, 150 Idaho at 561, 249 P.3d at 360 (*quoting from Envirosafe Services of Idaho, Inc. v. Cnty. of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987) (internal quotation marks omitted).

The *Giltner II* case arose during the "donut hole" between *Burns Holdings, LLC v. Madison Cnty. Bd. of Cnty. Comm'rs* ("*Burns Holdings I*"), 147 Idaho 660, 214 P.3d 646 (2009) and the 2010 LLUPA amendments when rezones were not subject to judicial review. The concurrence by Justice Jim Jones chastised counsel for its narrow approach to the litigation. The dairy could have obtained judicial relief either by framing the matter as a declaratory action or, after the 2010 amendments, requesting that they be applied retroactively.

In an earlier case, the Idaho Supreme Court recognized the district court's jurisdiction over a judicial review involving "an application to the County for approval to build a rental home on their leased property." *Allen v. Blaine Cnty.*, 131 Idaho 138, 139, 953 P.2d at 578, 579 (1998). The county denied the application because it was inconsistent with the final plat, which listed the lot as non-buildable. It is not clear from the opinion what the nature of the application was. Apparently, it was something that fell outside the ambit of LLUPA. In any event, the case did not discuss the availability or non-availability of LLUPA review, nor the interaction between LLUPA review and review under section 31-1506.

EE. Estoppel

In *Terrazas v. Blaine Cnty.*, 147 Idaho 193, 207 P.3d 169 (2009), the Idaho Supreme Court rejected an estoppel argument based on representations by the P&Z Administrator that a proposed subdivision did not lie within the mountain overlay district. The Court emphasized that estoppel is available only under "exigent circumstances" that were not present here, despite the fact that the applicants spent

over $50,000 in planning for a project that was ultimately rejected by the county as being within the mountain overlay district. The Court explained, "If this Court were to apply the doctrine of estoppel in the instant case, then all future boards of commissioners in similar circumstances would be estopped from disagreeing with the opinions of staff members simply because a landowner expended money in reliance on those opinions."

FF. Void for vagueness

Occasionally zoning and subdivision ordinances have been challenged as being void for vagueness. The basic premise is that "[a] statute is void for vagueness if persons of ordinary intelligence must guess at its meaning." *Terrazas v. Blaine Cnty.*, 147 Idaho 193, 207 P.3d 169 (2009). This is a difficult standard to meet.

In *Terrazas,* the Idaho Supreme Court rejected an argument that Blaine County's mountain overlay district ("MOD") ordinance was void for vagueness (and a separate argument that it was inconsistently applied in violation of equal protection). The MOD ordinance employed a textual definition of the MOD, as opposed to a map. (It has subsequently been changed to a map, to avoid the sort of confusion that led to this litigation.) The text defined the boundaries of the MOD in terms of the steepness of the slope. There was a dispute as to whether the MOD included flat bench areas above lower, high-slope areas. County staff told the applicant that these bench areas were excluded, based on a definition of "bench" in the ordinance. The county commissioners disagreed, concluding that while the term "bench" was a defined term, the MOD definition contained no exception for benches. The applicant's argument was, essentially, that if the staff and the county commissioners can't even agree on what the statute means, it must be unconstitutionally vague. The court (Judge Elgee) said that was not the test. Nor was the Court moved by comments made by county commissioners that the ordinance was difficult to understand. Rather, the Court looked at the language of the ordinance itself, and found it to be clear and correctly interpreted by the county commissioners. Hence it was not void for vagueness.

The Idaho Supreme Court affirmed the district court's decision. The district court decision contains a good summarizes the law on the subject, clarifying how the rule operates in criminal and civil contexts:

> Due process prohibits "a statute which either forbids or requires the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application" *Haw v. Idaho State Board of Medicine,* 140 Idaho 152, 90 P.3d 902 (2004). Although the void-for-vagueness doctrine is most often applied to criminal statutes, its application to civil statutes or ordinances is well founded. *Cowan v.*

> *Board of Commissioners of Fremont County*, 143 Idaho 501, 148 P.3d 1247 (2006). However, when applied to civil ordinances, "a greater tolerance is permitted." *Id*. Furthermore, "in evaluating a constitutional challenge to a statute on the basis of void for vagueness, the Court must consider both the essential fairness of the law and the impracticality of drafting legislation with greater specificity." *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 715, 791 P.2d 1285, 1294 (1990).

Terrazas v. Blaine Cnty., Case No. CV-05-760 (Idaho, Fifth Judicial Dist., Mar. 21, 2007) (Decision at 17), aff'd, *Terrazas v. Blaine Cnty.*, 147 Idaho 193, 207 P.3d 169 (2009).

GG. Construction of ordinances

(See also discussion under "Presumption of Validity" in section 24.I(3) at page 359.)

The issue of interpretation of ordinances comes up frequently in judicial review litigation. Here is the recurring fact pattern: The city (or county) says its ordinance means X, and that the court should defer to its construction. Both parties then employ various canons of construction to argue that the ordinance does or does not mean X.

At the outset, it should be noted that the interpretation of an ordinance is an issue of law. Therefore, both the district court and the appellate court exercise free review in interpreting the ordinance. *Ada Cnty. v. Gibson*, 126 Idaho 854, 855, 893 P.2d 801, 802 (Ct. App. 1995). *See also, Cnty. Residents Against Pollution from Septage Sludge (CRAPSS) v. Bonner Cnty. ("County Residents")*, 138 Idaho 585, 588, 67 P.3d 64, 67 (2003) (overturning county interpretation of appeal ordinance).

"We apply the same principles in construing municipal ordinances as we do in the construction of statutes." *Neighbors for a Healthy Gold Fork v. Valley Cnty.*, 145 Idaho 121, 131, 176 P.3d 126, 136 (2007). The interpretation of an ordinance "begins with the literal language of the enactment." *Payette River Property Owners Ass'n v. Bd. of Comm'rs of Valley Cnty.*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999); *Fischer v. City of Ketchum*, 141 Idaho 349, 109 P.3d 1091 (2005). Where the language of the ordinance is unambiguous, "the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction." *Payette River*, 132 Idaho at 557, 976 P.2d at 483. That is, the court must first determine whether the ordinance is ambiguous. If it is not, the plain language of the ordinance governs and it is improper to even consider other "interpretations." No "presumption of validity" changes this basic rule. *See also, The J & M Realty Company v. Bd. of Zoning Appeals of the City of Norwalk,*

286 A.2d 317, 319 (Conn. 1971) (a governing board may not interpret its zoning regulations beyond the "fair import" of the language of the regulations). Although the language may be slightly different, the substance is the same: the county may not interpret its ordinance in a way inconsistent with reason and the words of the ordinance.

Moreover, "ambiguity is not established merely because the parties present differing interpretations to the court." *Payette River*, 132 Idaho at 557, 976 P.2d at 483. Only where "reasonable minds might differ or be uncertain as to [the ordinance's] meaning," should a court consider rules of construction. *Payette River*, 132 Idaho at 557, 976 P.2d at 483; *Gibson*, 142 Idaho at 856, 893 P.2d at 803.

Nevertheless, courts will "defer[] to the [County Commission's] application and interpretation of its Zoning Ordinance unless such application or interpretation is capricious, arbitrary or discriminatory." *Sanders Orchard v. Gem Cnty.*, 137 Idaho 695, 700-01, 52 P.3d 840, 845-46 (2002) (upholding interpretation of central sewer requirement in ordinance). *See also, Rural Kootenai Organization, Inc. v. Bd. of Comm'rs, Kootenai Cnty.*, 133 Idaho 833, 842-43, 993 P.2d 596, 605-06 (2000) (overturning interpretation of ownership and open space requirements in zoning ordinance); *County Residents*, 138 Idaho at 588, 67 P.3d at 67 (overturning county's interpretation of ordinance, but without discussion of rules of construction). "Because there is a strong presumption favoring the validity of the actions of zoning boards, which includes the application and interpretation of their own zoning ordinances, this Court defers to County's interpretation." *Chisholm v. Twin Falls Cnty.*, 139 Idaho 131, 136, 75 P.3d 185, 190 (2003).

Even where the Court has found that ambiguity allows for the consideration of alternative constructions, it has said that "[c]onstructions that would lead to absurd or unreasonably harsh results are disfavored." *Payette River*, 132 Idaho at 557, 976 P.2d at 483.

In *County Residents*, the Idaho Supreme Court showed there are some limits on a governing board's authority to interpret their ordinances. In that case, the Bonner County Planning and Zoning Commission issued a permit to the applicant to apply septic tank sludge on his property. Several neighbors appealed to the county commission pursuant to the terms of the zoning ordinance. The county commission met and summarily dismissed the appeal pursuant to an ordinance provision allowing a summary dismissal where the appellant "does not state lawful grounds" for appeal. The district court reversed the decision and the Idaho Supreme Court upheld the reversal. The county had argued the "no lawful grounds" language in the ordinance permitted the county commission to dismiss the appeal simply if it did not want to hear it, and the applicant's sole remedy was to obtain judicial review in district court based on the planning and zoning commission's record. Notwithstanding the "presumption of validity" favoring the county, the Court rejected the county's

interpretation, finding that the appeal included both sufficient facts and legal grounds to require the county commission to hear the appeal under the terms of the ordinance. *County Residents*, 138 Idaho at 588, 67 P.3d at 67. The Court even ordered the county to pay the appellant's attorney's fees, both at the district court level and on appeal, for adopting a position without a reasonable basis in fact or law. *County Residents,* 138 Idaho at 589, 67 P.3d at 68.

The Court also applies to ordinances this well-known canon of construction: "All sections of applicable statutes must be construed together so as to determine the legislature's intent." *Friends of Farm to Market v. Valley Cnty.*, 137 Idaho 192, 197, 46 P.3d 9, 14 (2002).

HH. Deference to an agency's construction of its governing statute

The preceding section discussed the rules governing a local government's interpretation of its own ordinances. We turn now to the rules of statutory construction, that is, the rules governing its interpretation of the controlling statutes.

Ordinarily statutory construction is considered a question of law that is entirely within the province of the courts. Under some circumstances, however, deference is owed to the agency's own interpretation of its governing statute. The seminal modern federal case on this issue is *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In *Chevron*, the Supreme Court set out a two-step analysis. First, the reviewing court determines whether the Congress or state legislative body has spoken directly and unambiguously. If so, that is the end of the matter. If, however, the court concludes that the statute is silent or ambiguous, then the court moves to the second step. In the second step the court determines whether the agency's interpretation of the statute is based on a permissible construction, *i.e.*, whether it is reasonable. If so, the agency's interpretation is entitled to deference.

Agencies have been tripped up under this two-step process. Where the agency declared that the statute is unambiguous, and the court determines that it is ambiguous, the court will <u>not</u> then deferentially evaluate whether the agency's interpretation is reasonable. "Because the Secretary did not recognize the ambiguities inherent in the statutory terms, we do not defer to her plain meaning interpretation but instead remand for her to treat the statutory language as ambiguous." *Peter Pan Bus Lines, Inc. v. Federal Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006). "As the Final Rule is based on FWS' erroneous conclusion that the ESA is unambiguous on this point, the court may neither defer to the agency's construction nor endorse [its] construction." *The Humane Society of the U.S. v. Kempthorne*, 579 F. Supp. 2d 7, 15 (2008). The take-home message to

agencies and local governments: support your interpretation by arguments in the alternative (both plain meaning and reasonable construction of an ambiguous statute).

The Idaho Supreme Court embraced at least parts of *Chevron* in *J.R. Simplot Company, Inc. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991), declaring that "the rule of deference to agency statutory constructions retains continuing validity." In its ruling, however, the Idaho Supreme Court articulated a four-step analysis that incorporates some of the basic teaching of *Chevron* while departing in other ways.

> After reviewing our extensive case history, as well as the holdings of the U.S. Supreme Court and various other state courts, we hold that the rule of deference to agency statutory constructions retains continuing validity. We hold that a standard of "free review" is not applicable to agency determinations. Accordingly, we hereby clarify and limit *Idaho Fair Share* [*v. Public Utility Comm'n, 113 Idaho 959, 751 P.2d 107 (1988)*] to the extent that case implied that the standard of free review was appropriate for reviewing an agency's statutory interpretations.
>
> In determining the appropriate level of deference to be given to an agency construction of a statute, we are of the opinion that a court must follow a four-prong test. The court must first determine if the agency has been entrusted with the responsibility to administer the statute at issue. Only if the agency has received this authority will it be "impliedly clothed with power to construe" the law. *Kopp v. State*, 100 Idaho 160, 163, 595 P.2d 309, 312 (1979).
>
> The second prong of the test is that the agency's statutory construction must be reasonable. This requirement was recognized at the beginning of our case law when in *State v. Omaechevviaria*, 27 Idaho 797, 152 P. 280 (1915), we indicated that deference would not be appropriate when an agency interpretation "is so obscure and doubtful that it is entitled to no weight or consideration." 27 Idaho at 803, 152 P. at 281; *see also Breckenridge v. Johnston*, 62 Idaho 121, 108 P.2d 833 (1940).
>
> The third prong for allowing agency deference is that a court must determine that the statutory language at issue does not expressly treat the precise question at issue. An agency construction will not be followed if it contradicts the clear expressions of the legislature because "the court,

> as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43, 104 S. Ct. at 2781 (footnotes omitted).
>
> If an agency, with authority to administer a statutory area of the law, has made a reasonable construction of a statute on a question without a precise statutory answer then, under the fourth prong of the test, a court must ask whether any of the rationales underlying the rule of deference are present. If the underlying rationales are absent then their absence may present "cogent reasons" justifying the court in adopting a statutory construction which differs from that of the agency.

J.R. Simplot Company, Inc. v. Idaho State Tax Comm'n, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991) (emphasis supplied).

As noted, the first prong of that test is to "determine if the agency has been entrusted with the responsibility to administer the statute at issue." *J.R. Simplot*, 120 Idaho at 862, 820 P.2d at 1219. In the land use context, the question would be whether the city or county is an agency entrusted to administer LLUPA. Presumably the answer would be yes, but, to our knowledge, that point has not been litigated.

II. Statutes and canons of construction

(1) Only ambiguous statutes are subject to statutory construction.

Statutory construction is appropriate only where the statute is ambiguous. *Bonner Cnty. v. Kootenai Hospital Dist.*, 145 Idaho 677, 145 Idaho 677 (2008) ("Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999).").

"The purpose of an unambiguous statute is not the concern of the courts when attempting to interpret a statute. The asserted purpose for enacting the legislation cannot modify its plain meaning. The scope of the legislation can be broader than the primary purpose for enacting it. This Court has stated that when the language of a statute is definite, courts must give effect to that meaning whether or not the legislature anticipated the statute's result. We do not construe a statute unless its wording is ambiguous." *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 233 P.3d 118, 122-23 (Idaho 2010) (Eismann, C.J.) (citations and internal quotation notations omitted).

In 2011, the Court rejected earlier suggestions that it might invalidate a statute whose unambiguous meaning would lead to an absurd result:

> We have recited the language from the *Willys Jeep* case or similar language numerous times, usually without even addressing whether we considered the unambiguous statute absurd as written. [String citation omitted.]
>
> In several cases, we have responded to arguments that the wording of an unambiguous statute would produce an absurd result, but we have never agreed with such arguments. [String citation omitted.]
>
> Thus, we have never revised or voided an unambiguous statute on the ground that it is patently absurd or would produce absurd results when construed as written, and we do not have the authority to do so. "The public policy of legislative enactments cannot be questioned by the courts and avoided simply because the courts might not agree with the public policy so announced." *State v. Village of Garden City*, 74 Idaho 513, 525, 265 P.2d 328, 334 (1953). Indeed, the contention that we could revise an unambiguous statute because we believed it was absurd or would produce absurd results is itself illogical. "A statute is ambiguous where the language is capable of more than one reasonable construction." *Porter v. Board of Trustees, Preston School Dist. No. 201*, 141 Idaho 11, 14, 105 P.3d 671, 674 (2004). An unambiguous statute would have only one reasonable interpretation. An alternative interpretation that is unreasonable would not make it ambiguous. *In re Application for Permit No. 36–7200*, 121 Idaho 819, 823–24, 828 P.2d 848, 852–53 (1992). If the only reasonable interpretation were determined to have an absurd result, what other interpretation would be adopted? It would have to be an unreasonable one. We therefore disavow the wording in the *Willys Jeep* case and similar wording in other cases and decline to address Plaintiffs' argument that Idaho Code section 39–1392b is patently absurd when construed as written.

Verska v. St. Alphonsus Regional Medical Center, 151 Idaho 889, 895-86, 265 P.3d 502, 508-09 (2011) (Eismann, J.) (citing *State, Dep't of Law Enforcement v. One 1955 Willys Jeep*, 100 Idaho 150, 595 P.2d 299 (1979)). This holding has been repeatedly confirmed. *E.g.*, *State v. Owens*, 158 Idaho 1, 5, 343 P.3d 30, 34 (2014) (Trout, J); *State v. Montgomery*, 163 Idaho 40, 44, 408 P.3d 38, 42 (2017)

(Brody, J.)[412]; *State v. Osborn*, 165 Idaho 627, 631, 449 P.3d 419, 423 (2019) (Brody).

In 2000 (prior to *Verska*), the Court said that statutes should be interpreted to avoid "hardship" or "an oppressive result." *Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52, 57, 14 P.3d 372, 377 (2000) (Silak, J.). However, that statement was made in the context of "choosing between alternative constructions of a statute." *Id.* Thus, the statement is not inconsistent with *Verska*, because it arose in the context of an ambiguous statute.

In 2016, the Court stated, without discussing *Verska* or any other authority, that it "will not read a statute to create an absurd result." *David & Marvel Benton Trust v. McCarty*, 161 Idaho 145, 151, 384 P.3d 392, 398 (2016) (W. Jones, J). In *Moser v. Rosauers Supermarkets, Inc.*, 165 Idaho 133, 443 P.3d 147 (2019) (Bevan, J.), the Court found that the statute at issue was unambiguous, which precluded an investigation of legislative intent.[413] Yet, in applying the unambiguous statute, the Court employed the absurd result language in *Benton Trust*. "It would be unreasonable to allow a claimant to file a claim for disability and prohibit an employer any opportunity to assess the merit of those allegations before they have to compensate the claimant. 'This Court will not read a statute to create an absurd result.'" *Moser*, 165 Idaho at 137, 443 P.3d at 151 (quoting *Benton Trust*).

This statement in *Moser* might seem like a retreat from *Verska*, but it was not. This made clear in *State v. Osborn*, 165 Idaho 627, 631, 449 P.3d 419, 423 (2019) (Brody). In *Osborn*, the majority simply stuck to *Verska* and applied what the dissent quite accurately called a textualist analysis of a statute dealing with sentencing. The dissent argued that the statute was ambiguous and should have been interpreted in a way in line with its clear legislative purpose. Citing *Benton Trust* and *Moser*, the dissent said those cases stand for the "cardinal principle of statutory construction to avoid reading ambiguous statutes in a manner that leads to an irrational result." *Osborn*, 165 Idaho at 636, 449 P.3d at 428 (Moeller, J., dissenting) (emphasis added). Thus, both sides of the Court are of the view there has been no departure from the

[412] The *Montgomery* case drew a sharp distinction between the interpretation of statutes and court rules. *Montgomery* recognized the prohibition in *Verska* against interpreting an unambiguous statute other than according to its plain meaning, but said that restriction does not apply to the interpretation of court rules. "We are not constrained by the constitutional separation of powers when interpreting rules promulgated by the Court. Today we make it clear that while the interpretation of a court rule must always begin with the plain, ordinary meaning of the rule's language it may be tempered by the rule's purpose. We will not interpret a rule in a way that would produce an absurd result." *Montgomery*, 163 Idaho at 44, 408 P.3d at 42. See *State v. Heath*, 168 Idaho 678, 485 P.3d 1121 (2021) (Brody, J.) (interpreting a court rule to avoid an absurd result).

[413] "We do not find Idaho Code section 72-433 to be ambiguous. We will therefore apply the statute as written." *Moser*, 165 Idaho at 136, 443 P.3d at 150.

rule in *Verska* that only ambiguous statutes are subject to examination of legislative intent.

A Justice of the U.S. Supreme Court, whose textualist legal philosophy aligns with that reflected in *Verska*, wrote in 2021 summed all this up with the observation that "no amount of policy-talk can overcome a plain statutory command." *Niz-Chavez v. Garland*, 141 S.Ct. 1474 (2021) (Gorsuch, J.).

(2) More specific controls

Where two statutes address the same subject matter and lead to different conclusions, the more specific and/or more recent statute controls.

"Further, '[w]here two statutes apply to the same subject matter they are to be construed consistent with one another where possible, otherwise the more specific statute will govern.'" *Hood v. Poorman*, 519 P.3d 769, 790 (Idaho 2022) (Zahn, J.) (citing *Huyett v. Idaho State Univ*., 104 P.3d 946, 951 (Idaho 2004)).

Regan v. Owen, 2017 WL 3927024 at *7 (Idaho, Sept. 8, 2017) (Horton, J.) ("when a conflict between statutes arises, the more specific will control"); *Christensen v. West*, 92 Idaho 87, 90, 437 P.2d 359, 362 (Idaho 1968) (McQuade, J.) ("we reaffirm the principle that a particular pertinent statute will prevail over a general pertinent statute").

(3) More recent controls

Mickelsen v. City of Rexburg, 101 Idaho 305, 307, 612 P.2d 542, 544 (1980) (McFadden, J.) ("when two governmental promulgations are in irreconcilable conflict, the one enacted later in time governs").

(4) Various canons

As *Verska* and its progeny (discussed above) make clear, courts may not engage in statutory construction where the statute is ambiguous. But where a statute is subject to differing interpretations, courts are expected to employ the canons of construction to search for the legislative intent. Indeed, the core purpose of statutory construction is to divine legislative intent. *Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52, 57, 14 P.3d 372, 377 (2000) (Silak, J.) ("Our objective in interpreting a statute is to derive the intent of the legislature.").

There are many well-known canons of statutory construction. These are simply rules of thumb applied by courts and other decision-makers to the interpretation of written laws of all sorts (constitutions, legislation, and ordinances).

Writing in *The Advocate*, an Idaho lawyer published a comprehensive list of canons of statutory construction. At the end, he summed them up saying, "In conclusion, the general rule appears to be that the most reasonable interpretation of a

statute is the one that will likely be adopted by the Court, as it is the likeliest intent of the legislature. These canons are in place simply to help determine what is reasonable under the circumstances." *Listing the Canons of Statutory Construction*, The Advocate (May 2016).

An excellent summary of the canons is found in this Court of Appeals decision:

> The interpretation of a statute is an issue of law over which we exercise free review. *Aguilar v. Coonrod*, 151 Idaho 642, 649-50, 262 P.3d 671, 678-79 (2011). Such interpretation must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011). It is well established that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature. *Id*. Only where a statute is capable of more than one conflicting construction is it said to be ambiguous and invoke the rules of statutory construction. *L & W Supply Corp. v. Chartrand Family Trust*, 136 Idaho 738, 743, 40 P.3d 96, 101 (2002). If it is necessary for this Court to interpret a statute because an ambiguity exists, then this Court will attempt to ascertain legislative intent and, in construing the statute, may examine the language used, the reasonableness of the proposed interpretations, and the policy behind the statute. *Kelso & Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 134, 997 P.2d 591, 595 (2000). Where the language of a statute is ambiguous, constructions that lead to absurd or unreasonably harsh results are disfavored. *See Jasso v. Camas Cnty.*, 151 Idaho 790, 798, 264 P.3d 897, 905 (2011).

State v. Kincaid, 165 Idaho 273, 278-79, 443 P.3d 287, 292-93 (Ct. App. 2019) (Huskey, J.).

Several basic premises of statutory construction are captured in this quotation:

> The interpretation of a statute is a question of law over which we exercise free review. *Zener v. Velde*, 135 Idaho 352, 355, 17 P.3d 296, 299 (Ct. App. 2000). We will construe a statute as a whole, and the plain meaning

> of a statute will prevail unless clearly expressed legislative intent is contrary or unless the plain meaning leads to absurd results. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-88 (1990); *Zener*, 135 Idaho at 355, 17 P.3d at 299. Statutes that are *in pari materia*, *i.e.*, relating to the same subject, must be construed together to give effect to legislative intent. *Paolini v. Albertson's Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006); *Union Pacific R.R. Co. v. Bd. of Tax Appeals*, 103 Idaho 808, 811, 654 P.2d 901, 904 (1982). In construing a statute, this Court examines the language used, the reasonableness of the proposed interpretations, and the policy behind the statutes. *Webb v. Webb*, 143 Idaho 521, 525, 148 P.3d 1267, 1271 (2006). This Court will avoid an interpretation that would lead to an absurd result or render a statute a nullity. *State v. Schmitt*, 144 Idaho 768, 770, 171 P.3d 259, 261 (Ct. App. 2007); *State v. Harvey*, 142 Idaho 727, 730, 132 P.3d 1255, 1258 (Ct. App. 2006).

Johnson v. McPhee, 147 Idaho 455, 561, 210 P.3d 563, 569 (Ct. App. 2009). But see *Verska v. St. Alphonsus Regional Medical Center*, 151 Idaho 889, 895-86, 265 P.3d 502, 508-09 (2011) (Eismann, J.) holding that the Court will not deviate from the plain meaning of a statute even if it leads to an absurd result.

Writing for a unanimous Court, Chief Justice Bevan (then Associate Justice) wrote:

> This Court exercises free review when interpreting a statute. [Citing *Lopez v. State*, 136 Idaho 136, 178, 30 P.3d 952, 956 (quoting *State ex rel. Industrial Commission v. Quick Transp., Inc.*, 134 Idaho 240, 999 P.2d 895 (2000)).] If the statutory language is unambiguous, we merely apply the statute as written. *Id.* If the statute is ambiguous, then we seek to determine the legislative intent. *Id.* When doing so, we may examine the language used, the reasonableness of proposed interpretations, and the policy behind the statute. *Id.* Interpretation begins with the literal language of a statute. *Wernecke v. St. Maries Joint Sch. Dist. No. 401*, 147 Idaho 277, 282, 207 P.3d 1008, 1013 (2009). "The statute should be considered as a whole, and words should be given their plain, usual, and ordinary

> meanings." *Id.* That said, the Court must also "give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant." *Id*.

Moser v. Rosauers Supermarkets, Inc., 165 Idaho 133, 136, 443 P.3d 147, 150 (2019) (Bevan, J.).

Another summary of the law is found in this 2021 Idaho Court of Appeals decision:

> This Court exercises free review over the application and construction of statutes. *State v. Reyes*, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003). Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000). The language of the statute is to be given its plain, obvious, and rational meaning. *Burnight*, 132 Idaho at 659, 978 P.2d at 219. If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *Escobar*, 134 Idaho at 389, 3 P.3d at 67. When this Court must engage in statutory construction because an ambiguity exists, it has the duty to ascertain the legislative intent and give effect to that intent. *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct. App. 2001). To ascertain such intent, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute and its legislative history. *Id*. It is incumbent upon a court to give an ambiguous statute an interpretation which will not render it a nullity. *Id*.

State v. Damiani, 2021 WL 3520973, *2 (Idaho Ct. App.) (Aug. 11, 2021).

Likewise, there is the rule that a statute should be construed so as to avoid constitutional questions. *United States v. Grace*, 461 U.S. 171, 175-76 (1983) ("Our normal course is first to ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.") (internal quotes and brackets omitted); *State v. Holden*, 126 Idaho 755, 761 n.4, 890 P.2d 341, 347 n.4 (Ct. Ap. 1995) ("We are mindful that whenever possible, a statute should be construed so as to avoid a conflict with the state or federal constitution."); *Cowles Publ'g Co. v. Magistrate Court of the First Judicial Dist. of the State of Idaho*, 118

Idaho 753, 759, 800 P.2d 640, 646 (1990) ("Where a statute is capable of two interpretations, one of which would make it constitutional and the other unconstitutional, it is well established that a court should adopt that construction which upholds the validity of the act.").

Writing for the U.S. Supreme Court in 2007, Justice Roberts quoted Justice Frankfurter speaking sixty years earlier:

> "Whatever temptations the statesmanship of policy-making might wisely suggest," the judge's job is to construe the statute—not to make it better. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533 (1947). The judge "must not read in by way of creation," but instead abide by the "duty of restraint, th[e] humility of function as merely the translator of another's command." *Id*., at 533-534. See United States v. Goldenberg, 168 U.S. 95, 103, 18 S. Ct. 3, 42 L. Ed. 394 (1897) ("No mere omission . . . which it may seem wise to have specifically provided for, justif[ies] any judicial addition to the language of the statute").

Jones v. Bock, 549 U.S. 199, 216-17 (2007).

> This Court has consistently adhered to the primary canon of statutory construction that where the language of the statute is unambiguous, the clear expressed intent of the legislature must be given effect and there is no occasion for construction. *Ottesen v. Board of Comm'rs. of Madison County*, 107 Idaho 1099, 1100, 695 P.2d 1238, 1239 (1985). Moreover, unless a contrary purpose is clearly indicated, ordinary words will be given their ordinary meaning when construing a statute. *Bunt v. City of Garden City*, 118 Idaho 427, 430, 797 P.2d 135, 138 (1990). In construing a statute, this Court will not deal in any subtle refinements of the legislation, but will ascertain and give effect to the purpose and intent of the legislature, based on the whole act and every word therein, lending substance and meaning to the provisions. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-88 (1990).

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Ada Cnty., 123 Idaho 410, 415, 849 P.2d 83, 88 (1993).

> "Language of a particular section need not be viewed in a vacuum. And all sections of applicable statutes must be construed together so as to determine the legislature's intent." *Lockhart v. Dept. of Fish and Game*, 121 Idaho 894, 897, 828 P.2d 1299, 1302 (1992) (quoting *Umphrey* [*v. Sprinkel*], 106 Idaho [700,] 706, 682 P.2d [1247,] 1253 [(1983)]; *see* also *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 853–54, 820 P.2d 1206, 1210–11 (1991)). Statutes and ordinances should be construed so that effect is given to their provisions, and no part is rendered superfluous or insignificant. *See Brown v. Caldwell Sch. Dist. No. 132*, 127 Idaho 112, 117, 898 P.2d 43, 48 (1995). There is a strong presumption of validity favoring the actions of a zoning authority when applying and interpreting its own zoning ordinances. *South Fork Coalition v. Bd. of Comm'rs*, 117 Idaho 857, 860, 792 P.2d 882, 885 (1990).

Friends of Farm to Market v. Valley Cnty., 137 Idaho 192, 197, 46 P.3d 9, 14 (2002).

> This Court exercises free review over the application and construction of statutes. *State v. Schumacher*, 131 Idaho 484, 485, 959 P.2d 465, 466 (Ct. App. 1998). Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999); *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000). The language of the statute is to be given its plain, obvious, and rational meaning. *Burnight*, 132 Idaho at 659, 978 P.2d at 219. If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *Escobar*, 134 Idaho at 389, 3 P.3d at 67. When this Court must engage in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent. *Rhode*, 133 Idaho at 462, 988 P.2d at 688. To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history. *Id*. It is "incumbent upon a court to give a statute an interpretation which will

> not render it a nullity." *State v. Nelson*, 119 Idaho 444, 447, 807 P.2d 1282, 1285 (Ct. App. 1991).

State v. Reyes, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003).

> If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history, or rules of statutory interpretation. *Escobar*, 134 Idaho at 389, 3 P.3d at 67.

State v. Abbott, 2014 WL 1266318 (Idaho Ct. App. Mar. 27, 2014) (Gutierrez, J.).

"Statutes and rules that can be read together without conflicts must be read in that way." *State v. Garner*, 161 Idaho 708, 711, 390 P.3d 434, 437 (2017) (Brody, J.).

"Constructions of an ambiguous statute that would lead to an absurd result are disfavored." *State v. Doe*, 140 Idaho 271, 275, 92 P.3d 521, 525 (2004) (Schroeder, J).

"'It is a universally recognized rule of the construction that, where a constitution or statute specifies certain things, the designation of such things excludes all others,' a maxim commonly known as *expressio unius est exclusio alterius." KGF Development, LLC v. City of Ketchum*, 149 Idaho 524, 528, 236 P.3d 1284, 1288 (2010) (J. Jones, J) (italics original).

(5) Codified vs. uncodified legislation

Most legislation of general applicability (federal, state, and municipal) is codified. Occasionally, for one reason or another, a legislature or municipal entity will determine not to codify a provision (or even to un-codify it). This is generally done to avoid unnecessary clutter in the codification. Codification is essentially a convenience for the reader. Whether a statute is codified or not has no bearing on the effectiveness of the statute.

For example, the following pieces of legislation are uncodified, notwithstanding their general applicability:

- A water right permit will specify a period of time during which beneficial use must be made. Idaho Code § 42-204. In 2013, the statute was amended allowing a ten-year extension of the deadline for proof. 2013 Idaho Sess. Laws, ch. 82. An uncodified portion of the 2013 legislation provided that the legislation is retroactive: "Permits pending before the department are entitled to the maximum qualifying extension available pursuant to the provisions of section 42-204, Idaho Code, regardless of whether the permittee received a prior extension

under section 42-204(6), Idaho Code." 2013 Idaho Sess. Laws, ch. 82 § 2.

- Legislation authorizing a petition for commencement of the Snake River Basin Adjudication was enacted in 1985. 1985 Idaho Sess. Laws, ch. 18, § 1 (formerly codified at Idaho Code § 42-1406A), as amended by 1985 Idaho Sess. Laws, ch. 118, § 1. It was then amended and uncodified by 1994 Idaho Sess. Laws, ch. 454, § 11).

JJ. Proper use of legislative history and statutory construction

Resort to legislative history is impermissible if the statute is unambiguous.

> The interpretation of a statute "must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written." *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003) (citations omitted). "We have consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." *City of Sun Valley v. Sun Valley Co.*, 123 Idaho 665, 667, 851 P.2d 961, 963 (1993). Furthermore, this Court has held that "[t]he asserted purpose for enacting the legislation cannot modify its plain meaning. The scope of the legislation can be broader than the primary purpose for enacting it." *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 892–93, 265 P.3d 502, 505–06 (2011) (quoting *Viking Constr., Inc. v. Hayden Lake Irr. Dist.*, 149 Idaho 187, 191–92, 233 P.3d 118, 122–23 (2010)). "If the statute as written is socially or otherwise unsound, the power to correct it is legislative, not judicial." Id. (quoting *In re Estate of Miller*, 143 Idaho 565, 567, 149 P.3d 840, 842 (2006)).

Wright v. Ada Cnty., 160 Idaho 491, 497, 376 P.3d 58, 64 (2016) (Burdick, J.).

"However, where a statute is unambiguous, its plain language controls and this Court will not engage in statutory construction." *Ravenscroft v. Boise Cnty.*, 154 Idaho 613, 615-16, 301 P.3d 271, 273-74 (2013) (Burdick, C.J.).

"This Court does not have the authority to revise a statute that is unambiguous as written 'on the ground that it is patently absurd or would produce absurd results

when construed as written.'" *Ravenscroft v. Boise Cnty.*, 154 Idaho 613, 616, 301 P.3d 271, 274 (2013) (Burdick, C.J.) (quoting *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 896, 265 P.3d 502, 509 (2011) (Eismann, J.).

KK. Procedural requirements on appeal

(1) Waiver of issues not raised below.

See also discussion in section 24.L(6) at page 399.

"[I]ssues not raised below but raised for the first time on appeal will not be considered or reviewed." *Whitted v. Canyon Cnty. Bd. of Comm'rs*, 137 Idaho 118, 122, 44 P.3d 1173, 1177 (2002).

In *Elias-Cruz v. Idaho Dep't of Transp.*, 2012 WL 2481632 (Idaho 2012), the Idaho Supreme Court noted:

> "Review on appeal is limited to those issues raised before the administrative tribunal," *Johnson v. Blaine County*, 146 Idaho 916, 920, 204 P.3d 1127, 1131 (2009), with the exception of "an issue the administrative tribunal lacked the authority to decide," *id.* at n.2. We will not consider on appeal issues that the administrative tribunal had the authority to decide but were not raised before it. *Id*. at 927, 204 P.3d at 1138.

In *Total Success Investments, LLC v. Ada Cnty. Highway Dist.*, ("*Total Success II*"), 148 Idaho 688, 696, 227 P.3d 942, 950 (Ct. App. 2010) (Perry, J. pro tem.), the Court noted: "However, an appellate court may affirm the district court's decision if an alternative legal basis supports it. *Hanf v. Syringa Realty, Inc.*, 120 Idaho 364, 370, 816 P.2d 320, 326 (1991)."

In *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J.), the city prevailed at trial in defending its sewer cap fee. On appeal, the city raised two additional statutory arguments that had not been presented below, contending that the rule against raising new issues on appeal applies only to the party seeking reversal. The Idaho Supreme Court agreed:

> That statute was not raised below, but the City contends that we could affirm the district court based upon this ground. *See Johnson v. Blaine County*, 146 Idaho 916, 921, 204 P.3d 1127, 1132 (2009) ("[T]he district court arrived at the correct result, but its decision was based upon the wrong theory. We will affirm the decision on the correct theory .").

NIBCA I, 158 Idaho at 85-86, 343 P.3d at 1092-93. The Court went on to consider, but reject, the alternative grounds.

Note the distinction, however, between raising new claims and raising new arguments in support of a previously raised claim:

> We must also reject respondent's contention that the regulatory taking argument is not properly before us because it was not made below. . . .
> . . . Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate claims. They are, rather, separate arguments in support of a single claim—that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here. . . .
> A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below.

Yee v. City of Escondido, 503 U.S. 519, 534-35 (1992) (O'Connor, J.) (citations omitted).

(2) Waiver of issues not supported by authority.

"[I]ssues on appeal that are not supported by propositions of law or authority are deemed waived and will not be considered." *Halvorson v. N. Latah Cnty. Highway Dist*., 151 Idaho 196, 202, 254 P.3d 497, 503 (2011) (quoting *Michalk v. Michalk*, 148 Idaho 224, 230, 220 P.3d 580, 586 (2009) and citing *Wheeler v. Idaho Dep't of Health & Welfare*, 147 Idaho 257, 266, 207 P.3d 988, 997 (2009)).

"A general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue. This Court will not search the record on appeal for error." *Halvorson v. N. Latah Cnty. Highway Dist*., 151 Idaho 196, 202, 254 P.3d 497, 503 (2011) (quoting *Dawson v. Cheyovich Family Trust*, 149 Idaho 375, 383, 234 P.3d 699, 707 (2010) and citing *Michael v. Zehm*, 74 Idaho 442, 445, 263 P.2d 990, 991 (1953); *Suits v. Idaho Bd. of Prof'l Discipline*, 138 Idaho 397, 400, 64 P.3d 323, 326 (2003)).

LL. Other judicial review provisions under LLUPA

LLUPA contains two other specific judicial review provisions. A P&Z commission is authorized to "seek judicial process" as necessary in the course of developing land use plans. Idaho Code § 67-6507. The rule prohibiting rezoning within four years may be judicially enforced. Idaho Code § 67-6511(d).

MM. Tort and damage claim procedures

Plaintiffs seeking financial recoveries against cities and counties should be careful to comply with advance notice requirements under Idaho Code §§ 6-907 (tort claims) and 50-219 (all damage claims by cities). See discussion in section 19 at page 280.

NN. Prejudgment interest

If damages are awarded on the basis of an uncompensated taking of property, the property owner may also be entitled to an award of prejudgment interest. Indeed, prejudgment interest is not viewed as an add-on to the damage award or as a cost of litigation. Rather, under both state and federal law, it is considered part and parcel of what was taken.

An Idaho statute establishes a default legal rate of interest (set at 12 percent) where a contract fails to specify an interest rate.[414] Idaho Code § 28-22-104(1)(1). Another sub-section of the same statute applies that 12 percent interest rate to "Money after the same becomes due." Idaho Code § 28-22-104(1)(2). This has been construed broadly to authorize prejudgment interest in damage awards (with various exceptions). *Roesch v. Klemann*, 155 Idaho 175, 179 n.1, 307 P.3d 192, 196 n.1 (2013) (Horton, J.).

In *Coeur d'Alene Garbage Service v. City of Coeur d'Alene* ("*Garbage Service*"), 759 P.2d 879 (Idaho 1988) (Johnson, J.), the Idaho Supreme Court held that a property owner who suffers an uncompensated taking under the Idaho Constitution is entitled to prejudgment interest.

This decision, however, was expressly limited to takings under the Idaho Constitution. *Garage Service* at 881. That decision did not address Idaho Code § 28-22-104(1)(2) or what interest rate should apply. Presumably, however, Idaho

[414] Another section of the statute sets the interest rate for postjudgment interest. Idaho Code § 28-22-104(2). This rate is set as 5 percent "plus the base rate in effect at the time of entry of the judgment." A protocol is set out for the determination of the base rate on July 1 of each year by the Idaho State Treasurer.

Code § 28-22-104(1)(2) would set the rate for prejudgment interest on taking claims brought pursuant to the Idaho Constitution.

In *Schneider v. Cnty. of San Diego*, 285 F.3d 784 (9th Cir. 2002), the Ninth Circuit, relying on U.S. Supreme Court precedent, held that the owner of property bringing a successful § 1983 action is entitled to prejudgment interest as part of the compensation due under the Fifth Amendment.

> The "just compensation" remedy for an unconstitutional taking is required by the Constitution. Accordingly, we look to the underlying constitutional provision at issue, and cases interpreting it, to define the appropriate measure of prejudgment interest in Section 1983 cases based on an unconstitutional taking. We conclude that the district court must examine what "a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal," *50.50 Acres of Land*, 931 F.2d at 1354, would receive in determining the amount of prejudgment interest due in Section 1983 actions predicated on an unconstitutional taking.

Schneider at 792.

The court then laid out the standard that should be applied. "The district court should apply an interest rate based on evidence of the rate that would be generated by investment in a diverse group of securities, including treasury bills." *Schneider* at 793.

The court ruled that this overrides a federal statute setting a 6 percent rate (which would set a floor, not a ceiling) applicable in federal condemnation actions under the Declaration of Taking Act.

> The Supreme Court has recognized that, unlike most constitutional provisions, the Fifth Amendment provides both the cause of action and the remedy for an unconstitutional taking, "frequently stat[ing] the view that, in the event of a taking, the compensation remedy is required by the Constitution." *First English*, 482 U.S. at 315–16, 107 S. Ct. 2378.

Schneider at 793 (brackets original).

Under *Schneider* and *50.50 Acres*, it app ears that Congress has the power to set a floor for compensation that might exceed what is constitutionally mandated by the Fifth Amendment. A question arises as to whether Idaho's prejudgment interest

statute may also set a floor on federal taking claims. Arguably it does not. The federal claim is based on federal law, not state law.

A handful of cases have addressed the choice of law question involving prejudgment interest. Most circuits conclude that federal law applies.

In *Golden State Transit Corp. v. City of Los Angeles*, 773 F. Supp. 204 (C.D. Cal. 1991), the court noted that "neither 42 U.S.C. § 1983 nor 42 U.S.C. § 1988 mention the award of prejudgment interest, and there is no general federal statute governing the award of prejudgment interest." The court went on to conclude, however, that federal law controls because "there is sufficient federal case law which governs the award of prejudgment interest" and "several courts in other circuits have held that federal law applies to the issue of prejudgment interest." *Golden State* at 209.

In *Murphy v. City of Elko*, 976 F. Supp. 1359 (D. Nev. 1997), another district court in the Ninth Circuit rejected contrary views in the Fifth and Eighth Circuits, holding that it follows from *Golden Gate* that federal law applies:

> We reject this principle [that state law applies to prejudgment interest]. There are, of course, legal questions arising in Section 1983 cases which are determined by state law, such as statutes of limitations, but the question of relief in general is determined entirely by federal law—damages, injunctions, costs, attorney's fees, and postjudgment interest are all determined by federal statutory and decisional law. We see no principled reason not to similarly compute prejudgment interest in accordance with federal law, and we think the Ninth Circuit would so conclude as well.

Murphy at 1363.

In 2015, the last sentence in that paragraph was quoted with approval by another district court in the Ninth Circuit. *Humann v. City of Edmonds*, 2015 WL 3539569 at *1 (W.D. Wash. 2015) ("We see no principled reason not to similarly compute prejudgment interest in accordance with federal law, and we think the Ninth Circuit would so conclude as well.").

In addition, several federal cases have noted that that where state claims are presented in federal court under its supplemental jurisdiction,[415] the state claims are

[415] The same principle applies in diversity cases. *Emmenegger v. Bull Moose Tube Co.*, 324 F.3d 616, 624 n.9 (8th Cir. 2003).

subject to state law governing prejudgment interest.[416] Indeed, one of them expressly noted that prejudgment interest is substantive, not procedural, law. The implication is that where federal claims are presented in state court, federal law, not Idaho's prejudgment interest standard, should apply.

OO. Class actions

There is little guidance in Idaho law whether a court might certify a class for recovery of unlawfully paid fees. Rule 23(a) and (b) of the Idaho Rules of Civil Procedure outline the requirements for the certification of a class action. Examples of intended class actions in the context of challenged fees and taxes include both *Miles* and *Alpert*. In both of those cases, however, once the Court determined there was standing, no further case history was made available (a likely indication that some sort of settlement was reached) and the issue of class certification was never addressed.

A class will not be certified for a class action unless it is sufficiently numerous that joinder of all parties is impractical. Idaho R. Civ. P. 23(a); *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 171-72, 108 P.3d 315, 318-19 (2004) (Eismann, J.) (class of 17 too small to certify).

PP. Res judicata

Idaho has long recognized that res judicata attaches to final judicial decisions. The seminal case is *Joyce v. Murphy land & Irrigation Co*., 35 Idaho 549, 553, 208 P. 241, 242-43 (1922) (Budge, J.).

> We think the correct rule to be that in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim, but also as to every matter which might and should have been litigated in the first suit.

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[416] *West Linn Corporate Park, LLC v. City of West Linn*, 2011 WL 47008774 at *4 (D. Or. 2011) (unpublished) ("In regard to interest, state law governs the award of prejudgment interest"); *Emmenegger v. Bull Moose Tube Co*., 324 F.3d 616, 624 n.9 (8th Cir. 2003) ("In a diversity case [involving state law claims], the question of prejudgment interest is a substantive one, controlled by state law."); *Olcott v. Delaware Flood Co*., 327 F.3d 1115,1126 (10th Cir. 2003) ("Where state law claims are before a federal court on supplemental jurisdiction, state law governs the court's award of prejudgment interest.). *Mills v. River Terminal Railway Co.*, 276 F.3d 222, 228 (6th Cir. 2002) ("Where state law claims come before a federal court on supplemental jurisdiction, the award of prejudgment interest rests on state law."); *Lewis v. Haskell Co., Inc.*, 304 F. Supp. 2d 1347, 1351 (M.D. Ala. 2004) ("in actions premised on supplemental jurisdiction, state law applies to the extent the party prevailed on state law").

Joyce, 35 Idaho at 553, 208 P. at 242-43.

This res judicata principle announced in *Joyce* has come to be known as "claim preclusion." It is one of two encompassed by the rule of res judicata, the other being "issue preclusion" (aka "collateral estoppel"). The distinction was explained by Judge Burnett (later Dean Burnett) in *Aldape v. Akins*, 105 Idaho 254, 258, 668 P.2d 130, 134 (Ct. App. 1983) (Burnett, J.),

> Functionally, the doctrine has two components—claim preclusion and issue preclusion.
>
> > "[C]laim preclusion," or true res judicata ... treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action." * * * When the plaintiff obtains a judgment in his favor, his claim "merges" in the judgment; he may seek no further relief on that claim in a separate action. Conversely, when a judgment is rendered for a defendant, the plaintiff's claim is extinguished; the judgment then acts as a "bar." * * * Under these rules of claim preclusion, the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial.
>
> > * * * * * *
>
> > [C]ollateral estoppel or "issue preclusion" ... bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties.... [T]he contested issue *257 **133 must have been litigated and necessary to the judgment earlier rendered.

Aldape, 105 Idaho at 256-57, 668 P.2d at 132-33 (quoting *Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc.*, 575 F.2d 530, 535–36 (5th Cir. 1978)).

(1) Res judicata attaches to administrative proceedings.

"The doctrine of res judicata applies to administrative proceedings. *Hansen v. Estate of Harvey*, 119 Idaho 333, 806 P.2d 426 (1991); *J & J Contractors/O.T. Davis Constr. v. State by Idaho Transp. Bd.*, 118 Idaho 535, 797 P.2d 1383 (1990)." *Sagewillow, Inc. v. IDWR* ("*Sagewillow II*"), 138 Idaho 831, 844, 70 P.3d 669, 682 (2003) (Eismann, J.). However, issue preclusion attaches only to issues actually

raised. Thus, a transfer approval in which the issue of forfeiture did not actually arise is not res judicata as to that issue.

QQ. Federal court – abstention and res judicata

In some cases, the federal court has abstained from considering the federal court challenge while state court proceedings challenging land use decisions are underway.[417] *Rollins v. Blaine Cnty.*, No. CV 07-275-S-ELJ-CWD (U.S. Dist. Ct., Dist. of Idaho June 12, 2008) (applying rules of the *Pullman* abstention doctrine under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941)).

In *Rollins*, the federal court noted that, if the Idaho Supreme Court ruled against the plaintiffs, that would bring an end to their federal due process appeals, and that res judicata would attach to the state court decision. This conclusion appears to be in accord with other decisions dealing with res judicata.

RR. Federal court – preliminary injunctions

In order to obtain a preliminary injunction to maintain the status quo pending the outcome of the litigation, plaintiffs must meet four tests. The plaintiffs must show (1) that she will suffer irreparable injury if the injunction does not issue, (2) likelihood of success on the merits, (3) that the balance of equities tips in her favor, and (4) that issuance of the injunction is in the public interest. Courts have long held that there is a sliding scale applicable to these tests allowing a strong showing on one to compensate for a weak showing on another.

In 2008, the U.S. Supreme Court rejected that sliding scale, at least as the showing of irreparable injury. In *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), the Court held that a mere "possibility" of irreparable injury was insufficient even if the other factors weighed strongly in the plaintiffs' favor.

The *Winters* opinion could be read to eliminate the sliding scale altogether—as to each of the tests. The Ninth Circuit, however, has concluded that the sliding scale survives *Winter* at least with respect to likelihood of success on the merits test. In *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011), the court found that the "significant questions" standard still prevails in the Ninth Circuit. (In so ruling, the Ninth Circuit followed the Second and Seventh Circuits. Only the Fourth Circuit has taken the contrary position.) This means that there is still a partial sliding scale making it easier for plaintiffs to obtain injunctive relief. If the plaintiffs

[417] In other cases have simultaneously proceeded on two tracks without the issue of abstention being raised. *E.g.*, *Crown Point Dev., Inc. v. City of Sun Valley*, 144 Idaho 72, 156 P.3d 573 (2007), and *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 852-53 (2007) (where the defendant did not seek abstention).

can show that the equities "tip sharply" in their favor, they need to meet only the more modest showing that they have raised "significant questions" going to the merits. And they do not have to meet the more challenging standard of showing a likelihood of success on the merits.

SS. Authority of courts to raise issues *sua sponte.*

Our courts have long recognized that public policy is a central concern in the application of equitable principles. Here, the public policy elephant in the room is the Land Board's violation of a sacred constitutional duty.

In a case that has been cited 79 times, our Supreme Court observed that contracts against public policy are void, and "[p]ublic policy may be found and set forth in the constitution or in the statutes." *Stearns v. Williams*, 72 Idaho 276, 287, 240 P.2d 833, 840 (1952) (Thomas, J.).

> A party to a contract, void as against public policy, cannot waive its illegality by failure to specially plead the defense or otherwise, but whenever the same is made to appear at any stage of the case, it becomes the duty of a court to refuse to enforce it; again, a court of equity will not knowingly aid in the furtherance of an illegal transaction; in harmony with this principle, it does not concern itself as to the manner in which the illegality of a matter before it is brought to its attention. Furthermore, the court itself will raise the question of the invalidity of a contract which offends public policy and, as stated before, the parties cannot waive it.

Stearns, 72 Idaho at 290, 240 P.2d at 842 (citations omitted) (emphasis supplied).

The holding was reiterated in 1969. "This court undoubtedly has the power to raise the questions of illegality and public policy *sua sponte*." *Nab v. Hills*, 92 Idaho 877, 822, 452 P.2d 981, 986 (1969) (Donaldson, J.) (quoted in *Braddock v. Family Finance Corp.*, 95 Idaho 256, 506 P.2d 824 (1973) (Bakes, J., dissenting); *Crane Creek Country Club v. City of Boise*, 121 Idaho 485, 826 P.2d 446 (1992) (Bistline, J., concurring)).

It was addressed again in 1997.

> Whether a contract is against public policy is a question of law for the court to determine from all the facts and circumstances of each case. Public policy may be found and set forth in the statutes, judicial decisions or the constitution. An illegal contract is one that rests on illegal consideration consisting of any act or forbearance

> which is contrary to law or public policy. A contract prohibited by law is illegal and hence unenforceable.
>
> . . . [I]n Idaho a court may not only raise the issue of whether a contract is illegal *sua sponte*, but it has a duty to raise the issue of illegality, whether pled or otherwise, at any stage in the litigation. *Stearns*.

Quiring v. Quiring, 130 Idaho 560, 566-67, 944, P.2d 695, 701-02 (1997) (Schroeder, J.) (citations omitted) (emphasis supplied).

This was drilled home in the Court's recent decision in the case challenging the illegal contract awarded for the Idaho Education Network:

> The district court correctly concluded that *Quiring* imposed on it a duty to invalidate the SBPOs if they were unlawful. If the SBPOs were void for violating state procurement laws, as the district court ultimately concluded, then it was proper for the district court to find that it had an independent duty to invalidate them. We affirm the district court's holding that it had a duty to raise the issue of illegality of the SBPOs, regardless of whether Syringa could raise that issue on remand.

Syringa Networks, LLC v. Idaho Dep't of Admin. ("*Syringa II*"), 159 Idaho 813, 822-23, 367 P.3d 208, 217-18 (2016) (J. Jones, J.) (2016) (J. Jones, J.) (emphasis supplied).[418]

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[418] The *Syringa* litigation involved a challenge by Syringa Networks, LLC, a subcontractor to a successful bidder in the construction of the Idaho Education Network ("IEN"). The IEN was a publicly funded undertaking to bring a network of high-bandwidth telecommunications to public schools, libraries, and agencies across the State. Competitive bidding for the project was overseen by the Idaho Department of Administration ("DOA").

DOA issued a Request for Proposals ("RFP") in 2008. It explained that each bidder must provide "a total end-to-end service support solution" (*i.e.*, system-wide proposals only) *Syringa I*, 155 Idaho at 59, 305 P.3d at 503. Accordingly, Syringa entered into a "teaming agreement" with ENA Services in order to provide a comprehensive joint proposal. The joint proposal was submitted by ENA, with ENA providing "E-rate" management and Syringa (serving as a subcontractor to ENA) constructing the "network backbone." Competing proposals were filed by two other bidders.

DOA awarded two contracts (known as Statewide Blanket Purchase Orders ("SBPOs"), to ENA and to Qwest. These were for identical services, but would be split geographically. Thus, ENA (with Syringa as its "backbone" subcontractor) would construct a substantial portion of the project, while Qwest constructed the rest, based on some yet-to-be-determined geographic division.

One month later, DOA modified the awards. Under the amendment, Qwest would build the backbone on a statewide basis, and ENA would provide E-rate services statewide. The effect was to eliminate any role for Syringa, while expanding the roles for Qwest and ENA. "[I]t didn't take long for ENA to forsake its team partner and cozy up to Qwest." *Syringa I*, 155 Idaho at 68, 305 P.3d at 512 (J. Jones, J, concurring). "Gwartney [the Director of DOA] appears to have been the architect of

the State's effort to bend the contracting rules to Qwest's advantage. . . . Syringa alleges that Gwartney made threatening statements against Syringa on a couple of occasions, indicating he would 'make sure Syringa would never get any of the IEN business.'" *Syringa I*, 155 Idaho at 68-69, 305 P.3d at 512-13 (J. Jones, J, concurring).

Syringa sued DOA (and individual officials), Qwest, and ENA, seeking a declaratory judgment that the DOA violated statutory bidding procedures. (Idaho Code § 67-5725 provides a basis for relief in such cases. It states that contracts made in violation of procedures are void and that money advanced thereunder shall be repaid.)

Everyone agreed that the DOA could issue multiple contracts only for the same or similar property. DOA contended, however, that it was not restricted from subsequently modifying the contracts to differentiate their scopes. "They believed they could do in two steps what they could not do in one." *Syringa I*, 155 Idaho at 61, 305 P.3d at 505. This amounted to "changing the RFP after the bids were opened." *Id*. "[M]ere schemes to evade law, once their true character is established, are impotent for the purpose intended. Courts sweep them aside as so much rubbish." *Syringa II*, 159 Idaho at 829, 367 P.3d at 224 (quoting *Syringa Networks v. Idaho Dep't of Admin.* ("*Syringa I*"), 155 Idaho 55, 62, 305 P.3d 499, 506 (2013) (Eismann, J.) (quoting, in turn, *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 325, 303 P.2d 672, 678 (1956) (Porter, J.)) (brackets original).

Syringa I dealt with challenges to Syringa's standing, as well as other defenses and side-issues. The Court found that Syringa had standing. The Court held that Syringa was not a party to the contracts issued to Qwest and ENA, and therefore "does not have standing to challenge them. . . . However, when the amendments to the contracts are viewed in the context of the entire bidding process, Syringa does have standing." *Syringa I*, 155 Idaho at 61, 305 P.3d at 505. The case was remanded to evaluate the merits of the alleged violations of state procurement law.

On the second appeal, the Court reached those merits and voided the contracts. The Court first dealt with a critical procedural issue. On remand, Syringa sought a ruling that the contracts (SBPOs) were illegal and void, but Syringa was estopped from doing so due to an earlier admission that only the amendments were illegal. The Idaho Supreme Court upheld the district court's ruling that, even if Syringa could not raise the issue, the Court had an independent duty to invalidate them:

> The district court correctly concluded that *Quiring* imposed on it a duty to invalidate the SBPOs if they were unlawful. If the SBPOs were void for violating state procurement laws, as the district court ultimately concluded, then it was proper for the district court to find that it had an independent duty to invalidate them. We affirm the district court's holding that <u>it had a duty to raise the issue of illegality</u> of the SBPOs, regardless of whether Syringa could raise that issue on remand.

Syringa II, 159 Idaho at 822-23, 367 P.3d at 217-18 (emphasis supplied). "The district court had the authority to declare the SBPOs void regardless of whether Syringa had properly challenged them." *Syringa II*, 159 Idaho at 827, 367 P.3d at 222

The Court then tackled another critical procedural issue: mootness. The defendants sought to moot the case by rescinding the amended contracts in 2014. The Court found this was ineffective because void contracts cannot be rescinded. "We now hold that void contracts may not be rescinded because they are deemed never to have existed." *Syringa II*, 159 Idaho at 826, 367 P.3d at 221.

The *Syringa II* Court then reached the merits, extensively quoting and approving statements that it made in *Syringa I* in the context of standing.

> The amendments to the purchase orders issued to ENA and Qwest were, in effect, changing the RFP after the bids were opened. The RFP solicited proposals from bidders who were able to perform the entire contract which, under the wording of the RFP, would be a "total end-to-end service support solution." . . . The RFP did not

"[M]ere schemes to evade law, once their true character is established, are impotent for the purpose intended. Courts sweep them aside as so much rubbish." *Syringa II*, 159 Idaho at 829, 367 P.3d at 224 (quoting *Syringa Networks v. Idaho Dep't of Admin.* ("*Syringa I*"), 155 Idaho 55, 62, 305 P.3d 499, 506 (2013) (Eismann, J.) (quoting, in turn, *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 325, 303 P.2d 672, 678 (1956) (Porter, J.)) (brackets original).

In sum, no failing of the parties relieves a court of its power and duty to recognize the invalidity of a transaction against public policy.

TT. Necessary and indispensable parties

Both the Idaho and federal rules of civil procedure contain a Rule 19 addressing necessary and indispensable parties. The state and federal versions are similar, but not precisely identical. This section addresses the Idaho rule, Idaho R. Civ. P. 19.

Under Rule 19, "necessary parties" are whose that must be joined if possible (Rule 19(a)), and "indispensable parties" are those whose failure to join (because they are beyond the reach of the court) results in dismissal of the action (Rule 19(b)).

> seek bids for one contract to provide the backbone and a separate contract to be the E-rate service provider. . . .
>
> By amending the contracts so that Qwest and ENA were no longer furnishing the same or similar property, the State has, in effect, changed the RFP after the bids had been opened in violation of I.C. § 67–5718(2) and IDAPA 38.05.01.052. The separate contracts as amended no longer conform to the RFP's description of the property to be acquired. The description of property to be provided by Qwest under its amended contract is not a minor deviation from the property to be provided by the successful bidder under the RFP, nor is the property to be provided by ENA under its amended contract. "[M]ere schemes to evade law, once their true character is established, are impotent for the purpose intended. Courts sweep them aside as so much rubbish." *O'Bryant* [*v. City of Idaho Falls*], 78 Idaho [313] at 325, 303 P.2d [672] at 678 [(1956)].

Syringa II, 159 Idaho at 828-29, 367 P.3d at 223-24 (ellipses and brackets original). The Court went on to decide that even if the original contracts were lawful, they could be rendered unlawful and void by the subsequent illegal amendments. *Syringa II*, 159 Idaho at 829, 367 P.3d at 224.

The Court then addressed the elephant in the room: The fact that millions of dollars had already been expended by the State in constructing the system under void contracts. It noted that the statute governing procurement obligates the State to seek repayment of money advanced under the void SBPOs. "But it imposes no obligation on the district court to preemptively order that DOA comply with this obligation. If the appropriate State officer fails to perform this statutory obligation, the State's chief legal officer can step forward to make the State whole for these unfortunate violations of State law." *Syringa II*, 159 Idaho at 830, 367 P.3d at 225.

The terms "necessary" and "indispensable" are the traditional words of art use by lawyers to describe parties under subsections (a) and (b) of the rule. The rule itself does not employ these terms. Indeed, it refers to what we call necessary parties as "required parties."

Necessary parties are those whose absence "as a practical matter [would] impair or impede the person's ability to protect the interest." Rule 19(a)(1)(B)(i). Neither Rule 19 nor the cases interpreting it suggest that a mere "interest in the outcome" is sufficient to make them necessary to the litigation.

Rule 19 sets forth a two-step process for determining whether an action should be dismissed for failure to join an indispensable party. *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999). First, the court must determine whether an absent party is necessary under Rule 19(a). If an absent necessary cannot be joined, the court must determine whether the absent party is indispensable under Rule 19(b). If so, the case must be dismissed.

"The party advocating for joinder has the burden of proving that the absent person should be joined." Baicker-McKee, *et al.*, *Federal Civil Rules Handbook 2019* ("*Handbook*") at 613.

"As a general rule, courts construing contracts require that parties to the contract be joined." *Handbook* at 611.

Rule 19 does not call for a rigid analysis of property interests. "More than most Rules, the application of Rule 19 is highly fact specific. Thus, when the court addresses questions of impairment of interest, the court will examine both legal and actual, real-world, impairment." *Handbook* at 609. One of those considerations is whether the absent parties are sufficiently represented by others. "By contrast, when the interests of an absent group are adequately represented by existing parties, the absent group need not be joined." *Handbook*, page 611.

"Rule 19 contains no express time limit within which a party seeking joinder must file a motion. However, undue delay in filing can be grounds for denying a motion." *Handbook* at 613.

However, a motion under Rule 12(b)(7) to dismiss for failure to join a party under Rule 19 must be filed prior to the first responsive pleading.

Volume 2

Land Use Handbook

The Law of Planning, Zoning, and Property Rights in Idaho

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VOLUME 2

24. COSTS AND ATTORNEY FEE AWARDS

Unless a specific statute, rule, or contract dictates another outcome, Idaho courts follow the "American rule" regarding the award of attorney fees.[419] Under this approach, each party to litigation bears the burden of his or her own attorney fees, except in those rare cases where the court finds one party's actions to be frivolous. Under the American Rule, persons may engage in non-frivolous litigation without fear that they will be saddled with the other side's attorney fees if they lose. On the other hand, the American Rule means that successful litigants are often unable to recover their own legal fees even when they prevail. This contrasts with the practice in England of automatically awarding attorney fees to the prevailing party.

Idaho statutes, rules and common law provide some relief from American Rule, enabling courts to award attorney fees in certain circumstances. These are discussed below. Only one (Section 12-117) is typically applicable in an appeal of a land use decision. A brief discussion of other key attorney fee recovery rules is included. These could be applicable to other litigation arising out of a land use matter.

A. Costs

Idaho R. Civ. P. 54(d) (and the corresponding statute, Idaho Code § 12-101) authorizes the award of costs (including expert witness fees) to the prevailing party "as a matter of right." It does not authorize the award of attorney fees. Rule 54(d)(2) authorizes the award of costs to each of the prevailing parties, where multiple parties are involved.

Idaho Appellate Rule 40 (and the corresponding statute Idaho Code § 12-107) authorizes costs on appeal. Where a judgment is modified or a new trial ordered, costs are discretionary with the appellate court. In all other cases (*e.g.*, where the decision is affirmed), the prevailing party is entitled to costs as a matter of right. Rule 40 and Idaho Code § 12-114 both set out procedures for taxing costs on appeal to the Idaho Supreme Court.

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[419] "We continue to adhere to the so-called 'American Rule' to the effect that attorney fees are to be awarded only where they are authorized by statute or contract." *Hellar v. Cenarrusa*, 106 Idaho 571, 578, 682 P.2d 524, 532 (1984). "The Idaho Legislature has authorized the award of attorney fees in only a few clearly defined circumstances. . . . From the foregoing statutes, it is clear that the Idaho legislature has provided for the award of attorney fees specifically when it so intends, and only when it so intends." *Idaho Power Co. v. Idaho Public Utilities Comm'n*, 102 Idaho 744, 751, 639 P.2d 442, 449 (1981). "This assertion of a general inherent authority to award fees was incorrect. Idaho law does not recognize such an equitable power to grant attorney fees. Rather, our law adheres to the 'American Rule' which generally permits an attorney fee award only when authorized by contract or statute." *Keevan v. Estate of Keevan*, 126 Idaho 290, 298, 882 P.2d 457, 465 (Ct. App. 1994).

B. Idaho Code §§ 12-117(1) to 12-117(3): Actions involving a state agency or political subdivision and a private party.

(1) Idaho Code § 12-117(1): General principles

Prevailing parties in actions involving a state agency or local government and a private entity as adverse parties may recover their costs and attorney fees where they can show that the non-prevailing party acted "without a reasonable basis in fact or law."

Section 12-117(1) authorizes awards of attorney fees to the "prevailing party" when "the nonprevailing party acted without a reasonable basis in fact or law." Both determinations are committed to the discretion of the trial court and are reviewed under an abuse of discretion standard. *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005) (J. Jones, J.); *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012) (J. Jones, J.).

As amended in 2012, the first section of the statute provides:

> (1) Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

Idaho Code § 12-117(1) (emphasis supplied).

When first enacted in 1984, it was applicable only to recovery of attorney fees in litigation against state agencies. It was amended in 1994 to include litigation with cities, counties, and other taxing districts. 1994 Idaho Sess. Laws, ch. 36, § 1.[420]

It was amended in 2000 to provide for an award to either prevailing party, turning the statute into a two-edged sword. 2000 Idaho Sess. Laws, ch. 241, § 1.

The statute was amended again in 2010, 2010 Idaho Sess. Laws, ch. 29, to change the result obtained in *Rammell v. ISDA*, 147 Idaho 415, 210 P.3d 523 (2009), which is discussed further in the next footnote. The amendment restored the prior

[420] Apparently the Idaho Supreme Court was not aware of this amendment when it handed down its decision in *Gibson v. Ada Cnty.*, 142 Idaho 746, 756, 133 P.3d 1211, 1221(2006), *cert. denied*, 549 U.S. 994 (2006), *rehearing denied*, 549 U.S. 1159 (2007) (Schroeder, C.J.), declining to award attorney fees against Ada County under section 12-117 because it is not a state agency.

law, which is that attorney fees may be awarded in administrative proceedings, not just court proceedings.

Unfortunately, while the amendment fixed one problem (restoring the availability of attorney fee awards in administrative actions), it created another (inadvertently eliminating attorney fee awards in judicial reviews).[421]

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[421] It took two legislative corrections to restore what had been the law for 20 years prior to 2009. The Idaho Supreme Court had long held that Idaho Code § 12-117 allowed administrative tribunals to award attorney fees at the conclusion of the administrative stage. *E.g., Stewart v. Dep't of Health & Welfare*, 115 Idaho 820, 771 P.2d 41 (1989); *Rural Kootenai Organization, Inc. v. Bd. of Comm'rs, Kootenai Cnty.*, 133 Idaho 833, 845-46, 993 P.2d 596, 608-09 (2000). In *Stewart*, the Court acknowledged that the statute authorized "the court" to award attorney fees in certain "administrative or civil judicial proceeding[s]." The *Stewart* Court found that it would be anomalous to allow fee awards only in administrative proceedings that are appealed to court. Accordingly, the Court determined that the statute authorized administrative tribunals to make such awards, too.

In 2009, the Idaho Supreme Court overruled the *Stewart* line of cases. *Rammell v. ISDA*, 147 Idaho 415, 210 P.3d 523 (2009). (This reversal was foreshadowed by a concurrence by Justice Eismann in *Sanchez v. State of Idaho, Department of Correction*, 143 Idaho 239, 245, 141 P.3d 1108, 1114 (2006) (referring to "the clear abuse of power by the majority in *Stewart*").) The *Rammell* Court ruled that the statute meant what it said and that only courts may award attorney fees. The Court ruled, "A court may only make such an award of fees incurred in the appeal of an administrative determination." (In a strongly worded concurrence, Justice Eismann said, "There is simply no basis in law for holding that the legislature intended the word 'court' in Idaho Code § 12-117 to include administrative agencies. The *Stewart* majority simply rewrote the statute to provide what it wanted, rather than what the legislature enacted. Therefore, *Stewart* must be overruled." *Rammell*, 147 Idaho at 424, 210 P.3d at 532.) Thus, under *Rammell*, administrative agencies could no longer award attorney fees in administrative matters. But courts could award attorney fees associated with the judicial review of an administrative matter.

The Idaho Legislature responded swiftly in 2010, but partially missed the mark. The legislature changed the statute as follows: "(1) Unless otherwise provided by statute, in any administrative proceeding or civil judicial proceeding involving as adverse parties a state agency~~, a city, a county or other taxing district~~ or political subdivision and a person, the state agency or political subdivision or the court, as the case may be, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if ~~the court~~ it finds that the nonprevailing party ~~against whom the judgment is rendered~~ acted without a reasonable basis in fact or law." 2010 Idaho Sess. Laws, ch. 29. As the legislative history makes clear, the intent was to expand coverage (restoring pre-*Rammell* coverage to administrative matters). The legislative history shows that this result was unintended. "In 1989, the Supreme Court construed Idaho Code Section 12-117 to permit awards of costs and attorney fees to prevailing parties not only in court cases, but also in administrative cases." Statement of floor manager Representative Grant Burgoyne on House Bill 421, House Judiciary, Rules & Administration Committee (Feb. 3, 2010). "This bill will restore the law as it existed since 1989." Statement of floor manager Representative Grant Burgoyne on House Bill 421, Senate Judiciary & Rules Committee (Feb. 15, 2010).

Alas, the effect was to fix one problem and create another. The 2010 amendment made it clear that attorney fees may be awarded at the administrative level by the administrative tribunal. However, by inserting the word "proceeding," the legislation made it no longer possible for the court to read the phrase "administrative or civil judicial proceeding" to include a judicial review of an administrative matter. Thus, the legislation eliminated attorney fee recoveries under section 12-117

In March of 2012, in response to *Smith v. Washington Cnty.*, 150 Idaho 388, 247 P.3d 615 (2010), the Idaho Legislature amended Idaho Code § 12-117 yet again to restore the availability of attorney fee awards in judicial reviews. 2012 Idaho Sess. Laws, ch. 149, § 1. Following these judicial and legislative gyrations between 2009 and 2012, it is now settled, once again, that Idaho Code § 12-117 authorizes attorney fees in administrative proceedings as well as judicial review proceedings and civil actions.

None of these legislative and judicial gyrations, however, changed the substance of the attorney fee statute. Accordingly, prior precedent remains valid.

In 2004, the Idaho Supreme Court described the dual purposes of the attorney fee statute:

> We believe the purpose of that statute is two-fold: (1) to serve as a deterrent to groundless or arbitrary agency action; and (2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies never should have made."

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in judicial reviews of administrative actions. That is how the Idaho Supreme Court interpreted the amendment in *Smith v. Washington Cnty.*, 150 Idaho 388, 392, 247 P.3d 615, 619 (2010) (replacing earlier opinion): "The Legislature therefore must also have intended to abrogate the part of *Rammell* that interpreted § 12-117 to allow courts to award fees in petitions for judicial review. Again, *Rammell* read the prior version of § 12-117 to allow fees in "administrative judicial proceedings," which included petitions for review of administrative decisions. By separating "administrative proceedings" from "civil judicial proceedings," the Legislature signaled that the courts should no longer be able to award fees in administrative judicial proceedings such as this one." *Smith*, 150 Idaho at 392, 247 P.3d at 619.

The 2010 legislative history shows that this result was unintended. "In 1989, the Supreme Court construed Idaho Code Section 12-117 to permit awards of costs and attorney fees to prevailing parties not only in court cases, but also in administrative cases." Statement of floor manager Representative Grant Burgoyne on House Bill 421, House Judiciary, Rules & Administration Committee (Feb. 3, 2010). "This bill will restore the law as it existed since 1989." Statement of floor manager Representative Grant Burgoyne on House Bill 421, Senate Judiciary & Rules Committee (Feb. 15, 2010). This legislative history was brought to the attention of the Idaho Supreme Court in *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 264 P.3d 916 (2011). However, the Court declined to reverse course, holding that the matter is now *stare decisis*. "The County acknowledges that *Smith* controls here, but asserts that this Court should overrule *Smith* because the Legislature intended to expand the availability of attorney's fees, not bar fee awards in administrative appeals. . . . Stare decisis requires this Court to follow controlling precedent unless it is manifestly wrong, proven to be unjust or unwise, or overruling it is necessary in light of obvious principles of law and justice. . . . This Court's interpretation of section 12–117 was not manifestly wrong." *Sopatyk*, 151 Idaho at 818-19, 264 P.3d at 925-26. In March of 2012, the Idaho Legislature amended Idaho Code § 12-117 to restore the availability of attorney fee awards in judicial review. 2012 Idaho Sess. Laws, ch. 149, § 1.

Bogner v. State Dep't of Revenue and Taxation, 107 Idaho 854, 859, 693 P.2d 1056, 1061 (1984). This language has been quoted by appellate courts at least 20 times.[422]

(2) The "without a reasonable basis" requirement.

Bringing a lawsuit in plain violation of an applicable statute of limitations gives rise to an attorney fee award. *State of Idaho v. Estate of Joe Kaminsky*, 141 Idaho 436, 439-40, 111 P.3d 121, 124-25 (2005). In that case, the Court quoted the dual purposes of the statute stated in *Bogner* and declared that both were violated. "The action was groundless because the Department clearly waited too long to present its claim. . . . It is appropriate to discourage such action. Further, the Department's action placed an unjustified financial burden on the Estate." *Id*.

To be eligible for fees under the statute, the party must prevail and show that the other party "acted without a reasonable basis in fact or law." *Reardon*, 140 Idaho at 118, 90 P.3d at 343.

Although the courts have applied the statute on countless occasions, the discussion of the standard tends to be conclusory, providing little guidance for future litigants. "[U]nfortunately, very little discussion of the standard exists." Mark D. Perison, *A Guide to Attorney Fee Awards in Idaho*, 32 Idaho L. Rev. 29, 69 (1995).

In *Stevens v. Fleming*, 116 Idaho 523, 527, 777 P.2d 1196, 1200 (1989), the Idaho Supreme Court held that notice "is prerequisite to maintaining a claim" and failure to file a timely notice means that "the claim against the Grimes failed for lack of jurisdiction."

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[422] *Fuchs v. Idaho State Police, Alcohol Beverage Control*, 153 Idaho 114, 117, 279 P.3d 100, 103 (2012); *In re Daniel W.*, 145 Idaho 677, 682, 183 P.3d 765, 770 (2008); *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 458-59, 180 P.3d 487, 497-98 (2008) (J. Jones, J.); *Neighbors for a Healthy Gold Fork v. Valley Cnty.*, 145 Idaho 121, 138, 176 P.3d 126, 143 (2007); *Ralph Naylor Farms v. Latah Cnty.*, 144 Idaho 806, 809, 172 P.3d 1081, 1084 (2007); *Ater v. Idaho Bureau of Occupational Licenses*, 144 Idaho 281, 286, 160 P.3d 438, 443 (2007); *In re Estate of Kaminsky*, 141 Idaho 436, 439-40, 111 P.3d 121, 124-25 (2005); *In re Estate of Elliot*, 141 Idaho 177, 184, 108 P.3d 324, 331 (2005); *Reardon v. City of Burley*, 140 Idaho 115, 118, 90 P.3d 340, 343 (2004); *Canal/Norcrest/Columbia Action Committee v. City of Boise* (*"Canal I"*), 136 Idaho 666, 671, 39 P.3d 606, 611 (2001); *State of Idaho, Dep't of Finance v. Resource Service Co., Inc.*, 134 Idaho 282, 284, 1 P.3d 783, 785 (2000); *Payette River Property Owners Ass'n v. Bd. of Comm'rs of Valley Cnty.*, 132 Idaho 551, 558, 976 P.2d 477, 484 (1999); *Rincover v. State, Dep't of Finance*, 132 Idaho 547, 549, 976 P.2d 473, 475 (1999); *McCoy v. State, Dep't of Health and Welfare*, 127 Idaho 792, 797, 907 P.2d 110, 115 (1995); *Idaho Dep't of Law Enforcement v. Kluss*, 125 Idaho 682, 685, 873 P.2d 1336, 1339 (1994); *Hood v. Idaho Dep't of Health and Welfare*, 125 Idaho 151, 154, 868 P.2d 479, 482 (1993); *Lockhart v. Dep't of Fish and Game*, 121 Idaho 894, 898, 828 P.2d 1299, 1303 (1992); *Cox v. Dep't of Insurance, State of Idaho*, 121 Idaho 143, 148, 823 P.2d 177, 182 (1991); *Fox v. Bd. of Cnty. Comm'rs, Boundary Cnty.*, 121 Idaho 686, 692-93, 827 P.2d 699, 705-06 (Ct. App. 1991); *Stewart v. Dep't of Health and Welfare*, 115 Idaho 820, 822, 771 P.2d 41, 43 (1989).

In *Allied Bail Bonds, Inc. v. Cnty. of Kootenai*, 151 Idaho 405, 415, 258 P.3d 340, 350 (2011), the Court awarded attorney fees against the plaintiff pursuant to Idaho Code § 12-117 noting: "Allied misrepresented controlling precedent in its briefing, and also presented multiple arguments in its briefing that it abandoned at oral argument. Further, Allied unreasonably pursued this appeal even though it failed to comply with the notice requirement of the ITCA and the bond requirement of I.C. § 6–610."

The Court of Appeals has described the standard under section 12-117 ("without a reasonable basis in fact or law") as "similar" to the standard under section 12-121 ("frivolously, unreasonably or without foundation"). *Total Success Investments, LLC v. Ada Cnty. Highway Dist.* ("*Total Success II*"), 148 Idaho 688, 695, 227 P.3d 942, 949 (Ct. App. 2010) (Perry, J. Pro Tem.).

If an agency's actions are based upon a "reasonable, but erroneous interpretation of an ambiguous statute," then attorney fees should not be awarded. *Idaho Potato Comm'n v. Russet Valley Produce, Inc.*, 127 Idaho 654, 661, 904 P.2d 566, 573 (1995) *citing Cox v. Dep't. of Ins., State of Idaho*, 121 Idaho 143, 148, 823 P.2d 177, 182 (Ct. App. 1991)).

"Attorney's fees are also inappropriate if the City presented a legitimate question for this Court to address." *Lane Ranch Partnership v. City of Sun Valley* (*"Lane Ranch II"*), 145 Idaho 87, 91, 175 P.3d 776, 780 (2007). This statement has been quoted in a number of more recent opinions. *E.g., Kepler-Fleenor v. Freemont Cnty.*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012); *City of Osburn v. Randel*, 152 Idaho 906, 910, 277 P.3d 353, 357 (2012).

Even some inconsistency in treatment of applicants before a government entity may be overlooked where there is no express appellate decision establishing a precedent. *Lake CDA Investments, LLC v. Idaho Dep't of Lands*, 149 Idaho 274, 284-85, 233 P.3d 721, 731-32 (2010). Indeed, the Court frequently has held that a losing party cannot be said to have acted without reasonable basis when litigating a case of first impression. *Arambarri v. Armstrong*, 152 Idaho 734, 740-41, 274 P.3d 1249, 1255-56 (2012) (W. Jones, J.); *St. Luke's Magic Valley Regional Medical Center, Ltd. v. Bd. of Cnty. Comm'rs of Gooding Cnty.*, 149 Idaho 584, 591, 237 P.3d 1210, 1217 (2010); *KGF Development, LLC v. City of Ketchum*, 149 Idaho 524, 532, 236 P.3d 1284, 1291 (2010) (J. Jones, J); *State of Idaho, Dep't of Finance v. Resource Service Co., Inc.*, 134 Idaho 282, 284-85, 1 P.3d 783, 785-86 (2000); *Treasure Valley Concrete, Inc. v. State*, 132 Idaho 673, 678, 978 P.2d 233, 238 (1999); *Rincover v. State of Idaho, Dep't of Finance*, 132 Idaho 547, 550, 976 P.2d 473, 476 (1999).

In contrast, a party that ignores settled precedent will be subject to an award of fees under section 12-117. *Excell Construction, Inc. v. Idaho Dep't of Commerce and Labor*, 145 Idaho 783, 793, 186 P.3d 639, 649 (2008) (attorney fees awarded

against an agency that failed to apply a case whose relevant facts were "virtually indistinguishable"); *Gallagher v. State*, 141 Idaho 665, 669, 115 P.3d 756, 760 (2005) (attorney fees may be awarded when "the law is well-settled").

The Court has laid down essentially a "per se" rule when an agency acts outside of its authority. "Where an agency has no authority to take a particular action, it acts without a reasonable basis in fact or law." *Fischer v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005); *Reardon*, 140 Idaho at 120, 90 P.3d at 345; *Moosman v. Idaho Horse Racing Comm'n*, 117 Idaho 949, 954, 793 P.2d 181, 186 (1990).

Where an agency ignores the procedural requirements of its own ordinance, attorney fees will be awarded. *Fischer v. City of Ketchum*, 141 Idaho 349, 355-56, 109 P.3d 1091, 1097-98 (2005). Likewise, presenting an erroneous interpretation of an unambiguous statute may give rise to an attorney fee award. *State of Idaho, Dep't of Health and Welfare v. Estate of Dolores Arlene Elliott*, 141 Idaho 177, 184, 108 P.3d 324, 331 (2005).

Failure to address controlling appellate decisions and failure to address factual or legal findings of the district court equates to pursuing an appeal without a reasonable basis in law or fact. *Waller v. State of Idaho, Dep't of Health and Welfare*, 146 Idaho 234, 240, 192 P.3d 1058, 1064 (2008).

In some instances, pursuit of litigation may not be reasonable at the outset. But once the party is presented with clear contrary authority (for example, in the district court's decision), pursuit of an appeal may give rise to an award of attorney fees.

> Although the Castrignos may have had a good faith basis to bring the original suit based on their interpretation of Idaho law, the Castrignos were very clearly aware of the statutory procedures, failed to appeal separate appraisals when they had a right to appeal, and were clearly advised on the applicable law in an articulate and well reasoned written decision from the district court. Nevertheless, the Castrignos chose to further appeal that decision to this Court, even though they failed to add any new analysis or authority to the issues raised below. Accordingly, it was frivolous and unreasonable to make a continued argument, and Ada County is awarded its reasonable attorney fees.

Castringo v. McQuade, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005) (Trout, J.).

Another factor to be considered is whether the losing party took taken actions that unreasonably increased the costs of litigation borne by the prevailing party.

Canal/Norcrest/Columbia Action Committee v. City of Boise (*"Canal I"*), 136 Idaho 666, 671, 39 P.3d 606, 611 (2001).

The Idaho Supreme Court has noted that where the requirements of the statute are met, an award of attorney fees is mandatory, not discretionary. "This Court has further noted that Idaho Code § 12-117 is not a discretionary statute; but it provides that the court *shall* award attorney fees where the state agency did not act with a reasonable basis in fact or law in a proceeding involving a person who prevails in the action." *Rincover v. State of Idaho, Dep't of Finance*, 132 Idaho 547, 549, 976 P.2d 473, 475 (1999) (emphasis original). "The statute is not discretionary but provides that the court must award attorney fees where a state agency did not act with a reasonable basis in fact or in law in a proceeding involving a person who prevails in the action." *Fischer v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005) (awarding attorney fees to a private litigant where the City of Ketchum "ignored the plain language" of its own zoning ordinance). "Under a two-part test, attorney fees pursuant to I.C. § 12–117 must be awarded if the party is a prevailing party and if the state agency did not act with a reasonable basis in fact or law." *Fuchs v. Idaho State Police, Alcohol Beverage Control*, 153 Idaho 114, 117, 279 P.3d 100, 103 (2012) (Burdick, C.J.) (citing *Reardon*).

However, in *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012) (J. Jones, J.), the Court explained that the award is mandatory only upon a determination that the non-prevailing party acted without reasonable basis in fact or law. Those threshold determinations do involve an exercise of discretion.

In *Rincover*, the Court denied an award of attorney fees to a prevailing party on the basis that state agency's action was not without reasonable basis. "At the time, the specific provisions in I.C. 30-1413 which were relied upon by the Department had not been construed by the courts. . . . The Department did not act without or contrary to statutory authority, or ignore or refuse to comply with duties imposed by statute." *Rincover*, 132 Idaho at 550, 976 P.2d at 476. Thus, it appears, where the agency is legitimately grappling with an unsettled area of law, it may be immune from an attorney fee award, even when the court rules against it. This makes all the more sense where, as here, the state agency was not affirmatively acting outside its authority, but was required to take on a judge-like role in a contested case.

In the same vein are the following three cases: *Lane Ranch Partnership v. City of Sun Valley* (*"Lane Ranch II"*), 145 Idaho 87, 91, 175 P.3d 776, 780 (2007) ("A party is not entitled to attorney's fees if the issue is one of first impression in Idaho. . . . Attorney's fees are also inappropriate if the City presented a legitimate question for this Court to address."); *Kootenai Medical Ctr. v. Bonner Cnty.*, 141 Idaho 7, 10, 105 P.3d 667, 670 (2004) ("In this case, the Appellant is raising issues of first impression to this Court and therefore we do not believe Bonner County acted

without a reasonable basis in fact or law."); *SE/Z Construction, LLC v. Idaho State Univ.*, 140 Idaho 8, 14, 89 P.3d 848, 854 (2004) ("The facts, however, gave rise to questions of first impression regarding application of Idaho's competitive bidding law. Therefore, the challenge SE/Z brought was reasonably founded in fact and law . . . ."); *IHC Hospitals, Inc. v. Teton Cnty.*, 139 Idaho 188, 191-92, 73 P.3d 1198, 1201-02 (2003) ("Here, a legitimate question was presented as to what constitutes an application or delayed application; therefore, we deny an award of fees to the County.").

Unlike other attorney fee provisions, section 12-117 also applies to attorney fees incurred during the pre-judicial administrative phase. Indeed, where one of the parties to the administrative proceeding is a governmental entity, the administrative decision-maker has authority to award attorney fees at the administrative level. *Stewart v. Dep't of Health and Welfare*, 115 Idaho 820, 822, 771 P.2d 41, 43 (1989) (awarding attorney fees against the Idaho State School and Hospital in an administrative proceeding before the Idaho Personnel Commission involving the firing of employees)[423]; *Cox v. Dep't of Insurance, State of Idaho*, 121 Idaho 143, 823 P.2d 177 (Ct. App. 1991); *Ockerman v. Ada Cnty. Bd. of Comm'rs*, 130 Idaho 265, 939 P.2d 584 (Ct. App. 1997) (holding that a hearing officer in a county personnel proceeding has authority to award attorney fees against the county); Mark D. Perison, *A Guide to Attorney Fee Awards in Idaho*, 32 Idaho L. Rev. 29, 69 (1995). Of course, this posture (private party versus governmental entity appearing as parties in an administrative matter) is not likely to present itself in the land use context. In the land use context, the governmental entity is typically the decision-maker, not a party.[424] In some instances, however, a city or county may take on an adversarial role even in a land use context, for example by directing an order to show cause against a permit holder.

In *Eacret v. Bonner Cnty.*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004) (Burdick, J.), the Court noted that section 12-117 does not apply to a County sitting in its appellate capacity reviewing a P&Z decision, but only comes into play when the county becomes an "adverse party" when sued in district court. At that point, arguably, the prevailing party would be entitled to an award of attorney fees reaching back to capture the attorney costs incurred at the administrative stage. See *Bogner* and *Stewart* discussed above. The counter-argument would be that the governmental entity was not an adverse party at the administrative stage.

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[423] The *Stewart* Court noted that section 12-117 does authorize administrative decision-makers to award attorney fees, in contrast to section 12-121, which authorizes courts to award attorney fees in the context of civil proceedings following administrative actions. See discussion of *Bogner*, and its unusual judicial review posture, in footnote 435 at page 526.

[424] This posture does arise from time to time in water right cases, in which cities or other governmental entities protest the water rights of private parties. See discussion in the *Idaho Water Law Handbook*.

In an interesting split, the Court once upheld an award of attorney fees to a permit applicant at district court level, but denied attorney fees to the same party on appeal. *Sanders Orchard v. Gem Cnty.*, 137 Idaho 695, 702, 52 P.3d 840, 847 (2002).

Ralph Naylor Farms v. Latah Cnty. ("Naylor Farms"), 144 Idaho 806, 172 P.3d 1081 (2007), involved an ordinance adopted by Latah County creating the "Moscow Sub-basin Groundwater Management Overlay Zone." The ordinance prohibited certain specified land uses that were found to consume large quantities of water (mineral extraction and processing, large CAFOs, and golf courses). The ordinance was enacted as a direct response to the county's failed protest of Naylor Farms' application to IDWR for a ground water right for clay processing. When the Director of the Planning and Building Department refused to accept Naylor Farms' application for a conditional use permit on the basis of the use was prohibited under the overlay zone, Naylor Farms challenged the validity of the overlay ordinance. The challenge was brought as a collateral attack by way of complaint (not under LLUPA). The district court invalidated the ordinance on the basis that it was preempted by the authority granted to IDWR to regulate water resources.[425] The county did not appeal. Instead, the prevailing applicant appealed the district court's denial of its attorney fee request. The Supreme Court upheld the district court's finding that "the conflict between the Ordinance and the state law 'was by no means obvious.'" *Naylor Farms*, 144 Idaho at 810, 172 P.3d at 1085. In upholding the denial of attorney fees, the Idaho Supreme Court concluded: "Even though the district court ruled against the County and set aside the Ordinance, it did so on the basis that the County's actions were preempted by State law and not because the County acted wrongfully or without any authority. Because there a legitimate question about the validity of the County's actions in adopting the Ordinance, the County did not act without a reasonable basis in fact or law . . . ." *Naylor Farms*, 144 Idaho at 811, 172 P.3d at 1086.

Note that a city or county that unsuccessfully defends its own decision may be subject to an award of attorney fees. *Lowery v. Bd. of Cnty. Comm'rs for Ada Cnty.*

[425] While the appeal dealt with attorney fees, the court found it necessary to discuss the merits of the preemption issue, essentially upholding the district court's preemption analysis. Neither the parties nor the court discussed Idaho Code § 42-201(4), which was enacted in 2006, the year after the county adopted the ordinance in question. The 2006 statute delegates to IDWR "exclusive authority over the appropriation of the public surface water and ground waters of the state" and prohibits any other agency from taking any "action to prohibit, restrict or regulate the appropriation" of water. Instead, the district court and the Idaho Supreme Court applied a common law implied preemption analysis under *Envirosafe Services of Idaho, Inc. v. Cnty. of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987). (See the *Idaho Water Law Hand*book for a discussion of section 42-201(4).) In any event, the case appears to reinforce the effect of the 2006 statute.

(*"Lowery I"*), 115 Idaho 64, 70-71, 764 P.2d 431, 437-38 (Idaho App. 1988).[426] In *Lowery I*, the Court of Appeals assessed attorney fees solely against the applicant for the permit, who had filed a separate appeal, finding that the county's role in the appeal was limited and passive. The Court of Appeals said:

> When acting upon a quasi-judicial zoning matter the governing board is neither a proponent nor an opponent of the proposal at issue, but sits instead in the seat of a judge. . . .
> In the instant case, the Ada County board now acknowledges having committed an error of law. Neither the Board nor its counsel actively advocated the position found to be frivolous by the district court. Instead the Board apparently tried to maintain a passive, nonpartisan and removed posture on appeal, while at the same time explaining its decision below.

Lowery I, 115 Idaho at 71, 764 P.2d at 438.

Nevertheless, the Court of Appeals emphasized that under different circumstances (presumably where the county played a more active role in the appeal), the county might have had to pay: "We do *not* hold that circumstances could never exist where an administrative or governmental tribunal could be subjected to an award of attorney fees to an appellant for frivolously defending its decision below." *Lowery I*, 115 Idaho at 71, 764 P.2d at 438 (emphasis original).

In *Galli v. Idaho Cnty.*, 146 Idaho 155, 191 P.3d 233 (2008) and again in *Neighbors for Responsible Growth v. Kootenai Cnty.*, 147 Idaho 173, 207 P.3d 149 (2009),[427] the Court determined that section 12-117 is not applicable where the county was a named party but was not actively involved on the merits of the appeal. In an earlier decision, the Court also noted that a fee award did not make sense when the governmental body is acting as a decision-maker. "Idaho Code, Section 12-117

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[426] This case involved a claim for attorney fees under section 12-121, not section 12-117 (which, at that time, was limited to claims against the state). In *Lowery II*, the Idaho Supreme Court held that section 12-121 is not available in judicial review actions. Nevertheless, the Court of Appeals' reasoning in *Lowery I* would appear to apply today to attorney fees claimed against cities and counties under section 12-117.

[427] In *Neighbors*, the appellants had not timely sought attorney fees at the administrative or district court level. The only issue was attorney fees on appeal to the Idaho Supreme Court. Citing *Galli*, the *Neighbors* Court explained: "Similarly, the county in this case is not adverse to either party. The county's only involvement in this appeal was to waive any objection to Neighbors' motion to dismiss and to waive any claim to attorney fees. Furthermore, Appellants are intervenors on the side of the county—perhaps the most obvious indicator that the two are not adverse. Thus, because Appellants are not adverse to the county, they are not entitled to an award of attorney fees under I.C. § 12-117." *Neighbors*, 147 Idaho at 177, 207 P.3d at 153.

states that attorney fees, witness fees and expenses may be awarded against a county only when it is an 'adverse party.' We note that the Board of Commissioners was sitting in its appellate capacity reviewing the administrative proceeding of the Planning and Zoning Commission and was not an 'adverse party' until the case was taken to the district court." *Eacret v. Bonner Cnty.*, 139 Idaho 780, 788 n.2, 784, 86 P.3d 494, 498, 502 n.2 (2004) (Burdick, J.).

In *Rammell v. State*, 154 Idaho 669, 678, 302 P.3d 9, 18 (2012), the Idaho Supreme Court affirmed an award of attorney fees below and awarded attorney fees on appeal to the State, noting that the plaintiff "both mischaracterized and misapplied the law to the extent that no reasonable basis in law existed."

Where a party wins, but not on the issue argued by the party, that party is not entitled to fees under section 12-117. "Although the Respondents have prevailed from an overall standpoint, it cannot be said that Paddison acted without a reasonable basis in fact or law. Indeed, neither side argued the issue upon which the appeal was decided. Thus, we decline to find that the requirements for a fee award under I.C. § 12–117 have been met." *Paddison Scenic Properties, Family Trust, L.C. v. Idaho Cnty.*, 153 Idaho 1, 278 P.3d 403 (2012).

A party may be subject to attorney fees either for abandoning or pursuing losing arguments. "Allied misrepresented controlling precedent in its briefing, and also presented multiple arguments in its briefing that it abandoned at oral argument. Further, Allied unreasonably pursued this appeal even though it failed to comply with the notice requirement of the ITCA and the bond requirement of I.C. § 6–610." *Allied Bail Bonds, Inc. v. Cnty. of Kootenai*, 151 Idaho 405, 415, 258 P.3d 340, 350 (2011).

"The District was clearly the prevailing party, as Zingiber's claims were dismissed with prejudice in a motion for summary judgment." *Zingiber Investment, LLC v. Hagerman Highway Dist.*, 150 Idaho 675, 686, 249 P.3d 868, 879 (2010).

(3) The "prevailing party" requirement under Idaho Code §§ 12-117(1) and other statutes.

(a) Idaho R. Civ. P. 54(d)(1)(B) guides the court's inquiry on the prevailing party question.

A fundamental prerequisite to the award of attorney fees is that the person seeking them be the "prevailing party." Although this section deals primarily with section 12-117, it is equally applicable to sections 12-120, 12-121 and, presumably, any other prevailing party award statute.

Regardless of the statute, Idaho R. Civ. P. 54(d)(1)(B) guides the court's inquiry on the prevailing party question. *Shore v. Peterson*, 146 Idaho 903, 914, 204 P.3d 1114, 1125 (2009) (J. Jones, J.) (arising under section 12-120).

That rule provides:

> (B) Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

Idaho R. Civ. P. 54(d)(1)(B).

(b) Determination of prevailing party involves an exercise of discretion.

"A determination on prevailing parties is committed to the discretion of the trial court and we review the determination on an abuse of discretion standard." *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005) (J. Jones, J.). "The determination of prevailing party status is committed to the sound discretion of the district court and will not be disturbed absent an abuse of that discretion." *Credit Suisse AG v. Teufel Nursery, Inc.*, 2014 WL 1053324 (Idaho Mar. 19, 2014) (quoting *Jorgensen v. Coppedge*, 148 Idaho 536, 538, 224 P.3d 1125, 1127 (2010)) (this statement was made in the context of a different attorney fee recovery statute).

The role of discretion is also expressly stated in the applicable rule of civil procedure, Idaho R. Civ. P. 54(d)(1)(B) (quoted above).

(c) Determination of prevailing party is based on the overall result.

The prevailing party standard was discussed at length by the Idaho Supreme Court in a 2012 decision. *Hobson Fabricating Corp. v. SE/Z Const*., LLC, 154 Idaho 45, 294 P.3d 171 (2012) (Burdick, C.J.). In this case, the parties settled all claims except costs and attorney fees at the district court. The district court determined that both sides prevailed in part, and awarded no attorney fees to either. Two of the parties appealed, contended that they were the overall prevailing party and should have been awarded fees. The Idaho Supreme Court affirmed, holding (1) the trial court did not abuse its discretion in finding that both parties prevailed in part and (2) the request for partial prevailing party fees was not properly presented and would not be considered. In so ruling, the Court provided this explanation of the prevailing party issue:

> Rule 54(d)(1)(B) directs the court to consider, among other things, the extent to which each party prevailed relative to the "final judgment or result." This Court has previously noted that it may be "appropriate for the trial court, in the right case, to consider the 'result' obtained by way of a settlement reached by the parties." *Bolger v. Lance*, 137 Idaho 792, 797, 53 P.3d 1211, 1216 (2002). Additionally, where there are claims and counterclaims between opposing parties, "the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis." *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005). Accordingly, this Court has held that the trial court has the discretion to decline an award of attorney fees when it determines that both parties have prevailed in part. *Oakes v. Boise Heart Clinic Physicians*, 152 Idaho 540, 545, 272 P.3d 512, 517 (2012) (citing *Jorgensen*, 148 Idaho at 538, 224 P.3d at 1127). Therefore, the issue in this case is not who succeeded on more individual claims, but rather who succeeded on the main issue of the action based on the outcome of both the litigation and the settlement.

Hobson, 154 Idaho at 49, 294 P.3d at 175.

The need for an overall perspective was reiterated in 2013:

> "In determining which party prevailed in an action where there are claims and counterclaims between opposing parties, the court determines who prevailed 'in the action.' That is, the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis."

Advanced Medical Diagnostics, LLC v. Imaging Center of Idaho, LLC, 154 Idaho 812, 814, 303 P.3d 171, 173 (2013) (Eismann, J.) (quoting *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005) (J. Jones, J.)).

The same analysis applies where the case is settled by stipulation:

> For purposes of analysis in this case, stipulations to dismiss are a form of settlement. Idaho has treated cases ending in settlement no differently than cases tried to conclusion. In either case, the court must still look to

> I.R.C.P 54(d)(1)(B). As this Court stated in *Bolger v. Lance*:
>
> > Rule 54(d)(1)(B) directs the court to consider, among other things, the extent to which each party prevailed relative to the "final judgment or result." [I]t may be appropriate for the trial court, in the right case, to consider the "result" obtained by way of a settlement reached by the parties. However, the "[d]etermination of who is a prevailing party is committed to the sound discretion of the trial court and will not be disturbed absent abuse of discretion."
>
> 137 Idaho 792, 797, 53 P.3d 1211, 1216 (2002) (citations omitted). Additionally, *Bolger* stands for the proposition that the trial court may take into consideration the result obtained by way of settlement, but that result alone is not controlling.

Hobson, 154 Idaho at 51, 294 P.3d at 177 (brackets and parentheticals original).

Where there is a true split decision—with each side scoring a major victory—neither side is a prevailing party for purposes of section 12-117. *Trilogy Network Systems, Inc. v. Johnson*, 144 Idaho 844, 172 P.3d 1119 (2007); *Fuchs v. Idaho State Police, Alcohol Beverage Control*, 153 Idaho 114, 117, 279 P.3d 100, 103 (2012) (Burdick, C.J.).

> In *Trilogy*, following a court trial, the district court found that the plaintiff had proved that the defendant breached a contract. The district court further found that the plaintiff had failed to prove its damages with reasonable certainty. Under these circumstances, the district court found that there was no prevailing party, because the plaintiff had prevailed on the issue of liability and the defendant had prevailed on the issue of damages.

Fuchs, 153 Idaho at 118, 279 P.3d at 104 (citations omitted). Note that *Trilogy* arose under Idaho Code § 12-120. However, it was cited as applicable authority in *Fuchs*, a section 12-117 case.

Where a party presents claims or affirmative defenses in the alternative, either of which would be sufficient to achieve the desired result, and prevails on only one of them, that party is the overall prevailing party. *Shore v. Peterson*, 146 Idaho 903, 915, 204 P.3d 1114, 1126 (2009) (J. Jones, J.) (arising under section 12-120).

Where a defendant succeeds in fending off a lawsuit, he or she is the prevailing party:

> In *Daisy Manufacturing Co. v. Paintball Sports, Inc.*, 134 Idaho 259, 999 P.2d 914 (Ct. App. 2000), the Court of Appeals observed: "The 'result obtained' in this case was a dismissal of [plaintiff's] action with prejudice, the most favorable outcome that could possibly be achieved by [a defendant].

Shore, 146 Idaho at 915, 204 P.3d at 1126 (brackets original).

Idaho Military Historical Society, Inc. v. Maslen, 2014 WL 2735320 (Idaho June 17, 2014) (Schroeder, J. pro tem.) involved a dispute over a PT23 Fairchild airplane donated to an aviation museum by former Micron President Steve Appelton. When the museum ran low on funds to pay for storing the plane, it accepted an offer from defendants Maslen and another aviation museum to house the plane. Sometime later, the original museum decided to give the plane to a third aviation museum (the plaintiff). Upon learning of this, the defendants filed a $12,025 lien on the plane and refused to surrender possession to the plaintiff museum. The district court ordered the defendants to surrender possession of the plane to the plaintiff but denied the plaintiff's $796,218 damage claims as well as $14,630 in counterclaims by the defendants. Although the plaintiff did not prevail on its $796,218 damage claims, the district court found that it was nonetheless the prevailing party, because securing title and possession of the plane was the key goal of the litigation. This Court affirmed.

In so ruling, the Court disavowed language in *Nampa & Meridian Irrigation Dist. v. Washington Fed. Savings*, 135 Idaho 518, 522, 20 P.3d 702, 706 (2001) (Walters, J.) suggesting that a party could escape an attorney fee award in an otherwise frivolously litigated case if it managed to present a single triable issue. *Idaho Military Historical Society* at *7.

Although *Idaho Military Historical Society* arose in the context of Idaho Code § 12-121, the case was decided on the basis of Idaho R. Civ. P. 54(d)(1)(B), which applies equally to Idaho Code § 12-117 (and every other prevailing party statute). *Idaho Military Historical Society* at *4.

In sum, *Idaho Military Historical Society* makes clear that attorney fees may be awarded to the overall prevailing party, which is determined based on a broad view of the action that identifies the principal issues and goals in the case. In some instances, that award may be reduced where less important issues are pursued by the other party in a non-frivolous fashion. This is consistent with the express language of Idaho R. Civ. P. 54(d)(1)(B) as well as the provisions in both 12-117(1) and (2).

(4) Partially prevailing parties: Idaho Code § 12-117(2)

Subsection 12-117(2) provides that even a partially prevailing party may obtain an award of attorney fees as to those issues on which it prevailed and the other party acted without a reasonable basis. Subsection (2) states:

> (2) If a party to a proceeding prevails on a portion of the case, and the state agency or political subdivision or the court hearing the proceeding, including on appeal, finds that the nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the case, it shall award the partially prevailing party reasonable attorney's fees, witness fees and other reasonable expenses with respect to that portion of the case on which it prevailed.

Idaho Code § 12-117(2).

Curiously, this provision has received scant attention in the appellate cases. The first case to address the subsection (2) of the statute is *Roe v. Harris*, 128 Idaho 569, 917 P.2d 403 (1996) (Johnson, J.). Consistent with the plain language of the statute, the *Roe* Court ruled that a litigant may lose a part of the case and still be a prevailing party in the grand scheme of things and thus be entitled to an attorney fee award as to those issues on which he or she prevailed.

In *Roe*, pro-abortion plaintiffs challenged the constitutionality of an anti-abortion statute and an anti-abortion rule. The district court upheld the statute (but based on an interpretation favorable to the plaintiffs) and struck down the rule. The plaintiffs sought attorney fees on for the portion of the case they won pursuant to Idaho Code § 12-117(2). (They also sought attorney fees for the entire case under the private attorney general doctrine, but that claim was rejected by the trial court and the Idaho Supreme Court on the basis that section 12-117 is exclusive).

The district court ruled that the plaintiffs were the prevailing party, but were not entitled to fees because the case "was not defended frivolously or without reasonable basis." *Roe*, 128 Idaho at 573, 917 P.2d at 407. The Idaho Supreme Court agreed with the first conclusion but not the second; thus the plaintiffs were entitled to a fee award.

As to the prevailing party determination, the Court said determining who is a prevailing party under Idaho R. Civ. P. 54(d)(1)(B) should not be made on a claim by claim basis, but upon an overall evaluation of the litigation. "Rather than focusing on tallying the issues or the counts in the complaint however, the trial court should evaluate the result in relation to the relief sought." *Roe*, 128 Idaho at 571, 917 P.2d at 405 (internal quotations marks omitted). The Court concluded that even though statute's constitutionality was upheld, the decision narrowed its reading, and, in the

grand scheme of things, it was within the district court's discretion to conclude that the plaintiffs were overall prevailing parties. Thus, the plaintiffs in *Roe* were entitled to attorney fees at least on the one count on which they formally prevailed. (It appears that the plaintiffs sought fees only on as to that count.)

The *Roe* Court concluded that this holding was not in conflict with another case, *Magic Valley Radiology Associates, P.A. v. Professional Business Services*, 119 Idaho 558, 563, 808 P.2d 1303, 1308 (1991), which held that the case should be considered as a whole in determining which was the overall prevailing party. The *Roe* Court then said, simply: Idaho Code § 12-117(2) (Supp. 1995) provides a different rule." *Roe*, 128 Idaho at 574, 917 P.2d at 408.

It would be nice if the explanation provided by the Court in *Roe* were a little more thorough, but the bottom line is unmistakable. A partially prevailing party who achieves the major objective of the litigation is entitled, at a minimum, to a partial fee award.

The Court briefly referenced the statute in *Nelson v. Big Lost River Irrigation Dist.*, 133 Idaho 139, 143, 983 P.2d 212, 216 (1999) (Kidwell, J.). In that case, the Court upheld the district court's award of partial attorney fees to each party under Idaho Code § 12-117(2). In so holding, the *Nelson* Court referenced its decision in *Prouse v. Ransom*, 117 Idaho 734, 791 P.2d 1313 (Ct. App. 1989) (Burnett, J.) (upholding a spilt award on the basis of Idaho R. Civ. P. 54(d)(1)).

In *Hobson Fabricating Corp. v. SE/Z Const.*, LLC, 154 Idaho 45, 49-51, 294 P.3d 171, 175-77 (2012) (Burdick, C.J.), the Court upheld the district court's finding that the parties seeking attorney fees were not the "overall prevailing party" and thus not entitled to attorney fees under Idaho Code § 12-117(1). On appeal, those parties argued, in the alternative, that if they were not overall prevailing parties they were at least entitled to partial recovery of attorney fees under Idaho Code § 12-117(2). The Court said, in essence, "good point, but you should have raised it below."

> In this case, the Contractors failed to adequately describe that the basis of the award they were pursuing was centered on I.C. § 12–117(2), and they did not cite to any case where an award of attorney fees was made pursuant to I.C. § 12–117(2). . . . Because the Contractors did not properly present a request pursuant to I.C. § 12–117(2) below, they are not allowed to pursue that request on appeal.

Hobson, 154 Idaho at 52-53, 294 P.3d 171, 178-79. While the *Hobson* court did not reach the merits on section 12-117(2), its ruling did nothing to disturb or question the holding in *Roe* that partially prevailing parties may be entitled, at least, to partial awards.

(5) Appellate review of attorney fee awards under section 12-117(1).

In *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012) (J. Jones, J.), the Court overturned a line of cases[428] that applied various standards of review (including "clearly erroneous" and *de novo* review) and settled instead on an abuse of discretion standard for review a decision to grant or deny attorney fees under Idaho Code § 12-117. "Our prior holdings to the contrary in *Rincover* [*v. State of Idaho, Dep't of Finance*, 132 Idaho 547, 550, 976 P.2d 473, 476 (1999)] and its progeny are hereby overruled in this respect." *City of Osburn*, 152 Idaho at 908, 277 P.3d at 355. This holding was confirmed in *Martin v. Smith*, 154 Idaho 161, 163, 296 P.3d 367, 369 (2013).

This abuse of discretion standard applies not only to the "without a basis in fact or law" standard, but also to the determination of who is the prevailing party. "A determination on prevailing parties is committed to the discretion of the trial court and we review the determination on an abuse of discretion standard." *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005) (J. Jones, J.).

At first, it may seem odd to employ an abuse of discretion standard to a statute that makes an award of attorney fees mandatory.[429] However, in *City of Osburn*, the Court explained that the award is mandatory only upon a determination that the non-prevailing party acted without reasonable basis in fact or law. That determination, which is focused on reasonableness, "is properly left to the district court's reasoned judgment." *City of Osburn*, 152 Idaho at 908, 277 P.3d at 355. In other words, the determination of whether the non-prevailing party acted reasonably involves an exercise of discretion and is reviewed on an abuse of discretion standard.

The same standard applies when a district court evaluates an attorney fee award or denial by an administrative agency. "This Court reviews a determination of whether to award attorney fees pursuant to I.C. § 12-117 under an abuse of discretion standard." *Fuchs v. Idaho State Police, Alcohol Beverage Control*, 153 Idaho 114, 116, 279 P.3d 100, 102 (2012) (involving judicial review of an administrative

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[428] Prior to *City of Osburn*, the rule was that, on appeal, the reviewing court freely reviews a district court's award of attorney fees under section 12-117. This was in contrast to awards under other statutes, such as section 12-121, which are reviewed for an abuse of discretion. *Total Success Investments, LLC v. Ada Cnty. Highway Dist.* ("*Total Success II*"), 148 Idaho 688, 695, 227 P.3d 942, 949 (Ct. App. 2010) (Perry, J. Pro Tem.).

[429] "Furthermore, this Court interpreted I.C. § 12–117 to require a fee award where a government entity acts without a reasonable factual or legal basis." *City of Osburn*, 152 Idaho at 909, 277 P.3d at 356 (citing *Rincover v. State of Idaho, Dep't of Finance*, 132 Idaho 547, 549, 976 P.2d 473, 475 (1999).

decision denying attorney fees to the prevailing party) (citing *Halvorson v. N. Latah Cnty. Highway Dist.*, 151 Idaho 196, 208, 254 P.3d 497, 509 (2011).

"Where the district court acts within the bounds of its discretion and reaches its decision through an exercise of reason an abuse of discretion will not be found." *Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 498, 300 P.3d 18, 30 (2013) (internal quotation marks and brackets omitted).

(6) Attorney fees awards on appeal under Idaho Code § 12-117.

In 2012, section 12-117(1) was amended to codify prior decisions[430] holding that it authorized attorney fee awards on appeal as well as below. 2012 Idaho Sess. L. ch. 149.

"The Court employs a two-part test for I.C. § 12–117 on appeal: the party seeking fees must be the prevailing party and the losing party must have acted without a reasonable basis in fact or law." *City of Osburn v. Randel*, 152 Idaho 906, 910, 277 P.3d 353, 357 (2012) (J. Jones, J.).

"On appeal, all of the issues raised by Alpine have been resolved in favor of McCall, therefore they are the prevailing party. Additionally, Alpine pursued these issues without a reasonable basis in fact or law. This Court awards attorney fees to McCall pursuant to I.C. § 12–117." *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.).

(7) Prevailing party status in cases involving appeal and cross appeal.

The decisions involving awards of attorney fees on appeal contain only cursory discussions of the prevailing party issue.

There is a line of authority holding that if a party prevails on the appeal but loses the cross appeal for attorney fees (or any other aspect of the appeal), he or she is not a prevailing party. *Hoskins v. Circle A Const., Inc.*, 138 Idaho 336, 63 P.3d 462 (2003) (Schroeder, J.); *Keller v. Inland Metals All Weather Conditioning, Inc.*, 139 Idaho 233, 241, 76 P.3d 977, 985 (2003) (Eismann, J.); *KEB Enterprises, L.P. v. Smedley*, 101 P.3d 690, 699, 140 Idaho 746, 755 (2004) (Eismann, J.); *Total Success Investments, LLC v. Ada Cnty. Highway Dist.* ("*Total Success II*"), 148 Idaho 688, 696, 227 P.3d 942, 950 (Ct. App. 2010) (Perry, J. Pro Tem.); *Tapadeera, LLC v. Knowlton*, 153 Idaho 182, 189, 280 P.3d 685, 692 (2012) (Eismann, J.); *Hurtado v.*

[430] "The statute authorizes the awarding of attorney fees on appeal . . . ." *Daw ex rel. Daw v. School Dist. 91 Bd. of Trustees*, 136 Idaho 806, 41 P.3d 234 (2001) (Eismann, J.)

Land O'Lakes, Inc., 153 Idaho 13, 23, 278 P.3d 415, 415 (2012) (Horton, J.) [431]; *Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 498, 300 P.3d 18, 30 (2013) (J. Jones, J.); *Hehr v. City of McCall*, 155 Idaho 92, 97, 305 P.3d 536, 543 (2013) (Burdick, C.J.); *Sanders v. Bd. of Trustees of Mtn. Home School Dist. No. 193*, 2013 WL 1349418 (Idaho Apr. 7, 2014) (Burdick, C.J.).

Hoskins involved dueling substantive appeals and cross-appeals, both of which raised significant issues. Because Hoskins won one and lost the other, he was not the prevailing party. "However, Hoskins has only prevailed in part in this appeal. He cross-appealed, and Circle A has prevailed on the cross-appeal. Both parties prevailed in part. Under these circumstances, Hoskins is not entitled to attorney fees." *Hoskins*, 138 Idaho at 343, 63 P.3d at 469.

Keller was a contract damages case involving a defective dehumidifier installed in an athletic club. The trial court awarded the athletic club damages of $13,452 and attorney fees (under Idaho Code § 12-120(3)) of $74,400. The contractor appealed. The Idaho Supreme Court substantially reduced the damage award—to $2,793—but affirmed all other aspects of the judgment. The Court then concluded: "Because both parties have prevailed in part on appeal, we will not award attorney fees on appeal." *Keller*, 139 Idaho at 241, 76 P.3d at 985.

In *Tapadeera*, the plaintiff succeeded below in obtaining a judgment against the defendants for $23,421, but lost its request for attorney fees in the amount of $22,666. *Tapadeera*, 153 Idaho at 185-86, 280 P.3d at 688-89. Both sides appealed, and the Idaho Supreme Court affirmed on both scores. The Court concluded, simply: "[The plaintiff] prevailed on the Knowltons' appeal but lost its cross-appeal. Therefore, Tapadeera is not the prevailing party on appeal and is not entitled to an award of attorney fees under Idaho Code section 12–121. *Tapadeera*, 153 Idaho at 189, 280 P.3d at 692. Having prevailed on one appeal for $23,421 while losing its cross-appeal for $22,666, it is obvious that these appeals resulted in a wash with no overall prevailing party.

Hoskins, *Keller*, and *Tapadeera* are classic split decisions in which each party won a substantial part and lost a substantial part on appeal. In other words, there was no obvious winner, and it is easy to see why attorney fees were not awarded on appeal.

In the other cases mentioned above, however, the Court simply recited a rule-of-thumb suggesting that if the party loses any aspect of the appeal, he or she can never be a prevailing party. For example, in *Hurtado* the Court said, "Where both parties prevail in part on appeal, this Court does not award attorney fees to either party." *Hurtado*, 153 Idaho at 23, 278 P.3d at 425.

[431] *Keller* and *Hurtado* involved only Idaho Code § 12-120(3). However, *Hurtado* (which cited *Keller*) was cited in *Sanders* involving section 12-117 and 12-120(3).

Such a rule-of-thumb stands in sharp contrast to how the prevailing party is evaluated at the district court or administrative agency level. In those arenas, the Court has said, "the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis." *E.g.*, *Advanced Medical Diagnostics, LLC v. Imaging Center of Idaho*, LLC, 154 Idaho 812, 814, 303 P.3d 171, 173 (2013) (Eismann, J.) (quoting *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005) (J. Jones, J.)).

Indeed, the relative significance of attorney fees versus the merits was noted by the Court in another context (construing a stipulation): "Furthermore, we have said costs and attorney fees are collateral issues which do not go to the merits of an action . . . ." *Straub v. Smith*, 145 Idaho 65, 69, 175 P.3d 754, 758 (2007) (Burdick, J.).

Because the same statute, section 12-117, applies to attorney fee awards at below and on appeal, one would think that Idaho R. Civ. P. 54(d)(1)(B) (which describes the prevailing party standard) would apply. In another context, however, the Court has said that the rule "has no application on appeal." *Tapadeera, LLC v. Knowlton*, 153 Idaho 182, 189, 280 P.3d 685, 692 (2012) (Eismann, J.).

In any event, this line of cases presents a dilemma to a prevailing party on appeal who lost an award of attorney fees below. By including a challenge to the denial of attorney fees below (which is difficult to win, given the discretion involved), that party may forfeit attorney fees on the appeal despite winning every other point in the case.

(8) Idaho Code § 12-117(1) is not exclusive.

In *Syringa Networks, LLC v. Idaho Dep't of Admin*. ("*Syringa I*"), 155 Idaho 55, 305 P.3d 499 (2013) (Eismann, J.), the Idaho Supreme Court overturned over a dozen cases dealing with the exclusivity of Idaho Code § 12-117. "Therefore, we hold that section 12–117(1) is not the exclusive basis upon which to seek an award of attorney fees against a state agency or political subdivision, but attorney fees may be awarded under any other statute that expressly applies to a state agency or political subdivision, such as sections 12-120(3) and 12-121." *Syringa I*, 155 Idaho at 67, 305 P.3d at 511.

Thus, there is no doubt that attorney fee requests may be made, in the alternative, under Idaho Code § 12-120(3) (dealing with contracts) and Idaho Code § 12-121 (civil actions), both of which expressly define "party" to include the State and its political subdivisions. It appears, however, that, Idaho Code § 12-117, if available, remains exclusive where the alternative attorney fee statute is not one "that expressly applies to a state agency or political subdivision."

The ruling that section 12-117 was exclusive derives from the Court's 1997 decision that section 12-117 supplants the private attorney general doctrine and

provides "the exclusive basis upon which to seek an award of attorney fees against a state agency." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 718, 722-23, 947 P.2d 391, 395-96 (1997) (which relied on *Roe v. Harris*, 128 Idaho 569, 917 P.2d 403 (1996)).

This point was reiterated in many other cases. *Lake CDA Investments, LLC v. Idaho Dep't of Lands*, 149 Idaho 274, 285, 233 P.3d 721, 732 (2010); *Kootenai Medical Center v. Bonner Cnty. Comm'rs*, 141 Idaho 7, 105 P.3d 667 (2004) (applying to counties as well as state agencies); *Westway Construction, Inc. v. ITD*, 139 Idaho 107, 116, 73 P.3d 721, 730 (2003). However, the private attorney general doctrine (discussed in section 24.K at page 533) remains available in actions against the state itself (as opposed to a state agency). *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 718, 722-23, 947 P.2d 391, 395-96 (1997).

Although this line of reasoning arose in the context of denying claims under the private attorney general doctrine and was thus limited to precluding attorney fee claims against the government, more recent decisions have made clear that Idaho Code § 12-117 is exclusive in all situations.[432] "I.C. § 12–117 is the exclusive means for awarding attorney fees for the entities to which it applies." *Potlatch Educ. Ass'n v. Potlatch School Dist. No. 285*, 148 Idaho 630, 635, 226 P.3d 1277, 1282 (2010). *See also*, *Smith v. Washington Cnty.*, 150 Idaho 388, 392, 247 P.3d 615, 619 (2010); *Brown v. City of Pocatello*, 148 Idaho 802, 811, 229 P.3d 1164, 1173 (2010); *Sopatyk v. Lemhi Cnty.*, 151 Idaho 818, 264 P.3d 916, 925 (2011); *Kepler-Fleenor v. Freemont Cnty.*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012); *City of Osburn v. Randel*, 152 Idaho 906, 910, 277 P.3d 353, 357 (2012); *State of Idaho, Dep't of Transportation v. JH Grathol*, 153 Idaho 87, 93, 278 P.3d 957, 963 (2012); *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, 329, 297 P.3d 1134, 1146 (2013) (holding that an irrigation district is a political subdivision within the meaning of section 12-117; awarding fees sua sponte under Idaho Appellate Rule 11.2 despite the fact that defendant failed to request fees under section 12-117).[433]

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[432] On other occasions, the Court has applied both section 12-117 and 12-121. *E.g.*, *Ada Cnty. Highway Dist. v. Total Success Investments, LLC ("Total Success I")*, 145 Idaho 360, 372, 179 P.3d 323, 335 (2008); *Total Success Investments, LLC v. Ada Cnty. Highway Dist.* ("*Total Success II*"), 148 Idaho 688, 694-96, 227 P.3d 942, 948-50 (Ct. App. 2010) (Perry, J. Pro Tem.). The authors are not aware that these cases have been expressly overruled, but the most recent decisions of the Court have stuck with the position that Idaho Code § 12-117 is exclusive where it is available.

On the other hand, a 2008 decision held that specific attorney fee provisions in specialized statutes may apply and even override section 12-117. *Beehler v. Fremont Cnty.*, 145 Idaho 656, 661, 182 P.3d 713, 718 (Ct. App. 2008). Perhaps this remains good law, in this specialized situation. Thus, it may be that the principle that section 12-117 is exclusive is applicable only in the context of dueling generic attorney fee authorities.

[433] Despite the Court's repeated statements (until *Syringa I*) that section 12-117 is exclusive, it continued to entertain and occasionally grant attorney fees under Idaho Code § 12-121 in cases involving governmental entities. *E.g.*, *Athay v. Rich Cnty.*, 153 Idaho 815, 291 P.3d 1014 (2012) (granting attorney fees under section 12-121 without discussing

While it is now clear that both statutes are available, whether this makes a difference depends on the statutes involved. In the case of Idaho Code §§ 12-117 and 12-121, the substantive standards have been equated by the Idaho Supreme Court. There appears to be some difference in how the two statutes address the "prevailing party" requirement, and section 12-121 appears to apply a tougher standard. Thus, it is difficult to conceive that if an award is not justified under the first statute (section 12-117), it would be justified under the second.

C. Idaho Code § 12-117(4): Litigation between two adverse governmental entities

Idaho Code § 12-117 was amended in 2012 to add a new provision dealing with litigation between governmental entities. Idaho Sess. Laws, ch. 149. This subsection mandates an award of attorney fees to the "prevailing party" in "any civil judicial proceeding" between adverse governmental entities. Idaho Code § 12-117(4). In other words, there is no requirement that the non-prevailing governmental entity act without a reasonable basis in fact or law.

Unlike section 12-117(1), subsection (4) does not apply in administrative litigation. It is unclear whether "civil judicial proceeding" includes judicial review or is limited to a civil action.

Section 12-117(4) does not address what happens when one of the governmental entities only partially prevails. It may be that section 12-117(2) (dealing with partially prevailing parties) applies to awards under section 12-117(4). However, section 12-117(2) requires a finding that the non-prevailing party acted without a reasonable basis in fact or law; so it does not mesh well with the mandatory award concept in section 12-117(4).

On the other hand, the 2012 amendment that added section 12-117(4) also tinkered with section 12-117(2)—suggesting that the legislature was aware of section 12-117(2) and intended it to apply in the context of 12-117(4). If so, that would mean that where two governmental agencies litigate against each other and neither fully prevails, a partial award will only be made where the other governmental agency acted frivolously. In other words, the mandatory award of fees occurs only where one of the governmental entities prevails on every issue.

D. Idaho Code § 12-120(1): Civil cases under $35,000

Section 12-120(1) provides that the prevailing party is entitled to recover his or her attorney fees in civil actions where the amount pleaded is $35,000 or less (formerly $25,000). To be eligible for this award, a prevailing plaintiff must have

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section 12-117); *Ravenscroft v. Boise Cnty.*, 154 Idaho 613, 617, 301 P.3d 271, 275 (2013) (denying attorney fees on the merits of the claim); *Hoagland v. Ada Cnty.*, 2013 WL 2096575 (May 16, 2013) (denying attorney fees on the merits of the claim). This inconsistency is mooted by *Syringa I.*

made written demand for payment of the claim on the defendant at least ten days prior to commencing suit. No attorney fee award will be made if the defendant tendered to plaintiff at least 95 percent of the amount demanded.

The notice requirement keys into the filing of the complaint, not an amended complaint. "The request for attorney fees under Idaho Code section 12–120(1) is also denied because Tapadeera did not make written demand for the payment of the claim 'not less than ten (10) days before the commencement of the action.' I.C. § 12–120(1). 'A civil action is commenced by the filing of a complaint with the court,' I.R.C.P. 3(a)(1), not by filing a second amended complaint." *Tapadeera, LLC v. Knowlton*, 153 Idaho 182, 189, 280 P.3d 685, 692 (2012) (Eismann, J.).

The Idaho Supreme Court has ruled that cases seeking injunctive or declaratory relief, rather than a monetary award, do not satisfy the "under $25,000" rule. *Boise Cent. Trades & Labor Council, Inc. v. Bd. of Ada Cnty. Comm'rs*, 122 Idaho 67, 831 P.2d 535 (1992).

This statute does not apply to personal injury actions; those are covered instead by section 12-120(4) discussed below.

E. Idaho Code § 12-120(4): Personal injury claims under $25,000

Section 12-120(4), applies to civil actions under $25,000 involving claims for personal injury. The only differences between this and section 12-120(1) deal with the requirement for pre-litigation demand. In personal injury cases, the demand must be made both on the party and on her insurer at least 60 days prior to commencing the action. Also, the defendant is protected against an award of attorney fees if she tendered 90 percent of the amount demanded.

F. Idaho Code § 12-120(3): Commercial transactions

Section 12-120(3) allows recovery of attorney fees by the prevailing parties in cases involving commercial transactions.[434] Typically to fall within the definition of "commercial transaction" the suit will be for enforcement of a business contract . See, *e.g.*, *Brower v. E.I. DuPont De Nemours & Co.*, 117 Idaho 780, 792 P.2d 345 (1990).

Note that fees under this section are not available in judicial review cases. "Like section 12-121, section 12-120(3) allows for attorney's fees in "civil action[s]." Civil actions are commenced by the filing of a complaint. Because

[434] More specifically, the statute applies to civil actions "to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services in any commercial transaction." Idaho Code § 12-120(3). "The term 'commercial transaction' is defined to mean all transactions except transactions for personal or household purposes." Idaho Code § 12-120(3).

Travelers initiated these proceedings by filing a petition for judicial review with the district court, attorney's fees cannot be awarded under Idaho Code section 12-120(3)." *In re Idaho Workers Compensation Bd.*, 167 Idaho 13, 25, 467 P.3d 377, 389 (Burdick, C.J.).

In *Westway Construction, Inc. v. Idaho Transportation Dep't*, 139 Idaho 107, 73 P.3d 721 (2003), a private litigant sought attorney fees against a state agency under section 12-120(3). It would seem that the Supreme Court could have dismissed the request because the case arose under the IAPA and did not involve a "commercial transaction." Instead the Court stated, "That statute [section 12-120(3)] is not applicable. 'I.C. § 12-117 provides the exclusive basis upon which to seek an award of attorney fees against a state agency.'" *Westway*, 139 Idaho at 116, 73 P.3d at 730 (quoting *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 718, 723, 947 P.2d 391, 396 (1997)).

Note that in *Syringa Networks, LLC v. Idaho Dep't of Admin*. ("*Syringa I*"), 155 Idaho 55, 305 P.3d 499 (2013) (Eismann, J.), the Idaho Supreme Court overturned over a dozen cases holding that, where Idaho Code § 12-117 is available, it is the exclusive means of seeking attorney fees. "Therefore, we hold that section 12–117(1) is not the exclusive basis upon which to seek an award of attorney fees against a state agency or political subdivision, but attorney fees may be awarded under any other statute that expressly applies to a state agency or political subdivision, such as sections 12-120(3) and 12-121." *Syringa I*, 155 Idaho at 67, 305 P.3d at 511. Thus, requests for attorney fees may be made under Idaho Code § 12-120(3) in the alternative to Idaho Code § 12-117.

Section 12-120(3) also allows attorney fees to be awarded on appeal:

> Both parties request an award of attorney fees on appeal pursuant to Idaho Code section 12–120(3). That statute provides that in any civil action to recover in a commercial transaction, the prevailing party shall be allowed a reasonable attorney fee. This was an action to recover in a commercial transaction, and the statute applies even if the only issue on appeal involves the award of attorney fees below. *BECO Constr. Co., Inc. v. J–U–B Engineers Inc.*, 149 Idaho 294, 298, 233 P.3d 1216, 1220 (2010).

Advanced Medical Diagnostics, LLC v. Imaging Center of Idaho, LLC, 154 Idaho 812, 816, 303 P.3d 171, 175 (2013) (Eismann, J.).

G. Section 12-121 (Non-prevailing party was frivolous – civil actions only)

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Editor's Note: On September 28, 2016, the Idaho Supreme Court handed down *Hoffner v. Shappard*, 160 Idaho 870, 380 P.3d 681 (2016) (Horton, J.). This decision overturned decades of precedent. The Court held that Idaho R. Civ. P. 54(e)(1) (which established the "frivolously, unreasonably or without foundation" standard) is in conflict with Idaho Code § 12-121. *Hoffner* was promptly "reversed" by the Idaho Legislature with the enactment of House Bill 97 in March of 2017. The legislation amended Idaho Code 12-121 to read:

> 12-121. ATTORNEY'S FEES. In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties~~, provided that this~~ when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation. This section shall not alter, repeal or amend any statute ~~which~~ that otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

Idaho Code § 12-121 (as amended by House Bill 97 in 2017).

In short, the Legislature eliminated the conflict with the rule by grafting the language of Idaho R. Civ. P. 54(e)(1) directly into the statute. The Legislature underscored its intent with the following statement of legislative intent (enacted as section 1 of the bill):

> It is the intent of the Legislature, by enactment of this legislation, to reinstate and make no change to Idaho law on attorney's fees as it existed before the Idaho Supreme Court's decision in *Hoffer v. Shappard*, 2016 Opinion No. 105, September 28, 2016. To accomplish that goal, it is the Legislature's intent that this legislation be construed in harmony with Idaho Supreme Court decisions on attorney's fees that were issued before *Hoffer v. Shappard*.

Accordingly, the discussion of authorities below remains relevant.

In 1976, the Legislature adopted a broad attorney fee recovery provision authorizing the award of attorney fees to prevailing parties in all civil actions:

> In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

Idaho Code § 12-121.

Section 12-121, however, is limited to civil actions initiated by complaint; it does not apply in cases such as judicial review of administrative action and land use decisions initiated by petition.[435] *Lowery v. Bd. of Cnty. Comm'rs for Ada Cnty.* (*"Lowery II"*), 117 Idaho 1079, 1081-82, 793 P.2d 1251, 1253-54 (1990)[436]; *Sanchez v. State of Idaho, Department of Correction*, 143 Idaho 239, 245, 141 P.3d 1108, 1114 (2006); *Johnson v. Blaine Cnty.*, 146 Idaho 916, 929, 204 P.3d 1127 (2009) (confirming *Lowery*); *Knight v. Dep't of Insurance*, 119 Idaho 591, 593, 808 P.2d

[435] "Attorney's fees are not available under Idaho Code section 12-121 on petitions for judicial review because they are not commenced by the filing of a complaint." *In re Idaho Workers Compensation Bd.*, 167 Idaho 13, 24, 467 P.3d 377, 388 (Burdick, C.J.) (the Court said that the same goes for fees under Idaho Code § 12-120(3)). The case of *Bogner v. Idaho Dep't of Revenue and Taxation*, 107 Idaho 854, 693 P.2d 1056 (1984), presents a unique application of this statute in the context of the Tax Commission. In *Bogner*, section 12-121 was found applicable to a judicial review of an adverse Tax Commission decision. "An appeal to district court is for certain a civil action, and hence within the purview of I.C. § 12-121." *Bogner* at 858, 693 P.2d at 1060. Indeed, the *Bogner* court allowed an award of attorneys fees by the district court to reach back and cover attorney fees incurred at the administrative level. How can a judicial review be a civil action? The answer is found in the unique judicial review statute for tax cases, which authorizes challenges to the Tax Commission not by petition but by complaint. See discussion in *Bogner* at 858, 693 P.2d at 1060, n.4.

[436] In *Lowery II*, the court ruled that Idaho Code § 12-121 did not apply to a judicial review of a conditional use permit. "Idaho Rule of Civil Procedure 3(a) clearly declares that 'a civil action is commenced by filing a complaint with the court.' . . . The award of attorney fees in the instant case was therefore error as this proceeding was not a "*civil action.*'" *Lowery II*, 117 Idaho at 1081-82, 793 P.2d at 1253-54 (emphasis original). Without expressly saying so, *Lowery II* essentially overturned *Lowery v. Bd. of Cnty. Comm'rs for Ada Cnty.* (*"Lowery I"*), 115 Idaho 64, 67, 764 P.2d 431, 434 (Ct. App. 1988), in which the Idaho Court of Appeals applied Idaho Code § 12-121 in the context of a judicial review of a LLUPA permit.

1336, 1338 (Ct. App. 1991).[437] As a consequence, this statutory provision is not ordinarily available in land use appeals.[438]

When enacted, the statute sent conflicting messages. Its reference to "prevailing parties" suggests the English Rule. But this result was softened by the use of the permissive "may." The resulting ambiguity resulted in widely differing practices among district judges. Jesse R. Walters, Jr., *A Primer for Awarding Attorney Fees in Idaho*, 38 Idaho L. Rev. 1, 18 (2001).

In response, the Idaho Supreme Court appointed a blue ribbon committee to review the problem. The result was the adoption of a new rule of civil procedure, Idaho R. Civ. P. 54(e)(1), which significantly constrained the statute:

> In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B) [defining "prevailing party"], when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation; but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment.[439]

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[437] In the case of *Angstman v. City of Boise*, 128 Idaho 575, 917 P.2d 409 (Ct. App. 1996) (Walters, C.J.), the Court of Appeals considered an award of attorney fees to the city of Boise under section 12-121 in a land use appeal under LLUPA, but denied it on the merits of the request. The Court apparently overlooked the inapplicability of section 12-121. This case arose before section 12-117 was amended to allow prevailing municipalities to obtain attorney fees under that statute.

[438] But see, *Chisholm v. Twin Falls Cnty.*, 139 Idaho 131, 136, 75 P.3d 185, 190 (2003), in which the Idaho Supreme Court declined to award attorney fees in an appeal of a "livestock confinement operation" permit decision by the P&Z administrator. The disappointed party filed an action seeking both review under LLUPA and declaratory action. The Court declined to award attorney fees under Idaho Code § 12-121, but apparently believed that the statute was applicable. Although the court did not discuss the issue, it may have concluded that the statute was applicable because the complaint was also premised on a non-LLUPA claim (declaratory action).

In *Neighbors for Responsible Growth v. Kootenai Cnty.*, 147 Idaho 173, 177 n.1, 207 P.3d 149, 153 n.1 (2009), the court noted that attorney fees in *Giltner I, LLC v. Jerome Cnty.*, 145 Idaho 630, 634, 181 P.3d 1238, 1242 (2008), were "improvidently granted." The Court explained that fees should not have been awarded under Idaho Code § 12-121 because *Giltner* was a judicial review case.

[439] The referenced Rule 54(d)(1)(B) defines "prevailing party" in a flexible manner, allowing the court to take into account multiple claims, etc.

Idaho R. Civ. P. 54(e)(1). The effect of the rule was to convert what reads like a prevailing party rule in Idaho Code § 12-121 to an American Rule approach of awarding attorney fees only in cases of frivolous conduct.

Note that Rule 54(e)(1) is not an independent basis for the award of attorney fees; it merely sets the conditions for an attorney fee award where such an award is authorized by statute or contract. *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 2010 WL 5186735 (Idaho 2010).

As a result of the clarification provided by Rule 54(e)(1), it is clear today that awards under Idaho Code § 12-121 are discretionary:

> Although Respondents are the prevailing parties, the statutory power is discretionary, and attorney fees are not awarded as a matter of right. Ordinarily, attorney fees will not be awarded where the losing party brought the appeal in good faith and where a genuine issue of law was presented.

Chisholm v. Twin Falls Cnty., 139 Idaho 131, 136, 75 P.3d 185, 190 (2003).

In *McCuskey v. Canyon Cnty.* ("*McCuskey I*"), 123 Idaho 657, 851 P.2d 953 (1993) (Bistline, J.), the plaintiff succeeded in invalidating an ordinance that downzoned his property. Upon prevailing in *McCuskey I*, the plaintiff promptly sued the county again in *McCuskey v. Canyon Cnty. Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 912 P.2d 100 (1996) (Trout, J.). The second suit sought damages for inverse condemnation for the temporary taking alleged to have occurred between the original stop work order and the decision in *McCuskey I*. The Court denied the claim as time barred, concluding, based on *Tibbs v. City of Sandpoint*, 100 Idaho 667, 603 P.2d 1001 (1979), that the statute of limitations clock began to run at the time of the stop work order not the subsequent decision vindicating the plaintiff. Accordingly, the Court awarded attorney fees to Canyon County.[440] "This Court clearly established the time when a cause of action accrues in an inverse condemnation claim *Tibbs*. . . . McCuskey has provided no 'substantial' showing that the district court misapplied the rule elucidated in these cases with his particular claim and has given no compelling reason to deviate from the rule we have established." *McCuskey II*, 128 Idaho at 218, 912 P.2d at 105. (In dictum, the Court also cast doubt on the viability of the takings claim. *McCuskey II*, 128 Idaho at 216 n.2, 912 P.2d at 103 n.2.)

In *Covington v. Jefferson Cnty.*, 137 Idaho 777, 782, 53 P.3d 828, 833 (2002), the Court distinguished *McCuskey II* in denying attorney fees to the county. With

[440] The fee award in *McCuskey II* was made under Idaho Code § 12-121, not 12-117, which, at the time was a one-way street and did not allow counties to obtain fee awards against private parties.

little analysis, the Court declared, "However, we find the Covingtons have made some valid arguments relating to their claim for inverse condemnation, which demonstrates that the appeal is not frivolous or unreasonable." The Court did not say which arguments were valid. Presumably the Court was referring to the debate over whether a regulatory action authorizing a hot mix plant (which in turn emits odors that travel to plaintiffs property) is a physical or regulatory taking).

Similarly, in *Gibson v. Ada Cnty.*, 142 Idaho 746, 756, 133 P.3d 1211, 1221 (2006), *cert. denied*, 549 U.S. 994 (2006), *rehearing denied*, 549 U.S. 1159 (2007), the Court denied attorney fees despite the plaintiff missing the statute of limitations because it found, "She made a good faith argument based on relevant authority that the statute of limitations was tolled."

"Attorney fees are awardable if an appeal does no more than simply invite an appellate court to second-guess the trial court on conflicting evidence, or if the law is well settled and appellant has made no substantial showing that the district court misapplied the law." *Johnson v. Edward*, 113 Idaho 660, 662, 747 P.2d 69, 71 (1987).

The prevailing party must show that the other party's conduct of the litigation was without foundation as to the overall case, not just that a particular claim or defense was frivolous. "When deciding whether the case was brought, pursued, or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account. Thus, if there is a legitimate, triable issue of fact, attorney fees may not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation." *McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003) (citation omitted). The *McGrew* case presented mixed results where "both parties prevailed in part"; hence, it was appropriate to deny attorney fees. *Id*. In *Michalk v. Michalk*, 148 Idaho 224, 235, 220 P.3d 580, 591 (2009), the Court cited *McGrew* (paraphrasing its holding in broad terms favorable to the non-prevailing party), but nevertheless awarded attorney fees because owing to the non-prevailing party's failure to amend an earlier appeal from the magistrate. This failure, said the Court, meant that the trial court had no choice but to rule against her.

The Court has broad authority to apportion fees under section 12-121 where some of the claims were those of first impression (or "debatable") and others were without any reasonable basis. *Nampa Charter School, Inc. v. DeLaPaz*, 140 Idaho 23, 29, 89 P.3d 863, 869 (2004).

The Idaho Supreme Court has said that the non-prevailing party is subject to attorney fees under section 12-121 only if its position was frivolous in every respect:

> An award of attorney fees under Idaho Code § 12–121 is not a matter of right to the prevailing party, but is

> appropriate only when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation. *McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003). When deciding whether attorney fees should be awarded under I.C. § 12–121, the entire course of the litigation must be taken into account and if there is at least one legitimate issue presented, attorney fees may not be awarded even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation. *Id.*

Michalk v. Michalk, 148 Idaho 224, 235, 220 P.3d 580, 591 (2009).

Note that in *Syringa Networks, LLC v. Idaho Dep't of Admin*. ("*Syringa I*"), 155 Idaho 55, 305 P.3d 499 (2013) (Eismann, J.), the Idaho Supreme Court overturned over a dozen cases holding that, where Idaho Code § 12-117 is available, it is the exclusive means of seeking attorney fees. "Therefore, we hold that section 12–117(1) is not the exclusive basis upon which to seek an award of attorney fees against a state agency or political subdivision, but attorney fees may be awarded under any other statute that expressly applies to a state agency or political subdivision, such as sections 12–120(3) and 12–121." *Syringa I*, 155 Idaho at 67, 305 P.3d at 511. Thus, requests for attorney fees may be made under Idaho Code § 12-121 in the alternative to Idaho Code § 12-117.

H. Section 12-123 (frivolous conduct in a civil case)

Section 12-123 was adopted in 1987. It authorizes the award of sanctions (including attorney fees) for frivolous conduct in a civil case. Judge Walters summed up the statute this way:

> Apparently this statute was part of the 'Tort Reform' law to provide for sanctions against over-zealous plaintiff attorneys. Its use has been very limited, or almost non-existent. . . . This statute seems to be a cross between section 121 and Idaho R. Civ. P. 11. It seems to allow the award of attorney fees against an attorney personally, as does Idaho R. Civ. P. 11, and it seems to prohibit frivolous actions like section 121. The criteria for awarding attorney fees under section 123 is more restrictive than section 121, but not quite the same as Idaho R. Civ. P. 11. The courts appear to treat sections 121 and 123 similarly if not identically.

Jesse R. Walters, Jr., *A Primer for Awarding Attorney Fees in Idaho*, 38 Idaho L. Rev. 1, 37-38 (2001).

The statute says that the award must be made within 21 days after entry of judgment in a civil action, and sets up procedures for a hearing on a motion for sanctions.

The statute applies only to district court proceedings. "The request for fees under Idaho Code section 12-123 is denied because that statute does not apply on appeal." *Tapadeera, LLC v. Knowlton*, 153 Idaho 182, 189, 280 P.3d 685, 692 (2012) (Eismann, J.) (citing *Spencer v. Jameson*, 147 Idaho 497, 507, 211 P.3d 106, 116 (2009)).

I. Rule 11 (frivolous litigation)

Idaho R. Civ. P. 11(a)(1) requires that pleadings, motions, and other papers signed by an attorney, or a party not represented by an attorney, meet certain criteria. The signature certifies that "to the best of his knowledge, information, and belief, after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument." This rule affords courts broad authority to issue sanctions for frivolous litigation. Sanctions may be imposed against the attorney, the party, or both. The rule specifically identifies payment of the opposing side's attorney fees as a possible sanction.

In *Durrant v. Christensen*, 785 P.2d 634 (Idaho 1990), the Court held that bad faith is no longer required for a court to award Rule 11 sanctions; rather the Court must merely apply an objective reasonableness under the circumstances standard.

A parallel rule operates with respect to discovery. Idaho R. Civ. P. 26(f).

Idaho's appellate rules contain a parallel provision, Idaho App. R. 11.2 (which, until 2009 was Idaho App. R. 11.1.)

In *Read v. Harvey*, 147 Idaho 364, 209 P.3d 661 (2009), The Court also upheld the district court's award of attorney fees below under Idaho R. Civ. P. 37(c) (dealing with discovery abuses). Read, 147 Idaho at 369-70, 209 P.3d at 666-67. The prevailing party also asked for attorney fees on appeal but failed to identify a basis for an award as required by Idaho App. R. 35(a)(5). See discussion in section 24.R at page 536. The Court nonetheless acted *sua sponte* in awarding attorney fees on appeal under Idaho App. R. Rule 11.1 (now 11.2), noting that Harvey had misrepresented the record and pursued the appeal without foundation in fact or law. *Read*, 147 Idaho at 370-71, 209 P.3d at 667-68 (2009). In an unusually forceful message to counsel, the Court ordered that the fees be paid not by the party or even by the party's law firm, but by a specifically named member of the law firm representing the party.

In *Lattin v. Adams Cnty.*, 149 Idaho 497, 504, 236 P.3d 1257, 1264 (2010), the Idaho Supreme Court employed Rule 11.2 to award attorney fees against Idaho County for frivolously appealing its defense of a quiet title action involving a road. By the way, this was not a *sua sponte* award. The party sought an award under Rule 11.2.

In *Gibson v. Ada Cnty. Sheriff's Office*, 147 Idaho 491, 211 P.3d 100 (2009), the Court awarded attorney fees under Rule 11.1 to the Sheriff's office citing a litany of erroneous claims which the Court found unnecessary to address in the opinion on the merits, even in dicta, but which were taken into account nonetheless for purposes of Rule 11.1. It is unclear why the Sheriff's office did not include a claim under Idaho Code § 12-117.

In *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, 329, 297 P.3d 1134, 1146 (2013), the Court denied attorney fees as requested under section 12-121 holding that an irrigation district is a political subdivision within the meaning of section 12-117 and that the latter is the exclusive attorney fee statute available. Nevertheless, the Court awarded fees *sua sponte* under Idaho Appellate Rule 11.2. "In this case, we have determined that Bettwieser's appeal was brought for an improper purpose. That determination is based upon the level of hostility, both in his briefing and at oral argument, directed toward the district court, the directors of the New York Irrigation District, and its counsel. This animosity, coupled with the complete absence of merit to Bettwieser's claims, leads us to the conclusion that Bettwieser has pursued this appeal for the purpose of harassment and annoyance. Bettwieser has filed lengthy briefs that contain little in the way of legal argumentation or authority and raises several issues on appeal that were not before the district court at trial . . . ." *Id.*

The comparable federal rule, Fed. R. Civ. P. 11, is conceptually the same but procedurally quite different. The federal rule contains a "safe harbor" provision requiring that a party moving for sanctions must first serve the motion on the other party and then wait for at least 21 days. The purpose is to allow the other party an opportunity to withdraw or otherwise correct the offending pleading or paper. If that occurs, the complaining party may not file the motion. Fed. R. Civ. P. 11(c)(2). The court, however, has power to impose sanctions on its own motion and is not subject to this safe harbor provision. Fed. R. Civ. P. 11(c)(3). The rule is directed primarily to counsel. In some circumstances sanctions may be awarded against the party. Fed. R. Civ. P. 11(5).

J. Rule 65(c) – injunctions (attorney fees)

Idaho R. Civ. P. 65(c) governs the requirement that a party seeking an injunction must post a bond "for the payment of costs and damages including reasonable attorney's fees." In *Devine v. Cluff*, 110 Idaho 1, 713 P.2d 437 (Ct. App. 1985), the Court of Appeals interpreted this to authorize an award of attorney fees to

a person who was wrongfully enjoined, despite the fact that the person did not contest the injunction prior to the trial.

In *Brady v. City of Homedale*, 130 Idaho 569, 944 P.2d 704 (1997), the Supreme Court held that Idaho R. Civ. P. 65(c) does not provide a basis for an award of attorney fees to a party who successfully defends against the issuance of an injunction. In other words, an injunction must issue wrongfully (and be reversed on appeal) before attorney fees can be granted. This decision is based solely on a reading of the rule; the Court did not discuss the policy basis (or lack thereof) for such a distinction. In *Nelson v. Big Lost River Irrigation Dist.*, 133 Idaho 139, 983 P.2d 212 (1999) (Kidwell, J.), the Court applied and confirmed *Brady*.

K. Discovery (attorney fees)

A rule comparable to Rule 11 operates with respect to discovery. Idaho R. Civ. P. 26(f).

In *Read v. Harvey*, 147 Idaho 364, 209 P.3d 661 (2009), the Court affirmed an award of attorney fees for a discovery violation based on Idaho R. Evid. 37(c)—failure to admit.

L. Private attorney general doctrine

Under rare circumstances, courts will award attorney fees to a prevailing party in an action against the state under the "private attorney general doctrine." In *Hellar v. Cenarrusa*, 106 Idaho 571, 577-78, 682 P.2d 524, 530-31 (1984), the Idaho Supreme Court awarded attorney fees under this theory to a private party who challenged a legislative reapportionment statute. In this case, the Attorney General was obligated to defend the legislature, and it fell upon this private citizen, acting as a sort of "private attorney general" to defend the Constitution of the State of Idaho against this improper legislation.

The Court established a three-part test for that the prevailing party must meet: (1) the strength or societal importance of the public policy indicated by the litigation; (2) the necessity for private enforcement and the magnitude of the resultant burden on the Plaintiff; and (3) The number of people standing to benefit from the decision. *Hellar*, 106 Idaho 571, 577-78, 682 P.2d 524, 530-31 (1984).

In *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 718, 722-23, 947 P.2d 391, 395-96 (1997), the Idaho Supreme Court explained that the private attorney general doctrine is not (as its name implies) a creation of the common law. Rather, the doctrine is simply a judicial interpretation of Section 12-121, which authorizes the courts to award attorney fees to the prevailing party. Consequently, the tests of that statute must also be met. What the doctrine accomplishes is to eliminate the limitation found in Idaho R. Civ. P. 54(e)(1) to cases that are defended frivolously, unreasonably, or without foundation.

The applicability of this theory, however, is severely limited by the decision in *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 718, 722-23, 947 P.2d 391, 395-96 (1997). In this case, the Court declared that the private attorney general doctrine is preempted by Idaho Code section 12-117 where the action involves a suit against a state agency. "[A] court may not award attorney fees against a state agency under the private attorney general doctrine . . . . I.C. § 12-117 provides the exclusive basis upon which to seek an award of attorney fees against a state agency." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 718, 722-23, 947 P.2d 391, 395-96 (1997). Thus, the doctrine appears to be available only in rare instances where the plaintiff seeks relief from a state official or the State itself (rather than a state agency).

The conclusion reached in *Hagerman* (that a court may not award attorney fees against a state agency under the private attorney general doctrine) was reaffirmed in *Kootenai Medical Ctr. v. Bonner Cnty.*, 141 Idaho 7, 10, 105 P.3d 667, 667 (2004), and extended to counties and other entities.

M. Attorney fees awards following stipulated dismissals

Attorney fees may be awarded following a stipulated dismissal where the stipulation is silent as to attorney fees. *Straub v. Smith*, 145 Idaho 65, 175 P.3d 754 (2007). As noted in Justice Eismann's concurrence: "Every attorney worth his or her salt knows that if you want to dismiss your complaint just before trial and do not want your client to be liable for the defendant's court costs and attorney fees, you had better seek a stipulation stating that each party will bear their own costs and attorney fees." *Straub*, 145 Idaho at 73, 175 P.3d at 762.

The *Straub* Court explained: "In litigation, avoiding liability is as good for a defendant as winning a money judgment is for a plaintiff." *Straub*, 145 Idaho at 72, 175 P.3d at 761 (Eismann, J., concurring) (quoting *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005)).

In a 2012 case, the Court explained:

> For purposes of analysis in this case, stipulations to dismiss are a form of settlement. Idaho has treated cases ending in settlement no differently than cases tried to conclusion. In either case, the court must still look to I.R.C.P 54(d)(1)(B). As this Court stated in *Bolger v. Lance*:
>
> > Rule 54(d)(1)(B) directs the court to consider, among other things, the extent to which each party prevailed relative to the "final judgment or result." [I]t may be appropriate for the trial court, in the right

> case, to consider the "result" obtained by way of a settlement reached by the parties. However, the "[d]etermination of who is a prevailing party is committed to the sound discretion of the trial court and will not be disturbed absent abuse of discretion."
>
> 137 Idaho 792, 797, 53 P.3d 1211, 1216 (2002) (citations omitted). Additionally, *Bolger* stands for the proposition that the trial court may take into consideration the result obtained by way of settlement, but that result alone is not controlling.

Hobson Fabricating Corp. v. SE/Z Const., LLC, 154 Idaho 45, 49-51, 294 P.3d 171, 175-77 (2012) (Burdick, C.J.) (brackets original).

The federal courts also have recognized that a litigant may be a prevailing party based on a favorable settlement that changed the legal relationship of the parties. "A litigant qualifies as a prevailing party if it has obtained a "court-ordered 'chang[e] [in] the legal relationship between [the plaintiff] and the defendant.'" *St. John's Organic Farm v. Gem Cnty. Mosquito*, 574 F.3d 1054, 1059 (9th Cir. 2009) (brackets and internal quotations original).

N. Attorney fees need not be plead at the district court stage

It is not required that a party plead a request for attorney fees in the district court pleadings. *Straub v. Smith*, 145 Idaho 65, 175 P.3d 754 (2007).

O. EAJA

Although beyond the scope of this handbook, the reader should be aware of the existence of the Equal Access to Justice Act, which authorizes the award of attorney fees in actions against federal agencies. The act is codified primarily to 5 U.S.C. § 504 (dealing with administrative actions) and 28 U.S.C. § 2412 (dealing with judicial actions).

In the judicial context, EAJA authorizes an award of attorney fees to a "prevailing party" against the United States "unless the court finds that the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A). If a party prevails against the United States, that is prima facie evidence that the position of the United States was not substantially justified, and the burden shifts to the federal government to show the court that its position was substantially justified.

If the case involved a finding that the government was "arbitrary and capricious," that obviously weights against the government, but it is not definitive. These are different standards, and it is possible that the government may have been

arbitrary and capricious and yet still be (ironically) substantially justified in its position.

On the other hand, a finding that the government was arbitrary and capricious is not a prerequisite to an EAJA award. A party may earn an EAJA award in a case not involving that standard at all. For instance, the party might prevail by showing that the government violated some statutory rule or the Constitution. Here, too, simply prevailing is not enough. The government might lose on the law, but successfully defend the EAJA claim on the basis that its position was consistent with prior precedent or otherwise not unreasonable.

P. Attorney fee awards under § 1983.

The Civil Rights Act of 1871[441] contained no provision for award of attorney fees. The Civil Rights Attorney's Fee Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, amended 42 U.S.C § 1988(b), to authorize awards of attorney fees to successful litigants under § 1983. Under section 1988, fees are available to "the prevailing party, other than the United States."

The United States Supreme Court and the Idaho Supreme Court have both held that an award of fees under section 1988 should be given to a prevailing party, unless special circumstances exist that would make an award unfair. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); *Shields v. Martin*, 109 Idaho 132, 141, 706 P.2d 21, 30 (1985). There is an extensive body of federal law on the subject of attorney fees under this section. In any event, the standard appears to be more generous (to the prevailing party) than is available under other Idaho attorney fee provisions, such as Idaho Code § 12-117 which requires the prevailing party to establish that the non-prevailing party acted "without a reasonable basis in fact or law."

Q. Attorney fees under the Idaho Tort Claims Act

The Idaho Tort Claims Act contains its own, exclusive attorney fee provision. Idaho Code § 6-918A. It is far more restrictive than most others, requiring a showing of bad faith and capping the amount of the award.

R. Attorney fees on appeal

(1) Procedural requirements (Idaho App. R. 35 and 41)

Idaho Appellate Rule 41 sets out procedural requirements for seeking an attorney fee award on appeal. "This rule alone does not provide a basis for awarding attorney fees on appeal, but simply allows the appellate court to award fees if those fees are permitted by some other contractual or statutory authority." Jesse R.

[441] See section 24.CC at page 453 for a discussion of § 1983 actions.

Walters, Jr., *A Primer for Awarding Attorney Fees in Idaho*, 38 Idaho L. Rev. 1, 37-38 (2001) (citing *Swanson v. Kraft*, 116 Idaho 315, 775 P.2d 629 (1989)). Instead, it simply constitutes a "codification" of the court's authority to award fees on appeal. Idaho App. R. 35 also establishes procedural requirements, but provides no authority for an award. *Capps v. FIA Card Services, N.A.*, 149 Idaho 737, 744, 240 P.3d 583, 590 (2010).

Idaho App. R. 35(a)(5) requires the appellant, if claiming attorney fees on appeal, to "so indicate in the division of issues on appeal . . . and state the basis for the claim." The Idaho Supreme Court has interpreted Idaho App. R. 35(a)(6)[442] as requiring the appellant to present argument and authority on the attorney fee request in the opening brief. *Cowles Publ'g Co. v. Kootenai Cnty. Bd. of Cnty. Comm'rs*, 144 Idaho 259, 266, 159 P.3d 896, 903 (2007); *Frazier v. J.R. Simplot Co.*, 136 Idaho 100, 29 P.3d 936 (2001); *McVicker v. City of Lewiston*, 134 Idaho 34, 995 P.3d 804 (2000); *Sprenger, Grubb & Associates v. Hailey* ("*Sprenger Grubb II*"), 133 Idaho 320, 322, 986 P.2d 343, 345 (1999) (Walters, J.). This rule is vigorously applied. *Carroll v. MBNA America Bank*, 148 Idaho 261, 270, 220 P.3d 1080, 1089 (2009) ("A citation to statutes and rules authorizing fees, without more, is insufficient. Although MBNA cited to the above statutory fees provisions, it submitted no argument in its brief as to why fees should be awarded under either I.C. § 12–120(3) or I.C. § 12–121. Thus, we decline to award attorney's fees to MBNA on appeal.") (citation omitted); *Capps v. FIA Card Services, N.A.*, 149 Idaho 737, 744, 240 P.3d 583, 590 (2010) (quoting from *Carroll*).

Idaho App. R. 35(b)(5) and (6) apply in similar fashion to the appellee. The Court has justified this seemingly harsh rule on the basis of due process. *Walters* at 80; *see Bingham v. Montana Resource Associates*, 133 Idaho 420, 424, 997 P.2d 1035, 1039 (1999)).

The case law is equally rigorous when it comes to challenges on appeal to the award of attorney fees by the district court. In *Gallagher v. State*, 141 Idaho 665, 115 P.3d 756 (2005), the appellant included the following argument in the opening brief: "This action was presented as a public service in good faith – the imposition of sanctions should be reversed." The Court declared that this fell short of the requirement to support each position by citing to "propositions of law, authority, or argument." The Court stated, "When an opening brief contains no authority on an issue presented, it is immaterial that the party provides authority either in a reply brief or in supplemental briefing because the issue had already been waived." *Gallagher*, 141 Idaho at 669, 115 P.3d at 760. This requirement is not stated expressly in Idaho App. R. 35 (although that rule has been cited by the court as its

[442] Idaho App. R. 35(a)(6) provides: "Argument. The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to authorities, statutes and parts of the transcript and record relied upon."

basis); rather it is premised on case law, *e.g.*, *Estes v. Barry*, 132 Idaho 82, 87, 967 P.2d 284, 289 (1998).

In *Kirk-Hughes Development, LLC v. Kootenai Cnty. Bd. of Cnty. Comm'rs*, 149 Idaho 555, 237 P.3d 652 (2010), the district court rejected a developer's LLUPA appeal of a zoning decision, concluding that the denial did not prejudice Kirk-Hughes's substantial rights under Idaho Code § 67-5279(4). The developer appealed, raising four issues including an arbitrary and capricious claim. The Idaho Supreme Court rejected the appeal because Kirk-Hughes failed to challenge the prejudice issue. Kirk-Hughes did mention it in passing in its brief, but the Idaho Supreme Court said that the mere declaration that its substantial rights had been prejudiced "is conclusory and without more, is insufficient." *Kirk-Hughes* at *3. The Court, citing prior precedent, noted that the party must also provide "propositions of law, authority or argument." *Id.*

The appellate rules ordinarily do not come into play until there is an appeal from district court. However, they also apply at the district court level when an appeal is made pursuant to the IAPA. They are adopted by reference under Idaho R. Civ. P. 84(r) and therefore apply also to the initial judicial appeal from land use decisions to district court. Presumably, the rules governing the identification of, and argument and support for, attorney fee awards are equally applicable there.

The Court rarely cuts any slack to parties whose lawyers do not follow the procedural requirements of Idaho App. R. 35(a)(5). In *Read v. Harvey*, 147 Idaho 364, 209 P.3d 661 (2009), the Court awarded attorney fees despite the prevailing party's failure to identify a basis for an award of attorney fees. The Court nonetheless acted *sua sponte* in awarding attorney fees to the prevailing party under Rule 11 (which specifically allows a court to act on its own initiative), noting that Harvey had misrepresented the record and pursued the appeal without foundation in fact or law. In an unusually forceful message to counsel, the Court ordered that the fees be paid not by the party or even by the party's law firm, but by a specifically named member of the law firm representing the party.

A request for attorney fees on appeal is different from requesting the appellate court to overturn the district court's denial of attorney fees below. In order to comply with the rules requiring that attorney fee requests be accompanied by legal argument (Idaho App. R. 35 and 41), it is important to distinguish between the two. *See Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 498, 300 P.3d 18, 30 (2013).

(2) Substantive standards for attorney fees on appeal

"Section 12–117 authorizes fees to the prevailing party on appeal. The Court employs a two-part test for I.C. § 12–117 on appeal: the party seeking fees must be the prevailing party and the losing party must have acted without a reasonable basis

in fact or law." *City of Osburn v. Randel*, 152 Idaho 906, 910, 277 P.3d 353, 357 (2012) (citation omitted) (quoted in *Hobson Fabricating Corp. v. SE/Z Const.*, LLC, 154 Idaho 45, 53, 294 P.3d 171, 179 (2012).

In *Rueth v. State* ("*Rueth II*"), 103 Idaho 74, 644 P.2d 1333 (1982) (McFadden, J.), the Court awarded attorney fees on appeal noting that an appellant will be subject to an attorney fee award if he or she appeals without a reasonable expectation of obtaining reversal:

> In the instant case a dispassionate view of the record discloses there was no valid reason to anticipate reversal of the judgment below on the factual grounds urged. The record contains abundant evidence supporting the determination of the judge and jury. Similarly, the arguments and authorities advanced in support of the two legal issues presented on appeal failed to establish how the discretionary decisions of the district court not to bifurcate the issues involved in the trial or to act upon the motion for a view arose to the level of error.

Rueth II, 103 Idaho at 81, 644 P.2d at 1340.

S. Sua sponte awards of attorney fees.

Generally speaking, courts may not make sua sponte awards of attorney fees.

> The district judge's underlying assumption that he had the power to award fees on a basis not asserted by Montane is erroneous. In order to be awarded attorney fees, a party must actually assert the specific statute or common law rule on which the award is based; the district judge cannot sua sponte make the award or grant fees pursuant to a party's general request.

Bingham v. Montane Resource Associates, 133 Idaho 420, 423-24, 987 P.2d 1035, 1038-39 (1999) (cited for this point in *Hobson Fabricating Corp. v. SE/Z Const.*, LLC, 154 Idaho 45, 52, 294 P.3d 171, 178 (2012)).

An exception is Idaho R. Civ. P. 11(a)(1) and its parallel provision in the appellate rules, Idaho App. R. 11.2. These expressly provide for sua sponte awards of attorney fees. *See, e.g., Read v. Harvey*, 147 Idaho 364, 370-71, 209 P.3d 661, 667-68 (2009); *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, 329, 297 P.3d 1134, 1146 (2013).

T. Attorney fee awards in federal court diversity actions

"Idaho law governs the award of attorney fees in this matter because federal courts follow state law as to attorney fee awards in diversity actions. *See Interform Co. v. Mitchell*, 575 F.2d 1270, 1280 (9th Cir. 1978) (applying Idaho law). *LaPeter v. Canada Life Ins. of America*, 2007 WL 4287489, *1 (D. Idaho 2007) (not reported in F. Supp. 2d).

U. Attorney fees in administrative proceedings

Awards of attorney fees in administrative proceedings (prior to judicial review thereof) are quite limited. See discussion of this topic in the *Idaho Water Law Handbook.*

25. DUE PROCESS RIGHTS APPLICABLE TO LAND USE DECISIONS

A. Procedural due process rights generally

Due process rights derive from the Fifth Amendment of the U.S. Constitution, applicable to the states via the Fourteenth Amendment. U.S. Const. amend. V and XIV, § 1. Idaho's Constitution also guarantees due process. Idaho Const. art. I, § 13.

As its name implies, procedural due process deals with the procedural rights of litigants.[443] "Procedural due process requires that some process be provided to ensure that the individual is not arbitrarily deprived of his or her rights in violation of the state or federal constitutions." *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 454, 180 P.3d 487, 493 (2008) (J. Jones, J.).

Procedural due process requirements under the Idaho and federal constitutions are applicable to quasi-judicial land use and zoning actions. "Since decisions by zoning boards apply general rules to specific individual, interests or situations, and are quasi-judicial in nature they are subject to due process constraints." *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 510, 148 P.3d 1247, 1256 (2006) (Burdick, J.) (internal quotation marks omitted).[444] These constitutional protections undergird the rights discussed throughout this chapter.

The Idaho Supreme Court has described the flexible nature of the due process analysis this way:

> Due process is not a concept to be rigidly applied, but is a flexible concept calling for such procedural protections as are warranted by the particular situation. The U.S. Supreme Court has stated that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private

[443] Due process ordinarily refers to "procedural due process," which should not be confused with "substantive due process." Substantive due process is an oxymoron. It has nothing to do with process. Instead, it deals with the rationality of the legislation itself—that is, the substance. "In this context substantive due process requires that legislation which deprives a person of life, liberty, or property must have a rational basis. That is, the statute must bear a reasonable relationship to a permissible legislative objective. The reason for the deprivation must not be so inadequate that it may be characterized as an arbitrary exercise of state police powers." *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 455, 180 P.3d 487, 494 (2008) (J. Jones, J.) (citing *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 90, 982 P.2d 917, 926 (1999)).

[444] Other cases recognizing that due process rights attach to quasi-judicial land use decisions include *Neighbors for a Healthy Gold Fork v. Valley Cnty.*, 145 Idaho 121, 127, 176 P.3d 126, 132 (2007); *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 510, 148 P.3d 1247, 1256 (2006) (Burdick, J.); *Gay v. Cnty. Comm'rs of Bonneville Cnty.*, 103 Idaho 626, 628, 651 P.2d 560, 562 (Ct. App. 1982); *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1994).

> interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, third, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirements would entail.

Neighbors for a Healthy Gold Fork v. Valley Cnty., 145 Idaho 121, 127, 176 P.3d 126, 132 (2007) (citations omitted).

Due process issues pertinent to land use matters include: bias of the decision-maker, *ex parte* communications, site visits (aka "views"), executive sessions, mediation, and the rights of participants at hearings. The first three are discussed in the following subsections. Executive sessions are discussed in section 35.B at page 855. Mediation is discussed in section 14 at page 186. The hearing process is discussed in section 13 at page 171. Conflicts of interest are discussed in section 36 at page 857.

As discussed more fully below, procedural due process rights are applicable in quasi-judicial settings, not legislative settings. Accordingly, it is always important to ask "what hat" the decision-makers are wearing. Other procedural requirements, for example open meeting requirements and conflict of interest rules, arise out of statutes or rules (as opposed to the constitutional provisions on due process). Unlike due-process-based procedural requirements, the latter are not limited to quasi-judicial settings.

B. Bias

(1) Overview

When decisions are made in the legislative context, bias is sometimes part of the process. For instance, a city official may run on a platform supporting or opposing foothills development. If elected, that person would be expected and entitled to act in accordance with that bias when he or she considers a new zoning plan or comprehensive plan dealing with the foothills.

The expectations are quite different, however, when it comes to actions on individual matters. Where parties are appearing in quasi-judicial settings, such as CUP applications, rezones, or variance proceedings, they are entitled to unbiased decision makers. "The Due Process Clause entitles a person to an impartial and disinterested tribunal." *Eacret v. Bonner Cnty.*, 139 Idaho 780, 784, 86 P.3d 494,

498 (2004) (Burdick, J.).[445] The discussion below is limited to such quasi-judicial proceedings. (See discussion in section 24.F(4) at page 344 dealing with legislative versus quasi-judicial actions.)

The right to be protected from biased decision makers is rooted squarely in the state and federal constitutions, and applies to local agencies. "The Due Process Clause entitles a person to an impartial and disinterested tribunal. This requirement applies not only to courts, but also to state administrative agencies . . . ." *Davisco Foods Int'l, Inc. v. Gooding Cnty.*, 141 Idaho 784, 794, 118 P.3d 116, 123 (2005) (Schroeder, C.J.) (citing *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) and *Eacret v. Bonner Cnty.*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004) (Burdick, J.).

However, this prohibition against bias only applies to judges, not legislators. After all legislators may campaign on their biases and are often elected precisely because the voters like their biases. In contrast, judges are expected to approach each case without bias—or recuse themselves if they cannot. Consequently, the no-bias rule operates only when planning and zoning commissions are acting in a judge-like capacity. "[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." *Eacret v. Bonner Cnty.*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004) (Burdick, J.) (citing *Schweiker v. McClure*, 456 U.S. 188, 195 (1982)).

Thus, applicants and other affected persons in permit application proceedings are entitled to have the application heard by unbiased decision-makers. "[A] decision by a zoning board applying general rules or specific policies to specific individuals, interests or situations, are quasi-judicial in nature and subject to due process constraints." *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1994). The same is true of an appeal of such a decision to a board of county commissioners. *See Comer v. Cnty. of Twin Falls*, 130 Idaho 433, 438-39, 942 P.2d 557, 562-63 (1997) (analyzing whether the county board violated due process in the appeal of a P&Z decision).

Indeed, some courts view the no-bias rule as applying even more vigorously to quasi-judicial proceedings than to true judicial proceedings. "The rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the customary safeguards affiliated with court proceedings have, in the interests of expedition and a supposed administrative efficiency, been relaxed." *Reid v. New Mexico Bd. of Examiners in Optometry*, 589 P.2d 198, 200 (N.M. 1979); *Marris v. City of Cedarburg*, 498 N.W.2d 842, 845, 847 (Wis. 1993) ("zoning decisions are especially vulnerable to problems of bias"). Idaho courts have not addressed this point.

[445] The call for a "disinterested" decision maker is not for one who is bored or otherwise uninterested in the proceedings. It is a call for someone with no conflict of interest.

In any event, the impartial adjudicator requirement is "imperative" in quasi-judicial zoning decisions in Idaho. "With appellate review so limited, it is imperative that biased or potentially biased commissioners be barred from participating in the zoning procedure." *Manookian v. Blaine Cnty.*, 112 Idaho 697, 701, 735 P.2d 1008, 1012 (1987). Thus, Idaho law flatly forbids biased decision-makers from participating in zoning applications where they have or display a bias. *Bowler v. Board Of Trustees of Sch. Dist. No. 392*, 101 Idaho 537, 543, 617 P.2d 841, 846 (1980) ("It is well established that 'actual bias of a decisionmaker is constitutionally unacceptable.'"); *Floyd v. Bd. of Comm'rs of Bonneville Cnty.*, 137 Idaho 718, 725, 52 P.3d 863, 870 (2002) (A county commissioner's pre-hearing public statements indicating "predetermination" on an issue demonstrate "actual bias," rendering his or her participation in the hearing "constitutionally unacceptable.").

Other states have reached the same conclusion. *Prin v. Council of the Municipality of Monroeville*, 645 A.2d 450, 451-52 (Pa. 1994) (holding, under a due process analysis, that a councilman's public statements and letters to constituents "expressing strong opposition" to a shopping center proposal "clearly demonstrated his bias"); *Marris v. City of Cedarburg*, 498 N.W.2d 842, 845, 848-49 (Wis. 1993) (holding that a zoning board of appeals chairperson's pre-hearing statements that an applicant's legal position was a "loophole" in need of "closing" and that the board should try to "get her on the Leona Helmsley rule" had "created a situation in which the risk of bias was impermissibly high" under "common law concepts of due process and fair play"); *Acierno v. Folsom*, 337 A.2d 309, 314-17 (Del. 1975) (holding that a planning board chairman "deprived the appellant of due process" by failing to disqualify himself from hearing an appeal of a subdivision proposal when he had previously "conducted himself like an actual adversary" of the proposal).

A decision maker's express or implied assertion of non-bias and refusal to recuse herself for bias will not prevent a court from overturning the decision for bias. *See, e.g., Prin v. Council of Municipality of Monroeville*, 645 A.2d 450, 451-52 (1993) (holding that council member was biased despite his refusal to recuse himself); *Acierno v. Folsom*, 337 A.2d 309, 316 (Del. 1975) (The Chairman refused to disqualify himself. The Court said: "A public officer acting in a quasi-judicial capacity is disqualified to sit in a proceeding in which there is a controverted issue as to which he has publicly expressed a pre-conceived view, bias, or prejudice.").[446]

[446] *See, e.g., Cinderella Career & Finishing Sch., Inc. v. Fed. Trade Comm'n*, 425 F.2d 583, 590-91 (D.C. Cir. 1970) ("It requires no superior olfactory powers to recognize that the danger of unfairness through prejudgment is not diminished by a cloak of self-righteousness"); *Staton v. Mayes*, 552 F.2d 908, 913-15 (10th Cir. 1977) (holding that "firm public statements before the hearing" by school board members on issues to be decided at hearing demonstrated bias despite the board members' trial court testimony that they based their votes "on the evidence" and "had not committed" to a position before the hearing); *Marris v. City of Cedarburg*, 498 N.W.2d 842, 848-49 (Wis. 1993) (holding that a zoning board member's biased pre-hearing statements violated due process despite the board's protestations that it had "engaged in objective fact-finding" and that the

It is one thing to express a general policy viewpoint in an election campaign or other context. It is another matter to make a statement tied to a particular development. This principle is illustrated by a Tenth Circuit decision in which a school board candidate made biased statements about a particular matter "in his campaign for election." *Staton v. Mayes*, 552 F.2d 908, 913 (10th Cir. 1977) (not a land use case, but a matter involving a school board election). The Court set aside the school board's decision as impermissibly lacking the appearance of fairness, stating, "[w]e do not say that such statements in an election campaign or between members were unlawful or improper. However, a due process principle is bent too far when such persons are then called on to sit as fact finders and to make a decision affecting [other's] property interests." *Staton* at 915.

Similarly, in *Nat'l Bank of Chester Cnty. & Trust Co*., 27 Pa. D. & C. 384, 390, 393-94 (Pa. Ct. Quarter Sessions, Chester County 1962), an individual who had publicly opposed a zoning application subsequently was elected to the board that ultimately denied the application. *Nat'l Bank of Chester Cnty. & Trust Co*., 27 Pa. D. & C. 384, 390, 393-94 (Pa. Ct. Quarter Sessions, Chester County 1962). He argued that disqualifying him from voting on the application would be tantamount to holding that "no candidate for public office would be eligible to vote, after election, on any question which had been an issue during the campaign." *Nat'l Bank of Chester Cnty. & Trust Co*., 27 Pa. D. & C. 384, 390, 393-94 (Pa. Ct. Quarter Sessions, Chester County 1962). The Court rejected the argument, observing that such a candidate would be ineligible only in regard to quasi-judicial proceedings regarding which he or she had shown bias: the candidate would remain eligible to vote in all other instances. *See Nat'l Bank of Chester Cnty. & Trust Co*., 27 Pa. D. & C. 384, 390, 393-94 (Pa. Ct. Quarter Sessions, Chester County 1962) (distinguishing between legislative and quasi-judicial proceedings and holding that an official was disqualified from voting on a zoning adjustment application he had opposed as a candidate).

(2) Injunctive relief available

Idaho law presumes "honesty and integrity in those serving as adjudicators." *Shoebe v. Ada Cnty.*, 130 Idaho 580, 586, 944 P.2d 715, 721 (1997) (internal quotation marks and citation omitted). However, "upon a showing that there is a probability that a decision-maker in a due process hearing will decide unfairly any issue presented in the hearing, a trial court may grant an injunction to prevent the decision-maker from participating in the proceeding." *Johnson v. Bonner Cnty. Sch. Dist. No. 82*, 126 Idaho 490, 494, 887 P.2d 35, 39 (1994). Moreover, a county

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statements were years old and taken out of context); *Siegfried v. City of Charlottesville*, 142 S.E.2d 556, 559-61 (Va. 1965) (holding that the trial court erred in failing to dismiss commissioners deciding condemnation compensation when the commissioners had read a biased newspaper article regarding the property in question, even though the commissioners all testified they would decide the case objectively).

commissioner's pre-hearing public statements indicating "predetermination" on an issue demonstrate "actual bias," rendering his or her participation in the hearing "constitutionally unacceptable." *Floyd v. Bd. of Comm'rs of Bonneville Cnty.*, 137 Idaho 718, 725, 52 P.3d 863, 870 (2002). *See also Acierno v. Folsom*, 337 A.2d 309, 316 (Del. 1975) ("A public officer acting in a quasi-judicial capacity is disqualified to sit in a proceeding in which there is a controverted issue as to which he has publicly expressed a pre-conceived view, bias or prejudice.")

(3) The appearance of fairness is not the legal standard; actual bias must be shown.

Earlier cases suggested that the mere appearance of impropriety could be a basis for disqualifying a decision maker.[447] Indeed, the importance of protecting against even the appearance of impropriety is well established in other jurisdictions.[448]

Without mentioning or expressly overruling is prior decisions speaking about the importance of an "appearance" of fairness, the Idaho Supreme Court seems now

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[447] *Floyd v. Bd. of Comm'rs of Bonneville Cnty.*, 137 Idaho 718, 726, 52 P.3d 863, 871 (2002) (Court must determine the effect of biased vote in order to "avoid the appearance of impropriety.") The "appearance of impropriety" was mentioned as a contributing factor in reversing a zoning decision in *Eacret v. Bonner Cnty.*, 139 Idaho 780, 787, 86 P.3d 494, 501 (2004) (Burdick, J.). The statement at issue in *Eacret* addressed a matter of general public policy (that boat docks should be more freely permitted). "Here, Commissioner Mueller publicly expressed his position regarding building of Bottle Bay boathouses in general." *Eacret*, 139 Idaho at 786, 86 P.3d at 500 (emphasis supplied). The Bonner County Commissioner's statement did not address any particular boat dock or any particular application. Nevertheless, this Court found even this statement, when considered in the context of other statements and actions, crossed the line and created an unacceptable "appearance of unfairness."

[448] *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995) (stating, in regard to state administrative adjudications, the adjudicator's personal interest in the outcome of the proceedings may create an appearance of partiality that violates [federal] due process, even without any showing of actual bias) (emphasis in original) (citing *Gibson v. Berryhill*, 411 U.S. 564, 578 (1973)); *Staton v. Mayes*, 552 F.2d 908, 914-15 (10th Cir. 1977) (holding that public statements by school board members endorsing removal of a superintendent prior to the termination hearing violated the fourteenth amendment because the statements "left no room for a determination that there was a decision by a fair tribunal, with the appearance of fairness"); *Acierno*, 337 A.2d at 316 ("It is fundamental that a quasi-judicial tribunal, like a court, must not only be fair, it must appear to be fair") (Court of Chancery of Delaware); *Bunko v. City of Puyallup Civil Service Comm'n*, 975 P.2d 1055, 1060 (Wash. Ct. App. 1999) ("The appearance of fairness doctrine protects public confidence in quasi-judicial proceedings"); *Marris*, 498 N.W.2d at 848-49 (concluding that a board member's pre-hearing statements violated common-law due process when the statements did not show "actual bias" but nonetheless "created a situation in which the risk of bias was impermissibly high") (Wisconsin Supreme Court); 16B Am. Jur. 2d *Constitutional Law* § 968 (1998) ("The Due Process Clause is concerned not only with the actual bias of judges and jurors, but also with the need for the appearance of justice.").

to have embraced a more rigorous requirement that a litigant seeking to overturn a decision of a local government on due process grounds must prove "actual" bias.

> This Court has never adopted the appearance of fairness doctrine of our westerly neighbor [the state of Washington]. Rather, we recognize that due process "entitles a person to an impartial and disinterested tribunal[,]" but we require a showing of actual bias before disqualifying a decision maker even when a litigant maintains a decision maker has deprived the proceedings of the appearance of fairness.

Cowan v. Bd. of Comm'rs of Fremont Cnty., 143 Idaho 501, 515, 148 P.3d 1247, 1261 (2006) (Burdick, J.) (emphasis supplied) (citing *Davisco Foods Int'l, Inc. v. Gooding Cnty.*, 141 Idaho 784, 791, 118 P.3d 116, 123 (2005) (Schroeder, C.J.)).

The holding in *Cowan* is in conflict with (and implicitly overrides) the suggestion in *Eacret* that an "appearance of impropriety" or "appearance of unfairness" may give rise to a due process violation. *Eacret v. Bonner Cnty.,* 139 Idaho 780, 784, 786, 86 P.3d 494, 498, 500 (2004) (Burdick, J.).

(4) General policy statements do not necessarily reflect bias

Plainly, where a decision maker announces that he or she has made up his or her mind prior to the hearing, that is actual bias, and that decision maker must be disqualified from participating. *Floyd v. Bd. of Comm'rs of Bonneville Cnty.,* 137 Idaho 718, 725, 52 P.3d 863, 870 (2002) (A county commissioner's pre-hearing public statements indicating "predetermination" on an issue demonstrate "actual bias," rendering his or her participation in the hearing "constitutionally unacceptable.").

On the other hand, not every comment on a policy issue constitutes evidence of bias:

> A decision maker is not disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that the decision maker is "not capable of judging a particular controversy fairly on the basis of its own circumstances." Prehearing statements by a decision maker are not fatal to the validity of the zoning determination as long as the statement does not preclude the finding that the decision maker maintained an open mind and continued to listen to all the evidence presented before making the final decision. By way of explanation

> then, prehearing statements by a decision maker are fatal to the validity of the zoning determination if the statements show that the decision maker: (a) has made up his or her mind regarding the facts and will not listen to the evidence with an open mind, or (b) will not apply the existing law, or (c) has already made up his or her mind regarding the outcome of the hearing.

Eacret v. Bonner Cnty., 139 Idaho 780, 785, 86 P.3d 494, 499 (2004) (Burdick, J.) (quoting *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Education Ass'n*, 426 U.S. 482, 493 (1941)).

As the Idaho Supreme Court previously noted:

> Mere familiarity with the facts of a case . . . does not, however, disqualify a decisionmaker . . . . [n]or is a decisionmaker disqualified simply because [the decisionmaker] has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that [the decisionmaker] is not "capable of judging a particular controversy fairly on the basis of its own circumstances."

Johnson v. Bonner Cnty. Sch. Dist. No. 82, 126 Idaho 490, 493, 887 P.2d 35, 38 (1994) (quoting *Hortonville*, 426 U.S. at 493) (citations omitted) (ellipses, brackets, and emphasis by Idaho Supreme Court).

Such pre-hearing policy pronouncements are not fatal "as long as the statement does not preclude the finding that the decision maker maintained an open mind and continued to listen to all the evidence presented before making the final decision." *Johnson*, 126 Idaho 490, 493, 887 P.2d 35, 38 (1994).

In *Eacret*, the Court then summed up the law:

> By way of explanation then, prehearing statements by a decision maker are fatal to the validity of the zoning determination if the statements show that the decision maker: (a) has made up his or her mind regarding the facts and will not listen to the evidence with an open mind, or (b) will not apply the existing law, or (c) has already made up his or her mind regarding the outcome of the hearing.

Eacret, 139 Idaho at 785-86, 86 P.3d at 499-500.

In *Davisco Foods Int'l, Inc. v. Gooding Cnty.*, 141 Idaho 784, 118 P.3d 116 (2005) (Schroeder, C.J.) (Schroeder, C.J.), the Court noted its statement in *Eacret* that a "decision maker is not disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute." In *Davisco*, one of the county commissioners was quoted in the newspaper that he was "absolutely against Jerome Cheese's proposal to pipe waste from its Jerome plant." The *Davisco* Court viewed this statement as an acceptable general policy statement, because the statement was published nearly three years prior to the vote, the project had undergone some modification since that time, and the commissioner later asserted (after his statements were discovered on appeal) that he had an open mind all the time. This case suggests that courts will overlook a great deal in deference to a statement (even a post-hoc statement) from the decision-maker that he or she has an open mind.

C. *Ex parte* contacts

(1) Summary

Ex parte contacts refers to communications regarding a substantive issue in a pending matter between an interested party and a decision maker out of the presence of other interested parties. The law governing *ex parte* communications varies depending on the context. *Ex parte* communications are strictly prohibited in a contested case before an agency. In contrast, *ex parte* contacts in a quasi-judicial local government proceedings are not strictly prohibited, so long as they are fully and timely disclosed at the time of the hearing in order to allow other parties a meaningful opportunity to rebut any information provided to the decision maker.

Note that while *ex parte* contacts may be "cured" through full disclosure in a quasi-judicial land use proceeding, they do not appear to be curable in the context of a contested case before an administrative agency. In the latter context, *ex parte* contacts are governed not just by the law of due process, but by statutes and agency rules that appear to be less flexible than the constitutional principle. (See discussion in section 25.C(4) at page 557.) Note also that rules of professional conduct are an additional overlay applicable to lawyers. However, those rules seem to incorporate the general law of *ex parte* communications. (See discussion in section 25.C(3) at page 555.)

(2) *Ex parte* communications in quasi-judicial settings

(a) *Ex parte* contacts are commonplace in land use matters

It is natural for the applicant or opponent of a land use matter to desire to "lobby" the decision makers. Waiting for the public hearing to make one's case is neither realistic nor wise for either the applicant or the public. The fact is that public hearings are often ill-suited forums for serious and thoughtful discussion of a project.

Moreover, it is often too late. An applicant does not want to learn for the first time at the hearing what is really bothering the commissioners about a proposal. Likewise, opponents of the application need access to decision-makers to make sure they are fully prepped for the hearing and know to ask the right questions. Thus, *ex parte* contacts are an essential part of the educational process leading to sound decision making.

On the flip side, *ex parte* communications provide an opportunity to improperly influence the decision making process. Parties may present incomplete, misleading or downright false information to the decision-makers in contexts where it remains completely untested by the adversarial system.

In order to balance these competing considerations, some very clear and strict rules apply to these exchanges. Alas, as a practical matter, these rules are routinely violated. Despite this, parties are well advised to pay scrupulous attention to them. If a violation can be shown, it provides a free ticket to the other side for overturning the decision.

(b) Distinction drawn between legislative and quasi-judicial actions of commissions

As with bias, the rules governing *ex parte* contacts depend upon the type of proceeding. (See discussion in section 24.F(4) at page 344.) *Ex parte* contacts are strictly forbidden in a judicial setting or a contested case proceeding, except for very specific exceptions.[449] At the other extreme, *ex parte* rules do not apply at all in the legislative branch. *Bi-Metallic Investment Co. v. Bd. of Equalization*, 239 U.S. 441 (1915). Indeed, elected representatives are expected and encouraged to communicate directly with their constituents and all others who may have relevant information about pending legislation. Thus, it is entirely permissible for a lawyer or a lobbyist to discuss a client's interest in pending legislation in private conversations with legislators.

The same goes for legislative acts at the local level. This includes, for instance, the adoption of ordinances by county or municipal authorities. In the zoning context, the Idaho Supreme Court has also determined that the adoption of comprehensive plans and general zoning regulations constitutes "legislative" action. *Cooper v. Bd. of Cnty. Comm'rs of Ada Cnty.*, 101 Idaho 407, 409-10, 614 P.2d 947, 949-50 (1980); *see also Gay v. Cnty. Comm'rs of Bonneville Cnty.*, 103 Idaho 626, 628, 651 P.2d 560, 562 (Ct. App. 1982); Daniel R. Mandelker, *Quasi-Judicial vs. Legislative: What Does It Mean?*, SB06 ALI-ABA 749 (1996).

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[449] "A lawyer shall not . . . communicate *ex parte* with such a person [a judge, juror, prospective juror or other official] except as permitted by law . . . ." Idaho Rules of Professional Conduct 3.5(b).

In contrast, decisions on CUPs, variances and other particularized actions are deemed "quasi-judicial" actions, and are subject to *ex parte* contact rules. *Idaho Historic Preservation Council, Inc. v. City Council of Boise* ("*Historic Preservation*"), 134 Idaho 651, 8 P.3d 646 (2000) (Silak, J.). In such cases, the commissioners sit in a judge-like capacity on individual claims. Yet, they are not exactly like judges, hence the term "quasi-judicial."

The concept behind the quasi-judicial label is nicely explained in an Oregon case:

> [C]ommissioners need not conduct themselves in all respects as judges or the proceedings in all respects as trials. The Supreme Court characterized particular land-use proceedings as "quasi-judicial," which means they have many, but not all, of the attributes of actual judicial proceedings . . . . Another gap in the analogy arises from the nature of the office. A judge is expected to be detached, independent and nonpolitical. A county commissioner, on the other hand, is expected to be intensely involved in the affairs of the community. He is elected because of his political predisposition, not despite it, and is expected to act with awareness of the needs of all elements of the county . . . .

Eastgate Theatre v. Bd. of City Comm'rs, 588 P.2d 640, 643-44 (Ore. App. 1978).

(c) *Ex parte* contacts in a quasi-judicial setting are not prohibited, but must be fully disclosed

The rules governing *ex parte* contacts in quasi-judicial settings are rooted in due process considerations. Over the years, the Idaho Supreme Court has laid out a series of decisions laying the constitutional foundation for the right to due process in administrative proceedings, such as land use permit applications. *Cooper v. Bd. of Cnty. Comm'rs of Ada Cnty.*, 101 Idaho 407, 614 P.2d 947 (1980); *Van Orden v. State*, 102 Idaho 663, 665, 637 P.2d 1159, 1161 (1981); *Gay v. Cnty. Comm'rs of Bonneville Cnty.*, 103 Idaho 626, 651 P.2d 560 (Ct. App. 1982); *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1994); *Comer v. Cnty. of Twin Falls*, 130 Idaho 433, 942 P.2d 557 (1997); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 928, 950 P.2d 1262, 1267 (1998). They established that due process requires that the parties be afforded a fair opportunity to build the record that will form the basis of the decision. Thus, the preparation of a fair record is at the center of the *ex parte* analysis.

While the Idaho Supreme Court has dealt broadly with the subject of due process for decades, the first case to deal squarely with *ex parte* contacts in a land use

permit case was not decided until 2000. *Idaho Historic Preservation Council, Inc. v. City Council of Boise* ("*Historic Preservation*"), 134 Idaho 651, 8 P.3d 646 (2000) (Silak, J.).[450] The *Historic Preservation* case involved a challenge to a decision by the City of Boise authorizing the demolition of the Foster Warehouse Building.[451] At the outset of the hearing by the city council, certain council members disclosed that they had received phone calls from concerned citizens who expressed views on the issue. While disclosing the existence of the calls, the council members failed to disclose who the calls were from or what arguments or facts were asserted.

The Supreme Court held that mere disclosure of the existence of such calls fell short of due process requirements.

The Court's reasoning was a bit unclear.[452] But the rule it stated is quite clear: *Ex parte* contacts are not prohibited *per se*, so long as meaningful disclosure is made:

> This decision does not hold the City Council to a standard of judicial disinterestedness. As explained above, members of the City Council are free to take phone calls from concerned citizens and listen to their opinions and arguments prior to a quasi-judicial proceeding. In order to satisfy due process, however, the identity of the callers

[450] Another Idaho case addressing the *ex parte* contact issue in the land use context is *Castaneda v. Brighton Corp.*, 130 Idaho 923, 950 P.2d 1262 (1998). In brief, Castaneda contended that Brighton engaged in an improper *ex parte* contact by obtaining a preliminary plat approval from the City of Boise at a hearing that Castaneda did not attend. The notice given for this hearing did not comply with the notice requirements of LLUPA. The Court held that due process requirements were satisfied (with the possible implication that subdivision plat applications are not subject to LLUPA notice requirements). The Court also held the hearing did not constitute an improper *ex parte* contact, since the hearing was publicly noticed and open to the public and the press. Of course, this case did not address the issue of meeting with a decision-maker outside of the public hearing.

[451] *Historic Preservation* neither a LLUPA case nor an IAPA case. A separate statute (the Idaho Preservation of Historic Sites Act, Idaho Code §§ 67-4601 to 67-4619) requires a landowner to obtain a "certificate of appropriateness" before modifying a building within an historic district. The owner of Foster's Warehouse sought a certificate allowing it to demolish the historic structure. The Boise City Historic Preservation Council denied the certificate, but, on appeal, the City of Boise granted the permit. The state historic preservation council sought judicial review of the City's decision under a provision of the preservation act authorizing such review. The Idaho Supreme Court invalidated the certificate of appropriateness, and Fosters Warehouse stands today in Boise's BODO district.

[452] The Court discussed at some length Oregon cases that applied a more relaxed standard with respect to *ex parte* contacts. But rather an endorsing or rejecting them, the Court then found it unnecessary to do so: "Even if this Court were persuaded that *Tierney* and *Neuberger* express the better rule, the requirements of procedural due process … were not met." *IHPC* at 655, 8 P.3d at 650.

> must be disclosed, as well as a general description of what each caller said.

Historic Preservation, 134 Idaho at 656, 8 P.3d at 651.

The bottom line is that *ex parte* contacts which are properly put in the record (with identity and subject matter reasonably described) do not constitute a violation of due process in the context of a quasi-judicial proceeding.

The Court dealt with *ex parte* contacts again in *Eacret v. Bonner Cnty.*, 139 Idaho 780, 86 P.3d 494 (2003) (Burdick, J.), which reiterated and expounded upon the ruling in *Historic Preservation*:

> A quasi-judicial officer must confine his or her decision to the record produced at the public hearing. Any *ex parte* communication must be disclosed at the public hearing, including a general description of the communication. The purpose of the disclosure requirement is to afford opposing parties with an opportunity to rebut the substance of any *ex parte* communications.

Eacret, 139 Idaho at 786, 86 P.3d at 500 (citations and internal quotations omitted).

(d) Documentation of *ex parte* communications

The case law provides no guidance on what documentation, if any, should be kept of *ex parte* communications. It merely requires that they be fully disclosed, overturning decisions where a commissioner "did not reveal the substance of the conversations or when exactly they had taken place." *Eacret*, 139 Idaho at 787, 86 P.3d at 501.

Given this, commissioners ought to keep detailed records of every *ex parte* communication. The fact is, however, they rarely do. Consequently, it is wise for the applicant or other interested party to keep track of every communication that person has with any decision-maker outside the hearing. The authors recommend the maintenance of journal-type entries of all such contacts, which can then be made a formal part of the record by the party. This way, the party does not need to rely on the commissioner to make a full and complete disclosure.

(e) Do *ex parte* rules apply before the application is filed?

Plainly, once an application has been filed for a permit or variance, *ex parte* rules are in effect and a record of such contacts must be maintained and disclosed. As for pre-application consultations, the statutes and case law provide no guidance.

Drawing an analogy to the contested case (a more purely judicial procedure[453]), one might conclude that *ex parte* rules do not apply prior to application. Under the IAPA, *ex parte* constraints apply only during the pendency of a "contested case." Idaho Code § 67-5253. (See discussion in section 25.C(4) at page 557.) Thus, applicants before administrative agencies routinely make substantive inquiries of agency staff (including agency decision-makers) during the pre-contested-case phase.[454]

Whether the same is true in the context of a quasi-judicial land use application is an open question. The more prudent approach is to make certain that records of all contacts are maintained to permit full disclosure on the record from the outset.

Interestingly, the Idaho Supreme Court quoted this very statutory provision in *Eacret*, 139 Idaho at 786, 86 P.3d at 500. The Court failed to explain why it quoted the statute, which applies to contested cases before administrative agencies, not land use matters. Perhaps, however, the Court meant to draw the same parallel as we draw here.

(f) Procedural inquiries are permissible

Ex parte communications are generally understood to apply to substantive communications and do not include, for instance, purely procedural inquiries. However, the conversation must not stray into any issue which has a bearing on the merits of the case.

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[453] Administrative decision-makers involved in a contested case are not acting in a quasi-judicial capacity. Their actions are purely judicial (or close to it). Thus, the IAPA simply prohibits *ex parte* communications (with some exceptions), rather than calling for disclosure of *ex parte* communications. On the other hand, the Attorney General has issued rules calling for disclosure of *ex parte* communications, with the implication that such disclosure eliminates any *ex parte* problem. IDAPA 04.11.01.417. See Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner,* 30 Idaho L. Rev. 273, 324 (1993) for a general discussion of *ex parte* communications in contested case proceedings.

[454] In 2003, the Idaho Department of Water Resource rejected a challenge to this practice: "The Irrigation Protestants seemingly suggest that there should be zero contact between a member of the public seeking to file an application and IDWR. An administrative agency must not only rule on applications that come before it, the agency also has the obligation to provide support to the public that it serves. It is both expected and proper that the administrative agency provide the public with general guidance, especially since it is the administrative agency that has expertise in the area and implements the regulations relating to the applications coming before it." *Order Denying Motion for Order Authorizing Preliminary Discovery Regarding Due Process*, In the Matter of Application for Transfer of Water Rights in the Name of United Water Idaho, Inc., Integrated Municipal Application Package) (June 11, 2003).

(g) Contacts with staff

The limitations on *ex parte* contacts are directed to decision-makers. Consequently, communications with agency staff are not ordinarily considered improper. We are not aware of any case law on this subject, however. In some agency settings, there is not a bright line between who is a decision-maker and who is not. Some agencies have designated which employees are part of the "decision-making circle" and are therefore subject to *ex parte* communications restrictions.

(h) *Ex parte* contacts in land use mediations, executive sessions, and negotiation.

Ex parte rules apply in the context of mediation. See discussion in section 14 beginning on page 186.

Ex parte communications in executive sessions and negotiations are discussed in section 35 at page 853.

(3) Idaho rules of professional conduct

The Idaho Rules of Professional Conduct (applicable to lawyers) do not directly address the issue of *ex parte* contacts with decision-makers in an administrative or municipal setting. However, the rules do provide the following guidance that lawyers should be familiar with.

> A lawyer shall not:
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order.

Idaho Rules of Professional Conduct 3.5 (as amended, effective July 1, 2004).[455]

The first question is, to which communications does this rule apply? The terms judge, juror and prospective juror are clear enough. But what is included by the reference to "other official"? To what extent does this rule apply to regulatory agencies and local governmental bodies? Although the rule itself offers no guidance and does not employ the term "tribunal" in its body, the rule is entitled "Impartiality and Decorum of the Tribunal." Presumably, then, it is intended to apply to "tribunals," and that is a defined term.

[455] Another ethics rule that bears tangentially on *ex parte* communications forbids a lawyer to: "(d) engage in conduct that is prejudicial to the administration of justice; (e) state or imply an ability to influence improperly a government agency or official; or (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law." Idaho Rules of Professional Conduct 8.4 (as amended, effective July 1, 2004)

> "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

Idaho Rule of Professional Conduct 1.0(m) (emphasis supplied).

The reference in the definition to "acting in an adjudicative capacity" means that it applies to "contested cases" before regulatory agencies (as that term is used in the Idaho Administrative Procedures Act). It is less clear whether it applies to informal quasi-judicial proceedings undertaken by local governments, such as an application for a CUP before a planning and zoning commission in which a town hall style hearing is to be held. Although the definition seems aimed at formal hearing officer situations, the safer course is to assume that the prohibition applies to all quasi-judicial proceedings. On the other hand, being limited to adjudicative matters, it apparently does not apply to lobbying and advocacy before bodies sitting in a legislative capacity (*e.g.*, annexation and initial zoning).

The reference in Rule 3.5(b) to *ex parte* communications "during the proceeding" presumably means that informal interactions with agency staff (or even agency decision-makers) prior to the initiation of a contested case are not prohibited. Thus, for example, it is permissible for an attorney and her client to meet with agency officials to inquire about agency policy and how best to shape an application to satisfy agency expectations. There may even be back-and-forth discussion and advocacy as to what that policy should be.

Where those interactions are substantive and, in particular, with agency decision makers, it is a good practice to memorialize those discussions with written communications on the agency record. Doing so will reduce the likelihood of other parties successfully challenging the agency's action (or the lawyer's conduct) as violations of *ex parte* commination rules (including due process considerations discussed below).

The prohibition in Rules 3.5(a) against attempting influence "by means prohibited by law" and the permission granted by Rule 3.5(b) to *ex parte* communications where "authorized to do so by law" both suggest that not all *ex parte* communications are prohibited. Rather, the rule appears to incorporate the broader body of case law and other applicable rules governing *ex parte* communications with agency and local government officials.

Rule 3.5 appears to integrate with Idaho case law addressing *ex parte* communications discussed above. Thus, to the extent that *ex parte* communications are allowed if fully disclosed, they do not violate Rule. 3.5.

(4) *Ex parte* communications in contested cases

The discussion above addresses *ex parte* communications in quasi-judicial governmental decision making (notably, land use matters). The rules against *ex parte* communications are stricter in the context of a formal contested case before a state agency (where a hearing officer, aka presiding officer, has been appointed).

In a contested case, the presiding officer is acting not in a quasi-judicial capacity, but in something approaching a fully judicial capacity. Accordingly, the IAPA sets out an absolute bar against such communications:

> Unless required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in a contested case shall not communicate, directly or indirectly, regarding any substantive issue in the proceeding, with any party, except upon notice and opportunity for all parties to participate in the communication.

Idaho Code § 67-5253.[456]

The Attorney General has promulgated a rule implementing this provision. While recognizing the bar on substantive *ex parte* communications, the rule provides a cure for written communications through disclosure:

> Unless required for the disposition of a matter specifically authorized by statute to be done ex parte, a presiding officer serving in a contested case shall not communicate, directly or indirectly, regarding any substantive issue in the contested case with any party, except upon notice and opportunity for all parties to participate in the communication. The presiding officer may communicate ex parte with a party concerning procedural matters (e.g., scheduling). Ex parte communications from members of the general public not associated with any party are not required to be reported by this rule. However, when a presiding officer becomes aware of a written ex parte communication regarding any

[456] A general discussion of *ex parte* communications in contested cases is found in Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 323-25 (1993).

> substantive issue from a party or representative of a party during a contested case, the presiding officer shall place a copy of the communication in the file for the case and distribute a copy of it to all parties of record or order the party providing the written communication to serve a copy of the written communication upon all parties of record. Written communications from a party showing service upon all other parties are not ex parte communications.

IDAPA 04.11.01.417 (rules of the Attorney General).

Idaho Department of Water Resource's Rule of Procedure 417, IDAPA 37.01.01.417, authorizes a hearing officer to engage in *ex parte* communications with parties that are limited to procedural issues. In contrast, the prohibition of *ex parte* communications in Idaho Rule of Professional Conduct 3.5(b) contains no exception for procedural issues. The authors suggest that such procedural communications with IDWR hearing offers are nonetheless permitted under Idaho Rule of Professional Responsibility 3.5 because they are "authorized . . . by law."

D. Unauthorized "view" of the site

A recurring problem occurs when decision-makers take it upon themselves to visit and view the site of a proposed project or other action. It is a natural tendency, it seems, for people to want to go out and see things for themselves. However, this is simply not allowed.

In *Comer v. Cnty. of Twin Falls*, 130 Idaho 433, 942 P.2d 557 (1997), the Court said that a viewing of the project site by either the P&Z or the county board of commissioners "is analogous to a viewing in a trial. We have held that a judge or jury may not view premises without notice to the parties." *Comer*, 130 Idaho at 439, 942 P.2d at 563 (citing *Highbarger v. Thornock*, 94 829, 831, 498 P.2d 1302, 1304 (1972).

As with *ex parte* communications, the rule against unauthorized views has its basis in the statutory and constitutional requirement that the decision be made "on the record":

> A quasi-judicial officer must confine his or her decision to the record produced at the public hearing. . . . A view of the subject property without notice to the interested parties by a board considering an appeal from the commission has been held a violation of due process.

Eacret v. Bonner Cnty., 139 Idaho 780, 786-87, 86 P.3d 494, 500-01 (2004) (Burdick, J.).

It is now a black letter rule that *ex parte* views by the decision-maker are improper:

> *Comer* demands that any view of a parcel of property in question must be preceded by notice and the opportunity to be present to the parties in order to satisfy procedural due process concerns. If Commissioner Mueller had previously viewed the property for reasons unrelated to the pending matter (*i.e.* located in his neighborhood or on his daily commute to work) he should have disclosed the fact of the view prior to the hearing, in order to allow the parties to object or move for a viewing by all of the commissioners. The commissioners could then have dealt with those motions within their discretion.

Eacret, 139 Idaho at 787, 86 P.3d at 501 (quoting *Comer*, 130 Idaho at 439, 942 P.2d at 563)).

In several cases, however, improper views have been held to be deemed harmless error.[457] The first was *Evans v. Bd. of Comm'rs of Cassia Cnty.*, 137 Idaho 428, 433, 50 P.3d 443, 448 (2002). The *Evans* Court distinguished *Comer*, noting that in this case the county was not acting in an appellate capacity:

> The Board was not acting upon a cold appellate record to make its decision, as was the case in *Comer*, rather, it was the original deciding body. There was substantial evidence presented at the hearing upon which the Board could have based its decision, wholly independently from the visit to the property. . . . We find that whatever knowledge the Board may have gained from visiting the property was not necessary to form the basis of its decision, as the hearing yielded substantially the same evidence as could have been garnered during the visit. Also, interested persons were provided a fair opportunity to present and rebut evidence at the hearing. Consequently, the appellants cannot show that a substantial right of theirs has been prejudiced by the Board's visit to the site.

Evans v. Bd. of Comm'rs of Cassia Cnty., 137 Idaho 428, 433, 50 P.3d 443, 448 (2002). The Court's suggestion in *Evans* that *ex parte* site visits are more of a problem in appellate proceedings that when the county acts as the original decision-maker is difficult to understand. Due process rights plainly attach to quasi-judicial

[457] See discussion of harmless error in section 24.I(8) at page 367.

actions at the original decision-making stage.[458] *Evans* is also difficult to reconcile with the Court's subsequent decision in *Eacret* (which did not mention *Evans*). *Eacret* involved a county's *de novo* review of a decision by the planning and zoning commission. The fact that the county was acting as the original decision maker (on *de novo* review) did not relieve it of its obligation to avoid improper site visits.

In *Terrazas v. Blaine Cnty.*, 147 Idaho 193, 207 P.3d 169 (2009), the Idaho Supreme Court relied on section 67-6535(c) (now 67-6535(3)) in determining that an improper site visit by one county commissioner did not merit overturning the county's decision.

In *Noble v. Kootenai Cnty.*, 148 Idaho 937, 231 P.3d 1034 (2010) (Burdick, J.), the Idaho Supreme Court rejected a developer's appeal of the denial of a subdivision application, finding that the developer failed to submit base flood elevation ("BFE") data required by the local ordinance. The Court also declared a site visit improper because the board failed to allow members of the public to get close enough to hear what was being said. It seems that the board members consciously avoided getting near a group of interested persons because they feared that they would attempt to engage the board in a discussion. The Court agreed that the board was under no obligation to take public comment. Nevertheless, the board was obligated to provide fair notice of the site visit and to allow those attending to get "close enough to hear what is being said." *Noble*, 148 Idaho at 943, 231 P.3d at 1040. The *Noble* Court cited *Comer v. Cnty. of Twin Falls*, 130 Idaho 433, 440, 942 P.2d 557, 564 (1997), and noted that *Comer* was decided on due process grounds.

The *Noble* Court then pivoted from the constitutional analysis to the Open Meeting Act, Idaho Code §§ 67-2340 to 67-2347, ruling that the way the site visit was conducted did not "comply with the spirit of the open meeting laws." *Noble*, 148 Idaho at 943, 231 P.3d at 1040. Despite this violation, the Court found that the substantial rights of the applicant had not been violated in light of the fact that applicant failed to submit BFE information required by the statute and applicants "have no right to approval of a subdivision application that does not meet the requirements of the governing ordinances." *Id*. at *6. Moreover, the application was not denied with prejudice and the applicant retained the opportunity to submit the required BFE information in the course of a subsequent subdivision application.

[458] "In *Cooper v. Bd. of Cnty. Comm'rs of Ada Cnty.*, 101 Idaho 407, 411, 614 P.2d 947, 951 (1980), we held that a decision by a zoning board applying general rules or specific policies to specific individuals, interests or situations, are quasi-judicial in nature and subject to due process constraints." *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho 115,118, 867 P.2d 989, 992 (1994).

E. Combinations of bias, *ex parte* contacts, and improper views

Where there is evidence of both bias and *ex parte* contacts, the court will consider the combined effect of the two. Thus, either alone might be insufficient to cross the constitutional threshold, but consideration of the "totality of factors" may be sufficient to render the decision invalid. *Eacret*, 139 Idaho at 787, 86 P.3d at 501. "When ex parte contacts are present in the context of quasi-judicial zoning decisions, such as variances and CUPs, courts will be more receptive to challenges to decisions on grounds of zoning bias." *Eacret*, 139 Idaho at 786, 86 P.3d at 500 (quoting *McPherson Landfill, Inc. v. Bd. of Comm'rs of Shawnee Cnty.*, 49 P.3d 522, 533 (Kan. 2002) (quoting in turn, 32 *Proof of Facts* 531, § 16)).

F. When multiple decision makers are involved

Where multiple decision makers vote on an application, the disqualification of a single decision maker (due to bias, *ex parte* contacts, improper view, or a combination of them) does not automatically invalidate the vote of the entire board. If the disqualified individual did not cast a "swing vote," the court may uphold the vote of the remaining commissioners. *Eacret v. Bonner Cnty.*, 139 Idaho 780, 786-87, 86 P.3d 494, 500-01 (2004) (Burdick, J.) (biased commissioner was swing vote, so decision was invalid); *Floyd v. Bd. of Comm'rs of Bonneville Cnty.*, 137 Idaho 718, 727, 52 P.3d 863, 871 (2002) (biased commissioner was not swing vote, so his vote was simply disregarded).

What happens when so many decision makers are disqualified that the decision-making body is denied a quorum? That is a good question. As the Idaho Supreme Court said in 1994: "In the event a board is deprived of a quorum, our trial courts will find it necessary to devise solutions to the dilemma presented by this circumstance." *Johnson v. Bonner Cnty. Sch. Dist. No. 82*, 126 Idaho 490, 494, 887 P.2d 35, 39 (1994).

G. Failure to provide mandatory information in the application

Failure to supply a concept plan and narrative with an application constitutes a violation of due process rights of other affected property owners, resulting in voiding approval of the application. The deficiency is not cured by providing the required information at the hearing. *Johnson v. City of Homedale*, 118 Idaho 285, 796 P.2d 162 (App. 1990). *But see Taylor v. Bd. of Cnty. Comm'rs, Cnty. of Bonner* ("*Taylor I*"), 124 Idaho 392, 860 P.2d 8 (Ct. App. 1993) (Swanstrom, J.) (finding that substantial rights of applicant were not prejudiced by failure to provide information in application). *Evans v. Bd. of Comm'rs of Cassia Cnty.*, 137 Idaho 428, 50 P.3d 443 (2002) (holding general information in application to be sufficient).

H. Transcribable record

LLUPA requires city, county, and planning and zoning commissions to make a transcribable verbatim record of "all public hearings at which testimony or evidence is received or at which an applicant or affected person addresses the commission or governing board regarding a pending application or during which the commission or governing board deliberates toward a decision after compilation of the record." Idaho Code § 67-6536. Failure to compile a transcribable verbatim record is grounds for vacating a land use agency's decision. *Gay v. Cnty. Comm'rs of Bonneville Cnty.*, 103 Idaho 626, 629, 651 P.2d 560, 563 (1982); *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 36, 655 P.2d 926 (1982). The commission is also required to compile and permanently preserve a set of minutes. On the other hand, even a very poor recording of the hearing may suffice. *Rural Kootenai Organization, Inc. v. Bd. of Comm'rs, Kootenai Cnty.*, 133 Idaho 833, 843-44, 993 P.2d 596, 606-07 (2000).

26. EQUAL PROTECTION

Equal protection claims arise from time to time in land use appeals, although they rarely gain any traction.

The Fourteenth Amendment of the Constitution bars states from enacting legislation that denies any person equal protection under the law. U.S. Const., Amend XIV, § 1. Similar protection is embodied in Idaho's Constitution. Idaho Const. art. I, § 2. These equal protection provisions apply to corporations as well as to natural persons. In re Case, 20 Idaho 128, 132-33, 116 P. 1037, 1038 (1911). In essence, the equal protection provisions prohibit the government from singling out certain individuals or classes of persons for special treatment. While some classification is inherent in all legislation, the Equal Protection Clause prohibits laws that are in reality "a subterfuge to shield one class or unduly burden another." 16B Am. Jur. 2d., Constitutional Law § 808 (1998). Thus, where legislation classifies persons without any rational basis, treating some better than others, it is unconstitutional.

Not all legislative classifications are inappropriate. The Equal Protection Clause "does not preclude the states from enacting legislation that draws distinctions between different categories of people, but it does prohibit them from according different treatment to persons who have been placed by statute into different classes on the basis of criteria wholly unrelated to the purpose of the legislation." 16B Am. Jur. 2d., Constitutional Law § 793 (1998).

By way of example, it is reasonable and proper to implement different maximum fee schedules for ophthalmologists and optometrists. *Posner v. Rockefeller*, 31 A.D.2d 352 (N.Y. 1969). In that case the purpose of the legislation (to implement Medicare requirements) was rationally related to the distinction drawn between doctors and non-doctors. The situation would be entirely different if instead the Legislature declared that ophthalmologists are subject to a moratorium on new water rights, while optometrists are not. Plainly, such a classification would improperly single out a particular class of citizens, thus violating the Equal Protection Clause.

Our Supreme Court has summed up the law concisely: "The discrimination must rest upon some reasonable ground of difference between the persons or things included and those excluded, having regard to the purpose of the legislation, and, within the sphere of its operation, the statute must affect all persons similarly situated." *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 403-04, 263 P. 45, 53 (1927). In *Big Wood*, the Court upheld a statute providing special treatment of irrigation systems covering over 25,000 acres, noting that the classification was legitimate because it did not bear on the nature of the corporation, but instead "its classification relates solely to size." Big Wood, 45 Idaho at 403, 263 P. at 53.

A good example of an unconstitutional differentiation is found in *Corm v. Farm*, 33 Idaho 314, 193 P. 1013. In that case, the Idaho Supreme Court struck down a law that singled out Carey Act irrigation companies, allowing them to modify their boards more easily than other Idaho corporations. The Court declared that such special treatment of one type of water user "is not founded on a difference either natural, or intrinsic, or reasonable." *Crom*, 33 Idaho at 319, 123 P. at 1014.

Equal protection claims can also be founded on allegations of unequal and discriminatory enforcement of land use ordinances. A good overview of the law in this context can be found in *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 853-54, 136 P.3d 310, 324-25 (2006) (J. Jones, J.) (remanding with instructions on how to evaluate equal protection claims).

In 2012, the U.S. Supreme Court rejected an equal protection challenge in *Armour v. City of Indianapolis*, 132 S. Ct. 2073 (2012). For decades, Indianapolis funded sewer projects using Indiana's "Barrett Law," which authorized cities to assess fees to property owners served by individual sewer projects and improvements. They could pay the fee in a lump sum or over a period of up to 30 years. In 2005, the city changed its funding mechanism to rely more on bonds (repaid by property owners city-wide), thereby lowering individual sewer connection charges and encouraging transition away from septic tanks. To facilitate the change, the city simply forgave all outstanding unpaid charges under the former Barrett Law system. This benefited those who were paying overtime and, not surprisingly, upset those who had already paid the entire hook-up fee. The latter group sued, alleging that the city's transition to the new system violated equal protection. In a six-three decision, the Court rejected the charge.

The Court began by noting that the city's classification system does not involve a fundamental right or suspect classification.

> As long as the City's distinction has a rational basis, that distinction does not violate the Equal Protection Clause. This Court has long held that "a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 319–320, 113 S. Ct. 2637, 125 L.Ed.2d 257 (1993); *cf. Gulf, C. & S.F.R. Co. v. Ellis*, 165 U.S. 150, 155, 165–166, 17 S. Ct. 255, 41 L. Ed. 666 (1897).

Armour, 132 S. Ct. at 2079-80. The Court noted that that this might have been different had the new payment system targeted newcomers or out-of-state commerce. *Armour*, 132 S. Ct. at 2080. The Court then concluded that Indianapolis'

classification system has a rational basis because, "[o]rdinarily administrative considerations can justify a tax-related distinction." *Armour*, 132 S. Ct. at 2081. The Court explained:

> After that change, to continue Barrett Law unpaid-debt collection could have proved complex and expensive. It would have meant maintaining an administrative system that for years to come would have had to collect debts arising out of 20-plus different construction projects built over the course of a decade, involving monthly payments as low as $25 per household, with the possible need to maintain credibility by tracking down defaulting debtors and bringing legal action.
>
> . . .
>
> The rationality of the City's distinction draws further support from the nature of the line-drawing choices that confronted it. To have added refunds to forgiveness would have meant adding yet further administrative costs, namely the cost of processing refunds.

Armour, 132 S. Ct. at 2081.

27. DEVELOPMENT AGREEMENTS

A. Section 67-6511A (development agreements for rezones).

Development agreements are contracts between a land developer and a local government in which the developer makes various commitments affecting a proposed development conditioned upon receiving the necessary land use approvals. These commitments might encompass restrictions on use, design of the development, conservation requirements (such as water reuse), and provision for roads and other infrastructure, open space, workforce housing, and other benefits. These conditional commitments enable the governing body to consider the land use application in the light of these favorable features. The local government, in turn, has a mechanism to ensure that promises made are kept.

Development agreements are routinely employed in a variety of land use contexts. As discussed below, they have been recognized by the Idaho Supreme Court as valid independent of specific statutory authorization. *E.g.*, *Sprenger, Grubb & Associates v. Hailey* (*"Sprenger Grubb I"*), 127 Idaho 576, 903 P.2d 741 (1995) (Silak, J.) (upholding a development agreement that predated the authorization now contained in Idaho Code § 67-6511A).

In 1991, the Legislature ratified and codified the longstanding practice of entering into development agreements in the context of rezoning. Idaho Code § 67-6511A.[459] Specifically, the statute authorized local governments to "require or permit as a condition of rezoning that an owner or developer makes a written commitment concerning the use or development of the subject parcel."[460] The legislation was developed and promoted by the Association of Idaho Cities, which explained that it would facilitate "contract zoning"—allowing local governments to require commitments from developers before approving a rezone.[461] The legislative

[459] Section 67-6511A was enacted by 1991 Idaho Sess. Laws, ch. 146. It has never been amended.

[460] The statute refers to "commitments." The section heading refers to "development agreements." Neither term is defined. The bill's statement of purpose uses the terms "commitment" and "development agreement" interchangeably: "The purpose of this legislation is to create a new section of Idaho Code relating to the Local Planning Act. This new section, 67-6511A, Idaho Code, would give a city or county the option to require a written commitment—a development agreement—regarding the use or development of a parcel which is rezoned. The city or county using this authority will be required to adopt rules relating to the creation, form, recording, modification, enforcement and termination of the development agreements." Statement of Purpose for RS00039 (1991).

[461] "The AIC will promote legislation to allow for "contract zoning." This is a zoning technique which would allow a city to control—through the use of a contract—the type of development for which a zoning variance might be granted. The contract would protect the city from a situation in which a proposed development falls through and a less desirable replacement development is established on the newly zoned property." *Recommended Top Ten Priorities*, Statement of Association of Idaho Cities in support of H.B. 194 (1991). "Chairman Stone called on

history further explains that the legislation employed contracts to ensure that commitments made by one developer would carry over to subsequent owners of the property.[462]

In many cases, development agreements are initiated by the developer hoping to secure approval of the necessary entitlements. However, section 67-6511A also authorizes a local government to impose conditions on a rezone sought by a developer. The statute includes no substantive guidance or limitations on the types of conditions a jurisdiction may impose on a development. Therefore, the developer can be placed in a difficult position if the jurisdiction seeks to impose exactions as conditions of rezoning or initial zoning that are unfair or beyond development standards that the jurisdiction has adopted for the community at large. The *Nollan* and *Dolan* cases[463] may prevent exactions that are out of proportion to the development's impact on the community (see Section 28.E at page 606). However, these protections are not written into the annexation, zoning, or development agreement statutes.

The authority granted by the statute is not self-executing. Rather, it authorizes a city or county governing board to adopt an implementing ordinance addressing the "creation, form, recording, modification, enforcement and termination of conditional commitments." Idaho Code § 67-6511A.

The act requires the development agreement to be recorded. Nevertheless, it is binding on the owner and others with notice even if it is not recorded. Idaho Code § 67-6511A.

A development agreement becomes effective upon adoption of the zoning ordinance and is binding on the owner of the parcel, each subsequent owner, and

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Mike Wetherell to introduce the legislation to the committee. He stated this new section, 67-6511[A] gives the city or county the option of requiring a written development agreement regarding the use or development of a parcel that is rezoned. Frequently a developer comes to the city with a well-designed project, receives rezoning and then the project falls through. Years later the deal falls through and the developer sells to a third party who wants to build something on the land that does not fit into the original rezoning intentions of the planning and zoning authority." Hearing before the House Local Government Committee, at 1 (Feb. 12, 1991). "Mr. Wetherell told the committee this legislation would give a city or county the option of requiring a development agreement regarding the use or development of a parcel which is rezoned. He told the committee that developers are supportive of the legislation because it is often difficult to get a parcel rezoned." Hearing before the House Local Government Committee, at 1 (Feb. 26, 1991).

[462] "Bill Jaroki made the presentation of House Bill 194. This bill holds agreements in place that are made between a city and a developer to those new developers that may buy property. A written contract would hold such agreements in place." Hearing before Senate Local Government and Taxation Committee, at 2 (Mar. 11, 1991).

[463] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (Scalia, J.); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (Rehnquist, J.).

each person acquiring an interest in the parcel, unless modified or terminated by the governing board after a public hearing. Idaho Code § 67-6511A.

The statute expressly provides that development agreements are enforceable against the developer. Perhaps that includes specific performance. However, the only remedy specifically mentioned in the statute is the provision allowing the governing board to terminate the agreement and rezone the parcel back to its prior zoning if the developer does not live up to its commitments in the agreement. Idaho Code § 67-6511A. Oddly, the statute does not address the question of whether the development agreement is enforceable against the governing body. However, it would seem that two-way enforceability is implicit in the statute's use of the term "agreement."

In *Price v. Payette Cnty. Bd. of Cnty. Comm'rs,* 131 Idaho 426, 431, 958 P.2d 583, 588 (1998) (Trout, C.J.), the Court ruled that the authority to enter into a development agreement under section 67-6511A is purely discretionary. Even after enacting an implementing ordinance, the county was not required to enter into a development agreement.

B. Development agreements may be employed in the context of annexation and initial zoning, as well as re-zones.

By its terms, section 67-6511A applies only to rezoning.[464] Neither the legislation nor the legislative history addresses whether that includes the initial zoning that accompanies annexation. Given the broad purposes of the Act, as illustrated by its legislative history,[465] it is difficult to imagine that the Legislature would have intended to cover rezones but not initial zones. The twin goals of encouraging developers to make commitments and ensuring that those commitments carry over to future owners would seem equally applicable in both situations. The failure to address the question is not surprising. The distinction between initial zoning and rezoning is a subtle one not well understood even by many

[464] A rezone occurs when property has been previously zoned and that zoning is now being changed by the same entity that zoned it previously. Technically speaking, this does not apply to the "initial" zoning that occurs when a property is annexed. Even if the land was previously zoned by the county, the city's first zoning ordinance applicable to the annexed land is considered an initial zone. *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 960 n.3, 188 P.3d 900, 902 n.3 (2008). As explained in footnote 467 at page 569, this legal principle dates to 1968, but the terminology is a recent development.

[465] All of the relevant legislative history is set out in footnotes 460, 461, and 462. That legislative history uses the term rezone, but, like the statute itself, does not explain whether it was intended to include or exclude initial zoning.

practitioners.[466] Moreover, the terminology drawing a distinction between "rezone" and "initial zone" did not come into common usage until after 1991.[467]

The conclusion that section 67-6511A encompasses initial zoning as well as rezoning is implicitly confirmed in *Wylie v. State*, 151 Idaho 26, 253 P.3d 700 (2011) (J. Jones, J.). In that case, the Idaho Supreme Court enforced a development agreement entered into in conjunction with the annexation, initial zoning, and approval of a preliminary plat of a subdivision along Chinden Boulevard in Meridian.[468] No one, it appears, challenged the validity of the development

[466] In *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008), a developer filed an application entitled "annexation/rezone application." *Id*., 145 Idaho at 961, 188 P.3d 903. The Court explained that this was not the correct terminology and that the correct term is "initial zoning." *Id*., 145 Idaho at 960 n.3, 188 P.3d 902 n.3.

[467] The seminal case dealing with zoning upon annexation, *Ben Lomond, Inc. v. City of Idaho Falls*, 92 Idaho 595, 448 P.2d 209 (1968), established the legal principle that newly annexed land is unzoned, but that case did not employ the "initial zoning" terminology for annexed land. At the time, the term "initial zoning" was used to describe the first time any jurisdiction zoned the land. *Dawson Enterprises, Inc. v. Blaine Cnty.*, 98 Idaho 506, 512, 567 P.2d 1257, 1263 (1977) (Bistline, J.); *Taylor v. Bd. of Cnty. Comm'rs, Cnty. of Bonner*, 124 Idaho 392, 396-97, 860 P.2d 8, 12-13 (Ct. App. 1993). The only pre-1991 case to use the term initial zoning in the context of annexed land, and then only in passing, was *Burt v. City of Idaho Falls*, 105 Idaho 65, 67, 665 P.2d 1075, 1077 (1983) ("The annexed land was not rezoned by the city but initially zoned."). The first case to define the term "initial zoning" in the context of newly annexed land was *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 960 n.3, 188 P.3d 900, 902 n.3 (2008) (Eismann, J.). In *Wylie v. State*, 253 P.3d 700, 703 (Idaho 2011), however, the court used the terms "initial zoning" and "rezoning" interchangeably. *Wylie* at 703 (noting that the applicant "applied for the annexation and rezone" while, in the very next sentence, saying that the city "approved the initial zoning of the Property"). Thus, there is no reason to think that the Legislature in 1991 would have used the term "rezoning" to exclude initial zoning upon annexation.

[468] The *Wylie* decision is a bit challenging to sort out. In the development agreement, Wylie's predecessor agreed to limit access to Chinden Boulevard from his proposed development in Meridian. After acquiring the property, Wylie sought a variance allowing direct access to Chinden Boulevard. The City denied the variance request, after which Wylie promptly sought a declaratory judgment declaring that ITD had exclusive jurisdiction to control access and that the City's ordinance dealing with access was void. As the Idaho Supreme Court pointed out, it is unclear why Wylie did not seek an amendment of the development agreement (despite earlier having obtained a modification on a different aspect of the agreement). The Court first ruled that the development agreement's unambiguous requirement limiting access mooted any claims that Wylie might have under the development agreement. (This is confusing, because the opinion does not suggest that Wylie had any claims under the agreement.) The Court then turned to the ordinance, holding the agreement did not render the challenge to the ordinance non-justiciable. (The Court did not explain why this is so. It would seem that if the applicant agreed to do something, that would moot its argument that the city could not have compelled the applicant to do it. This seems to have been the holding the district court.) The Court first opined that the ordinance was not preempted by state law or otherwise *ultra vires*. Despite this ruling on the merits, the Court then concluded that the ordinance challenge was nonjusticiable because "Wylie has been unable to articulate how a judgment declaring the Ordinance invalid would provide him any relief." *Wylie*, 151 Idaho at 34, 253 P.3d at 708. This statement, however, does not seem to be based on Wylie's commitments in the

agreement itself. Nor did the parties or the Court draw a distinction between initial zoning and rezoning.[469]

The Court expressly ruled, "The terms of the Agreement are binding on Wylie . . . ." *Wylie*, 151 Idaho at 32, 253 P.3d at 706. In so ruling, the Court noted that it was entered into pursuant to Idaho Code § 67-6511A. *Wylie*, 151 Idaho at 33 n.7, 253 P.3d at 707 n.7. Thus, there appears to be no doubt that section 67-6511A authorizes development agreements for annexation/initial zoning as well as for rezones.

C. Development agreements are also valid outside the context of section 67-6511A.

The Idaho Supreme Court has recognized the efficacy of development agreements arising prior to the enactment of section 67-6511A. *Sprenger, Grubb & Associates v. Hailey* (*"Sprenger Grubb I"*), 127 Idaho 576, 903 P.2d 741 (1995) (Silak, J.) involved a development agreement entered in 1973 governing the annexation and initial zoning of 654 acres of land.[470] Under the agreement, the developer committed to make cash contributions, to construct a recreation center and a sewage treatment facility, and to dedicate open space totaling over 30 percent of the property. The city, in turn agreed to the annexation and initial zoning and to "take all action as may be required by [the developer] to develop the annexed real property in accordance with the terms and provisions of the [developer's] Master Plan . . . ." *Sprenger Grubb I*, 127 Idaho at 580, 903 P.2d at 745.[471]

In this case, most of the development was residential, but the master plan also contemplated a small commercial area within the development. Many years later, after much but not all of the development had been built, the City of Hailey downzoned the commercial area from "business" to "limited business." This was done, apparently, to prevent construction of a big box discount store outside of the

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development agreement but on the fact that the ITD had independently denied Wylie relief. Although the Court's reasoning is tricky to sort, the bottom line message appears to be that challenging governmental action as unauthorized is fraught with difficulty if the challenger has first agreed to the action.

[469] Indeed, the Court used the terms interchangeably. It noted that the applicant "applied for the annexation and rezone" and, in the very next sentence, said that the city "approved the initial zoning of the Property"). *Wylie* at 703.

[470] *Sprenger Grubb I* did not mention LLUPA's provision on development agreements, Idaho Code § 67-6511A, enacted in 1991, presumably because the development agreement at issue pre-dated that provision (by nearly two decades).

[471] Development agreements entered into before the government approval are typically made conditional upon approval of the relevant entitlements. In such cases, the government is not bound to approve the development despite signing the agreement. Presumably that was the case here, but the opinion does not specifically say so.

city business core.[472] The developer sued alleging, among other things, that the downzone violated the development agreement.

The Idaho Supreme Court took it for granted that cities and developers have authority to enter into such development agreements. Instead, the Court focused on whether the downzone violated the terms of the development agreement. The Court found that the agreement contemplated small convenience stores to serve the homeowners, not a large, regional store. Accordingly, it found this particular downzone did not violate the agreement. For this reason, the Court found it unnecessary to consider the harder question of "whether such a provision [barring any future downzoning] could even be enforced against a City Council exercising its police powers many years later." *Sprenger Grubb I*, 127 Idaho at 581, 903 P.2d at 746 (citing *Idaho Falls v Grimmett*, 63 Idaho 90, 97, 117 P.2d 461, 464 (1941)). Thus, while a question remains about whether a city or county may "barter away its police power,"[473] there is no doubt that under *Sprenger Grubb I* development agreements are valid and enforceable against the developer (and, at least to some extent, against the government).

Another case dealing with a pre-1991 development agreement (that is, before section 67-6511A) is *Lane Ranch Partnership v. City of Sun Valley* (*"Lane Ranch I"*), 144 Idaho 584, 166 P.3d 374 (2007) (Trout, J.). This case dealt with a 1986 agreement setting out terms for annexation and initial zoning of a property by Sun Valley. The developer's successor later sought a rezone that was inconsistent with the development agreement, and the city turned it down on the basis that the development agreement must first be amended.[474] The Court found that since the rezone was sought by the landowner, the city could grant it without amending the

[472] The opinion makes reference to "a major retain shopping center, such as a 'K-Mart' or 'Shopko.'" *Sprenger Grubb I*, 127 Idaho at 581, 903 P.2d at 746.

[473] The *Sprenger Grubb I* Court cited *Idaho Falls v. Grimmett*, 63 Idaho 90, 97, 117 P.2d 461, 464 (1941) (Ailshie, J.) (police power of a municipality cannot be bartered away even by express contract). *Sprenger Grubb I*, 127 Idaho at 581, 903 P.2d at 746.

[474] This case involved a challenge to an annexation agreement entered into in 1986 between the city and the predecessor of Lane Ranch Partnership. The agreement provided that the city would annex the property, and provided that the portion south of Elkhorn Road would be zoned residential and the property north of the road would be zoned open space. In 2001, Lane Ranch filed subdivision and rezone applications (and a request for amendment of the comprehensive plan) to allow some development on the northern property. The city denied the applications noting that granting them would require amendment of the development agreement. The city said, in effect, "We might both agree that this rezone makes sense, but, alas, we're bound by the annexation agreement. Before we can even consider the rezone, we must renegotiate the development agreement."

development agreement.[475] By clear implication, however, the development agreement was otherwise assumed to be valid.

An example of a case involving a development agreement outside the context of rezoning is *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 148 P.3d 1247 (2006) (Burdick, J.). In 2001, the county approved the development and issued a final plat subject to a requirement to enter a development agreement. A neighbor sued, complaining that, under the local ordinance, the county should have insisted on a development agreement being in place prior to final plat. The Court found that under the local ordinance development agreements were mandatory, but the county could decide when to enter into the agreement. "Thus, we hold P & Z did not err by conditioning its approval on the acceptance of a development agreement." *Cowan*, 143 Idaho at 516, 148 P.3d at 1262. The Court further noted that "a development agreement is a contract between the County and the developer and gives the developer vested rights in the plat." *Cowan*, 143 Idaho at 516, 148 P.3d at 1262. Although the subject agreement was entered into after 1991, the Court did not mention section 67-6511A, presumably because the development agreement was not required in the context of a rezone.

None of these cases relied on (or even mentioned) section 67-6511A. Plainly, then, there is sound common law authority recognized the proper role of development agreements. Although the appellate courts have not articulated a basis for this authority, it is presumably part of the inherent police power and/or based on the general statutory authority (Idaho Code §§ 50-301, 31-601, 37-604) described in footnote 476 at page 573. In any event, these cases demonstrate that the effect of section 67-6511A was not to create new authority, nor to limit the authority to rezones. Section 67-6511A simply codified the practice (and set particular requirements, such as an implementing ordinance) in the context of rezones.

[475] The Court applied traditional rules of construction to construe the annexation agreement, finding that it was unambiguous. It ruled that the agreement contemplated development only on the southern property. Despite this, the Court ruled that the agreement did not prohibit the developer from seeking zoning inconsistent with the agreement, nor justify the city in automatically denying the applications on the basis of the agreement. (This ruling was made in the context of the second prong of the litigation—the judicial review of the city's factual findings.) Instead, the Court ruled that "the City may certainly consider the Agreement as well as the Agreement's history and purpose, in deciding whether to grant or deny the Partnership's applications. The Agreement may be a factor in the city's determination, but the Agreement does not absolutely bind the City to deny the rezone as the City's findings suggest." *Lane Ranch I*, 144 Idaho at 591, 166 P.3d at 381. In other words, the existence of the agreement is not dispositive; the city must decide whether or not to follow it. The Court offered no guidance to the city as to how it should factor into its decision an agreement reached two decades ago. Apparently, however, it has enough discretion to change its mind.

D. Other statutory authority for development agreements.

In addition to section 67-6511A and the common law recognition of development agreements discussed above, cities and counties have broad and express statutory authority to enter into contracts of all types and to engage in other actions in fulfillment of their police powers.[476] The authors are not aware of any judicial decisions construing this authority in the context of development agreements. (This authority is also discussed in the section of this Handbook dealing with lawful fees versus illegal taxes.)

E. Development agreements and IDIFA.

Note that the Idaho Development Impact Fee Act ("IDIFA") also authorizes certain development agreements for site-specific project improvements. Idaho Code § 67-8214(2).

By its express terms, the various restrictions and requirements relating to impact fees imposed by the Idaho Development Impact Fee Act ("IDIFA") do not apply to applicants for voluntary annexation. Voluntary annexations are typically governed by agreements that addresses the annexation and the initial zoning. IDIFA provides:

> Nothing in this chapter [IDIFA] shall restrict or diminish the power of a governmental entity to annex property into its territorial boundaries or exclude property from its territorial boundaries upon request of a developer or owner, or to impose reasonable conditions thereon, including the recovery of project or system improvement costs required as a result of such voluntary annexation.

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[476] Idaho Code § 50-301 applies to cities: "Cities governed by this act shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; accept grants-in-aid and gifts of property, both real and personal, in the name of the city; acquire, hold, lease, and convey property, real and personal; have a common seal, which they may change and alter at pleasure; may erect buildings or structures of any kind, needful for the uses or purposes of the city; and exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho." Idaho Code § 50-301 (emphasis supplied). Similar statutory authority exists for counties: "Every county is a body politic and corporate, and as such has the powers specified in this title or in other statutes, and such powers as are necessarily implied from those expressed." Idaho Code § 31-601. "It has power: 1. To sue and be sued. 2. To purchase and hold lands. 3. To make such contracts, and purchase and hold such personal property, as may be necessary to the exercise of its powers. 4. To make such orders for the disposition or use of its property as the interests of its inhabitants require. 5. To levy and collect such taxes for purposes under its exclusive jurisdiction as are authorized by law. 6. Such other and further authority as may be necessary to effectively carry out the duties imposed on it by the provisions of the Idaho Code and constitution." Idaho Code § 37-604 (emphasis supplied).

Idaho Code § 67-8214(7).

The only restrictions section 67-8214(7) places on conditions to a voluntary annexation are that the conditions must be "reasonable." This includes, but is not limited to, conditions for the recovery of project or system improvement costs. By negative implication, cities have the authority to impose conditions within that broad sweep.

28. TAKINGS

A. The constitutional basis

One often hears references to "unconstitutional takings." It is important to understand what is meant by that term. After all, there is nothing unconstitutional about the government taking private property for a public purpose. The only requirement is that compensation be paid. Specifically, the Fifth Amendment[477] requires the government to compensate individuals for the taking of property.[478]

The term "unconstitutional takings" can mean either of two things. It may refer to a taking that is not for a public purpose. But those are extremely rare. Compensated takings are undertaken all the time by means of condemnation. The only limit on the power of condemnation is the issue explored in *Kelo v. City of New London*, 545 U.S. 469 (2005) (Stevens, J.)—that is, whether the purpose of the condemnation is truly a public purpose. That topic is explored in another chapter. The issue also arises in the context of the Idaho Regulatory Takings Act discussed in section 28.I at page 648.

This chapter addresses an entirely different question—the extent to which the government may burden private property without paying compensation. In other words, what is a taking? If a governmental action amounts to a taking, the thing that makes it unconstitutional is not the taking itself but the government's refusal to pay for it. Indeed, we might be clearer if we would refer to these as "uncompensated takings" rather than "unconstitutional takings."

We begin by noting that not every uncompensated burden placed by the government on private property is a taking. As citizens, we accept the fact that governmental actions often limit the use of our property. For instance, when the government tells us that we must stop at a red light, our right to use our car is

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[477] "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Fifth Amendment is applicable to the states via the due process clause of the Fourteenth Amendment, U.S. Const. amend. XIV § 1. *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 536 (2005).

[478] The term "taking" derives from the Constitution's language about the taking of property in the Just Compensation Clause of the Fifth Amendment: "[N]or shall private property be taken for public use without just compensation." U.S. Const. amend. V. The Fifth Amendment is applicable to the states via the due process clause of the 14th Amendment. *Chicago Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226 (1897); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). The constitutional protection extends to all kinds of property, real, personal, and intangible. *See, e.g.*, *City of Cincinnati v. Louisville & Nashville R.R. Co.*, 223 U.S. 390, 400 (1912) ("[L]and and movables [are] within the sweep of [eminent domain]."); *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1003-04 (1984) (holding that property right in trade secrets is protected by Takings Clause.

Idaho also has its own constitutional protection. "Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor." Idaho Const. art. I, § 14.

impaired. We accept this, however, because the burden is shared widely and makes all of our lives better. On the other hand, we would not accept a regulation that allowed the Mayor to take our car when it was needed for government business. Doing so would place too much of the burden of government on an individual.

"The Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public has a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The law of takings addresses the question of when governmental action crosses this line and entitles the property owner to compensation for the burden imposed.

When the government recognizes its obligation to pay for property it takes, its acts by way of condemnation (eminent domain), a subject treated elsewhere. Takings cases arise where the government contends it has no obligation to compensate property owners for the impact of governmental action. Because the property owner is the plaintiff in a takings case (in contrast to being the defendant in a condemnation case), takings cases are often referred to as "inverse condemnation" cases.[479]

The body of law addressing takings in Idaho is not so extensive as in the federal cases. However, in recent years[480] the Idaho Supreme Court has embraced the taking analysis of U.S. Supreme Court when analyzing takings issues under the Idaho State Constitution. *E.g.*, *BHA Investments, Inc. v. State of Idaho, Alcohol Beverage Control Bd.* ("*BHA v. State*"), 138 Idaho 348, 354, 63 P.3d 474, 480 (2003) (Schroeder J.); *KMST, LLC v. Cnty. of Ada*, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003); *Covington v. Jefferson Cnty.*, 137 Idaho 777, 781-82, 53 P.3d 828, 832-33 (2002); *McCuskey v. Canyon Cnty. Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 216-17, 912 P.2d 100, 103-04 (1996) (Trout, J.). The Court has noted that the Idaho Constitution differs somewhat from other state constitutional takings provisions.[481]

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[479] "An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemnor. An inverse condemnation action cannot be maintained unless an actual taking of private property is established." *Covington v. Jefferson Cnty.*, 137 Idaho 777, 780, 53 P.3d 828, 831 (2002). "Such a suit is 'inverse' because it is brought by the affected owner, not by the condemnor." *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 n. 6 (1984).

[480] In earlier years, the Idaho Supreme Court suggested that it might follow a different path. "We note, however, that . . . the decision in *Agins v. City of Tiburon, supra*, would be binding upon us only insofar as it interprets the United States Constitution. *Agins* is not necessarily binding as to our interpretation of the Idaho Constitution . . . ." *Cnty. of Ada v. Henry*, 105 Idaho 263, 266, 668 P.2d 994, 997 (1983).

[481] "Article I, section 14 of the Idaho Constitution, unlike the constitution of many other states, omitted the words 'damaged' following the word 'taken.' . . . [I]n other words, it has not authorized the collection of damages where there is no actual physical taking of the property." *Covington v. Jefferson Cnty.*, 137 Idaho 777, 780-81, 53 P.3d 828, 831-32 (2002) (internal quotation and ellipses omitted). The absence of the word "damaged" however simply brings Idaho's taking

Apparently the Court nonetheless views the Idaho Constitution as being in line with the federal constitution.

"Under the United States Constitution, the United States Supreme Court has articulated the longstanding distinction between physical and regulatory takings." *Covington v. Jefferson Cnty.*, 137 Idaho 777, 781, 53 P.3d 828, 832 (2002). In addition, the Supreme Court recently has articulated other "categorical" takings, such as a taking based a permanent deprivation of all economically beneficial uses (section 28.C(4) at page 591). Likewise, there are sub-categories of takings cases involving particular facts, such as the exaction cases (section 28.E at page 606). Some might classify these as different species of takings. The authors prefer to classify them under the broader rubric of regulatory takings. Each of these is discussed below.

B. Direct appropriation of property and other physical takings

(1) Distinguishing physical and regulatory takings

There are two types of takings cases: physical and regulatory. In the early days of the nation, the takings provision of the Constitution was viewed narrowly and thought to apply only to physical takings. "Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922), it was generally thought that the Takings Clause reached only a 'direct appropriation' of property or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1014 (1992) (Scalia, J.) (citations omitted, brackets original).

> The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property. See, *e.g.*, *United States v. Pewee Coal Co.*, 341 U.S. 114, 71 S. Ct. 670, 95 L. Ed. 809 (1951) (Government's seizure and operation of a coal mine to prevent a national strike of coal miners effected a taking); *United States v. General Motors Corp.*, 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311 (1945) (Government's occupation of private warehouse effected a taking).

Lingle v. Chevron USA, Inc., 544 U.S. 528, 537 (2005) (O'Connor, J.).

> The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to

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provision into line with the federal takings clause. In this case, the Court found that a diminution in value of one fourth of the assessed value was insufficient to render the government's action a taking.

> exclude others from entering and using her property—perhaps the most fundamental of all property interests.

Lingle, 544 U.S. at 539.

"A physical taking occurs when the government's action amounts to a physical occupation or invasion of the property, including the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Tulare Lake Basin Storage Dist. v. United States*, 49 Fed. Cl. 313, 318 (2001) (quoting *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878).

The authors of a 2010 law review article explained the distinction this way: "This article includes as potential 'physical takings' regulations that require owners of private property to submit to occupations by the government or by third parties. See generally *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (presenting the issue of whether a cable company's physical occupation of a person's property as authorized by New York Law amounted to a taking, and finding that such actions were a taking). In contrast, this article characterizes regulations that restrict uses of property as potential 'regulatory takings.'" Daniel L. Siegel and Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 Vt. J. Envtl. L. 479, 480 n.2 (2010).

A good summary of the distinction between physical and regulatory takings is found in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *overruled on other grounds by Yee v. City of Escondido*, 503 U.S. 519 (1992) (O'Connor, J.).

> Supreme Court cases addressing this question can be divided into two lines of authority: the so-called regulatory taking cases and the physical occupation cases. Regulatory taking cases are those where the value or usefulness of private property is diminished by regulatory action not involving a physical occupation of the property. A typical case of this sort is *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), where New York City prohibited Penn Central from building a 55-story office tower over its Grand Central Terminal. Despite the drastic diminution in the value and usefulness of Penn Central's property, the Court held that the city's action did not amount to a taking.
>
> Physical occupation cases are those where the government physically intrudes upon private property either directly or by authorizing others to do so. A typical case is *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868

> (1982), where New York City authorized Teleprompter to string 36 feet of one-half inch coaxial cable and place two switchboxes, all amounting to about one and one half cubic feet, on a private building. Despite the minimal burden placed on the property owner, the Court in *Loretto* held that a taking had occurred.

Hall, 833 F.2d at 1275 (footnotes omitted). The *Hall* case involved a challenge to a municipal rent control ordinance. The court classified the ordinance as a physical occupation rather than regulatory taking.[482] *Hall* held that rent control ordinances constitute physical takings, not because they involve money, but because they allow lessees to physically occupy the landowner's property.

The conclusion that rent control results in a physical taking was expressly overruled in *Yee v. City of Escondido*, 503 U.S. 519 (1992) (O'Connor, J.), another rent control case.

> The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. . . .
> But the Escondido rent control ordinance, even when considered in conjunction with the California Mobilehome Residency Law, authorizes no such thing. Petitioners voluntarily rented their land to mobile home owners. At least on the face of the regulatory scheme, neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with 6 or 12 months' notice. Cal. Civ. Code Ann. § 798.56(g). Put bluntly, no government has required any physical invasion of petitioners' property.

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[482] The *Hall* court explained:

> Reduced to its essentials, appellants' claim is that the Santa Barbara ordinance has transferred a possessory interest in their land to each of their 71 tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent; and that this interest is transferable, has an established market and a market value. If proven, appellants' claims would amount to the type of interference with the property owner's rights the Court described so eloquently in *Loretto*.

Hall, 833 F.2d at 1276. The court's primary focus was on how uncompensated physical occupations constitute *per se* takings. It also concluded in a footnote that because a physical taking was involved, prong one of *Williamson County* is automatically satisfied. *Hall*, 833 F.2d at 1281 n.28.

Yee, 503 U.S. at 527 (italics original, underlining added). Thus, the U.S. Supreme Court said the rent control statute must be analyzed as a regulatory taking, not a physical taking, which entails a balancing analysis and is not a *per se* taking. "Such forms of regulation are analyzed by engaging in the "essentially ad hoc, factual inquiries" necessary to determine whether a regulatory taking has occurred." *Yee*, 503 U.S. at 529.

The distinction between physical and regulatory takings has been recognized by the Idaho Supreme Court as well. "Under the United States Constitution, the United States Supreme Court has articulated the longstanding distinction between physical and regulatory takings. Recently, the Court has re-emphasized it is inappropriate to treat precedent from on as controlling on the other." *Covington v. Jefferson Cnty.*, 137 Idaho 777, 781, 53 P.3d 828, 832 (2002) (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002)).[483]

"When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes the entire parcel or merely a part thereof." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) (Stevens, J.) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)). *Tahoe-Sierra* was a temporary takings case involving a moratorium on new development. Thus, it was a regulatory taking, not a physical taking case. However, the Court spoke at length about the difference between the two, because the plaintiffs urged a *per se* taking rule similar to the one that applies to physical takings. The Court, however, declined to go there.

In a physical taking, the owner is entitled to compensation "no matter how minute the intrusion, and no matter how weighty the public purpose behind it." *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1015 (1992) (Scalia, J.). This absolute obligation to pay for physical takings stands in sharp contrast to regulatory takings, discussed below, which usually are evaluated on the basis of a balancing test in which mere diminution in value does not give rise to a taking.

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[483] In the *Covington* case, the county planning and zoning authorities allowed a landowner to construct a hot mix plant and landfill across the street from the Covingtons. Rather than sue the neighbor for nuisance, the Covingtons sued the county. The Idaho Supreme Court determined that this was not a physical taking (despite the alleged invasion of their property by dust, flies, and noise), because there was no actual physical invasion of the property. Instead they analyzed it as a regulatory taking, finding that the mere diminutation in value fell short of the *per se* taking requirement in *Lucas*. This raises an interesting question, which the Court did not address. Bear in mind that the county's regulatory zoning action was not directed at the Covingtons. In other words, the county did not restrict in any way what the Covingtons may do with their property. The Court's decision assumes that every governmental regulation of one property that has an effect on another property must be analyzed as a regulatory taking. One might suggest that this is a false assumption.

(2) Exactions are regulatory takings

Note that when the government physically takes property through an exaction, that is analyzed as a regulatory taking, not a physical taking. This is evident from *Yee*, which emphasized that in order to constitute a physical occupation, the property owner must have no choice in the matter. *Yee*, 503 U.S. at 527 ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land.") (emphasis original). Where the property owner may continue to make use of her property, but seeks regulatory authorization to do something else with the property, the exaction is analyzed as a regulatory matter, not a physical occupation.

In *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005), the Court drew a clear distinction between physical takings and exaction-based regulatory takings, even when the end result is that the government ends up with physical possession of the plaintiff's money or property:

> In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking. The question was whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny. . . . *Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings.
> . . .
> In so doing, we reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above-by alleging a "physical" taking, a *Lucas*-type "total regulatory taking," a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*.

Lingle, 544 U.S. at 546-48 (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-32 (1987) (Scalia, J.), *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (Rehnquist, J.), *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1960) (Brennan, J.), and *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1014 (1992) (Scalia, J.)). In other words, obtaining an easement in the property by direct appropriation would have been a physical taking. Obtaining the same thing via

an exaction may still be a taking, but it is analyzed as an exaction (a special category of regulatory taking).

Despite this clear statement by the Supreme Court, the Ninth Circuit for some reason has struggled with whether the acquisition of an easement by way of an exaction should be characterized as a physical or a regulatory taking. "[The] claims arising out of the exaction of the offers to dedicate can plausibly be characterized as either regulatory or physical takings. . . . We think it most plausible to characterize [the] claims as alleged regulatory rather than physical takings." *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 380 (9th Cir. 2002).[484]

(3) Federal law: *Causby*, *Kaiser Aetna*, *Loretto*, and *Tulare Lake*

The only tricky part of physical takings cases is deciding if it is physical. Where the government appropriates a person's property for a road or reservoir, the physical invasion is so obvious that, as a practical matter, these cases are never litigated as takings cases. Instead, the government proceeds by way of condemnation, and the issue is not whether compensation is owed, but how much.

The few physical takings that are litigated occur on the edges, where it is not so obvious that the taking is physical. The lead case on this question is *United States v. Causby*, 328 U.S. 256 (1946), in which the Court ruled that frequent over flights immediately above a landowner's property (which interfered with his raising of chickens) constituted a taking, even though the government never set foot on the property. Justice Douglas wrote that the plaintiff's loss "would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it." *Causby* at 261.

In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (Rehnquist, J.), the Supreme Court held that a requirement by the Corps of Engineers that the developers of a private marina allow public access constituted a physical invasion and, therefore, a categorical taking. "In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests of interests that the Government cannot take without compensation." *Kaiser Aetna*, 444 U.S. at 179-180.

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[484] Elsewhere the court waivered saying, "It is also plausible to characterize Johnson's and the Bucklews' claims as alleged physical takings." *Daniel* at 382. But that was because the exaction involved the physical occupation of the plaintiffs' property. "Although the exactions of the [options for dedication of easements] resulted from the Coastal Commission's regulatory process, the ultimate result of the process was the exaction of options for a public access easement across private property." *Id*. There is nothing in *Daniels* to suggest that an exaction of money constitutes a physical taking.

The next physical taking case occurred in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This case involved a municipal regulation requiring landlords to install cable television connections in their apartments. In *Loretto*, the Supreme Court held that any permanent physical occupation of private property by a government entity is a *per se* taking without regard to whether the regulation achieves an important public benefit or has only minimal economic or other impact on the owner.[485]

In 2004, the Idaho Supreme Court ruled against a takings claim brought in response to a statute immunizing seed farmers from harm caused by their burning of grass. *Moon v. North Idaho Farmers Ass'n*, 140 Idaho 536, 96 P.3d 637 (2004). "The taking asserted by plaintiffs is not a physical taking because the plaintiffs' land is not appropriated and because the smoke complained of does not result in a loss of access or of any complete use of the property." *Moon*, 140 Idaho at 542, 96 P.3d at 643.[486]

Litigation in the Federal Claims Court has involved water rights impacted by the Endangered Species Act. In *Tulare Lake Basin Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001), California water users prevailed in a taking claim against the federal government in response to water use restrictions imposed by the U.S. Bureau of Reclamation ("BOR") to aid the endangered Chinook salmon and delta smelt. Responding to biological opinions issued by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, BOR restricted diversions of water out of the Sacramento and Feather Rivers to the Central Valley Project and the State Water Project, in order to increase flows into San Francisco Bay. The federal defendant urged the Court to evaluate the claim as a regulatory taking, subject to the balancing test set out in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (Brennan, J.), discussed below. However, the district court determined that the interference with the water right constituted a physical taking, thus entitling plaintiffs to compensation even though the entire property right had not been taken.

> While water rights present an admittedly unusual situation, we think the *Causby* example is an instructive

[485] *Loretto* involved a New York City statute that required landlords to install cable television equipment on the roof of their buildings. The city required the landlords to provide a location for a six-foot section of cable one-half inch in diameter, as well as two four-cubic-inch metal boxes. This permanent physical occupation by the city was recognized as a taking, despite its minimal size, consequences, and burden.

[486] The court went on to hold that there was no regulatory taking, either. The court might have reached this conclusion simply by applying the *Penn Central* balancing test. Instead, for reasons that are unclear, the Court ignored *Penn Central* and focused on whether the statute immunizing the seed farmers created an easement to maintain a nuisance. In rejecting the easement theory, the Court found it necessary to expressly reject the view reflected in the *Restatement of Property* § 451.

> one. In the context of water rights, a mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right itself since plaintiffs' sole entitlement is to the use of the water. Unlike other species of property where use restrictions may limit some, but not all of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of all value. . . . To the extent, then, that the federal government, by preventing plaintiffs from using the water to which they would otherwise have been entitled, have rendered the usufructuary right to that water valueless, they have thus effected a physical taking.

Tulare Lake, 49 Fed. Cl. at 319 (citation omitted). The court noted that the taking of property did not have to be complete to be a physical taking and it did not matter that the government did not physically enter the property to effect the taking.

> Defendant attempts to distinguish these cases on the ground that each involved actual diversions of water by the government for its own consumptive use, whereas here, it is claimed, the government has merely regulated the plaintiffs' method of diverting water. Additionally, defendant argues that the government could not by law have physically appropriated plaintiffs' property right since California does not recognize a right to appropriate water for in-stream uses. But as defendant readily admits, the ultimate result of those rate and timing restrictions on pumping is an aggregate decrease in the water available to the water projects. Under those circumstances, whether the government decreased the water to which plaintiffs had access by means of a dam or by means of pumping restrictions amounts to a distinction without a difference.

Tulare Lake, 49 Fed. Cl. at 319-20 (citation omitted).[487]

[487] The *Tulare Lake* case was criticized by the same court in *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (2005), but not on the basis of the physical taking analysis. In *Klamath*, the court concluded that the water user's contract rights for water delivery with BOR were not property rights protected under the Fifth Amendment.

(4) Idaho Law: *BHA II* (*per se* takings based on unauthorized fees)

A special category of takings has been recognized by the Idaho Supreme Court which arises where a municipality charges an illegal fee.

In *BHA Investments, Inc. v. City of Boise* ("*BHA I*"), 138 Idaho 356, 63 P.3d 482 (2003) (Schroeder, J.), the Court invalidated a fee imposed by the City of Boise on the transfer of liquor licenses.[488] The Court noted that Idaho's Constitution grants the State sole authority to regulate liquor. Consequently, cities may charge fees in connection with the sale of liquor only if legislatively authorized. The Court found that the applicable legislation authorized cities to charge a fee for the initial liquor license, but does not authorize cities to charge fees for the transfer of liquor licenses.

In an appeal following remand,[489] *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 108 P.3d 315 (2004) (Eismann, J.),[490] the Court ruled the collection of a fee by a city without authority is a *per se* taking and a violation of the Idaho and United States Constitutions. "Since the City had no authority to charge the liquor license transfer fee, its exaction of the fee constituted a taking of property under the United States and Idaho Constitutions." *BHA II*, 141 Idaho at 172, 108 P.3d at 319. The *BHA II* Court did not use the phrase "*per se*." That is a short-hand description the authors of this Handbook have employed to capture the essence of the holding: that charging an illegal fee automatically equates to a taking.

The effect of this is to convert a challenge to an unauthorized development impact fee (a claim under the municipal taxation provision of the Idaho Constitution, Idaho Const. art. VII, § 6) into a takings claim under both the Idaho Constitution,

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[488] In a decision issued the same day as *BHA I*, the Idaho Supreme Court threw out BHA's claim against the State Alcoholic Beverage Control Board. *BHA Investments, Inc. v. State of Idaho, Alcohol Beverage Control Bd.* ("*BHA v. State*"), 138 Idaho 348, 354, 63 P.3d 474, 480 (2003) (Schroeder, J.; Horton, D.J.). The state, which was authorized to impose transfer fees, was not limited to charging an amount related to the cost of the service provided. The liquor transfer fee was allowed to be disproportionately large because the fee was intended to discourage market entry. Thus, the requirement that a regulatory fee bear a rough relation to the cost of the regulation (per *Chapman*, *Brewster*, and *Loomis*) is applicable "only to licensing of those professions considered desirable." *BHA v. State*, 138 Idaho at 353, 63 P.3d at 479.

[489] On remand from *BHA I*, the district court granted BHA summary judgment and awarded it judgment against the city on the illegal fee issue. However, BHA also sought certification as a class action, which the district court denied. BHA appealed only the class action issue, and the Idaho Supreme Court affirmed. However, the case was consolidated with another case involving other similarly situated parties (Bravo Entertainment and Splitting Kings). This portion of the case became the foundation for most of the discussion in *BHA II*.

[490] A third case, *BHA Investments, Inc. v. State*, 138 Idaho 348, 63 P.3d 474 (2003), involved a challenge to the fees imposed by the state (as opposed to the city). The Court found those fees were proper.

Idaho Const. art. I, § 14, and the U.S. Constitution, U.S. Const. amend. XIV, § 1. This has the effect of giving rise to a federal claim for relief under 42 U.S.C. § 1983, and an entitlement to recovery of attorney fees under 42 U.S.C. § 1988.

C. Regulatory takings

The more difficult and interesting area of inverse condemnation law involves government regulatory actions[491] that rise to the level of a taking. These so called "regulatory takings" are a fairly recent phenomenon. Although traceable to *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)., the explosion of regulatory takings cases began with *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (Brennan, J.).

In the land use context, regulatory takings usually involve (1) restrictions placed on property or (2) exactions (payments) demanded in exchange for regulatory approvals. Of course, the government usually would not institute eminent domain proceedings in a regulatory action, believing, rightly or wrongly, that its actions fall within the police power. If the landowner believes a government regulatory action rises to the level of a taking, it may be appropriate to bring an inverse condemnation or regulatory taking action.

The U.S. Supreme Court recently summarized the difference between physical and regulatory takings this way:

> Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by essentially ad hoc, factual inquiries designed to allow careful examination and weighing of all the relevant circumstances.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 322 (2002) (quotation marks and citations omitted).[492] The Court zeroed in

[491] While *Tahoe-Sierra* seems to put the physical takings cases in a distinct category from regulatory takings, *Lucas* classified physical takings (where there is no express expropriation of the property) as a class of regulatory takings. *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1015 (1992) (Scalia, J.). The distinction is purely semantic. Either way, physical takings are categorical takings, while other regulatory takings are decided on a case-by-case basis applying *Penn Central*'s balancing test. This chapter, depending on whether you prefer the *Lucas* or the *Tahoe-Sierra* terminology, could be entitled simply "regulatory takings" or the more cumbersome "non-physical invasion regulatory takings."

[492] A good discussion of the distinction between physical and regulatory takings is also found in a recent Idaho Supreme Court decision, *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 846-47, 136 P.3d 310, 317-18 (2006) (J. Jones, J.).

on one key difference. In a physical taking, taking any part of the property, even a very small part, requires compensation. In a regulatory taking, in contrast, the amount of the property taken must be quite substantial:

> It is worth noting that *Lucas* underscores the difference between physical and regulatory takings. For under our physical takings cases it would be irrelevant whether the property owner maintained 5% of the value of her property so long as there was a physical appropriation of any of the parcel.

Tahoe-Sierra at 330 n.25.

The essential sideboards of regulatory takings law can be stated in two points: First, the mere diminution in value, standing alone, does not establish a taking. *Covington v. Jefferson Cnty.*, 137 Idaho 777, 782, 53 P.3d 828, 833 (2002). However, if government regulation of private property goes too far, it may amount to a compensable taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). This section explores the development of these principles and how they are applied.

(1) Harbinger of regulatory takings: *Pennsylvania Coal*

Takings law is popularly viewed as providing protection of the little guy against actions of big government. This is particularly so in the context of the furor raised over the Supreme Court's decision on eminent domain in *Kelo v. City of New London*, 545 U.S. 469 (2005) (Stevens, J.).

However, the constitutional takings principle applies equally to protect well-heeled developers and large corporations. Indeed, in the seminal takings case, the principle was employed to protect a large mining company against governmental action taken on behalf of the little guy.

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Supreme Court expressly held for the first time that a regulation may constitute a taking within the meaning of the Takings Clause. In that watershed decision, the Court considered whether a Pennsylvania statute that prohibited coal mining prone to cause subsidence in pre-existing buildings was an unconstitutional taking of the private property of coal mine owners. The Pennsylvania statute was adopted to benefit homeowners who had the misfortune or poor judgment to build homes on land that they did not own in fee simple. The homeowners had acquired merely the surface rights, while the coal company, by agreement, expressly retained the right to mine the land in such a way as to cause subsidence. The Pennsylvania legislature sought to undo this perceived injustice by prohibiting mining in such a way as to destroy the residences (even though their contract said they could). The Supreme Court sided with the coal company, finding that it was owed compensation for the taking of its property:

> But the question at bottom is upon whom the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

Pennsylvania Coal at 415. In short, the Court found that the Pennsylvania Legislature was not justified in altering, without compensation, the allocation of a risk that private parties had allocated among themselves.

Justice Holmes spoke these now famous words, thereby laying the foundation for a new era in takings law: "Government hardly could go on if, to some extent values incident to property could not be diminished without paying for every such change in the general law. . . . The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal* at 413, 415.

(2) Three-part balancing test: *Penn Central*

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (Brennan, J.), is considered the granddaddy of all modern regulatory takings cases because it set forth the three-part takings test that is still applied in the overwhelming majority of inverse condemnation cases. Ironically, recent public statements by the judicial clerk for Justice Brennan who wrote the first draft of the *Penn Central* opinion indicate that the U.S. Supreme Court did not intend at the time for this decision to be of any real importance, let alone contribute the test by which most subsequent taking claims would be judged.

In *Penn Central*, a New York City historic preservation ordinance acted to prevent the owners of Grand Central Station from building a 55-story office tower on top of the station. In deciding that such a restriction was not a regulatory taking (in part because of the availability of transferable development rights), the Court set forth three factors of "particular significance:" (1) the economic impact on the property owner; (2) the extent to which the regulation interferes with distinct investment-backed expectations; and (3) the "character" of the government action.

Given the subjective nature of *Penn Central*'s test, each one of the three factors could be the topic of its own handbook. Remember, there is no magic tipping point as to any of these factors. However, each factor, if sufficiently persuasive, can conclusively establish a taking on its own without reference to the other two factors. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1005 (1984) (investment-backed expectations were "so overwhelming" so as to dispose of the takings question in favor of the government).

More often than not however, the factors are weighed together to decide if the balance of them favors the government or the landowner. What might be considered a large enough economic impact to constitute a taking in one case may not be large enough in another case where the landowner did not have the same level of investment-backed expectations. With these things in mind, recognize that this handbook only highlights a few issues to keep in mind with each factor.

(a) Economic impact

The first component of the balancing test is the extent of the economic impact of the regulation on the landowner. *Penn Central*, however, makes clear that "mere" diminution in value is insufficient, in itself, to constitute a taking. A severe economic loss, however, is a factor to be considered. The questions, then, is "how severe"? In *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992) (Scalia, J.), the Court hinted that perhaps a 95 percent diminution in value would likely constitute a taking. The Federal Circuit has similarly hinted that a 62.5 percent loss could be a taking. Courts outside the Federal Circuit most often say that there must be a deprivation of all or substantially all economic use for a taking.

Penn Central's central theme—that mere diminution in value is insufficient—is good law in Idaho. "While they contend the value of their property has decreased by $29,000, the diminution in property value, standing alone, is insufficient to establish a taking. *Covington v. Jefferson Cnty.*, 137 Idaho 777, 782, 53 P.3d 828, 833 (2002) (citing *Penn Central*).

Note that if the economic depreciation is 100 percent, the balancing test does not apply. Instead, this would be a *per se* taking under *Lucas*. See discussion in section 28.C(4) at page 591.

(b) Investment-backed expectations

The second factor is "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. Issues under this factor may include: (1) the role of a landowner's initially limited economic intentions for the property versus his later intentions for development; (2) whether reasonable expectations can exist when the landowner voluntarily entered a highly regulated field like banking; (3) whether government interference with a property's primary use (*i.e.*, longstanding and existing at time of regulation) plays a role in determining the property owner's investment-backed expectations; and (4) does this factor undermine a takings claim by an owner who acquired the property as a gift of some sort?

The fact that the plaintiff acquired the property after the offending regulation was in place, however, is not part of the calculus. See discussion in section 28.C(7) at page 603.

(c) Character of government action

The third factor mentioned by the *Penn Central* court (the "character" of the government's action) is the most amorphous. Although the term "character" may mean many things, some examples come to mind:

(1) *emergency response versus routine regulation*. If the government action is for war, fire-fighting, or other emergency purposes, courts are more likely to find no taking.

(2) *benefits versus prevention of harm*. A taking is more likely to be found where the purpose of the regulation is to create a public benefit (which, presumably the public as a whole should pay for) as opposed to the prevention of a public harm caused by individual's use of property. However, this distinction was rejected as a defense for categorical takings in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025-26 (1992) (Scalia, J.).

(3) *physical invasion versus limitation on use*. "[Another factor] is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, see, *e. g., United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124. However, this is not really a balancing factor to be weighed in a regulatory taking. If a physical invasion is involved, it is not a regulatory taking at all, and there will be no balancing.

(3) Substantially advance legitimate state interests: *Agins* overruled by *Lingle*

For twenty-five years, the courts followed a decision in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (Powell, J.).[493] In *Agins*, the U.S. Supreme Court upheld the downzoning of property on land overlooking San Francisco Bay, finding that it did not constitute a taking. The Court announced: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." *Agins* at 260 (citations omitted).

This pronouncement caused a stir among legal theorists who believed this test to be more of a substantive due process inquiry as opposed to a taking analysis. Critics pointed out that this test improperly allowed a landowner to second-guess the reasonableness of a government land use decision.

[493] The Idaho Supreme Court acknowledged the decision in Agins, but described it as "murky and unresponsive to many of the broad issues." *Cnty. of Ada v. Henry*, 105 Idaho 263, 266, 668 P.2d 994, 997 (1983).

In the end, the critics won out. In *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 545 (2005) (O'Connor, J.), the United States Supreme Court ruled, "we conclude that the 'substantially advances' formula announced in *Agins* is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation." Agreeing with what commentators and legal theorists had been saying for years, the Court said: "We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and . . . it has no proper place in our takings jurisprudence." *Lingle* at 540.[494]

The Idaho Supreme Court has recognized *Lingle*'s overruling of *Agins*. *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 847, n.5, 136 P.3d 310, 318, n.5 (2006) (J. Jones, J.).

(4) Categorical taking based on no economically viable use: *Lucas, Palazzolo,* and *Tahoe-Sierra*

(a) A new type of categorical taking.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (Scalia, J.), the Supreme Court carved out a new type of "categorical" taking. The Court ruled:

> [W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Lucas, 505 U.S. at 1019 (emphasis original).

In *Lucas*, the developer paid nearly a million dollars for two beachfront lots on the Isle of Palms near Charleston, South Carolina. At the time of purchase, they were zoned for residential development. Two years later, the state legislature enacted a strict coastal protection law that prevented Lucas from erecting any habitable structures on the lots. The trial court found that the regulation rendered the property "valueless," and that factual finding was not challenged on appeal.[495] The state supreme court ruled against Lucas, holding that no compensation is required when a regulation is legitimately aimed at preventing serious public harm. The U.S. Supreme Court reversed. It found that the state had a legitimate interest in protecting its coastline and that the Act substantially advanced that interest. Nonetheless, the Supreme Court determined that the Act effected a taking because it deprived the owner of all economically viable use of his land—thus creating a new class of categorical (that is automatic or *per se*) takings.

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[494] Another effect of *Lingle* was to undermine *Armendariz v. Penman*, 75 P.3d 1311 (9th Cir. 1996), which held that the Fifth Amendment's Takings Claim subsumes or preempts substantive due process claims challenging land use regulations. See discussion in section 28.H(2) at page 647.

[495] The validity of the finding, nonetheless, was questioned by the dissent.

By recognizing this as a categorical taking, the landowner no longer has to demonstrate that his or her harm outweighs other considerations. As one commentator said: "Balancing tests are, however, maddeningly complicated. They require extensive factual analysis; precedents are difficult to analogize and distinguish; and outcomes are unpredictable. Dissatisfied with the complexities and uncertainties of the *Penn Central* balancing test, the current Court has taken an interest in defining categories of 'per se' takings, or government actions that are takings regardless of the public interest involved. In effect, per se takings are pre-balanced. They are categories of governmental action so extreme and intrusive that they always out-weigh the public interest." Angela Schmitz, Note, *Taking Shape: Temporary Takings and the Lucas Per Se Rule in Tahoe-Sierra Preservation Council, Inv. v. Tahoe Regional Planning Authority*, 82 Or. L. Rev. 189, 190 (2003).

(b) Requires <u>no</u> viable economic use.

While the categorical taking test is simple to apply (the landowner wins) once it is determined that a categorical taking has occurred, the *Lucas* Court acknowledged that it is not so easy to determine whether there is a categorical taking in the first instance:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Lucas, 505 U.S. at 1016 n.7.

The *Lucas* Court went on, in another footnote, to observe that a 95% loss in value would take the analysis out of the categorical taking box and put it into the *Penn Central* balancing test box. *Lucas*, 505 U.S. at 1019 n.8.

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330 (2002), the Court seized on this footnote, emphasizing that "[a]nything less than a 'complete elimination of value,' or a 'total loss,'" requires analysis under the *Penn Central* test.

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Court had occasion to address a 94% reduction in value resulting from a regulation barring development on marshland and wetlands. Mr. Palazzolo acknowledged that, with regulation in force,

the property still was worth $200,000 (down from $3,150,000 had the development of the marshlands been allowed) because a single home could have been constructed on the upland portion of the 18-acre property. But he complained that the state should not be able to avoid a *Lucas* taking "by the simple expedient of leaving a few crumbs on the table." *Palazzolo*, 533 U.S. at 631. The Court said it agreed with that principle, but found $200,000 to be more than a few crumbs:

> Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. This is not the situation of the landowner in this case, however. A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property economically idle.

Palazzolo, 533 U.S. at 631.

Mr. Palazzolo might have argued that the wetland regulation constituted a 100% taking of the wetland portion of his property. Indeed he did, but only in his appellate brief. Having failed to preserve the argument, the Court declined to consider it. However, the Court did offer, in dictum, a critical swipe at the prior law on the subject of "the proper denominator." *Palazzolo*, 533 U.S. at 631.

While the Court's holding denied Mr. Palazzolo a categorical taking, the possibility of a *Penn Central* taking was left open on remand. *Palazzolo*, 533 U.S. at 632.

(c) The "background principles of state law" exception.

Lucas contains an important exception to its rule for categorical takings. If the regulation is based on nuisance prevention or abatement or is based on other "background principles of state property law" (such as the public trust doctrine[496]), then the developer did not have the right to develop in the first place—and nothing is "taken."

As the Court put it:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically

[496] *E.g., Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002) (no taking occurred when property restrictions were undertaken pursuant to Washington's public trust doctrine). Note, however, that in 1996 the Legislature abolished the public trust doctrine in Idaho except as to land below navigable waters. Idaho Code §§ 58-1201 to 58-1203.

> antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.
>
> . . .
>
> Any limitation so severe [as to deny all economic use] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.

Lucas, 505 U.S. at 1027, 1029.

What exactly constitutes a "background principle of property law" is a complicated topic that has given rise to considerable comment and litigation.[497] One should examine the history, purpose, and application of the regulation to determine whether it is a *bona fide* nuisance regulation or merely a downzone cloaked in public interest rhetoric. The existence of exceptions to the regulation may give a clue. Exceptions that genuinely probe the existence, extent, or mitigation of the nuisance would support the conclusion that the regulation is legitimately concerned with nuisance. But exceptions that have nothing to do with (1) the existence, extent, or mitigation of nuisance or (2) legally mandated grandfathering, cut in the other direction.

One thing we do know is that a zoning restriction does not become a "background principle of the State's law" simply because the property is transferred to a new owner. See discussion of *Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001) in section 28.C(7) at page 603.

(d) Moratoriums are not categorical takings

The Supreme Court ruled in 2002 that moratoriums do not constitute "categorical" or "*per se*" takings. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (Stevens, J.). (See discussion of temporary takings in section 28.C(6) at page 599.) Rather, each moratorium will be evaluated individually to determine whether affected landowners are entitled to compensation.

(e) Idaho's recognition of *Lucas*.

The Idaho Supreme Court has cited *Lucas* approvingly on four occasions (as of 2009). *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 136 P.3d 310 (2006) (J. Jones, J.) (citing *Lucas* eight times before remanding for a determination of whether

[497] See, e.g., Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 Harv. Envtl. L. Rev. 321 (2005).

a *Lucas*-type or *Penn Central*-type taking occurred); *Moon v. North Idaho Farmers Ass'n*, 140 Idaho 536, 542, 96 P.3d 637, 643 (2004) (no *Lucas*-type taking because "the plaintiffs have not claimed a permanent deprivation of all economically beneficial uses of their land"); *Covington v. Jefferson Cnty.*, 137 Idaho 777, 781-82, 53 P.3d 828, 832-33 (2002) (no *Lucas*-type taking because plaintiff failed to show that he was deprived of "any economic use"); and *McCuskey v. Canyon Cnty. Comm'rs ("McCuskey II")*, 128 Idaho 213, 912 P.2d 100 (1996) (Trout, J.) (inverse condemnation action barred by statute of limitations, citing *Lucas* for general proposition only).

(5) The "denominator" or "relevant parcel" problem

In determining whether a governmental action results in a *Lucas*-type categorical taking, it is necessary to determine what is the "relevant parcel" to evaluate. *Apollo Fuels, Inc. v. United States*, 54 Fed. Cl. 717, 723 (2002) (the "threshold matter" in a regulatory takings case is the determination of the "relevant parcel").

By way of example, if a property owner owns a single 160-acre parcel of land, 40 acres of which are wetlands subject to government regulation prohibiting development, has the property's value been reduced by only 25 percent (40 of 160) or has the property owner lost 100 percent of the value as to the regulated 40 acres? If the property owner only owned the 40 acres of wetlands, he undoubtedly would be entitled to compensation under *Lucas*, so should he be punished for owning the other 120 acres? What if the wetlands and uplands are not contiguous but are across the street from each other? Or separated by one parcel in between? As you will see, this issue has arisen in some form in most of the cases cited above.

Keep in mind that the issue of relevant parcel can focus on many different aspects of property beyond the scope of this handbook. The relevant parcel analysis may include consideration of such things as subsurface rights vs. surface rights, air rights above the property, contiguous land holdings operated as one operation, non-contiguous land holdings operated as one operation, parcels purchased at different points, transferable development rights, and property interests over time. "The relevant parcel of real property can extend not only below the surface and to the very heavens above, but also across time itself." Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. Haw. L. Rev. 353, 363 (2003).

Penn Central gave rise to the " parcel as a whole" rule, wherein the Supreme Court wrote:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular government

> action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."

Penn Central at 130-31. The *Penn Central* Court refused to allow the owners of Grand Central Station to separate the air rights over the station from the remainder of the property—an effort by the property owners to say that 100 percent of their property had been taken.

As you will see, the "parcel as a whole" rule is still the rule of law, but it is coming under increasing scrutiny.

The "relevant parcel" issue arose again nine years later in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987), wherein the Court wrote:

> Because our test for regulatory takings requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'

Keystone involved a government regulation that required coal-mining companies to avoid mining any coal they owned which could lead to subsidence of residential areas. This had the effect of prohibiting the coal companies from mining approximately 27 million tons of coal. The coal companies filed an inverse condemnation action arguing that this government regulation effected a taking.

Rather succinctly, the *Keystone* Court held: "The 27 million tons of coal do not constitute a separate segment of property for takings law purposes." Rather, the Court focused on all of the coal owned by the coal companies and determined that only about two percent of their coal was unavailable to mine because of the regulation, therefore, there was no taking.

In that same year, the U.S. Supreme Court recognized that a taking could be "temporal." In *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304 (1987), the Court held that the government must compensate a property owner denied all use of his property for the period of time a regulation was in place, even though the regulation was later invalidated by the courts. This case shows that the "relevant parcel" issue can involve issues of time.

In *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994), the court of appeals rejected the government's argument that the court should

look to the entire 250-acre parcel owned by a developer in New Jersey. The court determined that the proper denominator was the 12.5-acre parcel for which a Clean Water Act permit was denied.

A few years later in *Lucas*, the U.S. Supreme Court recognized a categorical taking in situations where regulation denies all economically beneficial or productive use of land. In addition, in a famous footnote, the Court recognized the difficulties of the "relevant parcel" issue:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured … Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court.

Lucas at 1016-17 n.7.

More recently, in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the U.S. Supreme Court rejected a property owner's attempt to allege a 100 percent taking of all the wetlands he owned. The Court rejected the attempt to parcel out the wetlands portions of the contiguous property, but did so only because this argument had not been made by the landowner in the trial court below. However, the Court hinted that it was less than satisfied with the "parcel as a whole" rule:

> This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators.

Palazzolo at 631 (2001)

In a recent decision that seems to contradict (or at least narrowly apply) *First English*, the U.S. Supreme Court relied upon the "parcel as a whole" rule to reject a claim for a temporal taking. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (holding that segmentation based on time violates the "parcel as a whole" rule). In *Tahoe-Sierra*, the government placed a 32-month moratorium on development near Lake Tahoe, so that environmental studies could be conducted. The landowners owning property near Lake Tahoe brought an inverse condemnation claim based on *Lucas* and *First English*.

First, the *Tahoe-Sierra* Court addressed *First English* and stated that in that case it had "assumed" that a taking occurred, therefore *First English* only addressed whether compensation was due for an established temporary taking. The *Tahoe-Sierra* Court specifically rejected the idea that *First English* stood for the proposition that compensation is due whenever the government temporarily restricts the use of property. *Tahoe-Sierra* at 328.

Second, the *Tahoe-Sierra* Court narrowly interpreted its *Lucas* decision to apply only in those cases where an "unconditional and permanent" taking has occurred, thus requiring a "permanent obliteration of the value" of the property before *Lucas* could apply. Because the moratorium at issue was temporary, *Lucas* did not apply.

Lastly, as to the relevant parcel issue, the *Tahoe-Sierra* Court refused to "sever a 32-month segment from the remainder of each landowner's fee simple estate" and determine whether that separate temporal segment had been taken.

In summation, the *Tahoe-Sierra* Court wrote: "The starting point for the [trial] court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework." However, in a separate dissent, Justice Thomas questioned the majority's reliance upon the "parcel as a whole" rule, noting that the Court in *Palazzolo* had recently called the concept into question.

Like the *Penn Central* three-part test that applies in most regulatory takings cases, the relevant parcel issue is an ad hoc factual issue, which means it continues to be a somewhat confusing area of takings jurisprudence. Several courts, but not those in Idaho, have tried to devise some formulation or set of factors for its determination. Some examples are listed below.

Walcek v. United States, 49 Fed. Cl. 248, 260 (2001), finding an entire 14.5-acre parcel to be the "relevant parcel" because "the Property is contiguous and unsubdivided; was purchased over a matter of a month or two, with uniform ownership; has been maintained for many years as a single parcel; has the same zoning status; and, in all the plans the partners advanced, has always been intended to be developed as a whole."

Cane Tennessee, Inc. v. United States, 57 Fed. Cl. 115 (2003):

> In determining the "parcel as a whole," the focus is on the economic expectations of the claimant with regard to the property. Accordingly, where a "developer treats legally separate parcels as a single economic unit, together they may constitute the relevant parcel." This is a factual inquiry, and the relevant consideration have been said to include the degree of contiguity, the dates of acquisition,

> the extent to which the parcel has been treated as a single unit, the extent to which the [regulated] lands enhance the value of remaining lands, and no doubt many others….

(citing *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (1991)) (citations omitted).

Machipongo Land & Coal Co. v. Commonwealth, 799 A.2d 751 (Pa. 2002): adopting a "flexible approach, designed to account for factual nuances;" listing a non-inclusive list of factors to consider when determining the relevant parcel:

> unity and contiguity of ownership, the dates of acquisition, the extent to which the proposed parcel has been treated as a single unit, the extent to which the regulated holding benefits the unregulated holdings; the timing of transfers, if any, in light of the developing regulatory environment; the owner's investment-backed expectations; and the landowner's plans for development.

For further discussion and an in-depth analysis of the "relevant parcel" issue, refer to an article appearing recently in the University of Hawaii Law Review. Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. Haw. L. Rev. 353 (2003).

(6) Temporary takings

(a) Federal cases

In *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304 (1987), a church owned a 21-acre parcel that it used as a summer camp for handicapped children. When the property flooded, the county and flood district enacted a ban that prevented rebuilding the destroyed camp. The church brought an action for inverse condemnation (as well as a tort action, alleging the cloud seeding and other actions led to the flooding). The state appeals court[498] ruled that landowners may not bring inverse condemnation actions for regulatory takings. Rather than seeking damages, they must seek only declaratory relief that the regulation constitutes a taking. At that point, the government could elect to rescind the regulation (without paying compensation) or to pay compensation. The U.S. Supreme Court reversed, finding that inverse condemnation is an appropriate remedy for what it described as a "temporary taking." Thus, if the government rescinds the offending regulation, it must nonetheless pay compensation for the time the regulation was in place.

[498] This was the highest state court ruling. The California Supreme Court did not denied review.

Thus, the *First English* case was decided in the abstract. It did not decide that there was a temporary taking (or any taking at all).[499] It merely found that a temporary taking is theoretically possible and that the plaintiff should be allowed to pursue the inverse condemnation claim. If the ordinance ultimately were found to be a taking, the church would be entitled to compensation for the period during which its use of the property was denied.

The Court emphasized repeatedly that the potential entitlement to compensation for a temporary taking was premised on the fact that the plaintiff alleged a total deprivation of all use of the property: "We also point out that the allegation of the complaint which we treat as true for purposes of our decision was that the ordinance in question denied appellant all use of its property. We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *First English*, 482 U.S. at 322.

For a while, it looked like *Lucas* and *First English* might team up to create a categorical temporary taking in the event of a moratorium on new construction or approvals. But it was not to be. The limited nature of the *First English* ruling on temporary takings was made clear in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). (This case is discussed further in section 28.C(5) at page 595.) In *Tahoe-Sierra*, the Court explained that not every temporary regulation gives rise to a compensable taking. The Court applied the "parcel as a whole" rule to find that a moratorium on all construction was not a temporarily taking. It would seem, however, that applying the "parcel as a whole" analysis to a temporary taking would mean essentially destroy the whole idea of temporary takings.

The case of *Arkansas Game and Fish Comm'n v. United States*, 133 S. Ct. 511 (2012) (Ginsburg, J.) follows logically from the cases discussed above. The Supreme Court reaffirmed two basic principles: First, temporary takings are possible. Second, they are not automatic and must be evaluated on a case-by-case basis. This does not appear to carve out any new territory. In this unanimous decision, the Court found it necessary to overturn a federal appellate court decision which held, incorrectly, that in flooding cases, a taking occurs only in the case of "a permanent or inevitably recurring condition, rather than an inherently temporary situation." *Arkansas Game*, 133 S. Ct. at 515. The Supreme Court explained that the quoted statement (which was based on *Sanguinetti v. United States*, 264 U.S. 146 (1924) was dictum that

[499] "We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations." *First English*, 482 U.S. at 313.

predated the law of temporary takings that emerged during World War II. In so ruling, the Court emphasized the limited nature of its holding, which did nothing to disturb the cases like *Tahoe-Sierra* discussed above:

> We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection. When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking. See *Loretto*, 458 U.S., at 435, n. 12, 102 S. Ct. 3164 (temporary physical invasions should be assessed by case-specific factual inquiry); *Tahoe–Sierra*, 535 U.S., at 342, 122 S. Ct. 1465 (duration of regulatory restriction is a factor for court to consider); *National Bd. of YMCA v. United States*, 395 U.S. 85, 93, 89 S. Ct. 1511, 23 L.Ed.2d 117 (1969) ("temporary, unplanned occupation" of building by troops under exigent circumstances is not a taking).
>
> Also relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action. See *supra*, at 517; *John Horstmann Co. v. United States*, 257 U.S. 138, 146, 42 S. Ct. 58, 66 L. Ed. 171 (1921) (no takings liability when damage caused by government action could not have been foreseen). See also *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355–1356 (C.A. Fed. 2003); *In re Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 799 F.2d 317, 325–326 (C.A. 7 1986). So, too, are the character of the land at issue and the owner's "reasonable investment-backed expectations" regarding the land's use. *Palazzolo v. Rhode Island*, 533 U.S. 606, 618, 121 S. Ct. 2448, 150 L.Ed.2d 592 (2001). . . . Severity of the interference figures in the calculus as well. See *Penn Central*, 438 U.S., at 130–131, 98 S. Ct. 2646; *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329–330, 43 S. Ct. 135, 67 L. Ed. 287 (1922) ("[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [a taking]. Every successive trespass adds to the force of the evidence.").

Arkansas Game, 113 S. Ct. at 522-23.

In sum, "if government action would qualify as a taking when permanently continued, temporary actions of the same character may also qualify as a taking." *Arkansas Game*, 113 S. Ct. at 515 (emphasis supplied). Thus, temporary regulatory takings are limited to situations in which a regulatory action was intended to be permanent but was later rescinded or overturned, where the regulatory action would have caused (1) a *Lucas*-style total deprivation of all use of the property, (2) an overreaching exaction in violation of *Nollan* or *Dolan*, or (3) a regulatory taking of the *Penn Central* variety. Even then, the effect, circumstances, and duration of the impairment will considered under the principles of the "parcel as a whole" rule (made applicable by *Tahoe-Sierra* and confirmed in *Arkansas Game*). See, Daniel L. Siegel and Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 Vt. J. Envtl. L. 479 (2010).

(b) Idaho cases

The Idaho Supreme Court touched on the issue of temporary takings in *Moon v. North Idaho Farmers Ass'n*, 140 Idaho 536, 542, 96 P.3d 637, 643 (2004) (Burdick, J.). In *Moon*, plaintiffs challenged a statute immunizing grass seed growers from certain nuisance and trespass actions. They contended that this immunity constituted a taking of their property, which was invaded by smoke from the annual burning of post-harvest straw and stubble. The district court found this constituted a taking. The Idaho Supreme Court reversed.

The *Moon* decision includes the following statement: "[T]he mere interruption of the use of one's property, as it is less than a permanent (complete) deprivation, does not mandate compensation." *Moon*, 140 Idaho at 542, 96 P.3d at 643. However, the case does not seem to turn on this point. For instance, the Court recognized that a physical invasion (flooding from a government dam) could result in a taking, even though the flooding was only temporary. "[W]here a structure causes permanent liability to intermittent but inevitably recurring overflows it is [a] taking." *Moon*, 140 Idaho at 542, 96 P.3d at 643 (emphasis and internal quotation marks omitted). Note also that the quoted statement about interruption of the use of one's property was not made in the context of a temporary taking arising from the effect of an ordinance prior to its being overturned. Rather, it was made in reference to the intermittent nature of the smoke invasion. Ultimately, the Court determined that the invasion of smoke at most a nuisance. Unlike other states, the right to maintain a nuisance is not an easement (which might give rise to an argument for a physical taking). And the Legislature is free to modify the common law right to abate a nuisance.

The *Moon* case did not discuss an earlier Idaho precedent, *McCuskey v. Canyon Cnty. Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 216, 912 P.2d 100, 103 (1996) (Trout, J.), which recognized temporary takings in concept. In *McCuskey II*, the plaintiff claimed a temporary taking from the time Canyon County issued a stop

work order to the time the Idaho Supreme Court voided the controlling ordinance in *McCuskey v. Canyon Cnty.* ("*McCuskey I*"), 123 Idaho 657, 851 P.2d 953 (1993) (Bistline, J.). The Court stated: "If a regulation of private property that amounts to a taking is later invalidated, this action converts the taking to a 'temporary' one for which the government must pay the landowner for the value of the use of the land during that period." *McCuskey II*, 128 Idaho at 216, 912 P.2d at 103 (citing *First English*). While this temporary taking was the premise of the plaintiff's case, the Court did not explore the law of temporary takings. Instead, it dismissed the case on basis of the statute of limitations.

(7) Post-regulation transfer of the property: ***Palazzolo***

Most taking claims arise when a restrictive regulation is applied to a piece of property already owned by the plaintiff. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) involved a claim by a person who acquired the property after the allegedly confiscatory regulation was adopted. For years, the plaintiff (and his predecessor corporation) sought permission to fill marshland in order to develop a waterfront property in Westerly, Rhode Island. Finally he sued, alleging both a categorical taking under *Lucas* and a traditional regulatory taking under *Penn Central*.

The state contended that the taking claim was defeated by the fact that Mr. Palazzolo had acquired the property after wetlands ordinance was adopted.[500] The state argued this timing factor defeated the *Lucas* taking because the wetland regulation had become part of the "background principles of state property law" by the time he owned the property. It contended that the timing also defeated the *Penn Central* taking because Mr. Palazzolo had no "reasonable, investment-backed expectation" of development at the time he acquired the property. The U.S. Supreme Court rejected both arguments noting that the "State may not put so potent a Hobbesian stick into the Lockean bundle." *Palazzolo*, 533 U.S. at 627. The *Palazzolo* Court noted with approval that in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 860 (1987) (Scalia, J.) the Court had recognized that "[s]o long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Palazzolo*, 533 U.S. at 629. The *Palazzolo* Court also rejected the idea that *Lucas* introduced a new stumbling block for the new owner under the "background principles" exception. "It suffices to say that a regulation that would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title." *Palazzolo*, 533 U.S. at 629-30.

[500] Technically this was true. However, Anthony Palazzolo has owned the property through a corporation of which he was the sole stockholder for some time prior to the wetlands regulation.

In short, *Palazzolo* made clear that the fact that the property owner did not own the property at the time of the regulatory taking is immaterial in a regulatory taking under either *Lucas* or *Penn Central*.

Physical takings are a different matter. The Court noted that in the case of direct condemnation or a physical invasion (where the fact and extent of the taking are known at the outset and need not be ripened), "any award goes to the owner at the time of the taking, and that right to compensation is not passed to a subsequent purchaser." *Palazzolo*, 533 U.S. at 628.

One Idaho case held that a person acquiring a property with notice that it was subject to restrictive zoning could not claim that the prior downzoning constituted a taking of his property. *Cnty. of Ada v. Henry*, 105 Idaho 263, 266, 668 P.2d 994, 997 (1983). More recently, however, the Idaho Supreme Court has moved away from this and embraced *Palazzolo*: "However, since 2001, the fact that an owner acquires property after a regulation has been enacted does not necessarily bar a claim that the regulation has effected a taking." *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 848, 136 P.3d 310, 319 (2006) (J. Jones, J.) (citing *Palazzolo*). See also the discussion of standing in inverse condemnation cases at section 28.C(7) at page 603, dealing with the related issue of whether the purchaser can sue to vindicate a taking imposed on the predecessor-in-interest.

(8) Downzoning and takings

From time to time downzoning (that is, rezoning a property to a more restrictive zone) is challenged as an unconstitutional taking. The analysis is straightforward, and the result is usually to uphold the downzone.

Downzones are not physical takings, because they involve no physical invasion of the property by the government. Instead (unless the downzone is so complete as to constitute a categorical taking under *Lucas*), they are analyzed as regulatory takings, applying the same three-part balancing test first established in *Penn Central*. Under *Penn Central* it is clear that mere diminution in value resulting from planning and zoning land use restrictions, standing alone, does not establish a taking.

The Idaho Supreme Court is in accord with federal case law that the mere diminution in value associated with a typical downzone does not give rise to a taking claim:

> However, once again, we hold that a property owner has no vested interest in the highest and best use of his land, in the solely monetary sense of that term. This Court has repeatedly declared that a zoning ordinance which downgrades the economic value of property does not constitute a taking of property in violation of the

> United States Constitution, where some residual value remains in the property.

Sprenger, Grubb & Associates v. Hailey (*"Sprenger Grubb I"*), 127 Idaho 576, 581-82, 903 P.2d 741, 746-47 (1995) (Silak, J.) (citations and internal quotation marks omitted). "[A] zoning ordinance that downgrades the economic value of private property does not necessarily constitute a taking by the government, especially if some residual value remains after the enactment of the ordinance." *Covington v. Jefferson Cnty.*, 137 Idaho 777, 781, 53 P.3d 828, 832 (2002) (quoting *McCuskey v. Canyon Cnty. Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 216, 912 P.2d 100, 103 (1996) (Trout, J.)). Thus, whether it is or is not a taking must be analyzed on an *ad hoc* basis under the *Penn Central* test. "A zoning ordinance which downgrades the economic value of property does not constitute a taking of property without compensation at least where some residual value remains in the property." *Intermountain West, Inc. v. Boise City*, 111 Idaho 878, 880, 728 P.2d 767, 769 (1986) (Donaldson, C.J.) (citing *Cnty. of Ada v. Henry*, 105 Idaho 263, 266, 668 P.2d 994 (1993).[501]

On the other hand, if the downzoning was so severe that, in practical effect, it denied the landowner all economic use of the property, it would constitute a categorical taking under *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992) (Scalia, J.).

D. Exhausting administrative remedies under IDIFA

In Idaho, a developer may not challenge the impact fee imposed under IDIFA unless the developer has exhausted his or her administrative remedies under the local ordinance implementing IDIFA. In *KMST, LLC v. Cnty. of Ada*, 138 Idaho 577, 578, 67 P.3d 56, 57 (2003) (Eismann, J.), a partnership that wanted to construct a shopping center sought ACHD's approval of a land use application. Prior to submitting this application, the partnership met with the supervisor of ACHD's Development Services Division regarding the proposed development. The supervisor told them that he would recommend they be required to construct a street along the east side of the property and dedicate it to the public. *KMST*, 138 Idaho at 579, 67 P.3d at 58. In its application to ACHD, the plaintiff agreed to construct the street. The ACHD commissioners and the county commissioners subsequently approved the application and final development plan. *KMST*, 138 Idaho at 579, 67 P.3d at 58. One month after the final development plan was approved, the plaintiff conveyed the

[501] The Court also based its decision on violation of the statute of limitations. In doing so, it evaluated two different accrual dates for two distinct claims. One was a tort claim based on the city's failure to recognize that the developer was entitled to rely on a prior zoning certificate obtained from Ada County before the land was annexed. The second was a claim based on the subsequent downzoning by the city after the annexation alleging that the downzone was so severe as to constitute a regulatory taking.

street to ACHD by warranty deed and also paid impact fees to ACHD in the amount of $99,127. *KMST*, 138 Idaho at 579, 67 P.3d at 58.

Approximately one year later, the plaintiffs filed an action claiming, among other things, that ACHD's impact fee assessment was excessive and constituted a taking of plaintiffs' property without due process of law. *KMST*, 138 Idaho at 580, 67 P.3d at 59. Specifically, plaintiffs contended that the fee constituted an unconstitutional taking because (1) ACHD used outdated fee tables; (2) it failed to give the plaintiffs any credit for the expense they incurred in designing and constructing the public street; and (3) it failed "to consider the extent to which the street benefited the ACHD's highway system." *KMST*, 138 Idaho at 583, 67 P.3d at 62. The Idaho Supreme Court rejected these arguments stating,

> In this case, the ACHD staff calculated the impact fees for [plaintiffs'] development based upon the fee schedules in the Ordinance. [Plaintiff] did not request an individual assessment of the amount of its impact fees; it did not appeal the calculation of the fees; and it did not pay the fees assessed under protest. It simply paid the impact fees in the amount initially calculated. Having done so, it cannot now claim that the amount of the impact fees constituted an unconstitutional taking of its property.

KMST, 138 Idaho at 583, 67 P.3d at 62.

Therefore, pursuant to the holding in *KMST*, a developer must exhaust all administrative remedies with ACHD *prior* to bringing an action alleging that the impact fee assessment was excessive and constituted an unconstitutional taking.

This holding is consistent with other cases holding that plaintiffs are not required to exhaust administrative remedies when challenging the authority of the governmental entity to act at all. Here, ACHD had authority to impose impact fees. The question was whether the fee imposed was correct. In such cases, exhaustion is clearly required.

E. The exaction cases: *Nollan* and *Dolan*

Often, as a condition to granting a development permit, a government agency will require that the applicant developer perform certain other actions in order to counteract the effects of the proposed development. For example, a landowner might be required to dedicate a portion of her property for use as a road or greenbelt. These are called "exactions." Such exactions, which are analyzed as regulatory takings, may or may not constitute a taking. "In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking. The question was whether the government could,

without paying compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny." *Lingle* at 546-47 (citations omitted). The answer depends on the circumstances.

The most famous exaction cases are *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (Scalia, J.) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (Rehnquist, J.). These cases established the dual principles that an exaction is a unconstitutional taking only if (1) there is no "nexus" between the exaction and a public need created by the development and (2) the exaction is not roughly proportional to impact of the proposed development.

(1) Substantial nexus: *Nollan*

In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (Scalia, J.), the owners of beachfront land situated between two public beaches wanted to rebuild the existing bungalow on the parcel into a three-bedroom house, which would be in conformance with the rest of the neighborhood.

A California statute required the owners to obtain a coastal development permit from the California Coastal Commission before beginning any construction on their parcel. The Coastal Commission granted the owners a construction permit, subject to a requirement that the owners grant the public a lateral easement across the back of the parcel between the high tide line and a seawall. The Coastal Commission justified this requirement by arguing that while the proposed house would not actually restrict the public's beach access, it would serve as a "psychological barrier" to the public because it limited the view of the beach. The owners challenged the permit requirement as a regulatory taking.

The Supreme Court began with the premise that if the government had simply imposed a unilateral requirement on the landowner to convey an easement to the government, that, obviously, would constitute a taking. The Court then inquired whether the fact that the easement requirement was a condition on a permit sought by the landowner changed things. The Court said that would indeed change things (making it not a taking), but only if the government's condition had an "essential nexus" to some public need created by the development. In other words, if the thing that is permitted imposes an unacceptable burden on the community, the government may constitutionally prohibit the action altogether or, in the alternative, it may impose a condition to ease that burden.

In this case, however, the Court found no "essential nexus" between the Coastal Commission's requirement that the Nollans dedicate an easement to the public and any legitimate governmental purpose actually related to the construction of the bungalow. In short, the Court found no plausible connection between the

visual impact of the home's expansion and the need for an easement on the other side of the seawall. Accordingly, the Court struck down the permit requirement.

By way of explanation, the Court offered this example of a condition that would have met the nexus requirement:

> Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end.

Nollan at 836.

The point of the Court's somewhat improbable hypothetical seems to be that it is permissible for the government to impose even a rather intrusive condition (dedication of an ocean viewing area) so long as the condition has an essential nexus to the problem caused by the thing that is being permitted. Here, however, there was no nexus, because the condition (providing ocean access) was not aimed at solving the problem caused by the permitted construction (blocked view of the ocean).

(2) Rough proportionality: *Dolan*

Seven years later, the Court decided the case of *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (Rehnquist, J.). In *Dolan*, an Oregon property owner wished to expand her store and pave her parking lot. The City Planning Commission said she could do so only if she dedicated part of her land for a public "greenway." The Commission justified this requirement as a means of minimizing the flooding that

would be exacerbated by the increase in water-impervious surfaces associated with the property's development and decreasing downtown traffic congestion by providing for a pedestrian/bicycle pathway.

The property owner challenged the Commission's requirement. The Court found that minimizing the potential for flooding and decreasing traffic were legitimate state interests. The Court also found that the requirement for a greenway would substantially advance these interests. However, despite these findings, the Court held that dedication of a greenway would be a compensable regulatory taking unless the Commission could show on remand that there was a "rough proportionality" between the required dedication and the impact of the proposed development.

Subsequent Supreme Court decisions have made clear that the nexus and rough proportionality requirements articulated in *Nollan* and *Dolan* are limited to exaction cases.[502] The Idaho Supreme Court reached the same conclusion.[503]

Both *Nollan* and *Dolan* rely on *Agins* for the basic principle land use restrictions are not takings is they meet basic tests. "We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" *Nollan*, 483 U.S. at 834 (brackets original) (quoting *Agins*, 447 U.S. at 260). *Agins* was overturned by *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 545 (2005) (O'Connor, J.), but *Nollan* and *Dolan* remain good law.[504] Indeed, the *Lingle* Court specifically said so. "In short, *Nollan* and *Dolan* cannot be characterized as applying the 'substantially advances' test we address today, and our decision should not be read to disturb these precedents." *Lingle* at 548.

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[502] "Both Nollan and Dolan involved Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Lingle*, 544 U.S. at 546. "[W]e have not extended the rough-proportionality test of Dolan beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) (Kennedy, J.).

[503] "*Dolan* is distinguishable. It involved the reasonableness of conditions exacted on a property owner before the community would grant a building permit." *Sprenger, Grubb & Associates v. Hailey* (*"Sprenger Grubb I"*), 127 Idaho 576, 582, 903 P.2d 741, 747 (1995) (Silak, J.).

[504] The Idaho Supreme Court has recognized *Lingle*'s overruling of *Agins*. *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 847, n.5, 136 P.3d 310, 318, n.5 (2006) (J. Jones, J.).

(3) *Koontz*: The Supreme Court responds to attempts to limit *Nollan-Dolan*

(a) Grant versus denial of permit

In *Koontz v. St John River Water Management District*, the U.S. Supreme Court confirmed and expanded the applicability of its prior holdings in *Nollan* and *Dolan*.

First, the Court tackled the question of whether it made a difference that the permit in *Koontz* was not granted subject to the objectionable condition. Instead, it was denied, because the developer declined to agree to the condition. The majority held that this was no more than a semantic difference and the *Nollan/Dolan* analysis applies the just same.

(b) Dedicatory versus monetary exactions

Another distinction, drawn by some, is that "*Nollan-Dolan* should be limited to dedicatory exactions—that is, exactions that require dedication of land, rather than payment of money—because monetary exactions are somehow more 'benign' than dedicatory exactions." Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513, 1519 (2006). The Supreme Court has not yet spoken on the issue of applying *Nollan* and *Dolan* to monetary exactions, which are also commonly employed by government. Lower courts are split on this issue. The suggest that such a distinction exists has been sharply criticized. Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513 (2006).

This contention was put to rest by the Court in *Koontz*, which said it made no difference whether money or real property was involved. Because the demand for money was tied to a parcel of property (the one for which the land use entitlement is sought) it triggers the Fifth Amendment's protection against takings.

This is hardly a startling proposition. Indeed, it appears that the Idaho Supreme Court has always operated on the same premise—otherwise it would be difficult to explain the outcome in cases like *BHA Investments, Inc. v. City of Boise* ("*BHA I*"), 138 Idaho 356, 63 P.3d 482 (2003) (Schroeder, J.), which found a fee charged for transfer of a liquor license to be a *per se* taking.

(c) User fees and taxes

In addition to its main holdings, the *Koontz* decision contains reinforces a point that may bear on disputes in which user fees have been challenged as unconstitutional takings. This issue was not presented directly by the facts of the *Koontz* case. Nevertheless, both the Court addressed the subject in the context of explaining what the decision does and does not do. The majority was very clear: "It

is beyond dispute that '[t]axes are . . . not takings." *Koontz*, slip op at 18 (internal quotation and ellipses original). The Court continued, "This case therefore does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners." *Id*. (emphasis supplied).

(d) Administrative versus legislative exactions

There is language in *Dolan*[505] suggesting (to some at least) that the *Nollan-Dolan* analysis is applicable only in the context of so-called administrative (aka quasi-judicial) decision making by local governmental bodies, and that the principles do not apply to legislative actions such as the enactment of impact fee ordinances.

This conclusion has been hotly contested in courts and in the law reviews. *E.g.*, Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513 (2006); Christopher T. Goodin (Note), *Dolan v. City of Tigard and the Distinction Between Administrative and Legislative Exactions: "A Distinction Without a Difference*," 28 U. Haw. L. Rev. 139 (2005).

The dissent in *Koontz* picked up on this again, but the majority chose to ignore it.

(e) Remedies

We turn now to a procedural point. The *Koontz* Court held that because the permit was denied, no taking occurred under *Nollan/Dolan* for which just compensation is owed. That does not mean that such an applicant is not entitled to appropriate relief for the impairment of its constitutional rights. But whether the applicant is entitled to monetary relief (as opposed to relief aimed at issuance of the permit) is a function of other causes of action. In this case, the applicant framed his case under Florida law. Accordingly, the U.S. Supreme Court remanded for a determination of "what remedies might be available." *Koontz*, slip p. at 11.

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[505] "The sort of land use regulations discussed in the cases just cited . . . differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions f the property to the city." *Dolan*, 512 U.S. at 385. "[I]n evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city." *Dolan*, 512 U.S. at 321 n.8.

F. A regulation may favor one private interest over another

In *Miller v. Schoene*, 276 U.S. 272 (1928), the Supreme Court considered a Virginia statute which required the destruction of all red cedar trees within a prescribed distance of an apple orchard and provided no compensation for this destruction. Virginia had passed the law because many red cedar trees in the state were infected with cedar rust, a disease that is highly destructive to apple orchards. The Court upheld the uncompensated destruction of red cedar trees, holding that the state had a right to determine that apple orchards were more important to the state economy than cedars. This was true even though it had the effect of favoring the interests of apple orchard owners over red cedar tree owners.

G. Initiating a takings action (inverse condemnation)

(1) Nature of inverse condemnation

An inverse condemnation case is simply a condemnation case in which the parties are reversed, with the landowner suing the government for compensation (or other relief) resulting from a taking.[506]

As the Court explained in *Rueth v. State* ("*Rueth I*"), 100 Idaho 203, 596 P.2d 75 (1982) (Bistline, J.), *appeal following remand, Rueth v. State* ("*Rueth II*"), 103 Idaho 74, 644 P.2d 1333 (1982) (McFadden, J.), an inverse condemnation action finds its basis in the self-executing constitutional provision on takings:

> In *Renninger v. State*, 70 Idaho 170, 213 P.2d 911 (1950) the Court stated tersely but accurately that that action, which sought damages for the permanent although intermittent flooding of the property owners' lands, was in essence "a condemnation suit in reverse." *Id*. at 177, 213 P.2d 911. The final paragraph of that opinion said this: "Because this is, in effect, a condemnation suit and the condemnor must bear all costs, costs are awarded (to) appellants." *Id*. at 179, 213 P.2d at 917. It is clear that the Court there considered that <u>what is now popularly</u>

[506] "An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemnor." *Covington v. Jefferson Cnty.*, 137 Idaho 777, 780, 53 P.3d 828, 831 (2002) (Trout, J.). "Inverse condemnation is a taking of private property for a public use without the commencement of condemnation proceedings." *Wadsworth v. Idaho Dep't of Transportation*, 128 Idaho 439, 441, 915 P.2d 1, 3 (1996) (Schroeder, J.). "Inverse condemnation is 'a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.'" *Agins v. City of Tiburon*, 447 U.S. 255, 258 (1980) (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)) (Rehnquist, J.). "Such a suit is 'inverse' because it is brought by the affected owner, not by the condemnor." *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 n. 6 (1984) (Marshall, J.).

> called an action in inverse condemnation is nevertheless a proceeding in eminent domain and the only difference is the reversed alignment of the parties. The Court there noted that "Article 1, Section 14 of the Constitution of Idaho, is mandatory that private property may not be taken until a just compensation, to be ascertained in the manner prescribed by law, is paid." *Id*. at 177, 213 P.2d at 915. The Court there reiterated what an earlier Court had said in *Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 722 (1931), that this constitutional provision is self-executing, that is, " 'No action of the Legislature further than providing the procedural machinery by which the right may be applied is necessary.'" *Id*., 70 Idaho at 177, 213 P.2d at 915. The import of that holding is clear. Both the right to condemn and the right of the condemnee to just compensation are granted, not by the legislature, but by the Constitution. The Court in *Renninger*, supra, repeated the holding from *Bassett*, supra, that " 'whether or not a right claimed under this provision of the Constitution is within the grant Is held to be a judicial question to be determined by the courts.'" *Id*. at 177, 213 P.2d at 915. In the ordinary situation the constitutional right to condemn is exercised by the party seeking to take private property. In the "reverse" situation the constitutional right to be paid just compensation is exercised by the property owner who brings the action, alleging that his property rights have been taken without payment.

Rueth I, 100 Idaho at 217-18, 596 P.2d at 89-90 (emphasis supplied).

The U.S. Supreme Court offered this commentary on the nature of inverse condemnation and the origin of the term, which is entirely consistent with what the Idaho Supreme Court has said:

> Although a landowner's action to recover just compensation for a taking by physical intrusion has come to be referred to as "inverse" or "reverse" condemnation, the simple terms "condemn" and "condemnation" are not commonly used to describe such an action. Rather, a "condemnation" proceeding is commonly understood to be an action brought by a condemning authority such as the Government in the exercise of its power of eminent domain . . . .
>
> . . .

> . . . The phrase "inverse condemnation" appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted. As defined by one land use planning expert, "[i]nverse condemnation is '*a cause of action against a governmental defendant* to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'" D. Hagman, *Urban Planning and Land Development Control Law* 328 (1971) (emphasis added). A landowner is entitled to bring such an action as a result of "the self-executing character of the constitutional provision with respect to compensation. . . ." *See* 6 P. Nichols, *Eminent Domain* § 25.41 (3d rev. ed. 1972). A condemnation proceeding, by contrast, typically involves an action by the condemnor to effect a taking and acquire title. The phrase "inverse condemnation," as a common understanding of that phrase would suggest, simply describes an action that is the "inverse" or "reverse" of a condemnation proceeding.

United States v. Clarke, 445 U.S. 253, 255-57 (1980) (Rehnquist, J.) (emphasis original).

Idaho first recognized a cause of action for inverse condemnation in *Boise Valley Const. Co. v. Kroeger*, 17 Idaho 384, 105 P. 1070 (1909) (Ailshie, J.). It continues to recognize the action. "A property owner who believes that his or her property, or some interest therein, has been invaded or appropriated to the extent of a taking, but without due process of law and the payment of compensation, may bring an action for inverse condemnation." *KMST, LLC v. Cnty. of Ada*, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003) (Eismann, J.).

To support a claim for inverse condemnation, "the action must be: (1) instituted by a property owner who (2) asserts that his property, or some interest therein, has been invaded or appropriated (3) to the extent of a taking, (4) but without due process of law, and (5) without payment of just compensation." *Covington v. Jefferson Cnty.*, 137 Idaho 777, 780, 53 P.3d 828, 831 (2002) (Trout, J.).

An inverse condemnation action begins like all other civil matters with a complaint and summons. "[T]he determination of whether or not there was a taking is a matter of law to be resolved by the trial court." *Covington*, 137 Idaho 777, 880,

53 P.3d 828, 831 (2002) (Trout, J.) (quoting *Tibbs v. City of Sandpoint*, 100 Idaho 667, 670, 603 P.2d 1001, 1004 (1979) (Thomas, J. pro tem.)).

"[A]ll issues regarding inverse condemnation are to be resolved by the trial court, except the issue of what is just compensation. Once the trial court has made the finding that there is a taking of the property, the extent of the damages and the measure thereof are questions for the jury." *Covington*, 137 Idaho at 880, 53 P.3d at 831 (citing *Rueth v. State* ("*Rueth II*"), 103 Idaho 74, 79, 644 P.2d 1333, 1338 (1982) (McFadden, J.)).

(2) Standing

See section 13 at page 171 for a discussion of standing in inverse condemnation cases.

(3) Remedies in takings cases

The most common remedy sought in inverse condemnation cases is damages, but there may be other remedies available depending on the facts of an individual case. For instance, the property owner may seek an injunction to prevent a recurring government action (*e.g.*, flooding of property) from taking place in the future. In still other cases, a property owner may be able to recover possession of his land in ejectment proceedings (i.e., where the government occupies or takes private property without a proper public purpose).

However, efforts to re-characterize takings as damage claims for equitable or declaratory relief in order to avoid *Williamson County* had not been well received. The plaintiffs in *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 383 (9th Cir. 2002), *cert. denied*, 537 U.S. 973, argued they were not subject to *Williamson County* because they were seeking injunctive and declaratory relief, not damages. The *Daniel* court recognized an exception to the requirement to employ state inverse condemnation proceedings (where the plaintiff is making a facial challenge to a municipal ordinance), but found it not applicable there. Where a regulatory exaction is alleged to be a taking, the remedy is not to stop the exaction, but to make the government pay for it. Thus declaratory and injunctive relief is inappropriate. *Daniel*, 288 F.3d at 385.

(4) Role of judge and jury

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (Kennedy, J.), the U.S. Supreme Court upheld a jury's award of $1.45 million in damages in a § 1983 action[507] to a property owner who claimed it had been denied all economically viable use of its property. The award was based on a "temporary

[507] Civil Rights Act, 42 U.S.C. § 1983.

taking."[508] The case focused on issue of the right to jury trial, holding 1983 actions for damages are common law actions within the meaning of the Seventh Amendment. The Court upheld the jury's finding that the repeated roadblocks thrown up by the city made it clear, as a practical matter, that the plaintiff would never be allowed to develop the property. The case was couched, in part, in *Agins'* language (jury instruction on whether the project substantially advanced a legitimate project purpose). That part of the case is no longer good law, in light of *Lingle*. However, the case's basic message remains viable: abusive treatment of land use applicants may subject municipalities to liability, and that a jury may get to make the call under a § 1983 challenge.

In contrast, the Idaho Supreme Court declared that "all issues regarding inverse condemnation are to be resolved by the trial court, except the issue of what is just compensation." *Covington v. Jefferson Cnty.*, 137 Idaho 777, 780, 53 P.3d 828, 831 (2002). "[T]he question whether a regulatory taking has occurred is committed to the trial court; just compensation is a matter for the jury." *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 854, 136 P.3d 310, 325 (2006) (J. Jones, J.).

(5) Exhaustion

See discussion of exhaustion in section 24.L(4) at page 384.

H. Procedural limitations on federal inverse condemnation actions

NOTE: *Williamson County* was overturned in a five to four decision by *Knick v. Township of Scott, Pennsylvania*, 2019 WL 2552486 (S. Ct. June 21, 2019) (Roberts, C.J.).

(1) *Williamson County* ripeness ("final decision" and "state remedies")

In 1985, the U.S. Supreme Court decided *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (Blackmun, J.), a pivotal case setting up new roadblocks for plaintiffs pursuing federal taking claims. The decision laid down two significant procedural requirements for regulatory taking claims under federal law, requiring that they be ripe in the sense that (1) the agency "has arrived at a final, definitive position regarding how it will apply the regulations at issue"[509] and (2) the plaintiff has first utilized all available state procedures for

[508] The Court had little to say about why this was a temporary, rather than a permanent, taking. We presume it was because, during the course of the litigation, the State of California purchased the property from the landowners. *Del Monte Dunes* at 700.

[509] *Williamson County*, 473 U.S. at 191.

recovery of compensation. It bears emphasis that, while the Court employed the term "ripeness" in describing these two tests, it did not mean ripeness in the ordinary sense. This is a special variant of ripeness applicable only to federal taking claims.

Williamson County was not an exactions case. Rather, it was a regulatory takings case of the *Lucas* variety involving a downzoning that allegedly deprived the plaintiff of all economically viable use of the property. *Williamson County*, 473 U.S. at 182-83, 191. The plaintiff was the successor to the developer of a residential subdivision in Tennessee. In 1973, the developer obtained approval of a preliminary plat authorizing construction of 736 homes in Temple Hills Country Club Estates. In 1977, before the final plat was submitted, the local planning and zoning entity amended and toughened the zoning ordinance, resulting in a substantial reduction in the number of lots allowed. Applying the revised ordinance, the planning commission then disapproved a revised preliminary plat.

The developer's successor brought a § 1983[510] action in federal court alleging, among other things, a taking of the property.[511] The focus of the argument at trial

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[510] Section 1983 refers to the Civil Rights Act of 1871, 17 Stat. 13, now codified at 42 U.S.C. § 1983.

[511] The *Williamson County* plaintiff also alleged violations of equal protection and substantive and procedural due process. Those theories were not pursued on appeal. *Williamson County*, 473 U.S. at 182 n.4. The great majority of subsequent courts have held that taking claims may not be re-packaged as due process or equal protection claims; they remain subject to *Williamson County* no matter the label. *E.g.*, *Acierno v. Mitchell*, 6 F.3d 970 (3d Cir. 1993); *Taylor Inv., Ltd. v. Upper Darby Tp.*, 983 F.2d 1285 (3d Cir. 1993); *Unity Ventures v. Lake Cnty.*, 841 F.2d 770 (7th Cir. 1988); *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173 (D. Kan. 1999); *Shelter Creek Development Corp. v. City of Oxnard*, 838 F.2d 375 (9th Cir. 1988); *Herrington v. Sonoma Cnty.*, 834 F.2d 1488, (9th Cir. 1987), *opinion amended on denial of reh'g*, 857 F.2d 567 (9th Cir. 1988); *Celentano v. City of West Haven*, 815 F. Supp. 561 (D. Conn. 1993); *Seguin v. City of Sterling Heights*, 968 F.2d 584 (6th Cir. 1992); *Forseth v. Village of Sussex*, 20 F. Supp. 2d 1267 (E.D. Wis. 1998), *aff'd in part, rev'd in part on other grounds*, 199 F.3d 363 (7th Cir. 2000); *Forseth v. Village of Sussex*, 199 F.3d 363 (7th Cir. 2000); *Sameric Corp. of Delaware, Inc. v. City of Philadelphia*, 142 F.3d 582 (3d Cir. 1998); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994); *Gamble v. Eau Claire Cnty.*, 5 F.3d 285 (7th Cir. 1993); *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84, 95 (2d Cir. 1992); *Front Royal and Warren Cnty. Indus. Park Corp. v. Town of Front Royal, Va.*, 922 F. Supp. 1131, 1150 n.26 (W.D. Va. 1996), *rev'd*, 135 F.3d 275 (4th Cir. 1998); *Glendon Energy Co. v. Borough of Glendon*, 836 F. Supp. 1109 (E.D. Pa. 1993); *Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988); *John Corp. v. City of Houston*, 214 F.3d 573 (5th Cir. 2000); *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173 (D. Kan. 1999); See Note, *Determining Ripeness of Substantive Due Process Claims Brought by Landowners Against Local Governments*, 95 Mich. L. Rev. 492 (1996); Note, *The Applicability of Just Compensation to Substantive Due Process Claims*, 100 Yale L.J. 2667 (1991); *Seeking of variance as prerequisite for ripeness of challenge to zoning ordinance under due process clause of Federal Constitution's Fifth and Fourteenth Amendments—post-Williamson cases*, 111 A.L.R. Fed. 483. On the other hand, some courts have found exceptions to *Williamson County* for truly different claims, such as actions based on race or retaliation. *E.g.*, *Flying J Inc. v. City of New Haven*, 549 F.3d 538, 543-44 (7th Cir. 2008) ("conduct that evidences a spiteful effort to 'get' him for reasons unrelated to any legitimate state

and on appeal was whether temporary takings are compensable. The U.S. Supreme Court, however, changed course and threw the case out on procedural grounds.[512]

(a) Applicable to all takings

Williamson County is often thought of (and spoken of) as applying to takings arising out of local land use actions. Indeed, *Williamson County* arose in such a context, and the huge majority of cases applying it involve such regulatory takings. However, nothing in the decision limits its applicability to any particular class of takings. As discussed below, the prong one (the first of two ripeness tests) applies only to regulatory takings (as opposed to physical takings). But prong two—requiring the plaintiff to employ available means to obtain compensation—is premised on the Court's textual reading of the Fifth Amendment, and it applies to all takings.

While the great majority of *Williamson County* cases involve challenges to state or local government actions alleged to be takings, *Williamson County* applies as well to federal governmental actions. In that context, however, the prong two requirement that available state remedies for just compensation be employed is transmuted into a requirement that the plaintiff first seek relief in the Claims Court under the Tucker Act, unless another statute withdraws Tucker Act jurisdiction. *Horne v. Department of Agriculture*, 133 S. Ct. 2053, 2062-63 (2013).

(b) Prong one: Final decision

First, the Court held that in order to be ripe for judicial consideration, the challenged decision must be a "final decision":

> As this Court has made clear in several recent decisions, a claim that the application of governmental regulations effects a taking of property is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding application of the regulations to the property at issue.

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objective" creates a *bona fide* equal protection exception to the *Williamson County*, ripeness requirement); see *Federal Land Use Law & Litigation* § 12:25 (2015).

[512] The trial court issued an injunction ordering the planning commission to apply the 1973 ordinance but rejected the jury's award of $350,000 for a temporary taking. The planning commission did not appeal the ruling that it must apply the 1973 ordinance. Instead, the plaintiff appealed the judgment notwithstanding the verdict as to the temporary taking. On appeal, the Sixth Circuit reinstated the award for a temporary taking. On certiorari to the U.S. Supreme Court, the planning commission contended that even if it should have applied the 1973 ordinance, its failure to do so constituted, at most, a temporary regulatory interference that, even if it is a taking, it does not give rise to a claim for money damages. The Supreme Court did not reach the planning commission's argument, instead finding that the plaintiff's claim was not ripe.

Williamson County, 473 U.S. at 186.[513]

Although the local planning commission had squarely rejected the revised preliminary plat and, apparently, no further administrative appeal was available,[514] that was not final enough, said the Court, because the developer had failed to seek a variance. Instead of seeking a variance under the new ordinance the developer filed suit, insisting that the planning commission should have applied an earlier zoning ordinance. The Court explained why requiring the plaintiff to probe the decision maker in this way is a fundamental prerequisite to a takings claim:

> Thus, in the face of respondent's refusal to follow the procedures for requesting a variance, and its refusal to provide specific information about the variances it would require, respondent hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision that no variances would be granted.

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[513] Although not mentioned by the Court, the decision in *Williamson County* was foreshadowed by its earlier decision in the famous *Penn Central* case, which spoke of the plaintiff's failure to explore other options for a less intrusive building:

> Appellants, moreover, exaggerate the effect of the law on their ability to make use of the air rights above the Terminal in two respects. First, it simply cannot be maintained, on this record, that appellants have been prohibited from occupying any portion of the airspace above the Terminal. While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit any construction above the Terminal. The Commission's report emphasized that whether any construction would be allowed depended upon whether the proposed addition "would harmonize in scale, material and character with [the Terminal]." Record 2251. Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal.

Penn Central Transp. Co. v. New York City, 438 U.S. 104, 136-37 (1978) (Brennan, J.) (footnote omitted) (brackets original). The *Penn Central* connection to *Williamson County* was discussed by the Idaho Supreme Court in *Hehr v. City of McCall*, 155 Idaho 92, 97-98, 305 P.3d 536, 543-44 (2013) (Burdick, C.J.) (finding that the developer failed both prongs of the ripeness test).

[514] Tennessee has a quirky planning and zoning system with authority split between counties and regional and municipal planning commissions. The developer had previously appealed from the regional planning commission to the county board of zoning appeals, but the regional planning commission later determined that the county had no jurisdiction to entertain the appeal. *Williamson County*, 473 U.S. at 180-82.

> As in *Hodel*, *Agins*, and *Penn Central*, then, respondent has not yet obtained a final decision regarding how it will be allowed to develop its property. Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. . . . Those factors [which determine whether there has been a taking] simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Williamson County, 473 U.S. at 190-91 (emphasis supplied) (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) (Marshall, J.); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (Powell, J.); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (Brennan, J.)). Note that this principle is based on the Constitution itself and not on something in § 1983.

These are not, by the way, traditional Article III or prudential ripeness tests. Rather, they are special ripeness tests for federal taking claims. Frankly, they sound more like exhaustion, but the Supreme Court has made clear that they are not. Indeed, the Court took pains to explain that it was requiring ripeness (aka "finality"), not exhaustion.

> While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Williamson County, 473 U.S. at 193 (emphasis supplied).

This mattered, because, under *Patsy v. Bd. of Regents of the State of Florida*, 457 U.S. 496 (1982), § 1983 litigants are not required to exhaust administrative remedies.[515] Thus, for instance, a landowner would not be required to bring a declaratory judgment action challenging the validity of the zoning ordinance or to bring an appeal to the Board of Zoning Appeals, "because those procedures are

[515] The Court made clear that the ripeness tests apply because of the nature of the taking claims. *Williamson County*, 473 U.S. at 190-91. In other words, they do not apply because of § 1983. Rather, they apply in spite of § 1983.

clearly remedial" and have nothing to do with the finality of the decision rendered. *Williamson County*, 473 U.S. at 193.[516] The Court explained:

> Resort to those procedures [seeking declaratory judgment] would result in a judgment whether the Commission's actions violated any of respondent's rights. In contrast, resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed. The Commission's refusal to approve the preliminary plat does not determine that issue; it prevents respondent from developing its subdivision without obtaining the necessary variances, but leaves open the possibility that respondent may develop the subdivision according to its plat after obtaining the variances.

Williamson County, 473 U.S. at 193-94 (emphasis supplied).

Notwithstanding the Supreme Court's characterization of these as ripeness tests, other courts from time to time have referred to them as exhaustion requirements.[517] At the end of the day it makes no difference what they are called. Their effect is to block the litigation.

In *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997) (Souter, J.), the Court recognized that there are limits to the requirement of finality. (*Suitum* dealt only with the first prong of *Williamson County*. *Suitum*, 520 U.S. at 734.) The plaintiff owned an undeveloped lot near Lake Tahoe. The planning agency determined that the lot was not eligible for any development, but the landowner would be entitled to receive and to sell certain TDRs (transferable development rights). Rather than seeking to use the TDRs, which she described as an "idle and futile act," Ms. Suitum sued claiming a taking. *Suitum* at 732. The Supreme Court reversed the lower courts, finding that the landowner's claim satisfied the finality requirement of *Williamson County* even she did not receive a final agency decision as to the transfer of her TDRs. (It did not reach the merits, but remanded for further proceedings.)

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[516] See *Montgomery v. Carter Cnty.*, 226 F.3d 758 (6th Cir. 2000), for further explanation of the difference between exhaustion and ripeness in this context.

[517] *E.g.*, *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 93-94 (1st Cir. 2003), *cert. denied*, 540 U.S. 1090 (2003); *Harbours Pointe of Nashotah, LLC v. Village of Nashotah*, 278 F.3d 701, 706 (7th Cir. 2002); *Hehr v. City of McCall*, 155 Idaho 92, 98, 305 P.3d 536, 542 (2013) (Burdick, C.J.); *Kurtz v. Verizon New York, Inc*., 758 F.3d 506, 513-14 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1156, 190 L. Ed. 2d 912 (2015).

In *Suitum*, prong one was satisfied because a decision on the sale of TDRs is not "the type of 'final decision' required by our *Williamson County* precedents," *Suitum* at 739, and there was "no question here about how the regulations at issue [apply] to the particular land in question," *Suitum* at 739 (quoting *Williamson County*, brackets original). "Because the agency has no discretion to exercise over Suitum's right to use her land, no occasion exists for applying *Williamson County's* requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel." *Suitum*, 520 U.S. at 739.[518]

While *Williamson County* dealt with the failure to seek a variance, the holding is equally applicable in other contexts. For example, it would presumably apply to the failure to appeal a planning and zoning decision to the city council or county commission.[519] The Idaho Supreme Court has had occasion to apply prong one of *Williamson County* in a handful of land use cases.

In KMST, LLC v. Cnty. of Ada, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003) (Eismann, J.), the Idaho Supreme Court rejected a challenge to the Ada County Highway District ("ACHD") under the first prong of *Williamson County* It held that the inverse condemnation action against ACHD not ripe because the objectionable requirement was merely recommended by ACHD, which lacked final authority to impose the requirement. The plaintiff should have challenged Ada County's adoption of ACHD's recommendation for the dedication of a street as a condition of approval.

In *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 845-46, 136 P.3d 310, 316-17 (2006) (J. Jones, J.), the Idaho Supreme Court applied the *Williamson County* ripeness requirement, despite the fact that neither side had raised it. It found

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[518] In passing, the *Suitum* Court described the *Williamson County* ripeness tests as "prudential" in nature. *Suitum* at 733. But it did not explain how that affected the decision, and it does not appear that it did. Indeed, the Court did not rely on the prudential nature of the tests to avoid applying them. To the contrary, it applied prong one (the only one at issue) and found that it was satisfied.

[519] In discussing the difference between ripeness and exhaustion, the Court noted: "Similarly, respondent would not be required to appeal the Commission's rejection of the preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decisionmaking." *Williamson County*, 473 U.S. at 193. This example, however, is limited to Tennessee's peculiar appeal mechanism in which the Board sits in the nature of an appellate body. In Idaho, where cities and counties have the authority to not only reverse the planning and zoning commission but to modify that decision, such an appeal presumably would be necessary in order to satisfy *Williamson County*'s "final decision" requirement. This nuance, however, appears to have been overlooked by the Ninth Circuit in *Hacienda*. "In *Williamson County* the Supreme Court made it clear that resort beyond the 'initial decision-maker' is not necessary to fulfill the final decision prong of the ripeness analysis." *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 657 (9th Cir. 2003).

Palazzolo futility exception was applicable to the first prong; plaintiffs were not required to seek a variance where none would have been granted.

In *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.), the City of McCall required a developer to provide affordable housing as a condition of development approval. When the affordable housing ordinance was overturned in separate litigation (*Mountain Central Bd. of Realtors, Inc. v. City of McCall*, Case No. CV 2006-490-C (Idaho, Fourth Judicial Dist., Feb. 19, 2008) (Thomas F. Neville, J.)), the city released the developer from its obligations. By that time, however, the housing market had crashed and the developer was left holding an apartment building (the Timbers) that it had acquired to meet the requirement. The Court ruled that the developer failed the final decision prong of the *Williamson County* test by failing to explore other options for meeting the requirement.

> There is nothing in the record to indicate any action by McCall that would constitute a final decision regarding the application of Ordinance 819 to Alpine's development. Although Alpine initially proposed an alternative to satisfy the ordinance, there is no evidence that Alpine challenged the purchase of the Timbers to the county or the city. For this reason, it is unclear how McCall would have responded. Like in *Penn Central*, the absence of such a challenge means this Court does not have the benefit of a final decision, and the federal claims are unripe under the first prong of the *Williamson County* ripeness test.

Alpine Village, 154 Idaho at 938, 303 P.3d at 625. (The Court went on to award attorney fees to the city.)

The take home message is that if the planning entity imposes requirements that are thought to be unlawful, the applicant should speak up and explore whether an accommodation can be achieved.

(c) Prong two: Failure to timely pursue state remedies

(i) Federal action premature until state remedy pursued and denied

The second holding in *Williamson County*, also framed in terms of ripeness, is even more restrictive. Prong two requires that, before pursuing a federal taking claim, the plaintiff must first (or, in some cases, simultaneously) pursue any available state law remedy and be denied relief by the state.

Note that in cases involving federal governmental actions, this requirement is transmuted into a requirement to seek relief under the Tucker Act (see discussion in section 28.H(1)(a) at page 618).

As a practical matter, it bars litigation involving federal regulatory taking claims aimed at state or local governments in jurisdictions like Idaho where state remedies for takings are available. The *Williamson County* Court held that when a federal regulatory taking is alleged against a state or local government agency, the property owner must first "seek compensation through the procedures the State has provided for doing so" before pursuing the federal taking claim. *Williamson County*, 473 U.S. at 194.

> Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491. [Citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-20 (1984).] Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Williamson County, 473 U.S. at 195. The Court further explained:

> Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not "complete" until the State fails to provide adequate compensation for the taking.

Williamson County, 473 U.S. at 195.

In other words, where state courts will entertain actions under state law to address the alleged taking, the landowner must avail itself of that remedy (and be denied) before pursuing the federal taking claim[520]—unless doing so would be futile.[521] This is necessary, the Court explained, because the Just Compensation

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[520] As discussed elsewhere, if the litigation is pursued in state court, the state and federal claims may be presented in the same complaint, thus allowing the state court to take up the state claim first and then to consider the federal claim if the state claim fails. However, the state claim must be timely presented. The federal claim cannot be ripened by including an untimely state claim.

[521] *Williamson County* requires use of state procedures only where "the [state] government has provided an adequate process for obtaining compensation." *Williamson County*, 473 U.S. at 194. The Ninth Circuit has read into this a futility test. The futility test, however, is a difficult one. *E.g.*, *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 658-61 (9th Cir. 2003)

Clause does not prohibit takings. It simply prohibits takings without just compensation. Thus, it is necessary to turn first to the state to see if compensation will be granted. *Williamson County*, 473 U.S. at 194-95.

Although this case was brought under § 1983, the holding is not premised on that statute. Rather, the ripeness requirements arise out of the Constitution itself: "The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." *Williamson County*, 473 U.S. at 195. Thus, it would seem that the *Williamson County* ripeness requirements would be applicable even if the Court held that federal takings claims could be made directly under the Constitution.

The prong two principle was reiterated in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999) (Kennedy, J.): "A federal court, moreover, cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy."

(ii) Forfeiture of federal claim

Prong two is more than a sequencing requirement (requiring that the state law claim be brought first or simultaneously with the federal claim in state court). Where a plaintiff fails to pursue an available state remedy that is now time-barred under state law, federal claim not ripe and can never become ripe. Consequently, it is forfeited altogether.

"[W]hile the *Williamson County* requirements typically reveal a claim to be premature, they may also reveal that a claim is barred from the federal forum." *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 95 (1st Cir. 2003), *cert. denied*, 540 U.S. 1090 (2003).[522] In other words, *Pascoag* recognized that where it is too late to go back to ripen a federal claim in state court, the federal claim is forfeited altogether.

In *Pascoag*, the State of Rhode Island sued in state court to quiet title to land and lake access on a privately owned reservoir based on adverse possession. When the State prevailed in the state quiet title action, the reservoir owner brought a new suit in federal court alleging that the adverse possession amounted to an uncompensated taking under the federal Constitution (among other claims). The First Circuit found it unnecessary to resolve the question of whether adverse possession can give rise to a right of compensation, because the case was not ripe

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(rejecting plaintiff's argument that resort to California courts would have been futile in a regulatory taking case).

[522] *Pascoag* was emphatically affirmed in *Downing/Salt Pond Partners, L.P. v. Rhode Island and Providence Plantations*, 643 F.3d 16 (1st Cir. 2011).

under prong two of *Williamson County*. *Pascoag* at 90.[523] It was not ripe, because Pascoag failed to bring a state law inverse condemnation action within the state's statute of limitation.

> As the Rhode Island Supreme Court noted, there is a fatal flaw in Pascoag's claim: it is too late for any state law cause of action. *Williamson County* requires the pursuit of state remedies before a taking case is heard in federal court. Adequate state remedies were available to Pascoag; it simply ignored those remedies until it was too late. By failing to bring a timely state cause of action, Pascoag forfeited its federal claim.

Pascoag, 337 F.3d at 94.

Noting that the case involved a physical taking, the First Circuit did not apply the first prong of *Williamson County*. However, it applied the second prong. *Pascoag* at 91-92 (citing *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1281 n.28 (9th Cir. 2002); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989), *overruled on other grounds by Armendariz v. Penman*, 75 F.3d 1311, 1326 (9th Cir. 1996) (en banc)). It ruled that by bringing suit in federal rather than state court, Pascoag failed to ripen its claim under prong two.

Pascoag contended that it should be excused (under the *Palazzolo* futility exception) from the requirement to first pursue a state remedy, because its state law remedy had lapsed under the statute of limitations. The court rejected that argument.

> If the futility rule were read this broadly it would swallow the general rule of state remedy exhaustion. Like the other exceptions, the futility exception must consider the landowner's available state remedies at the time of the taking. . . . There is no evidence that the state would not have been receptive to Pascoag's claim had it been brought at the time the property was taken . . . .

Pascoag, 337 F.3d at 93-94.

As a result, the federal claim could never be ripened:

> Adequate state remedies were available to Pascoag; it simply ignored those remedies until it was too late. By

[523] As for the merits of Pascoag's claim, the author of this section of the Handbook would opine that such a claim is ludicrous and contrary to the whole idea of adverse possession, which is that the adverse user obtains the property for free. For a contrary view, see Martin J. Foncello [Comment], *Adverse Possession and Takings Seldom Compensation for Chance Happenings*, 35 Seaton Hall L. Rev. 667 (2005).

> failing to bring a timely state cause of action, Pascoag forfeited its federal claim.

Pascoag, 337 F.3d at 94.

> [W]hile the *Williamson County* requirements typically reveal a claim to be premature, they may also reveal that a claim is barred from the federal forum. The *Williamson County* 'ripeness' requirements will never be met in this case, because the state statute of limitations has run on Pascoag's inverse condemnation claim. By failing to bring its state claim within the statute of limitations period, Pascoag *forfeited* its federal claim.

Pascoag, 337 F.3d at 95 (citations omitted, emphasis original).

Similarly, in *Harbours Pointe of Nashotah, LLC v. Village of Nashotah*, 278 F.3d 701 (7th Cir. 2002), the court threw out a federal taking claim for failure to satisfy prong two of *Williamson County*. In 1980, the village began imposing "reserve capacity assessments" to pay for construction of a local sanitary sewer system. It appears that the assessments were initially imposed on "every parcel of land in Village." *Harbours Point* at 702. However, after the Village collected sufficient funds to retire the debt, it continued to collect the fees "from developers in the Village." *Harbours Point* at 703. In 1996, the plaintiff acquired property which had never paid the assessments. In connection with development of the property, the plaintiff entered into a Developer's Agreement with the village agreeing to pay the sewer assessment. Over a year later, the developer later sued the village in a § 1983 action in state court, complaining that the village failed to adopt an "impact ordinance" and that the assessment was therefore an unlawful taking. The village removed the case to federal court. *Harbours Pointe* at 703. The Seventh Circuit affirmed the district court's ruling that the plaintiff failed to employ an adequate state remedy—a statute authorizing challenges to assessments within 90 days of entering into the Developer's Agreement. As a result, it failed to ripen that thereby forfeited its federal taking claim.

> A property owner cannot "let the time for seeking a state remedy pass without doing anything to obtain it and then proceed in federal court on the basis that no state remedies are open." *Gamble*, 5 F.3d at 286. An unexcused failure to exhaust adequate statutory remedies forfeits a claimant's rights. *Id.* Because Harbours Pointe waited nineteen months after receiving notice of the assessment and then filed a complaint on July 16, 1998, it is now barred from recovering any refund from the Village. Harbours Pointe failed to pursue its state

> remedies in a timely fashion and has forfeited its right to assert a claim for just compensation under either Wisconsin or federal law. *Id.*

Harbours Pointe at 706 (citing *Gamble v. Eau Claire Cnty.*, 5 F.3d 285 (7th Cir. 1993)).

Both *Pascoag* and *Harbours Pointe* relied on *Gamble v. Eau Claire Cnty.*, 5 F.3d 285 (7th Cir. 1993). That case, like *Pascoag*, involved a blown statute of limitations on the state inverse condemnation claim (as well as failure to seek judicial review of a land use decision), resulting in forfeiture of the federal takings claim. "By booting her state compensation remedies she forfeited any claim based on the takings clause to just compensation." *Gamble* at 286.

A Ninth Circuit decision reached the same conclusion in 2002. *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 381 & 382 (9th Cir. 2002), *cert. denied*, 537 U.S. 973. The court noted:

> Assuming that adequate state procedures were available to seek such compensation, the failure of Johnson and the Bucklews to seek just compensation meant that they never created ripe federal takings claims. The failure of Johnson and the Bucklews to use such state procedures cannot now be cured because the applicable state limitation periods have long since expired.

Daniel at 381 (emphasis supplied).

In Idaho, an inverse condemnation based on a denial or restrictive approval of a land use application is pursued by seeking judicial review of the decision within 28 days of the adverse decision. If the governmental action complained of is not appealable under LLUPA, inverse condemnation may be pursued by filing a complaint against the local government.[524] In addition, the litigant could seek a "regulatory taking analysis" under Idaho Code § 67-8003(2).

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[524] Idaho first recognized a cause of action for inverse condemnation in *Boise Valley Const. Co. v. Kroeger*, 17 Idaho 384, 105 P. 1070 (1909). As our Supreme Court explained in 1950:

> In essence, this is a condemnation suit in reverse. The State took appellants' land without paying for it and now contends, because of interposed immunity of the State, appellants may not recover herein.
>
> Article 1, Section 14 of the Constitution of Idaho, is mandatory that private property may not be taken until a just compensation, to be ascertained in the manner prescribed by law, is paid. This Section is self-executing:
>
> "This provision of our Constitution to the extent of establishing the nature of the use required has been held to be self-

Under *Williamson County*, this becomes a prerequisite to a federal court action alleging a taking. However, both state and federal taking claims may be pursued simultaneously in a timely state action. Subsequent cases, notably *San Remo Hotel, L.P. v. City and Cnty. of San Francisco*, 545 U.S. 323 (2005) (Stevens, J.), have made clear that the plaintiff can (and, under *Williamson County*, must) bring the federal claims in state court. In other words, *Williamson County* does not require the plaintiff to pursue state substantive remedies (*e.g.*, its state constitutional claims) first. The federal remedy may be pursued from the outset, so long as it is pursued in state court.

In *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.), the Idaho Supreme Court applied the forfeiture principles of *Pascog* even though it did not cite those cases. The *Alpine Village* Court rejected a lawsuit under prong two of *Williamson County* because the plaintiff failed to seek relief under either the Idaho Regulatory Takings Act or LLUPA within 28 days. The Court said:

> In response, McCall argues that state law provides Alpine with a means of challenging a taking through judicial review under the Local Land Use Planning Act (LLUPA) and that Alpine failed to use it. Additionally, McCall argues that any plaintiff that fails to timely file a state takings claim can never satisfy this prong of *Williamson County*.
> The Local Land Use Planning Act (LLUPA) provides an avenue to evaluate certain proposed regulatory or

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> executing and constitutes a grant of the power of eminent domain in behalf of the uses therein expressed. No action of the Legislature further than providing the procedural machinery by which the right may be applied is necessary. his is provided by the special proceedings in eminent domain enacted by the Legislature, and whether or not a right claimed under this provision of the Constitution is within the grant is held to be a judicial question to be determined by the courts." *Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 722, 725 [(1931)].

Renninger v. State, 70 Idaho 170, 177, 213 P.2d 911, 915 (1950) (Givens, J.).

The Court continues to recognize the action. "A property owner who believes that his or her property, or some interest therein, has been invaded or appropriated to the extent of a taking, but without due process of law and the payment of compensation, may bring an action for inverse condemnation." *KMST, LLC v. Cnty. of Ada*, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003) (Eismann, J.). To support a claim for inverse condemnation, "the action must be: (1) instituted by a property owner who (2) asserts that his property, or some interest therein, has been invaded or appropriated (3) to the extent of a taking, (4) but without due process of law, and (5) without payment of just compensation." *Covington v. Jefferson Cnty.*, 137 Idaho 777, 780, 53 P.3d 828, 831 (2002). For further discussion of inverse condemnation, see section 28.G at page 612.

> administrative actions to assure that such actions do not result in an unconstitutional taking of private property:
>
> > Upon the written request of an owner of real property that is the subject of such action, such request being filed with the clerk or the agency or entity undertaking the regulatory or administrative action not more than twenty-eight (28) days after the final decision concerning the matter at issue, a state agency or local governmental entity shall prepare a written taking analysis concerning the action.
>
> I.C. § 67–8003; *see also Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 496, 300 P.3d 18, 28 (2013). Alpine did not seek judicial review under this statute. Alpine correctly notes an exception in I.C. § 67–6521(2)(b) which allows a legal action under Article I, Section 14 of the Idaho Constitution. But this exception requires "a final action restricting private property development" and as discussed above there was no final action in this matter. Therefore, we hold that the second prong of the *Williamson County* ripeness test has not been satisfied and that Alpine's federal claims are not ripe.

Alpine Village, 154 Idaho at 939, 303 P.3d at 626 (emphasis supplied). In sum, where there is an opportunity to present a state law takings claim through judicial review and the plaintiff fails to make timely use of it and that avenue is no longer available, the plaintiff forfeits the federal claim.

In *Hehr v. City of McCall*, 155 Idaho 92, 305 P.3d 536 (2013) (Burdick, C.J.), the Court found that a developer's taking claim against the City of McCall failed both prongs of the *Williamson County* test, this time citing both *Pascoag* and *Harbours Point*. The problem under prong two was the developer's failure to seek a regulatory taking analysis:

> Greystone filed permit applications with McCall for a subdivision and a planned unit development. Under the Local Land Use Planning Act (LLUPA) provisions dealing with subdivision permits and planned unit development permits, *see* I.C. §§ 67–6513, 67–6515, Greystone could have requested a regulatory taking analysis pursuant to I.C. § 67–8003. S.L. 2003, ch. 142, §§ 24. Idaho Code section 67–6513 specifically states, "Denial of a subdivision permit or approval of a

> subdivision permit with conditions unacceptable to the landowner may be subject to the regulatory taking analysis provided for by section 67–8003, Idaho Code, consistent with the requirements established thereby." "[B]ecause the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied." *Williamson County*, 473 U.S. at 194 n. 13, 105 S. Ct. 3108. If Greystone had found the conveyance of the nine lots unacceptable, it could have sought a regulatory taking analysis under I.C. § 67–8003. *See Buckskin Props., Inc. v. Valley County*, 154 Idaho 486, 492, 300 P.3d 18, 24 (2013). Greystone failed to seek just compensation under I.C. § 67–8003 and it has not shown that this statute's procedures were inadequate. Having failed to timely bring a state claim for just compensation, Greystone has forfeited its federal claim. *See Harbours Pointe of Nashotah, LLC v. Vill. of Nashotah*, 278 F.3d 701, 706 (7th Cir. 2002) ("An unexcused failure to exhaust adequate statutory remedies forfeits a claimant's rights."); *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 94 (1st Cir. 2003). Greystone's claim fails to meet both of the ripeness requirements set forth in *Williamson County*. Because Greystone has waived its federal takings claim, we affirm the district court's dismissal of this claim.

Hehr, 155 Idaho at 98, 305 P.3d at 542.

Thus, in *Alpine Village* and again in *Hehr*, the Idaho Supreme Court embraced the "forfeiture of claim" analysis developed by the Seventh Circuit (*Harbours Point*) and the First Circuit (*Pascoag*). In both cases, the Idaho Court found that the developer's failure to take advantage of an optional procedure (seeking a regulatory taking analysis) constituted failure to failure to employ an adequate procedure for seeking just compensation, resulting in forfeiture of the federal claim.

(d) Exceptions to prong one (finality requirement).

(i) Physical takings

Various lower courts have recognized an exception to the first *Williamson County* requirement. The requirement that there be a final government decision is automatically satisfied by a physical taking because the taking occurs at the moment there has been a physical invasion. *Vacation Village, Inc. v. Clark Cnty., Nev*ada, 497 F.3d 902, 912 (9th Cir. 2007); *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375,

382 (9th Cir. 2002). This is a fairly narrow exception, however, and it does not apply in the context of regulatory takings, including exaction cases. (See discussion of physical takings in section 28.B(1) at page 577.)

In any event, the exception does not eliminate the second prong of the *Williamson County* test requiring utilization of state inverse condemnation proceedings.[525] Relying on Ninth Circuit precedent, the court in *Pascog* explained:

> The present case concerns a potential physical taking, based on the intrusion onto Pascoag's property or the acquisition of rights in that property. In a physical taking case, the final decision requirement is relieved or assumed because "[w]here there has been a physical invasion, the taking occurs at once, and nothing the [governmental actor] can do or say after that point will change that fact." *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1281 n.28 (9th Cir. 1987); cf. Arnett v. Myers, 281 F.3d 552, 563 (6th Cir. 2002) (finding final decision requirement satisfied because decision maker "arrived at a definitive position inflicting an actual, concrete injury when its agents removed and destroyed" plaintiff's alleged property); *Forseth v. Village of Sussex*, 199 F.3d 363, 372 n. 12 (7th Cir. 2000) (finding physical taking claim subject only to Williamson County's state action requirement). However, the state action requirement remains in physical taking cases: "[C]ompensation must first be sought from the state if adequate procedures are available." *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989), *overruled on other grounds by Armendariz v. Penman*, 75 F.3d 1311, 1326 (9th Cir. 1996) (en banc).

Pascog at 91-92 (footnote omitted).

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[525] "Even in physical taking cases, compensation must first be sought from the state if adequate procedures are available." *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989), overruled on other grounds by *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). "The second *Williamson County* requirement remains the same. In a physical takings case, as in a regulatory takings case, the property owner must have sought compensation for the alleged taking through available state procedures." *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002). *Vacation Village, Inc. v. Clark Cnty., Nev*ada, 497 F.3d 902, 912-13 (9th Cir. 2007) (first prong was inapplicable in the context of a physical taking, but second prong applied). This is consistent with holdings in other circuits, *e.g.*, *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1977); *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 380 (2nd Cir. 1995); *Peters v. Village of Clifton*, 498 F.3d 727, 732 (7th Cir. 2007).

(ii) Independent legal theories

The *Williamson County* ripeness hurdles may not be applicable if the plaintiff has identified significant, independent legal theories in addition to the takings claim.

> Land-use regulation may be challenged on theories different from a taking claim. The [*Williamson County*] ripeness tests applied to a taking claim are likely to be applied to other theories as well when it is difficult to find any clear conceptual distinction between the alternative theory and a taking claim. Courts frequently refer to the other theories as "ancillary" to the taking claim. As distinctions emerge, however, general ripeness theories may displace the specific finality and exhaustion requirements applied to taking claims.

Wright, Miller *et al.*, 13B *Federal Practice and Procedure* § 3532.1.1.

However, merely reframing the taking issue as a due process violation does not negate the applicability of the *Williamson County* ripeness requirements. In *Williamson County*, the planning commission urged that the developer's takings claim should be analyzed instead as a due process claim. (The developers alleged procedural and substantive due process claims. *Williamson County*, 473 U.S. at 182 n.4. The planning commission argued that the case should be viewed through that lens: a regulation that "goes too far" is a violation of due process. It hoped that by reframing it as a due process question, it the claim would not give rise to damages for the temporary taking.) The Court said that it does matter what you call it, ripeness is a requirement in any event.[526]

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[526] The Court explained:

> We need not pass upon the merits of petitioners' [due process] arguments, for even if viewed as a question of due process, respondent's claim is premature. Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of property through eminent domain or physical possession.
>
> . . .
>
> In sum, respondent [developer]'s claim is premature, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment."

Williamson County, 473 U.S. at 200.

See also *Herrington v. Cnty. of Sonoma*, 857 F.2d 567, 569 (9th Cir. 1988) (holding that the *Williamson County* ripeness tests apply to equal protection and substantive due process claims, and stating that "we see no reason, under the circumstances of this case, to apply a different standard to [plaintiff's] procedural due process claim."); *Harris v. Cnty. of Riverside*, 904 F.2d 497, 500 (9th Cir 1990) ("Procedural due process claims arising from an alleged taking may be subject to the same ripeness requirements as the taking claim itself depending on the circumstances of the case."); *Weinberg v. Whatcom Cnty.*, 241 F.3d 746 (9th Cir. 2001) (procedural due process claim was unrelated to the takings claim and therefore not subject to the ripeness analysis).

> Accordingly, the Ninth Circuit requires a final decision for a due process claim if it relates to, or arises from, a taking claim. *See Norco Construction, Inc v. King County*, 801 F.2d 1143 (9th Cir. 1986). Otherwise procedural due process claims are not subject to heightened ripeness constraints. *Carpinteria Valley Farms, Ltd v. County of Santa Barbara*, 344 F.3d 822, 831 (9th Cir. 2003) ("Thus * * * claims under 42 USC § 1983 concerning land use may proceed even when related Fifth Amendment 'as applied' taking claims are not yet ripe for adjudication."). *See also Harris v. County of Riverside*, 904 F.2d 497, 500-01 (1990). Here, plaintiffs' due process claims do not relate to or arise from a taking claim; hence, the standard ripeness test [as opposed to *Williamson County*] is appropriate.

Mi Pueblo San Jose, Inc. v. City of Oakland, 2006 WL 2850016 (N.D. Cal. 2006) (unreported).

(iii) Futility

In *Palazzolo v. Rhode Island*, 533 U.S. 606, 618-26 (2001), the U.S. Supreme Court grafted on a futility exception to *Williamson County*[527] For over 40 years, Mr. Palazzolo owned about eighteen acres of valuable wetlands containing a few spots of uplands. In the span of twenty-three years, Mr. Palazzolo applied four times for a permit to fill in the wetlands; each time he was denied. Mr. Palazzolo brought an inverse condemnation action in state court and lost. The Rhode Island Supreme Court affirmed the trial court decision, finding that Mr. Palazzolo's claim was not ripe because he had failed to apply for "less ambitious development plans", *i.e.*, a plan that only sought to develop the small upland portions of the property.

[527] The *Palazzolo* Court also spoke on the issue of preclusion, holding that the fact that a property owner acquires the property after the regulations go into effect does not *ipso facto* preclude a takings claim.

The U.S. Supreme Court reversed, holding that Mr. Palazzolo established ripeness because the "unequivocal nature of the wetland regulations" and the government's decisions "make plain that the agency interpreted its regulations to bar petitioner from engaging in any filling or development activity on the wetlands . . . ." *Palazzolo, 533 U.S.* at 619, 621. In other words, it was sufficiently clear from the record that no development would be permitted the property, so there was no point in filing further applications. *Palazzolo* at 623. Basically, the Court recognized a "futility" exception to the requirements of *Williamson County*[528]

As noted above, the Idaho Supreme Court recognized and applied the *Palazzolo* exception in *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 845-46, 136 P.3d 310, 316-17 (2006) (J. Jones, J.).

In *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87 (1st Cir. 2003), *cert. denied*, 540 U.S. 1090 (2003), the court rejected the plaintiff's argument that ripening the federal claim by first bringing a state takings claim would have been futile because the claim was barred by the statute of limitations. A plaintiff may not show futility through self-inflicted wounds. See more detailed discussion of *Pascoag* in section 22.I(3) at page 317.

(iv) Facial challenges

In *Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992) (O'Connor, J.), the Supreme Court noted that the first prong of the *Williamson County* ripeness test does not apply to facial challenges to ordinances.

> As a preliminary matter, we must address respondent's assertion that a regulatory taking claim is unripe because petitioners have not sought rent increases. While respondent is correct that a claim that the ordinance effects a regulatory taking *as applied* to petitioners' property would be unripe for this reason, petitioners mount a *facial* challenge to the ordinance. They allege in this Court that the ordinance does not "substantially advance" a "legitimate state interest" no matter how it is applied. As this allegation does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which

[528] "Ripeness doctrine does not require a landowner to submit applications for their own sake." *Palazzolo*, 533 U.S. at 622. "Where the state agency charged with enforcing a challenged land-use regulation entertains an application from an owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing court has cited noncompliance with reasonable state-law exhaustion or pre-permit processes, federal ripeness rules do not require the submission of further and futile applications with other agencies." *Palazzolo*, 533 U.S. at 625-26.

> these particular petitioners are compensated, petitioners' facial challenge is ripe.

Yee at 533-34 (emphasis original) (citations and internal quotes omitted).

The Court reiterated this in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 730 (1997) (Souter, J.). "Such 'facial' challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed, but face an 'uphill battle,' since it is difficult to demonstrate that 'mere enactment' of a piece of legislation deprived the owner of economically viable use of his property.'" *Suitum*, 520 U.S. at 737 n.10 (citation omitted; internal quotation marks and brackets omitted).[529]

The Ninth Circuit has followed suit: "Facial challenges are exempt from the first prong of the *Williamson* ripeness analysis because a facial challenge by its nature does not involve a decision applying the statute or regulation." *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1117 (9th Cir. 2010) (quoting *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003), *cert. denied*, 543 U.S. 1041 (2004 and 2005) (two petitions for certiorari denied)).[530]

"The state remedies prong [prong two], however, does apply to facial challenges." *Hacienda*, 353 F.3d at 655. "This requirement [prong two] applies to both facial challenges as well as 'as applied' challenges." *8679 Trout, LLC v. North Tahoe Public Utilities Dist.*, 2010 WL 3521952 at *4 (E.D. Cal. 2010) (publication pending). "As-applied challenges must meet both prongs of the *Williamson County* ripeness analysis." *Hacienda*, 353 F.3d at 657. This breakdown is summarized in the chart below:

	Facial challenge	As-applied
Prong one (final decision)	Not applicable	Applicable
Prong two (state remedies)	Applicable	Applicable

[529] *Yee* and *Suitum* involved only prong one. The *Yee* litigation was initiated in state court, thus satisfying prong two. Moreover, the Court makes clear in the quotation above that an "as applied" challenge would not have been ripe. In *Suitum*, the Court stated: "Because only the "final decision" prong of Williamson was addressed below and briefed before this Court, we confine our discussion here to that issue." *Suitum* at 734. In a footnote, the *Suitum* Court noted that counsel agreed that no state remedies were available to the plaintiff. The Court suggested that the Court of Appeals might want to examine that more closely on remand. *Suitum* at 734, n.10. This observation confirms that prong two is a live issue, applicable in a facial challenge.

[530] Do not be confused, by the way, by the distinction drawn in *San Remo Hotel, L.P. v. City and Cnty. of San Francisco*, 545 U.S. 323 (2005) between the facial and as-applied claims. The *San Remo* case involved only the second prong of *Williamson County* (the state remedies requirement), so the facial challenge exception to the first prong was not relevant or discussed. The *San Remo* case dealt with a distinction over the nature of the takings claim which has now been mooted by *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 545 (2005). See *San Remo*, 545 U.S. at 346 n.25.

The fact that facial challenges are exempt from prong one, but not prong two, makes sense. Prong one is premised on the need to know the extent of the taking. If the existence of the taking can be established simply by reading the ordinance, there is no need for a final administrative decision applying it. In contrast, prong two is based on the text of the Fifth Amendment and the fact that a taking does not occur unless the property owner has actually been denied compensation by the state. That requirement is just as true for a facial challenge.

(e) Exceptions to prong two (state remedies): None

We are not aware of any judicially recognized exceptions to prong two of *Williamson County*

(f) *San Remo*: The federal taking claim may be brought simultaneously in state court

Note: See also discussion of when the cause of action accrues in section 22.I(3) at page 317.

As noted above, the second prong of the *Williamson County* ripeness test requires a plaintiff to pursue state law remedies in state court (and fail) before bringing the federal taking claim. This would appear to mandate a two-step process in which the plaintiff first litigates any state-law based inverse condemnation claim and, when that fails, may bring the federal takings claim. In *San Remo Hotel, L.P. v. City and Cnty. of San Francisco*, 545 U.S. 323 (2005) (Stevens, J.), however, the U.S. Supreme Court said this is not the case. This case expressly provided that a federal takings claim that is not ripe in federal court due to *Williamson County* may nonetheless be brought in state court simultaneously with any state claims.

San Remo dealt with the "reservation" of federal claims under *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) (Stevens, J.). So, first, a word about *England* reservations. In *England* a group of newly graduated chiropractors brought suit in federal court challenging licensing requirements in Louisiana. They brought both state statutory claims and a federal Fourteenth Amendment claim. The federal court of appeals invoked the *Pullman* abstention doctrine,[531] noting that the issue might be resolved by a narrow construction of the state statute. The plaintiffs then litigated both the federal and state claims in state court. Losing there, plaintiffs returned to federal court. On appeal, the U.S. Supreme Court established the principle that where the federal court sends the plaintiff to state court to litigate a state issue, the plaintiff may affirmatively reserve the federal issue in the state court litigation thus preserving it for subsequent federal court litigation.[532]

[531] The *Pullman* extension doctrine is based on *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

[532] Interestingly, these plaintiffs failed to make such a reservation, but were forgiven for their mistake. The Court made clear that henceforth an affirmative reservation is required.

Thus, *England* reservations occur only when the plaintiff begins in federal court and is directed back to state court.

In *San Remo*, the owner of the San Remo Hotel in Fisherman's Wharf challenged a $567,000 fee imposed by the City of San Francisco for converting "residential units" to "tourist units." The plaintiff brought a petition for mandamus in state court challenging the decision to classify the hotel as residential hotel (contending that it was really a tourist hotel all along). The state court action, however, was stayed while the plaintiff pursued another action in federal court. There it alleged both facial and as-applied federal taking claims (in addition to other claims).

The federal district court ruled for the city, dismissing all the claims as either unripe, barred by the statute of limitations, or precluded by prior adverse judgment. On appeal to the Ninth Circuit, the hotel owners took the unusual step (for a plaintiff) of asking the appeals court to abstain under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The idea was that by allowing the dormant state court action to proceed first, the whole issue might be resolved by finding that the hotel was a tourist hotel all along and not subject to the fee. The Ninth Circuit agreed to the *Pullman* abstention as to the facial claim (because it was ripe and the Court had jurisdiction[533]). As for the as-applied claim, the Ninth Circuit found that it was not ripe under prong two of *Williamson County* Accordingly, *Pullman* abstention was not appropriate as to the as-applied challenge. Instead, the Ninth Circuit dismissed it—apparently without prejudice so that it could be litigated in state court. The Ninth Circuit noted in a footnote that while the plaintiffs pursued their mandamus action in state court they were free to simultaneously litigate their facial taking claim in state court, or it could reserve it under *England*.[534]

Back in state court, the plaintiffs revived their dormant action while purporting to reserve their federal claims under *England.* Despite the reservation,

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[533] The facial takings claim was based on two theories: deprivation of economicially viable use under *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992) (Scalia, J.) and failure of the ordinance to substantially advance state interests under *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (which was subsequently been overruled). The Ninth Circuit found that the first was barred under prong two of *Williamson County. San Remo v. City and Cnty. of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998). Prior to overruling of *Agins*, however, the Ninth Circuit had taken the positions that claims based on this now defunct legal theory were not subject to either prong of *Williamson County. Sinclair Oil Corp. v. Cnty. of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996). Accordingly, the Ninth Circuit ruled that the facial takings challenge was ripe based on the *Agins* theory.

[534] The Ninth Circuit referred to taking claim in the singular, apparently in reference to the facial claim on which it abstained. However, it is apparent from the Supreme Court's decision that both the facial and as-applied claims were pursued subsequently in state court. *San Remo*, 545 U.S. at 344.

however, they actively litigated both the facial and as applied taking claims through the California Supreme Court—losing them both on the merits. The plaintiffs did not seek certiorari. Instead, they returned to federal court seeking to litigate the taking claims based on their *England* reservation. This did not work. The Supreme Court ruled that the facial claim (which was ripe in federal court under *Williamson County* but subject to a *Pullman* abstention) could have been reserved, but was not effectively reserved because the plaintiff voluntarily litigated it in state court. As for the as-applied claim, it was never the proper subject of an *England* reservation because it was unripe under *Williamson County* and therefore not properly before the federal court. Thus, the plaintiff was free to litigate the as-applied claim in state court but could have no expectation that it would be immune from res judicata. "*England* does not support their erroneous expectation that their reservation would fully negate the preclusive effect of the state-court judgment . . . ." *San Remo*, 545 U.S. at 338. In other words, if the plaintiffs wanted to ripen the claim in state court, they would be bound by the state court's decision. (As noted, they could have sought certiorari from the state supreme court to the U.S. Supreme Court, but chose not to do so. *San Remo*, 545 U.S. at 334.)

The bottom line is that when *Williamson County* is combined with *San Remo*, the message is that federal taking claims that are unripe under prong two of *Williamson County* may nevertheless be litigated in state court simultaneously with any state claims.[535] The Court said:

> With respect to those federal claims that did require ripening [that is, those claims barred from federal court under *Williamson County*], we reject petitioners' contention that *Williamson County* prohibits plaintiffs from advancing their federal claims in state courts. The requirement that aggrieved property owners must seek "compensation through the procedures the State has provided for doing so," 473 U.S., at 194, 105 S. Ct. 3108, does not preclude state courts from hearing simultaneously a plaintiff's request for compensation

[535] Prior to *San Remo*, the courts struggled with how to implement the ripening process mandated by *Williamson County*. In *Palomar Mobilehome Park Association v. City of San Marcos*, 989 F.2d 362, 365-66 (9th Cir. 1993), the Ninth Circuit held that the doctrine of claim preclusion acted to preclude the federal courts from hearing plaintiff's federal takings claim because the federal claim could have been presented in state court at the time that the plaintiff was pursuing his state claims pursuant to *Williamson County* and, in any event, was taken up by the state court. Two years later, the Ninth Circuit held read *Williamson County* as requiring a plaintiff only to present its state inverse condemnation claims in state court. *Dodd v. Hood River Cnty.*, 59 F.3d 852 (9th Cir. 1995). See also *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118 (2nd Cir. 2003) (holding that parties may make an *England* reservation in the mandated state court proceedings and thereby preserve their federal taking claims for federal court litigation).

> under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution. Reading *Williamson County* to preclude plaintiffs from raising such claims in the alternative would erroneously interpret our cases as requiring property owners to "resort to piecemeal litigation or otherwise unfair procedures."

San Remo, 545 U.S. at 346 (citing *MacDonald, Sommer & Frates v. Yolo Cnty.*, 47 U.S. 340, 350 n.7 (1986).

Accordingly, *England* reservations for unripe federal taking claims have been rendered useless. Some hope for the litigant seeking access to federal courts, is found in the strongly worded concurrence to *San Remo*. *San Remo* at 352. It would not change the rule that res judicata attaches to state court litigation of taking claims. But it suggests that the Court is ready to rethink the second holding in *Williamson County* and allow litigants to proceed directly to federal court with taking claims. Of course, that requires a litigant to volunteer to be first. In the meantime, expect most taking claims based on zoning claims to be brought in state court.

The Ninth Circuit applied the *San Remo* principle in *Adam Bros. Farming, Inc. v. Cnty. of Santa Barbara*, 604 F.3d 1142 (9th Cir. 2010), a case involving a particularly egregious abuse of wetland delineation authority by the local government. Recall that in *San Remo*, the plaintiff actually litigated its federal claims in state court and was then barred from re-litigating them in federal court. In *Adam Bros.*, in contrast, the plaintiff failed to pursue the federal takings claim in state court (after a dismissal without prejudice[536]). After prevailing in state court on some of its claims and losing others, the plaintiff brought a temporary takings claim under the Fifth Amendment in federal court. The Ninth Circuit ruled this was barred by res judicata because it could have been raised in state court along with the other claims. This is the logical consequence of *San Remo*. The federal takings claim was not merely un-ripe. Having failed to raise it in the state court litigation, plaintiff is forever barred from raising it federal court. Note that the *Adam Bros*. court reached

[536] The plaintiff began the suit in state court, where it initially included a federal taking claim. The state district court dismissed the federal taking claim along with its state inverse condemnation claim because it had failed to pursue administrative remedies. Adam Bros., 604 F.3d at 1145. "After the dismissal without prejudice, Adam Bros. chose to file an amended complaint that omitted the takings and inverse condemnation claims. Res judicata bars 'not only claims actually litigated in a prior proceeding, but also claims that could have been litigated.' *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364 (9th Cir.1993) (emphasis added) (citing *Busick v. Workmen's Compensation Appeals Bd.*, 7 Cal.3d 967, 975, 104 Cal.Rptr. 42, 500 P.2d 1386 (1972)). By choosing to proceed in state court without the takings claim, Adam Bros. risked that the state court's later judgment would forever bar that takings claim." *Adam Bros*., 604 F.3d at 1149 n.5.

this issue and was able to rule on the merits of this procedural flaw by waiving the prudential ripeness tests in *Williamson County* This is discussed further in section 28.H(1)(h) at page 641.

In 2007, the Ninth Circuit summed up the situation: "The holding of the Supreme Court in *San Remo* changed the landscape of federal regulatory taking claims, making clear that the failure to simultaneously pursue federal claims in state court with state inverse condemnation claims will likely result in a state court judgment that has a preclusive effect on a later federal action." *Doney v. Pacific Cnty.*, 2007 WL 1381515, at *5 (E.D. Wash. 2007) (unpublished).

(g) Statute of limitations

If a federal claim is not ripe under *Williamson County*, does this mean that the statute of limitations has not yet begun to run? This question is addressed in section 22 at page 302.

(h) The ripeness tests are "prudential"; impact on removal

In *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-34 & n.7 (1997), the U.S. Supreme Court described the two *Williamson County* tests as "prudential" ripeness principles, in contrast to jurisdictional Article III barriers. This point has been emphasized by the Ninth Circuit on many occasions.

In *Beverly Blvd. LLC v. City of West Hollywood*, 238 Fed. Appx. 210 (9th Cir. 2007), *cert. denied*, 552 U.S. 1309 (2008), the court explained that these prudential ripeness tests could be waived in order to reach the merits and dismiss the case:

> We need not resolve whether this claim is ripe under the standards articulated in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L.Ed.2d 126 (1985). *Williamson* sets forth a prudential rule, *see Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 & n. 7, 117 S. Ct. 1659, 137 L.Ed.2d 980 (1997), and we may therefore assume without deciding that the takings claims are ripe in order to reject them on the merits. *See Weinberg v. Whatcom County*, 241 F.3d 746, 752 n. 4 (9th Cir. 2001); *accord Grubbs v. Bailes*, 445 F.3d 1275, 1281 (10th Cir. 2006).[537]

[537] In *Weinberg v. Whatcom Cnty.*, 241 F.3d 746, 752 n.4 (9th Cir 2001), the court announced in a footnote without discussion, "We assume without deciding that the Federal taking claim is ripe." *Grubbs v. Bailes*, 445 F.3d 1275, 1280 (10th Cir. 2006), *cert. denied*, 549 U.S. 953 (2006), dealt with waiver of prudential standing concerns. "Questions relating to prudential standing, however,

Beverly Blvd. at 210.

Similarly, in *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2765 (2009), the Ninth Circuit recognized that the ripeness tests in *Williamson County* are prudential and may be waived so as to reach the merits and deny the takings claim:

> Because this case raises only prudential ripeness concerns, we have discretion to assume ripeness is met and proceed with the merits of the McClungs' takings claim. Accordingly, we do not resolve whether this claim is ripe under the standards articulated in *Williamson*, and instead assume without deciding that the takings claim is ripe in order to address the merits of the appeal.

McClung, 548 F.3d at 1224. The Court then ruled on the merits that the city's action was not a taking.

It appears that the *McClung* court was motivated to waive ripeness in order to dispose of the case because the McClungs had waited years to bring their suit. "In this case, we easily conclude that the facts presented raise only prudential concerns. The McClungs installed the storm pipe over ten years ago, resulting in a clearly defined and concrete dispute." *McClung*, 548 F.3d at 1224. Note that this was a case initially filed by the McClungs in state court, which was removed to federal court by the city. The Ninth Circuit raised *Williamson County* ripeness tests *sua sponte* and then waived them.

Again, in *Adam Bros. Farming, Inc. v. Cnty. of Santa Barbara*, 604 F.3d 1142 (9th Cir. 2010), the Ninth Circuit waived the prudential *Williamson County* ripeness tests and "assumed without deciding" that the takings claim was ripe. *Adam Bros.*, 604 F.3d at 1148. It then promptly dismissed the case under *San Remo* on res judicata grounds. *Adam Bros.*, 604 F.3d at 1148-50.

The Ninth Circuit followed suit a month later with *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010), yet another rent control / takings case. This was a procedurally complicated case. It began in federal court, but the federal action was stayed pursuant to *Pullman* abstention to allow the plaintiffs to pursue a state action. When that case was settled, the Guggenheims returned to federal court. After an initial appeal and remand, the district court dismissed the case. On appeal again to the Ninth Circuit, the court raised the issue of *Williamson County* ripeness *sua sponte*, and then, citing *Suitum*, *McClung*, and *Adam Bros.*, decided to waive it.

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may be pretermitted in favor of a straightforward disposition on the merits." *Grubbs*, 445 F.3d at 1280.

> In this case, we assume without deciding that the claim is ripe, and exercise our discretion not to impose the prudential requirement of exhaustion in state court. Two factors persuade us to follow this course. First, we reject the Guggenheims' claim on the merits, so it would be a waste of the parties' and the courts' resources to bounce the case through more rounds of litigation. Second, the Guggenheims did indeed litigate in state court, and they and the City of Goleta settled in state court. Unfortunately the law changed after their trip to state court, so they might well have proceeded differently there had they been there after Lingle came down, but it is hard to see any value in forcing a second trip on them.

Guggenheim, 638 F.3d at 1118.

(i) Is removal appropriate?

This leads to an interesting question. If a plaintiff brings its federal taking claim in state court, may the defendant remove it to federal court under federal question jurisdiction?

8679 Trout, LLC v. North Tahoe Public Utilities Dist., 2010 WL 3521952 (E.D. Cal. 2010) (publication pending) involved a federal takings claim that was properly filed in state court but would have not have been ripe if removed to federal court. The court held:

> Because Defendants removed this litigation from state court, Plaintiff was denied the opportunity to seek state reimbursement. As ripeness is a threshold jurisdictional question, Defendants cannot confer jurisdiction to this Court by removal. Therefore, Plaintiff has yet to satisfy the requirements under the *Williamson* analysis to make its claim ripe for federal court adjudication. Although the claim was ripe when it was originally filed in state court, it became unripe the moment that Defendants removed it.

8679 Trout at *5. Curiously, the court then dismissed the federal claims without prejudice, rather than remanding. It remanded just the state claims. This appears to be consistent with what the plaintiff asked for in its motion. "Plaintiff filed its Motion to Remand on July 21, 2010 requesting that this Court remand the state claims and stay the federal causes of action." *8679 Trout* at *2. But for plaintiff's motion, it would seem that remand of both the state and federal claims would have been appropriate.

A remand was the result in *Doney v. Pacific Cnty.*, 2007 WL 1381515 (E.D. Wash. 2007) (unpublished). "Plaintiffs have not pursued a regulatory takings claim in state court because Pacific County removed the case before Plaintiffs had a chance to proceed. . . . Because *Williamson County* remains valid legal authority and because Plaintiffs have not adjudicated an inverse condemnation claim in state court, the federal takings claim is not yet ripe and should accordingly be remanded to state court. Therefore, to this extent, Plaintiffs' Motion to Remand should be granted." *Doney* at *4.

In *Doak Homes, Inc. v. City of Tukwila*, 208 WL 191205 (W.D. Wash. 2008) (unreported), a land developer brought suit in state court against the city, which had denied it various permits. The city removed, but the federal district court ruled that it lacked subject matter jurisdiction because the claim was unripe under prong one of *Williamson County*. Similar to *8679 Trout* and *Doney*, the court also found the case unripe under prong two: "Defendants' decision to remove this case from state court effectively denied Doak an opportunity to utilize Washington's procedure for reimbursement, and brought a takings claim to this Court that was not ripe for review." *Doak Homes* at *4. (The *Doak Homes* decision, however, seems to confuse prong one and prong two. The body of the opinion speaks only of prong one, but conclusion speaks in terms of prong two. Thus, it is difficult to understand how the court thought Doak could proceed in state court. Be that as it may, the court believed that the removal "denied Doak an opportunity" that it otherwise had. In any event, this unreported decision does not address *Suitum* or any of the Ninth Circuit cases holding that ripeness can we waived.)

A different situation was presented in *Stathoulis v. City of Downey*, 2011 WL 759559 (D.C. Calif. 2011) (publication pending). This case involved state and federal constitutional claims initially brought in state court. The claims arose out of the city's allegedly unfair treatment of plaintiffs' 1950s-style restaurant. The taking claim was dismissed in an early round of the case. The case then proceeded on equal protection and procedural due process claims, along with other state and federal claims. The city removed the case to federal court and filed a motion to dismiss. The court granted the motion to dismiss with prejudice as to the federal claims.[538] Only the state law claims were remanded. The court found the equal protection and due process claims were unripe based on prong one of *Williamson County* (Prong two was not involved, presumably because there was no longer a taking claim.) Unlike cases like *Doney* and *8679 Trout*, remand was not appropriate here because the plaintiffs were not deprived of an opportunity bring a viable federal claim in state

[538] In a parallel action referenced in footnote 3, another judge dismissed similar claims without prejudice. Presumably, however, that was not to allow the plaintiffs to proceed immediately to state court but, rather, to allow them to seek judicial relief after obtaining a final administrative decision. In footnote 4, the court explained that this time dismissal with prejudice was appropriate.

court. The prong one problem could not have been cured by pursuing the action in state court.

Moreover, the conclusion reached in *8679 Trout* and similar cases does not address the observation in *Suitum* and *Adam Bros*. (see above) that *Williamson County* tests are merely prudential. In other words, it would seem that the federal court would have the power to put aside the ripeness issue and accept jurisdiction if it chose to do so. Indeed, this might be the appropriate thing to do if the federal claims could be disposed of quickly on other grounds, such as the statute of limitations. This was what the Ninth Circuit concluded in *Guggenheim*. "First, we reject the Guggenheims' claim on the merits, so it would be a waste of the parties' and the courts' resources to bounce the case through more rounds of litigation." *Guggenheim*, 638 F.3d at 1118.

A case with tangential bearing on this subject is *Ballou v. Vancouver Police Officers' Guild*, 389 Fed. Appx. 618 (9th Cir. 2010) (unpublished decision). In *Ballou*, a police officer sued her union in state court under the National Labor Relations Act ("NLRB") and other state claims. The union removed the case to federal court. Because the NLRB does plainly did not apply to the parties, the Ninth Circuit said that the claim was frivolous. The court held, "Because the federal claim was clearly frivolous, the [federal] district court lacked subject matter jurisdiction." *Ballou*, 389 Fed. Appx. at 682. Accordingly, the court ruled that removal was improper, and it remanded the case to state court.

(j) Supplemental jurisdiction

Federal courts that have acquired jurisdiction over a case based on a federal question also obtain jurisdiction over state law claims raised by the plaintiff.[539] This is known today as supplemental jurisdiction; it used to be called pendant jurisdiction.

When the federal court dismisses the federal constitutional claims under *Williamson County*, it may be confronted with the question of what to do with the remaining state law claims. A federal court may decline to exercise supplemental jurisdiction where it has dismissed all claims over which it obtained original jurisdiction. 28 U.S.C. § 1367(c)(3). The Supreme Court has pointed out that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise

[539] Federal question jurisdiction has been with us a long time. But it was not always part of the federal court system. It dates back to Reconstruction. Prior to that, there was no federal question jurisdiction, and, unless diversity jurisdiction was available, federal laws were enforced in state courts. Richard H. Fallon, Jr., *The Ideologies of Federal Court Law*, 74 Va. L. Rev. 1141, 1154 (1988); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L.Q. 499, 506 (1928).

jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7 (1988).

(k) *Williamson County* remains viable despite criticism

Despite criticism of *Williamson County*, the U.S. Supreme Court has continued to adhere to this formulation of ripeness. *MacDonald, Sommer & Frates v. Cnty. of Yolo*, 477 U.S. 340 (1986); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 730 (1997); *Palazzolo v. Rhode Island*, 533 U.S. 606, 618-26 (2001). As the Ninth Circuit noted in 2007, "While the case law surrounding *Williamson County* is in a state of flux, and several courts have recently discussed the peculiar results produced by the second prong of the ripeness test, the Ninth Circuit has repeatedly interpreted the second prong of *Williamson County* as requiring Plaintiffs to pursue their claims in state court before they can bring a claim under the Fifth Amendment, so long as the state provides an adequate procedure for receiving just compensation." *Doney v. Pacific Cnty.*, 2007 WL 1381515, at *3 (E.D. Wash. 2007) (unpublished).

On the other hand, the four-justice concurring opinion in *San Remo Hotel, L.P. v. City and Cnty. of San Francisco*, 545 U.S. 323 (2005), contains a strongly worded suggestion that if the litigants simply had asked, the Court might have reconsidered the second prong of *Williamson County* (state remedies). "I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." *San Remo* at 352. While the drumbeat to do away

with prong two has continued,[540] the suggestion in the *San Remo* concurrence has not been followed.[541]

(2) Substantive due process claims no longer preempted.

Until recently, a body of law in the Ninth Circuit held that challenges to land use regulations based on substantive due process (that is, based a challenge to a land use regulation that does not substantially advance legitimate interests) are subsumed (and thereby precluded) by the Fifth Amendment's takings clause, which serves as the sole vehicle to remedy claims based on property rights. This conclusion was premised on *Armendariz v. Penman*, 75 P.3d 1311 (9th Cir. 1996), which, in turn was based on *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (Powell, J.). *Agins* was overturned by *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 545 (2005) (O'Connor, J.), which held that the "substantially advances" test is grounded in the due process clause, not the takings clause. Accordingly, in *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 852-53 (2007), the Ninth Circuit ruled that *Armendariz* is no longer good law. "We now explicitly hold that the Fifth Amendment does not invariably preempt a claim that land use action lacks any substantial relation to the public health, safety, or general welfare." *Crown Point*, 506 F.3d at 856. The court then remanded for further consideration, and the matter was resolved by stipulation. *Crown Point Dev., Inc. v. City of Sun Valley*, No. CV 05-492-ELJ, Docket Nos. 23, 25..

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[540] Some courts in the Ninth Circuit have weighed in in support of Justice Rehnquist's concurrence: "Recently, however, courts have begun to question the prudence of requiring plaintiffs to fulfill the second prong of *Williamson County*. Most notably, former Chief Justice Rehnquist, in a concurring opinion in *San Remo*, brought *Williamson County*'s second prong into question, stating that '*Williamson County's* state-litigation rule has created some real anomalies, justifying our revisiting the issue.' [San Remo, 545 U.S.] at 351 (Rehnquist, J. concurring). Chief Justice Rehnquist also noted that the Court's holdings in *San Remo* and *Williamson County* 'all but guarantee[ ] that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee.' *Id*." *Doney v. Pacific Cnty.*, 2007 WL 1381515, at *3 (E.D. Wash. 2007) (unpublished). "First, the state litigation ripeness doctrine articulated in *Williamson* has been weakened considerably since former Chief Justice Rehnquist and three other justices urged its reconsideration in *San Remo Hotel, L.P. v. City & Cnty.. of San Francisco*, 545 U.S. 323, 348–52 (2005) (Rehnquist, J., concurring). Lower courts, including the Ninth Circuit, have undercut the state litigation requirement by holding that *Williamson* is a 'prudential' ripeness rule which may not be applied when doing so would cause unfairness or an inefficient expenditure of court and party resources. *Emmert v. Clackamas Cnty.*, 2015 WL 9999211 (D. Or. 2015) (unpublished) (citing *Guggenheim v. City of Goleta*, 638 F3d 1111, 1116–18 (9th Cir. 2010)).

[541] "Because *San Remo* effectively sub silentio converted *Williamson County* into a decision stripping federal courts of jurisdiction over most taking claims, four Justices advocated overruling the state procedures requirement in an "appropriate case." However, *San Remo* was not that case, and despite repeated petitions to the Court, it has declined to revisit *Williamson County*." J. David Breemer, *Ripeness Madness: The Expansion of Williamson County's Baseless "State Procedures" Takings Ripeness Requirement to Non-Takings Claims*, 41 Urban Law. 615, 616-17 (2009) (footnotes omitted).

(3) Claims against the United States – Tucker Act

The Tucker Act, 28 U.S.C. § 1491 and the Little Tucker Act, 28 U.S.C. § 1346(a)(2), authorize suits against the federal government for money damages. The Tucker Act and Little Tucker act waive sovereign immunity and grant jurisdiction (with respect to certain money claims against the United States), but do not create a cause of action. The Tucker Act places jurisdiction in the U.S. Court of Federal Claims; the Little Tucker Act (for claims up to $10,000) allows money claims to be brought in federal district court.

Taking claims against the federal government are premature until the property owner has availed itself of the process provided by the Tucker Act. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-20 (1984); *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985) ("Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491."). This is analogous to the requirement imposed by the *Williamson County* Court that plaintiffs must first take advantage of opportunities available under state law to obtain compensation before initiating an inverse condemnation action.

Of course, the Tucker Act requirement does not come into play in local land use matters (even if brought in federal court pursuant to § 1983), because the claim is not against the federal government.

I. The Idaho Regulatory Takings Act

In 1994 the Idaho Legislature enacted the Idaho Regulatory Takings Act ("Takings Act"). Idaho Code §§ 67-8001 to 67-8004. (In addition, there are cross-references to the act found throughout LLUPA, *e.g.*, Idaho Code § 67-6512(a).) The law was enacted in response to concerns that state and local agencies were not acting consistently and correctly in evaluating their regulatory actions in light of constitutional takings law. According to the statute, the purposes of the Takings Act is "to establish an orderly, consistent review process that better enables state agencies and local governments to evaluate whether proposed regulatory or administrative actions may result in a taking of private property without due process of law." Idaho Code § 67-8001.

The statute defines a "regulatory taking" as a "regulatory or administrative action resulting in deprivation of private property that is the subject of such action, whether such deprivation is total or partial, permanent or temporary, in violation of the state or federal constitution." Idaho Code § 67-8002(4). This appears to be quite broad. Although there are some cross-references in LLUPA to the Takings Act, the Takings Act is not limited to actions that are subject to judicial review under LLUPA.

The Takings Act requires the Attorney General to prepare an "orderly, consistent process, including a checklist," designed to better enable state agencies and local governments to evaluate proposed regulatory or administrative actions, "to assure that such actions do not result in an unconstitutional taking of private property." Idaho Code § 67-8003(1). The Attorney General is required to update and review this process at least annually, to "maintain consistency with changes in the law." Idaho Code § 67-8003(1). All state agencies and local governments must use the guidelines set forth by the Attorney General to assess the impact of proposed regulations. Idaho Code § 67-8003(1).

Pursuant to the statute, the Attorney General issued the *Idaho Regulatory Takings Act Guidelines* (reproduced in Appendix I, also available at www.state.id.us/ag). The guidelines provide that state agencies and local governments must ask themselves the following six questions:

1. Does the regulation or action result in either a permanent or temporary physical occupation of private property?

2. Does the regulation or action require a property owner to either dedicate a portion of property or to grant an easement?

3. Does the regulation deprive the owner of all economically viable uses of the property?

4. Does the regulation have a significant impact on the landowner's economic interest?

5. Does the regulation deny a fundamental attribute of ownership?

6. (a) Does the regulation serve the same purpose that would be served by directly prohibiting the use or action; (b) does the condition imposed substantially advance that purpose?

Idaho Regulatory Takings Act Guidelines at 9-12 and Appendix C thereto (2003).

While an affirmative answer to any of the questions above does not necessarily mean there has been a "taking," it does mean there may be a constitutional issue, and that legal counsel should carefully review the proposed action. *Idaho Att'y Gen, Idaho Regulatory Takings Act Guidelines* C-1, app. C (2003).

Guidelines released by the Attorney General in December of 2003 contain an appendix providing a recommended form for use by property owners needing to request a regulatory taking analysis. *Idaho Att'y Gen., Idaho Regulatory Takings Act Guidelines* B-1, app. B (2003).

In 2003, the Legislature amended the Takings Act to give a property owner affected by a governmental action the right to request a regulatory taking analysis from the state agency or local government. The property owner must submit a written request within 28 days after the final decision concerning the matter at issue is made. Idaho Code § 67-8003(2). The government entity then has 42 days within which to provide the property owner with a completed taking analysis. Idaho Code § 67-8003(2). The "regulatory taking analysis shall be considered public information." Idaho Code § 67-8003(2). Should the state agency or government entity not complete the properly requested regulatory taking analysis within the 42 days allotted, the government action is voidable. Idaho Code § 67-8003(3). If the requested taking analysis is not provided within 42 days, the affected property owner may seek judicial determination of the validity of the governmental action in the district court in the county in which the property (or a portion thereof) is located. Idaho Code § 67-8003(3). When a request for a taking analysis is made, all deadlines (presumably including the 28-day deadline for seeking judicial review) are tolled until the analysis is provided. Idaho Code § 67-8003(4).

LLUPA was also amended in various locations to cross-reference this requirement. For example: "Denial of a subdivision permit or approval of a subdivision permit with conditions unacceptable to the landowner may be subject to the regulatory taking analysis provided for by section 67-8003, Idaho Code, consistent with the requirements established thereby." Idaho Code § 67-6513. A similar provision is found in connection with conditional use permits (Idaho Code § 6512(a)), planned unit developments (Idaho Code § 67-6515), and rezones (Idaho Code § 67-6511(a)). Likewise, LLUPA's general provision on approvals and denials of all site-specific permits cross-references the regulatory takings provision. Idaho Code § 67-6535(3).

The Idaho Regulatory Takings Act should not be confused with an exhaustion exception relating to eminent domain authority found in Idaho Code § 67-6521(2)(b), which is discussed in section 24.L(5)(c) at page 396.

On more than one occasion, the Idaho Supreme Court has cited a party's failure to timely seek a regulatory takings analysis as a failure to pursue an available state remedy which, in turn, leads to forfeiture of the party's federal takings claim under *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (Blackmun, J.) and its progeny. See discussion in section 28.H(1)(c)(ii) at page 625.

29. USER FEES, IMPACT FEES (IDIFA), AND THE "ILLEGAL TAX" ISSUE

A. Introduction

Ordinarily, cities and counties raise revenue to fund local services by taxing all property owners within their jurisdiction. Historically, efforts to "make development pay for itself" were limited to requirements that subdividers make in-kind contributions through dedication of streets, provision for sewer lines and sidewalks, and, occasionally, dedication of open space and school lands within their developments.

In recent decades, municipalities have sought to shift a greater portion of the financial burden imposed by new growth away from the general taxpayer onto the developers of residential and commercial properties through the imposition of impact fees, user fees, capitalization fees, buy-in fees, tap fees, and the like. Each of these are aimed at covering some or all of the additional cost of providing public infrastructure required by the development. In addition, some cities and counties have become more aggressive in demanding other "voluntary" exactions in exchange for approvals of entitlements, notably for affordable workforce housing.

This chapter explores the constitutional and statutory authority for local governments to impose these requirements. Specifically, it explores whether user fees, buy-in fees, impact fees, and exactions are authorized under the police power, the municipal taxation power provisions of Idaho's Constitution (which are not self-executing and require implementing legislation), or some other express or implicit grant of authority by the Legislation—or whether they are ultra vires. It does not address the separate question of regulatory takings[542] or the question of whether local ordinances imposing fees or other exactions are preempted by the Idaho Development Impact Fee Act ("IDIFA"), Idaho Code §§ 67-8201 to 67-8216.

The quick answer is that the authority to impose fees and other exactions to recover the costs of development is sharply limited in Idaho, more so than in some other jurisdictions.

Although this case law as emerged largely in the "make development pay for itself" context, it applies in other contests as well. The same principles have been

[542] Thus, even if the local government has constitutional or statutory authority to impose fees or other exactions, those charges may still subject to the requirement under the federal *Nollan* and *Dolan* cases that the charges not be disproportionate or unrelated to the burden imposed by the development. That is an entirely separate subject and a special class of takings, known as exaction, which is discussed in section 28.E at page 606 ("the exaction cases"). Properly designed ordinances under IDIFA probably result in fees that meet the nexus and rough proportionality tests under the exaction cases. But impact fees or other exactions that are not narrowly tailored to remedy the burdens imposed by the development or which are disproportionately large may constitute a compensable taking.

applied, for example, in cases challenging stormwater fees and municipal franchise fees.

B. Terminology: exactions, impact fees, linkage fees, and inclusionary fees

The term "exaction" is an inclusive term intended to describe any sort of *quid pro quo* exchange in which a regulatory entity requires an applicant to give something of value in exchange for a regulatory approval. Over the years, various terms have come into use to describe particular types of exactions.

Perhaps the most common is the term "impact fee." The following definition of the term has been employed by our Attorney General and numerous commentators:

> An "impact fee" is a type of exaction which is:
> In the form of a predetermined money payment;
> Assessed as a condition to the issuance of a building permit, an occupancy permit or plat approval;
> Pursuant to local government powers to regulate new growth and development and provide for adequate public facilities and services;
> Levied to fund large-scale, off-site public facilities, and services necessary to serve new development;
> In an amount which is proportionate to the need for public facilities generated by new development.

Idaho Att'y Gen. Op. 93-5 (Apr. 7, 1993).[543]

Impact fees are traditionally used to fund public infrastructure, such as roads and water facilities. They can also be used for parks and open space.

More recently, the term "linkage fee" has come into use (more in other states than in Idaho). This is a sub-species of the impact fee in which the facilities to be constructed are typically not public. Thus, the term "linkage fee" is often employed where the exaction is designed to provide land or funding for subsidized workforce housing or, occasionally, private recreational facilities. The term "linkage" is used to convey the idea that approval of the building permit is linked to need for and funding

[543] The identical formulation is found in: Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulations: Paying for Growth with Impact Fees*, 59 S.M.U. L. Rev. 177, 205 n.104 (2006) (citing Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The Second Generation*, 38 Wash. U. J. Urb. & Contemp. Law 55, 64 (1990)). Yet another identical description is found in Olson, Greensweig & Riggs, *The Future of Impact Fees in Minnesota*, 24 William Mitchell Law Review 635, 638 (1998).

of these facilities. Of course, all exactions are linked in this way, so the term is not particularly illuminating.

Another confusing term is the "inclusionary fee," which is also employed to describe impact fees for affordable housing. For reasons that are neither intuitive nor logical, the term "inclusionary fee" is typically (but not consistently) associated with fees on residential projects, while linkage fees are often associated with commercial development. However, this terminology is not consistently employed and, in any event, does nothing to clarify or enlighten the legal analysis. The legal analysis is the same whatever it is called.[544]

C. Overview of constitutional authority: Dillon's Rule

Idaho follows Dillon's Rule under which local governments' powers are limited to those granted or clearly implied by the state Constitution or state legislation.[545] Home rule cities, in contrast, hold broader authority to legislate with

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[544] The workforce housing fee struck down in *Schaefer v. City of Sun Valley*, Case No. CV-06-882 (Idaho, Fifth Judicial Dist., July 3, 2007) (reproduced in Appendix E) was styled a "linkage fee." The similar fee struck down in *Mountain Central Bd. of Realtors, Inc. v. City of McCall*, Case No. CV 2006-490-C (Idaho, Fourth Judicial Dist., Feb. 19, 2008) (reproduced in Appendix F) was styled an "inclusionary fee." See the district court's statement on semantics set out in footnote 606 at page 712.

[545] Dillon's Rule is named after the former chief justice of the Iowa Supreme Court. Justice Dillon stated:

> In determining the question now made, it must be taken for settled law, that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power.

Merriam v. Moody's Executors, 25 Iowa 163, 170 (1868) (Dillon, C.J.). In *Merriam*, the court invalidated the sale of a home for nonpayment of a special tax, noting that the Legislature authorized the tax, but did not expressly authorize the sale of property for nonpayment of the tax. The quoted passage is restated in nearly the same words in 1 J. Dillon, *Commentaries on the Law of Municipal Corporations* § 237 (5th Ed. 1911).

Another decision authored by Chief Justice Dillon in the same year (and quoted by the U.S. Supreme Court) provided:

> Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, and the *corporation* could not

respect to citizens and property within the boundary of the city. Home rule is typically granted by state constitutional amendment, the effect of which is to displace Dillon's Rule as to those municipalities who adopt a home rule charter. *See* 56 Am. Jur. 2d *Municipal Corporations, Etc.* §§ 91, 109-10 (2010). This legislative power includes the power to tax. Idaho cities, however, are not home rule cities in that sense.[546]

The term "home rule," however, can mean different things. The most extreme form of home rule is one espoused by Judge Cooley[547] who subscribed to the inherent right of cities to self-government, even in the absence of express authority. This approach has few followers. *E.g.*, C. Rhyne, *Municipal Law* §§ 3-4, 4-2 (1957). Most view home rule as something that is granted to cities either by the state constitution or by statute.

> There are two types of home rule. Under "constitutional" home rule, the guarantees of local home rule proceed directly from the state constitution. These guarantees are theoretically immune from incursions by the state legislature. . . . Under "legislative" home rule, a city's home rule powers proceed from state legislative enactments or legislatively authorized home rule charters.

Michael C. Moore, *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?*, 14 Idaho L. Rev. 143, 148 (1977).

Under the most common form of home rule, the municipal governance is nonetheless constrained by various limits, such as not conflicting with state laws. "In contrast, under 'true' home rule systems, if a subject is within an area of purely local concern, the legislature cannot legislate in that area and thereby pre-empt the city." Moore, at 149.

> prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere *tenants at will* of the legislature.

City of Clinton v. Cedar Rapids & Missouri River Railroad. Co., 24 Iowa 455,475 (1868) (emphasis original) (Dillon, C.J.) (quoted approvingly by the U.S. Supreme Court in *Atkin v. Kansas*, 191 U.S. 207, 221 (1903) (Harlan, J.)).

As discussed below, Dillon's rule was expressly adopted in Idaho, *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980) (Donaldson, C.J.), and remains in effect, *e.g.*, .

[546] Historically, there were three exceptions to this. The cities of Boise, Lewiston, and Bellevue were created as "home rule" cities with broader legislative powers. Boise is no longer a home rule City. *Caesar v. State*, 101 Idaho 158, 161, 610 P.2d 517, 520 (1980). The authors have not researched the home rule status of the other two cities.

[547] Thomas Cooley, *A Treatise on the Constitutional Limitations* 189-90 (Boston 1868).

The Idaho Supreme Court repeatedly has rejected any of the extreme forms of home rule. There is no inherent right of cities to self-governance, and what powers are granted to cities remain subject to overriding state control.

As early as 1918, our Supreme Court said:

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation - not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

Bradbury v. City of Idaho Falls, 32 Idaho 28, 32, 177 P. 388, 389 (1918) (quoting 1 *Dillon on Municipal Corporations* § 237 (5th ed.)).

Dillon was quoted again in 1956. *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 320, 303 P.2d 672, 674-75 (1956) (Porter, J.) (finding that the city unlawfully circumvented bonding requirements under the Revenue Bond Act by having the bonds issued by a non-profit controlled by the city).

The most quoted case of all was decided in 1980:

> Idaho has long recognized the proposition that a municipal corporation, as a creature of the state, possesses and exercises only those powers either expressly or impliedly granted to it. This position, also known as "Dillon's Rule" has been generally recognized as the prevailing view in Idaho. Thus, under Dillon's Rule, a municipal corporation may exercise only those powers granted to it by either the state constitution or the legislature and the legislature has absolute power to change, modify or destroy those powers at its discretion.

Caesar v. State, 610 P.2d 517, 519 (Idaho 1980) (Donaldson, C.J.) (citations omitted).

In a case invalidating a city's grant of a solid waste disposal monopoly, the Court said:

> Municipal power is a classic example of derivative power. It is a longstanding rule in Idaho that cities possess only the powers expressly conferred on them by the legislature or which can be derived by necessary implication. This Court has articulated this rule as a strict limitation when construing municipal powers: "municipalities may exercise only those powers granted to them or necessarily implied from the powers granted . . . . If there is a fair, reasonable, substantial doubt as to the existence of a power, the doubt must be resolved against the city." *City of Grangeville v. Haskin*, 116 Idaho 535, 538, 777 P.2d 1208, 1211 (1989). This rule is especially applicable to proprietary functions, of which garbage collection services are included.

Plummer v. City of Fruitland, 140 Idaho 1, 4-5, 89 P.3d 841, 844-45 (2003) (Trout, J.) (other citations omitted, brackets and ellipses original), *modified on rehearing*, 139 Idaho 810, 87 P.3d 297 (2004).

Accordingly, in Idaho we look first to the Idaho Constitution to determine what authority has been granted to municipal corporations. The Idaho Constitution contains two provisions that could support city or county authority to impose taxes, fees, and exactions:

Taxation power:

> The legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may by law invest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation.

Idaho Const. art. VII, § 6.

Police power:

> Local police regulations authorized. — Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.

Idaho Const. art. XII, § 2.

The constitutional provision dealing with local taxation is not a self-executing grant of taxing authority to cities and counties.[548] Rather, it is a grant of authority to the Legislature which, in turn, may elect to grant taxing powers to local governments as it sees fit.

The effect of this constitutional provision is simply to authorize the Legislature to delegate taxing power to local governments. "Although the state legislature may not pass local laws for the assessment and collection of taxes, it may by law invest in municipal corporations, the power to assess and collect taxes for all purposes of such corporations." *City of Lava Hot Springs v. Campbell*, 125 Idaho 768, 769, 874 P.2d 576, 580 (1994). In other words, this constitutional provision is not a grant of taxing authority at all. Instead, Idaho cities and counties must look to some statutory authorization (or other constitutional delegation of power) for taxing authority.

In addition to actions under the self-executing police power and the taxation power (which required authorizing legislation), local governments may also act in a proprietary function. But proprietary functions, like the imposition of taxes, must be authorized by some legislative act.

The authority may be express or implied, but in Dillon's Rule jurisdictions implied powers are disfavored. "In some instances, even if there is no express authorization, courts will find implied authority. In jurisdictions that adhere to Dillon's Rule, however, the powers of local governments will be construed narrowly, and an exaction or fee not expressly authorized or necessarily implied from such express authorization will not survive judicial scrutiny." Delaney, Gordon & Hess, *Exactions: A Controversial New Source for Municipal Funds*, 50 L. & Contemporary Problems 139, 146 (1987).

In Idaho, there are only a few express delegations of the power to tax. For instance, the Legislature has granted cities and counties the authority to impose certain *ad valorem* taxes, which are taxes imposed on all taxable property within the jurisdiction. Idaho Code §§ 50-235, 50-1007 (authority for cities to impose *ad valorem* taxes); Idaho Code § 63-203 *et seq.* (assessment procedures); Idaho Code § 42-3213 (authority of water and sewer districts to impose *ad valorem* taxes). Under very limited circumstances, cities and counties also have the authority to

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[548] "Thus the grant of taxing powers to cities is not self-executing or unlimited." *Brewster v. City of Pocatello*, 768 P.2d 765, 766 (Idaho 1988) (Shepard, J.) "However, that taxing authority is not self-executing and is limited to that taxing power given to the municipality by the legislature." *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene* ("*IBCA*"), 890 P.2d 326, 328 (Idaho 1995) (Trout, J.). "Thus the grant of taxing power to cities is not self-executing or unlimited. It is limited by what taxing power the legislature authorizes in its implementing legislation." *Sun Valley Co. v. City of Sun Valley*, 708 P.2d 147, 150 (Idaho 1985) (Donaldson, J.) (upholding the local option resort city tax law, Idaho Code §§ 50-1043 to 40-1049).

impose certain sales taxes. *E.g.*, Idaho Code §§ 50-1043 to 40-1049 (local option resort city tax authority). In addition, there are various specialized tax and fee authorization statutes, *e.g.*, Idaho Code § 31-4404 (authorizes counties to impose taxes and fees for solid waste disposal).

The Legislature has also granted cities and counties the authority to impose certain "impact fees" for specified capital development projects under the Idaho Development Impact Fee Act of 1992 ("IDIFA"), Idaho Code §§ 67-8201 to 67-8216. (See discussion of IDIFA in section 32 at page 761.) Unlike *ad valorem* taxes, which are assessed on all property owners, impact fees are directed only to homebuilders and other developers engaged in new development.

In contrast to the taxation power, the police power granted by the Idaho Constitution is broad and self-executing. "The great majority of the decisions of the Idaho Supreme Court, however, view article XII, section 2 of the Idaho Constitution as a direct grant of the police powers to Idaho counties and cities, for which no additional enabling legislation is required." Michael C. Moore, *The Idaho Constitution and Local Governments*, 31 Idaho L. Rev. 417, 423-24 (1995).

In addition to the power to regulate, the police power carries with it limited authority to impose what are known as regulatory fees. However, this incident to the police power does not include the power to tax—hence, the key distinction between proper regulatory fees and unauthorized taxes. In the words of our Supreme Court: "In addition, under its police powers, the municipality may provide for 'the collection of revenue incidental to the enforcement of that regulation.' However, if the fee or charge is imposed primarily for revenue raising purposes, it is in essence a tax and can only be upheld under the power of taxation." *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene*, 126 Idaho 740, 742-43, 890 P.2d 326, 328-29 (1995) (citation omitted).

Accordingly, in states like Idaho that follow Dillon's Rule, the courts have carefully limited the police power to regulation, not taxation. These are distinct powers. "[T]he Idaho Supreme Court has always treated [the powers to tax, to annex, and to condemn] as separate and distinguishable from the police power." Michael C. Moore, *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?*, 14 Idaho L. Rev. 143, 145 (1977). "As already noted, the police power does not include the power to tax." Moore at 159.

In a few cases, the Idaho Supreme Court has recognized a third category of authority whereby cities and counties may impose fees for services rendered as part of their proprietary function.

D. Idaho Code § 50-301 does not provide home rule to Idaho cities.

It is well established that Idaho is a Dillon's Rule state, and that Idaho's Constitution extends home rule only to the police power. The authors of two law review articles, however, contend that a statutory amendment in 1976 contains a broad grant that extends home rule in Idaho past the police power. Michael C. Moore, *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?*, 14 Idaho L. Rev. 143 (1977); James S. Macdonald & Jacqueline R. Papez, *Over 100 Years Without True "Home Rule" in Idaho: A Time for Change*, 46 Idaho L. Rev. 587, 608 (2010).

Idaho Code § 50-301 sets out the basic authorities of cities.[549] In 1976, the Idaho Legislature amended the statute to read as follows:

> 50-301. CORPORATE AND LOCAL SELF-GOVERNMENT POWERS. Cities governed by this act shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; accept grants-in-aid and gifts of property, both real and personal, in the name of the city; acquire, hold, lease, and convey property, real and personal; have a common seal, which they may change and alter at pleasure; may erect buildings or structures of any kind, needful for the uses or purposes of the city; and exercise ~~such other powers as may be conferred by law~~ all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.

[549] The parallel provisions governing counties differ considerably:

> Every county is a body politic and corporate, and as such has the powers specified in this title or in other statutes, and such powers as are necessarily implied from those expressed.

Idaho Code § 31-601.

> It [every county] has power: 1. To sue and be sued. 2. To purchase and hold lands. 3. To make such contracts, and purchase and hold such personal property, as may be necessary to the exercise of its powers. 4. To make such orders for the disposition or use of its property as the interests of its inhabitants require. 5. To levy and collect such taxes for purposes under its exclusive jurisdiction as are authorized by law. 6. Such other and further authority as may be necessary to effectively carry out the duties imposed on it by the provisions of the Idaho Code and constitution.

Idaho Code § 37-604 (emphasis supplied).

Idaho Code § 50-301 (showing amendment made by R.S. 685, H.B. 422, 1976 Idaho Sess. Laws, ch. 214 § 1).

Prior to its revision in 1976, the statute contained an explicit recognition of the Dillon's Rule limitation (limiting a city's powers to those "conferred by law").[550] The 1976 amendment struck that provision, replacing it with what appears to be a sweeping grant of home rule, albeit still subject to any limitations imposed by the Legislature. Yet no Idaho court has so ruled, or even considered the matter. Although several post-1976 decisions (*e.g.*, *Caesar v. State*, 610 P.2d 517, 519 (Idaho 1980) (Donaldson, C.J.)) have reiterated the applicability of Dillon's Rule in Idaho, none has discussed the effect of Idaho Code § 50-301.

In a 2010 law review article, Professor Macdonald commented on this situation:

> As a matter of statutory construction, an amendment to a statute is presumably to change its meaning. Because the Idaho courts had consistently interpreted Article XII, Section 2 as granting home rule with regard to police powers for Idaho municipalities, it seems unlikely that the legislature's revision of Section 50-301 was intended to duplicate this result. Instead, Section 50-301 must serve a different function than Article XII, Section 2. This conclusion is supported by the 1976 Legislative News, which noted that the purpose of the amendment to Section 50-301 was to reverse the current relationship between Idaho's state and local governments by allowing local governments to exercise any power and perform any function or service not prohibited by law. This was also the interpretation of the Association of Idaho Cities, which also noted that, with passage of the local self-government act, "where the Constitution or the Code was silent, local governments would be free to act." Enactment of this legislation would permit the exercise of true local self-government in Idaho.

[550] In 1976 the Idaho Attorney General concluded that that the pre-amendment statute did nothing to extend home rule past the constitutional grant of police power authority. "Idaho cities and counties do not enjoy constitutional home rule powers in local matters which fall outside the realm of local police powers. . . . [N]either Section 50-301, Idaho Code, nor Section 50-302, Idaho Code, can be considered a grant of legislative home rule regarding matters beyond the realm of police powers." Idaho Attorney General Opinion No. 76-3 at 7 (Jan. 20, 1976) (Wayne Kidwell, A.G.).

James S. Macdonald & Jacqueline R. Papez, *Over 100 Years Without True "Home Rule" in Idaho: A Time for Change*, 46 Idaho L. Rev. 587, 608 (2010) (footnotes omitted).

In *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J.), the City of Hayden presented the home rule issue as an argument in the alternative. The Idaho Supreme Court dismissed the argument out of hand. "There is a difference between the power of a city to act and the power of a city to tax. A municipal corporation's taxes on the general public require specific legislative authorization. Idaho Code section 50–301 does not grant the City the power to tax in order to expand its sewer system." *NIBCA I*, 158 Idaho at 86, 343 P.3d at 1093. The Court did not explain why section 50-301 did not constitute the requisite "specific legislative authorization," particularly in light of clear and unmistakable legislative history provided to the Court showing that the legislation was intended to establish home rule. Be that as it may, the issue was squarely presented, and rejected. Accordingly, the *NIBCA I* decision puts to rest the argument that Idaho cities enjoy home rule.

E. Lawful fees and exactions

(1) Overview

As noted above, the Idaho Constitution contains a broad, self-executing grant of police power to municipalities. Idaho Const. art. XII, § 2. In Idaho and elsewhere, the police power is broadly construed. Broad as it is, however, this provision does not include a general power to tax. "A city or village cannot, in the exercise of its police power, levy taxes." *State v. Nelson*, 36 Idaho 713, 722, 213 P. 358, 361 (1923) (Lee, J.), *overruled on other grounds by Greater Boise Auditorium Dist. v. Royal Inn of Boise*, 106 Idaho 884, 684 P.2d 286 (1984). Rather, its thrust is to authorize cities to make and enforce local regulations and to charge those served for particular services provided pursuant to the local government's police power.

A well-developed body of law has emerged to distinguish proper fees and exactions under the police power from unauthorized taxes masquerading as fees. The Idaho Attorney General offered this summary: "To be valid under the police power delegation, the fee must (1) be charged for a service or benefit not shared by members of the general public; (2) not be a forced contribution; and (3) not raise revenue, but only compensate the governmental entity for the expenses it incurred in providing the service." Idaho Att'y Gen. Op. 93-5 (Apr. 7, 1993) at 58.[551]

[551] Although this Attorney General's opinion describes user fees as falling under the police power, our Supreme Court has generally described it as being a proprietary function. Either way such fees are lawful, but calling it proprietary may suggest that it requires a statutory basis. See discussion in section 29.E(3)(a) at page 669.

It bears emphasis that the only time one needs to evaluate whether a user fee is an unlawful tax is in the absence of authorizing legislation, such as Idaho Code §§ 63-1311(1) and 31-870(1) (authorizing user fees), the Revenue Bond Act, Idaho Code §§ 50-1027 to 50-1042 (authorizing user fees), or the Idaho Development Impact Fee Act (authorizing impact fees), all of which are discussed below. If there is legislation authorizing the imposition of a charge, fee, assessment, exaction, or tax of any kind, the only constitutional question is whether the monetary requirement imposed fits within the legislation or whether it is merely masquerading as something that falls under the statute. In other words, if the charge has been authorized by the Legislature, and if the charge fairly falls within that legislative authorization, it makes no difference whether it is labeled a fee or a tax. Whatever one wishes to call it, it has been authorized, and that is all that Dillon's Rule requires.[552]

Over the years, the Idaho Supreme Court has recognized the following categories of fees and exactions that are proper exercises of the local authority power:

(1) fees incidental to a regulation (such as a dog license, vehicle registration, or building permit fee)

(2) user fees for services (such as a sewer connection charge or a park admission fee)

(3) conditions imposed in the context of zone changes or CUPs to address the need for public services provided by public entities, including school districts (Idaho Code §§ 67-6511 and 67-6512)

(4) outright and unconditional denial of a rezone, permit, or annexation request.

(5) traditional, on-site entitlement exactions tangibly related to and for the direct benefit of the property (such as a requirement that developers dedicate streets within the development).

[552] This point seems to have been lost on the Attorney General who issued an opinion in 1993 stating: "The characterization of impact fees presents a complex problem. If the impact fees are found to be disguised taxes rather than fees, the ordinance, and possibly the enabling statute, would be in violation of article 7, § 4 (exempting public property from taxation) and § 5 (requiring uniform taxation), of the Idaho Constitution." Idaho Att'y Gen. Op. 93-5 (Apr. 7, 1993) at 58. In fact, there is nothing complex about this. The "is it a tax?" constitutional complexity disappears with the enactment of enabling legislation. If the Legislature clearly authorized the revenue measure, it makes no difference that it is a tax. If the tax is authorized by legislation, it is constitutional. Consequently, there is no need to ponder, as the Attorney General did, whether IDIFA or ordinances created pursuant to it create disguised taxes. The Attorney General mistakenly applied law developed to analyze local ordinances in the absence of state legislation to the state legislation (IDIFA).

(6) municipal franchise fees.

The first (incidental regulatory fees) falls within the police power.

The second (service fees, also known as user fees) might be seen as part of the police power, but our courts have tended to view these fees as falling into a separate category—a "proprietary function" of local government. The effect of this is simple: It clarifies that there must be some legislative authorization (explicit or implicit) to engage in the proprietary function and to charge a fee associated with that function.

The third (impacts on facilities in the context of CUPs and zone changes) is expressly authorized by statute.

The fourth (outright denial of a rezone, permit, or annexation request) is plainly authorized under LLUPA.

The authority for the fifth (on-site entitlement exactions) is rarely discussed in Idaho case law (because they are rarely challenged). They presumably fall within the police power and, in any event, are authorized by statute under LLUPA.

In a 1990 case, the Court held that franchise fees (the sixth category above) are not illegal taxes.

The first five categories are discussed in turn below; the franchise fee issue is discussed in section 32.E ("The *Alpert* case—Franchise agreements and fees are lawful") on page 784.

(2) Incidental regulatory fees

The police power authorized under Idaho Const. art. XII, § 2 is a broad, self-executing grant of power to local governments empowering them "to enact regulations for the furtherance of the public health, safety or morals or welfare of its residents." *Brewster v. City of Pocatello,* 768 P.2d 765, 767 (Idaho 1988) (Shepard, J.).[553]

The grant of police power to local governments has been construed to contain within it the implicit authority to collect revenue necessary to fund its regulatory programs through fees. Because such revenue collection falls within the police power expressly granted to municipal governments by the Idaho Constitution, it requires no separate statutory authorization.

[553] "The 'police power' is the power of a governmental body to impose laws and regulations or enact ordinances that are reasonably related to the protection or promotion of the public health, safety, or welfare. It denotes the authority to regulate the actions of its citizens, to protect or promote their health, safety, morals, peace, or general welfare." 56 Am. Jur. 2d *Municipal Corporations, Etc.* § 369 (2010).

Thus, for instance, a city might adopt an ordinance requiring dog owners to obtain dog licenses. To fund enforcement of this regulatory requirement, the city might charge the dog owner a license fee. Such an incidental regulatory fee is different from an ordinary or general tax, because it targets the individual (in this case, the dog owner) and makes that person pay the administrative costs of the regulatory program. The same logic applies to vehicle emission testing fees, fees for recording documents, professional licensing fees, building permits, and all manner of incidental regulatory fees. *E.g.*, *State v. Bowman*, 104 Idaho 39, 655 P.2d 933 (1982) (Walters, J.) ($100/year license fee for dance halls found to be a lawful incidental regulatory fee); *Brewster v. City of Pocatello*, 768 P.2d 765, 768 (Idaho 1988) (Shepard, J.) (giving fees for "the recording of wills or the filing of legal actions" as examples of appropriate incidental regulatory fees).

Most litigation over incidental regulatory fees centers on whether the fee charged goes beyond what is necessary to pay for the regulatory program and is instead a revenue-generating tax. E.g., *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene* ("*IBCA*"), 126 Idaho 740, 890 P.2d 326 (1995) (Trout, J.). It bears emphasis, however, that there is a threshold issue. To be an incidental regulatory fee, there must be some underlying regulation (i.e., exercise of the police power) that the fee funds. "A[n incidental regulatory] fee's purpose is regulation . . . . [F]unds generated thereby must bear some reasonable relationship to the cost of enforcing the regulation." *Lewiston Independent School Dist. No. 1 v. City of Lewiston*, 264 P.3d 907, 912 (Idaho 2011) (W. Jones, J.). In *Lewiston*, the Court found that the city's stormwater fee was not an incidental regulatory fee because (among other reasons) the stormwater fee ordinance "contains no provisions of regulation and is not incidental to regulation." *Lewiston*, 151 Idaho at 805. 264 P.3d at 913.

To be a proper regulatory fee, the size of the fee must be reasonably related to the cost of the regulatory program that it funds:

> Such police power regulation may provide for the collection of revenue incidental to the enforcement of that regulation. . . . If municipal regulations are to be held validly enacted under the police power, funds generated thereby must bear some reasonable relationship to the cost of enforcing the regulation.

Brewster at 767.

Our Supreme Court has drawn a bright line on this point: "However, if the fee or charge is imposed primarily for revenue raising purposes, it is in essence a general tax and can only be upheld under the power of taxation." *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene* ("*IBCA*"), 890 P.2d 326, 329 (Idaho 1995) (Trout, J.). In other words, if it is really a revenue-generating mechanism to fund services or

capital expenses for the general benefit of the community, there must be authorizing legislation.

This distinction has been recognized for decades. In a 1923 decision, the Court provided this clear guidance:

> It is quite clear that the ordinance in question in the instant case was enacted for the purpose of raising revenue only, first because by its terms it so provides, and secondly, it has no provisions of regulation. A license that is imposed for revenue is not a police regulation, but a tax, and can only be upheld under the power of taxation.
> . . .
> One of the distinctions between a lawful tax for regulatory purposes and one solely for revenue is: If it be imposed for regulation, under the authority of section 2, art. 12, of the Constitution [the police power], the license fee demanded must bear some reasonable relation to the cost of such regulation . . . .

State v. Nelson, 213 P. 358, 361 (Idaho 1923) (Lee, J.) (citation omitted) (striking down a "license tax on certain occupations" imposed by the City of Rexburg), *overruled on other grounds by Greater Boise Auditorium Dist. v. Royal Inn of Boise*, 684 P.2d 286 (Idaho 1984).

While the fee must bear a "reasonable relation" to the cost of the regulatory program it funds, precision is not required. In *Foster's Inc. v. Boise City*, 118 P.2d 721, 728 (Idaho 1941) (Ailshie, J.), the owner of a furniture store challenged the city's authority to install parking meters on the public street in front the store—alleging that the meters were illegal taxes. The Court upheld the parking meter fees as a proper exercise of the police power, despite the fact that they apparently generated somewhat more income than required to cover the cost of the meters:

> The fact, that the fees charged produce more than the actual costs and expense of the enforcement and supervision [of traffic and parking regulation], is not an adequate objection to the exaction of the fees. The charge made, however, must bear a reasonable relation to the thing to be accomplished.
> The spread between the actual cost of administration and the amount of fees collected must not be so great as to evidence on its face a revenue measure rather than a license tax measure.

Foster's at 728 (citations omitted).

The Idaho Supreme Court has made it plain that it will look past the label assigned by the city or county to a particular charge, and examine its actual nature. In 1988, the Idaho Supreme Court struck down the City of Pocatello's "street restoration and maintenance fee" imposed on all owners and occupiers of property in the City. *Brewster v. City of Pocatello*, 768 P.2d 765 (Idaho 1988) (Shepard, J.). City voters twice rejected property tax increases (in levy override elections) to improve the city's streets. In response, city officials imposed a street fee, claiming it was not a tax, but an incidental regulatory fee under the police power. The Court said that, irrespective of what it was called, it had the attributes of a general tax:

> We view the essence of the charge at issue here as imposed on occupants or owners of property for the privilege of having a public street abut their property. In that respect it is not dissimilar from a tax imposed for the privilege of owning property within the municipal limits of Pocatello. The privilege of having the usage of city streets which abuts [sic] one's property, is in no respect different from the privilege shared by the general public in the usage of public streets.

Brewster at 767.[554]

The *Brewster* court further explained that when the purpose of a permit fee is not to fund regulation or enforcement, it is a tax:

> In the instant case it is clear that the revenue to be collected from Pocatello's street fee has no necessary relationship to the regulation of travel over its streets, but rather is to generate funds for the non-regulatory function of repairing and maintaining streets. The maintenance and repair of streets is a non-regulatory function as the terms apply to the facts of the instant case.

Brewster at 767.

(Note that the *Brewster* decision dealt both with incidental regulatory fees and user fees for services. See discussion below under that heading.)

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[554] *Brewster* demonstrates that distinction between fees and taxes is based on practical and functional considerations, not semantics, and that the courts will not be confused by labels. "Not surprisingly, local governments will frequently attempt to employ the label most likely to survive judicial scrutiny. However, they do not always use consistent terminology, and therefor cash payments related to land development have been called many things. . . . This ploy is met with mixed success since courts feel free to take a fresh look at the device under attack and to characterize it as they see fit." Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulations: Paying for Growth with Impact Fees*, 59 S.M.U. L. Rev. 177, 204-05 (2006).

Seven years later, in *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene* ("*IBCA*"), 890 P.2d 326 (Idaho 1995) (Trout, J.), the Court struck down the City of Coeur d'Alene's development impact fee ordinance. The ordinance, which was not enacted pursuant to IDIFA,[555] required developers to pay an impact fee as a precondition to the issuance of a building permit "to pay for a proportionate share of the cost of improvements needed to serve development." *IBCA* at 327. The fees apparently were not targeted or quantified for any particular use or service, but were generally "spent on capital improvements serving such things as libraries, police, fire, and streets. *IBCA* at 327-28. The city defended the fee as an exercise of its police power. *IBCA* at 329. The Court analyzed it as an incidental regulatory fee, and found it fell short.

Citing the *Brewster* case, the *IBCA* Court reiterated that a fee to provide for services benefiting the entire community which are not tied to use of a particular service by individual consumers is really a disguised tax:

> The City's impact fee ordinance purports to assess a fee to support additional facilities or services made necessary by the development, and to shift the cost of those additional facilities and services from the public at large to the development itself. Unfortunately there is otherwise nothing in the ordinance which in any way limits the use of the revenue created. It is to be used for "capital improvements" without limitation as to the location of those improvements or whether they will in fact be used solely by those creating the new developments. This is antithetical to this Court's definition of a fee. "[A] fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs." *Brewster v. City of Pocatello*, 115 Idaho 502, 505, 768 P.2d 765, 768 (1988).
>
> . . .
>
> Similarly, the assessment here is no different than a charge for the privilege of living in the City of Coeur d'Alene. It is a privilege shared by the general public which utilizes the same facilities and services as those purchasing building permits for new construction. The

[555] Note that at the time of this litigation the City of Coeur d'Alene could not enact an IDIFA-compliant ordinance because IDIFA (discussed in section 32 at page 761) applied only to cities with a population of 200,000 or more. The Act was amended in 1996 to remove this limitation. 1996 Idaho Sess. Laws, ch. 366. In any event, the city's impact fee ordinance was broader than allowed under IDIFA.

> impact fee at issue here serves the purpose of providing funding for public services at large, and not to the individual assessed, and therefore is a tax.

IBCA at 329-30.

Note that the *IBCA* case (in Coeur d'Alene) involved an impact fee (which fell outside the impact fees authorized by statute) masquerading as an incidental regulatory fee. In contrast, the *Brewster* case (in Pocatello) did not involve an impact fee on new development. The street tax at issue in that case applied to all residents. Thus, the Pocatello case involved a general tax masquerading as an incidental regulatory fee. Either way, the charges were unconstitutional.

It bears emphasis that the good intentions of the local government and legitimacy of the public policy served are not relevant to the constitutional analysis. Pocatello's street maintenance fee was not saved by the fact that it was urgently needed. "The issue is not the need for funding . . . . [It does not matter] how well-intentioned and desirable the ultimate result may be." *Brewster v. City of Pocatello*, 768 P.2d 765, 766, 768 (Idaho 1988) (Shepard, J.). Likewise, Coeur d'Alene's impact fee was struck down "no matter how rationally and reasonably drafted" it was. *IBCA* at 331.

Finally, the Court has been clear that it matters not that the fees are designed to offset the costs of new development. Money raised for capital investments or services benefiting the general community (even if the need for those expenditures is increased by new development) is a tax, not a fee. As the Court said in *IBCA*, "The fact that additional services are made necessary by growth and development does not change the essential nature of the services provided: they are for the public at large." *IBCA* at 330.

In a recent action, the district court invalidated a "linkage fee" for affordable housing established by the City of Sun Valley. The Court tracked the reasoning and decisions described above. A copy of the decision is attached under Appendix E. Sun Valley elected not to appeal the decision. The district court then awarded attorney fees to the plaintiff, noting that the law on this subject is well settled and that the city proceeded "at its peril" in ignoring the precedent. Another district court, acknowledging the recent Sun Valley decision, struck down the City of McCall's affordable housing fee. That decision is set out under Appendix F.

(3) User fees for services

This section addresses a different sort of fee—the "user fee" or "service fee" (interchangeable terms). These are fees charged for services provided by the governmental agency that are not connected with a regulatory program. For example, user fees may be charged for municipal water, sewer, or other services. As will be discussed in detail below, user fees are valid so long as they are truly fees

charged for a service provided and not a disguised revenue-generating measure unrelated to a particular service provided to the user.

(a) Provision of services by a local government is a proprietary function, not part of the police power.

One might think that the provision of traditional municipal services (such as sewer, water, solid waste collection and disposal, and stormwater management) by local governments would fall within the police power so long as the service is provided for the protection of the public health, safety, and welfare. In other words, one might think that the provision of such services is a part of a city's inherent authority—*i.e.*, part of its police power. After all, cities have been constructing sewer and water systems much longer that the legislative authorizations relied on in the cases discussed below.

Idaho courts, however, are not of that view. They draw a sharp distinction between governmental (*i.e.*, regulatory) and proprietary (*i.e.*, business-like) functions of local governments, and only the former are deemed to fall within the police power.

> There is no inconsistency between the holding herein that in the operation of a public utility the village exercises a proprietary function, and the holding that in requiring connections to be made with the sewage system the village is exercising its police power, which is a governmental function. The fact that an ordinance, providing for the establishment and operation of a municipal water and sewage system, may also contain regulations within the police power, is not conflicting, inconsistent, or an improper commingling of the two recognized functions of a municipality. The one is regarded as complimentary of the other. If the water and sewage system were privately owned and operated, unquestionably the municipality could by ordinance regulate the operation in the interests of public health, and, in so doing, require residents to connect with and use the system.

Schmidt v. Village of Kimberly, 256 P.2d 515 (Idaho 1953) (Taylor, J.) (this statement was later quoted in full in *Loomis v. City of Hailey*, 807 P.2d 1272, 1275 (Idaho 1991) (Boyle, J.).

In a 1989 case, the Idaho Supreme Court reiterated that the provision of city services for a fee does not fall under the police power, but is a "proprietary" function (hence requiring some legislative authorization):

> This Court has repeatedly held that municipalities may exercise only those powers granted to them or necessarily implied from the powers granted. If there is a fair, reasonable, substantial doubt as to the existence of a power, the doubt must be resolved against the city. This is especially true where the city is exercising proprietary functions instead of governmental functions. The operation of a water system, a sewer system and a garbage collection service by the city is a proprietary function, not a governmental function.

City of Grangeville v. Haskin, 777 P.2d 1208, 1211 (Idaho 1989) (Johnson, J.) (emphasis added; citations omitted). (The *Grangeville* case is discussed in section 29.E(3)(g) on page 698.)

In *Loomis v. City of Hailey*, 807 P.2d 1272 (Idaho 1991) (Boyle, J.), the Court noted:

> There is, however, a difference between the exercise of a police power and the proprietary functions of a municipality. . . .
>
> . . .
>
> Pursuant to this proprietary function municipalities may construct and maintain certain public works. The Idaho Constitution, art. 8, § 3 allows municipalities to impose rates and charges to provide revenue for public works projects, and pursuant to this section of the Constitution, the Idaho legislature enacted the Idaho Revenue Bond Act, codified at I.C. § 50-1027 through § 50-1042. It is pursuant to this Act and a municipality's proprietary function that the City of Hailey derives its authority to charge water and sewer connection fees.

Loomis at 1275-76 (footnote omitted) (emphasis added) (citing *Schmidt v. Village of Kimberly*, 256 P.2d 515 (Idaho 1953) (Taylor, J.).

In *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 233 P.3d 118 (Idaho 2010) (Eismann, C.J.), the Court reiterated that fees for services are neither regulatory fees nor taxes, but fall into a third category of "proprietary" action:

> *Loomis* recognized three categories of authority that could possibly be applicable and held that the connection fee was neither a tax nor a regulatory fee, but was a fee imposed pursuant to the city's proprietary function. . . .
>
> . . .

> Thus, this Court held in *Loomis* that the city imposed the connection fee pursuant to its proprietary function, not pursuant to its police power.

Viking at 124.

Again, in 2004, the Court noted: "'Proprietary function' refers to the actual act of hauling garbage. Passing laws regulating solid waste collection is a government function." *Plummer v. City of Fruitland*, 87 P.3d 297, 300 (Idaho 2004) (Trout, J.).

The reason this matters is that local governments may not engage in proprietary functions absent a grant of legislative authority.[556]

> As indicated above, art. 12, § 2, of the Idaho Constitution grants a form of home rule authority only in the area of the police power, and then only to the extent that the particular enactment does not conflict with state law. For proprietary powers, cities must look for a legislative grant of power.

Michael C. Moore, *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?*, 14 Idaho L. Rev. 143, 154 (1977).

Thus, a local government may not provide services, or charge for them, without some express or clearly implied authority beyond the constitutional grant of police power. Indeed, to the authors' knowledge, in every instance in which the courts have upheld a user fee, they have relied on some express statutory or constitutional authorization.

This conclusion is consistent with that set out in a 1995 law review article:

> Fees for proprietary services, not being directly authorized by the constitutional grant of police powers, must be authorized, expressly or impliedly, by legislative act, must conform to the statutory requirements, and must be reasonable, but do not appear to be subject to the same degree of judicial scrutiny as is a fee which purports to be imposed as a police power regulatory fee.

Michael C. Moore, *The Idaho Constitution and Local Governments*, 31 Idaho L. Rev. 417, 445 (1995) (footnotes omitted).

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[556] See footnote 567 on page 679 explaining that implementing legislation, although not required, was enacted with respect to the direct constitutional grant of authority to cities to undertake water and sewer works pursuant to Idaho Const. art. VIII, § 3.

Accordingly, the sections below explore a variety of statutory authorities for user fees.[557]

(b) Idaho Code §§ 63-1311(1) and 31-870(1) (city and county user fees)

(i) Overview of the statutes

Since 1980 there has been express legislative authority for all "taxing districts" (including cities) to charge fees for services provided:

> (1) Notwithstanding any other provision of law, the governing board of any taxing district may impose and cause to be collected fees for those services provided by that district which would otherwise be funded by property tax revenues. The fees collected pursuant to this section shall be reasonably related to, but shall not exceed, the actual cost of the service being rendered.

Idaho Code § 63-1311(1) (emphasis supplied).[558]

A virtually identical provision authorizes county governments to impose such user fees:

> (1) Notwithstanding any other provision of law, a board of county commissioners may impose and collect fees for those services provided by the county which would otherwise be funded by ad valorem tax revenues. The

[557] Idaho Code § 63-1311 and the Revenue Bond Act have received most of the attention in cases involving user fees. In *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 343 P.3d 1086 (Idaho 2015) (Eismann, J.),the City of Hayden relied primarily on those statutes. However, the city also made a "kitchen sink" argument under a third statute, Idaho Code § 50-323 (as interpreted in *Alpert v. Boise Water Corp*., 795 P.2d 298, 305 (Idaho 1990) (Boyle, J.), *City of Grangeville v. Haskin*, 116 Idaho 535, 777 P.2d 1208 (1989) (J. Johnson, J.), and *Snake River Homebuilders Ass'n v. City of Caldwell*, 607 P.2d 1321, 1322 (Idaho 1980) (Donaldson, C.J.)). The *NIBCA I* Court found no merit in the argument.

[558] When enacted in 1980, the first sentence of what is now section 63-1311(1) was enacted and codified as Idaho Code § 63-2201A. H.B. 680, 1980 Idaho Sess. Laws, ch. 290 § 2. (This was the codification referred to in *Brewster v. City of Pocatello*, 768 P.2d 765, 766 (Idaho 1988).) In 1988, section 63-2201A (now section 63-1311(1)) was amended to add what is now the second sentence (requiring that fees be reasonably related). S.B. 1340, 1988 Idaho Sess. Laws, ch. 201 § 3. In 1996, the entire revenue and taxation code was re-enacted, and section 63-2201A was recodified as section 63-1311. S.B. 1340, 1996 Idaho Sess. Laws, ch. 98 § 14 at 393; see also 1996 Idaho Sess. Laws, ch. 322 §7 (correcting cross-reference to section 63-1311 in section 31-870). In 1997, the provision was renumbered as section 63-1311(1) and what is now section 63-1311(2) was added. 1997 Idaho Sess. Laws, ch. 117 § 35 at 333.

> fees collected pursuant to this section shall be reasonably related to, but shall not exceed, the actual cost of the service being rendered. Taxing districts other than counties may impose fees for services as provided in section 63-1311, Idaho Code.

Idaho Code § 31-870(1) (emphasis supplied).[559] (Note that a separate provision provides specific authority for county governments to fund solid waste disposal facilities through either property taxes or fees. Idaho Code § 31-4404.)

The underlined portion of the statutes was added in 1988. See footnote 560 at page 673. This amendment was a codification of the Idaho Supreme Court's holding in *Brewster v. City of Pocatello,* 768 P.2d 765 (Idaho 1988) (Shepard, J.) discussed below. The portion of the statute enacted in 1980 pre-dated *Brewster* and was discussed in that case (see footnote 564 on page 676)

Both section 31-870 and the predecessor of section 63-1311 were enacted via the same bill in 1980 (H.B. 680, 1980 Idaho Sess. Laws, ch. 290). The legislative history confirms that the language was intended to confirm the authority of cities and counties to impose service fees (rather than rely exclusively on *ad valorem* taxes) where the charge is for "garbage, water and sewage" and other "functions that are clearly user oriented."[560]

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[559] Section 31-870(1) was enacted in 1980 as section 31-870. It was part of the same act that created section 63-2201A (the predecessor of section 63-1311). 1980 Idaho Sess. Laws, ch. 290 § 1. In 1988, what is now this section 31-870(1) was amended to add what is now the second sentence. 1988 Idaho Sess. Laws, ch. 201 § 2. This provision was amended in 1993 to add a second section dealing with fees for solid waste, authorizing such fees to be collected "in the same manner provided by law for the collection of real or personal property taxes." This allowed fees for fees for solid waste facilities to be collected as part of the property tax bill, rather than as a separately billed service fee. 1993 Idaho Sess. Laws, ch. 41 § 1. A technical amendment in 1996 conformed the cross reference to the recodified version of Idaho Code § 63-1311. 1996 Idaho Sess. Laws, ch. 322 § 7 at 1,036. In 1999, a new section 3 was added dealing with motor vechile registration. 1999 Idaho Sess. Laws, ch. 90 § 1.

[560] The legislative history to the original 1980 enactment (H.B. 680, based on R.S. 5694) is not extensive, but it shows that the legislation means what it says. "The purpose of this legislation is to give county commissioners and the governing boards of other taxing districts the power to collect fees for services in lieu of ad valorem taxes." Statement of Purpose (R.S. 5694). "Mr. Young explained that RS 5694 is permissive legislation for those levies that county commissioners do not have the power to impose. It will allow authority which many already have." Minutes of the Munger Subcommittee of the House Committee on Revenue and Taxation (Feb. 28, 1980). "Mr. Young explained that the purpose of RS 5694 is to allow county commissioners and governing boards of other taxing districts the authority to collect fees in lieu of ad valorem taxes. Many are now already doing this and this makes it all inclusive. Some examples of those fees are: garbage, water and sewage. Mr. Munger stated that it is permissive legislation and is not mandatory." Minutes of the House Revenue and Taxation Committee (Feb. 29, 1980). "Chuck Holden, Association of Idaho Counties, stated H 680 adds to the existing law to allow counties and taxing

It is unclear why both sections 31-870 and 63-1311 are needed. Both cities and counties are taxing districts,[561] so it would seem that both would be covered by section 63-1311 and that section 31-870 is unnecessary. For one reason or another, the drafters chose to enact duplicate legislation, placing the county authorization (codified at section 31-870) in Title 31, which deals with the counties and county law, and the city authorization in Title 63, which deals with revenue and taxation.

(ii) User fees may be imposed on entities not subject to *ad valorem* taxes.

Idaho Code §§ 63-1311(1) and 31-870(1) authorize the collection of fees "for those services provided by the county which would otherwise be funded by ad valorem tax revenues." At first blush this language might be thought to authorize

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districts to impose fees for providing services which are normally funded by ad valorem tax revenues. Cities have had this authority for a number of years and haven't abused it and we feel the counties should have it. Much discussion followed." Minutes of Senate Local Government and Taxation Committee (Mar. 22, 1980). It is not clear, by the way, what city authority Mr. Holden was referring to. In any event, the legislation affirmed the authority of cities to charge service fees. "H680 Tax and Taxation – Adds to existing law to allow counties and taxing districts to impose fees for providing services which are normally funded by ad valorem tax revenues." Official computer summary of legislation by House Revenue and Taxation Committee (tracking action through passage of H.B. 680 on April 1, 1980).

In 1988, both provisions were amended by adding the same identical sentence: "The fees collected pursuant to this section shall be reasonably related to, but shall not exceed, the actual cost of the services being rendered." S.B. 1340, 1988 Idaho Sess. Laws, ch. 201 (amending Idaho Code §§ 31-870 and 63-2201A). The legislative history of the 1988 amendment reinforced the purpose of the original legislation. "The concept of this bill is to start the move to fund those functions that are clearly user oriented with fees collected from the users themselves, rather than have so much reliance on ad valorem tax." Minutes of House/Senate Legislative Council, Committee on Local Government Revenues, at 4 (Sept. 10, 1986) (regarding R.S. 12966 in 1986, which initially was limited to amending Idaho Code § 49-158 dealing with motor vehicle fees; that bill was replaced by S.B. 1304AA in 1988 which added the provisions amending sections 31-870 and 63-2201A). The only discussion bearing directly on the language added in 1988 was this statement: "S1340AA has language added to I.C. 31-870 and I.C. 63-2201A, ie, 'The fees collected pursuant to this section shall be reasonably related to, but shall not exceed, the actual cost of the service being rendered'. This language, he felt, would more clearly define the parameters of the amount of fee charged." Statement of Senator Anderson, House Local Government Committee Minues (Mar. 16, 1988).

[561] The term "taxing district" is defined as follows: "'Taxing district' means any entity or unit with the statutory authority to levy a property tax." Idaho Code § 63-201(23). Plainly, this includes cities and counties, as well as special taxing districts for specific purposes like schools, irrigation, mosquito abatement, etc. That cities and counties are included among taxing districts is also reflected by use of the term elsewhere in the Idaho Code. For example, a provision of the Credit Report Protection Act refers to "a county, municipality or other taxing district." Idaho Code § 28-52-105(2)(e).

user fees only if the person or entity receiving the service is subject to local property taxes. Governmental and university property is not subject to property tax.[562]

However, both the language and the context of sections 63-1311(1) and 31-870(1) show that the authority to impose fees confirmed by these statutes is not limited to users who are subject to *ad valorem* taxes. The statutes are focused on the type of services provided, not the individual recipient of the services. If it is the type of service that might otherwise be funded with *ad valorem* taxes then the city or county is authorized to charge the fee. This is evident in the language of the statutes and is confirmed by the legislative history. See footnote 560 at page 673.

In sum, the key limitation—evident in both the language and the purpose of the statutes—is that the fee be reasonably related to the value of the service provided, irrespective of whether the entity receiving the service is subject to *ad valorem* taxes. As a practical matter, this is confirmed by the fact that user fees are sometimes imposed on tenants who pay no *ad valorem* taxes.

In any event, even if the authorization in sections §§ 63-1311(1) and 31-870(1) were read narrowly, that would not eliminate other statutory and constitutional authority for imposing such fees. The legislative history of sections 63-1311(1) and 31-870(1) makes clear that the purpose of the legislation was to confirm or expand existing governmental authority to impose fees, not to eliminate any other authorization for fees. See footnote 560 on page 673.

(iii) Case law construing these statutes

Two Idaho Supreme Court decisions have confirmed that user fees may be upheld on the basis of these statutes, but only if the fee charged is reasonably related to the service provided to identifiable users:

- *Brewster v. City of Pocatello*, 768 P.2d 765 (Idaho 1988) (Shepard, J.).
- *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J).

The Idaho Supreme Court discussed the predecessor to section 63-1311 in *Brewster v. City of Pocatello*, 115 Idaho 502, 768 P.2d 765 (1988) (Shepard, J.).[563]

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[562] "The Idaho Constitution prohibits a municipality from imposing a tax on other governmental entities. See IDAHO CONST. art. VII, § 4 (providing that '[t]he property of . . . the state, counties, towns, cities, villages, school districts, and other municipal corporations and public libraries shall be exempt from taxation . . . .')." *Lewiston*, 151 at 805, 264 P.3d at 912. See also Idaho Code § 63-602A(1) (exempting from taxation property belonging to the federal government, the state, local governments, and Indian tribes).

[563] The Court sidestepped a tricky standing issue. It would seem that this was a classic "taxpayer standing" case, in which taxpayers are found not to have standing to challenge ordinances that raise issues common to all taxpayers. The Court noted that "[s]uch assertion would appear to

In the case, city voters repeatedly failed to approve bonds for street maintenance. In response, the city imposed a "street restoration and maintenance fee" on all property owners. Property owners challenged the fee as an unauthorized tax. The city contended it was a service fee authorized by section 63-2201A (the predecessor to section 63-1311[564]). *Brewster*, 115 Idaho at 503, 768 P.2d at 766.

The *Brewster* Court rejected the city's contention, finding that the statute authorized certain fees, but not "to impose a *tax* upon users or abutters of public streets." *Brewster*, 115 Idaho at 504, 768 P.2d at 767 (emphasis original).

The *Brewster* Court first noted that the fee charged was not an incidental regulatory fee of the sort allowed under *Nelson* and *Foster's* (discussed above), because "the revenue to be collected from Pocatello's street fee has no necessary relationship to the regulation of travel over its streets, but rather is to generate funds for the non-regulatory function of repairing and maintaining streets." *Brewster*, 115 Idaho at 504, 768 P.2d at 767.

The Court then turned to whether the fee could be upheld as a user fee. The Court found that the street fee was not a user fee. However, the only thing that *Brewster* requires is that the fee be charged for a service provided "to the particular consumer," citing "sewer, water and electrical services" examples of appropriate user fees:

> We agree with appellants that municipalities at times provide sewer, water and electrical services to its residents. However, those services, in one way or another, are based on user's consumption of the particular commodity, as are fees imposed for public services as the recording of wills or filing legal actions. In a general sense a fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs.

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find support in *Bopp v. City of Sandpoint*, 110 Idaho 488, 716 P.2d 1260 (1986); *Greer v. Lewiston Golf & Country Club*, Inc., 81 Idaho 393, 342 P.2d 719 (1959)." Nevertheless, the Court allowed the case to proceed because "it is in the interest of both the city and the plaintiffs-respondents that the question be resolved." *Brewster*, 115 Idaho at 503, 768 P.2d at 766.

[564] When enacted in 1980, the first sentence of what is now section 63-1311(1) was enacted and codified as Idaho Code § 63-2201A. H.B. 680, 1980 Idaho Sess. Laws, ch. 290 § 2. In 1988, section 63-2201A (now section 63-1311(1)) was amended to add what is now the second sentence (requiring that fees be reasonably related). S.B. 1340, 1988 Idaho Sess. Laws, ch. 201 § 3. In 1996, the entire revenue and taxation code was re-enacted, and section 63-2201A was recodified as section 63-1311. S.B. 1340, 1996 Idaho Sess. Laws, ch. 98 § 14 at 393; see also 1996 Idaho Sess. Laws, ch. 322 §7 (correcting cross-reference to section 63-1311 in section 31-870). In 1997, the provision was renumbered as section 63-1311(1) and what is now section 63-1311(2) was added. 1997 Idaho Sess. Laws, ch. 117 § 35 at 333.

Brewster at 768 (emphasis supplied).[565]

On February 26, 2015, the Idaho Supreme Court handed down its decision in *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 343 P.3d 1086 (Idaho 2015) (Eismann, J.). NIBCA's chief contention in the case was that the city's sewer capitalization fee ("cap fee") was an illegal tax because it would be "solely used to pay for future expansion." Appellants' brief at 23 ("Issues Presented on Appeal").

The city charges its customers two sewer fees, a bi-monthly operation and maintenance fee and a one-time cap fee. The monthly fee was not in contention. In 2007, the City increased the cap fee from $735 to $2,280 per residential unit based on a cost-of-service study performed by its engineer, Welch Comer. The new cap fee was based on the cost of replacing the excess capacity within the existing sewer system that would be consumed by the new user. That cost was determined by taking the total cost to build out the sewer system to the city's area of city impact (some $20 million) divided the number of new residential unit equivalents ("ERs").

The city defended the fee under four statutes, relying primarily on Idaho Code § 63-1311(1) (the user fee statute) and Idaho Code § 50-1030(f) (part of the Revenue Bond Act). The city also presented two "long shot" statutory authorities as arguments in the alternative: Idaho Code §§ 50-323 (domestic water systems) and 50-301 (home rule). (See discussion in section 29.E(3)(g) on page 698 and section 29.D on page 659, respectively.)

The Idaho Supreme Court rejected NIBCA's argument that fee revenue may not be expended on future expansion of the system. It also confirmed prior precedent that the fee may be quantified on the basis of the replacement value (not just the historical cost) of the sewer capacity that will be consumed by the new user. However, the Court found that the city's quantification of replacement value was improper because it was based on the cost of building the next round of infrastructure rather than on the value of the existing capacity in the ground when the fee is

[565] While it seems readily apparent that the street fee was not an incidental regulatory fee, the closer question was whether it was a legitimate user fee. At the outset of the opinion, the Court acknowledged that that the fee purportedly was based on "a formula reflecting the traffic which is estimated to be generated by that particular property." *Brewster* at 765. But the Court never returned to that issue nor explained how the formula worked. Apparently the Court viewed this as a sham justification. In the end, the Court concluded: "The privilege of having the usage of city streets which abuts one's property, is in no respect different from the privilege shared by the general public in the usage of public streets." *Brewster* at 767. In any event, most of the Court's opinion was devoted to the other theory – a discussion of why it was not an incidental regulatory fee. If we speculate as to what was in the minds of the justices, it would seem that they were motivated primarily by the fact that the city repeatedly had sought and failed to achieve voter approval for a levy override. Thus, the Court saw this fee as an end-run around clearly expressed voter disapproval of a new tax. Indeed, the Court concluded its opinion on this very point. *Brewster* at 766.

charged. Each statutory authority is discussed in turn in this and the following sections.

First, the Court found that the city's quantification of the fee under section 63-1311(1) was improper because it was not based on "the actual cost of the service being rendered":

> As the statute states, any fee collected pursuant to the statute "shall be reasonably related to, but shall not exceed, the actual cost of the service being rendered." The issue is whether there was evidence supporting a finding that $2,280 was the actual cost of the service being rendered as of June 7, 2007. There is no evidence in the record that it was. In fact, the evidence in the record shows that it was not.

NIBCA I at 1088 (emphasis supplied).

The Court found that the fee may not be calculated by looking forward to the cost of building the next round of infrastructure. Rather, it must be based on the value of the existing capacity in the ground when the fee is charged:

> Because there is nothing in the record showing that as of June 7, 2007, the sum of $2,280 was the actual cost of providing sewer service to a customer connecting to the City sewer system and there is no showing that the amount of the fee was based upon any such calculation, the fee was not authorized by Idaho Code section 63–1311(1). The district court erred in holding that it was.

NIBCA I at 1088.

This portion of the opinion (dealing with section 63-1311(1)) was very short and provided no particular guidance on how a city should calculate "the actual cost of the service being rendered." In the next section of the opinion (dealing with the Revenue Bond Act), the Court expressly provided that the fee may be based on current replacement cost of the existing system and that money generated by the fees may be expended on future expansion of the system. Given that discussion in both sections was based on broad principles law dealing with fees versus taxes, it would follow that the fees under section 63-1311(1) may also be based on replacement cost of the existing infrastructure and that revenues therefrom may be expended on future expansion. This does not matter much for cities, because they have belt and suspenders authority under section 63-1311(1) and the Revenue Bond Act. It does matter, however, to governmental entities other than cities and irrigation districts, because they are not covered by the bond act. (See footnote 568 at page 679.)

(c) The Revenue Bond Act and Irrigation District Bond Act

(i) Overview of the bond acts

Idaho's Revenue Bond Act, Idaho Code §§ 50-1027 to 50-1042[566] implements the authority granted by Idaho Const. § VIII, § 3 allowing cities to construct water and sewer systems.[567] By enacting the Revenue Bond Act, the Legislature not only implemented but broadened the scope of the constitutional provision. For example, the statutory definition of "works" includes "drainage systems" (which are not mentioned in the Constitution). Idaho Code §§ 50-1029(a) and 50-1029(g).

Both the constitutional provision and the Revenue Bond Act apply only to Idaho cities. A separate statute, the Irrigation District Bond Act, Idaho Code §§ 43-1906 to 43-1920, provides functionally identical authority to irrigation districts.[568] This is important because legal precedents construing one statute are applicable to the identical language in the other statute.

Yet another statute, the Solid Waste Disposal Site Act, Idaho Code §§ 31-4401 *et seq.* (discussed in section 29.E(3)(d) on page 694), authorizes counties to issue bonds and charge user fees in connection with solid waste facilities. Its terms differ in some respects from the other bond acts.[569]

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[566] The Revenue Bond Act was enacted in its present form in 1967. 1967 Idaho Sess. Laws, ch. 429. A predecessor to the Act was enacted in 1951. S.B. 5, 1951 Idaho Sess. Laws, ch. 47. Earlier versions were in place early in the last century.

[567] By its own terms, Idaho Const. art VIII, § 3 (authorizing cities to construct water and sewer systems) constitutes an express grant of authority to engage in these functions and an implicit grant of authority to charge a user fee for the service provided. Any question about whether implementing legislation is necessary is mooted by the enactment of the Revenue Bond Act a century ago. "The Idaho Constitution, art. 8, § 3 allows municipalities to impose rates and charges to provide revenue for public works projects, and pursuant to this section of the Constitution, the Idaho legislature enacted the Idaho Revenue Bond Act, codified at I.C. § 50–1027 through § 50–1042. " *Loomis v. City of Hailey*, 807 P.2d 1272, 1275-76 (Idaho 1991) (Boyle, J.).

[568] The operative provision in the Irrigation District Bond Act (Idaho Code § 43-1909(a)) is identical to the operative provision of the Idaho Revenue Bond Act (section 50-1030(a)). Section 43-1909(a) was relied on by the Idaho Supreme Court to support the district's authority to use its connection fee for future expansion of its system. *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 233 P.3d 118, 128 (Idaho 2010) (Eismann, C.J.) ("spending revenues from connection fees for these purposes would be consistent with the Act."). Likewise, the *Viking* Court relied on section 43-1909(e) of the Irrigation District Bond Act, which is identical to section 50-1030(f) of the Revenue Bond Act. *Viking* at 122 (this statute "authorizes charging a connection fee to connect to an irrigation district's domestic water system.").

[569] The only pertinent difference that has been discussed by the appellate courts is the somewhat broader language in the Solid Waste Disposal Site Act allowing the user fee to be calculated on the basis of the cost of expanding the system. In *N. Idaho Bldg. Contractors Ass'n v.*

The Revenue Bond Act authorizes cities to issue revenue bonds for the construction, acquisition, or improvement of specified "works." It also contains provisions authorizing user fees:

> In addition to the powers which it may now have, any city shall have power under and subject to the following provisions:
>
> (a) To acquire by gift or purchase and to construct, reconstruct, improve, better or extend any works within or without the city, or partially within or partially without the city, or within any part of the city, and acquire by gift or purchase lands or rights in lands or water rights in connection therewith, including easements, rights-of-way, contract rights, leases, franchises, approaches, dams and reservoirs; to sell excess or surplus water under such terms as are in compliance with section 42-222, Idaho Code, and deemed advisable by the city; to lease any portion of the excess or surplus capacity of any such works to any party located within or without the city, subject to the following conditions: that such capacity shall be returned or replaced by the lessee when and as needed by such city for the purposes set forth in section 50-1028, Idaho Code, as determined by the city; that the city shall not be made subject to any debt or liability thereby; and the city shall not pledge any of its faith or credit in aid to such lessee;
>
> . . .
>
> (e) To issue its revenue bonds hereunder to finance, in whole or in part, the cost of the acquisition, construction, reconstruction, improvement, betterment or extension of any works, or to finance, in whole or in part, the cost of the rehabilitation of existing electrical generating facilities;
>
> (f) To prescribe and collect rates, fees, tolls or charges, including the levy or assessment of such rates, fees, tolls or charges against governmental units, departments or agencies, including the state of Idaho and

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City of Hayden ("*NIBCA I*"), 343 P.3d 1086 (Idaho 2015) (Eismann, J.), the Court limited a portion of its holding in *Kootenai Cnty. Property Ass'n v. Kootenai Cnty.*, 769 P.2d 553, 556 (Idaho 1989) (Bakes, J.) to the particular statute involved. That statute, Idaho Code § 31-4404, authorized the county to base its fee on the cost of "future acquisition of landfill sites." *NIBCA I* at 1091. This is in contrast, the Court said, to the Revenue Bond Act, which authorizes fees only based on the replacement cost of existing infrastructure.

> its subdivisions, for the services, facilities and commodities furnished by such works, or by such rehabilitated existing electrical generating facilities, and to provide methods of collections and penalties, including denial of service for nonpayment of such rates, fees, tolls or charges;

Idaho Code §§ 50-1030(a), (e) & (f) (emphasis supplied) (corresponding closely but not identically to sections 43-1909(a), (d) & (e) of the Irrigation District Bond Act).[570]

The term "works" referenced in section 50-1030 is defined to include "water systems, drainage systems, sewerage systems, recreational facilities, off-street parking facilities, airport facilities, air-navigation facilities, [and] electrical systems." Idaho Code § 50-1029(a). The "works" may be located inside or outside of the city. Idaho Code § 50-1030(a).

The only restriction is: "No city shall operate any works primarily as a source of revenue to the city, but shall operate all such works for the use and sole benefit of those served by such works and for the promotion of the welfare and for the improvement of the health, safety, comfort and convenience of the inhabitants of the city." Idaho Code § 50-1028 (emphasis supplied). (An identical provision is set out in Idaho Code § 43-1907 of the Irrigation District Domestic Water System Revenue Bond Act.)

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[570] The Revenue Bond Act requires that the works be provided "at the lowest possible cost" and not be operated "as a source of revenue." Idaho Code § 50-1028. The act authorizes and requires cities to charge rates, fees, tolls, or charges that are sufficient to ensure that the works are "self-supporting," that is, sufficient (1) to pay all bonds and interest and reserves therefore and (2) to pay for all operating and maintenance ("o&m") costs. Idaho Code § 50-1032. Thus, the bonds cover only capital expenditures, but the fees cover both repayment of capital expenses and ongoing o&m.

The Revenue Bond Act provides that "[a]ny city issuing bonds . . . shall have the right to appropriate, apply or expend the revenue of such works" for (1) repayment of bonds and interest, (2) o&m as well as replacement and depreciation costs, (3) payoff of certain other bonds and obligations, and (4) a reserve for improvements to the works. Money from fees may be allocated to general funds only if all of the proceeding have been fully paid. Idaho Code § 50-1033. This provision was relied on by the Court in Loomis, *Loomis*, 119 Idaho at 440, 807 P.2d at 1278. The *Viking* Court, however, made clear that this provision does not apply if no bonds are issued. *Viking*, 149 Idaho at 192, 197, 233 P.3d at 123, 128. This is in contrast to section 50-1030 (identical to section 43-1909) of the bond act which does apply even if no bonds are issued. *Viking* at 122-23.

Before any construction of works, the city must adopt an ordinance setting out the terms of the financing. No indebtedness shall be incurred beyond one year without an approval of the voters in an election on the bond. Certain bonds require approval of two-thirds of the electorate, others require only a majority vote. Idaho Code § 50-1035. Bonds must be repaid by fees generated by the services provided by the works. The city is not liable, and the city cannot levy taxes to pay the bonds. Idaho Code §§ 50-1040, 50-1041.

The Idaho Supreme Court has upheld user fees based on the Revenue Bond Act and its sister statutes (the Irrigation District Bond Act and the Solid Waste Disposal Site Act) in the following decisions:

- *Schmidt v. Village of Kimberly*, 256 P.2d 515 (Idaho 1953) (Taylor, J.).
- *Kootenai Cnty. Property Ass'n v. Kootenai Cnty.*, 769 P.2d 553, 556 (Idaho 1989) (Bakes, J.).
- *Loomis v. City of Hailey*, 807 P.2d 1272, 1275-76 (Idaho 1991) (Boyle, J.).
- *City of Chubbuck v. City of Pocatello*, 899 P.2d 411 (Idaho 1995) (Reinhardt, J. Pro Tem.).
- *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 233 P.3d 118, 128 (Idaho 2010) (Eismann, C.J.).
- *Manwaring Investments, L.C. v. City of Blackfoot*, 405 P.3d 22 (Idaho 2017) (Burdick, C.J.).

In other cases, the Court rejected user fees premised on these bond statutes, but only because the fee charged was excessive or otherwise not tied to the cost of the service provided to the fee payer:

- *Waters Garbage v. Shoshone Cnty.*, 67 P.3d 1260 (Idaho 2003) (Eismann, J.).
- *Lewiston Independent School Dist. No. 1 v. City of Lewiston*, 264 P.3d 907 (Idaho 2011) (W. Jones, J.)
- *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J) and *N. Idaho Bldg. Contractors Ass'n v. City of Hayden*, 432 P.3d 976 (Idaho 2018) ("*NIBCA II*") (Bevan, J.).
- *Hill-Vu Mobile Home Park v. City of Pocatello*, 402 P.3d 1041 (Idaho 2017) (Eismann, J.).

These cases, discussed below and elsewhere in this Handbook, make clear that cities and others operating under the various bond acts are authorized to charge user fees for specified works, and that revenue from those fees may be used to retire costs associated with their construction, for ongoing operation and maintenance, and for future expansion of the works.

In *Schmidt v. Village of Kimberly*, 256 P.2d 515 (Idaho 1953) (Taylor, J.), the Court upheld the constitutionality of the Revenue Bond Act in a "friendly" declaratory judgment action aimed at resolving the concerns of bond brokerages. The Court upheld the act and the user fee imposed by the city to recover the cost of bonds. Language in this seminal case has been quoted by the Supreme Court in the cases that follow.

In *Loomis v. City of Hailey*, 807 P.2d 1272 (Idaho 1991) (Boyle, J.), the City of Hailey approved revenue bonds to fund improvements in the city's sewer system.[571] The city passed an ordinance mandating that all residents connect to the sewer system and pay a connection fee to fund expansion of the system. That fee was successfully challenged in district court, and no appeal was taken. *Loomis* at 1277 n.2 (1991) (citing *Redman v. City of Hailey*, Blaine County District Court Case No. 11855, Memorandum Decision (June 4, 1984)). The city then adopted a more limited "equity buy-in" connection fee. Revenues collected pursuant to the new fee were placed into a separate account used only for replacement of existing system facilities and equipment; none were allowed to be used for expansion or improvement of the existing system. *Loomis* at 1274. Nor were the funds used to retire the bond indebtedness. *Loomis* at 1277. A separate monthly utility fee, which was not challenged, covered operating expenses and funded revenue bond retirement. *Loomis*, 119 Idaho at 436, 807 P.2d at 1274. Two local residents then challenged the equity buy-in fee of about $1,800 per connection.

The Court recognized that some fees may be upheld as incidental regulatory fees.[572] This fee, however, did not fall into that category of police power functions. Instead, the Court analyzed the equity buy-in as a "proprietary" function of the city. (See discussion of proprietary functions in section 29.E(3)(a) at page 669.) In other words, the fee could be upheld even if it was not imposed under the city's police power, so long as there was legislative authority for the action.

The Court then ruled that the fee was authorized under the Idaho's Revenue Bond Act, Idaho Code §§ 50-1027 to 50-1042, which, in turn, was authorized by Idaho Const. art. VIII, § 3 dealing with limitations on municipal indebtedness.

> Thus, when rates, fees and charges conform to the statutory scheme set forth in the Idaho Revenue Bond Act

[571] In reciting the facts of the case, the *Loomis* Court notes that bonds were issued. *Loomis*, 119 Idaho at 435, 807 P.2d at 1273. Elsewhere in the opinion, the Court says "the City of Hailey is not incurring any indebtedness." *Loomis* at 1278. Perhaps this seeming inconsistency may be explained by the fact that the revenue from the sewer connection fees was not used to retire the bonds. Instead, the bonds were retired with funds from the monthly charges. *Loomis* at 1277.

[572] Citing *Brewster*, the Court observed that cities may impose incidental regulatory fees so long as they "bear some reasonable relationship to the cost of enforcing the regulation." *Loomis* at 1275.

> or are imposed pursuant to a valid police power, the charges are not construed as taxes. *Schmidt v. Village of Kimberly*, 74 Idaho 48, 256 P.2d 515 (1953). However, if the rates, fees and charges are imposed primarily for revenue raising purposes they are in essence disguised taxes and subject to legislative approval and authority.

Loomis at 1276.

The Court launched into a detailed discussion of what was allowed under the Revenue Bond Act and found that the city's connection fee was consistent with the statute's requirements.[573] Indeed, the Court read those requirements generously and deferentially as to cities. The Court rejected plaintiffs' contention that the connection fee was too steep and should have been limited to the actual cost of the connection. It held that it was appropriate for the city to base the fee on the "replacement cost of the system components" and to charge the new user for "that portion of the system capacity that the new user will utilize at that point in time." *Loomis* at 1281 (emphasis supplied) (cited with approval in *Viking*, 149 Idaho at 194, 233 P.3d at 125 and *NIBCA I*, 158 Idaho at 82, 343 P.3d at 1089).

In *Loomis*, the Court found it unnecessary to address whether revenue from the fee could be expended on future expansion, because the city had tailored its equity buy-in fee so that it was not used to fund future expansion of the sewer system. *Loomis*, 119 Idaho at 439-40, 807 P.2d at 1277-78. As noted above, this restriction was imposed to comply with an earlier district court decision that the City of Hailey chose not to appeal. In a footnote, the *Loomis* court noted that "[s]ince the precise issue of whether fees may be collected for future expansion of a sewer or water system is not before us on this appeal, we leave for another day the determination of that issue." *Loomis* at 1277 n.3. Yet, on the very next page the Court noted that the Revenue Bond Act expressly authorizes use of fee revenue for "*replacement and depreciation* of such works . . . including *reserves therefor*." *Loomis* at 1278 (emphasis and ellipses original).

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[573] In *Loomis*, the plaintiffs relied on *O'Bryant v. City of Idaho Falls*, 303 P.2d 672 (Idaho 1956) (Porter, J.) to support its contention that the City of Hailey was unlawfully circumventing bonding requirements under the Revenue Bond Act because it did not put the connection fee to a vote of the public. In *O'Bryant*, the Court struck down a scheme by the City of Idaho Falls to do just that. In *O'Bryant*, the Court found it necessary to "pierce the corporate veil" on a plan to have the bonds issued by a non-profit controlled by the city. *O'Bryant* at 678. The *Loomis* court found *O'Bryant* to be inapposite. "In the instant case the City of Hailey is not incurring any indebtedness and voter approval pursuant to art. 8, § 3 of the Idaho Constitution is required only when the city is incurring indebtedness." *Loomis* at 1278. In discussing *O'Bryant*, the *Loomis* Court expounded on the "ordinary and necessary" limitation on indebtedness, which the City of Idaho Falls had sought to evade with its scheme. That discussion, however, was essentially dictum.

The *Loomis* court went on to note that the retention of fee revenue is not subject to the election requirement in Idaho Const. art. VIII, § 3 because "the City of Hailey is not incurring any indebtedness and voter approval pursuant to art. VIII, § 3 of the Idaho Constitution is required only when the city is incurring indebtedness." *Loomis* at 1278. The Court noted that the outcome would be different if the funds were used for general purposes. *Loomis* at 1279.

Finally, the plaintiffs complained that the fee should have been limited to the actual cost of the connection. The Court found that the Revenue Bond Act gives cities broad flexibility in setting fees, and that the city's approach was not unreasonable. *Loomis* at 1279-82.

A subsequent case, *City of Chubbuck v. City of Pocatello*, 899 P.2d 411 (Idaho 1995) (Reinhardt, J. Pro Tem.), also involved a challenge to a fee imposed under the Revenue Bond Act but added little to the law. The City of Pocatello operates a wastewater treatment plant that also serves the City of Chubbuck. Chubbuck challenged a fee increase by Pocatello, alleging that the fee (which included something called a "rate of return") violated the provision in Idaho Code § 50-1028 prohibiting cities from operating "any works primarily as a source of revenue." The Court rejected the argument without any real analysis. The Court simply found that "Chubbuck has made no showing that the fees collected by Pocatello have been used for any purpose other than those purposes specifically provided for by the Revenue Bond Act." *Chubbuck* at 415.

In *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 233 P.3d 118 (Idaho 2010) (Eismann, C.J.), a land developer challenged a domestic water system connection fee (including an "equity buy-in"[574]) of $2,700 per home imposed by an irrigation district. (Unlike many irrigation districts, this one also provided domestic water.)

Viking did not arise under the Revenue Bond Act. It arose under the functionally identical provisions of the Irrigation District Domestic Water System Revenue Bond Act ("Irrigation District Bond Act") §§ 43-1906 to 43-1920. However, the *Viking* Court expressly equated the two provisions.[575] Accordingly,

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[574] "A portion of the connection fee covers the actual cost of connecting to the water system, but the majority of the fee is intended to be the cost of buying an equity interest in the system." *Viking*, 149 Idaho at 190, 233 P.3d at 121.

[575] The Idaho Supreme Court noted: "The [district] court compared this provision with the identical language in Idaho Code § 50-1030(f), which this Court held in *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991) (Boyle, J.), authorized a city to collect a sewer and water connection fee. Since there is no basis for giving differing constructions to the identical language in the two statutes, Idaho Code § 43-1909(e) authorizes charging a connection fee to connect to an irrigation district's domestic water system." *Viking*, 149 Idaho at 191, 233 P.3d at 122. *Viking* also relied on section 43-1909(a) of the Irrigation District Bond Act, which is functionally identical to section 50-1030(a) of the Revenue Bond Act. *Viking*, 149 Idaho at 197, 233 P.3d at 128. This

Viking is good authority for how both the Irrigation District Bond Act and the Revenue Bond Act are construed. See discussion in section 29.E(3)(c)(ii) on page 689.

The *Viking* Court ruled that the connection fee (aka cap fee) need not be based on the historical cost of the plumbing in the ground, but may be based on the cost to replace the excess capacity consumed by the development:

> Thus, this section permitted the Irrigation District to charge new users of the domestic water system a connection fee that included an amount equal to the value of that portion of the system capacity that the new user will utilize at that point in time.
>
> The Irrigation District had discretion to decide what methodology to use in order to determine that value. For example, it is entitled to use replacement cost rather than historical cost as the basis of its calculations. The court's limited role is simply to determine whether the methodology used to determine the value is reasonable and not arbitrary.

Viking at 125 (emphasis supplied).

The Court further noted that the bond act authorizes governments to maintain reserves: "The statute cannot be read as only permitting irrigation districts that did issue bonds under the Act to provide a reserve for improvements to their works." *Viking* at 128. Moreover, the bond act authorizes governments to not just to maintain or replace systems but to "extend any works" and that "[s]pending revenues from connection fees for these purposes would be consistent with the Act." *Viking* at 125 (emphasis supplied). In other words, moneys may be held in reserve and expended as needed for future expansion.

The *Viking* Court went on to rule that there was a material fact in dispute (therefore denying summary judgment) on the question of whether the particular fee charge was "a reasonable method of determining an amount equal to the value of that portion of the system capacity that the new user will utilize at that point in time." *Viking* at 126.[576] The Court then proceeded to rule on additional questions of law that would govern the remand. Most notably, it elaborated on its holding in *Loomis* and ruled that the only fundamental limitation is that the fees not serve primarily as a

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section provides that revenues from fees may be spent to "extend any works," thus allowing funds to be used for construction of new system capacity to replace that consumed by the new user.

[576] By all indications—as reflected in extensive trial transcript quotations included by the Idaho Supreme Court—the irrigation district's determination of the fee amount was entirely arbitrary.

source of revenue to the governmental entity. *Viking* at 127. Indeed, this restriction is spelled out in bond act itself. Idaho Code § 50-1028 (Revenue Bond Act); Idaho Code § 43-1907 (Irrigation District Domestic Water System Revenue Bond Act). This means that the funds generated cannot be used "for purposes other than its sewer and water system." *Viking* at 127. However, the connection fee may "exceed the actual cost of the labor and materials necessary to connect to the sewer and water system" and must be "dedicated to those systems."[577] *Id*.

Recall that in *Loomis* the Idaho Supreme Court had reserved until another time the question of whether fee revenue could be used to fund future expansion. In *Viking*, the Court answered the question in the affirmative:

> The powers of an irrigation district under the Irrigation District Bond Act include "to construct, reconstruct, improve, better or extend any works within or without the district" and "[t]o operate and maintain any works within or without the boundaries of the district." I.C. § 43–1909(a) & (c). Spending revenues from connection fees for these purposes would be consistent with the Act. . . . .
>
> . . .
>
> The statute cannot be read as only permitting irrigation districts that did issue bonds under the Act to provide a reserve for improvements to their works.

Viking at 128. In other words, even entities that have not issued bonds may reserve funds generated by fees and spend them on future improvements or system expansion.

Viking held that section 43-1909(e) of the Irrigation District Bond Act (which is identical to section 50-1030(f) of the Revenue Bond Act) "authorized the city to charge new users of the sewer and water system a connection fee that was more than the actual cost of the physical hookup. The connection fee could include an amount equal to 'the value of that portion of the system capacity that the new user will utilize at that point in time.'" *Viking* at 125 (quoting *Loomis*, 119 Idaho at 443, 807 P.2d at 1281).

In *Lewiston Independent School Dist. No. 1 v. City of Lewiston*, 151 Idaho 800, 264 P.3d 907 (2011) (W. Jones, J.), the Idaho Supreme Court invalidated the city's stormwater utility fee, finding it to be an unlawful disguised tax. The city had

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[577] It is not necessary that the funds be maintained in a separate, segregated account. "The important issue was not that the fees were kept in a separate, segregated account. It is that they were not *used* for city functions other than the sewer and water systems." *Viking*, 149 Idaho at 196-97, 233 P.3d at 127-28 (emphasis original).

created a stormwater utility funded by a stormwater fee assessed on the basis of the extent of impermeable surface. The fee was charged irrespective of whether the property is served by the city's stormwater system.[578] The funds collected were used to fund the city's street sweeping, maintenance of the stormwater system, and NPDES compliance. Some of these functions were previously assigned to the Street Maintenance Department and were funded by general revenues.

The city sought to characterize the new utility fee primarily as an incidental regulatory fee under the police power. The city also contended the fee was a lawful user fee. In support of that argument, it mentioned in passing the Revenue Bond Act and various other provisions of Title 50 without any meaningful briefing. (See discussion in section 29.E(3)(c)(ii) on page 689.)

The Court found that the fee was not incidental to any regulation, because the authorizing ordinance did not regulate any activity related to stormwater. Rather, the Court said, it was simply imposed to raise revenue. "It is apparent that Ordinance 4512 is a revenue generating tax created to benefit the general public by charging all property owners for the privilege of using the City's preexisting stormwater system, regardless of whether they are using the stormwater system or not. . . . Thus, by its terms, the Ordinance is purely concerned with revenue generation." *Lewiston*, 151 Idaho at 805, 264 P.3d at 912.

The Court also rejected the argument that it was a service fee, emphasizing that the fee applied to all property owners regardless of whether stormwater left their property. "The Stormwater Utility provides no product and renders no service based on user consumption of a commodity." *Lewiston*, 151 Idaho at 806, 264 P.3d at 913. The Court found that the stormwater utility and fee was a transparent effort to shift funding of the street department from general revenues to the new fee. The Court also distinguished *Waters Garbage*, *Kootenai County Property Ass'n*, and *Loomis*, noting that they dealt with the application and interpretation of specific statutory authorizations.

The *Lewiston* Court brushed aside the city's half-hearted contention (see footnote 584 on page 693) that the fee was supported by the Revenue Bond Act, noting that the argument was not properly presented "because the City did not proceed under the Revenue Bond Act." *Lewiston*, 151 Idaho at 807, 264 P.3d at 915. See discussion in section 29.E(3)(c)(ii) on page 689.

[578] The Court explained: "As a result of the rate structures applying to all owners of property, there are many properties with impervious surfaces whose owners are charged by the Stormwater Utility, but whose runoff does not enter the stormwater drain because they have their own stormwater systems or because their neighborhoods are not connected to the stormwater system." *Lewiston*, 151 Idaho at 802, 264 P.3d at 909.

The fatal flaw in Lewiston's utility fee, it would seem, is that it was not a charge for a service provided. "Unlike water, sewer, or electrical service fees, which are based on user consumption of a particular commodity, the stormwater fee is assessed on those who do not use the Stormwater Utility." *Lewiston*, 151 Idaho at 806, 264 P.3d at 913. If it had been more carefully tailored to assess only those who directly benefited by the stormwater system (*e.g.*, providing an opt-out to those whose land drained water to the city's stormwater system), it might have survived. The inclusion of general street sweeping functions within the utility also made the fee more suspect.

In *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J), and *N. Idaho Bldg. Contractors Ass'n v. City of Hayden*, 164 Idaho 530, 432 P.3d 976 (2018) ("*NIBCA II*") (Bevan, J.) the Court rejected (on the basis of an inadequate record) the City of Hayden's sewer capitalization fee. The city had defended the fee as a user fee under both Idaho Code § 63-1311(1) and the Revenue Bond Act (notwithstanding that no bonds had been issued). The *NIBCA I* Court rejected the city's reliance on the Revenue Bond Act not because no bonds had been issued (see also the discussion in section 29.E(3)(c)(ii) below), but because the city used the wrong methodology for calculating the fee (calculating replacement cost on the basis of future expansion rather than replacing the in-ground system). The methodology issue is discussed in section 30 beginning on page 729. *NIBCA I*'s application of section 63-1311(1) is discussed in section 29.E(3)(b) beginning on page 672.

In 2017, the Idaho Supreme Court decided *Hill-Vu Mobile Home Park v. City of Pocatello*, 402 P.3d 1041 (Idaho 2017) (Eismann, J.). The case involved a challenge to water and sewer fees imposed pursuant to the Revenue Bond Act. The Court invalided the fee not because of any lack of authority under the Revenue Bond Act but because the fee was a blatant revenue-generating overreach. See discussion in section 29.E(3)(h) beginning on page 700.

In *Manwaring Investments, L.C. v. City of Blackfoot*, 162 Idaho 763, 405 P.3d 22 (2017) (Burdick, C.J.) the Court upheld a user fee charged by the City of Blackfoot under the authority of the Revenue Bond Act. The Court found the fee structure was reasonably related to the value of the service provided. This case is discussed in section 29.E(3)(c)(ii) below.

(ii) The issuance of bonds is not a prerequisite to reliance on the authority granted by the bond acts.

A. Overview

As discussed above, the Revenue Bond Act authorizes cities to issue bonds for certain city services and to charge user fees to recoup the cost of those services and to

pay off the bonds. One might imagine that the issuance of bonds is a prerequisite in order for a city to rely on the authority of the bond act to charge user fees.

Indeed, in three cases in which local governments justified user fees on the basis of the Revenue Bond Act, it appears that they had issued revenue bonds: *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991) (Boyle, J.); *Waters Garbage v. Shoshone Cnty.*, 138 Idaho 648, 67 P.3d 1260 (2003) (Eismann, J.); *Schmidt v. Village of Kimberly*, 74 Idaho 48, 256 P.2d 515 (1953) (Taylor, J.). But in other cases the Idaho Supreme Court has ruled (either expressly or implicitly) that the issuance of bonds is not a prerequisite to reliance on the Revenue Bond Act or its sister statutes. The only confusion on this point comes from faulty dictum in *Lewiston Independent School Dist. No. 1 v. City of Lewiston*, 151 Idaho 800, 264 P.3d 907 (2011) (W. Jones, J.) discussed below.

B. *Viking*

This issue is addressed most squarely in *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 149 Idaho 187, 233 P.3d 118 (2010) (Eismann, C.J.). In that case a land developer challenged a domestic water system connection fee. (See discussion of *Viking* in section 29.E(3)(c)(i) beginning on page 679.) The Court held that the irrigation district had authority under the Irrigation District Bond Act to impose the user fee notwithstanding the fact that it had not issued bonds under the act.

Viking did not arise under the Revenue Bond Act. It arose under the functionally identical provisions of the Irrigation District Domestic Water System Revenue Bond Act ("Irrigation District Bond Act") §§ 43-1906 to 43-1920. However, the *Viking* Court expressly equated the two provisions.[579] Accordingly, *Viking* is good authority for how both the Irrigation District Bond Act and the Revenue Bond Act are construed. See discussion in section 29.E(3)(c)(ii) on page 689.

Although the irrigation district in *Viking* had not issued revenue bonds to construct the facilities, it relied on a provision of the Irrigation District Bond Act, Idaho Code § 43-1909, authorizing the imposition of fees. This provision is functionally identical to the provision of the Revenue Bond Act, Idaho Code

[579] The Idaho Supreme Court noted: "The [district] court compared this provision with the identical language in Idaho Code § 50-1030(f), which this Court held in *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991) (Boyle, J.), authorized a city to collect a sewer and water connection fee. Since there is no basis for giving differing constructions to the identical language in the two statutes, Idaho Code § 43-1909(e) authorizes charging a connection fee to connect to an irrigation district's domestic water system." *Viking*, 149 Idaho at 191, 233 P.3d at 122. *Viking* also relied on section 43-1909(a) of the Irrigation District Bond Act, which is functionally identical to section 50-1030(a) of the Revenue Bond Act. *Viking*, 149 Idaho at 197, 233 P.3d at 128. This section provides that revenues from fees may be spent to "extend any works," thus allowing funds to be used for construction of new system capacity to replace that consumed by the new user.

§ 50-1030(f),[580] construed in *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991) (Boyle, J.).

The plaintiff in *Viking* argued that the irrigation district could not rely on the bond act's authorization of user fees because it had not issued revenue bonds.[581] The Idaho Supreme Court squarely rejected Viking's argument.

> According to Viking, "The power granted in I.C. § 43–1909(e) is contingent on the issuance of revenue bonds, after and only after, approval of the electorate." . . .
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> . . .
>
> Viking has not pointed to any ambiguity in Idaho Code § 43–1909. . . . By its terms, it is not limited to a district issuing bonds . . . .
>
> Viking also contends that the words "under and subject to the following provisions" limit the powers granted by Idaho Code § 43–1909 to irrigation districts that have issued revenue bonds. According to Viking, because the power granted is "under and subject to" subsections (a) through (g), "[t]he Act clearly demonstrates the legislature's express intention for a comprehensive plan." Thus, Viking's argument is that an irrigation district must exercise all of the listed powers, or it cannot exercise any of them. Viking cites no authority for so construing a statute such as section 43–909 that lists powers granted by the legislature, nor is such construction logical. The statute lists powers that any district may exercise. There is nothing in the language of the statute requiring an irrigation district to exercise all of the powers in order to exercise any of them. If that were the proper construction, in order to "operate and maintain any works," I.C. § 43–1909(c), the district would also have to "exercise the right of eminent domain," I.C. § 43–

[580] The key language of the bond act in *Viking* provides that the district shall have power "[t]o prescribe and collect rates, fees, tolls or charges . . . for the services, facilities and commodities furnished by works." Idaho Code § 43–1909(e). This corresponds to the virtually identical language of the Revenue Bond Act at Idaho Code § 50-1030(f)—the only difference being the inconsequential addition of the word "such": "[t]o prescribe and collect rates, fees, tolls or charges . . . for the services, facilities and commodities furnished by such works."

[581] This argument could have been presented in *Loomis*, but was not. In *Loomis*, the City of Hailey had issued revenue bonds, but its connection fee was not used to repay those bonds. "[N]o monies from this fund are transferred to the city's general fund, and none are used to retire the bond indebtedness." *Loomis*, 119 Idaho at 439, 807 P.2d at 1277.

> 1909(b), and to "issue its revenue bonds," I.C. § 43–1909(d), regardless of whether it desired to acquire more property or finance a project. The district court did not err in holding that Idaho Code § 43–1909(e) applies to the Irrigation District even though it has not issued revenue bonds.

Viking, 149 Idaho at 192-93, 233 P.3d at 123-24 (emphasis supplied).[582] (Section 43-1909(e) corresponds to section 50-1030(f) of the Revenue Bond Act.)

Near the end of the opinion, the Court reiterated this conclusion: "The statute cannot be read as only permitting irrigation districts that did issue bonds under the Act to provide a reserve for improvements to their works." *Viking*, 149 Idaho at 197, 233 P.3d at 128.

C. *Lewiston*

The only confusion on this issue comes from dictum in *Lewiston Independent School Dist. No. 1 v. City of Lewiston*, 151 Idaho 800, 264 P.3d 907 (2011) (W. Jones, J.). In that case, the plaintiff argued, contrary to the express holding in *Viking*, that the Revenue Bond Act is applicable only to cities that have issued bonds. The Court declined to consider this argument because it was not properly presented.[583] Nevertheless, elsewhere in the decision, the Court said, "The Revenue Bond Act is not applicable because no revenue bonds were issued by the City." *Lewiston*, 151 Idaho at 808, 264 P.3d at 915. The latter statement cannot be reconciled with the Court's holding in *Viking* (that the act applies even when no revenue bonds are issued) and is best understood as dictum on an issue that was not properly briefed.

Indeed, neither party's brief contains even a reference to *Viking*. Lewiston's brief, 2011 WL 700489 (Feb. 2, 2011); Respondents' brief, 2011 WL 5526052 (Mar. 10, 2011). It appears that the parties and the Court were uninformed of the *Viking* precedent. Perhaps for that reason, the city virtually abandoned its Revenue Bond

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[582] In *Alliance for Property Rights and Fiscal Responsibility v. City of Idaho F*alls, 742 F.3d 1100, 1105 n.3 (9th Cir. 2013) (N.R. Smith, J.) (internal quotation marks omitted), the Ninth Circuit relied on *Viking* for the proposition that the "revenue bond act is not limited to a district issuing bonds."

[583] "The City contends that the stormwater fee was enacted pursuant to valid police power authority under the Revenue Bond Act, the Local Improvement District Code, and numerous provisions of Title 50 of the Idaho Code. The City does not provide any arguments for how those provisions authorize a fee; neither does the City refer to the specific sections on which it relies. The only argument that the City makes is that the stormwater fee is valid under the Revenue Bond Act, I.C. § 50–1027, et seq. That issue, however, is not before this Court because the City did not proceed under the Revenue Bond Act." *Lewiston*, 151 Idaho at 808, 264 P.3d at 915.

Act argument, seemingly conceding that the act would apply only if the city later decided to issue revenue bonds.[584] Thus, the Court's faulty dictum is understandable.

D. Post-*Lewiston* cases

In any event, that dictum is contradicted not only by the Court's prior decision in *Viking*, but also by these subsequent decisions:

- *Alliance for Property Rights and Fiscal Responsibility v. City of Idaho Falls*, 742 F.3d 1100, 1105 (9th Cir. 2013).
- *Manwaring Investments, L.C. v. City of Blackfoot*, 162 Idaho 763, 405 P.3d 22 (2017) (Burdick, C.J.).
- *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 87, 343 P.3d 1086, 1094 (2015) (Eismann, J.), and *N. Idaho Bldg. Contractors Ass'n v. City of Hayden*, 164 Idaho 530, 432 P.3d 976 (2018) ("*NIBCA II*") (Bevan, J.).

The holding in *Viking* was recognized and followed by the Ninth Circuit in 2013. "The City may exercise the powers granted in the [Revenue Bond Act], even if the City is not issuing bonds." *Alliance for Property Rights*, at 1105.

Although *Manwaring* did not address the question directly, it upheld a wastewater fee charged by Blackfoot based on the Revenue Bond Act. There is no indication in the decision that the city issued bonds under the act. And by implication there is no indication that doing so is a prerequisite to relying on the act's authority to charge user fees. Instead, the Court simply noted that the city relied on the "grants of authority" found in the act. *Manwaring*, 162 Idaho at 769, 405 P.3d at 28. It then addressed whether the fee structure was reasonably related to the value of the service provided (finding that it was).

In *NIBCA I* and *NIBCA II*, the City of Hayden expressly relied on the bond act to defend its "sewer capitalization fee" notwithstanding that it has issued no revenue bonds.[585] The Court confirmed that the bond act could be used for that purpose, so long as the fee is reasonably related to the service charged. An entire section of the *NIBCA II* decision is entitled "The Idaho Revenue Bond Act Provides Authority for

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[584] The city stated: "As a related note, the City argues that the storm water fee is valid under the Revenue Bond Act. . . . The City has not sought to incur such indebtedness at this point, but would submit that there is high likelihood that the storm water utility fee established by the Ordinance would qualify as a fee for the purpose of the Revenue Bond Act." Lewiston's brief, 2011 WL 700489 at *23.

[585] The Court was well aware that the city had issued no bonds. See City of Hayden's response brief, 2014 WL 2434901 (May 19, 2014) at *26-27 (calling the Court's attention to the fact that cities may rely on the bond act "irrespective of whether bonds were issued" and "even those that have not issued revenue bonds").

Cities to Charge a New, One-time 'Buy-in" Fee." *NIBCA II*, 164 Idaho at 537, 432 P.3d at 983. Although the Court found it unnecessary to address issue that no bonds had been issued, the *NIBCA* decisions implicitly recognized that the issuance of bonds is not a prerequisite to reliance on the bond act's authority to charge user fees for services. Indeed, the *NIBCA* decisions discuss and rely on *Viking* extensively without any suggestion that this aspect of the *Viking* decision was in doubt, much less overturned.

(d) Idaho Code § 31-4404(2) (county solid waste systems)

In 1989, the Court upheld Kootenai County's mandatory solid waste disposal fee in *Kootenai Cnty. Property Ass'n v. Kootenai Cnty.*, 115 Idaho 676, 769 P.2d 553 (1989) (Bakes, J.). This was an annual fee imposed on all homeowners (not a connection fee to new users). In this case, the county relied on a specific statutory authorization for taxes and/or fees to fund solid waste programs, Idaho Code § 31-4404. Under the statute, there was no doubt that counties had authority to charge a fee for solid waste services. The question was whether Kootenai County's fee, which applied to all homeowners, was a fee or really a disguised tax. Opponents of the fee contended that it was not a lawful user fee because (1) it was imposed on all homeowners whether they chose to use the landfill services or not, (2) the fee was not precisely tailored to match the quantity of services consumed, and (3) it funded a future benefit (acquisition and preparation of new landfill sites) rather than providing an immediate "service." The Idaho Supreme Court rejected all three arguments.

First, the Court rejected the idea that a charge for service must be voluntary in order to be a "fee":

> The association further argues that when the benefit derived is a benefit to the general public, fees to provide the benefit must be considered a tax. A fee, according to the association, is voluntarily paid for specific services while a tax is involuntarily obtained for the general public benefit. However, the legislature, under its police powers, may mandate that citizens must accept certain services, and then require a fee for the receipt of those services. *See, e.g., Schmidt v. Village of Kimberly,* [74 Idaho 48, 256 P.2d 515 (1953)] (ordinance requiring mandatory sewer hookup and requiring payment of reasonable fee, approved); *City of Glendale v. Trondsen,* [308 P.2d 1 (Cal. 1957)] (ordinance establishing rubbish collection service and requiring payment for service regardless of whether building occupants use the service, approved) . . . .

Kootenai Cnty. Property Ass'n v. Kootenai Cnty., 115 Idaho 676, 679, 769 P.2d 553, 556 (1989) (Bakes, J.).

The Court said it made no difference that there is no opportunity to "opt out." "Their basic premise was that all humans live in residences and create solid waste, and whether they put it in their own trash cans or someone else's, or on the street, the refuse ultimately ends up in the same place, an authorized county waste disposal site (landfill)." *Kootenai County Property Ass'n*, 115 Idaho at 678, 769 P.2d at 555 (parentheses original).

Second, the Court ruled that it is not necessary that the fee be based precisely on how much garbage is generated and that a flat fee for residential use is reasonable.

> No one suggests that each and every residence generates the same amount of solid waste. Presumably, the precise annual cubic yardage of solid waste from each residence could be painstakingly monitored and determined for each residence by county employees. However, all users would have to pay substantially more to cover the additional salaries of trash monitors. A solid waste disposal system is comparable to a sewer system. Charging a flat residential sewage fee is reasonable even though the actual use (outflow volume) varies somewhat from house to house. *See Schmidt v. Village of Kimberly*, 74 Idaho 48, 256 P.2d 515 (1953). The legislature has not imposed exacting rate requirements upon localities for measuring actual residential solid waste disposal or sewage use. Reasonable approximation is all that is necessary. *Id.*

Kootenai County Property Ass'n, 115 Idaho at 678-79, 769 P.2d at 555-56 (emphasis supplied). (Note: the *Waters Garbage* case discussed below found that an opt out is required where the user makes other arrangements and does not require the service.)

Third, the Court rejected the plaintiffs' argument that the solid waste charge was not a fee because "it would not provide an immediate benefit, but rather would only provide a future benefit, i.e., acquisition and preparation of new landfill sites." *Kootenai County Property Ass'n*, 115 Idaho at 679, 769 P.2d at 556. Whether the fee is used to fund immediate services or the acquisition of new sites makes no difference, said the Court, because both were authorized activities under the statute. *Id*. In other words, fees may be user fees (and not taxes) even if the funds are used to expand the system.

In *Waters Garbage v. Shoshone Cnty.*, 138 Idaho 648, 67 P.3d 1260 (2003) (Eismann, J.), the county constructed solid waste disposal facilities funded by the

issuance of revenue bonds. To recoup its costs, the county imposed a mandatory solid waste disposal fee on all county property owners regardless of whether they used the county landfill or not. The fee premised on Idaho Code § 31-4404(2) (authorizing user fees to fund county solid water systems.

A private solid waste disposal firm that competed with the county's landfill asked the county to exempt its customers from the fee. When the county refused, the firm sued the county. This time, the Idaho Supreme Court backed off its broad proclamation in *Kootenai Cnty. Property Ass'n* that a county is not required to provide an "opt out" for persons not wishing to use the county service. The *Waters Garbage* Court agreed with the plaintiff that the "basic premise" in *Kootenai County Property Ass'n* (that all humans send waste to the local landfill) was not true here. Here, local residents could lawfully avoid sending their waste to the landfill by contracting with the private service provider. Accordingly, the Court concluded that the county could not legitimately deem its charge to be a fee for services if it was imposed on people who did not use the service. *Waters Garbage,* 138 Idaho at 651-52, 67 P.3d at 1263-64.

In *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J.), the Court limited a portion of its holding in *Kootenai County Property Ass'n* to the particular statute involved. See footnote 569 on page 679

(e) Idaho Code §§ 42-3201 and 42-3212 (water and sewer district fees)

In *Potts Const. Co. v. N. Kootenai Water Dist.*, 141 Idaho 678, 116 P.3d 8 (2005) (Schroeder, C.J.), the Court upheld a one-time capitalization fee based on an equitable buy-in structure charged to those seeking connections to the district's sewer system. The Court found that it was justified under Idaho Code §§ 42-3201 and 42-3212.[586] The latter "grants municipal water service boards the authority to increase or decrease rates and fees as needed and to proscribe those actions necessary and proper to carry out their duties." *Potts*, 141 Idaho at 682, 116 P.3d at 12. The Court concluded:

> Similar to Loomis, Ordinance 99–4's capitalization fee created an equitable buy-in structure, with revenues delegated for repairs, replacement and maintenance of system components proportionally used by those within the water district's system. Additionally, the capitalization fee is reasonable and rationally related to the purpose of the municipal's regulatory function of insuring clean and safe water for those users of the

[586] A reference in the case to 42-4201 should be to 42-3201.

> district's system. The capitalization fee imposed by Ordinance 99–4 only applies to those who pay into the system and is reasonably related to public health. It is a valid exercise of NKWD's police power.

Potts, 141 Idaho at 682, 116 P.3d at 12.

The Court's description of the fee as being within the police power is out of sync with other decisions that describe the provision of such services as being a proprietary function that requires statutory authorization. Indeed, the Court noted this error in a subsequent decision.[587]

In any event, there was statutory authorization to support the fee, which the Court relied on. The decision also includes some discussion of *Brewster* regarding incidental regulatory fees that seems out of place. A capitalization fee is not an incidental regulatory fee, because it is not intended to cover merely the cost of enforcing or administering some regulation.

Note that the case did not address the question of whether the such fees could be used to fund system expansion.[588] That question was left for the *Kootenai Cnty. Property Ass'n* and *NIBCA* cases.

(f) Idaho Code §§ 50-332 and 50-333 (drains and flood prevention) coupled with Idaho Code § 50-1008(assessments)

Idaho Code §§ 50-332 and 50-333 authorize Idaho cities to engage in activities relating to drains and flood prevention and to assess the cost thereof to property owners in accordance with Idaho Code § 50-1008. These appear to constitute express legislative authorizations of user fees of the kind required by such cases as *City of Grangeville v. Haskin*, 116 Idaho 535, 538, 777 P.2d 1208, 1211 (1989) (Johnson, J.).

Unlike Idaho Code §§ 50-1030(f), 63-1311(1), and 31-870(1) (discussed above), Idaho Code §§ 50-332 and 50-333 set out no guidance or limitation as the how the fee should be determined. One may predict, however, that, if called upon, the Idaho Supreme Court would apply the same principles to these statutes that it has

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[587] "In *Potts Construction Co. v. North Kootenai Water District*, 141 Idaho 678, 681, 116 P.3d 8, 11 (2005), we incorrectly stated that the connection fee in *Loomis* 'was upheld as a valid exercise of police power authority.'" *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 149 Idaho 187, 193 n.4, 233 P.3d 118, 124 n.4 (2010) (Eismann, C.J.).

[588] It describes the funds from the capitalization fee as being used solely for "repairs, replacement and maintenance of system components proportionally used by those within the water district's system." *Potts*, 141 Idaho at 682, 116 P.3d at 12.

applied elsewhere.[589] In other words, user fees authorized by these statutes must be reasonably tailored to the pro-rata cost of the benefit conferred in order to avoid being labeled "illegal taxes." "

To the authors' knowledge, no court has ruled on the extent of user fee authority conferred by these statutes. In any event, the authority they confer is clear on the face of the statutes and is in addition to (and redundant with) that already provided to cities by Idaho Code §§ 50-1030(f) and 63-1311(1).

(g) Idaho Code §§ 50-323 and 50-344 (domestic water systems and solid waste disposal)

Two other statutes authorize cities to establish and operate domestic water systems and solid waste facilities. Idaho Code §§ 50-323 and 50-344. These statutes provide additional (belt-and-suspenders) authority for cities to impose user fees to finance these systems.

These statutes have been addressed by four cases:

- *Snake River Homebuilders Ass'n v. City of Caldwell*, 101 Idaho 47, 607 P.2d 1321 (1980) (Donaldson, C.J.) (addressing Idaho Code § 50-323).
- *City of Grangeville v. Haskin*, 116 Idaho 535, 777 P.2d 1208 (1989) (Johnson, J.) (addressing Idaho Code §§ 50-323, 50-344, and 1030(f)).
- *Alpert v. Boise Water Corp.*, 118 Idaho 136, 795 P.2d 298 (1990) (Boyle, J.) (addressing Idaho Code §§ 50-323 and 50-344)[590].
- *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 87, 343 P.3d 1086, 1094 (2015) (Eismann, J.) (addressing Idaho Code § 50-323 and 50-344).

The *Snake River* case involved a challenge by a homebuilders association to an increase in Caldwell's fee for sewer line extensions, which was imposed pursuant to Idaho Code § 50-323. The case dealt primarily with procedural and due process issues. The Court held (1) the city could raise the rate by adoption of a resolution (as opposed to an ordinance) and (2) because the action was legislative in nature, it could

[589] For example, as discussed above, in *Brewster*, the Court imposed its general principles regarding illegal taxes on Idaho Code § 63-1311(1) before the statute was amended to codify them: "We hold that while such statute provides for the imposition of certain fees, nowhere does it authorize a municipality to impose a tax upon users or abutters of public streets." *Brewster*, 115 Idaho at 503-04, 768 P.2d at 766-67.

[590] The *Alpert* opinion refers to the domestic water system statute as section 50-322. This is a typographical error. It should be section 50-323.

act without public notice and hearing. The Court then ruled on the merits (albeit with little analysis) that that the fee itself was not "a void general revenue measure."[591]

The *Grangeville* case involved user fees charged for the city's water, and garbage services. The issue was not the legitimacy of the fees themselves—which the Court acknowledged to be properly imposed on the tenants receiving the service. Instead, the issue was the city's attempt to go after a property owner (the landlord) to collect fees unpaid by tenants receiving the services. The Court found that the fees charged to tenants were justified under both Idaho Code § 50-323 and the Revenue Bond Act (Idaho Code § 50-1030(f)). However, the Court did not premise the power to collect the fees on the statutes themselves but on contract law.[592] The *Grangeville* Court did not explain its reluctance to find authority in the statutes themselves. In any event, the Court was not troubled by the city's reliance on a combination of Idaho Code § 50-323 and contract law to support its user fee.

A third case, *Alpert*, mentions Idaho Code §§ 50-323 and 50-344 noting that they authorize cities to operate water and solid waste collection systems. The decision also contains a discussion of the "illegal tax" issue, concluding that the 3% fee tacked on by a city's franchise agreement (and passed along to the consumer) is not such a tax. (See discussion in section 32 on page 761.) The *Alpert* Court did not find it necessary to expressly state that Idaho Code §§ 50-323 and 50-344 provide the requisite statutory authority for a city to charge a user fee (because that was not the

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[591] The *Snake River* Court said:

> Appellant's final contention is that the resolution places no control over the city's expenditure of the funds collected for extension of water mains, and is therefore a void general revenue measure levied against a particular class of citizens. Respondent, on the other hand, maintains the resolution is in no way a revenue measure, but rather was passed to defray some of the cost of a service rendered. . . .
>
> . . .
>
> In granting summary judgment in favor of respondent city, the district court concluded, from the facts before it, that the increase set forth in the resolution was predicated upon a cost recovery basis and did not constitute a revenue-raising measure. Our review of the record discloses nothing to the contrary.

Snake River, 101 Idaho at 49-50, 607 P.2d at 1323-24.

[592] The *Grangeville* Court said:

> We acknowledge that the city may collect the charges for the water, sewer and garbage services provided by the city from those who use the services. This right to collect does not depend on any expressed or implied power of the city, but rather on principles of contract law that obligate one who accepts a service to pay for it.

Grangeville, 116 Idaho at 538-39, 777 P.2d at 1211-12.

focus of the case). But this would seem to be a necessary implication of the decision to uphold the user fees and associated franchise fees.

The fourth case addressing Idaho Code § 50-323 is *NIBCA I*. The *NIBCA I* Court found that section 50-323 (which deals with domestic water systems) was not relevant to and could not support user fees for Hayden's sewer system. *NIBCA I*, 158 Idaho at 84-85, 343 P.3d at 1091-92. In its discourse on the statute, however, the Court quoted with approval statements made in *Grangeville* to the effect that Idaho Code §§ 50-323, 50-344, and 50-1030(f) support the imposition of user fees on users of public services.[593] It should be said that the Court's discussion of this statute is difficult to follow.[594]

(h) All user fees must reasonably reflect the cost of the service provided.

Note: The subsections above are organized on the basis of statute authorizing the user fee. This subsection collects cases based on various statutes. This is because when the Idaho Supreme Court speaks on the subject of what is a lawful fee versus an unlawful tax, it tends to apply the same principles across-the-board, without regard to the particular statute.

To be valid, the user fee under the Revenue Bond Act or any other statute must reasonably reflect the cost of the service provided to the user. But this does not mean that the fee must reflect the exact amount of service consumed. Tailoring a fee with such precision is impossible. The Idaho Supreme Court has explained repeatedly that the standard is not precision but reasonableness.

> Charging a flat residential sewage fee is reasonable even though the actual use (outflow volume) varies somewhat from house to house. *See Schmidt v. Village of Kimberly*, 74 Idaho 48, 256 P.2d 515 (1953). The legislature has

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[593] For example: "I.C. § 50–344 grants cities 'the power to maintain and operate solid waste collection systems.' . . . 'We acknowledge that the city may collect the charges for the water, sewer and garbage services provided by the city from those who use the services.'" *NIBCA I*, 158 Idaho at 85, 343 P.3d at 1092 (quoting *Grangeville*, 116 Idaho at 538, 777 P.2d at 1211) (emphasis in *NIBCA I* only)

[594] For instance, the *NIBCA I* Court recites this quotation from *Grangeville*:

> The district court also ruled that the power of the city to collect from the owner *was necessarily implied* from the powers granted to the city in I.C. §§ 50–323 and 50–1030(f). *We disagree.*

NIBCA I, 158 Idaho at 85, 343 P.3d at 1092 (quoting *Grangeville*, 116 Idaho at 537, 777 P.2d at 1210) (emphasis in *NIBCA I* only).

That quotation, if read out of context, could be misunderstood. Indeed, it is unclear why the *NIBCA I* Court thought this quotation was relevant. The *Grangeville* Court held that user fees may be lawfully imposed, but only on the user of the service (the tenant in that case) not on the non-user, owner of the property (the landlord in that case). In any event, *NIBCA I* did not disturb that ruling.

> not imposed exacting rate requirements upon localities for measuring actual residential solid waste disposal or sewage use. Reasonable approximation is all that is necessary.

Kootenai Cnty. Property Ass'n v. Kootenai Cnty., 115 Idaho 676, 678-79, 769 P.2d 553, 555-56 (1989) (Bakes, J.). Note: The *Kootenai Cnty.* case did not involve the Revenue Bond Act; the county's fee was based on Idaho Code § 31-4404.

> The Irrigation District had discretion to decide what methodology to use in order to determine that value. For example, it is entitled to use replacement cost rather than historical cost as the basis of its calculations. <u>The court's limited role is simply to determine whether the methodology used to determine the value is reasonable and not arbitrary.</u>

Viking Const., Inc. v. Hayden Lake Irrigation Dist., 149 Idaho 187, 194, 233 P.3d 118, 125 (2010) (Eismann, C.J.) (emphasis supplied).

> It is not the province of this Court to determine how a municipality should allocate its fee and rate system. So long as the fees and rates charged conform to the statutory requirements and are reasonable, the fees, rates and charges will be upheld.

Loomis v. City of Hailey, 119 Idaho 434, 442, 807 P.2d 1272, 1280 (1991) (Boyle, J.).

> [The] funds generated thereby must bear some reasonable relationship to the cost of enforcing the regulation.

Brewster v. City of Pocatello, 115 Idaho 502, 504, 768 P.2d 765, 767 (1988) (Shepard, J.).

> The fact, that the fees charged produce more than the actual costs and expense of the enforcement and supervision [of traffic and parking regulation], is not an adequate objection to the exaction of the fees. The charge made, however, must bear a reasonable relation to the thing to be accomplished.
> The spread between the actual cost of administration and the amount of fees collected must not be so great as to evidence on its face a revenue measure rather than a license tax measure.

Foster's Inc. v. Boise City, 63 Idaho 201, 219, 118 P.2d 721, 728 (1941) (Ailshie, J.) (citations omitted).

> Creating a fee structure 'whereby every member of the general public would be charged only for his exact contribution of waste presumably could be established, but the system would be cumbersome and perhaps prohibitively expensive to maintain. The law only requires that the fee be reasonably related to the benefit conveyed.'

Manwaring Investments, L.C. v. City of Blackfoot, 162 Idaho 763, 768-69, 405 P.3d 22, 27-28 (2017) (Burdick, C.J.) (quoting *Kootenai Cnty. Property Ass'n v. Kootenai Cnty.*, 115 Idaho 676, 680, 769 P.2d 553, 557 (1989) (Bakes, J.).

Indeed, this reasonableness standard is built right into the authorizing legislation. "The fees collected pursuant to this section shall be reasonably related to, but shall not exceed, the actual cost of the service being rendered." Idaho Code § 63-1311(1) (applicable to cities); Idaho Code § 31-870 (applicable to counties).[595]

In 2015, the Idaho Supreme Court handed down *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J.), in which a builders association challenged the city's sewer cap fee. The case is discussed above in the context of Idaho Code § 63-1311(1). The city also defended its fee under section 50-1030(f) of the Revenue Bond Act.

The *NIBCA I* Court began its discussion under the Revenue Bond Act by recognizing that the cap fee is not limited to the mere cost of connecting to the sewer. To the contrary, the new user may be charged a buy-in fee reflecting the value of the system to which it is connecting.

> In *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991), we held that a connection fee charged to connect to a city's sewer and water system could exceed the actual cost of physically connecting to the system. *Id*. at 442, 807 P.2d at 1280. We upheld a fee that required a new user to pay a one-time connection fee to "buy in" to the city's sewer and water system. We held that Idaho Code section 50–1030(f) "specifically gives the municipality the power to set and prescribe the rates, tolls and charges to support the system" and that the city could

[595] In 1988, both provisions were amended by adding the same identical sentence: "The fees collected pursuant to this section shall be reasonably related to, but shall not exceed, the actual cost of the services being rendered." S.B. 1340, 1988 Idaho Sess. Laws, ch. 201 (amending Idaho Code §§ 31-870 and 63-2201A (the predecessor to Idaho Code § 63-1311)).

> calculate the amount of the buy-in "by dividing the net system replacement value by the number of users the system can support. The new user is charged the value of that portion of the system capacity that the new user will utilize at that point in time." *Id*. at 441, 443, 807 P.2d at 1279, 1281.

NIBCA I, 158 Idaho at 82, 343 P.3d at 1089 (emphasis supplied).

Moreover, the *NIBCA I* Court stood by its prior precedent that the fee may be based on today's replacement value, rather than the historical cost. The Court nonetheless ruled that Hayden had failed to establish on the record that its fee did not exceed the cost of replacing existing system capacity:

> In this case, the City did not calculate the fee by dividing the value of its current system by the number of users that system could support to determine the amount of the fee to be charged to each new user as an equity buy-in. Rather, it divided the estimated cost of increasing the size of the system from 5600 ER's to 14,550 ER's by the increase in capacity that would result from the construction and then charged each new user a proportionate amount of the cost of that increase.

NIBCA I, 158 Idaho at 82, 343 P.3d at 1089.[596]

In sum, a buy-in fee is lawful, but it must be based on an appropriate portion of today's replacement value of the existing system. It must not be measured by the cost of building new capacity to replace what is being consumed by the new user. The Court reached this conclusion based on the phrase "at that point in time" which appeared in the *Loomis* case and the *Viking* case. *NIBCA I*, 158 Idaho at 82, 343 P.3d at 1089.

[596] In a footnote, the *NIBCA I* Court made reference to the City of Hailey's buy-in formula in *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991) (Boyle, J.). *NIBCA I*, 158 Idaho at 82 n.2, 343 P.3d at 1089 n.2 (quoting from *Loomis*, 119 Idaho at 443 n.4, 807 P.2d at 1281 n.4). This discussion is quite technical. For instance, footnote 4 of *Loomis* says that gross replacement value is determined by multiplying the actual original cost of each system component by a ratio of today's cost index divided by the cost index at the time of construction—in other words, the dollar value for what it would cost to build the same system today. This gross replacement value is then "adjusted by subtracting the remaining bond principal to be retired and the unfunded depreciation." *Loomis*, 119 Idaho at 443 n.4, 807 P.2d at 1281 n.4. A concurrence in *NIBCA I* by Justice Jim Jones joined in by Chief Justice Burdick urged that the footnote 2 discussion in *NIBCA I* "may be correct but it seems to me that expert opinion below should address that issue." *NIBCA I*, 158 Idaho at 87, 343 P.3d at 1094.

The *NIBCA I* Court went on to reiterate what it had previously held in *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 149 Idaho 187, 196, 233 P.3d 118, 127 (2010) (Eismann, C.J.), that "connection fees collected by [the governmental entity] could be spent to extend the domestic water system." *NIBCA I*, 158 Idaho at 82, 343 P.3d at 1090 (emphasis original). In other words, the *NIBCA I* plaintiffs' contention that fee revenue could not be expended for future system expansion was wrong.

Thus it is clear that a city may charge a buy-in fee based on the current replacement value of the existing system (which is certain to be more that was actually spent on the system) and then use that money to pay for new infrastructure.

> When a new user pays a sewer connection fee to a city based upon the value of that portion of the sewer system's capacity that the new user will be utilizing at that point in time, the connection fee will probably allow the city to accumulate a fund to increase the capacity of its sewer system. That proportionate value of the system capacity used by the new user will undoubtedly be more than any increased operational costs of adding the new user to the current system. Assuming that the city is able to extend its sewer system by accumulating a fund from charging new users a connection fee based upon the value of the system capacity that each of them will be using, the Idaho Revenue Bond Act would not prevent a city from using those funds to extend its system, as long as it did so consistent with Idaho Code section 50–128 [sic, should be 50-1028].

NIBCA I, 158 Idaho at 83, 343 P.3d at 1090.[597]

In footnote 2, the *NIBCA I* Court described the particular methodology that should be employed in calculating the replacement value:

> The three methods of valuing real property are the income approach, the sales comparison approach, and the cost approach. Because city sewer systems are not to be operated primarily as a source of city revenue and the services are to be furnished at the lowest possible cost, I.C. § 50–1028, and because of the lack of comparable sales of city sewer systems, the cost approach is the most feasible method for valuation. Under that method, value

[597] The Court's reference to section 50-128 should be to 50-1028. This is the "grant of authority" under the bond act, which mandates that "works shall be furnished at the lowest possible cost. No city shall operate any works primarily as a source of revenue to the city . . . ."

> is based upon the estimated cost of duplicating the improvements to the real property, minus accrued depreciation, plus the value of the land, if any. Thus, in *Loomis*, the city calculated the net system replacement value "by first determining the gross replacement value of the system by using an engineering cost index to determine present day replacement cost of the system components," and it then subtracted from the gross replacement value "[u]nfunded depreciation and bond principal" to determine the net system replacement value.

NIBCA I, 158 Idaho at 82 n.2, 343 P.3d at 1089 n.2 (quoting *Loomis*, 119 Idaho at 443, 807 P.2d at 1281).[598]

So long as the fee can be shown not to exceed the replacement value of the existing system, the only constraint is that it be "consistent with Idaho Code section 50-1028." *NIBCA I*, 158 Idaho at 84, 343 P.3d at 1091 (referring to the provision in the Revenue Bond Act that the city shall not "operate any such works primarily as a source of revenue.")

In sum, the City of Hayden incorrectly assumed that it could calculate the replacement value of its existing sewer system (for purposes of its cap fee) by calculating the cost of building the next increment of its sewer system. The *NIBCA I* Court said that was not permissible because the replacement value must be based on the cost of replacing the existing system. But the Court remanded to allow the city justify its fee on that basis. The city did just that. On remand, the city calculated the per-user replacement value of its existing system and demonstrated to the district court that the cap fee it charged was less than that number. The plaintiff complained that this was an unfair, after-the-fact justification of the fee—what it called a "do over." The district court agreed, and the city appealed again. On the second appeal, *N. Idaho Bldg. Contractors Ass'n v City of Hayden* ("*NIBCA II*"), 164 Idaho 530, 432 P.3d 976 (2018) (Bevin, J.), the Court overturned the district court's rejection of the evidence offered by the City (which showed that its sewer buy-in fee, even though calculated on the basis of an improper methodology, did not exceed the amount that could be lawfully charged had the proper methodology been employed).[599] This was

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[598] The concurrence suggested that it was premature for the majority to engage in this level of specificity in describing the property methodology. *NIBCA I*, 158 Idaho at 87, 343 P.3d at 1094 (concurrence).

[599] "[T]he City can make a case that the 2007 Cap Fee was reasonable when it was adopted, even though the method used to arrive at the amount of the fee was flawed." *NIBCA II*, 164 Idaho at 539, 432 P.3d at 984.

"The City was precluded from establishing a legal, even if tardy, basis for the fee here. In not allowing the City to pursue its case the district court erred. Allowing its determination to stand could lead to a windfall to developers at taxpayer expense. The FCS study indicated that the $2,280

followed by a second remand, which should have been a slam dunk for the city. Instead, the city inexplicably and ill-advisedly threw in the towel.

In 2017, the Idaho Supreme Court decided *Hill-Vu Mobile Home Park v. City of Pocatello*, 402 P.3d 1041 (Idaho 2017) (Eismann, J.). The case involved a challenge to water and sewer fees charged by the City of Pocatello. The city imposed the fees pursuant to the Revenue Bond Act. Notwithstanding an opinion letter from the Idaho Attorney General warning of the illegality of the fee, the city added on two fees aimed at generating a profit off of its water and sewer systems. One was a "return-on-equity" add-on, which mimicked the return a public utility is allowed to keep as profit. The other was a "payment in lieu of taxes" (or PILOT) in which the water and sewer departments paid a PILOT to the city, which, in turn, was passed along to the water and sewer customers. It appears that the city agreed to drop the return-on-equity charge. The Building Contractors Association of Southeastern Idaho then brought suit challenging the PILOT. In 2013, the district court enjoining the city from charging the PILOT. No appeal was taken.

Apparently only injunctive relief was sought in the first case. In 2014, a second suit was brought, this time by the mobile home park, seeking a refund of PILOT sums that had been paid by the city department and passed through to rate payers. In this case, the illegality of the fees was taken as a given. (Indeed, it is beyond comprehension that Pocatello ever thought these fees were lawful.) The second case involved technical defenses to damage claims.

First, the Idaho Supreme Court found that Idaho Code § 6-904A does not immunize cities from charging illegal fees. (See discussion of this defense in section 20.C at page 288.) This provision provides immunity (with some limitations) for actions that arise "out of the assessment or collection of any tax or fee." Next, the Court reversed the district court's conclusion that money is not property within the meaning of the takings clause. *Hill-Vu* at 1048. The Court further held that the district court improperly failed to apply the decision in the earlier district court litigation that declared the fees illegal.

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fee was less than the actual cost for new users to connect to the system; this was sufficient evidence to withstand summary judgment. Ordering the City to reimburse NIBCA an amount exceeding $700,000 would require taxpayers in general to foot that bill." *NIBCA II*, 164 Idaho at 539, 432 P.3d at 985.

"The City erroneously failed to follow the *Loomis* criteria in establishing the fee in the first instance. Even so, because of the reversal of summary judgment in *NIBCA I*, it sought to justify the amount of its fee based on the reality that the cost in applying the *Loomis* and *Viking* methodology *exceeded* the amount it charged for the fee. It was not allowed to make that case. Thus, while the City originally relied on faulty logic in coming to the amount of the 2007 Cap Fee, using the *Loomis* criteria could allow the City to establish that its fee was in fact an authorized, lawful fee. The district court must then determine whether that fee is reasonable given the totality of the facts in the record." *NIBCA II*, 164 Idaho at 539-40, 432 P.3d at 985-86 (emphasis original).

Due to the posture of the case, there was no ruling on the merits. The Court left little doubt, however, about its take on the situation:

> The PILOT [fee charged by the City] was not a reasonable user fee to reimburse the City for the cost of government services. It was an exaction that was designed to be in addition to what would be a reasonable charge for the water and sewer systems to remain self-supporting. In the *Building Contractors* case [the earlier district court case], the City conceded that fact.

Hill-Vu at 1050.

(i) User fees regulated by the Idaho Public Utilities Commission.

In *Building Contractors Ass'n of Southwestern Idaho, Inc. v. Idaho Public Utilities Comm'n.*, 128 Idaho 534, 916 P.2d 1259 (1996) (Schroeder, J.), the Idaho Supreme Court invalidated a rate increase granted by the commission to Boise Water Corporation (now Veolia). The fee would have imposed the entire cost of the newly constructed Marden Treatment Plant on new users through sharply higher connection fees. The treatment plant was necessitated by recently toughened requirements under the Safe Drinking Water Act. The Court determined that the rate was discriminatory because the cost of improved water quality was not related to new development and should be borne proportionately by new and existing users. Although this case arose in the context of public utility law, the principle would seem to be applicable in the context of an illegal tax challenge to a connection fee or other user charge.

(4) Express statutory authority to address impacts on public facilities or services in the context of CUPs and zone changes.

On of LLUPA's stated goals is "To ensure that adequate public facilities and services are provided to the people at reasonable cost." Idaho Code § 67-6502. That goal finds expression in many requirements of LLUPA—from comprehensive planning to the establishment of areas of city impact—all of which are intended foster the efficient development of public services.

LLUPA expressly authorizes planning and zoning entities to address the need for additional public facilities and services, including school districts, resulting from new development. Thus it appears that cities and counties may condition the approval of CUPs and zone changes with requirements that the applicant mitigate for the impact of the development. This might entail contributions made to the entity providing the service, which may be different than the city or county granting the land use entitlement. This particular statutory authority is found only in the context of CUPs and zone changes, not other land use entitlements such as subdivision.

(a) CUPs (Idaho Code §§ 67-6512(a), 67-6512(d)(6), and 67-6512(d)(8))

Section 67-6512 of LLUPA deals with conditional use permits ("CUPs") also known as special use permits. Section 67-6512(a) recognizes that such permits may take into account the public services that will be required by the development:

> A special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms of the ordinance . . ., subject to the ability of political subdivisions, including school districts, to provide services for the proposed use . . . .

Idaho Code § 67-6512(a). This section then sets out a non-exclusive list of conditions that may be imposed on a CUP. Two are notable here.

The first allows conditions "[r]equiring the provision for on-site or off-site public facilities or services." Idaho Code § 67-6512(d)(6). The second authorizes conditions "[r]equiring mitigation of effects of the proposed development upon service delivery by any political subdivision, including school districts, providing services within the planning jurisdiction." Idaho Code § 67-6512(d)(8).

Note that there is a question as to the scope of what constitutes "public facilities or services" (under section 67-6512(d)(6)) and "service delivery" (under section 67-65-(d)(8)). One might read these as including mitigation of impacts on such things as roads and schools, but not to reach such things as affordable housing.

These constitute an express authorization by the Legislature for such conditions even in the absence of an IDIFA-complaint ordinance. Because they are legislatively authorized, they are not unlawful taxes.

The Idaho Supreme Court recognized the county's authority to impose mitigation conditions in *Buckskin Properties, Inc. v. Valley County*, 154 Idaho 486, 300 P.3d 18 (2013):

> Furthermore, even without the agreement of the developer, a governing board may attach a condition to a CUP requiring the provision for off-site public facilities or requiring mitigation of effects of the proposed development upon service delivery by any political subdivision. I.C. § 67-6512(d)(6) and (8). If a governing board attaches a condition unacceptable to the developer, the developer may seek judicial review (I.C. § 67-6519(4)) or request a regulatory taking analysis pursuant to I.C. § 67-8003. I.C. § 67–6512(a).

Buckskin, 154 Idaho at 492, 300 P.3d at 24. Thus, a mitigation condition might still be challenged as a taking if, for instance, it was disproportionate or unrelated to the impact of the development (per *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 860 (1987) (Scalia, J.) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (Rehnquist, J.)). But it is not a *per se* taking as an illegal tax, because such conditions are authorized by LLUPA.

Moreover, the *Buckskin* Court made the following observation about the authority to require mitigation under section 67-6512(d) in the context of its discussion of IDIFA. The Court first observed that "IDIFA does not prohibit governmental entities and developers from voluntarily entering into contracts to fund and construct improvements." *Buckskin*, 154 Idaho at 491, 300 P.3d at 23. In that context, the Court noted even in the absence of a voluntary agreement, mitigation may be required under section 67-6512(d). *Buckskin*, 154 Idaho at 492, 300 P.3d at 24.

One might ask, why would the Legislature enact IDIFA if it already had authority to impose these requirements under LLUPA? In response, it should be noted that this LLUPA provision is much narrower than IDIFA. First, LLUPA's CUP provision does not authorize impact fees for <u>all</u> development (*e.g.*, anyone pulling a building permit). Rather, it is limited to developers who file an application for a CUP. Second, it is limited to "public facilities and services." Arguably the reference to "public facilities" in LLUPA is quite broad, but this has not been tested. For example, does it include parks and open space? IDIFA, on the other hand, expressly encompasses certain specified public facilities, which includes parks and open space.

Thus, it appears that LLUPA's section 67-6512(d) would justify requiring mitigation fees (without IDIFA compliance) in connection with CUPs sufficient to cover the developer's proportionate share of increased government infrastructure and other costs associated with the new development. However, if the local government wishes to impose fees for development impacts in contexts other than CUPs, it would need to enact an IDIFA-compliant ordinance.

The conclusion that sections 67-6512(d)(6) and (8) authorize such conditions without enactment of an IDIFA-complaint ordinance is reinforced by dictum in *Burns Holdings, LLC v. Teton Cnty. Bd. of Comm'rs* ("*Burns Holdings II*"), 152 Idaho 440, 272 P.3d 412 (2012) (Eismann, J.). There the Court held a variance is the only means by which cities and counties may grant relief from bulk and height restrictions and that such relief could not be provided by conditions in a conditional use permit. (This result was promptly overturned by the Legislature. See discussion under "Variances" in section 4.K at page 99.) In the course of its ruling, however, the Court had occasion to describe the conditional use permit provision of LLUPA, Idaho Code § 67-6512(a). It noted:

> A CUP is used for classifications of uses that the zoning authority has determined will be permitted only if it is allowed to require specified types of conditions that are typically developed on a case-by-case basis in order to mitigate the adverse effects that the development and/or operation of the proposed use may have upon other properties or upon the ability of political subdivisions to provide services for the proposed use. Section 67–6512(d) includes a non-exhaustive list of the types of conditions that can be attached to a CUP.

Burns Holdings II, 152 Idaho at 444, 272 P.3d at 416 (footnote omitted). Although not an issue in this case, the Court noted that cities and counties have express statutory authority to impose certain mitigation conditions as part of a conditional use permit. In a footnote, the Court quoted Idaho Code § 67-6512(d), which sets out examples of categories of conditions that might be attached to a conditional use permit. *Burns Holdings II*, 152 Idaho at 444 n.5, 272 P.3d at 416 n.5.

On the other hand, another provision of LLUPA dealing with subdivision could be read as overriding the authority found in section 67-6512(d)(6) and (8) and making IDIFA the exclusive means of imposing development mitigation fees. A sentence in the section of LLUPA dealing with subdivision ordinances states: "Fees established for purposes of mitigating the financial impact of development must comply with the provisions of chapter 82, title 67, Idaho Code [IDIFA]." Idaho Code § 67-6513. No appellate court has addressed the interaction between this provision and sections 67-6512(d)(6) and (8). One could argue that section 67-6513 is more specific and therefore overrides or limits sections 67-6512(d)(6) and (8). On the other hand, one could argue that the provision in sections 67-6512(d)(6) and (8) are more specific (because they narrowly authorize provision for "mitigation" and "public facilities or services") and are not overridden by the more general provision in section 67-6513 as to fees for a broader range of issues (*e.g.*, affordable housing). Moreover, one could argue that the two provisions do not interact at all because section 67-6512(d) applies to CUPs while section 67-6513 applies to subdivisions. In any event, the conclusion in *Buckskin* (discussed above)that section 67-6512(d) provides authority for mitigation fees independent of and notwithstanding IDIFA remains the only law on the subject.

Note also that IDIFA expressly excludes the imposition of "[c]onnection or hookup charges" and "[a]vailability charges." Idaho Code §§ 67-8203(9)(b) and (c). The former (connection or hookup charges) appear to correspond to the physical cost of making a connection to a sewer or other infrastructure). The latter (availability charges) appear to refer to cost of system-wide infrastructure necessary to provide the capacity to serve the new customer. In Idaho, the term "capitalization fee" or

"connection fee" is typically used to cover both of these. Thus, a sewer capitalization fee or other connection fee need not (and indeed cannot) be implemented via IDIFA.

(b) Zone changes (Idaho Code §67-6511(2)(a))

Similarly, the re-zone provision of LLUPA states: "Particular consideration shall be given to the effects of any proposed zone change upon the delivery of services by any political subdivision providing public services, including school districts, within the planning jurisdiction." Idaho Code § 67-6511(2)(a). That section goes on to discuss conditional rezones, suggesting that governmental entities have authority to condition the rezone on measures taken by the applicant to address public services. The section notes that a condition approval or denial is subject to a regulatory takings analysis.

(5) Outright denial of a rezone, permit, or annexation request based on inadequate services or infrastructure

As discussed below (section 29.F(3) at page 716) with the respect to the *Cove Springs* litigation, Judge Elgee ruled that a local government may not condition permit approval on payment of an unlawful impact fee (outside of IDIFA). That much is clear. But could that same governmental entity instead simply deny the permit outright? The answer is yes, assuming the denial is legitimately based on the inability to serve the development taking into account the revenues that will be generated by the development.

For instance, LLUPA's provision on CUPs (aka special use permits) states: "A special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms of the ordinance, . . . subject to the ability of political subdivisions, including school districts, to provide services for the proposed use . . . ." Idaho Code § 67-6512(a).

Similarly, as noted above, the zoning provision of LLUPA states: "Particular consideration shall be given to the effects of any proposed zone change upon the delivery of services by any political subdivision providing public services, including school districts, within the planning jurisdiction." Idaho Code § 67-6511(2)(a).

In addition, zoning and conditional use permits must be consistent with the comprehensive plan, which is mandated to address such things as school facilities and transportation. Idaho Code § 67-6508(c).

IDIFA states: "Nothing in this chapter shall obligate a governmental entity to approve any development request which may reasonably be expected to reduce levels of service below minimum acceptable levels established in the development impact fee ordinance." Idaho Code § 67-8214(4). "Nothing in this chapter shall obligate a governmental entity to approve development which results in an extraordinary

impact." Idaho Code § 67 8214(3). (Note, however, that these provisions apply only to governmental entities that have adopted an IDIFA-compliant ordinance.)

Likewise, the governmental entity could grant the permit subject to the condition that the development be postponed until such time as funds become available to provide essential services. One of the conditions expressly authorized for conditional use permits is "[c]ontrolling the sequence and timing of development." Idaho Code § 67-6512(d)(2).

Annexations are a different animal. The quick answer is that the denial of an annexation request is generally viewed as not subject to judicial review or any court challenge (notwithstanding the 2002 statutory authorization of judicial review of Category B and C annexations). See discussion in section 24.X (Judicial review of municipal annexation) on page 444. Hence, it appears clear that a city may deny an annexation request based on the inadequacy of public services—or virtually any other reason.

(6) Traditional, on-site entitlement exactions

In addition to regulatory fees and user fees, a third category of exaction falls within the proper exercise of the police power. Local governments have long required developers to dedicate streets, provide for sewers and sidewalks, and, sometimes, dedicate open space or school sites within the subdivision, as a condition of approval for entitlement applications.[600]

The Idaho Supreme Court has not had occasion to explore the bounds of lawful on-site exactions.[601] However, it has said this: "This Court has recognized that aesthetic concerns, including the preservation of open space and the maintenance of the rural character of Blaine County, are valid rationales for the county to enact zoning restrictions under its police power. The purpose of the MOD [mountain overlay district], as set forth in B.C.C. § 9-21-1(B), falls squarely within the

[600] "Dedications have been common for decades. A survey conducted in 1958 revealed that the vast majority of cities then required subdividers to install various types of physical improvements, such as roads, sewers, and storm drains, within the subdivision." Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 Colum. L. Rev. 473 (1991).

[601] The closest the court came was in *KMST, LLC v. Cnty. of Ada*, 138 Idaho 577, 67 P.3d 56 (2003) (Eismann, J.), in which the plaintiff challenged a requirement that it dedicate a street as a condition of a zone change. The challenge, however, was framed as a Fifth Amendment takings rather than as a Dillon's Rule violation. In any event, for procedural reasons, the Court did not reach the takings issue.

recognized powers of the County." *Terrazas v. Blaine Cnty.*, 147 Idaho 193, 198, 207 P.3d 169, 174 (2009) (Horton, J.) (citation omitted).[602]

Courts in other states have recognized limited exactions of this sort as being proper. *E.g., Ridgefield Land Co. v. City of Detroit*, 217 N.W. 58 (Mich. 1928) (requirement to dedicate streets of a particular width as a condition of plat approval is within the police power and does not require an exercise of eminent domain); *Patenaude v. Town of Meredith*, 392 A.2d 582, 586 (N.H. 1978) (upholding requirement that developer dedicate recreational space so that "those moving into the subdivision will have an adequate recreational area"); *Mid-Continent Builders, Inc. v. Midwest City*, 539 P.2d 1377 (Okla. 1975) (upholding requirement that developer install sewer lines within the development and dedicate them to the city).

In any event, this practice is deeply engrained in the fabric of land use law and is unlikely to be viewed as *per se* unconstitutional, so long as the exaction is of the traditional kind (an on-site dedication of roads, sidewalks, curbs, school land, open space, or the like).[603]

Courts and commentators have justified these traditional exactions on the basis that "they will benefit the subdivision almost exclusively." John Martinez, *Local Gov't Law*, § 16.23 (2007) (citing *Blevens v. City of Manchester*, 170 A.2d 121 (N.H. 1961); *City of College Station v. Turtle Rock Corp.*, S.W.2d 802 (Tex. 1984); *Crownhill Homes, Inc. v. City of San Antonio*, 433 S.W.2d 448 (Tex. App. 1968). "[R]equirements to dedicate streets, roads, and similar facilities have also been upheld when the subdivision is found to be creating the need for such facilities and such facilities will benefit the subdivision exclusively." 8 McQuillin, *Law of Municipal Corporations*, § 25.118.40 (1999).[604]

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[602] *Terrazas* relied on *Dawson Enterprises, Inc. v. Blaine Cnty.*, 98 Idaho 506, 567 P.2d 1257 (1977) (Bistline, J.). In *Dawson*, the Court noted that there is disagreement in other jurisdictions over whether zoning for purely aesthetic purposes falls within the police power. In the case of Blaine County's zoning ordinance, however, aesthetics was only an additional consideration, not the sole or exclusive purpose of the regulation. That, said the Court, clearly fell within the was the scope of the police power. *Dawson*, 98 Idaho at 518, 567 P.2d at 1269. Note that Dawson, though decided in 1977, was based on actions occurring before the adoption of LLUPA in 1975. See footnote 3 and Justice Bakes' dissent.

[603] "The impacts on the municipality to be minimized by such regulatory conditions as the dedication of streets – to consider the most common of the conventional exactions – clearly fall within the permissible scope of regulation. No court to our knowledge has rejected the validity of objectives such as convenient access to houses for fire and police protection and rational street plans to handle traffic adequately." Ira Michael Heyman & Thomas K. Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 Yale L. J. 1119 (1964).

[604] Some states allow exactions in a broader set of circumstances, for instance, for off-site improvements or for purposes benefiting the community in general. These, however, are readily distinguishable for one or both of the following reasons: (1) They arise in home rule cities where,

The Idaho Legislature has codified this particular point—that exactions must benefit the particular development—in enacting the Idaho Development Impact Fee Act, Idaho Code §§ 67-8201 to 67-8216 ("IDIFA"). "Nothing in this chapter shall prevent a governmental entity from requiring a developer to construct reasonable project improvements in conjunction with a development project." Idaho Code § 67-8214(1). Moreover, IDIFA expressly exempts from the definition of development impact fees, and thus by clear implication allows, the imposition of certain site-related entitlement exactions and user fees. Idaho Code § 67-8203(9)(b) (fees allowed for "connection or hook-up charges"); Idaho Code § 67-8203(9)(c) (fees allowed for "availability charges"); Idaho Code § 67-8203(9)(d) (certain voluntarily negotiated payments that the "developer has agreed to be financially responsible for").[605]

In sum, Idaho's Constitution, IDIFA's restriction of exactions to those benefiting the project development, and common law foundational principles all point to the same conclusion: A city or county may lawfully require a developer to dedicate land for streets, school sites, and other such facilities within the project where the contributions will primarily (if not exclusively) benefit landowners within the subdivision. But a requirement to dedicate land (or to make other contributions) for services or projects benefiting the public generally is not permissible. Note, however, that conditions "[r]equiring the provision of on-site or off-site public facilities or services" are expressly allowed by LLUPA. Idaho Code § 67-6512(d)(6).

Finally, a question arises about what happens to the entitlement when an exaction is successfully challenged. Obviously, the developer gets its money back, if it has already been paid. But does the developer get to keep the permit, too? In most instances, the answer is, yes. Professor Martinez of the University of Utah School of Law offers this assessment: "Exactions cannot simply result from ad hoc bargaining between the permitting agency and a developer, they must be authorized by enabling statutes and implementing ordinances. If a developer accepts an exaction, but the exaction is subsequently invalidated as contrary to the statutory authority of the permitting agency to impose, then the entire permit will be stricken if the transaction bore the hallmarks of a blatant sale of a permit, but if the exaction was instead imposed through a good faith attempt to ameliorate the effects of the development, then only the exaction will be stricken and the permit itself will be upheld." John Martinez, *Local Gov't Law*, § 16.23 (2007). *See*, 8 McQuillin, *Law of Municipal*

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unlike Idaho, municipalities have broad inherent powers to tax, and/or (2) local governments are acting pursuant to authorizing legislation.

[605] The former (connect charge) appears to correspond to the physical cost of making a connection to a sewer or other infrastructure). The latter (availability charge) appears to refer to cost of system-wide infrastructure necessary to provide the capacity to serve the new customer. In Idaho, the term "capitalization fee" or "connection fee" is typically used to cover both of these.

Corporations, § 25.118.50 (1999), which echoes Professor Martinez's conclusion that "impact fees and exactions cannot simply result from ad hoc bargaining."

F. District court decisions addressing unlawful fees

Three district court decisions invalidated impact fees imposed by the City of Sun Valley, the City of McCall, and Blaine County. These decisions were the impetus for other cases that reached the appellate level. Each decision is reproduced in the appendix to this Handbook.

(1) The *Schaefer* case

In *Schaefer v. City of Sun Valley*, Case No. CV-06-882 (Idaho, Fifth Judicial Dist., July 3, 2007) (Robert J. Elgee, J.) (reproduced in Appendix E), the district court invalidated Sun Valley's Workforce Housing Linkage Ordinance (Ordinance 364), which imposed a requirement on applicants for building permits for residential and multi-family developments that they make certain contributions to address workforce housing needs in the community. The applicant had the choice of constructing the workforce housing, contributing land, or paying an in lieu fee. The Schaefers challenged the city's imposition of a fee of $11,989.97 for workforce housing. The district court invalidated the ordinance.

Tracking the analysis of Idaho Supreme Court decisions discussed above, Judge Elgee determined that the imposition of an in lieu fee was not a proper exercise of the police power, because it was not a fee incidental to a regulatory program. Rather, it was a revenue-generating measure intended to benefit the community as a whole, and therefore it was a tax.[606] The district court said that the fact that the city segregated funds from the fee in a special account, although a factor to be considered, did not save it.

As such, the fee would be permissible only if authorized by the Idaho Legislature. The city acknowledged that the fee was not imposed pursuant to IDIFA, which does not authorize fees for affordable housing. Instead, it contended that LLUPA provides an independent legislative authorization for the fee. The court rejected this argument, noting that LLUPA authorizes regulation of land use, not the imposition of fees. *Schaefer* at 17-18. The Court did not reach the Schaefers' second argument, that IDIFA preempted the city's ordinance.[607]

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[606] "The City spends a considerable amount of time arguing that the in-lieu fee is an exaction rather than an impact fee. . . . The City, however, cites no Idaho law supporting these propositions and this Court can find none. The analysis is the same whether it is labeled a fee or an exaction." *Schaefer v. City of Sun Valley*, Case No. CV-06-882, at 7 (Idaho, Fifth Judicial Dist., July 3, 2007) (reproduced in Appendix E)

[607] In a separate decision, the court awarded attorney fees to the Schaefers. The city appealed neither the decision on the merits nor the attorney fee award.

(2) The *Mountain Central* case

In *Mountain Central Bd. of Realtors, Inc. v. City of McCall*, Case No. CV 2006-490-C (Idaho, Fourth Judicial Dist., Feb. 19, 2008) (Thomas F. Neville, J.) (reproduced in Appendix F), Judge Thomas F. Neville invalidated two ordinances imposing fees on developers to fund the city's affordable housing efforts. Judge Neville's decision closely followed, and referenced, Judge Elgee's decision in *Schaefer*. Similar to the holding in *Schaefer*, Judge Neville ruled, "The inclusionary zoning ordinances at issue in this case go well beyond the traditional zoning standards relating to height, size, construction, zoning areas, open space requirements, density, and location." *Mountain Central* at 9. Accordingly, they are not authorized by LLUPA or the police power, but are illegal taxes.

(3) The *Cove Springs* case

In *Cove Springs Development, Inc. v. Blaine Cnty.*, Case No. CV-2008-22 (Idaho, Fifth Judicial Dist., July 3, 2008) (Robert J. Elgee, J.), the district court granted summary judgment invalidating five county ordinances which sought to impose various development impact fees for purposes including schools, school buses, police and fire protection, emergency services, roads, trails, and affordable housing. The court's reasoning was essentially identical to that in the *Sun Valley* case decided exactly a year earlier.

The county sought, unsuccessfully, to distinguish its ordinances from Sun Valley's. The county's ordinances did not quantify a specific fee, but instead authorized the county to evaluate whether the applicant's proposal sufficiently addressed the impact of the project on county services. In this case, the county never imposed a particular fee, but simply denied Cove Springs' application because it found its "voluntary" contributions were inadequate. The court rejected this argument:

> Approval of a plat may <u>not</u> be conditioned upon payment by the subdivider of a specified portion of the cost of improvements if no power to exact such a payment is delegated by the statutes. The county has a duty to keep all roads in reasonable repair and may not discharge that duty by imposing the costs on local developers, absent statutory authority; thus, <u>requiring a developer to pave a county road as a condition for approving a site plan is ultra vires</u>.

Cove Springs at 8 (quoting 83 Am. Jur. 2d *Zoning and Planning* § 485, at 420 (2003) (emphasis by the Court).

The court continued:

> Specifically, with regard to designated paragraph 223, the County argues that compliance with Standard § 10-9-8.D is voluntary. While part of that may be true, the County has made approval "contingent" on whether the proposed development has voluntarily agreed to contribute to mitigate off site impacts. When viewed in this context, the County has conditioned approval upon an agreement by the developer to contribute offsite improvements for clearly designated public purposes. In other words, the County has conditioned approval upon the developer's agreement to voluntarily pay a tax. In that regard, the County seeks to do indirectly, (by coercing payment of a fee for mitigation of offsite public impacts) what it may not do directly (levy an "exaction" or tax for precisely the same purpose).

Cove Springs at 9 (emphasis by the court).

In *Sun Valley*, the Court did not reach the preemption argument. In *Cove Springs*, it did:

> In addition, even if the County had inherent authority to impose taxes (which it does not), Subdivision Ordinance §§ 10-5-2.C, 10-6-8.A.9, and 10-9-8.D are void because they have been preempted by IDIFA. IDIFA is a broad regulatory program that comprehensively addresses development impact fees in Idaho and was intended "to occupy the entire field of regulation." *Envirosafe Services of Idaho v. Cnty. of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987).

Cove Springs at 8.

In each of these challenges, the local governments sought to defend their exactions on the basis that they passed muster under *Nollan* and *Dolan*, the seminal federal exaction cases.[608] Sun Valley, McCall, and Blaine County each contended that their ordinances were not regulatory takings because they were carefully tailored to meet the *Nollan/Dolan* tests. But *Nollan* and *Dolan* are irrelevant. Those cases arose in home rule states that give broad latitude to local governments. If an exaction

[608] These cases hold that an exaction is not a regulatory taking requiring compensation if (1) the exaction has an essential nexus to some public need created by the development and (2) the exaction is roughly proportional to the burden imposed on the government by the development. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (Scalia, J.), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (Rehnquist, J.). See discussion in section 28.E at page 606.

is otherwise lawful under state law, then the issue becomes whether it is nonetheless a regulatory taking. But one does not get to the taking analysis if the ordinance is void to begin with. The municipalities' error was to hire consultants from other states unfamiliar with Dillon's Rule. They believed, incorrectly, that so long as they could establish nexus and proportionality (which they probably could), they were home free.

The *Cove Springs* decision also addressed two other issues unrelated to impact fees. It invalidated three county ordinances that mandated that applications for certain permits (planned unit developments and cluster developments) comply with the comprehensive plan. The court ruled that some weight could be given to the comprehensive plan, but that these ordinances made the comprehensive plan determinative, thereby improperly elevating the comprehensive plan to the level of legally controlling zoning law. *Cove Springs* at 3. The court also invalidated the county's wildlife overlay district ordinance, finding that it improperly delegated authority to set the district's boundary to the Idaho Department of Fish and Game. *Cove Springs* at 14-19.

G. The Idaho Development Impact Fee Act ("IDIFA")

(1) Overview of IDIFA

The Idaho Development Impact Fee Act, Idaho Code §§ 67-8201 to 67-8216 ("IDIFA" or the "Act"), was enacted in 1992 and has been amended on several occasions.[609] The purpose of the Act was to resolve disputes over the authority of local governments to impose impact fees. The Act authorizes impact fees, but only for specified purposes and pursuant to detailed procedures to ensure fairness.

IDIFA is not a carte blanche authorization for local governments to impose development impact fees. Rather, IDIFA ensures that the developer pays only its fair and proportionate share of the cost of the new facilities. Idaho Code § 67-8204. The purpose of the Act is to ensure that adequate public facilities are available to serve new growth and development. Idaho Code § 67-8202(1). In order to ensure that impact fee ordinances adopted by governmental entities are uniform, the Act sets forth a series of minimum requirements by which each governmental entity must comply.

To the extent an impact fee ordinance falls within the scope of IDIFA and was adopted in compliance with substantive and procedural requirements (of which there are many), there is no need to engage in a debate over whether it is a regulatory fee or a disguised tax. Even if it is a tax, it is expressly authorized by the Legislature

[609] 1992 Idaho Sess. Laws, ch. 282; 1996 Idaho Sess. Laws, ch. 366; 2002 Idaho Sess. Laws, ch. 347; 2002 Idaho Sess. Laws, ch. 347; 2006 Idaho Sess. Laws, ch. 321; 2007 Idaho Sess. Laws, ch. 252; 2008 Idaho Sess. Laws, ch. 389.

pursuant to article VII of the Idaho Constitution. Thus, this constitutional issue is moot.[610]

IDIFA originally applied only to larger cities (with population over 200,000). It was amended in 1996 to make it applicable to all units of local government empowered to develop an impact fee ordinance. 1996 Idaho Sess. Laws, ch. 366 (codified at Idaho Code § 67-8203(14)). This seemingly circular definition includes county governments as well as cities. The operative provision of the Act, Idaho Code § 67-8204, provides that governmental entities may impose impact fees "as a condition of development approval." Plainly, counties have such authority. In addition, the Ada County Highway District ("ACHD") has adopted its own impact fee ordinance.[611]

IDIFA empowers governmental entities to impose impact fees on those who will benefit from new growth and development. The impact fees are limited, however, to funding for certain types of capital improvements.

> Expenditures of development impact fees shall be made only for the category of system improvements and within or for the benefit of the service area for which the development impact fee was imposed as shown by the capital improvements plan and as authorized in this chapter. Development impact fees shall not be used for any purpose other than system improvement costs to create additional improvements to serve new growth.

Idaho Code § 67-8210(2) (emphasis added). This statement employs several defined terms, which are discussed below.

(2) No double dipping

IDIFA provides in its statement of purpose that one of its central goals is "to prevent duplicate and ad hoc development requirements." Idaho Code § 67-8202(4). "No system for the calculation of development impact fees shall be adopted which

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[610] In theory, there could be other constitutional challenges to an impact fee. For example, does it meet the nexus and proportionality requirements in *Nollan/Dolan*? Does it afford due process and equal protection? However, compliance with IDIFA, which contains many procedural and substantive safeguards, would seem to ensure that it violates none of these constitutional provisions.

[611] In order to be "empowered" to develop an impact fee, the governmental entity must have the authority to promulgate ordinances (a prerequisite to imposing impact fees). Unlike other road districts, ACHD has this authority. Moreover, unlike other all other road districts, ACHD has authority to impose "a condition on development approvals" as required by Idaho Code § 67-8204. This is found in ACHD's authority to sign off on plats. Idaho Code § 40-1415(6). ACHD has successfully defended its authority to impose impact fees under IDIFA at the district court level, but there has been no appellate review.

subjects any development to double payment of impact fees." Idaho Code § 67-8204(19). The Act contains a section setting out "credits" that must be provided to avoid charging the developer twice for the same impact costs. It specifically provides that developers paying impact fees shall receive a credit for all taxes and user fees charged to the developer which revenue is used for the same system improvements. Idaho Code § 67-8209(2). IDIFA carves out connection fees from the definition of impact fee, Idaho Code §§ 67-8203(9)(b) and (c), thus allowing the government to charge both a connection fee and an impact fee. In so doing, however, credit must be given for the connection fee, if it will fund the same new infrastructure:

> In the calculation of development impact fees for a particular project, credit or reimbursement shall be given for the present value of any construction of system improvements or contribution or dedication of land or money required by a governmental entity from a developer for system improvements of the category for which the development impact fee is being collected, including such system improvements paid for pursuant to a local improvement district.

Idaho Code § 67-820(1).

The prohibition against double-dipping appears also in the section of IDIFA dealing with the calculation of the impact fee. It provides that the fee shall reflect a proportionate share of the costs incurred taking into account, among other things, user fees and debt service payments as a result of the new development. Idaho Code § 67-8207(1). This is reiterated in another part of the same section, providing that the calculation of the impact fee shall take into account "taxation, assessment, or developer or landowner contributions" by the developer used for the same system improvements. Idaho Code § 67-8207(2)(c). Likewise, it shall take into account the "extent to which the new development is required to contribute to the cost of existing system improvements in the future." Idaho Code § 67-8207(2)(d).

On the other hand, IDIFA specifically provides that "[c]redit or reimbursement shall not be given for project improvements." Idaho Code § 67-8209(1). Project improvements site-specific improvements (*e.g.*, curb cuts, traffic lights, etc.) that benefit the particular project. Idaho Code § 67-8203(22). "Nothing in this chapter shall prevent a governmental entity from requiring a developer to construct reasonable project improvements in conjunction with a development project." Idaho Code § 67-8214(1).

(3) System improvements

"System improvements" are a set of capital improvements identified by governmental entity in its "capital improvements plan." System improvements serve not just an individual development but an entire "service area" identified by the governmental entity.[612] System improvements are defined as "capital improvements" to "public facilities" designed to provide serve to a "service area." Idaho Code § 67-8203(28). "Capital improvements" are projects that have a life of at least ten years—thus excluding maintenance expenditures. Idaho Code § 67-8203(3). "Public facilities," in turn, are defined as any of six categories of capital expenditures:

1. water supply,
2. wastewater facilities,
3. roads,
4. storm water collection facilities,
5. parks and open space, and
6. public safety facilities.

Idaho Code § 67-8203(24).[613] Note that workforce housing is not among them.[614]

(4) Project improvements

As a counterpoint to "system improvement," the Act defines "project improvements" as "site improvements and facilities that are planned and designed to provide service for a particular development project and that are necessary for the use and convenience of the occupants or users of the project." Idaho Code § 67-8203(22). IDIFA draws a bright line between system improvements and project improvements. Only system improvements are included in the capital improvements plan (for which is funded by the impact fee). Idaho Code §§ 67-8208(1)(e) – (j).

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[612] In contrast to system improvements, IDIFA employs the term "project improvements" to describe "site improvements and facilities that are planned and designed to provide service for a particular development project and that are necessary for the use and convenience of the occupants or users of the project." Idaho Code § 67-8203(22).

[613] "'Public facilities' means: (a) Water supply production, treatment, storage and distribution facilities; (b) Wastewater collection, treatment and disposal facilities; (c) Roads, streets and bridges, including rights-of-way, traffic signals, landscaping and any local components of state or federal highways; (d) Storm water collection, retention, detention, treatment and disposal facilities, flood control facilities, and bank and shore protection and enhancement improvements; (e) Parks, open space and recreation areas, and related capital improvements; and (f) Public safety facilities, including law enforcement, fire, emergency medical and rescue and street lighting facilities." Idaho Code § 67-8203(24).

[614] This was no oversight. Affordable housing is specifically discussed in the statute, but only in the context of allowing an exemption from impact fees for project that provide affordable housing. Idaho Code § 67-8204(10).

The Act provides that the fee payer shall receive a credit for various contributions and dedications made in connection with the development, but not for project improvements. Idaho Code § 67-8209(1).

IDIFA further provides: "Nothing in this chapter shall prevent a governmental entity from requiring a developer to construct reasonable project improvements in conjunction with a development project." Idaho Code § 67-8214(1). In other words, for example, the government might require the developer to contribute land for left turn lane into the subdivision. And at cost would not be credited toward impact fee.

(5) Impact fee advisory committee

IDIFA requires that a governmental entity choosing to enact an impact fee ordinance must establish a "development impact fee impact fee advisory committee." Idaho Code § 67-8205. The committee may be established prior to adoption of the impact fee ordinance. After adoption of the ordinance, the committee will continue to operate on an ongoing, advisory basis reviewing the capital improvements plan and other functions specified in the statute.[615] The governmental entity appoints the members of the committee, which shall consist of at least five members. At least two of the members "shall be active in the business of development, building or real estate." Idaho Code § 67-8205(2). The planning and zoning commission itself may serve as the impact fee advisory committee if it meets the requirement that two of the members are from the development community.

(6) Capital improvements plan

IDIFA sets out detailed procedures for the establishment of impact fees. Central to this procedure is adoption of a "capital improvements plan" which must be developed in coordination with the development impact fee impact fee advisory committee. Idaho Code §§ 67-8203(5), 67-8206(2), 67-8208. The capital improvements plan will identify one or more "service areas" within which growth is to be projected over at least a 20-year planning period based on "land use assumptions." The capital improvements plan identifies a set of specific "system improvements" that may be funded with impact fees.

[615] The impact fee advisory committee will review and file written comments on any proposed capital improvements plan or amendment thereto. Idaho Code §§ 67-8205(3)(b), 67-8206(2), 67-8208(1). Once the plan is adopted, the impact fee advisory committee will monitor and evaluate the implementation of the capital improvements plan and submit a written report to the governmental entity at least once a year evaluating the capital improvements plan and any perceived inequity in implementation of the plan and the imposition of impact fees. Idaho Code § 67-8205(c)-(d). In addition, the impact fee advisory committee assists the governmental entity in adopting and updating land use assumptions, Idaho Code § 67-8205(a) and advises the governmental entity on the need to revise the capital improvement plan and impact fees, Idaho Code § 67-8205(e).

In the case of cities and counties with land use planning obligations, the capital improvements plan must be developed in conjunction with the comprehensive planning process. Idaho Code §§ 67-6509, 8208(1). Thus, it would seem that the "land use assumptions" required by IDIFA would be reflected in and form the basis of the comprehensive plan.

The selected system improvements cannot be pulled out of thin air. IDIFA specifies a methodology for determining the extent of system improvements required. The governmental entity determines a planning horizon (our term, not defined in IDIFA) of at least 20 years. Idaho Code § 67-8208(1)(h). The governmental entity then specifies one or more service area. Idaho Code § 67-8208(1). These service areas, apparently, may cover all or just a portion of the land within the governmental entity's jurisdiction. The system improvements are based on a quantification of "service units"[616] within each service area during the planning horizon. The statute requires that the amount of an impact fee per service unit be calculated by dividing the total cost of the capital improvements by the total number of projected service units. Idaho Code § 67-8204(15)(a).

The governmental entity must hold at least one public hearing in before adopting, amending, or repealing a capital improvements plan. Idaho Code § 67-8206(3).[617] Detailed public notice requirements are set out in Idaho Code §§ 67-8206(3) - (6). In addition, Idaho Code §67-8208(1) requires that cities and counties comply with the hearing requirements in LLUPA, Idaho Code §67-6509, and include the capital improvements plan as an element of the comprehensive plan. Finally, section 67-8208 sets out other detailed requirements governing the capital improvements plan.

(7) Impact fees limited to "new development"

The thrust of IDIFA is to impose impact fees on new growth and development.[618] The Act's operative provision reads: "Governmental entities which

[616] The term "service unit" is a fixed quantification reflecting the increase in demand for a particular type of public services generated by single home or other standardized unit of construction or land use. For example, a service unit might be "X" number of vehicle miles traveled associated with a new home. The total number of service units is a quantification of the total new demand for services of a particular type (*e.g.*, total additional vehicle miles traveled) associated with a new development.

[617] If the governmental entity makes a "material change" in the capital improvements plan, it may hold further hearings if it finds necessary in the public interest. Idaho Code § 67-8206(4). This flexibility appears to be in contrast to "amendments" to the plan, which require a public hearing. IDIFA does not explain what the difference is between a material change and an amendment.

[618] The purposes section of the Act states that IDIFA is intended to "[p]romote orderly growth and development by establishing uniform standards by which local governments may require that those who benefit from new growth and development pay a proportionate share of the cost of the new public facilities needed to serve new growth and development." Idaho Code § 67-8202(2).

comply with the requirements of this chapter may impose by ordinance development impact fees as a condition of development approval on all developments." Idaho Code § 67-8204 (emphasis added).

The term "development" is defined to include: "construction or installation of a building or structure, or any change in use of a building or structure, or any change in the use, character or appearance of land, which creates additional demand and need for public facilities or the subdivision of property that would permit any change in the use, character or appearance of land." Idaho Code § 67-8203(7). Under this broad definition, impact fees can be assessed not only against new construction but also against existing structures or land if the use or character of the structure or land changes in a way that will generate new demand for public services.

The term "development approval" is also a defined term. It means "any written authorization from a governmental entity which authorizes the commencement of a development." Idaho Code § 67-8203(8). This term is also drawn very broadly. It appears to encompass virtually any approval authorizing new use of land, including zoning changes, conditional use permits, planned unit development permits, variances, building permits, subdivision, and, perhaps, annexation. Although the definition does not say so in so many words, it is presumably limited to situations in which the developer has sought the authorization. For instance, one would not expect it to apply to a landowner whose land was rezoned by action of the government not based on a request by the landowner.

(8) Timing of fee collection.

Figuring out exactly what approvals trigger the fee (*e.g.*, whether it applies at annexation) is not particularly important at a practical level because no fee will be imposed until building permits are issued, unless the developer agrees to an earlier payment schedule.

> A development impact fee ordinance shall specify the point in the development process at which the development impact fee shall be collected. The development impact fee may be collected no earlier than the commencement of construction of the development, or the issuance of a building permit or a manufactured home installation permit, or as may be agreed by the developer and the governmental entity.

Idaho Code § 67-8204(3).[619]

[619] This section refers to both "commencement of construction of the development" and "issuance of a building permit." The ordinance is not clear on how these interact. Arguably, the local government could require payment of the impact fee for the entire development when dirt is

Thus, a developer may subdivide a property, develop lots, and sell them, without paying any impact fees. Instead, the impact fees for each lot would be paid by the builder or purchaser—whomever seeks the building permit.

As noted, however, a developer may agree to an earlier payment schedule for the impact fees. Idaho Code § 67-8204(3). Moreover, the local government is not obligated to issue a development approval if it determines that there is insufficient public infrastructure to support the development. LLUPA so provides,[620] as does IDIFA.[621] Under such circumstances, the local government could deny the development approval outright, or condition it upon the developer's agreement to pay the impact fee in advance of construction.

(9) Individual assessments

In order to ensure that all developers are treated equally, IDIFA requires any impact fee ordinance to contain a provision providing for individual assessments. Idaho Code § 67-8204(5).

(10) Exemptions from fees

IDIFA provisionally exempts developments undertaken by other "taxing districts" within the city or county, unless the ordinance expressly provides that they shall be taxed. Idaho Code § 67-8203(7).

In addition, IDIFA exempts several other types of developments from impact fees. Exempt developments include: (1) rebuilding the same amount of floor space of a structure which was destroyed by fire or other catastrophe, provided the structure is rebuilt and ready for occupancy within two years of its destruction; (2) remodeling or repairing a structure which does not increase the number of service units; (3)

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first turned. However, most jurisdictions implement this by requiring the fee to be paid when the building permit is issued or when construction occurs if no building permit is required.

[620] "A special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms of the ordinance, . . . subject to the ability of political subdivisions, including school districts, to provide services for the proposed use . . . ." Idaho Code § 67-6512(a). Similarly, the zoning provision of LLUPA states: "Particular consideration shall be given to the effects of any proposed zone change upon the delivery of services by any political subdivision providing public services, including school districts, within the planning jurisdiction." Idaho Code § 67-6511(a). In addition, zoning and conditional use permits must be consistent with the comprehensive plan, which is mandated to address such things as school facilities and transportation. Idaho Code § 67-6508(c). Likewise, the governmental entity could grant the permit subject to the condition that the development be postponed until such time as funds become available to provide essential services. One of the conditions expressly authorized for conditional use permits is "[c]ontrolling the sequence and timing of development." Idaho Code § 67-6512(d)(2).

[621] "Nothing in this chapter shall obligate a governmental entity to approve any development request which may reasonably be expected to reduce levels of service below minimum acceptable levels established in the development impact fee ordinance." Idaho Code § 67-8214(4).

replacing a residential unit, including a manufactured home, with another residential unit on the same lot, provided that the number of service units does not increase; (4) placing a temporary construction trailer or office on a lot; (5) constructing an addition on a residential structure which does not increase the number of service units; and (6) adding uses that are typically accessory to residential uses, such as tennis courts or a clubhouse, unless it can be clearly demonstrated that the use creates a significant impact on the capacity of system improvements. Idaho Code §§ 67-8204(20)(a) - (f).

IDIFA provides that local governments may require developers "to construct reasonable project improvements in conjunction with a development project." Idaho Code § 67-8214(1). In other words, reasonable exactions for traditional project-specific facilities may be required in addition to any fee imposed by IDIFA procedures. Note also that connection and hook-up charges are not treated as development impact fees and are likewise excluded from IDIFA's procedural requirements. Idaho Code § 67-8203(9)(b).

(11) Impact fees must be spent within the service area and within a fixed number of years

Under IDIFA, any expenditure of fees must be made only for system improvements for the benefit of or within the service area for which the impact fees were collected. Idaho Code § 67-8204(11). The statute also requires that they be spent within a fixed number or years or be refunded to the developer: within 20 years for "wastewater collection, treatment and disposal and drainage facilities" and within 8 years for all others. Idaho Code §§ 67-8210(4), 67-8204(12), 67-8211.

(12) Interaction of LLUPA (section 67-6513) and IDIFA (section 67-8215(1))

After the enactment of IDIFA, the section in LLUPA dealing with subdivisions was amended to cross-reference IDIFA: "Fees established for purposes of mitigating the financial impacts of development must comply with the provisions of [IDIFA]." Idaho Code § 67-6513 (contained in the section of LLUPA authorizing consideration of the effects of subdivision on the ability of local governments to deliver services). This could be read to mean that the only way to impose mitigation fees on new developments is through an IDIFA-compliant impact fee. On the other hand, this provision appears only in this subdivision section of LLUPA, and may be so limited. See discussion in section 29.E(4) at page 707.

A confusing and ambiguously drafted "transition" section of IDIFA provides:

> The provisions of this chapter shall not be construed to repeal any existing laws authorizing a governmental entity to impose fees or require contributions or property dedications for capital improvements. All ordinances

> imposing development impact fees shall be brought into conformance with the provisions of this chapter within one (1) year after the effective date of this chapter. Impact fees collected and developer agreements entered into prior to the expiration of the one (1) year period shall not be invalid by reason of this chapter. After adoption of a development impact fee ordinance, in accordance with the provisions of this chapter, notwithstanding any other provision of law, development requirements for system improvements shall be imposed by governmental entities only by way of development impact fees imposed pursuant to and in accordance with the provisions of this chapter.

Idaho Code § 67-8215(1).

In the first sentence, it preserves "any existing laws authorizing a governmental entity to impose fees or require contributions or property dedications for capital improvements." That would seem to recognize and preserve, for example, the authority under sections 67-6512(d)(6) and (8) of LLUPA to include mitigation conditions in conditional use permits. The section then requires impact fee ordinances existing at the time of enactment to be brought into conformity with IDIFA. Does this mean that the preservation of authority under sections 67-6512(d)(6) and (8) only lasts one year? Or are ordinances implementing those sections not considered "development impact fee" ordinances? The provision then declares that after adopting a new development impact fee ordinance, IDIFA shall provide the sole means of imposing development requirements for system improvements. Does this exclusivity provision come into play only if a development impact fee ordinance is enacted? The statute is confoundingly confusing, and the courts have offered no insights. This provision has never even been mentioned in an Idaho appellate decision.

Even if it were true that, a year after its enactment, IDIFA is generally exclusive, certain types of fees and requirements associated with development costs are still allowed outside of IDIFA, because IDIFA expressly so provides. For example, IDIFA expressly does not prohibit requirements that developers construct reasonable site-specific project improvements. "Nothing in this chapter shall prevent a governmental entity from requiring a developer to construct reasonable project improvements in conjunction with a development project." Idaho Code § 67-8214(1). Likewise, IDIFA expressly exempts from the definition of development impact fees, and thus by clear implication allows, the imposition of certain site-related entitlement exactions and user fees. Idaho Code § 67-8203(9)(b) (fees allowed for "connection and hook-up charges"); Idaho Code § 67-8203(9)(c) (fees allowed for "availability charges"—another term for connection fees); Idaho

Code § 67-8203(9)(d) (certain voluntarily negotiated payments that the "developer has agreed to be financially responsible for").

H. Implementing ordinances under IDIFA

(1) Boise parks ordinance

Boise City has an impact fee ordinance for parks. Boise City adopted Ordinance No. 6144 on December 11, 2001 to collect impact fees to finance new parks to alleviate the burden new development creates on existing parks. Boise Municipal Code § 11-15-0. The amount of the fee varies depending on the type of park that will be built within any given area. The park types include neighborhood parks,[622] community parks,[623] special parks, recreational trails, and natural open space. The park impact fees range from $315.76/single family residence for a neighborhood park to $121.01/single family residence for a natural open space park. Boise Municipal Code § 4-12-13(G). The fees also vary depending upon whether the development is a single-family residence, a multi-family residence under 800 square feet, and a multi-family residence 800 square feet and over, or a hotel or motel. Boise Municipal Code § 4-12-13(G). The Boise City Park impact fee schedule is located in section 4-12-12(G) of the Boise Municipal Code.

(2) The ACHD impact fee ordinance

The ACHD impact fee ordinance is the most complex impact fee ordinance in Idaho and has been the most controversial. The most recent Ordinance, Ordinance 198, was enacted in September of 2003. This ordinance was enacted pursuant to the ACHD's capital improvements plan, which was also adopted in September of 2003.

[622] A "neighborhood park" is defined as a combination playground and park, designed primarily for non-supervised, non-organized activities. Boise Municipal Code § 4-12-13 (C)

[623] A "community park" is defined as a park planned primarily to provide active and structured recreation activities for young people and adults. In general, community park facilities are designed for organized activities and sports. Boise Municipal Code § 4-12-13(C)

30. COMPARISON OF METHODOLOGIES FOR CALCLUATING CAP FEES

A. Overview

This section discusses standard methodologies for the calculation of capitalization ("cap") fees, which are also known as connection fees, hook-up fees, system development charges, capital facility charges, plant investment fees, capital investment fees, and improvement charges.

Cap fees most often are used in connection with municipally-provided sewer (aka waste water) or water service, but could be used for any "utility-like" service provided by the municipality, *e.g.*, electric power or solid waste collection.

Cap fees are used solely to cover the capital cost of the system infrastructure. Cap fees are on-time charges imposed on a new user or an existing user who has significantly expanded his or her use of the community infrastructure. Cap fees stand in contrast to operation and maintenance ("O&M") fees, which are typically charged on a monthly or bi-monthly basis to cover ongoing operation and maintenance costs and, sometimes, debt service on infrastructure.

When revenue from cap fees is used for system expansion, the fees serve purposes similar to impact fees. However, the term impact fee is a distinct term of art in Idaho, describing a fee developed pursuant to the Idaho Development Impact Fee Act ("IDIFA").

B. Supreme Court guidance

In *NIBCA I*, the Idaho Supreme Court struck down a cap fee that measured the replacement value of the excess capacity consumed by the new user by looking to the cost of building the user's proportionate share of system expansion costs. Thus, in Idaho, it appears that the only lawful approach to calculating a cap fee is to look to new user's proportionate share of the replacement value of the system in place "at that point in time." *Loomis*, 119 Idaho at 443 and 443 n.4, 807 P.2d at 1281 and 1281 n.4; *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 149 Idaho 187, 194, 233 P.3d 118, 125 (2010) (Eismann, C.J.); *NIBCA I*, 158 Idaho at 82, 343 P.3d at 1089.[624]

The guiding principles for a lawful fee methodology based on the replacement value of the existing system are set out in two Idaho Supreme Court cases:

(1) The *Loomis* case

The text of *Loomis* reads:

[624] A tiny opening is left in the concurring opinion in *NIBCA I*, in which Justice Jim Jones suggested that Loomis may not provide the only lawful method of lawfully calculating a cap fee. *NIBCA I*, 158 Idaho at 87, 343 P.3d at 1094 (J. Jones, J., concurring).

> The Ordinance drafted after receiving the engineers' report calculates the connection fee by first determining the gross replacement value of the system by using an engineering cost index to determine present day replacement cost of the system components. Unfunded depreciation and bond principal are then subtracted from the gross replacement value to determine the net replacement value of the system for the current year. The final connection fee is then ultimately determined by dividing the net system replacement value by the number of users the system can support. The new user is charged the value of that portion of the system capacity that the new user will utilize at that point in time.

Loomis v. City of Hailey, 119 Idaho 434, 443, 807 P.2d 1272, 1281 (1991) (Boyle, J) (footnote 4 omitted).

Footnote 4 of *Loomis* 4 reads:

> Ordinance 495 requires an annual valuation process to set the amount of the connection fee and provides in pertinent part:
>
> > *(2) Connection Fee. The basis for the connection fee charge* for those persons or entities connecting to the water and sewer systems is to *charge the value of that portion of the system capacity that the new user will utilize at that point in time. The value of the system is determined each year* by taking the original construction cost of each major capital improvement to the system and determining the cost to replace that improvement in that particular year. This is accomplished by determining the engineering news record construction costs index (ENR(CC1) in the year that the improvements were made and the year that the connection fee is being determined. The ENR(CC1) for the year that the connection fee is being calculated is divided by the ENR(CC1) for the year in which the improvements were made. This value is then multiplied by the original cost for the improvements. The value obtained is the

> estimated cost to replace the improvements at the time the connection fee is calculated. The gross value to replace the system must be adjusted by subtracting the remaining bond principal to be retired and the unfunded depreciation to obtain the net value.

Loomis v. City of Hailey, 119 Idaho 434, 443 n.4, 807 P.2d 1272, 1281 n.4 (1991) (Boyle, J) (emphasis added by Court).[625]

Further guidance is found in footnote 2 of *NIBCA I*:

> The three methods of valuing real property are the income approach, the sales comparison approach, and the cost approach. Because city sewer systems are not to be operated primarily as a source of city revenue and the services are to be furnished at the lowest possible cost, I.C. § 50–1028, and because of the lack of comparable sales of city sewer systems, the cost approach is the most feasible method for valuation. Under that method, value is based upon the estimated cost of duplicating the improvements to the real property, minus accrued depreciation, plus the value of the land, if any. Thus, in *Loomis*, the city calculated the net system replacement value 'by first determining the gross replacement value of the system by using an engineering cost index to determine present day replacement cost of the system components,' and it then subtracted from the gross replacement value '[u]nfunded depreciation and bond principal' to determine the net system replacement value.

N. Idaho Bldg. Contractors Ass'n v. City of Hayden ("*NIBCA I*"), 158 Idaho 79, 82 n.2, 343 P.3d 1086, 1089 n.2 (2015) (Eismann, J) (quoting *Loomis*, 119 Idaho at 443, 807 P.2d at 1281).

In short: Begin with the actual construction cost. Adjust this upwards (using an engineering construction cost index to the current gross replacement value). Note that *NIBCA I* allows the "value of the land" to be included in the gross replacement value. Then adjust the gross replacement value downward by subtracting (1) remaining bond principle and (2) unfunded depreciation. This is called the "net replacement value" (or "net system replacement value"). To calculate the cap fee,

[625] The reference to ENR(CC1) should be to ENR(CCI).

the "net replacement value" is the nominator of the fraction. The denominator is the number of users capable of being served at that point in time.

(2) The *NIBCA I* case

> The three methods of valuing real property are the income approach, the sales comparison approach, and the cost approach. Because city sewer systems are not to be operated primarily as a source of city revenue and the services are to be furnished at the lowest possible cost, I.C. § 50–1028, and because of the lack of comparable sales of city sewer systems, the cost approach is the most feasible method for valuation. Under that method, value is based upon the estimated cost of duplicating the improvements to the real property, minus accrued depreciation, plus the value of the land, if any. Thus, in *Loomis*, the city calculated the net system replacement value "by first determining the gross replacement value of the system by using an engineering cost index to determine present day replacement cost of the system components," and it then subtracted from the gross replacement value "[u]nfunded depreciation and bond principal" to determine the net system replacement value. 119 Idaho at 443, 807 P.2d at 1281 (footnote omitted).

N. Idaho Bldg. Contractors Ass'n ("*NIBCA I*") *v. City of Hayden*, 158 Idaho 79, 82 n.2, 343 P.3d 1086, 1089 n.2 (2015) (Eismann, J.)

The *NIBCA I* footnote is consistent with the *Loomis* footnote, except for the following:

- *NIBCA I* refers to "accrued depreciation" instead of "unfunded depreciation." It then goes on to quote *Loomis'* "unfunded depreciation" suggesting that there is no difference between them.
- *NIBCA I* notes that the "value of the land" may be included in the replacement value.
- NIBCA I gives the name "net system replacement value" for what *Loomis* calls the "net replacement value."

Loomis and *NIBCA I* are aimed at calculating the numerator (the net system replacement value). This must then be divided by the number of users to produce the cap fee. See section 30.C(4) at page 736.

C. Key issues to be addressed in any cap fee methodology

(1) Original cost

The cap fee determination begins with a determination of the value of the existing system. (The existing system includes both the used capacity and the excess capacity.)

The first step is to determine the original cost of each system component (each pipe, etc.).

(2) Gross replacement value

(a) Upward adjustment based on engineering cost index

The original cost of the system components is likely to be considerably less than what it would cost to construct the system today.

Loomis and *NIBCA I* unequivocally provide that municipalities are not required to base cap fees on the original system cost. Instead, they may base the fees on the replacement value of the system. This is referred to as "gross replacement value."

In *Loomis*, the replacement value was calculated by taking the original cost of each system component and adjusting it upward on the basis of an engineering cost index.[626] For example, the engineering cost index would specify the percentage increase in cost for a particular type of pipe for each year or period of years. Thus, the City could calculate that if it spent $X on pipe in 1995, it would cost $Y to purchase that much pipe today.

(b) Inclusion of land cost

It is generally assumed to be appropriate to include the cost of land (or easements) in addition to the cost of the infrastructure installed. Indeed, the *NIBCA II* footnote expressly authorizes the inclusion of the "value of the land." This presumably authorizes use of today's land value, rather than the original cost or value at the time it was acquired by the municipality.

(c) Inclusion of surface replacement cost

For both existing system and future expansion cost calculations, there is an issue of whether to include "surface restoration cost" in addition to "installation cost."

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[626] The *Loomis* Court referred to the ENR(CC1). The correct acronym is ENR(CCI) for Engineering News Record Construction Cost Index.

Experts generally agree that it is appropriate to include the cost of surface restoration in the calculation of system replacement cost because, in order to install or replace sewer infrastructure, it is necessary to remove and restore road and other hard surfaces. In other words, including surface replacement cost more accurately reflects what it would cost to build the system from scratch today. However, there is no Idaho appellate precedent on this issue. *Loomis* and *NIBCA I* are silent on this.

(d) Earlier contributed capital and other funding sources

Another issue is whether to include in system valuation system components (or other funding) that were previously contributed by prior developers or obtained from other sources (such as federal grants). This is typically referred to as "contributed capital."

Loomis and *NIBCA I* do not specifically address this question. However, the fact that they do not call for the exclusion (or other special treatment) of such contributed capital suggests that contributed capital should be treated no differently than system components paid for with municipal tax revenue. Such treatment would be consistent with the philosophy of *Loomis* and *NIBCA I*, which says that new users may be required to pay their share of what the system is worth today, irrespective of how much the municipality originally paid for it.

(3) Net replacement value

(a) Replacement value vs. depreciated value

Loomis and *NIBCA I* expressly provide that "gross replacement value" must be adjusted downward by deducting "unfunded depreciation." The result is called "net system replacement value" (or simply "net replacement value"). Net replacement value drives the cap fee.

The idea is that if a user is required to buy into an "old" system, he or she should be required to pay their share of what the system is worth today. If it is old, its replacement value should reflect depreciation.

However, only the "unfunded" depreciation need be deducted. To the extent there is a fund available to pay for replacement of an aging system, that eliminates the need to adjust for depreciation. In other words, the new user is expected to pay for its share of the value of the pot of money sitting there to fund depreciation.

The depreciation issue does not apply to future expansion costs, because there is nothing to depreciate. But this is not relevant in Idaho, because cap fees may not be calculated on the basis of future expansion costs. (However, revenue from cap fees may be spent to construct new, expanded facilities.)

The methods of calculating depreciation are discussed below.

(i) Straight line depreciation

Straight line depreciation simply takes into account the age of each system component. It assumes that the component will age "in a straight line" losing an equal fraction of its value in each year of its life. Specifically, today's replacement value of each system component is divided by the ratio of its remaining useful life over its original useful life. Thus, if something cost $100 and will last 100 years, it will depreciate at $1 per year. If it is 40 years old, its depreciated value is $60.

In theory, other forms of depreciation could take into account the fact that infrastructure does not lose its value in a perfect straight line. However, I am not aware of such an alternative approach being employed in cap fees.

NIBCA I expressly approves straight line depreciation (based on its reference to Engineering News Record Construction Cost Index calculations). However, neither case expressly say that this is the only lawful approach to calculating depreciation.

(ii) Unfunded depreciation

Once depreciation is determined, the next question is whether to make an adjustment to reflect available funding for replacement. As noted, *Loomis* and *NIBCA I* both endorse the use of unfunded depreciation, which reduces the deduction for depreciation and allows for a higher cap fee.

Unfunded depreciation takes into account that the user paying the cap fee may be buying into both (1) aging infrastructure and (2) a fund or funding source set aside by the city or other local government that may be used for replacement or repair of that infrastructure. This funding source might be, for example, excess revenue generated by monthly fees, which is made available for infrastructure improvement. Under this approach, the reserved funding offsets the depreciation in each fiscal year.

This may be determined by deducting system operating expenses from operating revenue to determine if a surplus existed for each fiscal year. If a surplus existed for a given year, that number is compared to the total annual depreciation for that year. If the funding surplus is greater than or equal to the annual depreciation, then all depreciation for that year is treated as "funded depreciation" and no "unfunded depreciation" is included for that year. If there was no surplus or the surplus was less than the annual depreciation, the amount of depreciation not covered by surplus was included in the total of unfunded depreciation.

(b) Remaining bond principal

If the capital improvements have been or will be funded by revenue bonds, the debt associated with the bonds (remaining bond principal) is typically subtracted

from the cost or replacement value of the system.[627] Indeed, *Loomis* and *NIBCA I* expressly require this deduction.

The idea is that it is fair to charge the newcomer the pro rata value of the system he or she will connect to. But if the infrastructure is burdened by debt (which the newcomer will participate in repaying), the newcomer is receiving less value. Hence, the unpaid debt must be deducted from the value of the infrastructure.

On the other hand, if the debt is incurred by a third party (such as an urban renewal agency) who will repay that debt in a manner that does not burden the newcomer, there would seem to be no basis for deducting that remaining bond principle.

(4) Number of customers

Once the "net system replacement value" is determined, the next step is to divide by the number of customer units that the system is capable of supporting. This may be more than the number of current customers.

In Idaho, this would be the number of customers that the current, constructed system is capable of supporting.[628] In other jurisdictions, depending on the methodology employed, it might be the number of customers that will be served by the system expansion or by the combination of the current system and the system expansion.

Not all users use the same quantity of services, particularly in comparing commercial and industrial customers to residential customers. Accordingly, it is necessary to develop a customer unit definition to allow an "apples to apples" analysis across types of customers. The most common unit of measurement of the "ERU," which stands for "equivalent residential unit."

(5) Credit for required on-site contributions vs. off-site impact fees

Most developments are required to shoulder the cost of on-site sewer, water, road, and other infrastructure. This is viewed as a cost of doing business, and does not entitle the developer or builder to a credit against a cap fee.

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[627] In, footnote 4 of *Loomis v. City of Hailey*, 119 Idaho 434, 443 n.4, 807 P.2d 1272, 1281 n.4 (1991) (Boyle, J.), the Court said that gross replacement value is determined by multiplying the actual original cost of each system component by a ratio of today's cost index divided by the cost index at the time of construction—in other words, the dollar value for what it would cost to build the same system today. This gross replacement value is then "adjusted by subtracting the remaining bond principal to be retired and the unfunded depreciation." *Id*.

[628] "The final connection fee is then ultimately determined by dividing the net system replacement value by the number of users the system can support." *Loomis*, 119 Idaho at 443, 807 P.2d at 1281.

On the other hand, if the developer or builder is required as a condition of development to contribute beyond the traditional on-site components (either through an impact fee or as a condition of a land use permit), there is a strong argument (at least in Idaho) that he or she is entitled to an offsetting credit for any cap fee whose purpose is to pay for the same type of infrastructure.

Although *Loomis* and *NIBCA I* do not address this, I believe the philosophy of those cases is clear: Users are expected to pay the reasonable value of what they receive. Failure to give a credit for mandatory in-kind contributions to system infrastructure may be viewed as charging twice for the same thing, and hence unconstitutional.

(6) Common benefit projects

Improvements in infrastructure often serve the dual purpose of replacing existing infrastructure and expanding system capacity. These are referred to as "common benefit projects." For example an aging 12-inch pipe (sufficient to meet current demand) might be replaced with a new 16-inch pipe (adding four inches of excess capacity).

In fees based on the cost of future expansion, it is critical to separate the cost attributable to each category of use. Thus, in the example above, only the additional cost of adding four inches should be included as a capital cost that is plugged into the cap fee calculation.

However, as noted above, cap fees in Idaho may be based only the value of existing capital infrastructure. So this issue is not relevant for cap fee calculation in Idaho. Nor is it relevant in Idaho to how cap fee revenues are spent. Our Supreme Court has left no doubt that money collected for infrastructure must be spent on infrastructure. *E.g.*, that money may not be co-mingled or put into the general fund. However, such funds may be spent for either replacement or expansion of the relevant infrastructure.

In sum, this financial allocation for common benefit projects is not constitutionally required in Idaho, either for cap fee calculation or spending of cap fee revenue.

(7) Planning period and geographic scope

Another issue that is important elsewhere, but not in Idaho, is the issue of the planning period and geographic scope of the system expansion.

For any of the methodologies that include valuation of future system expansion (Methods 2, 3 and 4, below (none of which are permissible in Idaho for non-IDIFA cap fees), it is necessary to carefully define the duration of the planning period and/or the geographic scope of the future expansion. Often the expansion is

keyed to the area of city impact (the formally defined area into which the city expects to grow). If the geographic area is clearly defined, it may not be necessary to precisely define that duration of the planning horizon, instead basing it on however long it takes to fully build out the new area.

In any event, it is critical that the number of customers used to calculate the fee correspond to the number of customers within the expansion area. In other words, the denominator corresponds to the numerator (see table in the section below).

D. Five examples of cap fee methodologies

The chart and discussion below relies on materials provided by John Ghilarducci of FCS GROUP. It evaluates cap fee methodologies uses throughout the country, not just in Idaho.

		Numerator			Denominator
Methodology		**Existing system – used capacity**	**Existing system – excess capacity**	**Future system expansion (including share of "common benefit projects")**	
1.	**Average Existing Cost Approach**	**Yes**	**Yes**		**Existing customers**
2.	**Incremental Future Cost Approach**			**Yes**	**Future customers**
3.	**Allocated Capacity Share Approach**		**Yes**	**Yes**	**Future customers**
4.	**Average Cost – Integrated Approach**	**Yes**	**Yes**	**Yes**	**Existing & future customers**
5.	**Idaho Mandated "Buy-in Formula"**	**Yes**	**Yes**		**Customers capable of being served by existing system**

Method 1: Average Existing Cost Approach (aka "Existing System Buy-In")

Cap fee = value of the existing system divided by the number of existing customers.

This is a purely "backwards looking" approach—focusing on things already built.

Includes both used capacity and unused capacity within the existing built system.

Method 2: Incremental Future Cost Approach

Cap fee = cost of capacity expansion divided by number of future customers.

Future "common benefit projects" that will provide both existing system replacement and capacity expansion are allocated proportionately. Only the capacity expansion component is included in cap fee.

This is a purely "forwards looking approach"—focusing on things not yet built.

This is the method used by the City of Hayden in its 2007 cap fee, which the Idaho Supreme Court declared unlawful. The City has now switched to a Method 5 approach (developed by FCS Group) which, ironically, produced a higher cap fee than the rejected Method 2.

Method 3: Allocated Capacity Share Approach

Cap fee = (cost of unused capacity in existing system plus cost of future capacity expansion) divided by number of future customers.

Same rule for "common benefit projects."

This is also a forward-looking approach. But it defines "forward" more broadly. It begins with future expansion costs (as in the Incremental Future Cost Approach) and adds in the cost of the existing system's unused capacity.

Both Method 2 and Method 3 have the same denominator (future customers). Consequently, Method 3 will produce a higher cap fee than Method 2.

Method 4: Average Cost – Integrated Approach

Cap fee = (cost of existing system plus future expansion) divided by (both existing and future customers).

This approach is all-inclusive, both forward- and backward-thinking.

Method 5: Equity Buy-In Approach (mandated by Idaho Supreme Court)

Cap fee = net replacement value of existing system divided by number of customers capable of being served by existing system.

This approach is also backwards-looking.

It may be identical to Method 1, except that the denominator is larger (including all customers capable of being served today, not just those actually served). (The numerator in Method 1 may be either original cost or replacement cost.)

This is the methodology described in footnote 2 of In *N. Idaho Bldg. Contractors Ass'n* ("*NIBCA I*") *v. City of Hayden*, 158 Idaho 79, 82 n.2, 343 P.3d 1086, 1089 n.2 (2015) (Eismann, J.) and footnote 4 of *Loomis v. City of Hailey*, 119 Idaho 434, 443 n.4, 807 P.2d 1272, 1281 n.4 (1991) (Boyle, J). Specifically, the Court endorsed a cap fee based on gross replacement value less unfunded depreciation and remaining bond principal.

The Court has not addressed the issue of "surface replacement costs." However, nothing in its decisions suggests that including this cost of service would be improper.

Likewise, the Court has not addressed this issued of "earlier contributed capital." However, given that the basis for its approved formula is requirement that the new user buy into the replacement value of the existing system, it would seem to make no difference what the actual cost of the existing system is or how the existing system was paid for.

Nor has the Court addressed the question of whether a credit must be provided for required contributions and impact fees that are duplicative with the infrastructure financed by the cap fee. The Idaho Supreme Court has held in a number of occasions, however, that lawful fees cannot exceed the reasonable value of the benefit provided. Thus, there is an argument that failing to provide such a credit would amount to double charging (constituting an unconstitutional taking).

31. THE "VOLUNTARY AGREEMENT" ISSUE

Under what circumstances may a party who enters an agreement with a local government in connection with a land use application subsequently challenge that agreement as an unconstitutional taking or contend that it is non-binding because it was *ultra vires*? In a 1992 case, *Black v. Young*, 122 Idaho 302, 834 P.2d 304 (1992) (McDevitt, J.), the Idaho Supreme Court invalidated an agreement between a city and an applicant for a street vacation where the conditions agreed to were deemed *ultra vires* because the statute authorizing the vacation of streets did not authorize those types of conditions. More recently, the Court has distinguished this precedent (*Boise Tower Assoc., LLC v. Hogland*, 147 Idaho 774, 215 P.3d 494 (2009) (W. Jones, J.)). But, in over two decades, that is the only Idaho case to even mention *Black* in this context. In a number of other cases, the Court has ignored the *Black* precedent in holding that voluntary agreements may not be challenged as unconstitutional takings. In 2014, however, a federal court revived the *Black* case in the context of a bankruptcy proceeding. *City of Hailey v. Old Cutters, Inc.*, 2014 WL 1319854 (D. Idaho Mar. 31, 2014) (Lodge, J.) (unpublished). This section attempts to sort out these precedents.

A. *Black v. Young* (1992)

In *Black v. Young*, 122 Idaho 302, 834 P.2d 304 (1992) (McDevitt, J.), a developer was required to agree to certain conditions in exchange for the vacation of an alley on its property. Specifically, the City of Ketchum enacted an ordinance approving the vacation subject to certain conditions, including funding of a $2.5 million construction loan. Essentially, the city took the position that vacation of the alley was in the public interest "provided that the motel is built." *Black*, 122 Idaho at 309, 834 P.2d at 311 (ellipses and italics omitted). On the same day, the landowners signed an estoppel affidavit stating that the conditions in the ordinance were acceptable to them and would not be challenged by them. *Black*, 122 Idaho at 305, 834 P.2d at 307.

Sometime later, the city denied various development plans for the parcel. The landowners then sued the city alleging that the vacation ordinance was *ultra vires*. They sought to have the alley vacated notwithstanding the fact that they were not able to build their motel. The Idaho Supreme Court overruled the district court and ruled for the developers. The Court found that Idaho Code § 50-311, which governs vacations of city streets, only allows conditions relating to the protection of access, easements, and franchise rights, and that the conditions imposed by Ketchum fell outside of that limited authority. Because the conditions imposed by the city were *ultra vires*, the developers were not bound by their promise not to challenge the conditions.

The Court remanded for a determination of whether the entire action (both the vacation and the conditions) must be invalidated, or whether the landowner could have his cake and eat it too by invalidating the conditions but keeping the vacation.

The concurring opinion described the city as asking, "What is in it for the City?" This, Justice Bistline said, was "unconscionable conduct" and "extortion." *Black*, 122 Idaho at 315, 834 P.2d at 317 (J. Bistline, concurring). But the decision did not turn on, or even discuss, whether the agreement was entered into voluntarily. The implication, however, seems to be that this was not a truly voluntary situation.

The *Black* decision, however, has been all but ignored by the Idaho appellate courts. The only case to mention it in this context is *Boise Tower Assoc., LLC v. Hogland*, 147 Idaho 774, 215 P.3d 494 (2009) (W. Jones, J.), which distinguished it. The *Black* case was cited and relied on by a federal court to invalidate a superficially voluntary *ultra vires* agreement in *City of Hailey v. Old Cutters, Inc.*, 2014 WL 1319854 (D. Idaho Mar. 31, 2014) (Lodge, J.) (unpublished).

B. *KMST* (2003)

In *KMST, LLC v. Cnty. of Ada*, 138 Idaho 577, 67 P.3d 56 (2003) (Eismann, J.), a developer brought a civil action[629] presenting two claims against the Ada County Highway District ("ACHD"), one in connection with ACHD's road dedication requirement and another in connection with ACHD's impact fees. (Despite the case name, the claims against Ada County were not pursued on appeal.) The Idaho Supreme Court dismissed both ACHD claims on technical grounds—*Williamson County* ripeness (as to the dedication) and exhaustion (as to the impact fees). Nevertheless, the Court went on to opine as to the merits of the taking claim on the road dedication saying that this was, in essence, not a taking because it was voluntarily offered. In essence, it was a not a "taking" but a "giving" (our words, not the Court's).

The procedural posture is a bit complicated. KMST's zone change application was before the county, but the county required the developer to obtain recommendations from ACHD with respect to streets. Based on conversations between the developer and an ACHD staff member, the developer included a provision in its own applications (to both ACHD and the county) agreeing to construct a street adjacent to the property and dedicate it to the public. Indeed,

[629] The issue of whether the actions should have been challenged via judicial review under LLUPA was not discussed in *KMST*. Failure to pursue exclusive judicial review under LLUPA would seem to be a defense to the challenge to Ada County conditioning of the re-zone approval. However, as noted, the challenge to Ada County was not pursued on appeal. LLUPA review presumably would not have been available to challenge ACHD's recommendation of the road dedication nor its imposition of impact fees under its IDIFA-based ordinance. This would explain why the civil action was the appropriate vehicle to present the claims and why LLUPA review was not discussed by the Court.

KMST touted the offer in its application noting that the road "will limit curb cuts on Overland Road and provide for a better circulation pattern within and adjacent to the project." *KMST*, 138 Idaho at 582, 67 P.3d at 61. ACHD included the street dedication in its recommendation to Ada County. The developer then, apparently, had a change of heart. When ACHD's recommendation reached the county, the developer suggested that it be deleted, but the county included it as a condition of the zone change. In accordance with the requirement, KMST constructed and dedicated the road. Meanwhile, ACHD imposed impact fees pursuant to its impact fee ordinance, which the developer paid. Then, the developer sued the county and ACHD on several counts, the most significant being an inverse condemnation for a regulatory taking.[630]

For reasons that are unclear, the developer did not pursue its appeal of the county's decision.[631] Instead, it pursued only the inverse condemnation action against ACHD—based on the road dedication requirement and "excessive" impact fees. The Court disposed of the road dedication taking claim on ripeness grounds, noting that ACHD's recommendation was not final agency action, and the plaintiff should have pursued its claim against Ada County, which actually imposed the condition. The Court pointed out that ACHD merely made what amounted to a recommendation. It was Ada County that actually imposed the road dedication requirement. "Because the condition imposed by the ACHD was not a final decision of the governmental entity that had authority to approve the development, it did not constitute a taking of KMST's property." *KMST*, 138 Idaho at 582, 67 P.3d at 61. Citing *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Court concluded that KMST sued the wrong entity (ACHD—which lacked the power to issue a final decision) and missed the boat by not pursuing its challenge to the county's zoning decision.[632]

The Court then went on to say that even if ACHD's recommendation had been a final decision, it would not have constituted a taking because the dedication was

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[630] The developer raised this as a traditional regulatory takings (inverse condemnation) claim against ACHD. The district court and the parties analyzed the street dedication as an exaction. The district court found that the ACHD met the nexus and proportionality tests in *Nollan* and *Dolan* and was therefore not a taking. (See discussion in section 28.E at page 606.) The Idaho Supreme Court reported this history, but never reached the *Nollan*/*Dolan* analysis. "We affirm the judgment dismissing KMST's claim against the ACHD, but for reasons different than those of the district court." *KMST*, 138 Idaho at 581, 67 P.3d at 60.

[631] The original lawsuit named both Ada County and the ACHD. The district court dismissed the claim against Ada County, and KMST did not appeal that dismissal. Instead, the appellate litigation focused exclusively on the ACHD, the only other party to the appeal. As explained below, this proved to be a fatal flaw for the plaintiff.

[632] "KMST has not appealed the judgment dismissing its claim against Ada County, and therefore we do not address the issue of whether the conduct of the Ada County Commissioners constituted a taking." *KMST*, 138 Idaho at 582, 67 P.3d at 61.

voluntary.[633] In a pre-application meeting with ACHD staff, KMST was advised that staff would recommend a requirement of a road dedication. In order to move things along, KMST agreed to the dedication and included it in its application. This proved fatal to KMST's taking claim.

> KMST representatives included the construction and dedication of Bird Street in the application because they were concerned that failing to do so would delay closing on the property and development of the property. KMST's property was not taken. It voluntarily decided to dedicate the road to the public in order to speed the approval of its development. Having done so, it cannot now claim that its property was "taken."

KMST, 138 Idaho at 582, 67 P.3d at 61 (emphasis supplied; internal quotations identifying district court's language omitted). This language is significant because it shows that it makes no difference that the developer was motivated by a desire to speed the processing of its application; the developer's action is still voluntary.

In a footnote, the Court clarified the narrow scope of its holding. "We are not holding that there was no taking simply because KMST built the public street before challenging that requirement in court. We are holding that there was no taking because KMST itself proposed that it would construct and dedicate the street as a part of its development." *KMST*, 138 Idaho at 582, n.1, 67 P.3d at 61, n.1.

That was the first claim. In addition, KMST challenged an impact fee that ACHD imposed pursuant to the ACHD's own ordinance, which had been adopted pursuant to IDIFA.[634] This claim was also dismissed on a technical basis. This time it was exhaustion:

> [KMST] simply paid the impact fees in the amount initially calculated. Having done so, it cannot now claim that the amount of the impact fees constituted an unconstitutional taking of its property.
> As a general rule, a party must exhaust administrative remedies . . . . KMST had the opportunity to challenge the calculation of the impact fees administratively, and it chose not to do so.

KMST, 138 Idaho at 583, 67 P.3d at 62.

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[633] Technically one might argue that this was dictum, but Justice Eismann's language made it clear that the Court intended it as a ruling.

[634] ACHD is the only road district in the State with the authority to impose impact fees. See footnote 611 at page 719.

Note that although this part of the case arose in the context of IDIFA, the Court's discussion of exhaustion was based on general principles of administrative law. Thus it would apply in contexts outside of IDIFA. In so ruling, however, the Court noted (in dictum) two exceptions that apply to the general exhaustion rule: "We have recognized exceptions to that rule in two instances: (a) when the interests of justice so require, and (b) when the agency acted outside its authority." *KMST*, 138 Idaho at 583, 67 P.3d at 62.

The district court had found that the exhaustion requirement did not apply,[635] due to a special provision in LLUPA exempting certain taking claims from exhaustion, Idaho Code § 67-6521(2)(b). The Idaho Supreme Court reversed on this point, concluding, without discussion, that this LLUPA provision is inapplicable.

It is worth mentioning what *KMST* did not decide.

First, as noted above, the Court emphatically adopted a narrow definition of what is voluntary, explaining that it was speaking in terms only of situations in which the developer included a dedication proposal in its own application. Arguably, *KMST's* concept of a voluntary payment would extend to those circumstances when a developer does not propose a payment, but also does not object to it. This would be particularly compelling where the developer enters into a development agreement in which he or she expressly "agrees" to payments imposed by the local government. (Indeed, the Court addressed this situation in *Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 496-97, 300 P.3d 18, 27-28 (2013) discussed below.)

Second, the Court did not consider other contexts in which an exaction might or might not be "voluntary." For instance, if a developer is given the option of paying an exaction in order to obtain additional density or other benefits, does that make the exaction "voluntary"? Indeed, can a municipality lawfully offer to trade zoning approvals for payments to the municipality?

Third, *KMST* was a regulatory takings case. (The developer did not allege that the exactions were illegal taxes (see discussion in 29 at page 651), only that they required compensation under *Nollan/Dolan*.) The Court ruled that because KMST had given the property away, it was not constitutionally "taken." Does the fact that it was not a taking also mean that it is not a tax? Presumably so. After all, people do not ordinarily volunteer to pay taxes. Moreover, illegal taxes are described as *per se* takings. *BHA Investments, Inc. v. City of Boise* ("*BHA I*"), 138 Idaho 356, 63 P.3d 482 (2003) (Schroeder, J.). But *KMST* did not directly answer that question.

[635] The district court nonetheless ruled against KMST, finding that the impact fee was not excessive or inappropriate under *Nollan* and *Dolan*. Given its ruling on exhaustion, the Idaho Supreme Court had no occasion to reach the *Nollan/Dolan* analysis.

Fourth, because ACHD had adopted an impact fee ordinance under IDIFA, the Court did not need to address the exception to the exhaustion rule for when the agency acts outside its authority. Does this exception mean that no exhaustion is required if an exaction is challenged as an illegal, disguised tax? The answer may depend on whether the challenge is facial or as applied.

Finally, there is a question as to whether ordinances offering to relax zoning standards (such as height, mass, or density) in exchange for payments of unauthorized fees are consistent with LLUPA's mandate that "[a]ll standards shall be uniform for each class or kind of buildings and structures . . . ." Idaho Code § 67-6511. In other words, is it "uniform" for the government to impose one standard on those who agree to pay an unauthorized fee and another standard on those who do not? Or is giving each landowner this choice sufficient uniformity? The authors are not aware of any Idaho court that has addressed this question.

By the way, a federal case arising in Washington, *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2765 (2009), reached much the same conclusion under federal takings law. "As for the installation of the 24-inch pipe, we conclude that the McClungs voluntarily contracted with the City to install the 24-inch pipe and thus the installation of that pipe was not a 'taking' by the City." *McClung*, 548 F.3d at 1222 (see also pages 1228-29).

C. *BHA II* (2004)

The recognition in *KMST* that voluntary actions do not give rise to takings is not undercut by the Court's holding in *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 108 P.3d 315 (2004) (Eismann, J.), which held that plaintiffs are not required to pay under protest as a prerequisite to challenging an unlawful tax. *BHA II* involved a challenge to a transfer fee charged by the City of Boise on liquor licenses. The Court ruled in a prior case, *BHA Investments, Inc. v. City of Boise* ("*BHA I*"), 138 Idaho 356, 357-58, 63 P.3d 482, 483-84 (2003) (Schroeder, J.), that the city had no regulatory authority whatsoever with respect to the transfer of liquor licenses. Only the State has such authority. *Id*.

BHA II involved two consolidated cases, the original *BHA I* case following remand and a different case.[636] In *BHA II*, the district court dismissed a claim by a different set of plaintiffs because they had not paid the fee under protest.[637] This was

[636] On remand, the district court granted BHA summary judgment and awarded it judgment against the city on the illegal fee issue. However, BHA also sought certification as a class action, which the district court denied. BHA appealed only the class action issue, and the Idaho Supreme Court affirmed. However, the case was consolidated with another case involving other similarly situated parties (Bravo Entertainment and Splitting Kings). This portion of the case became the foundation for most of the discussion in *BHA II*.

[637] The decision recites that one of the plaintiffs paid the fee, *BHA II*, 141 Idaho at 170, 108 P.3d at 317. So, apparently, the issue was that no formal "protest" accompanied the payment.

based on an old line of cases (*e.g.*, *Walker v. Wedgwood*, 64 Idaho 285, 130 P.2d 856 (1942)) holding that plaintiffs must pay taxes under protest to preserve the right to request a refund. In essence, the City of Boise tried to pull a fast one by saying, "OK, if you claim that our liquor license transfer fee is really a tax, you should have paid it under protest." The Court did not buy it.

The Supreme Court reversed the district court on that point, ruling that the requirement that taxes be paid under protest applies "when a governmental entity imposes what is on its face a tax" but is inapplicable "when a city imposes a fee that it has no authority to impose at all." *BHA II*, 141 Idaho at 176, 108 P.3d at 323. It contrasted the later situation (no authority to impose a fee at all) with the situation in which "a purported fee . . . does not bear a reasonable relationship to the services to be provided by the city [which is] in reality the imposition of a tax." *Id*.

The *BHA II* Court discussed *KMST*, but only in another context (exhaustion). The issue of voluntariness did not arise. Indeed, the facts are different. In *KMST*, the developer affirmatively agreed to a dedication of property. In *BHA II*, the city charged a fee, and the operator paid it (without protest). Thus, it is permissible not to protest, but if a party affirmatively offers to do something or expresses its agreement to a condition or payment, that constitutes voluntariness barring a taking claim.

D. *Lochsa Falls* (2009)

In *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 207 P.3d 963 (2009) (Horton, J.), a developer filed a civil complaint seeking reimbursement of fees it paid to the Idaho Department of Transportation ("ITD") for signalization. The developer sought an encroachment permit from ITD to install an intersection on a limited access state highway. In connection with its application to ITD, the developer submitted a Transportation Impact Study recommending the installation of the signal. ITD approved the encroachment permit upon condition that the developer install the signal, which it did. After constructing the intersection and signal, the developer sued ITD claiming that it should be reimbursed for the cost of the signal because it benefited the public as a whole and was therefore an illegal tax.

The district court threw out the case for failure to exhaust. The Idaho Supreme Court reversed, holding that, under ITD's rules, there are no remedies to exhaust. Accordingly, the Court remanded for evaluation of the constitutional challenge.

Note that ITD's permit was not issued pursuant to the Local Land Use Planning Act, Idaho Code §§ 67-6501 to 67-6538, and, therefore, was not subject to any of the procedures available to applicants for planning and zoning permits. Instead, it was governed by special rules that allow administrative review of the denial of an ITD permit but allow no review or other remedy where a permit application is approved with unacceptable conditions. Because no permit was denied

(but was granted with a condition), there were no remedies to exhaust. *Lochsa Falls*, 147 Idaho at 240, 207 P.3d at 971. Thus, *Lochsa Falls* describes a rare circumstance where no exhaustion is required (due to poorly drafted administrative rules). *Lochsa Falls* is also peculiar in that the Court addressed the issue as a matter of exhaustion of administrative remedies. But even if there were no administrative remedies to exhaust, that does not explain why the plaintiff was allowed to bring a collateral attack on the administrative decision outside of the IAPA.

Though not ruling on the constitutional issue, the Court offered the observation that "generally speaking, it is not an impermissible tax for the ITD to impose the condition of erecting a traffic signal as a requirement for a developer seeking to be granted an encroachment permit to a controlled access highway . . . ." *Lochsa Falls*, 147 Idaho at 241, 207 P.3d at 972. The Court then remanded for a determination of whether this particular requirement was reasonable.

Justice Jim Jones concurred, but dissented in the denial of attorney fees to ITD. While recognizing that a remand was technically required, he allowed, "In my estimation, Lochsa Falls' claims contain little substance." *Lochsa Falls*, 147 Idaho at 242, 207 P.3d at 973. He suggested that, on remand, the case should be decided against the developer based on the voluntary nature of the transaction—an issue that the majority did not address:

> This case could appropriately be analyzed in a contractual context. Lochsa Falls requests that ITD grant it the right to have a signalized intersection to benefit its subdivision. ITD agrees, provided that Lochsa Falls pays for signalizing the intersection. Lochsa Falls accepts the proposal without protest and proceeds to perform the signalizing work. Upon completion of the work, Lochsa Falls unilaterally changes its mind and decides it needs to be paid for the signalizing, but expresses no intention of giving up the valuable benefit it has derived from the deal. Lochsa Falls got what it bargained for but does not wish to honor its undertaking to bear the cost of such benefit. Had Lochsa Falls objected to the requirement that it pay for signalizing the intersection, it could simply have said "thanks, but no thanks" and done without a signal. One suspects there is not the slightest chance it would have done so, as the increase in the value of its lots would substantially outweigh the cost of the traffic signal.

Lochsa Falls, 147 Idaho at 242-43, 207 P.3d at 973-74 (J. Jones, J, concurring and dissenting). Given the cases that follow, this dissent seems now to reflect the majority view of the Court.

E. *Boise Tower* (2009)

In 2009, the Idaho Supreme Court distinguished its holding *Black v. Young*. As of 2016, this is the only Idaho appellate decision to revisit the *ultra vires* exception created in *Black.* In *Boise Tower Assoc., LLC v. Hogland*, 147 Idaho 774, 215 P.3d 494 (2009) (W. Jones, J.), the developer of a failed condominium tower in downtown Boise sued the city and its planning director. The planning director issued a building permit to the developer on May 3, 2000. The applicable ordinance provided the permit expires if no work is performed for 180 days. In 2002, the city mistakenly issued a stop work order to the developer based on a miscalculation of the 180-day rule. In order to resume work, the developer was required to enter into a stipulation requiring the developer to provide documentation of a funding commitment from its lender. The developer complained, but signed the agreement. Ultimately, the developer was unable to meet the funding commitment required by the stipulation, and the planning director again notified the developer that its building permit had expired. On appeal to the city council, the city found that the planning director had miscalculated the 180-day period, and reinstated the permit. Despite this victory, the developer sued the city and the planning director, alleging that the negative publicity led to cancellation of condominium purchases and doomed the project. The district court granted summary judgment to the city, and the developer appealed.

The developer argued that, under *Black*, the stipulation was *ultra vires*. The Idaho Supreme Court distinguished *Black*:

> *Black* is distinguishable from the present case because there the city's authority was limited to the processes set out in the statute for vacating streets and alleys. *Id*. In the present case, Hogland's authority was not narrowly circumscribed; rather, he had broad discretion to direct and enforce all provisions of the UBC [Uniform Building Code].

Boise Tower Assoc., LLC v. Hogland, 147 Idaho 774,797, 215 P.3d 494, 499 (2009) (W. Jones, J.).

Boise Tower appears to leave *Black* intact, but only by implication. The implication is that if the planning director had lacked authority to impose the type of conditions set out in the stipulation, the agreement would have been *ultra vires*.

It bears emphasis, however, that the stipulation in *Boise Tower* was clearly not voluntary. The Court emphasized in its recitation of facts that the developer protested vigorously, and agreed only under threat that the expiration of the permit would be made public the following day. Thus, *Boise Tower* does not address whether an *ultra vires* agreement is nevertheless enforceable if entered voluntarily.

F. *Wylie* (2011)

The Court faced the question of a voluntary agreement that was arguably *ultra vires* in *Wylie v. State*, 151 Idaho 26, 253 P.3d 700 (2011) (J. Jones, J.). This case, which did not mention *Black,* appears to hold that a voluntary agreement is enforceable, notwithstanding being *ultra vires*. Deciphering the case is a bit tricky, however.

In *Wylie*, a developer entered into a development agreement with the City of Meridian in conjunction with the annexation, initial zoning, and approval of a preliminary plat of a subdivision along Chinden Boulevard.[638] In the development agreement, Wylie's predecessor agreed to limit access to Chinden Boulevard from his proposed development. After acquiring the property, Wylie sought a variance allowing direct access to Chinden Boulevard. The City denied the variance request, after which Wylie sought a judgment declaring that ITD had exclusive jurisdiction to control access and that the City's ordinance dealing with access was void. As the Idaho Supreme Court pointed out, it is unclear why Wylie did not seek judicial review of the denial of the permit or an amendment of the development agreement (despite earlier having obtained a modification on a different aspect of the agreement). *Wylie*, 151 Idaho at 32, 253 P.3d at 706.

Wylie argued that the agreement waiving access was *ultra vires* and unenforceable because Idaho statutes preempt the authority of the city to control access to a state highway.

The Court first ruled that the development agreement's unambiguous requirement limiting access mooted any claims that Wylie might have under the development agreement. "Since the Agreement unambiguously restricts the ability of Wylie's property to have direct access to SH 20–26, there is simply no justiciable issue based on the Agreement." *Wylie*, 151 Idaho at 32, 253 P.3d at 706. It is unclear from the opinion, however, what claims were "based on the Agreement."

The Court noted that the "main thrust of his complaint is that the Ordinance is invalid, either because it is preempted by state law or an ultra vires act of the City." *Wylie*, 151 Idaho at 33, 253 P.3d at 707. The Court held that these "claims were not rendered nonjusticiable by virtue of the Agreement." *Id*. The Court suggested that the ordinance would pass muster because it "does not usurp the authority of ITD, nor is it preempted by statute." *Id*.

Despite making that observation, the Court never actually ruled on the ordinance. Instead, it found that the whole case is non-justiciable:

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[638] No one, it appears, challenged the validity of the development agreement itself. Nor did the parties or the Court draw a distinction between initial zoning and rezoning. See discussion in section 27.B at page 568.

> Turning to the question of justiciability, Wylie has been unable to articulate how a judgment declaring the Ordinance invalid would provide him any relief. The Agreement clearly precludes direct access to SH 20–26 and the provisions of the Agreement are not dependent upon the Ordinance.

Wylie, 151 Idaho at 34, 253 P.3d at 708.

This last point is crucial. The effect is that, even though the voluntary agreement does not prevent the Court from considering the legality of the ordinance, even a ruling that the ordinance was *ultra vires* would not relieve the developer from an agreement that was voluntarily entered. The Court did not discuss *Black*, but this conclusion appears to be a departure from *Black*.

G. *Buckskin* (2013)

In *Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 300 P.3d 18 (2013) (J. Jones, J.), the Idaho Supreme Court applied its holding in *KMST* to conclude that a development impact fee was paid voluntarily and therefore did not constitute a taking. The Court began by rejecting the developer's argument that the County lacked the authority to enter into voluntary agreements with developers.[639] It further held that while IDIFA is one way that local governments may impose impact fees, it is not the only way. Voluntary agreements are an alternative to IDIFA. "IDIFA does not prohibit governmental entities and developers from voluntarily entering into contracts to fund and construct improvements." *Buckskin*, 154 Idaho at 491, 300 P.3d at 23.

The Court then evaluated whether the developer's acquiescence in the County's practice of requiring developers to enter into road development agreements was voluntary.[640]

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[639] "Buckskin provides no authority for the proposition that a developer and governing board are prohibited from voluntarily entering into an agreement to fund and construct capital improvements that will facilitate the developer's development plans. Indeed, such agreements can benefit both the County taxpayers and developers. There is no reason why a governing body should be required to resort to taxpayer-derived revenue as the sole source of moving forward with capital improvements, such as road construction, that will primarily benefit a developer. On the other hand, it makes little sense to prohibit developers from voluntarily agreeing to shoulder a portion of the development costs in order to more quickly move forward with development of their property." *Buckskin*, 154 Idaho at 491, 300 P.3d at 23.

[640] Because the Court found that the voluntary agreement precluded a taking, it never reached the statute of limitations defense, which had been the basis of the district court's ruling. *Buckskin*, 154 Idaho at 494, 300 P.3d at 26.

> In this case, there was no taking because Buckskin initially proposed in its application that the parties enter into a capital contribution agreement that called for it to pay "agreed-upon compensation" to the County. . . . Buckskin stated no objection to the [Capital Contribution Agreement] or the requirement of paying the compensation. At that time, it was seeking approval of a subdivision plat, a PUD, and a CUP. . . . Buckskin could have requested a regulatory taking analysis pursuant to I.C. § 67–8003. S.L. 2003, ch. 142, §§ 24. Buckskin did not do so. It could have sought judicial review pursuant to I.C. §§ 67-6519 or 67–6521. It did not do so. It could have objected and paid under protest. It did not do so. There is no indication that Buckskin complained about, or objected to, the CCA, the RDA, or the impact charges to any representative of the County at any time. Buckskin does not claim that the improvements identified in the CCA and RDA were not completed or that the County failed to perform the terms of either agreement in any fashion. Nothing was taken from Buckskin and, therefore, it has no grounds for asserting an inverse condemnation claim.

Buckskin, 154 Idaho at 495-96, 300 P.3d at 27-28.

In so ruling, the Court made clear that a voluntary agreement is not necessarily inconsistent with some prodding by the governmental entity.

> As noted by the County, "[p]erhaps the developers of The Meadows were not pleased with the idea of paying for road improvements benefiting their property, but they did not say so and they certainly did not challenge the County's authority to require such mitigation." Buckskin's engineer simply believed that the County had legal authority to require the CCA, but he makes no contention that he was relying on any representation to that effect by any County official.

Buckskin, 154 Idaho at 495, 300 P.3d at 27.

To the same point, the *Buckskin* Court quoted from the holding in *KMST*, to the effect that if a developer agrees to terms in hopes of speeding development approval, that does not necessarily render the action involuntary. "It voluntarily decided to dedicate the road to the public in order to speed the approval of the

development." *Buckskin*, 154 Idaho at 492, 300 P.3d at 24 (quoting *KMST, LLC v. Cnty. of Ada*, 138 Idaho 577, 582, 67 P.3d 56, 61 (2003)).

The *Buckskin* Court did discuss *Black*. It would seem, however, that the only way to reconcile the two cases is to recognize a "voluntary agreement" exception to *Black*.

H. *Bremer* (2013)

In *Bremer, LLC v. East Greenacres Irrigation Dist*., 155 Idaho 736, 316 P.3d 652 (2013) (Burdick, J.), the Idaho Supreme Court once again applied the voluntary payment rule set out in *KMST* and *Buckskin*.

The owner of an industrial foam molding facility sought a water connection from the irrigation district ("EGID"). The district required the owner to extend the water main 800 feet to the property. The owner attempted to negotiate, but ultimately decided to build the extension and sue later. After construction, he paid a connection fee (which he did not challenge) and sued the district alleging the requirement to extend the main was an illegal tax. He alleged the extension was unnecessary to serve him, which the district disputed. The Court upheld a grant of summary judgment to the district. The Court found it unnecessary to wade into the question of whether the main extension was really for the benefit of the entire district. The Court ruled instead that the owner's construction of the main was voluntary and therefore defeated the takings claim.

> Here, Bremer's actions are similar to those of the developers in *KMST* and *Buckskin*. Similar to how the *KMST* developer took the initiative to propose the road to the highway district, Bremer approached EGID about water for their new building and had Bremer's own engineer submit his plans to EGID. Those plans included the main line extension. Analogous to the engineer in *Buckskin* who stated the fee was only included because the country required it, Bremer's engineer said that EGID told him that it required the extension. After submitting the plan, Bremer decided to build the main line extension to allow their business to operate, similar to how the developer in *KMST* voluntarily completed a road to speed the city's approval of the development. Thus, *KMST* and *Buckskin* generally indicate that a person cannot propose an improvement and thus voluntarily agree to the improvement, and then later contend there was no agreement because the improvement was for the public.

Bremer, 155 Idaho at 742, 316 P.3d at 658.

In another part of the decision, the *Bremer* Court made clear that the *KMST/Buckskin/Bremer* voluntariness rule is not the same as the "voluntary payment rule."

> The voluntary payment rule provides that "a person cannot, either by way of set-off or counterclaim, or by direct action, recover back money which he has voluntarily paid with full knowledge of all the facts, and without any fraud, duress or extortion, although no obligation to make such payment existed." *Breckenridge v. Johnston*, 62 Idaho 121, 133, 108 P.2d 833, 838 (1940). Under this rule, a person cannot recover a payment that he voluntarily made to satisfy a demand in excess of what is legally due, if he made that payment with full knowledge of the facts and free from mistake, fraud, duress, or extortion. *Id*.

Bremer, 155 Idaho at 745, 316 P.3d at 661.

I. *White Cloud* (2014)

The voluntary agreement issue was addressed yet again by the Court in *In the Matter of Certified Question of Law – White Cloud v. Valley Cnty.*, 156 Idaho 77, 320 P.3d 1236 (2014) (J. Jones, J.). This decision provided the Court's opinion on a question of law certified by the federal district court dealing with limitation periods. The Court included an extensive discussion under the heading "Questions this Court Declines to Answer" (because they were beyond the scope of the certified question). The Court nevertheless pointed out that the issue of the voluntary nature of the agreement by a developer to pay an exaction may be "central to the determination" of the question—essentially mooting the limitations period defense. *White Cloud*, 156 Idaho at 82, 320 P.3d. at 1241. The Court summarized its prior precedent on the subject as follows:

> In *Buckskin*, where the County had no IDIFA compliant ordinance, this Court held that "a developer and a governing board can legally enter into a voluntary agreement to fund capital improvements to be made by the governmental entity that facilitate the developer's development plans." 154 Idaho at 493, 300 P.3d at 25. That case also involved a suit by a developer against the County, seeking recovery of road development fees based on claims of an illegal impact fee and inverse condemnation. *Id*. at 489, 300 P.3d at 21. We first addressed the legality of the agreement, finding that issue to be "central to the determination" of the case. *Id*. at

> 490, 300 P.3d at 22. We observed that "a voluntary agreement between a governmental entity and a developer, whereby the developer voluntarily agrees to pay for capital improvements that will facilitate his development plans, does not run afoul of IDIFA. The key is whether the agreement is truly voluntary." *Id*. at 491, 300 P.3d at 23. In *Buckskin*, we upheld the district court's grant of summary judgment against Buckskin because the record contained no evidence "indicating that Buckskin was strong-armed into signing the . . . RDA [Road Development Agreement]; that it voiced any objection to anyone, at any time, to making the payment required under [the] agreement; or that it did not, as the County avers, benefit from the agreement by virtue of the road improvements facilitated by its payments." *Id*. at 492, 300 P.3d at 24.

White Cloud, 156 Idaho at 82, 320 P.3d. at 1241 (footnote omitted; first two bracketed inserts supplied; third original).

J. *Old Cutters* (2014)

Ketchum's actions in *Black* pale in comparison to the conduct of the City of Hailey in *City of Hailey v. Old Cutters, Inc.*, 2014 WL 1319854 (D. Idaho Mar. 31, 2014) (Lodge, J.) (unpublished), affirming the federal bankruptcy court in *Old Cutters, Inc. v. City of Hailey*, 488 B.R. 130 (Bankr. D. Idaho 2012) (Pappas, J.). Hailey's imposition of an annexation fee of over three million dollars (plus other requirements)—which it sought to collect even after the developer went bankrupt—makes the city the poster child for overreaching by a municipal government.

In this case, a developer sought to be annexed by the city in order to obtain water and sewer service. The city determined to impose annexation fees (as well as affordable housing requirements), which it raised incrementally from $350,000 to $3,787,500.[641] Ultimately, the developer signed an annexation agreement stating it

[641] Based on a prior fiscal study of annexation costs undertaken by the city, the developer estimated that it would be expected to pay about $350,000 as an annexation fee. Instead the city commissioned a new study, which called for an annexation fee of $788,000. Revisions to the study were then undertaken, resulting in a recommended fee of $1,875,920. Another revision by the City resulting in the proposed fee being increased to $2,056,427. The developer then offered to pay a flat $2,000,000, although strongly disputing the validity of the city's calculation and objecting, in particular, to the fact that the fee exceeded that actual expenses that the city would incur in connection with the annexation. In a subsequent public hearing, the city council rejected both the developer's offer and the fee proposed by the newest fiscal study. The city determined to initiate negotiations with the developers and agreed that the fee should not be less than $3,000,000. Those negotiations occurred, and the parties agreed on an annexation fee of $3,787,500.

agreed that the fees were "fair and equitable" and "agreed upon as consideration for the City providing essential governmental and utility services." *Old Cutters* at *3.[642] Despite finally agreeing to pay the fee, "Old Cutters repeatedly questioned Hailey's authority to impose an annexation fee in excess of actual costs, and protested Hailey's attempt to do so." *Old Cutters* at *23.

In 2011, the developer filed for bankruptcy. The city filed a claim for the unpaid portion of the annexation fee (over $2,500,000). The developer and another creditor objected to the city's claim, seeking to have it invalidated and also seeking release from the affordable housing obligation. The developer and creditor contended that the entire annexation agreement was an illegal tax and therefore *ultra vires*.[643] (The developer did not seek to recover fees already paid to the city. *Old Cutters* at *18 n.16.)

The district court said the city admitted that the costs of annexation were less than $788,000. *Old Cutters* at *18. The court was also troubled that the city seemed to be double dipping—charging the developer annexation fees for things that the developer would pay for again as a property tax payer.

Given this awkward factual setting, the case boiled down to whether the city had the explicit or implied power to charge fees in excess of its actual costs. *Old Cutters* at *13. Hailey contended that it had such authority under both the Annexation Statute (Idaho Code § 50-222) and the municipal powers statute (Idaho Code § 50-301). Judge Lodge disagreed as to both.

Section 50-222

Section 50-222 contains a grant of authority to cities to annex land. It says nothing, one way or the other, about annexation fees. Hailey contended that the power to impose annexation fees in excess of actual costs is implied, given that the decision to annex is discretionary. *Old Cutters* at *14.

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[642] In addition to the annexation fee, the annexation agreement obligated the developer to dedicate 20 percent of its residential lots to affordable housing. The annexation agreement contained a waiver specifically addressing this requirement whereby the developer waived any right to challenge the requirement. The city later repealed its affordable housing ordinance (following adverse litigation in Sun Valley and McCall), but declined to release the developer from the commitment based on the waiver. *Hailey* at *5; *Old Cutters*, 488 B.R. at 137, 157 n.23.

[643] The objectors also challenged the agreement as insufficiently precise under the statute of frauds. That argument failed. *Old Cutters*, 488 B.R. at 140-43. Another side issue involved the statute of limitations, raised as a defense by the city. The bankruptcy court brushed that aside holding that the statute of limitations was not applicable because the contract (or at least the challenged portions) were void *ab initio*. *Old Cutters*, 488 B.R. at 146-48. Although the bankruptcy court cited Idaho precedent, the cases cited do not clearly support such a sweeping exemption. The bankruptcy court elected not to certify these questions to the Idaho Supreme Court. *Old Cutters*, 488 B.R. at 143 n.14.

Based on a "legislative declaration" set out in the act, the court found that cities have the power to charge an annexation fee to "equitably allocate the costs of public services" associated with the annexation. *Old Cutters* at *14-15. But that, said the district court, is the extent of a city's authority to impose annexation fees.

Because the fee charged by Hailey exceeded the incremental cost of service that would be incurred by the city, the district court found that the annexation agreement was *ultra vires* and unenforceable—notwithstanding the fact that that this was a voluntary Class A annexation to which both parties had expressly agreed. *Old Cutters* at *16-17. The court said this was similar to *Black v. Young*, 122 Idaho 302, 834 P.2d 304 (1992) (McDevitt, J.), discussed above, in which another *ultra vires* agreement between a city and a developer was held unenforceable despite the developer's signed estoppel affidavit promising not to challenge the agreement. "Even assuming the annexation fee was freely negotiated, and consent voluntary, this precise theory was advanced by Ketchum and expressly rejected by the Idaho Supreme Court in *Black*." *Old Cutters* at *17. In reaching this conclusion, however, the district court clearly was moved by the city's leveraging of its annexation power at a time of financial difficulty for the developer, noting that the consent may not really have been voluntary at all. *Old Cutters* at *17.

Thus, in both *Black* and *Old Cutters*, the cities undertook action pursuant to a specific statute (vacations and annexation, respectfully) that placed strict limits on their authority to impose other conditions. In that circumstance, placing conditions beyond their authority rendered the action *ultra vires* and invalidated the waiver.

Section 50-301

The *Old Cutters* court then turned to the municipal power authority set out in Idaho Code § 50-301.

> 50-301. CORPORATE AND LOCAL SELF-GOVERNMENT POWERS. Cities governed by this act shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; accept grants-in-aid and gifts of property, both real and personal, in the name of the city; acquire, hold, lease, and convey property, real and personal; have a common seal, which they may change and alter at pleasure; may erect buildings or structures of any kind, needful for the uses or purposes of the city; and exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.

Idaho Code § 50-301 (emphasis supplied).

This is the statute that some have suggested established a form of home rule in Idaho (see discussion in section 29.D at page 659.) A review of the briefing, however, shows that the home rule argument was not presented to either the bankruptcy court or the reviewing district court. Instead, the parties and the courts focused on a different part of the statute—the part authorizing cities to "contract and be contracted with." *Old Cutters* at *19.

The district court found that section 50-301 does not expand the limited authority to impose fees found in the Annexation Statute. In other words, the Court said that the statute adds nothing to the city's authority to enter into annexation contracts:

> Although Hailey is empowered to contract and be contracted with under this provision, it may not enter into contracts that are "in conflict with the general laws or the constitution of the state of Idaho." . . .
> Hailey claims . . . the Annexation Statute, I.C. § 50–222, does not conflict with I.C. § 50–301. However, as the court held in *Black*, a city cannot contract for provisions it is not statutorily authorized to impose. As the Bankruptcy Court held, I.C. § 50–222 only authorizes annexation fees to the extent such fees are necessary to equitably allocate costs. Hailey cannot expand this limited authority through its general authority to contract. . . . Because the authority to impose annexation fees in excess of an equitable allocation of costs is not authorized under I.C. § 50–222, Hailey cannot rely upon I.C. § 50–301 as authority for the imposition of such fees.

Old Cutters at *19.

The court seems to read section 50-301 as saying, in essence: "Cities have the power to contract only to the extent that some other statute grants that power."[644] This reading seems to turn section 50-301 on its head. A more natural paraphrasing of Section 50-301 would seem to be: "Cities have the power to contract unless some other law prohibits it." Section 50-222 does not expressly prohibit any contracts. Indeed, elsewhere in the *Old Cutters* opinion, the court noted:

> . . . I.C. § 50–222 is silent as to whether a city may enter into a contractual annexation with a landowner.

[644] Without discussing why, the district court read the final clause of the subsection ("specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho") as applying to the authorization to contract. This is not obvious, as it might be read to apply only to the authority to "exercise all powers" provision.

> Assuming a city may do so, the statute is also mum about what terms and performance a city may require from the owner of annexed land within such agreement.

Old Cutters at *14. Thus, the *Old Cutters* court held that the absence of authority in section 50-222 (as it reads that statute) serves as a limit on contracting authority under section 50-301.

Section 67-8214(7)

The federal court (and presumably the parties) did not address another statute that provides authority for cities to impose conditions on annexations.

By its express terms, the various restrictions and requirements relating to impact fees imposed by the Idaho Development Impact Fee Act ("IDIFA") do not apply to applicants for voluntary annexation. Voluntary annexations are typically governed by agreements that addresses the annexation and the initial zoning. IDIFA provides:

> Nothing in this chapter [IDIFA] shall restrict or diminish the power of a governmental entity to annex property into its territorial boundaries or exclude property from its territorial boundaries upon request of a developer or owner, or to impose reasonable conditions thereon, including the recovery of project or system improvement costs required as a result of such voluntary annexation.

Idaho Code § 67-8214(7).

The only restrictions section 67-8214(7) places on conditions to a voluntary annexation are that the conditions must be "reasonable." This includes, but is not limited to, conditions for the recovery of project or system improvement costs. By negative implication, cities have the authority to impose conditions within that broad sweep.

Sprenger Grubb

The *Old Cutters* court also failed to address the holding in *Sprenger, Grubb & Associates v. Hailey* (*"Sprenger Grubb I"*), 127 Idaho 576, 903 P.2d 741 (1995) (Silak, J.), which upheld a development agreement that predated the express authorization for such agreements now contained in Idaho Code § 67-6511A. If cities have inherent authority to enter into development agreements without more specific legislative authorization, one might think that they have similar authority to enter into annexation agreements.

Buckskin distinguished

After concluding that the city lacked authority to impose far-reaching conditions in the annexation agreement, the *Old Cutters* court turned to *Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 300 P.3d 18 (2013) (J. Jones, J.), which reaffirmed the principle that developers who voluntarily enter into agreements with cities may be held to their bargains. The federal court distinguished *Buckskin* on three bases. First, it noted that in *Buckskin* the county's action in imposing mitigation fees was found to be authorized. Second, in *Buckskin* the developer actually benefited from road construction funded by the fees. Third, in *Buckskin*, the agreement was truly voluntary while here "Old Cutters repeatedly voiced its objections" but ultimately "felt forced to sign." *Old Cutters* at *22.[645]

One might argue that the *Old Cutters* court had to stretch a bit to distinguish the broad holding in *Buckskin* regarding the enforceability of voluntary agreements.[646] The take home message, however, is clear. When governments flagrantly leverage their regulatory power to extort financial contributions that go well beyond covering reasonable costs of government services, courts will find ways to invalidate those actions.

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[645] The authors suggest that the three *Old Cutters* tests summarized above do not fairly capture Idaho case law on the subject. First, Idaho courts have not held that voluntary agreements are enforceable only when the governmental body has authority to impose the conditions. To the contrary, cases like *KMST* and *Bremer* have held that even an unconstitutional taking in violation Idaho's "illegal tax" prohibition is immune from challenge if the developer has voluntarily agreed to the condition. Similarly, in *Wylie*, the Court ruled that it lacks jurisdiction to hear a challenge to a voluntary agreement, even when it is alleged that it is *ultra vires*. Second, the fact that the developer benefits from the infrastructure that will be funded with the fees was mentioned in *Buckskin* as one factor in determining whether the agreement is voluntary. But it is only a factor. It has not determinative and may be offset by other factors. Third, in *KMST* and *Buckskin*, the Court ruled that even begrudging acquiescence calculated to speed up the permitting process may be deemed voluntary.

[646] As for the first distinction (whether the city was authorized to impose the fees) is like was saying, "You are bound by your contract only if your challenge has no merit. So long as you have a good *ultra vires* argument, you may invalidate a voluntary contract." That would seem to defeat the whole principle of holding parties to their bargains. The *Hailey* court's second distinction (whether the developer benefited from the agreement) suggests that the enforceability of voluntary agreements is not a fixed principle of law but just a case-by-case equitable balancing question. The third principle (whether the agreement was truly voluntary) likewise reinforces the idea this is all about the equities.

32. FRANCHISE AGREEMENTS AND NON-FRANCHISE AUTHORITY OVER UTILITIES

The tables below serve as a quick reference to the statutes and constitutional provisions discussed in this section. They are divided into franchise and non-franchise provisions. The non-franchise provisions give cities regulatory authority over utilities that is not based on franchise agreements.

A. Citation tables (statutes and Constitution)

Constitutional provisions referencing franchises	
Citation	**Description**
Idaho Const. art. 15, § 2	Definition of franchise in the context of water providers, coupled with a requirement that such franchises be exercised in accordance with law.
Idaho Const. art. 11, § 8	Makes franchises subject to condemnation.

Precursors to modern franchise statutes (repealed in 1967 by recodification of Title 50)				
Chapter Heading (in 1948)	**Name of Statute (in 1948)**	**Enacted by**	**Idaho Code (prior codification)**	**Idaho Code (current version)**
Commission form of government—Franchises	(multiple)	1911 Idaho Sess. Laws, ch. 82, §§ 52-70	Idaho Code §§ 50-4102 to 50-4125	None (repealed)
Commission form of government—Miscellaneous provisions	Definitions	1911 Idaho Sess. Laws, ch. 82, § 73 (subd. 3)	Idaho Code § 50-4203(3)	None (repealed)
Cities of the first class	(multiple)	1913 Idaho Sess. Laws, ch. 74, §§ 24 (subd. 20) and 25	Idaho Code §§ 50-146 and 50-149	None (repealed)

Current franchise statutes				
Chapter Heading	**Name of Statute**	**Enacted by**	**Amended by**	**Idaho Code (current version)**
"Powers [of Cities]"	"Franchise ordinances -- Regulations"	1967 Idaho Sess. Laws, ch. 429, § 25	1995 Idaho Sess. Laws, ch. 226, § 1	§ 50-329
	"Franchise ordinances – Fees"	1995 Idaho Sess. Laws, ch. 226, § 2	1996 Idaho Sess. Laws, ch. 246, § 1	§ 50-329A
	"Rates of franchise holders – Regulations"	1967 Idaho Sess. Laws, ch. 429, § 26		§ 50-330

Non-franchise-based statutes providing municipal control over utilities						
Chapter Heading	**Name of Statute**	**1887 Rev. Stat.**	**1908 Rev. Codes of Idaho[647]**	**1919 Compiled Stat. of Idaho**	**Idaho Code (prior codification)**	**Idaho Code (current version)**
"Water and Canal Companies"	"Contracts for municipal water supply"	§ 2710	§ 2838	4842	§ 29-801	§ 30-801
	"Fixing water rates" (including free firefighting water)	§ 2711	§ 2839	repealed	none	none
	"Right of way granted"	§ 2712	§ 2840	§ 4843	§ 29-802	§ 30-802
	"Works not to obstruct highways"	§ 2713	§ 2841	§ 4844	§ 29-803	§ 30-803
"Rules and Restrictions Respecting the Use of Highways"	(none)	§ 863	§ 881	§ 1311	§ 40-305 § 39-305	§ 40-2308
Powers [of Cities]	"Utility transmission systems—Regulations"	none	none	none	none	§ 50-328

B. What is a franchise?

A franchise is a special privilege bestowed on a person or entity. It has different meanings in different contexts.[648] As used here, the term refers to a unique type of contract between a municipality and a utility, authorized by the Idaho Constitution and implemented by the Legislature. Technically, a franchise agreement is both an enforceable contract[649] and a property right.[650]

Historically, the core feature of municipal franchise agreements was a grant allowing use of a city's streets by the franchisee to install infrastructure needed to deliver water, power, or other services that could have been provided by the city but

[647] Westlaw incorrectly identifies this as 1909 Rev. Codes of Idaho.

[648] In other contexts, a franchise may refer to a license granted by a corporation to sell a product or service (as in a McDonald's franchise). Franchise may also refer to suffrage—the right to vote. It is used as well in the context of a sports league. It may also describe a group of movies or television productions marketed as a series.

[649] "Courts have repeatedly recognized that since a franchise is a contract between a government body and a private entity, it is binding upon the parties, enforceable and entitled to the respect a court must give all valid contracts." *Alpert v. Boise Water Corp*., 795 P.2d 298, 306 (Idaho 1990) (Boyle, J.) (emphasis added).

[650] "As a rule, franchises spring from contracts made between the sovereign power and private citizens, for a valuable consideration, for the purposes of individual advantage as well as public benefit. . . . Once granted, however, it becomes the property of the grantee . . . ." 36 Am. Jur. 2d *Franchises from Public Entities* § 4 (May 2023). The fact that a franchise is a property right is reflected also in Idaho's constitutional provision authorizing the condemnation of franchises. See footnote 659 on page 767.

is instead provided by the utility. This is reflected in the definition of franchise found in Idaho's first general franchise statute, enacted in 1911: "The word 'franchise' shall include every special privilege in the streets, alleys, highways and public places of the city, whether granted by the State or the city, which does not belong to the citizens generally by common right." 1911 Idaho Sess. Laws, ch. 82, § 73 (subd. 3) (codified until its repeal in 1967 at Idaho Code § 50-4203(3)).[651]

The Idaho Supreme Court provided this brief definition, also focusing on use of city property: "The term 'franchise' has been interpreted to mean a grant of a right to use property over which the granting authority has control." *Alpert v. Boise Water Corp*., 795 P.2d 298, 305 (Idaho 1990) (Boyle, J.) (citing 36 Am. Jur. 2d, *Franchises* § 1, which is quoted above).

The features of a franchise, including the use of city property, are summarized in the *American Jurisprudence* encyclopedia:

> The term "franchise" designates a right or privilege conferred by law for the provision of some public purpose or service, which cannot be exercised without the express permission of the sovereign power ….
>
> Franchises have been created when a governmental agency authorizes private companies to set up their infrastructures on public property in order to provide public utilities to the public; i.e., when railroad, gas, water, telephone, or electric companies set up tracks, pipes, poles, etc. across the streets and other public ways of a city.

36 Am. Jur. 2d *Franchises from Public Entities* § 1 (May 2023).

In addition to authorizing the franchisee to install its infrastructure in city property, franchise agreements typically, but not necessarily, grant exclusive business rights (a monopoly) to the franchisee. Specifically, the franchise may include guarantees by the municipality that it will not (1) grant a franchise to a rival company for the same service area and/or (2) enter into competition itself.

C. The franchise system is unnecessary and anachronistic, especially in Ada County

Although the franchise concept is deeply rooted in history and practice, it is also outdated. It is premised on the antiquated idea that cities must have the power to

[651] This definition did not survive the recodification of the municipal statutes in 1967. 1967 Idaho Sess. Laws, ch. 429. Today's franchise statutes do not include any definition of the word franchise.

regulate the operation of utilities within their boundaries and to grant monopoly power because, if they don't, no one will control abuses by these companies.[652] That premise has long since been supplanted by the regulatory control of the Idaho Public Utilities Commission ("IPUC") in 1913,[653] which is far better suited to the task.

In the case of Ada County, the idea of municipal franchise authority is uniquely obsolete due to the fact that, since 1971, cities in Ada County no longer own and control their streets. (See footnote 704 on page 788.) That said, cities and utilities, even in Ada County, still have the power to enter into franchise agreements with each other if they so choose. *Alpert v. Boise Water Corp.*, 795 P.2d 298 (Idaho 1990) (Boyle, J.). Whether cities have the power to demand that utilities enter into such contracts with them is a different question. See discussion in section 32.G ("Utilities are not obligated to enter into franchise agreements.") on page 791.

Even for Idaho cities that control their own streets (the case everywhere but Ada County), there is no real need for a franchise agreement in order to address use of a city's streets by a utility. Governmental entities routinely grant licenses and easements for that purpose. And they may charge fees incidental to such agreements to the extent the fee reflects regulatory or administrative costs actually incurred by the municipality.

As noted above, a franchise may also include a promise by the city that it will not (1) grant a franchise to a rival company and/or (2) enter into competition itself (which may or may not include an express or implied promise not to condemn the utility). The former was once important,[654] but is now a pointless anachronism in the

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[652] The early statutes granted to cities broad regulatory control over utilities. For example, the 1887 and 1913 statutes authorized cities to set rates charged to customers. 1887 Rev. Stat. of Idaho Terr. § 2711; 1913 Idaho Sess. Laws, ch. 74, § 24 (subd. 20). Those have been repealed, but cities retain authority to regulate service providers that are not subject to IPUC regulation (Idaho Code § 50-330). See Professor Colson's explanation of the historical origins of the constitutional provisions in section 32.D(2) on page 767.

[653] "The public utilities commission was created by act of the legislature in 1913. 1913, S.L. Chap. 61. By that act such powers as municipalities may have had to control and regulate public utilities was withdrawn and transferred to the commission." *Village of Lapwai v. Alligier*, 299 P.2d 475, 478 (Idaho 1956) (Taylor, C.J.).

[654] An MIT article describes the ferocious fight between early companies seeking to provide municipal water to the City of Boise.

> The Boise Warm Springs Water District was born out of an intense competition for a local contract to provide public water to Boise that began in 1890. In 1890 the owners of the Overland Hotel in Boise were granted permission by the city to provide a public water system by expanding the hotel's system. They incorporated as the Boise Water Works but there was competition for the local contract from the Artesian Water and Land Improvement Company. Descriptions of the competition recall images of the Wild West, "It was reported in March 1891, in the Idaho Statesman, that 'hatred

case of a utility regulated by the IPUC (which will see to it that service areas do not overlap). Thus, the only meaningful promise a municipality can make to a franchisee is to avoid competing itself with the utility. In the early days, that was a real issue.[655] It is less so today, particularly for large utilities whose service areas cover more than one municipality. As a financial, practical, and legal matter, utilities serving large geographic areas cannot realistically be taken over by an individual city.[656]

Today, it seems the main purpose of franchises is to serve as a hidden tax, collected by the utility and transferred to the municipality. Idaho cities are authorized to tack on a franchise fee of up to 3% of the utility's gross revenue. (See section 32.D(5)(b)(ii) on page 781.) This is convenient for the cities because they do not have to collect the fee and, accordingly, are insulated from public scrutiny and

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and strife' were rampant in Boise as a result of the battle between the two companies for customers" (Rafferty 1992, 1).

Boise's Geothermal District Heating System (MIT, 2009 student paper, 2009) (http://web.mit.edu/nature/archive/student_projects/2009/bjorn627/TheGeothermalCity/Boise.html. The contest between these early entities, leading to the formation of Boise Artesian Hot & Cold Water Co., is described briefly by the U.S. Supreme Court in *Boise Artesian Hot & Cold Water Co. v. Boise City* ("*Artesian III*"), 230 U.S. 84, 87 (1913) (Lurton, J.) (discussed in section 32.D(4) on page 770).

[655] For example, as described in *Denman v. Idaho Falls*, 4 P.2d 361 (Idaho 1931) (Budge, J.), the City of Idaho Falls drove out of business a private natural gas company that was competing with the city's own electric utility, both of which sought to provide power for stoves and furnaces.

Another stark example is found in *Village of Lapwai v. Alligier*, 299 P.2d 475 (Idaho 1956) (Taylor, C.J.). In this case, the village authorized private persons (the Alligers and their predecessor) to develop a municipal water supply, which they operated for many decades. Then, in 1953, sometime after the franchise had expired, the village adopted an ordinance requiring the water provider to cease operations and to remove all pipe and apparatus from city property. The water provider countered, contending the ordinance constituted an uncompensated taking. The Court sided with the village, holding that its control over city streets and its right to withdraw consent to their use (after the expiration of the franchise) was undiminished by the creation of the public utilities commission. Nor was the village obligated to seek permission of the IPUC to do so. *Village of Lapwai* at 478. (There was some question as to whether the original permission constituted a franchise or a license, but the Court said that did not matter. *Village of Lapwai* at 478.)

[656] As a practical matter, a city cannot condemn just the part of a multi-city utility that serves the condemning city. For example, when a water diversion facility and treatment plant serve a large geographic area, a city cannot condemn just a portion of the facility. These are integrated facilities, not components that could be separated into those serving one area or another. If the city condemned the entire delivery system, it would place itself in the politically untenable position of becoming the water provider to neighboring cities. In any event, cities have no authority to condemn outside of their boundaries. In *Alliance for Property Rights and Fiscal Responsibility v. City of Idaho F*alls, 742 F.3d 1100 (9th Cir. 2013) (N.R. Smith, J.), the Ninth Circuit, applying Idaho law, ruled that Idaho cities have no general, extra-territorial power of eminent domain under Idaho's eminent domain statute, Idaho Code §§ 7-701 to 7-721 or Idaho's Revenue Bond Act, Idaho Code §§ 50-1027 to 50-1042. The decision relied substantially on the Dillon's rule concept embodied in *Caesar v. State*, 610 P.2d 517 (Idaho 1980) (Donaldson, C.J.).

accountability for how the money is spent.[657] Meanwhile, utilities have little incentive to resist the imposition of these fees because the IPUC allows that cost to be passed through to the customer. See section 32.F on page 790.

D. Authority for cities to grant franchises, collect franchise fees, and otherwise regulate utilities

(1) Overview

The authority of cities to issue franchises and otherwise control utilities that provide services within the city comes in four forms.

1. There is a constitutional provision addressing franchises (which is limited to water providers). See section 32.D(2) on page 767.
2. There is early case law (probably now obsolete) describing an implied authority of cities to grant franchises. See section 32.D(3) on page 769.
3. There are statutes expressly authorizing cities to enter into franchise agreements. See section 32.D(5) on page 779.
4. There are statutes not involving franchises that authorize some municipal control over utilities operating within the city. See section 32.D(4) on page 770.

Today's statutes authorize and control the issuance of franchises and provide other regulatory control over utilities. None of them makes obtaining a franchise or other consent a legal prerequisite in order for a utility to serve customers within a city, unless the utility requires use of city streets or other city property. Utilities operating in Ada County (where cities do not control their streets) need not obtain a franchise or other consent if they are willing to forego the benefits of such an agreement, unless they need to lay new infrastructure in other city property. Where utilities need access to city property, the franchise and consent statutes give cities the ability to set the terms for franchises or other consents and force utilities to accept those terms. But there is no obligation for cities to exercise that leverage. Indeed, some cities elect not to require franchise agreements.[658] In any event, there is a limit to what cities can exact in return for a franchise or other consent. Franchise fees cannot exceed 1% without the agreement of the utility. See section 32.D(5)(b)(ii) on page 781. Arguably, a city may not impose requirements on a utility that are unrelated to the sound and safe provision of services or are otherwise unreasonable.

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[657] In the *Alpert* case, the Idaho Supreme Court found this practice to be lawful. See discussion in section 32.E(2) ("Franchise fees held not to be illegal taxes.") on page 785.

[658] Not all cities require franchise agreements. For example, Veolia has franchise agreements with the cities of Boise and Eagle, but not with Meridian, all of which it serves at least in part.

(2) Constitutional provision addressing franchises granted to water providers

Article 15 of Idaho's Constitution, adopted in 1889, addresses water rights, water providers, and the prior appropriation doctrine.[659] It is curious that an article of the Constitution dealing with water rights contains a reference to franchises, but there it is. Section two of this article sets out a definition of a franchise (for water service) coupled with a requirement that any such franchise be exercised in accordance with law:

> **Right to collect rates a franchise.**—The right to collect rates or compensation for the use of water supplied to any county, city, or town or water district, or the inhabitants thereof, is a franchise, and can not be exercised except by authority of and in the manner prescribed by law.

Idaho Const. art. 15, § 2 (emphasis supplied).

This article spells out no substantive law respecting franchises. Rather, it authorizes the Legislature to regulate franchises granted to private municipal water providers. A decision of the Idaho Supreme Court just five years after statehood confirmed that the constitutional provision is merely descriptive of what a franchise is and contains no mandate or prohibition:

> This section simply announces a general principle, and the first clause amounts only to a definition; that is, that the right to collect rates, etc., for water supplied to any county, city, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except in the manner prescribed by law. . . . In our view of it, this section is not prohibitory at all. It is, as said above, simply a definition.

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[659] The only other constitutional provision dealing with franchises is one dealing with the right to condemn a franchise. It declares that franchises are subject to condemnation:

> The right of eminent domain shall never be abridged, nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals; and the police powers of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the state.

Idaho Const. art. 11, § 8 (emphasis supplied). This provision is odd in that it authorizes the Legislature to condemn a franchise held by a private party. Ordinarily, the Legislature itself does not engage in condemnation.

City of Boise City v. Artesian Hot & Cold Water Co. ("*Artesian I*"), 39 P. 562, 563 (Idaho 1895) (Morgan, C.J.) (emphasis added) (modified on rehearing to address a procedural technicality, *City of Boise City v. Artesian Hot & Cold Water Co.* ("*Artesian II*"), 39 P. 566 (Idaho 1895)). *Artesian I* and related cases are discussed in section 32.D(4) which begins on page 770.

This constitutional reference to franchises should be read in context, which underscores its limited modern applicability. It appears in Article 15 of the Constitution dealing with water rights. It was copied word-for-word (except for the addition of "water district") from article X, section 6 of California's Constitution of 1879.[660] Its purpose in the Idaho Constitution was explained by Professor Colson of the University of Idaho Law School, a noted scholar on the subject:

> There are three important chapters in this story. The first chapter is the 1889 Convention, during which the Idaho Constitution was drafted. The principal challenge to irrigation farmers at the time of the Convention were the privately owned ditch companies appropriating water for resale and distribution to settlers. All six sections of Article XV adopted at the Convention were designed to defeat the challenge by the ditch companies. Waters appropriated by the ditch companies were declared to be a public use, the sale of those waters was a franchise subject to state regulation, and irrigation was declared the exclusive use for those waters. Domestic and agricultural uses were given a preference over prior appropriators.

Dennis C. Colson, *Water Rights in the Idaho Constitution*, 53 Advocate 20, 20 (Dec. 2010) (emphasis added).

In other words, the purpose of the franchise provision was to subject private water providers to such regulation as the Legislature might deem appropriate. Today, that regulation comes primarily in the form of utility regulation. See Idaho Code § 61-526, which requires that a water utility submit to the jurisdiction of the IPUC and be certified before beginning construction or extending its operation.

Professor Colson concluded:

[660] This constitutional language was not the only thing borrowed from California. In *Jack v. Village of Grangeville*, 74 P. 969, 973 (Idaho 1903) (Sullivan, C.J.), the Court noted that the 1887 statute dealing with franchises (see section 32.D(4) on page 770) was lifted directly from California statutes enacted in 1852. This was noted again by the U.S. Supreme Court in *Boise Artesian Hot & Cold Water Co. v. Boise City* ("*Artesian III*"), 230 U.S. 84, 94 (1913) (Lurton, J.).

> The Ditch Companies which so dominated the development of water resources at the time of the 1889 Convention were burdened heavily by the Water Article incorporated into the Constitution. The companies were further damaged in the financial crash of 1893, and disappeared from Idaho shortly after the turn of the century. This, in turn, rendered much of the language in Article XV dead letter.

Dennis C. Colson, *Water Rights in the Idaho Constitution*, 53 Advocate 20, 21 (Dec. 2010) (footnote omitted) (brackets original).[661]

In any event, the effect of the constitutional provision on the few for-profit, commercial water companies in operation today is inconsequential. The Constitution authorizes cities to enter into franchise agreements and makes those agreements subject to legislative control, but it sets out no substantive law or obligation.

(3) Implied authority to award franchises (based on city's right to provide services itself)

Before the enactment of Idaho's general franchise statutes in 1911 and 1913 (see footnote 687 on page 779), the Idaho Supreme Court recognized the implicit authority of cities to enter into franchise agreements based on a city's authority to establish its own municipal water system.[662] "Where a city or village is given power to establish a water system of its own, it would seem that it has power to contract with others for the establishment of a water system, or to buy water for fire and other

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[661] The term "Ditch Companies" used by Professor Colson is a term of art. This *Handbook* and the *Idaho Water Law Handbook* use the term "commercial water companies." Others employ the terms commercial irrigation companies, commercial ditch companies, or carrier ditch companies. They all refer to the same thing: private, for profit companies in the water delivery business. These are in contrast to mutual irrigation companies, irrigation districts, and other non-profit water providers. See *Idaho Water Law Handbook* (chapter on Water Delivery and Management Entities) for a discussion of the law and history of commercial water companies.)

In the early days of Idaho's settlement, commercial water companies were very common. Few remain. "The commercial ditch company's heyday was in the 1880's; almost none persist today." *Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc.*, 447 P.3d 915, 922 (Idaho 2019) (Burdick, C.J.).

To the author's knowledge, the only large private commercial water companies operating in Idaho today are Veolia and PacifiCorp. Based on IPUC filings, it appears that another 20 small commercial water companies (such as Capitol Water Corporation in Boise) provide municipal water to much smaller service areas. All of these are utilities regulated by the IPUC. Veolia and Capitol Water Corporation are municipal water providers serving the Boise area. PacifiCorp is an electric power company that also provides irrigation water, but no municipal water.

[662] Cities are authorized to operate their own utility systems for water, power, light, gas, and other services. Idaho Code §§ 50-323, 50-324, 50-325, and 50-326.

village necessities." *Jack v. Village of Grangeville*, 74 P. 969, 974 (Idaho 1903) (Sullivan, C.J.).

Presumably, the implied authority found by the Court in 1903 has been preempted and replaced by subsequent statutes, beginning in 1911, that explicitly provide general franchise authority.

(4) Statutory authority for non-franchise-based regulation of utilities by cities (Idaho Code §§ 30-801, 39-802, 30-803, 40-2308, and 50-328).

This section addresses six non-franchise statutes, five of which remain on the books. See citation table on page 762.

In addition to these statutes applicable to cities, there is an arcane and presumably no longer operative statute authorizing counties to set water rates.[663]

(a) Overview

In 1887, the Territorial Legislature enacted four statutes under the heading "Water and Canal Corporations" dealing with water supplied to Idaho cities.[664] The first, third, and fourth remain on the books as Idaho Code §§ 30-801, 30-802, and 30-803. The second was repealed sometime between 1908 and 1919.

The first two (Idaho Rev. Stat. §§ 2710 and 2711) are precursors to water utility regulation borrowed nearly verbatim from California statutes enacted in

[663] Chapter 10 of Idaho's Water Code (Idaho Code §§ 42-1001 to 42-1005) is entitled "Fixing Water Rates. The first of them authorizes Idaho counties to set rates for "parties interested in either furnishing or delivering for compensation … water for irrigation or other beneficial purpose." Idaho Code § 42-1001. These statutes were enacted in 1899 and have never been amended or repealed. 1899 Idaho Sess. Laws (aka Gen. Laws), pp. 380-87, § 26. One presumes that this statutory dinosaur was implicitly preempted by the establishment of IPUC authority in 1913 and is a dead letter today. The only reported cases addressing the statute (*Jackson v. Indian Creek Reservoir Ditch & Irrigation Co.*, 16 Idaho 430, 101 P. 814 (1909) and *Green v. Jones*, 22 Idaho 560, 126 P. 1051 (1912)) predate the IPUC. One may only wonder why this statute was not repealed after 1913.

Curiously, this 1899 statute existed at the same time as the 1887 statute giving cities authority to set rates for municipal water companies. 1887 Idaho Rev. Stat. § 2711 (municipal water rates to be set by a commission composed of city and water company representatives). Unlike the 1899 statute, the 1887 statute was repealed. The 1887 statute survived until at least 1908. (It appears in 1908 Idaho Rev. Codes § 2839.) It was repealed sometime before 1919. (It does not appear in the next recodification in 1919.) Thus, its repeal appears to coincide with the creation of the IPUC in 1913. However, from 1899 to at least 1908, two conflicting statutes gave both cities and counties control over water rates.

[664] 1887 Rev. Stat. of Idaho Terr. §§ 2710, 2711, 2712, and 2713 (June 1, 1887).

1852.[665] The latter two are grants of authority to utilities to use city streets and county roads for their infrastructure, subject to reasonable regulation. Of these four 1887 statutes, only the first is relevant to the discussion here. It now codified under the Corporations title as Idaho Code § 30-801. It is discussed in section 32.D(4)(b) on page 772.

In the same year, 1887, the Territorial Legislature enacted a statute addressing the use of city streets by gas, water, and railroad companies.[666] It is now codified under the Highways and Bridges title as Idaho Code § 40-2308. It is discussed in section 32.D(4)(c) on page 776

The only other non-franchise-based statute that authorizes city regulation of utilities is Idaho Code § 50-238, enacted in 1967.[667] It is discussed in section 32.D(4)(d) on page 778.

Of the six non-franchise statutes, three require utilities to obtain some form of consent or permission from a city in order to provide service to customers within the city or to lay infrastructure in city streets or other property: Idaho Code §§ 30-801, 40-2308, and 50-328. They are discussed in turn in the following sections.

Of the remaining three non-franchise statutes, one has been repealed and two contain no mandate that utilities obtain permission of cities. They are discussed in the bullet points below.

- Section 2711 of the 1887 statute was a broad grant of control over utilities, including a much-litigated provision requiring utilities to provide free water for firefighting.[668] It is no longer on the books.[669]
- Section 2712 of the 1887 statute (now Idaho Code § 30-802) is a broad grant of right-of-way to water companies, authorizing them to place

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[665] These 1887 Idaho territorial statutes were based on 1852 Cal. Stats., p. 171 (May 3, 1852). "Said sections 2710 and 2711 were adopted literally from the statutes of California, which California statutes were enacted in May, 1852." *Jack v. Village of Grangeville*, 74 P. 969, 973 (Idaho 1903) (Sullivan, C.J.). *Jack*, in turn, cites *Santa Ana Water Co. v. Town of Buenaventura*, 56 F. 339, 348-49 (S.D. Cal. 1893), which interpreted these California statutes.

[666] 1887 Rev. Stat. of Idaho Terr. § 863 (June 1, 1887). It was later codified at 1908 Rev. Codes of Idaho, § 881. Following the complete revision of Title 40 (dealing with public roads) in 1985, the statute has remained on the books in slightly amended form as Idaho Code § 40-2308.

[667] Idaho Code § 50-328 was enacted as 1967 Idaho Sess. Laws, ch. 439, § 50.

[668] The second (originally 1887 Rev. Stat. § 2711) provided detailed mechanisms for setting rates. It also mandated that private municipal water corporations furnish water for firefighting free of charge—giving rise to litigation.

[669] Section 2711 was amended in 1905 to eliminate the free firefighting water provisions. It was repealed altogether sometime between the codifications of 1908 and 1919.

their pipes in city streets and county roads, so long as they abide by "reasonable rules and directions" of the local government.[670] The statute applies only to streets, alleys, ways, and public roads; it does not apply to the use of other municipal property. The statute gives some regulatory control to local governments over the "mode and manner" of using the right-of-way. Importantly, it gives them no veto power or ability to impose fees or extract concessions. Thus, it cannot be used as leverage by a city to compel a utility to enter into a franchise agreement or to make other concessions. Moreover, it no longer has any applicability to cities in Ada County (which do not own their streets).

- Section 2713 of the 1887 statute (now Idaho Code § 30-803) is a single sentence requiring that waterworks not obstruct public highways.[671] It does not provide any regulatory or other governmental control over municipal water providers.

(b) Idaho Code § 30-801 (consent required to supply water)

The first of the 1887 statutes referenced above reads in full today:

> No corporation formed to <u>supply any city or town with water</u> must do so unless previously <u>authorized by an ordinance</u> of the authorities thereof, or unless it is done <u>in conformity with a contract</u> entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but an exclusive right must not be granted. No contract or grant must be made for a term exceeding fifty (50) years.

Idaho Code § 30-801 (nearly identical to 1887 Rev. Stat. § 2710) (emphasis added).

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[670] It reads in full today: "Any corporation created under the provisions of this title for the purposes named in this chapter, subject to the reasonable rules and directions of the city or town authorities as to the mode or manner of using such right of way within the city or town, and subject to the reasonable rules and directions of the board of county commissioners as to the mode and manner of using any right of way outside the corporate limits of such city or town, may use so much of the streets, alleys and ways in any city or town, or the public roads and highways within the county, as may be necessary for the laying of pipes for conducting water to its consumers, or the building and maintaining of ditches, canals, pipes, flumes and aqueducts in conducting water from outside points to the corporate limits of said city or town." Idaho Code § 30-802 (first enacted as 1887 Rev. Stat. § 2712, with minor amendments thereafter).

[671] It reads in full today: "All waterworks must be so laid and constructed as not to obstruct public highways." Idaho Code § 30-803 (first enacted as 1887 Rev. Stat. § 2713, substantially amended thereafter).

At the outset, it should be noted that section 30-801 and the other 1887 statutes are not franchise statutes.[672] Thus, the permission contemplated by the statute need not come in the form of a franchise.

On its face, the statute requires that private municipal water providers obtain some form of permission from the city before providing water to that city (and presumably to the city's inhabitants[673]). The Court said as much in 1895. "[T]his statute (section 2710) standing at the head of the chapter … absolutely forbids this corporation or any corporation to furnish any water to the city, either free or for a compensation, unless said corporation is previously authorized to do so by ordinance or by contract entered into between the corporation and the city." *City of Boise City v. Artesian Hot & Cold Water Corp.* ("*Artesian I*"), 39 P. 562, 563, (Idaho 1895) (Morgan, C.J.) (modified on rehearing to address a procedural technicality dealing with how the case would be handled on remand, 39 P. 566 (Idaho 1895)).[674] The water company, by the way, is not the same as Boise Water Corporation.[675]

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[672] Idaho Code § 30-801 is entitled "Contracts for municipal water supply." The word franchise appears nowhere in it nor in any of the 1887 statutes. Moreover, although not codified until later, it was eventually codified in Title 30 (dealing with corporations), not title 50 (dealing with the regulatory powers of municipalities). The fact that section 30-801 is not a franchise statute is reinforced by its provision that "an exclusive right must not be granted." Franchises, in contrast, typically are exclusive grants of authority. In addition, the franchise statute (Idaho Code § 50-329), authorizes franchises in excess of 50 years when agreed to by the franchisee. Finally, the conclusion that this is not a franchise statute is confirmed by the Court in *Boise Artesian Hot & Cold Water Co. v. Boise City* ("*Artesian III*"), 230 U.S. 84 (1913) (Lurton, J.), discussed further below. In the context of a discussion of 1887 Rev. Stat. §§ 2710 (now Idaho Code § 30-801), the Court held that Boise City "could not grant a corporate franchise to a water company." *Artesian III* at 91. (Although the appellate decision came down after 1911, *Artesian III* addressed an ordinance adopted in 1889 and a license fee imposed by the city in 1906.) Rather, the Court said, the City acted under authority of section 2710 to adopt an ordinance granting "the right to lay water pipes upon the streets for the purpose of distributing water" which constituted "a contract granting an easement." *Artesian III* at 90 and 91. In other words, the 1887 statute authorizes contracts for easements to city property, not franchise agreements.

[673] It may be that the statute means what it says and applies only to the provision of water to the city itself. The cases discussed in this section all arose in the context of water companies providing water to the City of Boise for firefighting purposes. Read in context with Idaho Code § 30-802, however, it appears likely that the municipal approval is required even if water is not provided directly to the city itself, but only to residents of the city.

[674] In *Artesian I*, a private water provider provided municipal water to the City of Boise and some of its residents. Initially, Boise paid the company for water used in its fire hydrants. After a few years, the city demanded that the water be provided for free. In response, the water company threatened to disconnect its pipes from the city's fire hydrants. The city brought suit seeking injunctive relief. In dictum, the Court upheld the constitutionality of the "free water" requirement, but threw out the City's complaint on procedural grounds. As discussed in section 32.D on page 766, the Court also commented on the meaning of the constitutional provision authorizing franchises for water service (noting that it is definitional, not prohibitory). The water company won on a technicality—bad pleading by the city. The company demurred to the complaint noting that the city

The requirement in section 30-801 that water companies secure city approval before serving customers, although written as an absolute requirement, does not mean that a city may exercise its approval authority arbitrarily, i.e., for purposes of leverage or coercion unrelated to the safe and sound delivery of water within the city. The statute should be read in context with the following section (section 30-802, set out in footnote 671 on page 771). The latter is a remarkably broad grant of right of way allowing private water companies to install their infrastructure under city and county streets. That sweeping grant is coupled with a burden. It subjects water companies to "reasonable rules and directions of the city." Read together, these statutes require a water company to submit to the reasonable regulatory requirements of the city before laying pipe in city streets or serving the city or its inhabitants with water. They do not give the city veto power over who may provide municipal water, so long as the water company meets reasonable requirements relating to public safety and the like.

The limited purpose of the 1887 statutes—requiring that private companies subject themselves to reasonable municipal requirements before placing their infrastructure within city property—is reinforced by the historical context of the statute. There was no public utilities commission until 1913 and, hence, no regulation of water utilities. It was the wild west, and these statutes filled that regulatory void as best they could by giving cities and towns authority to regulate water companies serving their citizens.

These statutes derived from a body of law crafted in gold-rush California and borrowed by Idaho's Framers to provide regulatory control over corporations that appropriate water not for their own use but for resale and distribution to early settlers. See footnote 665 on page 770 and discussion in section 32.G on page 791. See *Bothwell v. Consumers' Co.*, 92 P. 533 (Idaho 1907) (Alshie, C.J.) and *Hatch v. Consumers' Co.*, 104 P. 670 (Idaho 1909) (Alshie, J.). In both cases the Court used these 1887 statutes to address rates charged by the water company. As Professor Colson said with respect to the corresponding constitutional provisions, this pre-IPUC regulatory framework has been rendered a dead letter (see section 32.D(5) on page 779).

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failed to document the existence of any ordinance or contract authorizing the company to provide municipal water to Boise. *Artesian I* at 563 ("the plaintiff has not alleged that said company is authorized to furnish water at all"). The fact that such an agreement existed was not doubted, but the Court felt it necessary to see the agreement. *Artesian I* at 563 ("we think the court should know the exact condition of things between the city and water company, as there may be a contract or ordinance which would affect the character of the decree the court would be authorized to render").

[675] The Artesian Hot & Cold Water Co. (referred to in a subsequent case as Boise Artesian Hot & Cold Water Co.) is not the same as the Boise Water Corporation, a predecessor of Veolia. According to *Wikipedia*, the company's original geothermal wells are now managed by the Boise Warm Springs Water District. Further historical background is provided in an MIT paper: http://web.mit.edu/nature/archive/student_projects/2009/bjorn627/TheGeothermalCity/Boise.html.

In sum, it is a curiosity that section 2710 (now Idaho Code § 30-801) remains on the books. The core function of these four 1887 statutes was to provide a primitive form of regulation of private water providers that was borrowed from pre-Civil War California statutes before the creation of Idaho's public utility commission in 1913[676] and before the first general franchising statutes were enacted in 1911.[677] That purpose has been supplanted by modern public utility statutes[678] which give the IPUC, not cities, authority to decide which companies will provide service to city residents. Accordingly, sections 30-801 and 30-802, should be read together, subjecting water companies to "reasonable rules and directions" necessary to protect the city's interests, not to IPUC-like control over and supervision of service providers.

Only three cases have mentioned 1887 Rev. Stat. § 2710 (the predecessor to Idaho Code § 30-801). All of them are over 100 years old. In addition to *Artesian I*, discussed above, section 2710 was addressed in *Jack v. Village of Grangeville*, 74 P. 969, 974 (Idaho 1903) (Sullivan, C.J.)[679] and *Boise Artesian Hot & Cold Water Co. v. Boise City* ("*Artesian III*"), 230 U.S. 84 (1913) (Lurton, J.).[680] In each case, the focus

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[676] See footnote 665 on page 771.

[677] See footnote 687 on page 779.

[678] As for companies that provide services not regulated by the IPUC, cities retain broad authority to regulate their rates pursuant to their franchise authority. Idaho Code § 50-330 (discussed in section 32.D(5)(b)(iii) on page 783).

[679] In *Jack*, the Court recited the text of the first three sections of the 1887 statute, but the decision addressed only section 2711, the same "free water" provision discussed in *Artesian I* and *Artesian III*. Prior to 1898 the Village of Grangeville had no municipal water and consequently suffered from devastating fires and outbreaks of contagious disease. *Jack* at 969. In 1898, the village enacted authorizing ordinances and entered into a contract with Mr. Jack's predecessors for the provision of water to the city. The first ordinance authorized Messrs. Orchard and Graham to construct and operate the waterworks and to occupy the village's streets for a period of 30 years. The ordinance set the rates that could be charged to customers. It expressly provided that the rights given to Orchard and Graham were not exclusive. *Jack* at 970. The ordinance granted to the village an option to purchase the completed waterworks after ten years of operation at a price set by a formula in the ordinance. *Id.* The second ordinance was essentially a 30-year contract for the delivery of water to the village for firefighting. It also specified various conditions to be met by the waterworks in order that it may provide a water supply for up to 3,000 inhabitants. *Jack* at 970-71. The waterworks were constructed and everything went swimmingly until the Village elected new commissioners in 1902. They announced that the village would make no further payments to Mr. Jack for water used in its fire hydrants because the village was entitled to such water free of charge under section 2711. *Jack* at 972. Jack sued the city to recover $249.99 for hydrant water. The Court ruled in his favor, noting that the 1877 statutes requiring free water apply only to corporations, not to natural persons. *Jack* at 973. The Court never addressed the meaning or effect of section 2710.

[680] *Artesian III* was a decision of the U.S. Supreme Court. (The case reached the U.S. Supreme Court via an old statute granting direct appeal to that Court in cases alleging violation of the U.S. Constitution by a state statute. *Artesian III* at 90.) It addressed the "free water" statute (section 2711)—which continued to be a source of quarreling ever since *Artesian I*. In May 1906,

was on section 2711, not section 2710. Section 2711 (which required companies to provide free water for firefighting) no longer exists.

It bears emphasis that, whatever the 1887 statutes do, they do not mandate franchise agreements. To the extent section 30-801 has not been implicitly preempted by more recent and specific statutes governing municipal water providers and by Idaho Code § 50-330, compliance with section 30-801 may come in a variety of ways. For example, the consent requirement may be met by being certified by a city as a Designated Water Provider (see discussion in 32.G(4)(b) on page 794).

(c) Idaho Code § 30-2308 (consent required to lay infrastructure in city streets and squares)

The last of the five 1887 statutes listed above (now Idaho Code § 40-2308) reads in full today:

> Every gas, water, or railroad corporation has the power to lay conductors and tracks through the public ways and squares in any city with the consent of the city authorities, and under reasonable regulations and for just compensation, as the city authorities and the law prescribe.

Idaho Code § 40-2308 (nearly identical to 1887 Rev. Stat. § 863).

In the words of the statute itself, consent is required only to "lay conductors and tracks through the public ways and squares in any city." Two important points flow:

First, the statute applies only to new infrastructure at the time it is laid (placed) in city streets. If a city consented or acquiesced at the time the infrastructure

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Boise notified Artesian that it would no longer pay for water supplied to its fire hydrants. The next month, it adopted an ordinance requiring the water company to pay the city a "license fee" of $300/month for the use of its streets. *Artesian III* at 88, 92 . The Supreme Court held that the new license fee was in derogation of the license granted to the water company's predecessors in 1889, which was a substantial property right and not a mere revocable license. The Court also held that the 1889 license, if subject to section 2710, did not violate that statute's 50-year limit because it was of indefinite duration. *Artesian III* at 92. The Court then turned to the "free water" provision in section 2711. Here, Boise City had put itself in an awkward position. It notified Artesian that the city no longer needed water for firefighting, yet it continued to use water for that purpose. In response to the city's argument that its notice meant that Artesian had lost any contract right to be paid for firefighting water, the Court found the city's continued use of the water constituted an implied contract. Notably, the Court did not mention there being a need for a contract under section 2710. *Artesian* at 97. This was addressed purely as a matter of contract law, not a statutory obligation to secure a contract. The Court also observed that, in any event, the Legislature repealed the "free water" provision in 1905. *Artesian* at 93.

was laid, it has no power under the statute to bar the ongoing use of that infrastructure by the utility.

Second, in Ada County, where cities no longer own or control city streets, no consent is required at all unless new infrastructure is to be laid on the city's public squares (i.e., parks).[681]

Three cases have addressed section 40-2308. They offer nothing to change the conclusion laid out above.

- The first was *Trueman v. Village of St. Maries*, 123 P. 508 (Idaho 1912). The case was brought by two businessmen who sought damages against St. Maries when the village vacated a street and granted a franchise and right-of-way to a railroad company. The predecessor of Idaho Code § 40-2308 (1908 Rev. Codes of Idaho § 881) was identified as one of several bases justifying the city's action and defeating the damage claim.

- The second case was *Village of Lapwai v. Alligier*, 299 P.2d 475 (Idaho 1956) (Taylor, C.J.). It simply observed that gas, water, and railroad companies must obtain the consent of a city to lay infrastructure on city streets.[682]

- The last case to address the statute is *Alpert*. It did not identify section 30-2308 as a franchise statute. But it described section 30-2308 as laying the historical foundation for the franchise statute, Idaho Code § 50-329, noting that section 30-2308 requires that "utilities obtain consent from the cities to operate a service utility" and "provides for

[681] The words of the section 40-2308 refer to "the public ways and squares in any city." Ada County cities might contend that the consent requirement still applies because the streets are still public ways even though owned by ACHD. However, it seems unlikely that a court would deem a consent and just compensation requirement applicable to something the city no longer owns. No compensation would be just, and withholding consent for use of something the city does not own or control would be difficult to justify.

[682] The Court observed:

> Moreover, the legislature, in providing for the use of streets and alleys by utilities, expressly required the consent of the municipal authorities, and authorized the municipal authorities to impose reasonable regulations upon such use. § 40-305, I.C. [now Idaho Code § 40-2308]. Thus, the legislature recognizing the duty it imposes upon the municipality to control and maintain its streets and alleys, has preserved to the municipality the power to deny their use to a utility, or to impose reasonable regulations thereon, when necessary to the use of such streets and alleys by the public in the usual manner.

Lapwai at 478 (quoted in *Alpert v. Boise Water Corp.*, 795 P.2d 298, 305 (Idaho 1990) (Boyle, J.)).

just compensation to be paid by the utility." *Alpert* at 304. That is certainly true, but it is triggered only if the utility seeks to lay new infrastructure within city streets and squares. *Alpert* is discussed in detail in section 32.E on page 784.

(d) Idaho Code § 50-328 (authority to regulate utility transmission systems using city streets or other property)

The last of the non-franchise statutes listed above is Idaho Code § 50-328. Unlike the 1887 statutes, this is a modern statute. It was enacted by 1967 as part of a comprehensive revision of Title 50 (the municipal code).[683] It reads in full:

> All cities shall have power to permit, authorize, provide for and regulate the erection, maintenance and removal of utility transmission systems, and the laying and use of underground conduits or subways for the same in, under, upon or over the streets, alleys, public parks and public places of said city; and in, under, over and upon any lands owned or under the control of such city, whether they may be within or without the city limits.

Idaho Code § 50-328 (enacted in 1967 Idaho Sess. Laws, ch. 429, § 50) (emphasis added).

It is now codified adjacent to the franchise statutes (Idaho Code §§ 50-329, 50-329A, and 50-330). However, it makes no reference to franchises. Instead, it authorizes cities to regulate the placement of "utility transmission systems" within or under city streets and other city property. Indeed, the *Alpert* case did not list this statute among those authorizing franchises.[684] Instead, it described section 50-328 as dealing with "the regulation of utility transmission systems." *Alpert* at 305.

It gives cities authority to permit and regulate the provision of services by utilities, to the extent the utility needs to place its infrastructure within any streets or other property owned by the city. Note that this applies to any city property inside or outside the city, in contrast to Idaho Code § 40-2308 (which applies only to a city's "public ways and squares."

The reference to the city's power to "authorize" utility transmission systems using city property presumably equates to a consent requirement. This may be seen

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[683] Unlike the other statutes addressed here, Idaho Code § 50-328 appears to have no predecessor prior to its enactment in 1967. Nor has it been amended since then.

[684] *Alpert* cited Idaho Code §§ 50-329 and 50-330 as the only franchise statutes. "Furthermore, I.C. §§ 50–329 and –330 confer on the cities the authority to grant franchises …." *Alpert* at 303. Idaho Code § 50-329A had not yet been enacted.

as a veto power. On the other hand, cities arguably may not withhold consent unreasonably (i.e., to coerce concessions on issues unrelated to the reasonable regulation of the transmission infrastructure).

(5) Statutory authority for municipal franchises.

This section addresses the six general franchise statutes, three of which remain on the books. See citation table on page 761.

(a) Precursors to the current statutes

Idaho's first franchise statutes dealt with toll roads. Dating to the Civil War, these were among the earliest territorial statutes.[685] As is often the case with archaic laws, they remained on the books for over a century (until 1985).

In 1887, the Territorial Legislature adopted miscellaneous statutes under the heading "Sale of Franchises on Execution" addressing the corporate law side of municipal franchises.[686] They remain on the books, under the same heading, as Idaho Code § 30-201 to 30-206. These statutes are of no relevance to the authority of cities to grant municipal franchises.

The first general franchise statutes (i.e., statutes authorizing or regulating municipal authority to grant franchises generally, not just for toll roads) were enacted in 1911 and 1913.[687] The 1911 and 1913 laws remained intact in various

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[685] The toll road statutes were adopted in 1864 and 1867, 4 Idaho Terr. Sess. Laws (1867), ch. 64, §§ 1-4; 2 Idaho Terr. Sess. Laws (1864), ch. 440, § 10 & 13, 3 Idaho Terr. Sess. Laws (1866), ch. 179, § 2, ch. 181, § 1. They were re-codified over the years under the heading entitled "Miscellaneous Provisions Relating to Toll Roads, Bridges and Ferries" (since 1908). 1887 Idaho Rev. Stat. of Idaho Terr. §§ 1120-1123, 1128-1131); 1908 Rev. Codes of Idaho, §§ 1041 to 1048; Idaho Code §§ 39-1301 to 39-1308 (1932); 40-1401 to 40-1408 (1948). These long-obsolete statutes were not scrubbed from the code until 1985 when Title 40 (the municipal code) was entirely re-written. H.B. 265, 1985 Idaho Sess. Laws, ch. 253.

[686] 1887 Idaho Rev. Stat. §§ 2642-2647; 1908 Rev. Codes of Idaho, §§ 2778 to 2783; Idaho Code §§ 29-201 to 29-206 (1932). These statutes are no longer on the books.

[687] The first general franchise statutes were enacted in 1911 and 1913:

- 1911 Idaho Sess. Laws, ch. 82, §§ 52-70 and 73 (subd. 3) (codified until 1967 in relevant part at Idaho Code §§50-4102 to 50-4125 and 50-4203(3)).
- 1913 Idaho Sess. Laws, ch. 74, §§ 24 (subd. 20) and 25 (codified until 1967 in relevant part at Idaho Code §§ 50-146 and 50-149).

The 1911 statute was premised squarely on city control of city streets. The term "franchise" was expressly defined in terms of the right to use a city's streets. 1911 Idaho Sess. Laws, ch. 82, § 73 (subd. 3) (codified until 1967 at Idaho Code § 50-4203(3)). It expressly allowed cities to monetize the issuance franchise, going so far as to require cities to essentially auction off franchises to the highest bidder. 1911 Idaho Sess. Laws, ch. 82, § 54 (codified until 1967 at Idaho Code §§ 50-4104 to 50-4109).

The 1913 statute established procedures for granting franchises and authorizing cities to regulate rates charged by franchisees.

codifications until they were re-written, with substantial changes, as part of a comprehensive recodification of the entire municipal code in 1967.

The successors to the 1911 and 1913 franchise statutes are now codified to Title 50 (the municipal code) at Idaho Code §§ 50-329, and 50-329A and 50-330.[688] These three statutes are included in the chapter dealing with "Powers" of cities. Two of these (sections 50-329 and 50-330) were enacted in 1967.[689] The franchise fee statute (section 50-329A) was not enacted until 1995.[690]

(b) The current franchise statutes (Idaho Code §§ 50-329, 50-329A, and 50-330)

(i) Idaho Code § 50-329 (procedural rules governing the granting and duration of franchises)

The full text of Idaho Code § 50-329 is set out in the footnote.[691] Technically speaking, the words of this section do not state that cities are authorized to grant

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The fact that there were no general franchise statutes prior to 1911 is confirmed by the Court in *Artesian III* at 91 ("[Boise City] could not grant a corporate franchise to a water company."). Although the appellate decision came down in 1913, *Artesian III* addressed an ordinance adopted in 1889 and a license fee imposed by the city in 1906, which was before the first general franchise statutes were adopted in 1911.

[688] Idaho Code § 50-328 (discussed in section 32.D(4)(d) on page 778) is codified next to the Title 50 franchise statutes, but it is not a franchise statute. See footnote 684 on page 778.

[689] Section 50-329 was enacted by 1967 Idaho Sess. Laws, ch. 429, § 25 and amended by 1995 Idaho Sess. Laws, ch. 226, § 1. Section 50-328 was enacted as part of this group of statutes by 1967 Idaho Sess. Laws, ch. 429, § 24

[690] Section 50-329A was enacted by H.B. 329, 1995 Idaho Sess. Laws, ch. 226, § 2, and amended by H.B. 806, 1996 Idaho Sess. Laws, ch. 246, § 1. Note that this statute did not exist at the time *Alpert* was decided.

[691] Section 50-329 reads in full:

> No ordinance granting a franchise in any city shall be passed on the day of its introduction, nor for thirty (30) days thereafter, nor until such ordinance shall have been published in at least one (1) issue of the official newspaper of the city; and after such publication, such proposed ordinance shall not thereafter and before its passage be amended in any particular wherein the amendment shall impose terms, conditions or privileges less favorable to the city than the proposed ordinance as published; but amendments favorable to the city may be made at any time and after publication; provided that an ordinance granting a franchise to lay a spur, railroad track or tracks connecting manufacturing plants, warehouses or other private property with a main railroad line, need not be published before the same is passed by the council. No franchise shall be created or granted by the city council otherwise

franchises. Rather, the statute sets out limitations on how cities may issue franchises. For example, it provides that municipal franchises shall be for terms of 10 to 50 years, unless a shorter or longer period is agreed to by the utility.[692]

That said, the authority to grant franchises is implicit, and the statute has been interpreted as a grant of franchise authority. "Furthermore, I.C. §§ 50–329 and –330 confer on the cities the authority to grant franchises . . . ." *Alpert* at 303.

However, this authority to grant franchises includes no mandate that cities must issue franchises or that utilities obtain them prior to the provision of services. Note that *Alpert* dealt with franchise agreements entered into voluntarily by cities and utilities. (See discussion in section 32.E on page 784.) In a challenge brought by customers, *Alpert* found these voluntary franchises were lawful. *Alpert* did not discuss whether franchises are mandatory.

As a practical matter, however, cities that control city streets may leverage their authority to grant franchises to demand that utilities enter into franchise agreements and pay franchise fees. But Ada County cities do not have that leverage. See discussion in section 32.G ("Utilities are not obligated to enter into franchise agreements.") on page 791.

(ii) Idaho Code § 50-329A (franchise fees)

The second franchise statute is section 50-329A. It was enacted in 1995, decades after the other franchise statutes.[693] It sets the rules for franchise fees. It is

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> than by ordinance, and the passage of any such ordinance shall require the affirmative vote of one-half (½) plus one (1) of the members of the full council. Franchises created or granted by the city council for electric, natural gas or water public utilities, as defined in chapter 1, title 61, Idaho Code, or to cooperative electrical associations, as defined in section 63-3501(a), Idaho Code, shall be for terms of not less than ten (10) years and not greater than fifty (50) years unless otherwise agreed to by the utility or cooperative electrical association. All publications of ordinances granting a franchise, both before and after passage, shall be made at the expense of the applicant or grantee. Where an ordinance granting a franchise is sought to be amended after the same has been in force, the provisions of this section as to publication, before final action upon such amendment, shall apply as in cases of proposed ordinances granting original franchises.

Idaho Code § 50-329 (enacted in 1967 Idaho Sess. Laws, ch. 429, § 25, amended by 1995 Idaho Sess. Laws, ch. 226, § 1).

[692] This limit on the duration of franchise agreements was added in 1995 by the same bill that added the section on franchise fees discussed below. H.B. 329, 1995 Idaho Sess. Laws, ch. 226.

[693] Section 50-329A reads in full:

(1) This section applies to franchises granted by cities to electric, natural gas and water public utilities, as defined in chapter 1, title 61, Idaho Code, and to cooperative electrical associations, as defined in subsection (a) of section 63-3501, Idaho Code, which provide service to customers in Idaho and which shall also be known as "public service providers" for purposes of this section. Notwithstanding any other provision of law to the contrary, cities may include franchise fees in franchises granted to public service providers, only in accordance with the following terms and conditions:

(a) Franchise fees assessed by cities upon a public service provider shall not exceed one percent (1%) of the public service provider's "gross revenues" received within the city without the consent of the public service provider or the approval of a majority of voters of the city voting on the question at an election held in accordance with chapter 4, title 50, Idaho Code. In no case shall the franchise fee exceed three percent (3%), unless a greater franchise fee is being paid under an existing franchise agreement, in which case the franchise agreement may be renewed at up to the greater percentage, with the consent of the public service provider or the approval of a majority of voters of the city voting on the question at an election held in accordance with chapter 4, title 50, Idaho Code. For purposes of this section, "gross revenues" shall mean the amount of money billed by the public service provider for the sale, transmission and/or distribution of electricity, natural gas or water within the city to customers less uncollectibles.

(b) Franchise fees shall be collected by the public service provider from its customers within the city, by assessing the franchise fee percentage on the amounts billed to customers for the sale, transmission and/or distribution of electricity, natural gas or water by the public service provider within the city. The franchise fee shall be separately itemized on the public service provider's billings to customers.

(c) Cities collecting franchise fees shall also be allowed to collect user fees from consumers located within the city in the event such consumers purchase electricity, natural gas or water commodities and services from a party other than the public service provider. The user fee shall be assessed on the purchase price of the commodities or services, including transportation or other charges, paid by the consumer to the seller and shall be collected by the city from the consumer. Except as provided in this subsection, user fees shall be subject to all of the same terms, rates, conditions and limitations as the franchise fee in effect in the city and as provided for in this section. This subsection shall not apply to a consumer to the extent that consumer is purchasing commodities and services from a party other than the public service provider on the effective date of this act, only until such time that the existing franchise agreement for the city in which the consumer is located either expires or is renegotiated.

limited to electric, gas, and water franchises. As with section 50-329, section 50-329A does not mandate the use of franchises.

Prior to 1995, there was no limit on the size of a franchise fee. Fees of 5% were not unheard of.[694] The franchise fee statute was amended by H.B. 329, 1995 Idaho Sess. Laws, ch. 226 to add limits on the size of fees.

Specifically, it states that fees shall not exceed 1% without the consent of the utility (or approval of voters), but may be as high as 3% with such consent or voter approval. Idaho Code § 50-329A. In other words, if the utility and the city are not in agreement, the city may present a "take it or leave it" offer of no higher than 1%. In most parts of Idaho, the utility will have no option but to take the offer. In Ada County (where utilities do not need a franchise agreement to place infrastructure in city streets), a utility has the ability to decline the offer and operate without the benefits and burdens of a franchise agreement. See discussion in section 32.G ("Utilities are not obligated to enter into franchise agreements.") on page 791.

(iii) Idaho Code § 50-330 (rate-setting)

The third franchise statute, Idaho Code § 50-330 authorizes cities to regulate the rates and charges of a municipal franchisee, but only if the franchisee is not governed by the IPUC. Accordingly, it appears that this statute would apply to cable

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> (d) Franchise fees shall be paid by public service providers within thirty (30) days of the end of each calendar quarter.
>
> (e) Franchise fees paid by public service providers will be in lieu of and as payment for any tax or fee imposed by a city on a public service provider by virtue of its status as a public service provider including, but not limited to, taxes, fees or charges related to easements, franchises, rights-of-way, utility lines and equipment installation, maintenance and removal during the term of the public service provider's franchise with the city.
>
> (2) This section shall not affect franchise agreements which are executed and agreed to by cities and public service providers with an effective date prior to the effective date of this act.

Idaho Code § 50-329A (enacted as H.B. 329, 1995 Idaho Sess. Laws, ch. 226, § 2, amended by H.B. 806, 1996 Idaho Sess. Laws, ch. 246, § 1).

[694] In *City of Hayden v. Washington Water Power Co.*, 700 P.2d 89 (Idaho 1985) (per curium), Hayden sought to impose a 5% franchise fee.

The City of Boise and United Water Idaho (now Veolia Water Idaho, Inc.) were on the verge of increasing the franchise fee to 4% (and later to 5%) when the 1995 legislation limiting fees to 3% was enacted. See *In the Matter of United Water Idaho's Tariff Advice To Increase Customer Rates to Recover the City of Boise's 4% Franchise Fee*, 2003 WL 27091225 (Nov. 3, 2003).

TV, internet, and cellular companies.[695] But it has no applicability to private water, gas, or electric companies, which are regulated by the IPUC.

E. The *Alpert* case—Franchise agreements and fees are lawful, even in Ada County

The only significant modern case on the lawfulness of franchise agreements and fees is *Alpert v. Boise Water Corp*., 795 P.2d 298 (Idaho 1990) (Boyle, J.). This was a class action case challenging franchise agreements entered into by the cities of Boise, Meridian, Eagle, Kuna, and Garden City with the water and gas companies serving those cities.[696] Under these agreements, the utilities paid a franchise fee to each city which, in turn, was passed along by the utility to its customers in that city. Utility customers (who objected to paying the fee) challenged the agreements on various grounds including (1) antitrust violations, (2) an illegal tax claim, and (3) the city's lack of control over city streets (the ACHD issue). The first two are issues applicable to cities everywhere in Idaho. The third is unique to cities in Ada County.

(1) Franchises do not violate state antitrust laws.

The district court rejected the plaintiffs argument that the cities' franchise agreements violate state and federal antitrust laws. For some reason, only the state antitrust claim was pressed on appeal. Relying on *Denman v. Idaho Falls*, 4 P.2d 361 (Idaho 1931) (Budge, J.),[697] the Court found that "Idaho antitrust laws do not apply to municipal corporations." *Alpert* at 303-04. The *Denman* Court held that "it was clearly the intention of the legislature that the use of the word "corporation"

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[695] According to the IPUC's website, "The Commission does NOT regulate utility cooperatives (owned by the customers) or utilities operated by cities. The Commission has no jurisdiction over sewer operations, cable or satellite television, Internet service providers or cellular telephone companies." https://puc.idaho.gov/Page/Info/35#:~:text=The%20Commission%20has%20no%20jurisdiction,providers%20or%20cellular%20telephone%20companies.

[696] Plaintiffs filed a class action suit naming the five cities and the three utilities as defendants. At the time, defendants Boise Water Company (a predecessor of Veolia) and Capitol Securities Water Corp. (a predecessor of Capital Water Corp.) had franchise agreements only with Boise. Defendant Intermountain Gas Company had franchise agreements with each of the five cities. *Alpert* at 300. ACHD was allowed to intervene; it argued that ACHD, rather than the cities, was authorized to grant franchises because it controls the streets in Ada County. The district court upheld the franchise agreements and denied plaintiffs' request to certify a class action. In addition to addressing the merits, the case involved two significant jurisdictional rulings. On appeal, the Idaho Supreme Court found that plaintiffs had standing to bring the suit. *Alpert* at 301-302 (relying on *Miles v. Idaho Power Co.*, 778 P.2d 757, 778 (Idaho 1989) (Johnson, J.)). In another jurisdictional ruling, the Court rejected the procedural defense that only IPUC has jurisdiction to resolve the franchise fee issues. *Alpert* at 302.

[697] In *Denman*, the Court upheld the right of Idaho Falls to essentially drive out of business a private natural gas company that was competing with the city's own electric utility.

therein was to be limited to private corporations and not to include municipal corporations . . . ." *Denman* at 362.

Given the absolute immunity granted to cities by *Denman*, it is unclear why the Court then proceeded to apply general principles of antitrust law articulated by the U.S. Supreme Court and a legal encyclopedia (which do not grant absolute immunity but call for a probing examination of state policy on the subject). "[M]unicipalities, unlike the state, are not necessarily shielded from liability under the antitrust laws unless the municipality acts pursuant to an affirmatively expressed state policy to displace competition with regulation or monopoly public services." *Alpert* at 303. The Court found that Idaho's pro-monopoly policy is expressed in various statutes authorizing cities to provide utility services and enter into franchise agreements. *Id.*

In any event, whichever path of legal reasoning is followed (statutory interpretation under *Denman* or policy analysis), the outcome is the same. Municipal franchises do not violate state antitrust laws, notwithstanding the fact that they often grant monopolistic privileges and raise prices by imposing additional fees.

(2) Franchise fees held not to be illegal taxes.

Plaintiffs and intervenor ACHD argued that franchise fees are illegal taxes, because they are not based on the value of a service provided.[698]

The "illegal tax" case law is premised on the fact that Idaho is a Dillon's Rule state, meaning that Idaho cities are not "home rule" cities.[699] Instead, Idaho cities have only those powers expressly granted or clearly implied by the Idaho Constitution or state statute.

The constitutional grant of police power to municipalities is self-executing (requiring no legislative action). Idaho Const. art. XII, § 2. In contrast, the power of municipalities to impose taxes requires legislative action. Idaho Const. art. VII, § 6. Hence, a body of law has emerged to distinguish lawful fees from illegal taxes.[700] Accordingly, if a fee imposed by a municipality has the attributes of a tax (i.e., it is not a fee for a service provided nor a regulatory fee authorized by the police power) and it is not expressly authorized by statute, it is deemed an illegal tax.

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[698] To put a finer point on it, ACHD did not contend that all franchise fees are illegal taxes. Indeed, it sought to grant franchises and impose its own franchise fees. "ACHD specifically sought to have the franchise contracts invalidated because the Cities provided no consideration in exchange for fees received, due to their lack of ownership of the city highways and rights-of-ways after the creation of ACHD in 1971." ACHD's brief on appeal, 1989 WL 1820848 at *9.

[699] Dillon's Rule is named after Chief Judge Dillion of the Iowa Supreme Court, whose decisions and writing on the subject have been adopted in a minority of states, including Idaho.

[700] This subject is discussed in section 29 ("User Fees, Impact Fees (IDIFA), and the "Illegal Tax" issue") on page 651.

If *Alpert* were decided today, there would be no need to look beyond Idaho Code § 50-329A, which expressly authorizes franchise fees. But *Alpert* was decided in 1990, five years before the enactment that statute. Because there was no express authorization for a franchise fee at the time, the *Alpert* Court went through the illegal tax analysis. The Court rejected the illegal tax claim, declaring that franchise fees are lawful because they are "reasonable compensation" for the deal struck in which a city agrees not to compete with the utility:

> The district court correctly held that the charge imposed was not a tax but was contract consideration for the franchise granted. We agree. The three percent charge is valid consideration for the cities granting the franchises and agreeing not to compete with the utilities. … The three percent surcharge is simply a payment in consideration for the franchise to operate the utilities by the various municipalities. The charging of a fee for the utility franchise is reasonable compensation and consideration to the cities as expressly allowed by art. 15, § 2 of the Idaho Constitution and I.C. § 40–2308.
>
> …
>
> … In addition, the franchise agreements in this case provide that the municipalities or cities will not compete with the utilities in providing these services.

Alpert at 306-07 (emphasis added).

The only illegal tax fee case discussed by the Court was *Brewster v. City of Pocatello*, 768 P.2d 765 (Idaho 1988) (Shepard, J.). *Brewster* struck down the City of Pocatello's street restoration and maintenance fee as an illegal tax because it was unconnected to any individual service provided to the fee payer. One might think the same logic would apply in *Alpert*, but the Court brushed aside *Brewster*, explaining that in *Alpert* the fee paid by each customer was related to the amount of water or gas consumed:

> The three percent franchise fee is not imposed on the residents directly by the cities, but is paid by the utilities to the cities and as a cost of business is then passed on to the consumers by the utilities. . . . The water and gas services provided by the utilities in this case are based on consumption and use by the resident. . . . As such the tax imposed in *Brewster* is clearly distinguishable from the fee charged on the accounts of the consumers of the utility service presented in this case.

Alpert at 307 (emphasis added).

The *Alpert* Court evidently was unconcerned that the franchise fee is a surcharge on an otherwise reasonable utility fee. The underlying utility fee reflects the value of service provided, but the surcharge does not. The surcharge is a product of negotiation in which the cities are given all the bargaining leverage and use it in ways unrelated to any costs they incur.[701] The *Alpert* Court said it was reasonable for cities to use that leverage to maximize the fee because "the cases, statutes and the Idaho Constitution cited herein clearly allow the charging of a reasonable fee for granting a franchise to a utility." *Alpert* at 307. In other words, because cities have something valuable to trade (e.g., their promise not to compete) franchise fees are automatically reasonable.

That conclusion is difficult to reconcile with subsequent decisions on illegal taxes. The *Alpert* Court's conclusion that franchise fees do not have the attributes of a tax is a head-scratcher today, because such fees are so obviously unrelated to any service provided by the city or to the cost of a regulatory program. But the case is easier to understand in historical context. At the time of the decision in 1990, the law of illegal taxes was in its infancy. There is now a well-developed body of law holding that revenue-generating measures (other than fees and taxes expressly authorized by the Legislature) that are unrelated to the cost of a service provided or a regulatory function are illegal taxes. That case law would suggest that to be "reasonable" a franchise fee must reflect something other than raw bargaining power. Instead, it should bear some relation to the cost of supervision or administration of the franchisee undertaken by the city.

However, most of this case law did not exist at the time of *Alpert*. *Brewster* (a slip opinion at the time *Alpert* was briefed) was only the second case in the history of the State to actually find an illegal tax (the first being in 1923).[702] The great body of

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[701] In a deposition briefed to the Court, the Mayor of Kuna was asked how the franchise fee related to any supervision, regulation, or service provided by the City. He responded: "I don't think that it relates at all." *Appellant Alpert's Opening Brief*, 1989 WL 1821160, *9 (Feb. 9, 1989).

[702] The only case prior to *Brewster* to declare an illegal tax was *State v. Nelson*, 213 P. 358, 361 (Idaho 1923) (Lee, J.) (striking down the City of Rexburg's license tax on physicians and other occupations on the basis that it was purely revenue generating and unrelated to regulation).

A handful of pre-*Brewster* cases addressing the subject followed *Nelson*, but they all upheld the cities' actions: *Foster's Inc. v. Boise City*, 118 P.2d 721, 728 (Idaho 1941) (Ailshie, J.) (upholding parking meter fees as a proper regulatory fee); *Schmidt v. Village of Kimberly*, 256 P.2d 515 (Idaho 1953) (Taylor, J.) (upholding the constitutionality of the Revenue Bond Act in a "friendly" declaratory judgment action aimed at resolving the concerns of bond brokerages); *State v. Bowman*, 655 P.2d 933 (Idaho 1982) (upholding an annual license fee for dance halls as a lawful regulatory fee) (Walters, J.); *Sun Valley Co. v. City of Sun Valley*, 708 P.2d 147, 150 (Idaho 1985) (Donaldson, J.) (upholding local option resort city tax law authorized by Idaho Code §§ 50-1043 to 40-1049); *City of Hayden v. Washington Water Power Co*., 700 P.2d 89 (Idaho 1985) (per curium) (declaring unlawful the city's unilateral amendment of its franchise agreement to add a franchise fee); *Kootenai Cnty. Property Ass'n v. Kootenai Cnty.*, 769 P.2d 553 (1989) (Bakes, J.) (upholding a mandatory solid waste disposal fee as a reasonable fee and not an illegal tax).

case law on illegal taxes was developed after *Alpert*.[703]

(3) Cities in Ada County retain their authority to enter into franchise agreements notwithstanding ACHD's county-wide control over streets.

Intervenor ACHD took a different tack than the plaintiffs (who focused on illegal tax and antitrust arguments). ACHD offered a third argument. It contended that cities in Ada County lost their authority to enter into franchise agreements in 1971 and that ACHD became authorized to do so instead. This argument is premised on the fact that franchise agreements include a grant of access allowing the utility to use the city's streets to install its infrastructure (typically combined with a promise not to compete).

In 1971, ownership and control of all city streets within Ada County was turned over to ACHD by operation of law.[704] Idaho Code § 40-1410(2)[705] Thus, ACHD became the owner of whatever interest (fee or right-of-way) the cities previously held in their streets. ACHD contended this implicitly overrode the

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[703] These are post-*Alpert* cases dealing with illegal taxes: *Loomis v. City of Hailey*, 807 P.2d 1272 (Idaho 1991) (Boyle, J.); *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene* ("*IBCA*"), 890 P.2d 326 (Idaho 1995) (Trout, J.); *City of Chubbuck v. City of Pocatello*, 899 P.2d 411 (Idaho 1995) (Reinhardt, J. Pro Tem.); *Building Contractors Ass'n of Southwestern Idaho, Inc. v. IPUC*, 916 P.2d 1259 (Idaho 1996) (Schroeder, J.); *Waters Garbage v. Shoshone Cnty.*, 67 P.3d 1260 (Idaho 2003) (Eismann, J.); *Plummer v. City of Fruitland*, 87 P.3d 297, 300 (Idaho 2004) (Trout, J.); *Potts Const. Co. v. N. Kootenai Water Dist.*, 116 P.3d 8 (Idaho 2005) (Schroeder, C.J.); *Schaefer v. City of Sun Valley*, Case No. CV-06-882 (Idaho, Fifth Judicial Dist., July 3, 2007) (Robert J. Elgee, J.); *Mountain Central Bd. of Realtors, Inc. v. City of McCall*, Case No. CV 2006-490-C (Idaho, Fourth Judicial Dist., Feb. 19, 2008) (Thomas F. Neville, J.); *Cove Springs Development, Inc. v. Blaine Cnty.*, Case No. CV-2008-22 (Idaho, Fifth Judicial Dist., July 3, 2008) (Robert J. Elgee, J.); *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 233 P.3d 118 (Idaho 2010) (Eismann, C.J.); *Lewiston Independent School Dist. No. 1 v. City of Lewiston*, 264 P.3d 907, 912 (Idaho 2011) (W. Jones, J.); *Buckskin Properties, Inc. v. Valley County*, 300 P.3d 18 (Idaho 2013) (J. Jones, J.); *Alliance for Property Rights and Fiscal Responsibility v. City of Idaho Falls*, 742 F.3d 1100, 1105 (9th Cir. 2013); *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J); *Hill-Vu Mobile Home Park v. City of Pocatello*, 402 P.3d 1041 (Idaho 2017) (Eismann, J.); *Manwaring Investments, L.C. v. City of Blackfoot*, 405 P.3d 22 (Idaho 2017) (Burdick, C.J.); *N. Idaho Bldg. Contractors Ass'n v City of Hayden* ("*NIBCA II*"), 164 Idaho 530, 432 P.3d 976 (2018) (Bevin, J.).

[704] In 1971, the Legislature enacted a statute authorizing the creation of single, county-wide highway districts. H.B. 274, 1971 Idaho Sess. Law, ch. 273 (initially codified in chapter 27 of Title 40, codified since 1985 at Idaho Code §§ 40-1401 to 40-1418). The statute became effective on its date of enactment, March 25, 1971. Voters approved the creation of ACHD two months later on May 25, 1971, which became effective in January 1972.

[705] Idaho Code § 40-1410(2) was previously codified to Idaho Code § 40-2715. See *Worley Highway Dist. v. Kootenai Cnty*, 576 P.2d 206, 207 n.2 (Idaho 1978) (Donaldson, J.).

authority of cities to enter into franchise agreements and transferred that power to ACHD. The Court rejected ACHD's argument.

The *Alpert* Court began by recognizing the well settled principle that cities may exercise only those powers granted to them by the Constitution or the Legislature (Dillon's rule). *Alpert* at 304. That test was easily met, said the Court, because the authority of cities to provide utility services and/or to enter into franchise agreements with private utilities is established by both the state Constitution and by statute. *Alpert* at 304.

ACHD's technical argument turned on a sentence in its authorizing statute which said that that statute's provisions control over any conflicting statutes.[706] ACHD contended this trumped the statutes authorizing cities to enter into franchise agreements and transferred that authority to ACHD. The Court said the statute did not go that far. "The language of I.C. § 40–1406 is primarily in reference to imposition of ad valorem taxes and cannot be extended to replace the constitutional and statutory provisions controlling utility franchises. . . . " *Alpert* at 305. The Court said that the franchise power is about more than control of city streets. "Idaho Code § 50–328, which expressly addresses the regulation of utility transmission systems, gives the "city" the authority over all lands, not solely the public streets, which are owned or under control of such city." *Alpert* at 305. The Court further noted that franchises are not just about access to city property; they are also about avoiding competition with the city. "It is undisputed that municipal corporations in Idaho have the power to operate their own utility systems and provide water, power, light, gas and other utility services within the city limits. I.C. § 50–323; § 50–325." *Alpert* at 305. Granting franchises is one way a city may exercise its authority to provide city services. That is not an authority the Legislature shifted to the highway district.

In sum, ACHD stretched too far. It is one thing to say that franchise agreements with cities are no longer needed in order for utilities to gain access to city streets in Ada County. But that fact alone does not transfer statutory authority to ACHD to issue its own franchises, particularly given that there may be other reasons that cities and utilities might choose to enter into franchise agreements.

The bottom line is that, *Alpert* makes clear that franchise agreements and fees are lawful in Idaho—even in Ada County. Whether they are mandatory was not addressed by *Alpert* (which involved franchise agreements entered into voluntarily). However, the *Alpert* Court's "illegal tax" analysis (which rests on the city's right to strike a hard bargain with a utility who desires a franchise) underscores the point that bargaining is involved. In other words, if a utility does not need a city's promise not

[706] "Wherever any provisions of the existing laws of the state of Idaho are in conflict with the provisions of this chapter, the provisions of this chapter shall control and supersede all such laws." Idaho Code § 40-1406.

to compete and does not need the city's permission to use its streets, it may elect to conduct its utility business without a franchise agreement at all. See discussion in section 32.G on page 791.

(4) Post-*Alpert* decisions add nothing to the analysis

There has been little attention to the lawfulness of franchise fees in subsequent appellate decisions. Since *Alpert*, three cases have referenced that decision and its analysis of franchises. None of them shed any new light on the law of franchises and franchise fees.

In *Plummer v. City of Fruitland*, 140 Idaho 1, 89 P.3d 841 (2003) (Trout, J.), the Court distinguished *Alpert*, limiting its application to water and gas utilities. The *Plummer* Court concluded that Idaho statutes do not grant authority to cities to create private monopolies for solid waste disposal.

In *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 149 Idaho 187, 233 P.3d 118 (2010) (Eismann, C.J.), the Court upheld the authority of an irrigation district to charge a hook-up fee (aka connection fee) when providing domestic water to residential developments (but remanded for a determination of whether the particular fee in question was reasonable). The irrigation district served portions of the cities of Coeur d'Alene and Hayden, as well as some unincorporated areas. One of the developer's arguments was that the fee violated the franchise provision of the Idaho Constitution, Idaho Const. art. VI, § 2. The Court dismissed that argument out of hand saying only: "There is nothing indicating that the Irrigation District has granted any person or entity a franchise to supply water to the inhabitants of the District." *Viking*, 149 Idaho 199, 233 P.3d at 130.

In *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 84, 343 P.3d 1086, 1091 (2015) (Eismann, J), the plaintiff alleged that the City of Hayden's sewer connection fee was an illegal tax. In addition to its principle arguments, the City cited Idaho Code § 50-323 (the statute authorizing cities to provide utility services) as an authority for the tax. The Court gave short shrift to that argument, noting: "There is no contention in this case that the City cannot operate its sewer system." *NIBCA I*, 158 Idaho at 85, 343 P.3d at 1092. The Court recited its discussion of section 50-323 in *Alpert* and its conclusion that the franchise fee in that case was not a tax. But it offered no further analysis or commentary on that point. The Court simply concluded that the authorization to operate a utility system found in section 50-323 does not carry with it that implied right to impose fees in excess of the cost of services.

F. The IPUC has no review authority over franchise fees imposed on utilities it regulates.

The IPUC takes the position that it has no authority to review, approve, or disapprove franchise fees. The protocol is that the utility files a "tariff advice" with

the Commission notifying it of the amount of the franchise fee that will be passed through to customers. The Commission exercises no judgment but simply "approves for filing" the tariff advice. See *In the Matter of United Water Idaho's Tariff Advice To Increase Customer Rates to Recover the City of Boise's 4% Franchise Fee*, 2003 WL 27091225 (Nov. 3, 2003).[707]

G. Utilities are not obligated to enter into franchise agreements.

(1) Overview

Since statehood, utilities providing services within cities have routinely entered into franchise agreements with those cities. Franchise agreements generally provide two historically important benefits to utilities. First, they may authorize the placement of utility infrastructure within or below city rights-of-way and other city property. Second, they often provide monopoly status to the utility, protecting it against competition within its service area by the city or by other utilities.[708] Protection from competition between private providers is a non-issue today, but was enormously important in the early days prior to regulation by the IPUC. Likewise, protection from competition between the provider and the city itself was of much greater concern in the early days. See footnotes 654 and 655 beginning on page 764.

These two benefits are identified in the *Alpert* decision.[709] In return, cities generally, but not always, impose a franchise fee corresponding to a percentage of the utilities' net revenue. Although the franchise fees are substantial, the cost is not borne by the utility. Because the entire fee is passed through to the utility's customers—a captive audience—there is little incentive for the utility to resist.

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[707] It is curious that a 4% rate was being reviewed by the IPUC in 2003, eight years after the Legislature imposed a 3% cap. The explanation is that the City and franchisee were still negotiating when the 3% cap was enacted. Soon thereafter they entered into a new franchise agreement with a retroactive effective date (making it effective prior to the legislation). The City then slowly ramped up the increases, so the 4% fee didn't hit (and come to the IPUC's attention) until years thereafter. The IPUC declined to rule on the validity of the retroactive franchise date and instead ordered the franchisee to bring a declaratory action to resolve it. This, evidently, had the effect of inducing the City to back off the fee increases.

[708] For example, in section 11 of the 2015 franchise agreement between Boise City and Veolia Water Idaho, Inc. (then United Water Idaho Inc.), the City promises neither to compete with Veolia nor to allow others to compete within Veolia's certificated area. The latter promise, of course, is superfluous given the protection provided by the IPUC. The agreement contains no promise that the city will not condemn Veolia. Any implicit promise not to condemn (based on the promise not to compete) is negated by the City's express reservation of its right to condemn in section 10 of the franchise.

[709] "The term 'franchise' has been interpreted to mean a grant of a right to use property over which the granting authority has control." *Alpert*, 118 Idaho at 143, 795 P.3d at 305. "The franchise agreements provide that as consideration the cities will not engage in the business of the utility or enter into competition with the utilities." *Alpert*, 118 Idaho at 138, 795 P.3d at 300.

Cities in most of Idaho (but not in Ada County) have considerable leverage—they own the streets. Because utilities need permission to install infrastructure in city-controlled streets, they have no choice but to enter into a franchise agreement if the city requires one. Thus, as a purely practical matter (as opposed to an express legal mandate), franchise agreements are mandatory where a utility needs access to a city's property and the city insists on a franchise rather than a licensing agreement, easement, or other arrangement.

But what about utilities serving cities in Ada County where there is no need to obtain the city's permission to use its streets? May such a utility elect to forgo whatever protection may be provided by a franchise agreement?

For the reasons discussed below, the author concludes that cities may not compel utilities to enter into franchise agreements. However, in the case of municipal water providers, cities still have leverage under a non-franchise statute, Idaho Code § 30-801 (requiring city consent to provide water). In other words, a franchise may not be required, but some form of consent or agreement is. For water utilities operating in Boise that obtain certification as a Designated Water Provider, this requirement is satisfied without the need for a franchise agreement.

If a franchise is not needed to obtain access to city property or to satisfy section 30-801, the only practical incentive for a utility to secure a franchise is the possibility of negotiating a non-compete agreement with the city, including, potentially, a promise not to condemn the company. In the case of a small provider, like Capitol Water Corporation, securing a non-compete agreement might have some value. In the case of Veolia, the prospect of a take-over by Boise or any other city is remote. Veolia operates a vast and highly integrated water delivery system spanning multiple cities and unincorporated areas. It would be economically prohibitive for Boise to build its own water system. Likewise, takeover by condemnation is not possible. See footnote 656 on page 765 (explaining the practical impossibility of condemnation) and footnote 708 on page 791 (discussing the absence of condemnation protection in Veolia's franchise agreement).

(2) Idaho's Constitution does not compel franchise agreements.

Idaho's Constitution includes express authorization for cities to provide franchises for water service, thereby recognizing the vital role played by franchises in the early days before utility regulation.

> Right to collect rates a franchise.—The right to collect rates or compensation for the use of water supplied to any county, city, or town or water district, or the inhabitants thereof, is a franchise, and can not be

> exercised except by authority of and in the manner prescribed by law.

Idaho Const. art. 15, § 2 (emphasis supplied).

This oddly phrased sentence can best be understood to recognize the authority of cities to grant franchise rights, but only in compliance with statutory requirements. But it does not compel parties to enter into franchise agreements. This constitutional provision is discussed further in section 32.D(2) on page 767.

(3) Idaho's franchise statutes do not compel franchise agreements.

Likewise nothing in Idaho's franchise statutes gives cities the power to force a utility to enter into a franchise agreement if one is not needed to secure use of the city's streets. See discussion in section 32.D(5) on page 779.

The *Alpert* case makes clear that franchise agreements are lawful notwithstanding that Ada County cities do not control access to their own streets. As *Alpert* explains, there may be some other city property that the utility needs to use. And, in most cases, franchise agreements provide assurance that the city will not compete with the utility. Notably, nothing in *Alpert* says that franchise agreements are mandatory in cities that do not control their own streets.[710] Indeed, the legal underpinning of the decision is that franchises are contractual nature. Contracts are inherently voluntary. See discussion in section 32.E on page 784.

(4) Idaho's non-franchise statutes require city consent.

(a) In general

Although nothing in the Idaho's Constitution or statutes mandates that a utility enter into a franchise agreement as a prerequisite to providing service within a city, three of the non-franchise statutes discussed in section 32.D(4) on page 770 (Idaho

[710] The only other case touching on the question of whether there is an obligation to obtain a franchise is *Unity Light & Power Co. v. City of Burley*, 92 Idaho 499, 445 P.2d 720 (1968) (McFadden, J.). It is not on point. The Court ruled that Burley (which operates its own electric power system) could serve new customers in newly annexed areas, while the utility serving rural areas outside the city could continue to serve its existing customers within the annexed areas notwithstanding the fact that it neither sought nor received a franchise from the city. The decision includes the statement: "Until such time as Unity has secured a franchise from Burley, it is not entitled to extend its service to other than those members served at the time of annexation." *Unity* at 725. However, that statement was made in the context of annexation law and "pirating" law, not franchise law. For the quoted proposition, the Court cited no Idaho franchise statute or case law, but only annexation cases in North Carolina, Oklahoma, Arizona, and Washington. In any event, case involved a city that did control its own streets. Accordingly, the quoted statement cannot be read as a general principle that a franchise agreement is always required.

Code §§ 30-801, 40-2308, and 50-328) may be read to require utilities to obtain the consent or agreement of cities.

- Idaho Code § 30-801 requires that private municipal water providers obtain authorization from the city by ordinance or contract. Arguably, this 1887 statute has been preempted by the adoption of public utility regulation statutes 1913. In any event, the statute does not require a franchise agreement. Read in context with section 30-802, it does not authorize cities to exercise this authority arbitrarily for leverage purposes, but only to secure the public safety of water supplied to the city. This statute is discussed in section 32.D(4)(b) on page 772.

- Idaho Code § 40-2308 requires utilities to obtain the consent of cities to "lay conductors and tracks through the public ways and squares in any city." Once consent is given to lay infrastructure, no further or ongoing consent is required to use or maintain that infrastructure. Significantly in Ada County, where cities do not own or control city streets, no consent is required at all unless new infrastructure is to be laid in a public square of the city. This statute is discussed in section 32.D(4)(c) on page 776.

- Idaho Code § 50-328 gives cities authority to permit and regulate the provision of services by utilities, but only to the extent the utility needs to place its infrastructure within any streets or any other property owned by the city. This statute is discussed in section 32.D(4)(d) on page 778.

The consent or permission required by the non-franchise statutes discussed above may be satisfied by any manner of ordinance or agreement.

(b) Designated Water Provider

If a utility does not need city permission to use city streets or other property, the only applicable consent requirement is Idaho Code § 30-801, which applies only to municipal water providers.

In the case of the City of Boise, the consent requirement in section 30-801 may be satisfied by a utility obtaining certification by the City as a Designated Water Provider under the City's zoning code. This ordinance is discussed in the Idaho Water Law Handbook in the section dealing with Boise's Assured Water Supply ordinance.

33. THE LAW OF CONDEMNATION (EMINENT DOMAIN) IN IDAHO

A. Scope of topic and overview

Eminent domain is a complex topic that consumes volumes in many treatises. This treatment of eminent domain law provides an overview of the major issues and points out some of the peculiarities in Idaho law.

The discussion of eminent domain breaks into two main categories:

(1) The first is "eminent domain" (also known as "condemnation.") This usually, but not always, refers to formal actions taken by the government to take private property for public use. The government or other person exercising this authority must pay "just compensation" to the owner reflecting the fair market value of any property taken. Because just compensation must be paid, condemnation is essentially a forced sale.

(2) The second category is "inverse condemnation." These are lawsuits brought by property owners seeking compensation from the government for deprivation of property rights. Typically, inverse condemnation actions are premised on what are known as "regulatory takings" — that is, deprivation of property rights arising from governmental land use or other regulatory actions.[711] This section of the Handbook addresses only the first topic. Inverse condemnation is treated elsewhere.

B. The government's inherent power to condemn

The power to condemn is inherent in the federal government and state governments. "The power of eminent domain is a fundamental and necessary attribute of sovereignty, is superior to and independent of private rights of property, is inherent and essential to the independent existence of the nation and its sovereign states, requires no constitutional recognition, and cannot be surrendered." 26 Am. Jur. 2d *Eminent Domain* § 1. "The power of eminent domain arises as an incident to sovereignty of the state." *State ex rel. Flandro v. Seddon,* 94 Idaho 940, 943, 500 P.2d 841, 844 (1972).

C. Constitutional authority to condemn

The United States Constitution does not mention the right of eminent domain except to limit the power to condemn in the Fifth Amendment, which forbids "the taking of private property for public use without just compensation." U.S. Const. amend. V.

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[711] Not all inverse condemnations are based on regulatory takings. In some (albeit rare) cases, governmental entities acquire "privately owned land summarily, by physically entering into possession and ousting the owner. In such a case, the owner has a right to bring an 'inverse condemnation' suit to recover the value of the land on the date of the intrusion by the Government." *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 (1984) (citation omitted).

The Idaho Constitution contains substantially the same requirement in slightly different words, preceded by an expansive statement of what constitutes a public use:

> The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.
>
> Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.

Idaho Const. art. I, § 14 (emphasis added).

In addition to water development and mining, the section also includes two very broad catch-alls (underlined in the quotation above). These might be read as broad enough to encompass virtually any industrial or commercial purpose.

The Constitution does not expressly answer the question who has the authority to exercise the power of imminent domain. However, given that water development and mining are typically undertaken by private entities, it is implicit that the eminent domain authority extends to private parties. Presumably, the same is true for the catch-all provisions. As discussed in the following section, Idaho cases arising in the context of statutes implementing this constitutional provision recognize the authority of private parties to exercise the condemnation power.

Article XI, section 8, confirms that property belonging to private corporations may be taken by eminent domain, and that private corporations are subject to regulation under the police power:

> The right of eminent domain shall never be abridged, nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals; and the police powers of the state shall never be abridged or so construed as to permit corporations to conduct their business in such

> manner as to infringe the equal rights of individuals, or the general well being of the state.

Idaho Const. art. XI, § 8.

Article VIII, section 5 forbids the use of the eminent domain power on behalf of any industrial development project supported by non-recourse development bonds.

D. The constitutional right to condemn is self-executing.

The Idaho Supreme Court has determined that the Idaho Constitution's authorization for eminent domain is self-executing.

> Art. 1, Sec. 14, of the Idaho Constitution is self-executing in the sense that the nature of the use required is established and constitutes a grant of the power of eminent domain in behalf of the uses therein expressed. Legislative action other than the appropriate procedural machinery through which the right may be applied is not required. The necessary procedural machinery is found in the provisions of Title 7, Chap. 7 of the Idaho Code.

McKenney v. Anselmo, 416 P.2d 509, 514-15 (Idaho 1966) (citation omitted). See also, *Cohen v. Larson*, 867 P.2d 956, 958 (Idaho 1993) (Bistline, J.) ("This section of the Idaho Constitution is self-executing, leaving to the legislature only the task of providing the procedure for implementation.").

E. Statutory authority to condemn—generally

Notwithstanding that the power to condemn in the Idaho Constitution is self-executing, the Legislature has seen fit to articulate substantive and procedural rules governing the exercise of eminent domain.[712] It has dispensed this power liberally, granting the eminent domain power to dozens of governmental entities and others. A partial listing of Idaho statutes granting and/or addressing eminent domain powers is set out in the footnote.[713] This includes counties, cities, urban renewal districts,

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[712] Congress has also adopted statutes and rules governing condemnation actions by the federal government. A discussion of those provisions is beyond the scope of this Handbook. *See, e.g.*, 40 U.S.C. §§ 257 and 258a to 258f; Federal Rule of Civil Procedure 71A; D. Idaho L. Civ. R. 71A.1.

[713] Partial list of Idaho statutes addressing eminent domain:

- Idaho Code §§ 7-701 to 7-721 (general condemnation statutes)
- Idaho Code § 21-106 (establishing, operating and maintaining state airports by the Idaho Transportation Department)
- Idaho Code § 21-508 (acquisition of air rights for airport approach protection)
- Idaho Code § 21-807(3) (regional airport authority board of trustees vested with eminent domain power)

- Idaho Code § 31-806 (acquisition of property for parks or recreational purposes by board of county commissioners, including by eminent domain)
- Idaho Code § 31-4114 (acquisition of real or personal property by television translator district which is necessary or convenient for its purposes)
- Idaho Code §§ 31-4204(d); 31-4214 (county housing authorities vested with eminent domain power)
- Idaho Code § 31-4906(6) (board of directors for a regional solid waste district vested with eminent domain power)
- Idaho Code § 33-601(8) (school district board of trustees vested with eminent domain power)
- Idaho Code § 33-2122(d) (dormitory housing commissions in each junior college district is vested with eminent domain power)
- Idaho Code § 33-3804(c) (state educational institutions are vested with eminent domain power)
- Idaho Code § 36-104(b)(7) (fish and game commission vested with power of eminent domain)
- Idaho Code § 39-1331(j) (board of health and welfare vested with power of eminent domain)
- Idaho Code § 39-2804(e) (mosquito and vermin abatement district board of trustees vested with power of eminent domain)
- Idaho Code § 40-313(3) (Idaho Transportation Board vested with eminent domain power re: "restoration, preservation, and enhancement of scenic beauty, for use as informational sites, and for rest and recreation of the traveling public")
- Idaho Code § 40-506 (Idaho Transportation Department vested with power of eminent domain re: advertising displays required to be removed)
- Idaho Code § 40-606 (condemnation of highway rights-of-way by county commissioners)
- Idaho Code § 40-1307 (highway districts vested with power of eminent domain)
- Idaho Code § 40-2316 (authorizing counties and highway districts to condemn roads to be used as "private highways") (see discussion in section 33.G on page 802)
- Idaho Code § 42-1103 (rights of way for ditches or other conduits for carrying water for irrigation, municipal, and factory use)
- Idaho Code § 42-1104 (rights of way for ditches or other conduits for carrying water across State lands)
- Idaho Code § 42-1105 (rights of way for ditches or other conduits used by riparian appropriators)
- Idaho Code § 42-1106 (the main condemnation provision for rights of way for ditches, and other conduits)
- Idaho Code § 42-1107 (locating drains for carrying off surplus water to natural waterways)
- Idaho Code § 42-1734(9) (Idaho Water Resource Board vested with eminent domain power)
- Idaho Code § 42-2939 (drainage districts vested with eminent domain power)
- Idaho Code § 42-3115(11) (board of commissioners of flood control districts vested with eminent domain power)
- Idaho Code § 42-3212(j) (board of directors of a sewer district vested with eminent domain power)
- Idaho Code § 42-3708(6) (directors of a watershed improvement district vested with eminent domain power)
- Idaho Code § 42-5224(13) (board of directors for groundwater districts vested with eminent domain power)

irrigation districts, highway districts and a wide variety of other special purpose districts. As discussed below, private parties are also granted the right of condemnation under some circumstances. However, the Idaho Legislature has expressly denied the power of eminent domain to at least one governmental entity—county or city historic preservation commissions. Idaho Code § 67-4604. See also the discussion of Idaho Code § 7-701A (prohibiting condemnation in "*Kelo*-type" situations) in section 33.I(3) at page 806.

Idaho's general condemnation statutes are codified in Idaho Code, Title 7, Chapter 7 (Idaho Code §§ 7-701 to 7-721). They set out many requirements concerning the conduct of condemnation actions.

F. Authority for private persons to condemn

The main group of condemnation statutes are codified in Chapter 7 of Title 7 (entitled "Eminent Domain"). The first of these, Idaho Code § 7-701, recognizes a number of "public uses," many of which are tailored to private parties. The list includes, for example:

- "reservoirs, canals, ditches, flumes, aqueducts and pipes" (Idaho Code § 7-701(3)). (In addition, Title 42 contains condemnation authorization for condemnation of rights-of-way for canals, etc. See discussion of rights-of-way in *Idaho Water Law Handbook*.)
- "roads . . . for working mines" (Idaho Code § 7-701(4)). (In addition, Idaho Code §§ 47-903 to 47-913 authorize owners of mines to condemn rights-of-way.)
- "Byroads, leading from highways to residences and farms" (Idaho Code § 7-701(5)).

- Idaho Code §§ 43-304; 43-908 (board of directors for an irrigation district vested with eminent domain power)
- Idaho Code §§ 47-901 to 47-913 (condemnation of access for mining properties)
- Idaho Code §§ 50-311; 50-320; 50-1030 (cities have various eminent domain powers)
- Idaho Code § 50-1914 (city housing authorities have eminent domain power)
- Idaho Code §§ 50-2007(c); 50-2010 (city urban renewal agencies have eminent domain power)
- Idaho Code § 50-2706 (city shall not delegate eminent domain power to public corporations)
- Idaho Code § 67-4604 (county or city historic preservation commissions are NOT vested with eminent domain power to acquire historic lands)
- Idaho Code § 67-6206(g) (housing and finance associations vested with power of eminent domain) Idaho Code § 67-6521(2)(b) ("affected persons" may seek a judicial determination of whether a zoning action constitutes an exercise of eminent domain)
- Idaho Code § 70-1903; 70-1907 (all port districts wherein industrial development district have been established are vested with eminent domain power)

- "Electric distribution and transmission lines" (Idaho Code § 7-701(11)).

Other condemnation statutes are found scattered throughout the Idaho Code. See footnote 713 on page 797.

These statutes do not expressly provide, in so many words, that the power of condemnation may be exercised by private parties, but this is evident in the listing of public uses that only a private entity would undertake (e.g., mining). It is also evident in the procedural provisions. For example, Idaho Code § 7-707(1) provides that a complaint for condemnation may be filed by a "corporation, association, commission or person."[714]

A number of court decisions have authorized private parties to use of the power of condemnation.[715] Although condemnation must be undertaken for a "public

[714] It is not clear why this statute does not also list governmental agencies as private parties.

[715] "We note that the Constitution of the State of Idaho, Article I, Section 13 [should be 14], supra, grants a right of eminent domain much broader than grants in most other state constitutions. For example, completely private interests in the irrigation and mining businesses can utilize eminent domain." *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 880, 499 P.2d 575, 579 (1972).

"The courts of this state have repeatedly held the right is granted to private enterprises in uses necessary to the complete development of the state. In behalf of a private lumber company, ... In behalf of a power company not a public utility, ... In behalf of a private mining company, ..." *Bassett v. Swenson*, 51 Idaho 256, 263, 5 P.2d 722, 725 (1931).

"The timber of this state is a material resource and where that resource cannot be completely developed without the exercise of the power of eminent domain that power may be lawfully exercised." "The fact that the use may be for private benefit is immaterial since the controlling question is whether the use is for the complete development of the material resources of the state" *McKenney v. Anselmo*, 91 Idaho 118, 123, 416 P.2d 509, 514 (1966) (private condemnation action by one landowner against another, decided on other grounds that did not question the condemnation right).

"Condemnation is an act of public power vested by statute in a private plaintiff . . . ." *MacCaskill v. Ebbert*, 112 Idaho 1115, 1119, 739 P.2d 414, 418 (Ct. App. 1987) (Burnett, J.). The court referenced Idaho Code §§ 7-701 and 40-2316 as examples of statutorily authorized private condemnation. *MacCaskill* 112 Idaho at 1118, 739 P.2d at 417. All this was said in dictum, contrasting condemnation with easement by necessity.

See also, *Eisenbarth v. Delp*, 70 Idaho 266, 215 P.2d 812 (1950) (a private party condemnor is not afforded the same deference as is a public condemnor as to the question whether the condemnation is necessary and located on the appropriate route); *Erickson v. Amoth*, 99 Idaho 907, 591 P.2d 1074 (1978) (private condemnor put to its proof as to necessity and insufficiency of alternate access route); *Blackwell Lumber Co. Empire Mill Co.*, 28 Idaho 556, 155 P. 680 (1916), *appeal dismissed* 244 U.S. 651 (1917) (temporary logging road for private company was necessary to develop resource of the state, so the road was a "public use" and therefore could be acquired by a private timber company by condemnation); *Yellowstone Pipe Line Co. v. Drummond*, 77 Idaho 36, 287 P.2d 288 (1955) (condemnation of right of way for pipeline by private entity); *Bassett v. Swenson*, 51 Idaho 256, 263, 5 P.2d 722, 725 (1931) ("The courts of this state have repeatedly held the right is granted to private enterprises in uses necessary to the complete development of the state.

purpose," the courts have held, essentially, that purposes like development of the State's resources is a public purpose, even when undertaken by private parties for profit.

In *Gibbens v. Weishaupt*, 98 Idaho 633, 570 P.2d 870 (1977) (Donaldson, J.), the Court explained that the strict prohibition on expanding the scope of use of a prescriptive easement is softened by the ability of private parties to condemn a broader scope of use if needed to access a farm or residence:

> Title 7, ch. 7 of the Idaho Code [Idaho Code 7-701(5)] allows private persons to exercise eminent domain rights to acquire by-roads for access from highways to farms and residences. Thus, our decision will not inhibit the development of property in this state or be an undue hardship on the parties in this case who commenced use of the road after 1970.

Gibbens, 98 Idaho at 639, 570 P.2d at 876.[716] Private condemnation under section 7-701(5) has been noted as well in *Eisenbarth v. Delp*, 70 Idaho 266, 215 P.2d 812 (1950) (Givens, J.); *Machado v. Ryan*, 153 Idaho 212, 219 n.3, 280 P.3d 715, 722 n.3 (2012) (Horton, J.).

Other cases, however, have limited *Gibbens*. They hold that the condemnation statutes should be read so as not to expand the scope of the constitutional eminent domain power to include the acquisition of property solely to enhance one's private enjoyment. In *Cohen v. Larson*, 125 Idaho 82, 867 P.2d 956 (1993) (Bistline, J.), the Court found that lakeside lot owners could not condemn access to their private residences across a neighbor's property (notwithstanding the statutory grant of condemnation power for byroads leading to residences):

> The legal concept of eminent domain generally applies only to the government or to its designated agents. However, there are certain Idaho cases which have upheld the right of private entities to exercise the power of eminent domain in certain limited circumstances. These cases involve exploitation of natural resources for the benefit and the use of the general public. [Examples and citations omitted.] All of these cases involved

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In behalf of a private lumber company . . . . In behalf of a power company not a public utility . . . . In behalf of a private mining company . . . .") (citations omitted).

[716] Note that the scope of the easement may be expanded through an additional period of adverse use for the statutory period. At the time of the *Gibbens* case, that was five years; since 2006 it has been 20 years. In the *Gibbons* case, the expanded scope of use (for additional residences and a new business involving greenhouses) had occurred for only four years when the complaint was filed.

> private condemnation but, clearly, the proposed use for which a party's land was taken was to serve the public of this state. This Court has never held that private individuals may take the property of other private individuals in order to enhance their purely private enjoyment of their property.

Cohen, 125 Idaho at 84-85, 867 P.2d at 958-59. *Cohen* was cited as authority for denying the right to condemn access to residences in *Backman v. Lawrence*, 147 Idaho 390, 399-400, 210 P.3d 75, 84-85 (2009) (Burdick, J.) and *Latvala v. Green Enterprises, Inc.*, 168 Idaho 686, 703, 485 P.3d 1129, 1146 (2021) (Bevan, C.J.).

The *Cohen*, *Backman*, and *Latvala* cases make clear that whether condemnation is available for residences and farms turns on the individual facts. But the rule of thumb may be that condemnation by private parties under section 7-701(5) ("highways, leading to residences and farms") remains available if needed to support agriculture (farm access), but is not available if it serves solely to enhance the enjoyment of a private residence.

In 2006, the Idaho Legislature enacted Idaho Code § 7-701A limiting the authority of governmental entities to exercise their eminent domain powers for the purpose of transferring condemned property to private parties (the "*Kelo*" situation). It appears that this legislation is limited to the exercise of eminent domain by the government, and does not affect or limit the ability of private parties to condemn property. See discussion in section 33.I(3) on page 806.

G. Condemnation of a "private highway" by the highway district or county

As an alternative to public road creation or to a private condemnation action, Idaho Code § 40-2316 provides for establishment of private highways for the benefit of specific landowners by highway districts and counties.[717] This is essentially a condemnation proceeding undertaken by the highway district or county with jurisdiction over local roads.[718]

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[717] "Private highways may be opened for the convenience of one or more residents of any county highway system or highway district in the same manner as public highways are opened, whenever the appropriate commissioners may order the highway to be opened. The person for whose benefit the highway is required shall pay any damages awarded to landowners, and keep the private highway in repair." Idaho Code § 40-2316 (emphasis added).

[718] In *MacCaskill v. Ebbert*, 112 Idaho 1115, 1118, 739 P.2d 414, 417 (Ct. App. 1987) (Burnett, J.), the court referenced Idaho Code §§ 7-701 and 40-2316 as examples of statutorily authorized private condemnation. *MacCaskill* 112 Idaho at 1118, 739 P.2d at 417. "Condemnation is an act of public power vested by statute in a private plaintiff . . . ." *MacCaskill*, 112 Idaho at 1119, 739 P.2d at 418.

Thus, even if the highway district or county determined that the road is not appropriate for designation as a public road, it may nevertheless be acquired as a "private highway" where the person(s) seeking access pay damages to the servient estate.

H. Cities' condemnation power is limited to city limits

In *Alliance for Property Rights and Fiscal Responsibility v. City of Idaho F*alls, 742 F.3d 1100 (9th Cir. 2013) (N.R. Smith, J.), the Ninth Circuit, applying Idaho law, ruled that Idaho cities have no general, extra-territorial power of eminent domain under Idaho's eminent domain statute, Idaho Code §§ 7-701 to 7-721 or Idaho's Revenue Bond Act, Idaho Code §§ 50-1027 to 50-1042. The decision relied substantially on the Dillon's rule concept embodied in *Caesar v. State*, 610 P.2d 517 (Idaho 1980) (Donaldson, C.J.):

> As a "creature of the state," the City has only those powers "either expressly or impliedly granted to it." *Caesar*, 610 P.2d at 519. Because the power to exercise eminent domain extraterritorially for the purpose of constructing electric transmission lines (1) has not been expressly granted to the City by the state, (2) cannot be fairly implied from the powers that the City has been given by the state, and (3) is not essential to accomplishing the City's objects and purposes, the City does not have that power.

Alliance, 742 F.3d at 1109. Accordingly, the court concluded: "If the City has no other option for providing sufficient electricity to its growing population, then it should ask the legislature—not the courts—to expand its eminent domain power to accommodate that growth." *Alliance*, 742 F.3d at 1107.

I. Condemnation must be for public use

(1) Idaho's definition of "public use"

Idaho's eminent domain statutes are codified at Idaho Code §§ 7-701 to 7-721.

Idaho law allows government entities to acquire property only for "public use." However, Idaho law defines "public use" broadly, and the Idaho Supreme Court has articulated no substantive limits on the uses for which government agencies may exercise eminent domain.

The "right" of eminent domain is strangely placed among the individual rights in the Idaho Constitution. In fact, article I, section 14 articulates a government power. It does so oddly, but appropriately for Idaho, by including a series of powers related to the delivery of water and drainage of mines:

> The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, . . . is hereby declared to be a public use, and subject to the regulation and control of the state.

Idaho Const. art. I, § 14,

The Idaho Supreme Court has relied on this provision to permit condemnation for a variety of water-related projects, including dam construction, hydropower, and irrigation and reclamation of arid lands. *Washington Water Power Co. v. Waters,* 19 Idaho 595, 115 P. 682 (1911); *Bassett v. Swenson,* 51 Idaho 256, 5 P.2d 722 (1931); *Canyon View Irrigation Co. v. Twin Falls Canal Co,* 101 Idaho 604, 619 P.2d 122 (1980), *cert. denied,* 451 U.S. 912 (1981).[719] However, the Supreme Court denied the right to condemn a part of a canal for a pumping project for exchange of water. *Berg v. Twin Falls Canal Co.,* 36 Idaho 62, 213 P. 694 (1922).

Article I, section 14 goes on to define two other public uses, "any other use necessary to the complete development of the material resources of the state . . ." and "any other use necessary to . . . the preservation of the health of its inhabitants . . ." The first of these provisions has been cited to uphold the construction of timber roads as a public use, *Potlatch Lumber Co. v. Peterson,* 12 Idaho 769, 88 P. 426 (1906); *Blackwell Lumber Co. v. Empire Mill Co.,* 28 Idaho 556, 155 P. 680 (1916), appeal dismissed, 244 U.S. 651. The Supreme Court has relied on the second provision to vest the condemnation authority in a sewer and water district. *Payette Lakes Water & Sewer Dist. v. Hays,* 103 Idaho 717, 653 P.2d 438 (1982).

The Supreme Court has also upheld the use of the eminent domain power by electric utilities, urban renewal agencies, pipeline companies, highway authorities, and public works agencies. *Hollister v. State,* 9 Idaho 8, 71 P. 541 (1903) (Ailshie, J.); *Boise Redevelopment Agency v. Yick Kong Corp.,* 94 Idaho 876, 499

[719] See discussion of condemnation by private persons in Patricia J. Winmill, *How Right is Your Right-of Way?,* 102A RMMLF Inst. 9 (1998). Other Idaho cases recognizing the right of private parties to condemn include *Codd v. McGoldrick Lumber Co.*, 279 P. 298 (Idaho 1929); *Marsh Mining Co. v. Inland Empire Mining & Milling Co.*, 165 P. 1128 (Idaho 1916); *Blackwell Lumber Co. v. Empire Mill Co.*, 155 P. 680 (Idaho 1916); *Potlatch Lumber Co. v. Peterson,* 88 P. 426, 431 (Idaho 1906).

P.2d 575 (1972); *Boise City v. Boise City Development Co.*, 41 Idaho 294, 238 P. 1006 (1925); *Powell v. McKelvey*, 56 Idaho 291, 53 P.2d 626 (1935).

Further, Idaho Code § 7-701 includes a long list of uses that the Legislature has defined as public uses, too numerous to list here. Suffice it to say that few eminent domain proceedings will be defeated on the grounds that they do not serve a public use.

(2) Public vs. private use nationally

Despite Idaho's broad definition of public use, the public use versus private use question remains hotly debated and litigated on a national level, especially in the area of economic development as a public purpose, which has its roots in the "blight" cases that rose to prominence in the 1950s. *Berman v. Parker*, 348 U.S. 26 (1954).

Cities and counties often seek to condemn dilapidated and/or abandoned (*i.e.*, "blighted") areas in the name of economic redevelopment or urban renewal. The *Berman* Court adopted a broad definition of "public use" (equating it with "public purpose") and upheld the constitutionality of urban renewal/economic redevelopment as a public use, despite that fact that often the condemned property is sold by the city to commercial or residential developers at a considerable profit, who in turn develop the property for private uses. After *Berman*, many states, including Idaho, followed suit and found urban renewal, though often directly benefiting private parties, to be a public use. *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972) ("The state, both through the power of eminent domain and the police powers, may legitimately protect the public from disease, crime, and perhaps even deterioration, blight and ugliness") (citing *Berman*).

Eventually, the definition of "blight" was expanded greatly by states and municipalities. For example, under a 1998 Pennsylvania statute, an area of property may be deemed blighted, and thus subject to condemnation, if it has "inadequate planning" or has "excessive coverage of land by buildings." 35 Pa. Cons. Stat. § 1702(a).

Not content with expanding the scope of what constitutes blight, government agencies began in the 1980s to condemn private property for the asserted public use of increasing employment opportunities and increasing tax revenues, *i.e.*, economic development. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled by Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765 (2004).[720]

[720] On July 30, 2004, the Supreme Court of Michigan overruled *Poletown*, finding that *Poletown's* "conception of a public use—that of 'alleviating unemployment and revitalizing the economic base of the community'—has no support in the court's eminent domain jurisprudence before the [Michigan] Constitution's ratification . . . ."

In *Hathcock*, Wayne County invoked its eminent domain power to condemn 1,300 acres of property owned by several defendants near the newly renovated airport for the asserted public use of

Government entities began taking "non-blighted" private property solely on the ground that the private owner was not using the property for its highest and best use in the eyes of the government. This is where the national debate, and split of state courts, has occurred. *See infra*.

Cases holding that economic growth/development is not a public use include *Southwestern Illinois Development Authority v. Nat'l City Environmental*, 768 N.E.2d 1, 24-26 (Ill. 2002) (Illinois Supreme Court rejected the government's argument that the increase of economic growth is a public use because the intended beneficiary of the condemnation was a "private venture designed to result not in a public use, but in private profits"),*Georgia DOT v. Jasper Cnty.*, 586 S.E.2d 853 (S.C. 2003) (Supreme Court of South Carolina held that condemnation for a private marine terminal was not a public use even though it would have provided significant local economic benefit), and *Bailey v. Myers*, 76 P.3d 898 (Ariz. App. 2003) (finding no public use where government sought to condemn an existing auto repair shop in order to allow a private hardware store to occupy the property).

Cases/states holding economic growth/development is a public use include *Kelo v. City of New London*, 545 U.S. 469 (2005) (Stevens, J.) (Supreme Court upheld the condemnation of homes expressly for a private development that was going to bring economic growth to the community), *General Building Contractors, LLC v. Bd. of Shawnee Cnty. Comm'rs*, 66 P.3d 873 (Kan. 2003) (Supreme Court of Kansas found that economic development is a public use *per se* and upheld the condemnation of a viable construction business for the expressed purpose of allowing a Target store to occupy the condemned property), and *City of Toledo v. Kim's Auto & Truck Service, Inc*., 2003 Ohio 5604 (Ohio App. 2003) (upholding economic development as a public use).

(3) Idaho's legislative response to *Kelo* (Idaho Code § 7-701A)

In response to *Kelo v. City of New London*, 545 U.S. 469 (2005) (Stevens, J.) (in which a woman's home was condemned for urban renewal purposes to facilitate a development by Pfizer Corporation), the Idaho Legislature enacted Idaho Code § 7-

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"construction of a business park and technology park." The development was to be privately owned. The *Hathcock* Court found that these exercises of the eminent domain power did "not pass constitutional muster because they do not advance a public use as required," namely because the county intended "for the private entities purchasing defendants' properties to pursue their own financial welfare with the single-mindedness expected of any profit-making enterprise." In summation, the *Hathcock* Court wrote: "Our decision today does not announce a new rule of law, but rather returns our law to that which existed before Poletown and which has been mandated by our constitution since it took effect in 1963."

701A in 2006.[721] (In the same year, an even broader citizen initiative was defeated.[722])

In pertinent part, the statute provides: "Eminent domain shall not be used to acquire private property : (a) For any alleged public use which is merely a pretext for the transfer of the condemned property or interest in that property to a private party." Idaho Code § 7-701A(2)(a). This is clearly directed to *Kelo*-like condemnations by the government that are used to transfer the condemned property to private entities to promote economic development.

The statute is limited by the preceding paragraph which explains: "This section limits and restricts the use of eminent domain under the laws of this state or local ordinance by the state of Idaho, its instrumentalities, political subdivisions, public agencies, or bodies corporate and politic of the state to condemn any interest in property in order to convey the condemned interest to a private interest as provided herein." Idaho Code § 7-701A(1).

By limiting section 7-701A to condemnations undertaken by public entities, it is evident (though not expressly stated) that the statute does not apply to or limit the use of the condemnation power by <u>private</u> parties. If this anti-*Kelo* statute applied condemnations undertaken by private parties, that would destroy the long-recognized premise that private parties falling within the scope of constitutional and statutory authority may exercise the condemnation power.[723]

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[721] Section 7-701A was amended in 2015 (adding section 7-701(2)(c) (dealing with trails, paths, and greenways) and in 2021 (adding section 7-701A(3) (dealing with urban renewal agencies).

[722] A citizen initiative on the ballot on 2006, Proposition 2, was soundly defeated. The initiative would not only have halted local governments from condemning property to facilitate private development, but would have required local governments to compensate landowners whenever changes in zoning or subdivision rules reduce the fair market value of any property (except in specific circumstances such as nuisance abatement and nude dancing restrictions). Had this measure passed, it would have eliminated as a practical matter all new restrictive zoning by forcing governments to pay each affected landowner.

[723] By the way, a proviso in the statute may be read to significantly limit its application in any event. Section 7-701A(2)(b)(iii) provides that the limitation on the use of eminent domain for economic development purposes does <u>not</u> apply to "public and private uses for which eminent domain is expressly provided in the constitution of the state of Idaho." It would appear that this section was added to avoid having the statute declared unconstitutional. Thus, the statute must be interpreted to avoid conflict with or limitation of the self-executing constitutional grant of eminent domain authority. Plainly, then, section 7-701A may not be used to restrict use of condemnation for water development and mining—which are "expressly provide" in the Constitution. However, it would seem that the same is true for all uses falling within the broad "catch-all" provisions of the constitutional grant. After all, the catch-all provisions are also "expressly provided" in the Constitution. Arguably, then, the Legislature has largely gutted its own statute with this proviso.

J. All types of private property are subject to the just compensation requirement

Idaho law allows authorized entities to take all manner of private property for public use. "Private property of all classifications may be taken for public use." *Hughes v. State*, 80 Idaho 286, 328 P.2d 397 (1958). However, the corresponding obligation is that, if private property of any kind is taken, the property owner must be compensated.

(1) Fees and easements

The most obvious type of taking is the taking of a fee interest in real property. The government is specifically authorized to take a fee interest "when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris of a mine." Idaho Code § 7-702(1)

However, the statute also provides that the condemning party take "an easement, when taken for any other purpose." Idaho Code § 7-702(2).[724] (The statute is awkwardly written, but we read it to authorize creation of an easement on another fee property, not the condemnation of an existing easement.) This would seem to indicate that the condemning party can only take an easement for road building purposes and other uses that are not listed in Idaho Code Section 7-702(1). *See, Wooten v. Dahlquist*, 42 Idaho 121, 129, 244 P. 407, 409 (1926) ("[t]he right which the highway district acquires by the eminent domain proceedings is an easement for public road purposes. Title to the land, subject to such easement, still continues in the party owning the fee"). This is a curious provision. Does it also mean, for example, that a power company seeking to condemn land for a power plant under Idaho Code § 7-701(11) may only condemn an easement to site the plant? That makes little sense.

Note also that the statute only speaks only of an "easement." Presumably this reference to easements also includes negative easements (such as solar or wind easements[725]). But there is some risk that it could be more narrowly construed.

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[724] The eminent domain statute also permits the condemning entity to take "[t]he right of entry upon, and occupation of, lands, and the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for some public use." Idaho Code § 7-702(3).

[725] While Idaho has a conservation easement statute and a solar easement statute, it has no wind easement statute. The question is, does this matter? In other words, are wind easements enforceable in Idaho under common law without any express statutory authorization? Historically, at common law (going back to England), negative easements were strictly limited to only four types of easements (not including wind). Virtually every American court that has addressed this in modern times has expanded the allowable negative easements, and we find it close to inconceivably that Idaho would not do the same thing. But we are not aware of any decision on point. Indeed, we are not aware of any Idaho case dealing with solar easements, wind easements, or any negative

At least one Idaho statute purports to grant the power to condemn a fee simple outside the scope of Idaho Code Section 7-702(1). Idaho Code § 40-311 (giving the Idaho Transportation Department the power to "[p]urchase, exchange, condemn or otherwise acquire, any real property, either in fee or in any lesser estate or interest . . . deemed necessary by the board for present or future state highway purposes").

(2) Access rights (inverse condemnation cases)

Under Idaho law, a property owner has a right to "reasonable access" to his/her property. In *Johnston v. Boise City*, 390 P.2d 291 (Idaho 1964) (McFadden, J.), the Idaho Supreme Court held:

> Determination of whether damages are compensable under eminent domain or noncompensable under the police power depends on the relative importance of the interests affected. The court must weigh the relative interests of the public and that of the individual, so as to arrive at a just balance in order that the government will not be unduly restricted in the proper exercise of its functions for the public good, while at the same time giving due effect to the policy of the eminent domain clause of insuring the individual against an *unreasonable loss* occasioned by the exercise of governmental power.

Johnson at 295 (quoting a Kansas decision).

Johnston held that the elimination of a number of curb cuts did not violate the right of reasonable access.

Several other cases have denied taking claims for restriction of access. For example, in *Powell v. McKelvey*, 56 Idaho 291, 53 P.2d 626 (1935), the Court determined that no taking had occurred where a portion of a street was lowered to cross beneath a railroad track. The lowering adversely affected, but did not eliminate, access to adjacent parcels. Further, the Court upheld the installation of a median that required a circuitous access route in *Brown v. City of Twin Falls*, 124 Idaho 39, 855 P.2d 876 (1993). *See also Bane v. Dep't of Highways*, 88 Idaho 467, 401 P.2d 552 (1965) (holding that a gasoline station unlawfully erected had no right of access to a state highway).

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easements. Idaho has on many occasions expressly ruled that restrictive covenants are enforceable (within certain limits). Restrictive covenants are different in their historical development and different in how they are created from negative easements, but they are conceptually identical to negative easements in their operation. This further reinforces our conclusion that an express solar easement would be enforced in Idaho.

However, in *Farris v. City of Twin Falls*, 81 Idaho 583, 347 P.2d 996 (1959), the Court determined that a property owner stated a cause of action for inverse condemnation where a city impaired access to the property by raising the level of a street. *See also Hughes v. State*, 80 Idaho 286, 328 P.2d 347 (1958) (holding that cutting off the right of access to a business property constituted a taking).

Further, access rights may ripen into easements requiring compensation if they are taken. In *State v. Fonberg*, 80 Idaho 269, 328 P.2d 60 (1958), the Idaho Supreme Court explicitly stated that "the right of access to a public highway is a property right which cannot be taken or materially interfered with without just compensation." In *Monaco v. Bennion*, 99 Idaho 529, 585 P.2d 608 (1978), the Idaho Supreme Court held that platting a subdivision and dedicating rights-of-way creates an easement of access to the rights-of-way for each lot owner. The Supreme Court has never articulated the terms of this easement. It is not clear whether it is simply an easement for access somewhere to a piece of property or whether a government agency can change the place of access at will without compensation.

The Supreme Court has also not articulated whether a property owner has a right to rely on a particular curb cut or access if the property owner makes expenditures in reliance on that curb cut. *See Boise City v. Blaser,* 98 Idaho 789, 791, 572 P.2d 892 (1977). Another open issue is whether the property owner's expectation would pass to a subsequent purchaser of property if the use continued and what would happen if the use did not change.

(3) Leases, liens, mortgages and other real property interests

Leases of property are also private property to which just compensation requirements apply, although a lease of short duration may not require compensation because of the insignificant value or difficulty in valuation. 26 Am. Jur. 2d *Eminent Domain* § 259 (1996). The issue of how to allocate a compensation award between an owner, a lessee and other property interest holders is discussed below regarding damages. The lessee's rights may include compensation for fixtures to the extent that those fixtures belong to the lessee and increase the value of the leasehold. The lessee may be prevented from recovery if the fixture is not condemned or does not lose its value as a result of condemnation. 26 Am. Jur. 2d *Eminent Domain* § 262 (1996). The lessee is not entitled to compensation for personal property, unless it is condemned. *See State ex rel. Flandro v. Seddon,* 94 Idaho 940, 500 P.2d 841 (1972) (affirming a district court's denial of an injunction sought by the government to require the landowner to return all fixtures to the condemned property; finding that there was no evidence that the government intended to condemn the removed fixtures).

Mortgages and liens are also compensable property interests, as are a variety of other real property interests. 26 Am. Jur. 2d *Eminent Domain* §§ 266-287 (1996).

The Idaho Supreme Court has held that the owner of real property has reasonable airspace rights. *Roark v. City of Caldwell*, 87 Idaho 557, 394 P.2d 641 (1964)(invalidating a city ordinance that restricted building height in the vicinity of an airport as an unconstitutional taking).

(4) Franchise rights

The Idaho Constitution provides that franchises are subject to condemnation:

> The right of eminent domain shall never be abridged, nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals; and the police powers of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the state.

Idaho Const. art. 11, § 8 (emphasis supplied).

Idaho Code § 7-703(4) provides that franchise rights are property that require just compensation if taken by the government. The scope of this provision is unclear. It refers to "all other franchises," but the provision is plainly aimed at franchises for toll roads and the like.

Idaho Code §§ 61-333A, 61-333B, and 61-333C address condemnation of electrical facilities following annexation. See footnote 727 below.

In *Unity Light & Power Co. v. City of Burley*, 445 P.2d 720, 723 (Idaho 1968) (McFadden, J.), the Court protected a nonprofit electrical association which had acquired a franchise from a highway district to serve rural areas outside of the City of Burley. Burley, which operates its own electrical utility within the city, then annexed areas served by the nonprofit association. After annexation, "Unity continued to serve its members in the annexed areas, and continued to maintain its poles and transmission lines therein, although Burley had never granted any franchise to Unity for that purpose."[726] *Unity* at 721 (emphasis added).

Unity then sued the city seeking damages for the city's "pirating" of the association's customers. It also sought an injunction to prohibit the city from interfering with its operations. The city counterclaimed seeking an order directing

[726] The Court observed that the city never granted a franchise to the association. Apparently, none was sought by the association. The decision contains no suggestion that the failure to obtain a franchise was a problem. Indeed, the Court ruled in the association's favor—protecting its existing service territory and that of the city—notwithstanding the absence of a franchise.

Unity to remove all its poles and transmission lines within the annexed area.[727] The Court ruled in favor of the association, holding that both the city and the association were entitled to continue to serve their existing customers.

> The trial court enjoined Burley from interfering with Unity's present customers, and also enjoined Unity from serving any new customers in the area. Unity complains that the trial court erred in restricting it to service of its existing members. The trial court did not err in this regard. Until such time as Unity has secured a franchise from Burley, it is not entitled to extend its service to other than those members served at the time of annexation.

Unity at 725.

In *Coeur d'Alene Garbage Service v. City of Coeur d'Alene*, 759 P.2d 879 (Idaho 1988) (Johnson, J.), the Idaho Supreme Court determined that a taking had occurred when a garbage hauler was excluded from its prior service territory when the city annexed the area. The city's garbage contract required that a competitor haul all trash in the newly annexed area. The Court held that the exclusion of the prior hauler from any consideration for the hauling contract constituted a taking. The Court did not analyze the case in terms of franchise law. It did not even explain if the exclusive authority granted by ordinance to another garbage service was a franchise, though it certainly sounds like a franchise.

K. Condemnation of government property (waiver of sovereign immunity)

Idaho recognizes the principle that the State may be sued only when it gives its consent. See discussion of sovereign immunity in section 19 beginning on page 280. The question is whether Idaho has consented to condemnation actions by private persons against State property. The answer is "yes."

Idaho's eminent domain statute provides that the condemnation power extends not only to the taking of private land but to condemnation of state and even federal land:

> The private property which may be taken under this chapter includes:

[727] The city also counterclaimed for condemnation. In 1963 (while the suit was pending), the Legislature enacted 1963 Idaho Sess. Laws, ch. 269 (codified in pertinent part at Idaho Code §§ 61-333A, 61-333B, and 61-333C), which provide a special condemnation remedy and procedures when land served by electric utilities and cooperatives is annexed. The Court held that the city had a right to condemn the association's property using the condemnation statutes in place when the suit was initiated. *Unity* at 724-25.

> . . .
>
> 2. Lands belonging to the government of the United States, to this state, or to any county, incorporated city, or city and county, village or town, not appropriated to some public use.
>
> 3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated.
>
> . . .

Idaho Code § 7-703 (enacted 1887 and codified in 1911 Idaho Sess. Laws, ch. 75 § 1; it has never been amended).

Note that subsection 7-703(2) includes state lands, but only those state lands that are "not appropriated to some public use." Idaho Code § 7-703(2). In the case of federal lands, that presumably corresponds to reserved land (e.g., for national forests). In the case of state lands, its meaning is less clear. But it does not include school lands.[728] In other words, school lands are subject to condemnation.

In any event, even if school lands were deemed to be "appropriated to some other use," they are still subject to condemnation under subsection 7-701(3) so long as the land is sought "for a more necessary public use than that to which it has been already appropriated." Idaho Code § 7-703(3). This "more necessary" requirement is reiterated (redundantly) in the next section. "If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use." Idaho Code § 7-704(3).

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[728] School lands are not "reserved" lands today. Prior to statehood, they may or may not have been reserved. When Idaho was established as a territory, school lands that had been surveyed were reserved from disposal by the federal government. But unsurveyed school lands were not reserved.

> Sec. 14. And be it further enacted, That <u>when the lands</u> in the territory <u>shall be surveyed</u>, under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby <u>reserved</u> for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same.

Organic Act of the Territory of Idaho, 12 Stat. 808, 814, § 14 (Mar. 3, 1863) (emphasis added).

But once the lands were conveyed to the State upon statehood, they were no longer federal lands and, hence, were no longer "reserved" by the federal government. Instead, they were "granted to said State for the support of common schools" with the expectation that they would be "disposed of only at public sale." Idaho Admission Act, 26 Stat. 215, 215, §§ 4 & 5 (July 3, 1890). Indeed, the whole purpose of this grant is to allow school lands to be developed and, when appropriate, disposed of for the financial benefit of schools.

The question of whether Idaho Code § 7-703(2) constituted a waiver of sovereign immunity was first addressed in *Hollister v. State*, 71 P. 541 (Idaho 1903) (Ailshie, J.). The Court began by recognizing that, absent consent, the State may not be sued. *Hollister* at 542. It then turned to what is now section 7-703.[729] The Court stated, inexplicably: "This statute alone, however, would not authorize this action." *Id*. Yet the Court found another statute that it said was sufficient to provide consent.[730] More importantly, the Court turned to issue of whether the State had the power to consent to condemnation of State school lands. The Court noted that the Idaho Admission Act[731] provides that school lands "shall be disposed of only at public sale." *Hollister* at 543. The Court found this provision was no bar to condemnation of school lands.

> When Idaho became a state, it at once necessarily assumed the power of eminent domain, one of the inalienable rights of sovereignty; and that right, we take it, may be exercised over all property within its jurisdiction. But even if congress had the authority, in granting these lands to the state, to restrict and prohibit the state in the exercise of the power of eminent domain, we do not think it was intended or attempted in the admission act. It was evidently the purpose of congress in granting sections 16 and 36 in each township to the state for school purposes to provide that the revenue and income from all such lands should go to the school fund, and that when sold it should be at the highest market price. We cannot believe that congress meant to admit into the Union a new state, and by that very act throttle the purposes and objects of statehood by placing a prohibition on its internal improvements. To prohibit the state the right of eminent domain over all the school lands granted would lock the wheels of progress, drive capital from our borders, and in many instances necessitate

[729] *Hollister* referred to section 7-703(2) as being a statute found in the territorial statutes of 1887. It is unclear why the Court did not refer to a more recent codification. This is immaterial; the statute has not be amended since territorial times.

[730] The other statute was what is now Idaho Code § 42-1104, which the *Hollister* Court referred to as section 13 of act approved February 25, 1899 (Sess. Laws 1899, p. 381). This statute granted rights-of-way across State lands for ditches. Why the Court landed on this statute is unclear, because the condemnation was not for a ditch but for development of electric power for the town of Shoshone.

[731] Idaho Admission Act, 26 Stat. 215, 216, § 5 (July 3, 1890), amended by 56 Stat. 48 (1942).

> settlers who have taken homes in the arid portions of the state seeking a livelihood elsewhere.

Hollister at 543 (citations omitted).

Idaho Code § 7-703(2) was examined again in *Petersen v. State*, 393 P.2d 585, 590 (Idaho 1964) (McQuade, J.). In that case, the Petersens sought to condemn a roadway across state property to their lake-front property bordering Priest Lake, which they hoped to subdivide and develop. After the Petersens acquired the property, the State closed the road previously used to access the property. The State moved to dismiss on grounds of sovereign immunity. The *Petersen* Court found that section 7-703(2) constituted express consent to sue the State. In so ruling, the Court said the statement in *Hollister* that section 7-703(2) standing alone was insufficient to authorize condemnation against the State was pure dicta. *Petersen* at 587. The Court concluded that the State's consent was crystal clear:

> Moreover, the negative statements made in the Hollister case concerning the State's consent to be sued seem peculiar in light of the clarity of I.C. § 7–703. While we approve of strict statutory construction in this area, there is no need to construe a statute when the language employed is clear and unambiguous. *Blue Note, Inc. v. Hopper*, 85 Idaho 152, 377 P.2d 373 (1962). As noted above, the statute states that: 'The private property which may be taken under this chapter (Eminent Domain) includes: * * * Lands belonging to * * * this state, * * *.' It is difficult to imagine how the State could more clearly grant its consent to suit.

Petersen at 587 (asterisks original).

Hollister and *Petersen* appear to be the only reported decisions in Idaho addressing this subject.[732] Together they show unequivocally that (1) the State has

[732] The case of *Hellerud v. Hauck*, 13 P.2d 1099, 1100-01 (Idaho 1932) (Varian, J.) held that a statute of limitations (Idaho Code § 5-202) that authorizes adverse possession (or prescriptive easements) against the State has exceptions making it inapplicable to reserved lands or school lands held by the State. As for school lands, the exception derives from:

- The requirement in the Idaho Admissions Act that "None of the lands granted by this act shall be sold for less than ten dollars an acre." Idaho Admission Act, 26 Stat. 215, 217, § 11 (July 3, 1890), amended by 56 Stat. 48 (1942).
- The provision of the Idaho Constitution stating that "no school lands shall be sold for less than ten dollars per acre." Idaho Const. art. IX, § 8.

Neither of these come into play in a condemnation action, which would require that the State receive fair market value for any property taken. Moreover, the restrictions above arguably apply only to the sale of the entire fee, not to a right-of-way or other easement.

consented to condemnation of State lands and (2) that consent is not violative of the special treatment of school lands in the Idaho Admission Act.

Section 7-703(2) also authorizes condemnation of federal land. However, we are not aware of this authority being employed in the context of federal land. If it were, that would raise questions under the Supremacy Clause.

L. Condemnation actions include many special requirements

Title 7, Chapter 7 of the Idaho Code governs the conduct of eminent domain proceedings in Idaho. This chapter creates a number of unique features that differentiate a condemnation proceeding from other civil proceedings. The following sections discuss the most important of these.

(1) Prerequisites to taking

The condemnation statute includes four factual prerequisites to a taking. Idaho Code § 7-704. First, the property must be put to a public use authorized by law. Second, the taking must be necessary to such use. Third, if the property is already put to a public use, that the replacement use is a more necessary public use. Finally, if the use is a 230KV or larger electrical transmission line over private property dedicated to agriculture, a public meeting must have been held with at least 10 days prior notice.

A number of cases have addressed the "necessity" requirement of Section 7-704. The Idaho Supreme Court has not addressed this issue for many years, but the general tenor of the cases is that the court will strongly defer to the government agency's determination of whether the acquisition is necessary or not. *Boise City v. Boise City Development Co.*, 41 Idaho 294, 238 P. 1006 (1925); *Washington Water Power Co. v. Waters*, 19 Idaho 595, 115 P. 682 (1911). Unlike the determination of whether a taking has occurred, which is an issue of law, the issue of necessity is an issue of fact, and the court will not disturb findings that are based on substantial conflicting evidence. *Blackwell Lumber Co. v. Empire Mill Co.*, 29 Idaho 421, 160 P. 265 (1916), appeal dismissed, 244 U.S. 651 (1917).

Idaho Code Section 7-705 further states that the property taken "must be located in the manner which will be most compatible with the greatest public good and the least private injury . . ." Idaho courts have not interpreted this provision substantively.

Idaho Code Section 7-711A requires that the condemning authority give the property owner a very specific "advice of rights" form at the commencement of negotiations. While giving such form is not a formal prerequisite to exercising eminent domain, there are potentially serious consequences for failure to provide the form:

If the condemning authority does not supply the owner of the real property with this form, there will be a presumption that any sale or contract entered into between the condemning authority and the owner was not voluntary and the condemning authority may be held responsible for such relief, if any, as the court may determine to be appropriate considering all of the facts and circumstances.

Idaho Code § 7-711A.

(2) Special pleading requirements

The action must be commenced in the district court for the county in which the property is located. Idaho Code § 7-706.

Idaho Code Section 7-707 requires that the complaint must include several specific allegations, including:

- The name of the "corporation, association, commission or person in charge of the public use for which the property is sought, who must be styled as plaintiff;"
- "The names of all owners and claimants of the property, if known, or a statement that they are unknown." These are the defendants;
- "A statement of the right of the plaintiff" presumably to condemn the property;
- "If a right of way is sought, the complaint must show the location, general route and termini, and must be accompanied by maps thereof;"
- "A description of each piece of land sought to be taken, and whether the same includes the whole, or only a part, of an entire parcel or tract." The complaint may include all parcels needed in the county, but the court may consolidate or separate them "to suit the convenience of the parties."

If the owner resides in the county, "a statement that the plaintiff has sought, in good faith, to purchase the lands so sought to be taken, or settle with the owner for the damages which might result to his property . . . and was unable to make any reasonable bargain . . ." No such allegation is required if the property owner does not reside in the county, which raises some interesting equal protection and due process issues. The Idaho Supreme Court has held that the mere submission of a good faith offer by letter is insufficient to meet the requirements of this section. *State ex rel. Rich v. Blair*, 365 P.2d 216, (Idaho 1961). However, a process where the plaintiff engaged in significant negotiations over 13 months was considered sufficient. *Idaho Power Co. v. Lettunich*, 602 P.2d 540 (Idaho 1979). Further, where the property owner stated that he did not want an easement over his property and the testimony supported the valuation of the offer, the court has upheld a finding of good faith negotiation. *Southside Water & Sewer District v. Murphy*, 555 P.2d 1148 (Idaho 1976).

Idaho Code Section 7-708 includes special requirements for the summons, which must include the names of the parties, a general description of the whole property; a statement of the public use, a reference to the complaint to describe the specific parcels and a notice to the defendants to appear and show cause why the property should not be condemned. Otherwise, the summons is the same as in a civil matter.

Idaho Code Section 7-709 empowers all persons occupying or claiming an interest in the property to appear and defend the action, whether or not they are named in the complaint. Presumably, this includes lessees, mortgagees, lien-holders and even adverse possessors.

(3) Elements of compensation

The heart of most condemnation cases is the amount of compensation. The sections below discuss the involved process of assessing damages in an inverse condemnation case.

(a) Market value of property

The primary measure of damages in a condemnation case is the value of the property at the time it is taken. Idaho Code § 7-711.1; *Spokane & Palouse Ry. v. Lieuallen,* 29 P. 854 (Idaho 1892). Several caveats apply to this basic principle, however. First, the requirement that the property be valued at the time it is taken means that the valuation cannot consider the value of the improvements the government will add to the condemned property. For example, if the property taken will be used for a new road that will increase the value of the taken property, the valuation cannot consider the addition of the road—rather, it must be valued at a "pre-project" value.

Second, the amount paid for the property cannot be less than the valuation of the property for property tax purposes unless the property has been altered substantially. Idaho Code § 7-711.1.

Further, the referee, judge or jury is required to assess the property and all improvements, and each and every separate interest or estate. Separate parcels must be separately assessed. Idaho Code § 7-711.1.

Lastly, in determining market value, the court or jury is not restricted to the current use of the property:

> The compensation which must be paid for property taken by eminent domain does not necessarily depend upon the uses to which it is devoted at the time of the taking; rather, all the uses for which the property is suitable should be considered in determining market

> value. The highest and best use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as a measure of value, but to the full extent that the prospect of demand for such use affects the market value of the property. It must be shown that the use for which the property is claimed to be adaptable is reasonably probable.

State ex rel. Symms v. City of Mountain Home, 493 P.2d 387, 389-90 (Idaho 1972).

(b) Time of valuation

The property must be valued as of the time of the issuance of the summons. Idaho Code § 7-712. Improvements added post-summons are not included in the amount of damages. Idaho Code § 7-712.

(c) Severance damages/benefits

"As a general rule, damages for the taking of an interest in property are measured by the fair market value of the property taken plus severance damages to any remainder." *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 619 P.2d 122, 132 (Idaho 1980). Idaho Code Section 7-711.2(a) requires that a court or jury ascertain and assess "the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff [*i.e.*, government]."

Idaho Code Section 7-711.3 likewise requires a court or jury to ascertain and assess whether the remaining property not condemned will be specially and directly benefited by the government's proposed improvement on the condemned property. If the benefit to the remaining property is equal to or greater than the severance damages suffered by the landowner, the landowner will not be allowed to recover any damages under Idaho Code Section 7-711.2. Rather, he will only be compensated for the value of the property actually taken.

If the damages to the remaining property are greater than the benefits resulting from the government's proposed improvements, then the value of the benefits shall be offset against the value of the severance damages. Idaho Code § 7-711.3

Any benefit to the land owner's remaining property that was not condemned in excess of any severance damages to the same remainder parcel may not be offset against the landowner's recovery for the government's condemnation. That is, if just compensation for the taking of a land owner's property was determined to be $10,000, but the court also determined that the remainder parcel would incur benefits of $5,000 by reason of the government's proposed improvements, the court may not

offset the landowner's recovery to take account of the benefits received. *See City of Orofino v. Swayne* 128, 504 P.2d 398, 401 (Idaho 1972) (recognizing that while some jurisdictions allow for such offsets, under Idaho law "benefits which may accrue to the remainder may not be considered except as a set-off against damages that have accrued to the remainder by reason of the severance from the portion condemned").

(d) Business damages

In addition to severance damages, Idaho Code Section 7-711.2(b) requires that a court or jury ascertain and assess:

the damages to any business qualifying under this subsection having more than five (5) years' standing which the taking of a portion of the property by the plaintiff may reasonably cause. The business must be owned by the party whose lands are being condemned or be located upon adjoining lands owned or held by such party. Business damages under this subsection shall not be awarded if the loss can reasonably be prevented by a relocation of the business or by taking steps that a reasonably prudent person would take, or for damages caused by temporary business interruption due to construction; and provided further that compensation for business damages shall not be duplicated in the compensation otherwise awarded to the property owner for damages pursuant to subsections (1) and (2)(a) of section 7-711, Idaho Code.

Any business owner seeking business damages must submit to the government copies of "federal and state income tax returns, state sales tax returns, balance sheets, and profits and loss statements for the five (5) years preceding" the condemnation action. Idaho Code § 7-711.2(b)(iii-iv).

For further requirements and conditions regarding recovering business damages in condemnation proceedings, refer to Idaho Code Section 7-711.2(b)(i-v).

(e) Attorney's fees/costs

Attorney's fees and other expenses are not recoverable in condemnation proceedings, except as authorized by statute. *Ada Cnty. Highway District ex. rel. Fairbanks v. Acarrequi*, 673 P.2d 1067 (Idaho 1983) (Shepard, C.J.).

Attorney's fees and costs are recoverable in condemnation proceedings pursuant to Idaho Rule of Civil Procedure 54(d)(1). As in most civil cases, fees and costs may be awarded only to the prevailing party. Idaho Code § 12-121. Idaho Rule of Civil Procedure 54(e)(1) provides that attorney's fees under Idaho Code Section 12-121 "may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation."

The *Acarrequi* Court set forth several factors that a trial court should take into account when determining if a prevailing party is entitled to attorney's fees:

> a condemnor should have reasonably made a timely offer of settlement of at least 90 percent of the ultimate jury verdict. We also deem that an offer would not be timely if made on the courthouse steps an hour prior to trial. An offer should be made within a reasonable period after the institution of the action, to relieve the condemnee not only of the expense but of the time, inconvenience and apprehension involved in such litigation, and also to eliminate the cloud which may hang over the condemnee's title to the property. Other factors which may be considered by the trial court are any controverting of the public use and necessity allegations; the outcome of any hearing thereon and, as here, any modification in the plans or design of the condemnor's project resulting from the condemnee's challenge; and whether the condemnee voluntarily granted possession of the property pending resolution of the just compensation issue.

Acarrequi at 1072.

Furthermore, the *Acarrequi* Court hinted that a condemning government entity is not very likely to recover its attorney's fees: "Except in the most extreme and unlikely situation, we cannot envision an award of attorneys' fees and costs to a condemnor." *Acarrequi* at 1072.

"Costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides in the discretion of the court." Idaho Code § 7-718.

(f) Interest

"For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date, shall be the measure of compensation for all property to be actually taken…." Idaho Code § 7-712. "The compensation and damages awarded shall draw lawful interest from the date of the summons." Idaho Code § 7-712.

"Under the eminent domain statutes in the State of Idaho, Idaho Code § 7-701 *et seq.*, it is clear that a defendant is entitled to interest running from the date of the summons." *Eagle Sewer Dist. v. Hormaechea*, 109 Idaho 418, 422, 707 P.2d 1057, 1061 (Ct. App. 1985).

(4) Allocation of Damages

The "owner" of condemned property includes any person having a lawful interest in the property. 26 Am Jur. 2d *Eminent Domain* § 257 (1996). The generally accepted method for apportioning the compensation paid among the owners of the property is commonly called the "unit rule", the "undivided fee rule" or the "undivided basis rule." 26 Am Jur. 2d *Eminent Domain* at § 258. It is a two-step process: (1) the court determines the total compensation due for the fee taken; and (2) the court apportions the award among the various ownership interests. 26 Am Jur. 2d *Eminent Domain* at § 258. There is no standard method for apportioning the condemnation award or otherwise determining what percentage of the award each separate interest is entitled to.

By way of example, a landlord cannot recover for a taking that only affects her tenant's interest in the property, *i.e.*, a temporary taking that ceases to exist before the lease term expires. In such a case, the tenant would be entitled to 100 percent of the compensation awarded for the taking.

Idaho seems to have eschewed the generally accepted "unit rule" and adopted the minority "summation rule," which values each interest separately and adds them together to arrive at the total just compensation due. Idaho Code Section 7-711.1 provides that the court or jury must ascertain and assess the value of the property sought to be condemned "and of each and every separate estate or interest therein…." This section goes on to say that "if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed." Idaho Code § 7-711.1 (emphasis added).

(5) Role of judge and jury

As in all civil court matters, in condemnation actions, issues of law are for the trial court to decide and issues of fact are for a jury or fact finder to decide. "In an eminent domain action, the only issue for the jury is compensation for the land and the damages thereto." *Reisenauer v. State Dep't of Highways*, 120 Idaho 36, 38, 813 P.2d 375, 377 (Ct. App. 1991). All remaining issues are issues of law for the trial court to determine. Of course, as previously indicated, just compensation is the heart of any condemnation action.

However, aside from cases tried before the court, there are certain other circumstances where a judge will determine just compensation, at least initially.

See discussion in context of takings case in section 28.G(4) at page 615.

(6) Taking possession before trial

Idaho Code Section 7-721 sets forth certain circumstances where the government may take possession of and use any property it seeks to acquire through

condemnation "at any time after just compensation has been judicially determined and payment thereof made into court." Generally, the government may do this when it needs to take possession of land right away for the purposes of road-building or water/sewer purposes and it has been unable to negotiate a possession agreement with the property owner.

In these cases, the government will file a motion asking that it be placed in lawful possession of the property. Idaho Code § 7-721(1). Within 20 days, the court will hold a hearing on the motion to determine: (1) whether the government has the right of eminent domain; (2) whether or not the use to which the property is to be applied is authorized by law; (3) whether or not the taking is necessary to such use; and (4) whether or not the government has sought, in good faith, to purchase the property. Idaho Code § 7-721(1-2).

If the court finds these four criteria satisfied, then the court will hear "evidence as it may consider necessary and proper for a finding of just compensation…." Idaho Code § 7-721(3).

In its discretion, the court may appoint a disinterested appraiser as an agent of the court, at the expense of the government. Idaho Code § 7-721(3). The appraiser will be given 10 days to report his conclusions to the court. Idaho Code § 7-721(3). Within 5 days after receiving the appraiser's report or within 5 days after the hearing if no appraiser was appointed, the court shall "make an order of just compensation." Idaho Code § 7-721(3).

Thereafter, the government may deposit the ordered amount with the court, upon which the court will enter an order fixing a date when the government is entitled to possession of the property. Idaho Code § 7-721(5).

Once the money is deposited with the court, any "party defendant" may file with the court an application to withdraw her portion of the amount deposited by the government. Idaho Code § 7-721(6). If there is only one party defendant, then the court shall authorize the withdrawal. However, if there is more than one party defendant, then the court shall hold a hearing, giving notice to each party whose interest would be affected by the withdrawal. Idaho Code § 7-721(6). At the hearing, the court shall determine what portion of the deposited funds each party defendant may withdraw. Idaho Code § 7-721(6).

If more than 80 percent of the funds are withdrawn, then the defendant(s) withdrawing the money:

shall be required to make a written undertaking, executed by two (2) or more sufficient sureties, approved by the court, to the effect that they are bound to the plaintiff for the payment to it of such sum by which the amount withdrawn shall exceed the amount of the award finally determined upon trial of the case.

Idaho Code § 7-721(7).

Notably, the court's order of just compensation, the amount deposited with the court by the government, and the appraiser's report are not admissible in evidence in further proceedings to determine the actual just compensation owed to the property owner. Idaho Code § 7-721(4).

M. Practical issues in Idaho eminent domain

(1) Negotiating sale agreements and leases to address condemnation

Condemnation can become an issue in the purchase, sale or lease of real property. Condemnation becomes an issue in the purchase and sale of real property if part of the property is condemned between the entry of a purchase agreement and the sale of the property. The main question is what compensation, if any, the buyer owes the seller for property the buyer contracts to purchase that the government takes before closing.

For example, assume that a buyer contracts with a seller to purchase 100 acres of property at $100,000 per acre. The value is based on the installation of new road improvements adjacent to the property. Between entry of the purchase contract and the closing, the government condemns 10 acres for the contemplated road improvements. However, the government is only required to pay $50,000 per acre, the "pre-project" value of the land.

In the absence of a contractual provision, the condemnation creates a messy issue. Is the buyer bound by the contract or is he or she relieved from the obligation to pay for the condemned portion of the property by the intervening government action? To avoid this issue, the best practice is clearly to allocate the risks in the contract. As in all good contractual drafting, the parties should address all the possibilities. What happens if condemnation occurs? What if it does not? Is the seller entitled to the full price for the entire acreage or only for the acreage remaining? The answers to these questions are transaction specific, but they should be addressed.

A typical purchase and sale agreement will contain a "risk of loss" provision such as the following, which will most often encompass condemnation issues:

> Risk of Loss; Condemnation. Risk of loss or damage to the Property shall be borne by Seller until the Closing. From and after the Closing, loss of or damage to the Property shall be borne by Buyer. If the Property is or becomes the subject of any condemnation proceeding prior to the Closing, Buyer may, at its option, terminate this Agreement by giving notice of such termination to

> Seller within ten (10) days following the date Buyer learns about the condemnation proceeding, and upon such termination this Agreement shall be of no further force or effect and all Earnest Money and Review Period Extension Payments shall be returned to Buyer. Provided, however, Buyer may elect to purchase the Property, in which case the total Purchase Price shall be reduced by the total of any condemnation award received by Seller at or prior to the Closing. On Closing, Seller shall assign to Buyer all Seller's rights in and to any future condemnation awards or other proceeds payable or to become payable by reason of any taking of the Property. Seller agrees to notify Buyer of eminent domain proceedings within ten (10) days after Seller learns thereof.

While condemnation issues may be relatively rare in purchase and sale contracts, they are more common in leases. The question is what are the rights and obligations of the landlord and tenant if some or all of the leased property is condemned? Generally, the simpler cases are where the entire leased premises are condemned. The threshold question is whether the lease terminates at that point. If so, the landlord would hold the entire fee at condemnation and thus should be entitled to the condemnation award. If not, a question may remain about who is entitled to the condemnation award.

Another set of questions may arise if only a portion of the leasehold is taken. Does rent abate for the tenant for the portion of the leased premises taken? Is there additional compensation to the tenant if the value of the leasehold is harmed by the take? Is there additional rent due to the landlord if the take enhances the value of the leasehold? At what point does the property become uninhabitable, allowing the tenant to terminate the lease? The lease should address all of these issues if condemnation is a reasonable possibility during the lease term. Indeed, in the context of retail leases, failure to include provisions dealing with possible condemnation proceedings could amount to actionable malpractice. The following is an example of terms that should be included in a retail lease to address these issues:

> 1. Eminent Domain
>
> 1.1 Substantial Taking. Subject to the provisions of Section 1.4 below, in case the whole of the Premises, or such part thereof as shall substantially interfere with Tenant's use and occupancy of the Premises as reasonably determined by landlord, shall be taken for any public or quasi-public purpose by any lawful power or authority by exercise of the right of appropriation, condemnation or eminent domain, or sold to prevent such

taking, Landlord, subject to space availability, shall have the right to relocate Tenant to comparable space within the Retail Center, and if no such space is then available, Landlord shall notify Tenant and either party shall have the right to terminate this Lease effective as of the date possession is required to be surrendered to said authority.

1.2 Partial taking; Abatement of Rent. In the event of a taking of a portion of the Premises which does not substantially interfere with the conduct of tenant's business, then, except as otherwise provided in the immediately following sentence, neither party shall have the right to terminate this Lease and Landlord shall thereafter proceed to make a functional unit of the remaining portion of the Premises (but only to the extent Landlord receives proceeds therefore from the condemning authority), and the monthly installment of the Base Rent shall be abated with respect to the part of the Premises which Tenant shall be so deprived on account of such taking. Notwithstanding the immediately preceding sentence to the contrary, if any part of the Building or the Retail Center shall be taken (whether or not such taking substantially interferes with Tenant's use of the Premises), Landlord may terminate this Lease upon thirty (30) days' prior written notice to Tenant.

1.3 Condemnation Award. Subject to the provisions of Section 1.4 below, in connection with any taking of the Premises or the Building, Landlord shall be entitled to receive the entire amount of any award which may be made or given in such taking or condemnation, without deduction or apportionment for any estate or interest of Tenant, it being expressly understood and agreed by tenant that no portion of any such award shall be allowed or paid to Tenant for any so-called bonus or excess value of the Lease, and such bonus or excess value shall be the sole property of Landlord and Tenant hereby assign to Landlord any right Tenant may have to such damages or award, and Tenant shall make no claim against Landlord for the termination of the leasehold interest or interference with Tenant's business. Tenant shall not assert any claim against Landlord or the taking authority for any compensation because of such taking (including any claim for bonus or excess value of the Lease); provided, however, if any portion of the Premises is

taken, Tenant shall be granted the right to recover from the condemning authority (but not from Landlord) any compensation as may be separately awarded or recoverable by Tenant for the taking of Tenant's furniture, fixtures, equipment and other personal property within the Premises, for Tenant's relocation expenses, and for any loss of goodwill or other damage to Tenant's business by reason of such taking.

1.4 Temporary Taking. In the event of a taking of the Premises or any part thereof for temporary use, (a) this Lease shall be and remain unaffected thereby and at Landlord's election, (1) Rent shall abate in proportion to the square footage of the floor area of the Premises so taken, or (2) Tenant shall receive for itself such portion or portions of any award made for such use with respect to the period of the taking which is within the Term, provided that if such taking shall remain in force at the expiration or earlier termination of this Lease, Tenant shall perform its obligations under [other portions of the lease] with respect to surrender of the Premises and shall pay to Landlord the portion of any award which is attributable to any period of time beyond the Term expiration date. For purposes of this section 1.4, a temporary taking shall be defined as a taking for a period of two hundred seventy (270) days or less.

(2) Considerations in whether to settle an eminent domain case or try it

As previously indicated, Idaho law requires that before a government agency may institute condemnation proceedings, it must seek "in good faith, to purchase the lands so sought to be taken, or settle with the owner for the damages which might result to his property from the taking thereof…." Idaho Code § 7-707.6. Only after such attempts at purchase and settlement fail can the government then commence condemnation proceedings.

Therefore, the government cannot run absolutely roughshod over private landowners and must at least make some good faith effort at negotiating a purchase of the property or reaching a damages settlement. It is during this period of negotiations before the condemnation action has begun that a private landowner must first begin to assess whether she wishes to dig in her heels (*i.e.*, contest public use or valuation), and potentially pay thousands of dollars in attorney's fees, which she may or may not recover later. The alternative is to reach some mutually agreeable settlement or arrangement that still gives the government what it wants (the land or

use thereof; an inevitable conclusion in most cases) and saves the property owner the time and expense of protracted litigation.

However, private landowners should realize that government right-of-way agents do not necessarily see their jobs as to offer a fair settlement. Rather, the landowner should look at the right-of-way agent just as any potential purchaser: they are trying to get the best price they can for the property, subject to the additional requirement that they must provide an appraisal to support their proposed price. However, the values that different appraisers may set on a property may differ greatly based on the appraisal method used and the needs of the client.

The key for the property owner to successfully navigate these negotiations is to understand the value of his or her property. The property owner is at a natural disadvantage at the outset of the negotiations: the government has an appraisal and the property owner does not. This disadvantage may be exacerbated when surrounding uses have changed or the property has appreciated significantly so a long-term property owner may not have a good idea of value. Sometimes, figuring out the value may be a simple matter. If a comparable property next door has recently sold, and the price was not influenced by the upcoming condemnation, there may be little controversy about the price. However, there can be many complicating factors, and these are the things of which litigation is made.

When the government begins negotiations with a property owner, the owner should be given an appraisal. The first step is to review the appraisal carefully. This can often seem like an exercise in reading hieroglyphics, but there are some signs to look for. Ultimately, we believe the best advice is to affiliate experienced condemnation counsel and/or an appraiser if there is a significant amount of money potentially at stake.

Some of the signs the government's appraisal understate the value of the property include the following:

Has the appraisal correctly determined the highest and best use in contemplation of the land use plans for the area?

Does the appraisal rely on relevant comparable sales?

Does the appraisal include significant downward adjustments from the comparable sales?

Does the appraisal improperly discount damages to the remainder parcel? For example, does the appraisal address noise impacts, access restrictions or parcel configuration restrictions caused by the project?

Does the appraisal apply the pre-project requirement in a way that does not make sense? For example, does the appraisal treat the commercial use of a property

as a post-project enhancement when the property could be put to commercial use whether the project goes through or not?

For commercial or industrial properties, does the appraisal improperly discount an income method of appraisal? Or a replacement method if structures are taken?

(3) Should the condemnee hire an appraiser?

As mentioned, our advice is that the property owner should retain experienced counsel and/or an appraiser whenever a significant amount of money is at stake. There may be exceptions for very sophisticated landowners, but they are few.

(a) What can the appraiser do?

An appraiser can help the property owner sort through the list of issues above and provide responses to the government agency. If necessary, the appraiser can prepare an alternate appraisal, and provide expert testimony in court.

(b) The appraiser should have specific expertise

At the very least, the property owner should hire an appraiser with experience in condemnation proceedings. If the property is anything other than bare ground, *e.g.* a residence with remainder damage, a business, a billboard, etc., then the property owner should look for an appraiser with specific expertise in those areas.

(c) Cost to retain an appraiser

In some circumstances, one can hire an appraiser on an hourly basis for relatively brief consulting for a few hundred dollars or less. If a full-blown appraisal is required, the price is generally between a few thousand dollars for a simple appraisal to more than $10,000 for complex appraisal issues. If court testimony is required, the price can range from a few thousand dollars to many tens of thousands of dollars, depending on the complexity of the issues.

(d) Protecting discussions with the appraiser

If the landowner is represented by counsel, it may be desirable to have the attorney retain the appraiser to assist the attorney in advising the client regarding just compensation negotiations. In this way, it may be possible to protect certain discussions and information with the appraiser as part of the attorney-client privilege and attorney work-product doctrines.

Idaho Rule of Evidence 502(b) provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the

> rendition of professional legal services to the client which were made (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the client's lawyer and the lawyer's representative, (3) among clients, their representatives, their lawyers, or their lawyers' representatives, in any combination, concerning a matter of common interest, but not including communications solely among clients or their representatives when no lawyer is a party to the communication, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

Where the attorney employs the appraiser to assist in the rendition of professional legal services, the appraiser likely would be considered the lawyer's representative. Upon a showing that the communications were made for the purpose of obtaining legal advice, Rule 502 would act to protect confidential communications made between and among the client, the attorney, and the appraiser—at least to the extent that the appraiser does not testify in court. 81 Am. Jur. 2d *Witnesses* § 426 (1992) ("[t]he attorney-client privilege has extended, in addition to polygraph examiners, and physicians, psychiatrists, and other psychotherapists, to accountants, engineers, and real estate appraisers…"); *see also* 14 A.L.R. 4th 594 §16(a).

However, once the appraiser is designated as an expert witness for trial, his or her opinions and the facts and data underlying those opinions, which may necessarily include some communications made between the client, attorney and appraiser, are discoverable. I.R.E. 705.

34. CONSTITUTIONAL LIMITS ON GOVERNMENTAL DEBT AND THE NON-APPROPRIATION LEASE

(1) Background

Since its adoption in 1890, Idaho's Constitution has set out strict limitations on the ability of local governments to take on debt or liability without voter approval. It provides, in pertinent part:

> No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose . . . . Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state . . . .

Idaho Const. art. VIII, § 3.[733] In other words, absent super-majority voter approval, local governments are prohibited from taking on any debt or liability that cannot be

[733] The entire section reads:

> No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state and provided further that any city may own, purchase, construct, extend, or equip, within and without the corporate limits of such city, off street parking facilities, public recreation facilities, and air navigation facilities, and, for the purpose of paying the cost thereof may, without regard to any limitation herein imposed, with the assent of two-thirds of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by, such facilities as may be prescribed by law, and provided further, that any city or other political subdivision of the state may own, purchase, construct, extend, or equip, within and without the corporate limits of such city or political subdivision, water system, sewage collection systems, water treatment plants, sewage treatment plants, and may rehabilitate existing electrical generating facilities, and for the purpose of paying the cost thereof, may, without regard to any limitation herein imposed, with the assent of a majority of the qualified

fully paid with funds that will be available in the year the debt or liability is incurred.[734]

The Constitution contains several exceptions to this prohibition (some original, some added later). The most notable of these is that liability for "ordinary and necessary" expenditures is not subject to the constitutional provision and therefore does not require voter approval.[735] These exceptions are narrow, and Idaho appears to be the strictest state in the nation on the subject of public debt.[736]

> electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by such systems, plants and facilities, as may be prescribed by law; and provided further that any port district, for the purpose of carrying into effect all or any of the powers now or hereafter granted to port districts by the laws of this state, may contract indebtedness and issue revenue bonds evidencing such indebtedness, without the necessity of the voters of the port district authorizing the same, such revenue bonds to be payable solely from all or such part of the revenues of the port district derived from any source whatsoever excepting only those revenues derived from ad valorem taxes, as the port commission thereof may determine, and such revenue bonds not to be in any manner or to any extent a general obligation of the port district issuing the same, nor a charge upon the ad valorem tax revenue of such port district.

Idaho Const. art. VIII, § 3.

[734] This constitutional provision also requires that the governmental entity provide for the collection of an annual tax sufficient to pay the interest on any debt, and to pay off the debt within 30 years.

[735] The key decisions discussing the "ordinary and necessary" exception are *City of Challis v. Consent of the Governed Caucus*, 159 Idaho 398, 361 P.3d 485 (2015) (Horton, J.), *City of Idaho Falls v. Fuhriman*, 149 Idaho 574, 237 P.3d 1200 (2010) (Burdick, J.), and *City of Boise v. Frazier*, 143 Idaho 1, 137 P.3d 388 (2006) (Burdick, J.).

In *Consent of the Governed*, the city sought judicial confirmation of its plan to incur $3.2 million in debt without voter approval to pay for needed repairs and improvements to the existing municipal water delivery system (including pipe replacement, metering upgrades, etc.). The Court found the actions funded by the debt were "ordinary" but the entire package was unconstitutional because at least one of the actions was not "necessary." In reaching this conclusion, the Court strictly applied precedent from *Frazier* and *Fuhriman*. To be "necessary," the Court found that the expense must be incurred without delay. The Court ruled for the first time that the "necessity-requires-urgency analysis" articulated in *Fuhriman*, 149 Idaho at 578-79, 237 P.3d at 1204-05 "applies in instances where public safety is implicated." *Consent of the Governed*, 159 Idaho at 402, 361 P.3d at 489. "As with the proposed long-term power agreement in *Fuhriman*, metering and telemetry upgrades are undoubtedly desirable from an economic perspective. However, the need for these upgrades cannot be characterized as urgent." *Consent of the Governed*, 159 Idaho at 404, 361 P.3d at 491.

In *Frazier*, the Court described the types of expenditures that the Founder contemplated falling within the "ordinary and necessary" proviso: "Those expenditures included unavoidable expenses, such as carrying on criminal trials and abating flood damage, that could not be delayed. We observe that the expenditures contemplated by the delegates involved immediate or emergency

Given the challenge of obtaining super-majority voter approval, cities and counties routinely employ a device known as a "non-appropriation lease" (also known as "annual appropriation lease") to facilitate long-term leases and/or financing. The distinguishing feature of the non-appropriation lease is the "walk away" provision allowing the governmental entity to terminate (or not renew) the lease at the end of any year.[737] The term "non-appropriation" recognizes that the governmental entity, at any time, may elect not to appropriate funds to continue the lease for another year.

This non-renewal may come in the form of a one-year lease that is renewable by affirmative action, at the option of the government, for a specified number of years. Alternatively, it may come in the form of a lease for a set number of years that the government may terminate early, without penalty, at the end of any year. One could argue that the difference between the two is purely cosmetic. However, as discussed below, the only non-appropriation lease to be tested and approved by the Idaho Supreme Court was of the former variety. *Greater Boise Auditorium Dist. v. Frazier* ("*GBAD*"), 159 Idaho 266, 277, 360 P.3d 275, 286 (2015) (W. Jones, J.) (Eismann, J., concurring) ("The District must take affirmative action to renew the lease each year.").

There is a practical difference between the two formats. Under a renewable one-year lease, the local government cannot inadvertently become committed to another year by failure to timely terminate. The question is whether this is of constitutional significance. Were the framers concerned with protecting taxpayers

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expenses, such as those involving public safety, or expenses the government entity in question was legally obligated to perform promptly." *Frazier*, 143 Idaho at 4, 137 P.3d at 391 (citation omitted).

In other words, it is not sufficient that the expense be important or a good investment. Nor is it enough that the expense be for an existing municipal undertaking (as opposed to new construction). To be deemed "necessary," it must be urgently needed now—without time to obtain voter approval. The Coalition argued that the expense must be shown to be needed within the same fiscal year. The Court did not expressly endorse that rule, but it seems to be a reasonable rule of thumb for what might pass muster. *Consent of the Governed*, by the way, was a 3-2 decision with a vigorous dissent.

[736] "While many states have a similar constitutional provision, this Court has held that Idaho's is among the strictest, if not the strictest, in the nation." *Greater Boise Auditorium Dist. v. Frazier* ("*GBAD*"), 159 Idaho 266, 271, 360 P.3d 275, 280 (2015) (W. Jones, J.) (Eismann, J., concurring). "[T]he framers of our Constitution employed more sweeping and prohibitive language in framing section 3 of article 8, and pronounced a more positive prohibition against excessive indebtedness, than is to be found in any other Constitution to which our attention has been directed." *Feil v. Coeur d'Alene*, 23 Idaho 32, 49, 129 P. 643, 649 (1912) (Ailshie, J.).

[737] The term "year" in the Constitution is interpreted to apply to the entity's fiscal year. "The applicable year is the District's fiscal year. *GBAD*, 159 Idaho at 277, 360 P.3d at 286 (Eismann, J., concurring) (citing *Theiss v. Hunter*, 4 Idaho 788, 794, 45 P. 2, 3 (1896) (Sullivan, J.). For this reason, in the typical non-appropriation lease, the first term is less than a year ending on the last day of the current fiscal year.

from forgetful governments? Arguably not. But local governments will not have to face that unanswered question if they opt for the form of non-appropriation lease approved by the Court in *GBAD*.

Non-appropriation leases may or may not serve a financing function. In a non-financing context, a non-appropriation provision could be included in an ordinary lease (sometimes called a "true lease") that simply allows the government to use the property for a number of years. As with any ordinary rental agreement, when the lease concludes (or is terminated or not renewed), the lessor retakes the property and the lessee owns nothing.

Some non-appropriation leases are vehicles for long-term financing of a building or equipment purchase. Rather than simply renting, this is a "rent to buy" arrangement. At the end of such a lease (if it is renewed and paid for the requisite number of years), the lessee becomes the owner of the property for a nominal sum (or nothing at all). Those attacking such financing leases often refer to them, sometimes disparagingly, as disguised sales, conditional sale agreements, disguised mortgages, or equitable mortgages. Whatever they are called, the key point is that the lessor takes the risk that the lessee will not renew the lease at the end of each year. If the lessee does not renew, the lessor's only remedy is to foreclose or take possession of the subject of the lease. If the property has value only to the lessee (such as a courthouse or police station), the lessor will need to carefully evaluate the risk of such a walk away.

The Greater Boise Auditorium District entered into two non-appropriation leases, one of each type. The Centre Lease was a financing lease used for the purchase of the new auditorium. The District sought judicial confirmation of this lease. As part of the same development package, however, the District also agreed to enter into a non-financing lease (aka "true lease") to rent the fourth floor of the neighboring Clearwater Building to be used for additional meeting room facilities. The Clearwater Lease and other deal documents were provided to the district and appellate courts as background information to explain how the Centre Lease fit into the overall deal. Although judicial confirmation was sought only with respect to the Centre Lease, the Idaho Supreme Court ultimately gave its blessing to "the overall agreement entered into by the District." *GBAD*, 159 Idaho at 168-69, 360 P.3d at 284-85.

The contract terms may involve some additional complexities. In many cases, an urban renewal agency will issue revenue bonds and enter into a non-appropriation lease directly with the local government. Bonds are a favored means of financing, because it is easier for the borrower to lock in long-term interest rates.

The sale of bonds generates funds sufficient to pay the purchase price of the property. If necessary, the builder or developer may use that revenue to pay off (or pay down) construction loans, thereby clearing construction liens so that it may issue

free title to the buyer. The bond holders then take the risk that the governmental entity will fail to renew the lease and stop making payments. In other words, the "walk away" option is built into the bond documents.

A third party entity, typically an urban renewal agency, is often brought in to issue the revenue bonds, acquire the property, and lease it to the governmental entity. Auditorium districts have no authority to issue revenue bonds, but urban renewal agencies do. Even when the local government has the authority to issue revenue bonds, they typically bring in a third party conduit financer to issue the bonds, because that enables a simple way of describing the revenue stream (lease payments) that fund the bonds.

As an alternative to bond financing, the financing money may come from a private placement with banks and similar institutions.[738] In theory, banks could acquire the property and lease it to the governmental entity under a non-appropriation lease. However, for reasons including tradition, regulatory limitations, and the desire for consistency and certainty, banks do not typically care to be the owner and lessor of the property. They prefer to lend money in exchange for a note and deed of trust.

Consequently, if bank financing is involved, it is often necessary to bring another party into the transaction to serve as the lessor and conduit financer. As with revenue bonds, that additional party is frequently an urban renewal agency. The urban renewal agency obtains bank financing, purchases the real property, issues a "lease revenue note",[739] an "assignment of rent," and a deed of trust, and leases the property to the local government under a non-appropriation lease. Under Idaho law, urban renewal agencies are not subject to Article VIII, section 3.[740] Thus, they may

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[738] In the *GBAD* case, the District switched from bond financing to bank financing with its second petition for judicial review.

[739] A lease revenue note is no ordinary note. Ordinarily, a lender has recourse under a note if payments stop. In contrast, a "lease revenue note" is no more than a promise to pass through to the lender whatever payments are made by the lessee. If the lessee elects not to renew, this is not a default and the lender has no recourse other than to foreclose on the deed of trust.

For example, the bank's term sheet (at page 2) in the *GBAD* litigation provided: "Neither the Lease nor the Note constitutes indebtedness or multiple fiscal year direct or indirect obligation of the District within the meaning of any constitutional or statutory debt limitation. Neither the Lease nor the Note will directly or indirectly obligate the District to make any payments other than those which may be appropriated by the District for each District fiscal year. All obligations of the District under the Lease and the Note will terminate at the end of the Lease term following an event of non-appropriation."

[740] "Because the Agency is not a governmental subdivision, it is not subject to Article VIII, section 3." *GBAD*, 159 Idaho at 268, 360 P.3d at 277 (W. Jones, J.). "The Agency is not bound by the strictures of article VIII, section 3 because it lacks the power to levy and collect taxes and is not an alter ego of the City of Boise." *GBAD*, 159 Idaho at 279, 360 P.3d at 288 (Eismann, J., concurring) (citing *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 882–83, 499 P.2d 575, 581–82 (1972) (Shepard, J.)). See also; *Urban Renewal Agency of City of Rexburg v.*

obtain long-term bank financing (or bond financing, for that matter) wherein they pass through the rent payments made by the local government lessee.

Transactions involving building construction may entail more than one loan. The financing loan (used by the buyer, like a mortgage, to pay off the purchase cost over decades) is distinct from the construction loan (used by the builder to finance the construction). Typically, the construction loan is a short-term loan between a bank and the builder, which is paid off when construction is complete with proceeds from the new lender (or bond purchasers) at the time the financing loan is initiated. All of these arrangements may be tied together in one or more development agreements among the various parties.

(2) The *GBAD* Court rejects the "true lease" versus "financing lease" analysis.

Non-appropriation leases have been employed by cities, counties, and other governmental entities throughout Idaho for decades. Until 2015, there was no appellate authority on their constitutionality. Nine have been challenged in district court with no appeal taken. (Six upheld the leases.[741] Three rejected them.[742])

Hart, 148 Idaho 299, 302, 222 P.3d 467, 470 (2009) (Horton, J.) (urban renewal agency is not "simply the alter ego of the City").

[741] Non-appropriation leases were upheld in the following district court decisions.

"*Dunn Decision*": *In the Matter of the Pocatello-Chubbuck Auditorium Dist.*, Case No. CV 2013-4838-00 (Idaho, Sixth Judicial Dist. Aug. 5, 2002) (Stephen S. Dunn, D.J.) (approving non-appropriation lease to finance acquisition of auditorium facilities).

"*Elgee Decision*": *In re School Dist. No. 61, Blaine Cnty., Idaho*, Case No. CV2010-170 (Idaho, Fifth Judicial Dist. May 5, 2010) (Robert J. Elgee, D.J.) (approving non-appropriation lease of school facilities).

"*Granata Decision*": *In re Ada Cnty.*, Case No. 95055 (Idaho, Fourth Judicial Dist. Jan. 23, 1992) (George Granata, Jr., D.J.) (approving non-appropriation lease to finance acquisition of land for Ada County Courthouse).

"*May Decision*": *In re School Dist. No. 61, Blaine Cnty., Idaho*, Case No. SP-022782, (Idaho, Fifth Judicial Dist. Aug. 5, 2002) (James J. May, D.J.) (approving non-appropriation lease to finance acquisition of school facilities).

"*Mitchell Decision*": *Spencer v. North Idaho College*, Case No. CV 2009 8934 (Idaho, First Judicial Dist. Mar. 19, 2010) (John T. Mitchell, D.J.) (approving non-appropriation lease to finance North Idaho College).

"*Woodland Decision*": *Ada Cnty. Prop. Owners Ass'n v. Cnty. of Ada*, Case No. CVOC 99 01055-A (Idaho, Fourth Judicial Dist. Aug. 18, 1999) (William E. Woodland, D.J.) (approving non-appropriation lease for Ada County Courthouse notwithstanding boilerplate indemnities).

[742] Three district courts rejected non-appropriation leases.

"*Copsey Decision*": *In the Matter of City of Boise*, Case No. CVOC0202395D (Idaho, Fourth Judicial Dist. Aug. 26, 2002) (Cheri C. Copsey, D.J.) (rejecting non-appropriation lease for new police facility because city conveyed land to secure financing and would be required to operate the facilities).

"*Hosac Decision*": *In the Matter of Cnty. of Bonner, Petition for Minimum Security Facility*, Case No. CV08-641 (Idaho, First Judicial Dist. Sept. 4, 2008) (Charles W. Hosac, D.J.) (rejecting

Three cases reached the Idaho Supreme Court, but were not decided on the merits.[743] The first appellate decision on the merits was *Greater Boise Auditorium Dist. v. Frazier* ("*GBAD*"), 159 Idaho 266, 360 P.3d 275 (2015) (W. Jones, J.; Eismann, J., concurring).[744]

The *GBAD* suit was initiated when the District sought judicial confirmation of a proposed one-year non-appropriation lease between the District and the local urban renewal agency known as the Capital City Development Corporation ("CCDC").[745] Confirmation was opposed by David R. Frazier.[746] The lease would serve as a financing vehicle for the District's expansion of its Boise convention facilities (the Boise Centre).[747] The proposed lease would allow the District to renew the one-year

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non-appropriation lease for juvenile detention facility because county conveyed land to secure financing and would be required to operate the facilities). This decision was only recently discovered by the District.

"Stegner Decision": *In re: Kootenai Cnty., Idaho*, Case No. CV-2014-5205 (Idaho, First Judicial Dist. Sept. 2, 2014) (John R. Stegner, D.J.) (rejecting a purported non-appropriation lease because it failed to include a functional non-appropriation provision).

[743] *Lind v. Rockland School Dist. No. 382*, 120 Idaho 928, 821 P.2d 983 (1991) (McDevitt, J.) involved a non-appropriation lease, but the Court found the question of its constitutionality not to be ripe. *Koch v. Canyon Cnty.*, 145 Idaho 158, 177 P.3d 372 (2008) (Eismann, C.J.) also involved a non-appropriation lease, but the Court found the case moot and did not reach the merits. The *Koch* decision, however, established that taxpayers and citizens have standing to challenge alleged violations of Idaho Const. art. VIII, § 3. In *In re University Place / Idaho Water Center Project*, 146 Idaho 527, 547-48, 199 P.3d 102, 122-23 (2008), Justice Jim Jones wrote a concurrence commenting on non-appropriation leases and expressing disappointment that the issue was not presented by the parties.

[744] This was a 5-0 decision. The main opinion was authored by Justice Warren Jones, joined by Justices Jim Jones and Roger Burdick. A concurring opinion was authored by Justice Daniel Eismann, joined by Justice Joel Horton. The concurrence expresses no disagreement with the main opinion.

[745] Judicial confirmation refers to a statutory grant of jurisdiction, available since 1988, by which a local government may, at its option, seek a court's ruling on "the validity of any bond or obligation or of any agreement or security instrument related thereto." Idaho Code §§ 7-1301 to 7-1313. Where there is no controlling appellate precedent, bond counsel will not issue an unqualified opinion and lenders often require the local government to obtain judicial confirmation.

[746] Mr. Frazier is the same person who successfully challenged the City of Boise's airport parking project in *City of Boise v. Frazier*, 143 Idaho 1, 137 P.3d 388 (2006) (Burdick, J.) and the City of Boise's police facilities project in *In the Matter of City of Boise*, Case No. CVOC0202395D (Idaho, Fourth Judicial Dist. Aug. 26, 2002) (Cheri C. Copsey, D.J.). See discussion of Mr. Frazier's standing in section 34(7) at page 851.

[747] At the time the District sought judicial confirmation, it had already committed to purchase the new building from the developer, regardless of outcome. "The District has sufficient funds available to purchase the Centre Building, but it desires to finance that purchase in order to use its funds to purchase the facilities in the Clearwater Building, to construct a sky bridge connecting the Centre Building and the facilities in the Clearwater Building, and to make improvements to the Boise Centre." *GBAD*, 159 Idaho at 279, 360 P.3d at 288 (Eismann, J., concurring).

lease, at its option, for 24 additional one-year terms, after which it could acquire the new convention building for a nominal sum. The Court upheld the District's non-appropriation lease as well as the development agreement that linked together the construction loan, the purchase and sale agreement, the non-appropriation lease, and various other agreements.

The Idaho Supreme Court's decision followed two unsuccessful attempts by the District to obtain judicial confirmation of its non-appropriation lease. Both district judges concluded that the lease created a full and complete liability for the entire 25 years of payments immediately upon its execution because it was not a true lease, but a financing lease.[748] That reasoning relied on precedent in other contexts and from other jurisdictions that draw complicated distinctions between true leases and financing leases.

On appeal, the Idaho Supreme Court held that the true lease analysis employed by the district courts was irrelevant, confirming what the Court first said in 1931:

> We doubt whether it makes any difference whether it may be appropriately denominated a lease or a conditional sales contract. The important matter is, does it create "any indebtedness or liability in any manner or for any purpose, exceeding in that year the income and revenue provided for it for such year"?

GBAD, 159 Idaho at 278-79, 360 P.3d at 287-88 (Eismann, J., concurring) (quoting *Williams v. City of Emmett*, 51 Idaho 500, 506, 6 P.2d 475, 477 (1931) (McNaughton, J.)[749]).

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[748] "The next key question is whether the lease acts as a subterfuge for what is actually a conditional sales contract." *In the Matter of: Greater Boise Auditorium Dist.*, Case No. CV-OT-1411320, at 9 (Idaho, Fourth Judicial Dist., Aug. 28, 2014) (Melissa Moody, D.J.). (Technically, Judge Moody never answered her rhetorical question.) "Finally, the Court is not convinced that the lease agreement is, as a matter of law, a true lease. There are many circumstances under which a lease will be deemed to be a disguised security interest in a sale." *In the Matter of: Greater Boise Auditorium Dist.*, Case No. CV-OT-2014-23695 (Idaho, Fourth Judicial Dist., Mar. 23, 2015) (Lynn Norton, D.J.) at 10.

[749] In *Williams v. City of Emmett*, 51 Idaho 500, 6 P.2d 475 (1931) (McNaughton, J.), the Court held that a multi-year lease (which was not subject to a non-appropriation provision) violated Idaho Const. art. VIII, § 3. The City of Emmett had entered into a three-year lease of a street sprinkling truck, coupled with an option to purchase, wherein the rent payments would be credited toward the purchase price (which equaled the sum of the rent payments over the term of the lease). Notably, the Court concluded that it made no difference whether the agreement was viewed as a lease or a sales contract. Either way, under the reasoning of *Boise Dev.*, the agreement resulted in a "present *liability*" for the entire obligation at the time of execution and hence violated the Constitution. *Williams*, 51 Idaho at 507, 6 P.2d at 477 (emphasis original). Thus, the holding of

> We reaffirm that principle [in *Williams*] now. The relevant determination under Article VIII, section 3 is whether the governmental subdivision presently bound itself to a liability greater than it has funds to pay for in the year in which it bound itself. Questions about the characterization of the document only matter to the extent that they could provide additional liability.

GBAD, 159 Idaho at 273, 360 P.3d at 282, (W. Jones, J.).

> We follow our previous holdings and continue to "doubt whether it makes any difference whether [the document] may be appropriately denominated a lease or a conditional sales contract." We simply examine the terms of the agreement and consider whether they bind the District to more liability than it can pay off in the fiscal year.

GBAD, 159 Idaho at 275, 360 P.3d at 284 (W. Jones, J.) (brackets original) (citing *Williams*).

Justice Eismann's concurrence reinforces this conclusion.

> The district court held that the Centre Lease violated article VIII, section 3 because it was not a true lease; it was a conditional sale contract. . . . However, whether it is a lease or a conditional sale contract does not change the analysis under article VIII, section 3 of the Idaho Constitution. As this Court stated in *Williams v. City of Emmett*, 51 Idaho 500, 6 P.2d 475 (1931): "We doubt whether it makes any difference whether it may be appropriately denominated a lease or a conditional sales contract. The important matter is, does it create 'any indebtedness or liability in any manner or for any

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Williams is that <u>any</u> no-escape lease violates the Constitution if the sum of rent over the entire lease term exceeds funding available in the current year.

The Court ruled that although the contract was illegal and void, "the parties in apparent good faith have largely carried out the terms of the agreement." *Williams*, 51 Idaho at 508, 6 P.2d at 477. Consequently, although the contract was terminated, the lessor was not required to disgorge lease payments it had received for prior terms. "Clearly, the court could not enter an equitable decree without taking account of the benefits to the city resulting from the execution of the contract. The city could not have these benefits and a return of the money paid out on account of them too, even though the agreement under which the benefits were had was illegal." *Williams*, 51 Idaho at 507, 6 P.2d at 477-78.

> purpose, exceeding in that year the income and revenue provided for it for such year'?" *Id*. at 506, 6 P.2d at 477.

GBAD, 159 Idaho at 278, 360 P.3d at 287 (Eismann, J., concurring).

In sum, the nature or purpose of the lease makes no difference. The only thing that matters is what debt or liability is incurred. If a lease (whether true lease or a financing lease) commits the lessee to multiple years of payments without a walk-away provision, the liability for the entire commitment accrues when the lease is executed. If the government does not have the money on hand to pay all lease payments for the duration of the commitment, then it must seek voter approval.

The flip side is also true. If a lease (whether a true lease or a financing lease) contains a walk away provision, the only liability that accrues is the liability for the current term (the only one to which the government is committed). See *GBAD*, 159 Idaho at 272, 360 P.3d at 281 (W. Jones, J.) (distinguishing the multi-year commitment in *Williams* which had no walk away provision). So long as the government has the money (or will have the money by the end of the fiscal year) to pay the initial commitment of rent, Article VIII, section 3 is not implicated.

This rejection of the "true lease versus financing lease" distinction sets Idaho apart from virtually every other jurisdiction.[750] The reason Idaho is different is that its reading of its constitution's debt provision is stricter than that of other states. The key difference is Idaho's broader reading of the word "liability."[751] In a multi-year

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[750] This is not to say that the "true lease versus financing lease" distinction does not exist in Idaho. It does, but it is relevant only in other contexts unrelated to Article VIII, section 3. *E.g.*, *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 388, 111 P.3d 73 (2005) (Schroeder, C.J.) (true lease vs. disguised mortgage loan in context of statute setting upper limit on loan value in mortgage loans); *Goodtimes, Inc. v. IFG Leasing Co.*, 117 Idaho 452, 788 P.2d 853 (Ct. App. 1990) (Weston, J. Pro. Tem.) (true lease vs. conditional sale in context of usury statute); *Excel Leasing Co. v. Christensen*, 115 Idaho 708, 769 P.2d 585 (Ct. App. 1989) (Swanstrom, J.) (true lease vs. security agreement in context of Uniform Commercial Code); *Transp. Equip. Rentals, Inc. v. Ivie*, 96 Idaho 223, 526 P.2d 828 (1974) (McQuade, J.; Bakes, J., dissenting) (true lease vs. financing arrangement in context of usury laws); *Swayne v. Dep't of Employment*, 93 Idaho 101, 456 P.2d 268 (1969) (Spear, J.) (true lease vs. employment contract in context of employment security law).

[751] In *GBAD*, the Court harkened back to its seminal decision in 1912:

> This Court in *Feil* was careful to distinguish an "indebtedness" from a "liability," the latter being "a much more sweeping and comprehensive term than the word 'indebtedness[.]'"

GBAD, 159 Idaho at 271, 360 P.3d at 280 (W. Jones, J.) (quoting *Feil*, 23 Idaho at 49–50, 129 P. at 649). The *GBAD* Court continued:

> This Court found that presently obligating oneself to future payments is not a present indebtedness, but it is a present liability. . . .
>
> . . . Accordingly, governmental subdivisions are liable for the aggregate payments due over the total term of a contract rather

lease, the debt accrues year by year as the rent falls due. In contrast, liability for the entire multi-year term accrues at the outset.[752] Other states hold that (at least for a true lease) both indebtedness and liability extend only to the current year's rent. Accordingly, other states struggle mightily with whether the lease is a true lease or not, often tying themselves in knots with result-oriented logic.[753]

> than merely for what is due the year in which the contract was entered. . . .
>
> The aggregation principle was specifically extended to leases by this Court in *Williams v. Emmett*, 51 Idaho 500, 506, 6 P.2d 475, 477 (1931).

GBAD, 159 Idaho at 272, 360 P.3d at 281 (W. Jones, J.) (citing and quoting *Boise Dev. Co. v. City of Boise*, 26 Idaho 347, 363, 143 P. 531, 535 (1914) (Truitt, J.)).

[752] "If A. by a valid contract employs B. to work for him for the term of one year at $50 per month, payable at the end of each and every month, would this contract not be a liability on A. as soon as executed? A debt of $50 would accrue thereon at the end of each month, but the liability would be incurred at the time the contract was entered into." *Boise Dev. Co.* 26 Idaho at 363, 143 P. at 535.

[753] For example, California purports to follow the "true lease vs. sales contract" distinction, but applies it in a way that destroys its meaning, in order to uphold the constitutionality of virtually all long-term leases. In this respect, California is even more generous to municipalities than the rest of the nation. This is ironic, because California has a constitutional restriction on debt and liability equal to Idaho's.

The seminal case in California is *Dean v. Kuchel*, 218 P.2d 521 (Cal. 1950). The State of California sought judicial approval of a lease and lease-back arrangement whereby the State leased bare land to a development company for 25 years for a nominal sum (the ground lease), and the company would build an office building on the land and lease it back to the State for 25 years at a monthly rental of $3,325 (the building lease). The State is allowed to terminate the building lease after 15 years if certain payments are made. If all covenants under the building lease are performed for 25 years, the ground lease ends and all title vests in the State. The court began by reciting the state of the law: Multi-year leases with options to purchase do not violate the constitution unless the lease is a subterfuge for a conditional sales contract. The court then concocted a strange rule to the effect that if the payments are "in payment of the consideration furnished that year," the contract is constitutional irrespective of whether it is "denominated a mortgage, lease, or conditional sale." *Dean*, 218 P.2d at 523. Based on this, the court found that the payments made by the state were "for a month to month use" and that the transaction therefore "qualifies as a lease for the purpose of the debt limitation." *Dean*, 218 P.2d at 523.

This holding was reinforced by an even stronger statement in *Rider v. City of San Diego*, 959 P.2d 347 (Cal. 1998). There, the California Supreme Court upheld a financing agreement for the expansion of the San Diego Convention Center. The deal involved a lease and lease-back arrangement not unlike the arrangement in *Dean*. The issue was whether the City's commitment to pay "rent" equal to the debt service on the bonds sold by another entity converted this lease into a sales contract for purposes of the constitutional debt and liability limit. The plan was attacked as "a 'subterfuge,' 'artifice,' 'ruse,' and 'scheme.'" *Rider*, 959 P.2d at 350. The court bluntly said it did not matter. However one "might characterize the financing plan at issue here, we cannot characterize it as unlawful." *Rider*, 959 P.2d at 351.

Note that the leases approved in *Rider* and *Dean* were long-term leases without opt-out provisions. ("Thus, in effect, the City agreed to provide funds to meet all the Financing Authority's obligations as they arose, calling those funds rent payments." *Rider*, 959 P.2d at 349.) Thus,

Because Idaho "aggregates" the liability over the entire commitment irrespective of whether the lessee obtains ownership of the property at the end of the lease, in Idaho all multi-year financial commitments require voter approval unless the government has funds available at the outset for the entire commitment. In Idaho, labels do not matter. The only issue is: what is the extent of the commitment? The government is required only to have funds available to the cover those promises from which it cannot walk away.

> The District satisfied this requirement:
>
> > In the present case, the Centre Lease does not bind the District to any specifiable liability beyond the District's ability to pay in the year in which it was entered. It binds the District to pay rent of one year, something it currently has the funds to do. After the fiscal year's end, if the District has the funds to again pay for one year's rent, then it may renew the lease; if it does not, it does not have to pay anything by the terms of the contract. The District simply has not bound itself to a contractual liability beyond the fiscal year under the Centre Lease.

GBAD, 159 Idaho at 273, 360 P.3d at 282 (W. Jones, J.).

> Drafting a contract that does not violate the constitutional provision is not circumventing it. It is simply seeking to comply with it.

GBAD, 159 Idaho at 279, 360 P.3d at 288 (Eismann, J., concurring).

After the first attempt at judicial confirmation, the parties switched from bond financing to bank financing. The logic of the *GBAD* decision, however, compels the conclusion that bond financing with a walk-away provision would be treated the same as a lease with a walk-away provision. After all, the Court could hardly have been clearer that the nature of the agreement is beside the point; only the extent of the commitment matters.

(3) The constitutional prohibition does not extend to speculative future liability.

Idaho courts have long recognized that Article VIII, section 3 prohibits multi-year, unfunded commitments as to all forms of liability, not just debt. This is in contrast to a more lenient approach adopted in most other states. Writing in 1912,

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California has taken a position to the left of the Idaho Supreme Court and even to the left of most other states. Not only are multi-year lease commitments unobjectionable in California, they are unobjectionable even where the terms functionally mimic an installment sales contract.

Justice Ailshie gave short shrift to out-of-state precedents, dismissively describing how other courts have "indulged in various subtleties and refinements of reasoning to show that no debt or indebtedness [had] occurred." *Feil v. City of Coeur d'Alene*, 23 Idaho 32, 49, 129 P. 643, 649 (1912) (Ailshie, J.).[754]

In *Feil*, the City of Coeur d'Alene purchased a private waterworks funded with bonds payable over 20 years that were chargeable only against a special fund of fees paid by water users.[755] The city contended that, since the taxpayers were not at risk, the constitutional restriction did not come into play. The Court thought otherwise, rejecting the "special fund" defense and putting Idaho on a path at odds with most other states.

The Court rejected the conclusions reached by the highest courts of Washington, Iowa, North Carolina, and Wisconsin, declaring that "none of those cases deals with the word 'liability,' which is used in our Constitution, and which is a much more sweeping and comprehensive term than the word 'indebtedness.'" *Feil*, 23 Idaho at 50, 129 P. at 649.

The *Feil* decision has received its share of criticism,[756] but remains the law in Idaho.[757] What was unclear, until *GBAD*, was just how far the liability prohibition

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[754] The *Feil* Court was particularly offended by shifting of the responsibility for payment from the landowner to the consumer, describing this as a "subtle and dangerous" shift that was "clearly repugnant to the Constitution" and which "shocks the sense of justice and municipal honesty and integrity." *Feil*, 23 Idaho at 57, 129 P. at 652. This is ironic in that the prevailing public policy today tends to see user fees as a legitimate and desirable alternative to taxpayer funding. *See, e.g.*, Idaho Code §§ 50-329A(1)(c); 63-1311(1), 31-870(1). Indeed, 18 years after *Feil*, the Court expressed some misgiving on this point, but stuck to its precedent. "If this question were here for the first time, in view of the decisions relied on by defendants, this court might not reach the conclusion arrived at in the *Feil* Case. Indeed, it might be better, in view of the tax burden imposed on real property, for the consumers of water, electricity, etc., to provide the funds necessary to purchase such water and light systems." *Miller v. City of Buhl*, 48 Idaho 668, 284 P. 843 (1930) (Wm. E. Lee, J.).

[755] Though not denominated as such, these amounted to revenue bonds. Michael C. Moore, *Constitutional Debt Limitations on Local Gov't in Idaho – Article 8, Section 3, Idaho Constitution*, 17 Idaho L. Rev. 55, 60 n.26 (1980). When *Feil* was decided, Idaho Const. art. VIII, § 3 did not contain its current provisions dealing with revenue bonds.

[756] In *Foster's, Inc. v. Boise City*, 63 Idaho 201, 219, 118 P.2d 721, 729 (1941), Justices Morgan and Holden added a brief concurrence in which they expressly stated their disagreement with *Feil* and its progeny. More recently, a commentator observed:

> The *Feil* decision has not fared well outside of Idaho. The overwhelming majority of cases, including those decided under constitutional provisions which are similar, and sometimes virtually identical, to Idaho's, have rejected the *Feil* case and have adopted the view that a municipality does not incur an indebtedness or liability, within the constitutional limitation, by purchasing property to be paid for wholly from the income or revenue to be derived from

reaches. In *GBAD*, the district court read the prohibition expansively to include even unnamed and unknown liabilities that conceivably might arise someday as a consequence of the agreement. The Supreme Court described the district court's view this way:

> The district court's concern was that the "entire financing structure" could fail, which, in the district court's view, would allow the financier Wells Fargo to pursue remedies against the district. . . .
> . . . But instead of identifying any theory under which Wells Fargo could recover against the District, the district court simply was "not convinced that there is *no* theory of law or set of facts under which Wells Fargo could not recover against the District." It was concerned with "potential liabilities."

GBAD, 159 Idaho at 273, 360 P.3d at 282 (W. Jones, J.) (emphasis original).

> the property purchased. Many cases have expressly considered *Feil* and either distinguished or rejected it. Even some Idaho cases have expressed second thoughts about *Feil*. However, it can safely be said that, at least as applied to local governmental bodies, the Idaho Supreme Court has consistently adhered to *Feil* over the years.

Michael C. Moore, *Constitutional Debt Limitations on Local Gov't in Idaho – Article 8, Section 3, Idaho Constitution*, 17 Idaho L. Rev. 55, 64-66 (1980) (footnotes omitted).

[757] In *Miller v. City of Buhl*, 48 Idaho 668, 284 P. 843 (1930) (Wm. E. Lee, J.), the Court noted that the majority of courts in other jurisdictions, including California (which had a functionally identical constitutional provision), have embraced the special fund doctrine. But the *Miller* Court stuck to its precedent.

A second direct attack on *Feil* came two years later, in which the appellants urged that it be overruled because it was "not in keeping with the modern trend of municipal political economy." *Straughan v. City of Coeur d'Alene*, 53 Idaho 494, 496, 24 P.2d 321, 321 (1932) (Givens, J.). The Court declined.

A third direct attack on *Feil* came in 1983. *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983) (Huntley, J.). This one came closer, but did not quite make it. In *Asson*, five Idaho cities made the mistake of signing "dry hole" power contracts with the Washington Public Power Supply System ("WPPSS"). The planned nuclear power plants were terminated, but, due to the "dry hole" provision of the contracts, the cities remained on the hook to repay millions of dollars in bond indebtedness that WPPSS had acquired. Ratepayers brought suit seeking a declaration that the contracts were unconstitutional. The defenders of the contracts urged the Court to overrule *Feil* and apply the special fund doctrine. *Asson*, 105 Idaho at 438, 670 P.2d at 845. The Court declined to go there. It noted that, at least in the context of revenue bonds, a modified version of the special fund doctrine has been essentially constitutionalized via subsequent amendments, which still require voter approval, and, in any event, the exception would not apply here even if it was available in Idaho because "the WPPSS bonds [have] created no revenue-producing property." *Asson*, 105 Idaho at 438, 670 P.2d at 845. In sum, the Court found that, at least under these facts, *Feil* is still good law, the contracts were unconstitutional and the ratepayers were off the hook.

The Idaho Supreme Court rejected this expansive reading. It concluded that "liability" does not encompass every hypothetical financial setback that might someday emerge from a contractual relationship.

> The framers, while being quite concerned with incurring contingent liabilities, were not worried about all potential liabilities. . . .
> . . .
> This is not to say that every non-appropriation lease necessarily yields no long-term liabilities. But, as is the case here, in a lease where the subdivision is truly not subject to damages from not renewing the lease, and where no party has identified a specific liability, it does not make sense to require the District to disprove all *potential* liabilities.
> . . . An equitable remedy that does not require the District to pay monetary damages (even if the District already committed the wrong), is not the sort of liability the framers intended to prevent with Article VIII, section 3. . . .
> Even an action resulting in an order for specific performance of the terms of the lease would not bind the District to pay for more than it has available in the fiscal year because the terms of the lease are clear in that it is only for one year at a time and renewable in the District's sole discretion. . . .

GBAD, 159 Idaho at 274-75, 360 P.3d at 283-84 (W. Jones, J.) (emphasis original) (citing *Koch v. Canyon Cnty.*, 145 Idaho 158, 177 P.3d 372 (2008) (Eismann, C.J.)).

(4) The issue of indemnities was not before the Court.

As discussed above, the District twice sought judicial confirmation of its Centre Lease. The District's first non-appropriation lease contained standard, boilerplate indemnity provisions addressing liability for such things as environmental harm. These provisions were virtually identical to the indemnities approved by the district court in litigation over the Ada County Courthouse. *Ada Cnty. Prop. Owners Ass'n v. Cnty. of Ada*, Case No. CVOC 99-01055-A (Idaho, Fourth Judicial Dist. Aug. 18, 1999) (William E. Woodland, D.J.). Judge Moody, however, ruled that the indemnity provision gave rise to unconstitutional liability.

Rather than fight over that issue, the parties agreed to remove the indemnities in an effort to speed approval of its lease (which did not work).[758] Accordingly, the indemnities were not before the Court on appeal. Consequently, we do not have definitive appellate guidance on whether such provisions pass constitutional muster. Instead, we are left to grapple with the issue based on the guidance provided.

The Court observed, "The framers, while being quite concerned with incurring contingent liabilities, were not worried about all potential liabilities." *GBAD*, 159 Idaho at 274, 360 P.3d at 283 (W. Jones, J.). While the distinction between "contingent liabilities" and "potential liabilities" in the quotation above is not spelled out by the Court, one might surmise that "contingent liabilities" refers to known risks of liability that may become an actual liability based on the outcome of future events, which risks have been identified and allocated by the agreement. In contrast, "potential liabilities" may refer to claims, causes of action, regulatory violations, negligence, or torts that have not yet occurred, which risks of liability have not been identified and allocated by the agreement.

The Court further noted that "liability" within the meaning of Article VIII, section 3 only encompasses present liability arising under contracts entered and torts committed, not future torts:

> A liability "may arise from contracts, either express or implied, or in consequence of torts committed." *Feil*, 23 Idaho 32, 129 P. 643, 649 (1912). Notably, this definition includes "torts committed," not potential torts that may be committed. *Id*. . . . The District further has not committed any torts that have been raised before this Court. It may commit a tort in the future that could subject it to damages to Wells Fargo, but as discussed above, only torts committed can result in constitutional liabilities, not torts not yet committed. *Id*.

GBAD, 159 Idaho at 274, 360 P.3d at 283 (W. Jones, J.).

This point is reinforced in Justice Eismann's concurrence:

> Article VIII, section 3, only applies to voluntarily incurring a debt or liability; it does not apply to liability created by negligent acts. Therefore, even if in some manner the District became liable to the Agency for an

[758] The standard, open-ended indemnities in the first lease were replaced with a pre-funded $350,000 "Lease Contingency Fund" which provided up to $250,000 in protection to the urban renewal district (CCDC) and up to $100,000 in protection to the financing bank (Wells Fargo). This fund did not provide recourse for any party based on non-renewal. The lease provided that the $250,000 component would survive non-renewal, but the $100,000 for the bank would not.

> amount exceeding $250,000 [the amount prefunded by the District] due to the District's negligence, there would be no violation of article VIII, section 3.

GBAD, 159 Idaho at 278, 360 P.3d at 287 (Eismann, J., concurring) (citing *Cruzen v. Boise City*, 58 Idaho 406, 418–19, 74 P.2d 1037, 1042 (1937) (Givens, J.).

This guidance describes certain things—future negligence and other torts—that it says do not constitute present liability in violation of the Constitution. But is it permissible for a local government to indemnify against those things? If such an indemnity is permissible, may the indemnification cover known or undiscovered past actions, as well as future actions? May the indemnity cover environmental and other regulatory violations as well as torts and negligence?

On the one hand, any indemnity might be seen, in the words of Justice Eismann quoted above, as "voluntarily incurring a debt or liability." On the other hand, the Court has expressed concern over stretching the concept of present liability too far. Does the Constitution really prohibit governments from entering into standard, boilerplate indemnities of the sort routinely employed by businesses simply because once in a great while they might get stuck with an obligation?

The *GBAD* Court did not answer this question. But it did quote with approval dictum in another case emphasizing the need to be practical in evaluating non-appropriation leases:

> It is a virtual impossibility to present every multi-year governmental contract or lease to the public for a vote. Thus, leases and other contracts that are intended to extend beyond one year always contain provisions (1) making the government's performance subject to availability of appropriated funds and (2) making the agreement renewable on an annual basis for the contemplated term.

In re University Place / Idaho Water Center Project, 146 Idaho 527, 547-48, 199 P.3d 102, 122-23 (2008) (Jim Jones, J., concurring) (quoted in *GBAD*, 159 Idaho at 275, 360 P.3d at 284 (W. Jones, J.)).

The *GBAD* Court then expressly embraced and expanded on Justice Jim Jones' observation:

> Instead, the district court should have applied the logic from the passage, and concluded that requiring governmental subdivisions to disprove the existence of *any* potential liability before entering into an agreement would result in every agreement being unconstitutional

> without a vote; and similarly requiring subdivisions to present any agreement for a vote before proceeding would result in undue delays and restrictions to governmental progress.

GBAD, 159 Idaho at 275, 360 P.3d at 284 (W. Jones, J.).

Does this mean that indemnity provisions are permissible because they only deal with potential liabilities? We do not know the answer because the agreement before the Court contained no unfunded, open-ended indemnity provision. The only thing we know for certain is that the approach the District took—an agreement in which liability is capped at a dollar amount and funded with money available during the first year—is permissible.

(5) The "economic compulsion" issue.

(a) The desire to renew does not create an unconstitutional liability.

Prior to the *GBAD* litigation, two district court decisions invalidated non-appropriation leases on the basis of so-called "economic compulsion" (an issue that was not central to the *GBAD* litigation. Judge Copsey and Judge Hosac concluded that even though the leases authorize the city to walk away, as a practical matter, the city may be unable to do so. (See footnote 742 at page 836.)

The "economic compulsion" concern is that, after renewing for a number of years, local governments will feel they have too much invested to walk away. Likewise, they may feel they have no option to walk away if the lease is financing a facility that is vital to their public service obligation.

The district courts in the *GBAD* case did not deny confirmation on this basis. Although the economic compulsion issue was briefed and discussed at oral argument, the main opinion in *GBAD* did not mention it. Thus, by implication at least, perceived economic compulsion is not a constitutional consideration and does not render a walk away provision ineffective.[759]

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[759] This makes sense. The historical context and the framers' concern in adopting Article 8, section 3 was explained by the Court contemporaneously in 1896: "Warned by a fearful experience, the makers of the constitution were desirous of protecting the people from the cupidity and rapacity which past experience admonished them sometimes influenced those who had the management and control of state and county finances . . . ." *Cnty. of Ada v. Bullen Bridge Co*., 5 Idaho 79, 90, 47 P. 818, 823 (1896) (Huston, J.), *on reconsideration*, 5 Idaho 188. What was that "fearful experience"? At that time, towns were going huckledebuck making multi-year commitments on the hope of good economic times to come. They were operating on a "build it and they will come" philosophy. Article VIII, section 3 ensured that taxpayers would not be bound by bad multi-year commitments. The framers were not concerned that officials might be sorely tempted to renew a commitment.

The concurrence, however, addressed the issue and directly rejected the argument perceived economic compulsion creates a liability within the meaning of the Constitution:

> Implicit in Mr. Frazier's argument is that if the District renews the lease for a number of years, it will be compelled to continue doing so in order to protect its "equity" in the building. . . . There is nothing in the wording of article VIII, section 3 that would permit a contract for the purchase of real estate to be treated differently from a contract to purchase goods or services. Likewise, there is nothing in the wording of the provision that applies to any compulsion to continue renewing a contract where there is no contractual obligation to do so.

GBAD, 159 Idaho at 279, 360 P.3d at 288 (Eismann, J., concurring).

In the course of this discussion, Justice Eismann also rejected the notion that liability under Article VIII, section 3 might extend to a moral obligation, such as a decision to voluntarily renew a lease because it is the right thing to do.

> In order for the constitutional provision to apply, the entity must "incur any indebtedness, or liability, in any manner." Those words must be construed according to what they were understood to mean at the time the Constitution was ratified. . . . It is clear that the word *liability* meant a legal responsibility that could be enforced in a court of law. . . . Thus, a debt and a liability must be a legal obligation to pay a sum of money.

GBAD, 159 Idaho at 279, 360 P.3d at 288 (Eismann, J., concurring) (emphasis original).

(b) Does the loss of property constitute economic compulsion?

Two district courts (decisions by Judge Copsey and Judge Hosac, see footnote 742 at page 836.) rejected non-appropriation leases because the financing arrangement put property owned by the governmental entity at risk in the event of a non-renewal. In those cases, the governments owned the ground and used a non-appropriation lease to finance purchase of a building constructed on that ground, under terms of which they lost both the building and the ground in the event they elected to walk away. The district courts found this constituted an economic compulsion to renew, thereby rendering the entire obligation a liability under the Constitution.

This issue was not presented in the *GBAD* case, because the District did not own the land adjacent to the existing convention facilities where the new construction would occur. Rather, the non-appropriation lease financed the purchase of both the land and the building. Consequently, if the District walked away, it walked away from something it never owned (or, depending on the timing of the transaction, owned only briefly and was fully compensated for).

As discussed above, the *GBAD* decision contains some broad guidance suggesting that the Constitution is concerned with judicially enforceable debt and liability, not mere "economic compulsion." On the other hand, that discussion was not in the context the loss of an asset previously owned by the governmental entity, so this remains an open question.

This uncertainty is another reason that third party conduit financiers (typically urban renewal agencies) are likely to continue to play a role in the financing of real estate. This enables the third party to acquire the property from the builder/developer (or from the governmental entity based on a full-price purchase), making it crystal clear that, in the event of a non-renewal, the government's property is not at risk of loss without compensation.

In the *GBAD* case, the District doubled down on this protection with a provision in the non-appropriation lease enabling the District to re-acquire the property for a nominal sum even after it walked away. Nothing in the decision, however, suggests that the Court found such an extraordinary provision to be required for the non-appropriation lease to pass muster. Indeed, the Court did not even mention it.

(6) Judicial confirmation encompasses all related documents.

In *GBAD*, the District was forthcoming as to the entire suite of project documents, but sought judicial confirmation of only one document, the Centre Lease, on the basis that the other documents presented no constitutional issues. The Idaho Supreme Court agreed with the district courts that in a judicial confirmation the court should not review one document in isolation, but should consider any related documents as well. Indeed, the Idaho Supreme Court went even further. It not only considered the other documents, but ruled on them, holding that they all passed constitutional muster.[760]

[760] "We now hold that courts have a duty to examine other documents which affect the question submitted, and then to determine the propriety of the contracts before them." *GBAD*, 159 Idaho at 271, 360 P.3d at 280 (W. Jones, J.) "The statute under which this case was brought provides that 'upon hearing the court shall examine into and determine all matters and things affecting each question submitted [and] shall make such findings with reference thereto and render such judgment and decree thereon as the case warrants.' I.C. § 7–1308. We find this case warrants

Specifically, the Court upheld a provision in the master development agreement that provided construction loan priority and allowed the builder's construction lender to impose unspecified additional obligations relating to the District's performance of its obligation to purchase.[761] Essentially, this provision (section 3.3.2) allowed the construction lender (not to be confused with the financing lender) to demand that the District perform its obligation to purchase in the event of a default by the builder, if the bank provided another builder who satisfactorily completed the building. The Idaho Supreme Court ruled that this presented no ongoing open-ended liability, because these construction-related performance obligations would end when the District enters into the lease agreement and free title is delivered.[762]

(7) All property owners have standing to challenge violations of Article VIII, section 3.

One might think that it would be difficult for a private party to establish standing to challenge a local government's action as a violation of Article VIII, section 3. Such a challenge is in the nature of a taxpayer challenge, and taxpayer standing is quite narrow.[763] *Thomson v. City of Lewiston,* 137 Idaho 473, 476-77, 50 P.3d 488, 491-92 (2002) (Trout, C.J.) (taxpayer lacked standing to challenge urban renewal plan); *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002) (Trout, C.J.) (taxpayers lacked standing to challenge city's payments to Chamber of Commerce); *Greer v. Lewiston Golf and Country Club, Inc.*, 81 Idaho 393, 342 P.2d 719 (1959) (Taylor, J.) (taxpayers lacked standing to challenge disannexation of golf course).

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examination of the comprehensive agreement, and hold it constitutional as the MDA, the PSA, and the RDA do not subject the District to greater liabilities than it has funds to pay in the fiscal year in which they were entered." *GBAD*, 159 Idaho at 275, 360 P.3d at 284 (W. Jones, J.) (brackets original).

[761] The master development agreement was an over-arching agreement between the builder (K.C. Gardner Company, L.C.) and the District. It provided that the builder will build the new facilities (with the Builder's own construction financing) and that, upon completion, the District would purchase them, but that if judicial confirmation is obtained, the District could convey the right to purchase or the facilities themselves to the urban renewal agency (which would lease them back to the District under a non-appropriation lease). It also addressed a separate set of facilities in an adjacent building.

[762] "Appellant points to a PSA provision, which requires the Developer (Gardner) to deliver clear title by special warranty to the District (or the Agency if judicial confirmation is obtained before), to show that the Lender would not have an interest in the Centre Facilities extending beyond their sale. Appellant's analysis is correct." *GBAD*, 159 Idaho at 276, 360 P.3d at 285 (W. Jones, J.).

[763] Indeed, Mr. Frazier's standing in the *GBAD* case might seem even more tenuous in that he is not even an affected taxpayer. The District is not funded with ad valorem taxes, but by a room tax paid by hotel guests. However, given the clear law and precedent granting broad standing in such cases, Mr. Frazier's standing was not challenged, and the Court did not comment on it.

But these standing restrictions do not apply when it comes Article VIII, section 3. First, the judicial confirmation statute expressly grants standing to "[a]ny owner of property, taxpayer, elector or rate payer . . ." to oppose judicial confirmation. Idaho Code § 7-1307(1). In 2008, the Idaho Supreme Court said (albeit in dictum) that this means was it says. "Had [the city sought judicial confirmation], the Plaintiffs could have appeared in the proceeding to raise their objections. I.C. § 7-1307." *Koch v. Canyon Cnty.*, 145 Idaho 158, 162, 177 P.3d 372, 376 (2008) (Eismann, C.J.).

Moreover, the Idaho Supreme Court has rejected the taxpayer standing limits that would otherwise apply when private parties bring challenges under Article VIII, section 3 outside of the judicial confirmation statute. "For over one-hundred years this Court has entertained taxpayer or citizen challenges based upon that constitutional provision." *Koch*, 145 Idaho at 162, 177 P.3d at 376. "If this Court were to hold that taxpayers do not have standing to challenge the incurring of indebtedness or liability in violation of that specific constitutional provision, we would, in essence, be deleting that provision from the Constitution." *Koch*, 145 Idaho at 162, 177 P.3d at 376.

35. OPEN MEETINGS ACT AND EXECUTIVE SESSIONS

A. Scope of the Open Meetings Act

Idaho's Open Meetings Act was first enacted in 1974, and was recodified to a new Title in 2015. Idaho Code §§ 74-201 to 74-208.[764] The Act also sets out key exceptions allowing governmental entities to meet in "executive sessions" that exclude the public. Idaho Code §§ 74-202(3), 74-206.

The Open Meetings Act was enacted in 1974 with this bold statement of purpose:

> The people of the state of Idaho in creating the instruments of government that serve them, do not yield their sovereignty to the agencies so created. Therefore, the legislature finds and declares that it is the policy of this state that the formation of public policy is a public business and shall not be conducted in secret.

Idaho Code § 74-201.

The Act applies broadly to virtually all decision-making bodies headed by more than one person. Idaho Code § 74-202(5). Specifically, the Act applies to "all meetings of a governing body of a public agency." Idaho Code § 74-203(1)).[765] Plainly, this includes cities, counties, and planning and zoning commissions when they act on land use matters of all kinds.

There are a handful of exceptions, including the court system, Idaho Code § 74-202(4)(a), and the Idaho Public Utilities Commission, the Industrial Commission, and the Board of Tax Appeals. Idaho Code § 74-203(2). The Legislature falls outside of the definition of public agency, because it was not created pursuant to statute or executive order. Idaho Code § 74-202(4)(a). Notably, the Act

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[764] The Open Meetings Law was recodified in 2015 to Idaho Code § 74-201 to 74-208. 2015 Idaho Sess. Laws, ch. 140. It was formerly codified to Idaho Code §§ 67-2340 to 67-2347. A subsequent amendment in 2015, 2015 Idaho Sess. Laws, ch. 271, delayed the effectiveness of certain of the amendments dealing labor negotiations until 2020. Quotations of the statute set out in this Handbook will be based on 2015 Idaho Sess. Laws, ch. 140. The reader should consult 2015 Idaho Sess. Laws, ch. 271 prior to 2020 if the matter involves labor negotiations.

[765] "Governing body" is broadly defined to include "the members of any public agency that consists of two (2) or more members, with the authority to make decisions for or recommendations to a public agency regarding any matter." Idaho Code § 74-202(5). "Public agency" is defined to include (among other things): "Any state board, committee, council, commission, department, authority, educational institution"; "Any county, city, school district, special district, or other municipal corporation or political subdivision of the state of Idaho"; and "Any subagency of a public agency." Idaho Code § 74-202(4).

does not apply to the Governor or to state agencies headed by a single individual (as most are). Idaho Code § 74-202(5).

The Act prohibits any such governing body from meeting to make a decision or meeting to deliberate toward a decision unless the meeting is properly noticed and open to the public. Idaho Code §§ 74-202, 74-203, 74-204.[766] An additional requirement for a meeting is that a quorum be present. *Idaho Water Resources Bd. v. Kramer*, 97 Idaho 535, 571, 548 P.2d 45, 71 (1976). This applies any time a quorum of members is present, whether in a formal meeting or at a backyard BBQ.

Not every conversation in which quorum is present constitutes a "meeting" subject to the Act. The term "meeting" is defined as "the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter. Idaho Code § 67-2341(6). "Decision" and "deliberation" are also defined terms. Thus, if a quorum of decision-makers happens to meet at a BBQ, they may freely discuss the weather or the brisket. But if they discuss an application pending before them, they are in violation of the Open Meeting Act.

The Open Meetings Act does not address whether a series of meetings, each with fewer than a quorum, may trigger the Act. Nor has any Idaho case addressed the question. A number of other jurisdictions have found that such "serial meetings" trigger the Act.

Violations of the Open Meetings Act must be challenged by filing an action in the district court within 30 days of the alleged violation. Idaho Code § 67-2347(4); *Petersen v. Franklin Cnty.*, 181, 938 P.2d 1214, 1219 (Idaho 1997).

In *Noble v. Kootenai Cnty.*, 231 P.3d 1034 (Idaho 2010) (Burdick, J.), the Court found that a site visit violated the open meeting laws because the public was not allowed to be close enough to hear what was being said.

The mediation provision of LLUPA (Idaho Code § 67-6510) does not say that mediations are exempt from the Open Meetings Act. The authors aware of no

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[766] The operative provision reads: "Except as provided below, all meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act. No decision at a meeting of a governing body of a public agency shall be made by secret ballot." Idaho Code § 74-203(1).

The term, "meeting" is defined as follows: "'Meeting' means the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter." Idaho Code § 74-202(6). The definition goes on to define two types of meetings (regular and special).

The terms "decision" and "deliberate" are also defined terms, and are defined broadly. Idaho Code §§74-202(1) and 67-2341(2). Arguably, occasions when decision makers exchange information outside of meetings of the governing body (such as at the country club or in a mediation) do not meet the definition of "meeting" under the act—even if such exchange of information meets the definition of deliberation. *See, Safe Air for Everyone v. Idaho State Dep't of Agriculture,* 145 Idaho 164, 177 P.3d 378 (2008).

reported decision on the subject. Caution would suggest operating on the assumption that the Open Meetings Act applies to mediation.

B. Executive sessions

Section 74-206 sets out a number of exceptions to the open meeting requirement authorizing governmental entities to go into "executive session" for purposes of discussing matters outside the presence of the public. The exception most applicable in the land use context is section 74-206(1)(f) dealing with pending or imminent litigation. It authorizes executive sessions "[t]o communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. The mere presence of legal counsel at an executive session does not satisfy this requirement." Idaho Code § 74-206(1)(f).

On occasions, persons with matters pending before a local government (or on appeal) have sought to engage in negotiation discussions with the government officials in executive session. Of course, no decision on a matter could be made in executive session. But the thought is that more productive preliminary discussions could occur behind closed doors. Is this permissible? The answer is maybe; the Act is not clear.

On the one hand, the exception for meetings to discuss litigation matters with legal counsel sounds like it is aimed at allowing private discussions between lawyer and client (*i.e.*, those to which attorney-client privilege would attach), rather than discussions with an opposing side or an interested party. On the other hand, the Open Meetings Act was amended in 2015 adding a provision specifically prohibiting the use of executive sessions for labor negotiations. Idaho Code § 74-206A (effective only until 2020 per 2015 Idaho Sess. Laws, ch. 271). By implication, the use of executive sessions for all other negotiations is permissible.

It bears great emphasis, however, that, in any event, the government decision-makers cannot reach a final decision in the executive session. Idaho Code § 74-206(4). Rather, once a tentative solution has been reached, the elected officials must go into a public meeting, fully disclose the nature of the discussions and the proposed settlement, allow the public to comment on it, and then reconsider the whole thing with an open mind.

It also bears emphasis that communications by persons to decision-makers in the executive session are, by definition, *ex parte* communications. This is the reason that full, complete, and timely disclosure of the substance of the discussions is essential. (It is the authors' view that *ex parte* communications may be "cured" by such disclosure. But that is not a settled matter. See discussion in section 25.C at page 549.)

Even if lawful (and the authors are not aware of any law speaking directly to this question), using an executive session for the purpose of negotiation has its risks—legal and political. It may be viewed as inconsistent with the spirit of the open meeting law.

A completely different approach would be to conduct the negotiation or mediation in a public working session. This approach would allow members of the public to watch and listen, but not to speak during the course of the negotiation/mediation discussion. This is, of course, more transparent. But it can also make the discussions more difficult, because they are conducted in a fishbowl.

Another approach is to appoint just one member of the governing board to participate in the negotiation or mediation. Since that is not a quorum, it does not trigger the open meeting act. The downside to this, obviously, is that that person may not have buy-in from the other officials, who must ultimately approve any settlement.

Yet another alternative would be to engage in "shuttle diplomacy." For example, a city council could meet in executive session in one room while an applicant or other party could meet in another room. Counsel for the city could then meet with the other party to hear their proposal for settlement, and then return to the executive session to share it with the city. The city's counsel could then shuttle back to the applicant to share concerns and questions raised by the city, perhaps resulting further shuttling sessions. Given that all communications from the applicant (or other party) are through the city's counsel, and not directly to city officials, this arguably does not violate *ex parte* communication rules. Nevertheless, the better approach would be to fully document the communications and disclose them sufficiently in advance of any public hearing to enable all parties to meaningfully respond.

36. CONFLICTS OF INTEREST (LIMITED TO FINANCIAL CONFLICTS)

Another section of this Handbook (section 25.B at page 542) explores the prohibition on bias rooted in the due process clause. This section addresses the statutory prohibition on "conflicts of interest." This sounds like the same subject, but it is not. Bias embodies the policy perspective, viewpoints, and prejudices of the decision-maker.

Note: See the *Idaho Ethics Handbook* by Christopher H. Meyer for a more extensive discussion of conflicts of interest.

The statutory provision discussed here is narrower in that it is limited to the economic interests. In other respects, it is broader. For example, it applies not just to decision-makers, but to staff. Also, it applies to all types of proceedings, not just to quasi-judicial proceedings. (This is because it is based on statute (as opposed to the due process clause of the Constitution), and the statute says it applies to "any proceeding.")

LLUPA expressly prohibits certain conflicts of interest by members of P&Z commissions as well as city councils and county commissions when acting in zoning matters. Idaho Code § 67-6506. The conflict prohibition is rather narrowly drawn, however, prohibiting only conflicts based the commissioner having "an economic interest" in the matter:

> A governing board creating a planning, zoning, or planning and zoning commission, or joint commission shall provide that the area and interests within its jurisdiction are broadly represented on the commission. A member or employee of a governing board, commission, or joint commission shall not participate in any proceeding or action when the member or employee or his employer, business partner, business associate, or any person related to him by affinity or consanguinity within the second degree has an economic interest in the procedure or action. Any actual or potential interest in any proceeding shall be disclosed at or before any meeting at which the action is being heard or considered. For purposes of this section the term " participation" means engaging in activities which constitute deliberations pursuant to the open meeting act. No member of a governing board or a planning and zoning commission with a conflict of interest shall participate in any aspect of the decision-making process concerning a matter involving the conflict of interest. A knowing violation of this section shall be a misdemeanor.

Idaho Code § 67-6506 (emphasis supplied).

The statute specifically requires advance disclosure.[767] Note that, in contrast to the law governing *ex parte* communications, disclosure does not cure the conflict. If a conflict is disclosed, the affected member must not participate in any aspect of the decision-making process.[768] Finally, the act provides criminal penalties for violations.[769]

Also see Ethics in Government Act, Idaho Code §§ 74-401 to 74-406 (formerly codified to Idaho Code §§ 59-701 to 59-705). This is a stand-alone statute, not part of LLUPA. It applies to a broad class of elected and appointed public officials and legislators.[770] This definition includes, for example, appointed members of a planning and zoning commission, as well as the planning and zoning staff.

Idaho Code § 74-403(4) broadly defines "Conflict of interest" in terms of pecuniary interest, but includes a number of exceptions allowing, for example, elected officials to vote on taxes and other measures that affect a broad class of people. Idaho Code § 74-404 requires disclosure of conflicts of interest, but does not prohibit those with such conflicts from voting on matters. This section includes an extensive discussion with respect to an official seeking legal advice as to a conflict of interest. The section may be read to suggest that the official is expected to follow that advice, but the statute is less than clear on the subject.

See also Idaho Code § 18-1359 entitled "Using public position for personal gain." It provides, in part: "No public servant shall: (a) Without the specific authorization of the governmental entity for which he serves, use public funds or property to obtain a pecuniary benefit for himself." Idaho Code § 18-1359(1)(a).

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[767] "Any actual or potential interest in any proceeding shall be disclosed at or before any meeting at which the action is being heard or considered." Idaho Code § 67-6506.

[768] "No member of a governing board or a planning or zoning commission with a conflict of interest shall participate in any aspect of the decision-making process concerning a matter involving the conflict of interest." Idaho Code § 67-6506. Prior to 2006, a planning and zoning commissioner with a conflict was allowed to testify before the commission, so long as the conflict was disclosed. That portion of Idaho Code § 67-6506 was repealed by H.B. 724, 2006 Idaho Sess. Laws, ch. 213. Now commissioners with conflicts may neither testify nor participate in the consideration of the matter giving rise to the conflict.

[769] "A knowing violation of this section shall be a misdemeanor." Idaho Code § 67-6506.

[770] Idaho Code §§ 74-403(9) & (10) (defining "public official" as "(a) any person holding public office of a governmental entity by virtue of an elected process, including persons appointed to a vacant elected office of a governmental entity, excluding members of the judiciary . . . .; (b) . . . a legislator . . .; (c) . . . any person holding public office of a governmental entity by virtue of formal appointment required by law; or (d) . . . any person holding public office of a governmental entity by virtue of employment, or . . . on a consultative basis.").

Also see Idaho Code § 31-807A, which requires county commissioners to be financially disinterested in transactions involving county property.

Note that each of these statutory provisions describe conflict of interest in terms of a financial interest in the matter. None of them appear to address conflicts based on a personal interest or bias with respect to the issue or matter. Thus, it appears that it would not be a conflict of interest, for example, to campaign for city council on a platform of supporting public housing, and then consistently vote in support of public housing. It would be, however, a conflict of interest to vote for a public housing proposal that financially benefited that city council member.

37. PUBLIC RECORDS ACT

Note: The Public Records Act was recodified in 2015 to Idaho Code §§ 74-101 to 74-126. It was formerly codified to Idaho Code §§ 9-337 to 9-347.

Idaho's Public Records Act is the state law equivalent of the federal Freedom of Information Act, 5 U.S.C. § 552.

Idaho's Office of the Attorney General issued the *Idaho Public Records Law Manual* on July 2019. It is available online at www.ag.idaho.gov.

In many cases, the person making the request for documents will ask that copies be made by the custodian of the records. However, the Act also allows a person to peruse the records and make copies. In that case, the government may not inquire into what records have been copied. "The custodian shall not review, examine or scrutinize any copy, photograph or memoranda in the possession of any such person and shall extend to the person all reasonable comfort and facility for the full exercise of the right granted under this act." Idaho Code § 74-102(6).

The Public Records Act contains a number of exemptions from disclosure: Idaho Code §§ 74-104 to 74-111, and 74-124. In addition, the section dealing with proceedings to enforce the act provides that the act is not "available to supplement, augment, substitute or supplant discovery procedures in any other federal, civil or administrative proceeding." Idaho Code § 74-115(3) (formerly codified to Idaho Code § 9-3433)). In other words, if a matter is in judicial or administrative litigation where discovery is provided, the litigants are limited to what may be obtained through discovery and my not use public records requests as an alternative means of obtaining information in connection with the litigation. This is discussed in "Question No. 31" in the *Idaho Public Records Law Manual* (July 2019).

Curiously, the statute does not contain, within the list of exemptions, an express exemption from disclosure of documents protected by the attorney-client communication or work product privileges.[771] However, there is an exception to the exception to the exemptions found in a different part of the statute, Idaho Code § 74-113(3)(b), which provides a basis for denying a public records request for documents protected by these privileges.

[771] The protection of these privileges is mentioned, however, in the context of an exemption for self-insurance matters. Idaho Code § 74-107(11).

38. WHEN IS RULEMAKING REQUIRED? (*ASARCO* AND *PIZZUTO*)

A. Overview

The question of when executive agencies are required to undertake rulemaking is governed in Idaho by:

- the Idaho Administrative Procedure Act, Idaho Code §§ 67-5201 to 67-5292 ("IAPA")[772]
- the agency's organic act or other governing statute, and
- two cases: *Asarco Inc. v. State*, 138 Idaho 719, 69 P.3d 139 (2003) (Trout, C.J.) and *Pizzuto v. Idaho Dep't of Correction*, 2022 WL 775584 (Mar. 15, 2022) (Brody, J.) (abrogating *Asarco* in part).

At the outset of its decision, the *Pizzuto* Court noted that executive agencies may act in any or all of three capacities (the issuance of guidance, contested case orders, and rules):

> They may act in (1) a purely executive capacity by carrying out statutory directives; or (2) a quasi-judicial capacity by defining the rights and duties of individuals through deciding contested cases and issuing orders; or (3) a quasi-legislative capacity by defining the rights and duties of the public through rulemaking.

Pizzuto at *2.

That is a good summary, so long as it is understood that the first category (purely executive capacity) includes the issuance of informal guidance.[773]

Agency guidance is similar to rules in that it is often broadly applicable and forward-looking. But it is different than rulemaking in that guidance does not have the force and effect of law. *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 263, 715 P.2d 927, 933 (1985) (Bistline, J.). In other words, both agencies and the public are bound by lawfully adopted rules just as they are bound by statutes. Accordingly, an agency may rely on its rules to defend its actions and decisions. In contrast, guidance is not binding on anyone—it is just an expression of what the agency thinks

[772] Rules issued under the Idaho' APA are published in a compilation which, for no good reason, is commonly referred to as "IDAPA." This presumably stands for Idaho Administrative Procedure Act; why the compilation of rules would be referred to by an acronym referring to the statute is a mystery.

[773] The "purely executive capacity" may also be understood to include all manner of other agency actions including informal or one-off actions that do not entail the issuance of guidance, orders, or rules.

is the law or good policy. Accordingly, an agency may not rely on its guidance alone to defend its actions and decisions.

Most notably, guidance is issued without public notice and comment or compliance with other rulemaking procedures. Hence we have the recurring debate over whether an agency should have proceeded by rule when it chose another path.

Generally speaking, agencies have broad latitude in choosing adjudication versus rulemaking.

> [P]revailing background principles of administrative law . . . recognize substantial agency discretion over procedural matters. One such principle holds that "[a]gencies have discretion to choose between adjudication and rulemaking as a means of setting policy." At a more granular level, agencies also have substantial discretion to define the procedures they will use to conduct specific kinds of proceedings. This discretion is limited only by the requirement that agencies observe the minimum (and minimal) requirements imposed by the APA and the Constitution's guarantee of due process.

Emily S. Bremer, *The Agency Declaratory Judgment*, 78 Ohio St. L.J. 1169, 1188-89 (2017) (footnotes omitted).[774]

The same ought to be said with respect to the broad discretion an agency has in choosing between issuing formal rules and informal guidance. The key difference between the two is that only rules have the force and effect of law. Thus, if an agency wishes to make its regulatory statement enforceable, it must promulgate it as a rule. But agencies are not obligated to turn every guidance document into a rule. The very fact that guidance documents exist proves this point. Indeed, guidance documents are useful (both to the agency and to the public) and should be encouraged.

However, there are two relatively rare instances in which the agency may be compelled to issue a rule, rather than guidance or proceeding on a case-by-case basis via contested cases.

[774] Professor Bremer's article was originally commissioned and published as a report, in October 2015, by the Administrative Conference of the United States. The Administrative Conference adopted recommendation 2015-13 based on the report. *See* 80 Fed. Reg. 78,161, 78,163 (Dec. 4, 2015).

1. The first is where a statute expressly (or by unmistakable implication) instructs an agency to issue rules on a particular subject. This was the key issue in *Pizzuto*.

2. The second is where the guidance effectively operates with the same force and effect as a rule.[775] This was the key issue in *Asarco*.

The first category is easy. One must simply read the statute. If it does not contain a discernable mandate to issue rules, then the agency retains its inherent discretion to proceed by rule, guidance, or case-by-case decision making as it sees fit.

The second category is harder to resolve. An article describing Wisconsin's APA captures the idea well (quoted at length, because it is such a good explanation):

> Although agencies do not often make procedural mistakes when promulgating a rule, lawyers have invalidated rules based on an agency's failure to adhere to statutory rulemaking procedures showing that the agency did not go through any rulemaking procedures and instead, administered statutory provisions through the issuance of "guidance documents."
>
> As regulatory and compliance lawyers know, a guidance document is "regulatory material" that an agency may use "to manage internal operations and to communicate with outside parties." A guidance document may set forth an agency's interpretations of existing rules, outline how an agency intends to regulate a developing policy area, or take the form of a training manual or compliance document for agency staff or the public.
>
> In general, guidance documents do not have the force of law; however, they might have the effect of imposing general standards of policy on a class of individuals or entities that creates the same practical effect of a fully promulgated rule. If that is the case, then the guidance document is, in essence, a rule in disguise, and courts will permit a party to challenge the guidance document's validity based on the agency's failure to follow statutory rulemaking procedures.

[775] "In analyzing this question [whether a guidance is masquerading as a rule], courts ask whether a rule has a 'legally binding effect.' If so, agencies are required to issue a legislative rule." Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 Yale L.J. 782 (2010) (footnote omitted). See also, William Funk, *A Primer on Nonlegislative Rules*, 53 Admin. L. Rev. 1321, 1326 (2001).

> . . . Invalidating a guidance document requires the challenger to demonstrate that the guidance fits the definition of a "rule" in the Administrative Procedure Act. The guidance must 1) be a regulation, standard, statement of policy, or general order; 2) be of general application; 3) have the effect of law; 4) be issued by an agency; and 5) implement, interpret, or make specific legislation enforced or administered by such agency. Courts have given the most attention to the "effect of law" and "general application" elements.
>
> To show that an agency guidance document has the "effect of law," lawyers should search for language in the document in which the agency speaks with an "official voice intended to have the effect of law" rather than in an advisory, informational, discretionary, or descriptive manner. A lawyer can further bolster her argument that an agency guidance document has the effect of law if she can demonstrate that enforcement of the guidance could result in 1) criminal or civil sanctions, 2) denial or revocation of licensure, or 3) a detrimental impact on a class of individuals or entities. A guidance document is of "general application" if the class of individuals or entities subject to the guidance "is described in general terms and new members can be added to the class."

J. Wesley Webendorfer, *Challenging a State Agency Regulation*, 90 Wisconsin Lawyer 30, 32 (2017).

Here's the rub. The definition of "rule" in Wisconsin's APA is more carefully crafted that the Idaho version,[776] or the federal APA[777] for that matter. Notably, Wisconsin's statute describes a rule as "a regulation, standard, statement of policy, or general order of general application that has the force of law . . . ." Wisconsin Stat. § 227.01(13) (emphasis added).

The absence of similar language in Idaho's APA is a problem, but one that the Idaho Court has overcome. In two landmark decisions, *Asarco* and *Pizzuto*, the

[776] Idaho Code § 67-5201(19).

[777] 5 U.S.C. § 551(4).

Idaho Supreme Court has looked to the "force and effect of law" component in determining what is and what is not a rule.[778]

B. *Asarco* (2003) – TMDLs are rules because they have the practical force and effect of law.

In *Asarco Inc. v. State*, 138 Idaho 719, 69 P.3d 139 (2003) (Trout, C.J.), mining companies challenged TMDLs (short for total maximum daily load) issued by the Idaho Department of Environmental Quality ("IDEQ"). "TMDLs establish the maximum amount of a pollutant a waterbody can handle without violating the state's water quality standards." *Asarco*, 138 Idaho at 722, 69 P.3d 142. TMDLs, in turn, drive individual permitting decisions under the Clean Water Act.

The Idaho Supreme Court held that the TMDLs established by IDEQ were void because the agency failed to follow formal rulemaking requirements. Professor Goble provided this summary:

> *ASARCO* arose out of the establishment by the Department of Environmental Quality (DEQ) of Total Maximum Daily Loads (TMDL) for three pollutants in the Coeur d'Alene River Basin. A TMDL specifies the maximum amount of a pollutant that can be added to a water body from all sources. In establishing the TMDLs, DEQ "provided some notice to interested parties and took some testimony" but did not follow the IDAPA procedures necessary to promulgate a rule. Three mining companies challenged the legality of the TMDLs, contending that they were "rules" and hence invalid for want of the statutory procedure.

Dale D. Goble, *Not-Quite Ad Law: The Rule of Law Takes Another Hit*, 29 Admin. & Regulatory L. News, 25, 26 (2003).[779]

The Court declared that the TMDLs constitute a rule because the fit the definition of rule in the IAPA. To get there, however, the Court found it necessary to adopt a six-part test describing these "characteristics" of a rule:

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[778] The *Asarco* and *Pizzuto* cases can be difficult to understand. Rather than simply explaining that the Court is called upon to fill in the interstices of the IAPA, the Court has grounded its analysis and holding in the literal words of the statutes. That is a challenge, because the words of the IAPA simply do not answer the question of when an agency has discretion to issue rules and when it does not. Fortunately, both decision recognize and turn on the critical role played by the "force and effect of law" aspect of rules.

[779] The "hit" Professor Goble was referring to was not the *Asarco* decision (with which he agreed), but the Legislative response to it.

> Thus, under the statutory definition, an agency action is a rule if it (1) is a statement of general applicability and (2) implements, interprets, or prescribes existing law. Nonetheless, this definition of a rule is too broad to be workable. Under such a definition, virtually every agency action would constitute a rule requiring rulemaking procedures. Therefore, in order to provide further guidance in determining when agency action requires rulemaking, this Court adopts the reasoning of the district court and considers the following characteristics of agency action indicative of a rule: (1) wide coverage, (2) applied generally and uniformly, (3) operates only in future cases, (4) prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) expresses agency policy not previously expressed, and (6) is an interpretation of law or general policy. The district court correctly applied these factors to the facts, ultimately holding the TMDL constitutes a rule requiring rulemaking in order to be valid.

Asarco, 138 Idaho at 723, 69 P.3d 143 (citations omitted).

A key factor in holding that the TMDL is a rule is the Court's finding (with respect to the fourth characteristic) that "EPA considers these numbers binding and has already used the TMDL in order to reduce the discharge limits reflected in several of the Mining Companies' NPDES permits. Thus, the TMDL in fact contains quantitative legal standards not provided by either the Clean Water Act or the Idaho Water Quality Act." *Asarco*, 138 Idaho at 724, 69 P.3d 144. In other words, the TMDL did not operate as mere guidance that the agency might weigh but which could be effectively challenged by the permittee. As a practical matter, the adoption of the TMDL by IDEQ was definitive, final, and determinative as to subsequent permitting actions by the EPA. In short, the TMDL had the force and effect of law.

As Professor Goble noted:

> First, the TMDLs changed the legal status of the mining companies by modifying the amount of pollutants that they were permitted to discharge; thus they were obviously "enforceable." Second the agency action fell within the statutory definition of "rule" in I.C. § 67-5201(19). The TMDLs were statements of "general applicability" (so they were not adjudicatory) and they "implement, interpret, or prescribe . . . law or policy" by

> prescribing "quantitative legal standards" not contained in the applicable statutes. This was a clear application of standard administrative law: an agency can prospectively change the legal status of entities only by promulgating rules after notice and an opportunity for comment.

Goble at 26.

Finally, relying on Idaho Code §§ 67-5278(1), (3), the Court ruled that the mining companies were not required to exhaust administrative remedies before seeking a declaratory judgment that a rule is void.

The Legislature responded quickly:

> The legislative response was swift. H.R. 458 was quickly introduced, specifying that the rulemaking provisions of IDAPA "shall not apply to TMDLs." The Governor signed the bill on May 7 — less than two weeks after the decision in ASARCO. 2003 Idaho Sess. Laws 938. While the legislature undid the decision in ASARCO, it did not undermine the court's recognition of the importance of consistent procedural safeguards.

Goble at 26.

C. *Pizzuto* (2022) – SOP protocol not a rule because the statute did not require rulemaking.

In *Pizzuto v. Idaho Dep't of Correction*, 2022 WL 775584 (Mar. 15, 2022) (Brody, J.), a death row inmate challenged the Department's execution protocol for lethal injection known as an SOP (standard operating procedure) on the basis that it should have been issued as a rule.

The Court held the SOP need not be issued as a rule because the statute addressing lethal injection does not require the agency to issue a rule.

The operative provision in the statute reads: "The director of the department of correction shall determine the procedures to be used in any execution." Idaho Code § 19-2716. The Court found that the absence of an express reference to rulemaking was not dispositive. "[N]othing in the APA or our case law suggests that such 'magic words' are necessary." *Pizzuto* at *3. Instead, said the Court, rulemaking will be required if and only if "a statute requires an agency to produce something that fits the APA's definition of a rule . . . ." *Id*.

The Court then examined the definition of "rule" in the IAPA, which speaks in terms of their "general applicability." The Court said, "The general applicability of a rule is, perhaps, the most salient characteristic distinguishing quasi-legislative

rulemaking from a purely executive or quasi-judicial agency action." *Pizzuto* at *3. It then concluded that the legislative instruction to "determine the procedures to be used in any execution" does not fit that description of a rule.

In defining "rule," the IAPA employs the words "general applicability" but does not use the words "force and effect of law." It is important to note that the Court nevertheless managed to weave the latter concept into the definition of "rule." The Court found that "general applicability" encompasses the concept of "force and effect of law."[780] In the author's view, this is critical to understanding the *Pizzuto* case.

The Court reinforced its conclusion that the lethal injection statute contains no rulemaking mandate by focusing on the statute's use of the word "any" (rather than "every"). The Court said this "connotes case-by-case decision-making." *Pizzuto* at *3. In the author's view, this misses the point. The SOP was not a case-by-case determination; it is a "standard operating procedure" applicable to all death row inmates. The reason the SOP is not a rule is not that it is a case-by-case determination.[781] It is not a rule because (1) it does not have the force and effect of law and (2) the lethal injection statute does not otherwise mandate issuance of a rule.

The *Pizzuto* Court then took the unexpected step of "abrogating" the *Asarco* Court's adoption of the six factor test (which it had borrowed from the New Jersey Supreme Court).[782] Recall that the *Asarco* Court found the six factor test necessary because the definition of rule in the IAPA is "too broad to be workable. *Asarco*, 138 Idaho at 723, 69 P.3d at 143. The *Pizzuto* Court concluded that the "decision in

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[780] "The second way in which rules are generally applicable is that they must be applied uniformly by the agency. Because rules have the force and effect of law, they are binding both on the public and on the agency. See *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 263, 715 P.2d 927, 933 (1985) (holding that an agency 'must[ ] observe and be bound by its own rules'). Thus, although an agency may have the discretion to change its rules from time to time (complying with the rulemaking procedures of the APA, of course), it does not have discretion to depart from its rules while they are in effect. This distinguishes rulemaking from purely executive actions, in which an agency (or officer) enjoys discretion so long its actions are not contrary to express law." *Pizzuto* at *3.

[781] The Court asserted that the SOP was not generally applicable (like a rule) because "the Director may modify the procedures used at any time." *Pizzuto* at *4. That is not a particularly helpful observation. All guidance may be changed at any time.

[782] The *Pizzuto* Court did not clarify what is left of the *Asarco* precedent today. As noted, that case is now moot, because the Legislature changed the law (exempting TMDLs from rulemaking). Clearly, if an *Asarco*-like case arose today, it would not be decided on the basis the six-factor test. Instead, presumably, it would be decided on the basis of what *Pizzuto* called the key component of the definition of "rule," i.e., whether the standard, guidance, or protocol issued by the agency is of general applicability, taking into account an examination of whether the standard has the force an effect of law. Thus, the outcome in *Asarco* probably would have been the same, given the unusual nature of the TMDL in controlling future permitting decisions.

Asarco was manifestly wrong," the IAPA's definition of rule is just fine as is, and no additional factors are needed to understand the definition. *Pizzuto* at *6.

> It is simply not true that "virtually every agency action would constitute a rule" under section 67-5201(19) because the definition of "rule" contains an exception for matters of internal agency management. See I.C. § 67-5201(19)(b) (providing that "statements concerning only the internal management or internal personnel policies of an agency and not affecting private rights of the public" are not rules). Thus, the *Asarco* Court adopted the six factors to fix a problem with its incomplete definition of "rule," not a problem in the statutory definition itself.

Pizzuto at *6.[783]

Accordingly, the *Pizzuto* Court has scrapped the six-factor test and returned us to the words of the IAPA definition itself. In doing so, the *Pizzuto* Court has wisely incorporated into that statutory language the key concept of rules having "the force and effect of law." *Pizzuto* at *3. That concept is critical to making sense of all this. As the Court said, the force and effect of law and the fact that an agency is bound by its own rules is what "distinguishes rulemaking from purely executive actions, in which an agency (or officer) enjoys discretion so long its actions are not contrary to express law." *Pizzuto* at *3.

In sum, the *Pizzuto* case and what is left of the *Asarco* case each recognize that, by and large, agencies may choose to act by rule, by guidance, or by contested case. However, that discretion is curtailed and rules are required where either (1) the organic act or other statute governing the agency action mandates rulemaking on the subject at hand and/or (2) the effect of the guidance or contest-case action is to establish a regulatory standards of general applicability that, as a practical effect, has the force and effect of law.

It bears emphasis that these conditions are rare. The TMDLs in *Asarco* are an odd beast. They set standards that are then determinative of the outcome in subsequent permitting actions. Hence, they operated like rules and should have been promulgated as rules. (Until the Legislature changed the law in response to *Asarco*.)

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[783] The *Pizzuto* Court's criticism of *Asarco* is difficult to understand. The exclusion of "internal agency management" from the definition of "rule" is very narrow. The *Asarco* Court was correct in stating that the definition of rule is quite broad. That description remains true even if matters of internal agency management are excluded from the definition. The reason the definition is quite broad is that it is poorly drafted, ambiguous, and in need of judicial interpretation. The six factor test might not be the best way of judicially filling in the statutory interstices, but it wasn't an altogether bad or unnecessary approach.

The situation in *Pizzuto* will be the more common experience. Where the guidance document is not legally determinative of other outcomes (i.e., it does not have the force and effect of law) and where the applicable statute does not mandate rulemaking, agencies retain broad discretion in choosing among the three categories of agency action outlined in *Pizzuto*.

39. OVERVIEW OF REGIONAL PLANNING AND PUBLIC TRANSPORTATION LAW

A. Introduction to regional planning and public transportation

Regional planning and public transportation are emerging issues in Idaho, particularly in the rapidly urbanizing Treasure Valley. The following sections discuss these issues, using as examples the regional planning and public transportation entities existing in the Treasure Valley.

B. Metropolitan planning agencies and COMPASS

The Community Planning Association of Southwest Idaho (COMPASS) is the Metropolitan Planning Organization (MPO) [784] for the Treasure Valley.[785] COMPASS is a non-profit association of local governments in Ada County. COMPASS' members include Ada County, the cities of Boise, Eagle, Garden City, Kuna, Meridian, and Star, the Ada County Highway District, ValleyRide, Boise Independent School District, Meridian School District, the Greater Boise Auditorium District, Boise State University, Canyon County, the cities of Caldwell, Greenleaf, Melba, Middleton, Nampa, Notus, Parma, and Wilder, Canyon Highway District, Golden Gate Highway District, Nampa Highway District, and Notus-Parma Highway District. COMPASS' board consists of elected officials or members from each organization.

As the MPO for the Treasure Valley, COMPASS has several obligations. First, it must annually develop a Unified Planning Work Program and Budget showing how local and state agencies plan to utilize federal planning funds to accomplish metropolitan planning goals. Second, it must prepare a Long-Range Transportation Plan for the Treasure Valley for the next 20-plus years encompassing all modes of transportation including roadways and public transportation. Third, it must prepare and annually update a Transportation Improvement Program describing how local and state agencies will use federal funds to augment transportation systems in the short-term future. Fourth, it must develop a Congestion Management System to help local governments evaluate how best to accommodate the increased congestion in the Treasure Valley. A copy of these reports can be found on COMPASS' website located at www.compassidaho.org.

To generate the data necessary to estimate the present and future transportation needs in the Treasure Valley, COMPASS conducts traffic studies, household travel characteristics surveys, and tracks building permit information and

[784] Pursuant to federal law, urbanized areas larger than 50,000 people must designate an MPO which sets priorities for expending US Department of Transportation funds for highways and public transportation throughout a metropolitan region.

[785] The Treasure Valley includes the Metropolitan Region covering Ada and Canyon Counties.

automobile ownership rates. The data collected from these studies is then utilized to develop the reports discussed *supra*.

On July 15, 2002, COMPASS adopted *Destination 2025, the Long-Range Transportation Plan for Ada County* In this plan, COMPASS addresses several topics including: general transportation issues, the function of COMPASS' travel demand forecast model, major roadway projects, public transportation services and needs, transportation enhancement needs, and environmental concerns in Ada County.

COMPASS also recently adopted *Moving People 2025, the Long Range Transportation Plan for Canyon County* in February of 2003. Like Destination 2025, this Plan discusses current transportation problems and forecasts future transportation demands based on growth assumptions estimated from data collected by COMPASS. Both reports are available on COMPASS' website.

In addition to the Ada County and Canyon County Long-Range Transportation Plans, COMPASS is also in the process of developing Idaho's first *regional* long-range transportation plan for the Treasure Valley, *Communities in Motion*. This plan is being generated with the view that transportation planning should encompass a regional rather than solely a local view because commuting in the Treasure Valley often involves traveling through more than one town. This multi-modal[786] Plan outlines all *regional* transportation improvements that will be needed over the next 20-plus years in the Treasure Valley. More information regarding Communities in Motion is available at www.communitiesinmotion.org.

C. Regional transportation agencies and ValleyRide

The bus system in the Treasure Valley is managed and operated by ValleyRide, the Treasure Valley's Regional Public Transportation Agency. ValleyRide has been working cooperatively with COMPASS in preparing the Regional Long-Range Transportation Plan for the Treasure Valley.[787] Additionally, ValleyRide and COMPASS, along with other affected transportation service providers, have cooperatively developed a Transportation Improvement Program (TIP) that satisfies air quality standards in the Treasure Valley.[788]

The Treasure Valley's bus system has played an important role in correcting and maintaining the Treasure Valley's air quality. Under the Clean Air Act

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[786] Multi-modal transportation planning refers to planning involving several different transportation choices including: roadways, public transit, carpooling, etc.

[787] This plan outlines all regional transportation improvements that will be needed over the next 20-plus years in Ada and Canyon Counties.

[788] This plan outlines how local and state agencies will use federal funds to augment transportation systems in the short-term future.

Amendments of 1990, 42 U.S.C. § 7401 Et. Seq., Congress gave the Environmental Protection Agency (the "EPA") the authority to set limits on the allowable levels of air pollutants, including those pollutants discharged by motor vehicles. The Environmental Health Center: A Division of the National Safety Council, *Background on Air Pollution*, at http://www.nsc.org/ehc/mobile/acback.htm at pg. 4. Areas that exceed the EPA's standards are called non-attainment areas. Once a county or city is in non-attainment, the state's Department of Environmental Quality (DEQ) must submit a State Implementation Plan (SIP) laying out how the state plans to reach attainment. State of Idaho Department of Air Quality, *Transportation and Air Quality Planning*, at http://www.deq.state.id.us/air/monitoring/transportation.htm at pg. 1.

In 1978, Northern Ada County was designated as a non-attainment area for carbon monoxide (CO). Community Planning Association of Southwest Idaho, Air Quality, at http://www.compassidaho.org/airquality.html at 2. To remedy this violation, the Idaho Department of Environmental Quality developed an SIP that included transportation conformity measures to reduce CO emissions to reach attainment. *See* 40 C.F.R. Part 52, *available at* http://www.epa.gov/fedrgstr/EPA-AIR/1994/December/Day-01/pr-178.html. As part of these conformity measures, Boise Urban Stages replaced its entire fleet of buses with compressed natural gas buses; increased their fleet size from 26 to 30 buses; and enhanced its marketing efforts to promote transit use. By 2002, due in part to these measures, the Treasure Valley had reduced its CO emissions to acceptable levels and EPA redesignated northern Ada County as a maintenance area. *See* 40 CFR Parts 52 and 81, *available at* http://www.epa.gov/EPA-AIR/2002/October/Day-28/a27237.htm.

In addition to helping resolve air pollution problems in the Treasure Valley, ValleyRide has also been instrumental in providing transportation options to the disabled and elderly who are unable to utilize the regular bus system. More information about ValleyRide is available on its website located at www.valleyride.org.

D. Funding for public transportation in Idaho

The Idaho Legislature's piecemeal approach to solving public transportation needs has created non-uniform public transportation services throughout the state. While counties and cities have been granted express statutory authority to establish and operate public transportation services, the statutes conferring this authority are void of any explanation as to how the transportation services are to be funded. In an attempt to resolve these incongruities and to increase the effectiveness of Idaho's public transportation system, the legislature enacted the Regional Public Transportation Authority Act (the "Act") in 1994.

The Act, codified in Title 40, Chapter 21 of the Idaho Code, allows people in all or contiguous parts of one or more counties to vote for the creation a *single*

government entity that is "oriented entirely towards public transportation needs within each county or region." Pursuant to Section 40-2109, once a Regional Public Transportation Agency (RPTA) is created it "will have exclusive jurisdiction over all publicly funded or publicly subsidized services and programs except those transportation services and programs under the jurisdiction of public school districts and law enforcement agencies." Today, there are two RPTA's in Idaho – one in Bonneville County (approved by voters in 1995) and one in Ada and Canyon Counties (approved by voters in 1997). The Act, however, does not include a mechanism to fund RPTA's. As a result, the effectiveness of RPTA's has been severely limited.

Since the enactment of the Act, there have been numerous proposals before the legislature to raise revenue to fund public transportation in Idaho. In 1995, The Community Transportation Association of Idaho (CTAI), the Public Transportation Advisory Council (PTAC) and the Idaho Transportation Department (ITD), among others, proposed that an effort be made to increase the vehicle title transfer fee from $8 to $10, with the additional $2 going towards public transportation. This additional fee would have raised approximately $870,000 per year statewide. This bill, however, failed to get out of the House Transportation Committee.

In 1997, a funding proposal specifically directed to funding RPTA's was proposed. This bill, which became H.B. 348, authorized voters in an established RPTA region to vote on an up to $5 per year fee on all vehicles of 8,700 pounds or less gross weight registered within the region. The bill passed the House, but died in the Senate Transportation Committee without a hearing.

In 1998, legislation was again proposed to increase the vehicle title transfer tax. This time, however, the increase was by $2.50 and the proposal referred to the increased tax as a "surcharge." This proposal, which became H.B. 646, was reported out of the House Transportation Committee with a "do pass" recommendation. The bill, however, was defeated on the House floor by a vote of 38-30.

Today, Idaho remains one of only seven states that offer no state funding for public transportation.[789] In 2003, the Idaho Task Force on Public Transportation (the "Task Force") was established to identify and analyze various public transportation systems and to devise mechanisms to fund these systems. In a 2004 Report to the State Legislature (the "Report"), the Task Force summarized its state-wide research concerning public transportation demands throughout the state. In its report, the Task Force proposed two primary options to fund public transportation in the state. The first option it proposed involves imposing a personal property tax on vehicles with

[789] The other six states that do not receive state funds for public transportation are Alabama, Colorado, Mississippi, Hawaii, New Mexico and Utah.

the method of taxation to be based on the age and value of the vehicle.[790] Under this proposal, a standard tax percentage would be established based on the vehicle's original cost and current age. The percent tax would then decrease by 10 percent each year as the vehicle ages until it reaches a $15 per year minimum. Under this proposal, trucks and other commercial vehicles would be addressed separately.

The second option proposed by the Task Force involves a return to an increase in the title transfer fee. The report, however, did not provide a detailed explanation as to how or the way in which this fee would be increased.

A bill authorizing the Idaho Transportation Department and county-wide highway districts to construct and own light rail systems passed both houses of the Idaho Legislature in 2004, only to fall to Governor Kempthorne's veto. S.B. 1269A, Idaho Legislature, 2004 Session. While this bill did not create a funding mechanism for public transit, it was considered an important step in that direction. Effective public transportation systems probably will not exist in Idaho until the funding issue is addressed.

In the summer of 2004, Ada County, the six cities within the county, and the Ada County Highway District ("ACHD") signed a cooperative agreement to retain expert assistance to revise the comprehensive plans and zoning ordinances for the cities and the county. The purpose of this exercise is to adopt plans and ordinances that will create a more compact development pattern in Ada County. The motivation for this move was ACHD's recognition that traditional development patterns are badly straining ACHD's maintenance budgets. That is, ACHD discovered that the tax revenue generated by new development is insufficient to maintain the roads that development necessitates. We will update this section as this project develops.

[790] The use of a personal property tax on vehicles to fund public transportation is a common method used in other states.

40. FEDERAL LAWS AFFECTING IDAHO LAND USE

Federal claims may be raised in state court. "Also, it is well-established that state courts are fully competent to hear federal claims, including constitutional challenges to land-use regulations." *Adam Bros. Farming, Inc. v. Cnty. of Santa Barbara*, 604 F.3d 1142, 1148 (9th Cir. 2010).

Federal constitutional claims (notably takings) are frequently raised state court. In addition, developers and property owners should be aware of various federal statutory laws affecting land use. These federal laws may affect the decision to construct or purchase a building because they contain guidelines with which buildings must comply, and failure to comply with those guidelines could result in costly remedial measures or litigation.

A. The Fair Housing Act[791]

Title VIII of the Civil Rights Act of 1968, known as the Fair Housing Act (FHA), prohibits discrimination in the sale, rental, and financing of dwellings based on race, color, religion, sex, and national origin. 42 U.S.C. § 3603 (West 2003). In 1988, Congress passed the FHA amendments, which expanded coverage of Title VIII to protect individuals from discrimination in housing practices based on handicap or familial status. 42 U.S.C. §§ 3603, 3604. The FHA provides equal opportunities in the housing market for protected individuals regardless of whether the housing is publicly funded or not. This includes the sale, rental, and financing of housing, in addition to the physical design of new multifamily housing. 42 U.S.C. §§ 3603, 3604.

(1) Design and construction requirements

To prevent discrimination against protected individuals, the FHA provides design and construction requirements that apply to buildings built for first occupancy after March 13, 1991 that are covered multifamily dwellings. Prohibition Against Discrimination Because of Handicap, 24 C.F.R. § 100.205 (1991). A covered multifamily dwelling is (1) a dwelling unit in a building with four or more dwelling units if the building has one or more elevators, and (2) all ground floor dwelling units in other buildings with four or more units. 42 U.S.C. § 3604. These dwelling units must meet design requirements for public and common use spaces and must be accessible to people with handicaps. 24 C.F.R. § 100.205. The interior of dwelling units covered by the FHA must also meet certain accessibility requirements. 24 C.F.R. § 100.205. The design requirements for new buildings and dwelling units are: (1) accessible building entrance on an accessible route; (2) accessible and usable public and common use areas; (3) usable doors; (4) accessible route into and through

[791] Information on the Fair Housing Act was obtained from 42 U.S.C. § 3601 et seq. (2003), 24 CFR Ch. 1, as well as from the U.S. Department of Housing and Urban Development's Fair Housing Act Design Manual.

the covered dwelling unit; (5) light switches, electrical outlets, thermostats and other environmental controls in accessible locations; (6) reinforced walls for grab bars; (7) usable kitchens and bathrooms. 24 C.F.R. § 100.205.

(2) Renovations

The FHA does not require renovations to existing buildings, and it does not apply to buildings occupied before March 13, 1991. 24 C.F.R. § 100.205. In addition, a building is not subject to the design requirements of the FHA if a state, county, or local government on or before June 15, 1990 issued the last building permit or renewal. 24 C.F.R. § 100.205.

(3) Reasonable accommodations and reasonable modifications

The FHA contains two provisions to ensure that people with disabilities have full use and enjoyment of dwellings. The first provision states that it is unlawful to refuse to make reasonable accommodations when necessary to provide a disabled person an equal opportunity to use the property. 24 C.F.R. § 100.204. The second provision states that it is unlawful to refuse to permit individuals with disabilities, at their own cost, to make reasonable modifications to their dwelling unit or to the public or common areas. 24 C.F.R. § 100.203. For example, buildings that provide parking spaces must provide reserved parking spaces if requested by a disabled resident who needs them. U.S. Department of Housing and Urban Development's Fair Housing Act Design Manual.

The cost of reasonable modifications in new construction is the responsibility of the builder or landlord to the extent they must meet the design requirements specified by the FHA. U.S. Department of Housing and Urban Development's Fair Housing Act Design Manual. If a resident would like to buy a unit but needs additional modifications to accommodate his or her disability, the resident may ask for the modification and the builder may not refuse. U.S. Department of Housing and Urban Development's Fair Housing Act Design Manual. However, the resident must pay for the modification to the extent it is more expensive than the cost of the original design. U.S. Department of Housing and Urban Development's Fair Housing Act Design Manual.

(4) Exceptions

In some circumstances, the FHA exempts single-family housing with no more than four units, single-family housing sold or rented without the use of a broker, and housing operated by organizations and private clubs that limit occupancy to members only. 42 U.S.C. § 3603 (West 2003).

(5) Enforcement

An aggrieved person may file a complaint with the Secretary of Housing and Urban Development (Secretary) and may also commence a civil action in a United States district court or State court. 42 U.S.C. §§ 3607, 3613. The Secretary may also file a complaint on its own initiative. 42 U.S.C. § 3607.

B. The Americans with Disabilities Act[792]

Many Americans have one or more physical or mental disabilities, and society has "tended to isolate and segregate" those individuals. 42 U.S.C. § 12101 (West 1995). Thus, Congress enacted the Americans with Disabilities Act (ADA) to eliminate discrimination against disabled individuals and to provide enforceable standards for addressing this type of discrimination. 42 U.S.C. § 12101.

(1) Subchapter II-public services

Subchapter II of the ADA applies to programs, activities, and services of public entities. A public entity is defined as "any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; and the National Railroad Passenger Corporation, and any commuter authority." 42 U.S.C. § 12131.[793] Most of the requirements in this subchapter are based on section 504 of the Rehabilitation Act of 1973, which prohibits discrimination based on handicap in federally assisted programs and activities. Hummel Architects, P.A. Accessibility Guidelines and Technical Assistance Manual. The ADA extends section 504's prohibition on discrimination to all activities of State and local governments, not only those receiving federal financial assistance. Hummel Architects, P.A. Accessibility Guidelines and Technical Assistance Manual. Thus, under the ADA, the requirements for public entities under Subchapter II are consistent with, and sometimes identical to, section 504 of the Rehabilitation Act. Hummel Architects, P.A. Accessibility Guidelines and Technical Assistance Manual.

(a) Accessibility

The ADA prohibits public entities from denying the benefits of its programs, activities, and services to disabled individuals because its facilities are not accessible. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. § 35.149-35.150 (1992). A public entity's services, programs, or activities must be accessible to and usable by disabled individuals. 28 C.F.R. § 35.149-35.150. This standard is known as "program accessibility," and it

[792] Information on the Americans with Disabilities Act was obtained from 42 U.S.C. § 12101 *et seq.*, as well as from the Hummel Architects, P.A. Accessibility Guidelines and Technical Assistance Manual.

[793] This subchapter does not apply to private entities, which are covered by Subchapter III.

applies to all existing facilities of a public entity. 28 C.F.R. § 35.149-35.150. Program accessibility may be achieved by various methods, including providing access to facilities through structural methods, such as altering existing facilities or acquisition or construction of additional facilities. 28 C.F.R. § 35.149-35.150.

(b) Construction and alteration

All facilities designed, constructed, or altered by, on behalf of, or for the use of a public entity must be accessible to and usable by disabled individuals if the construction or alteration is begun after January 26, 1992. 28 C.F.R. § 35.151. "Readily accessible and usable" means that the facility must be designed, constructed, or altered in compliance with a design standard. 28 C.F.R. § 35.151. The regulation provides a choice of two standards that may be used: (1) the Uniform Federal Accessibility Standards (UFAS), or (2) the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG), which is the standard that must be used for public accommodations and commercial facilities under Subchapter III of the ADA. 28 C.F.R. § 35.151.

(2) Subchapter III-public accommodations and services operated by private entities

For land use purposes, this subchapter applies to places of public accommodation and commercial facilities, and private entities primarily engaged in transporting people (the Department of Transportation has issued regulations implementing that section of this subchapter). 42 U.S.C. § 12181 (West 1995).[794]

(a) Places of public accommodation

Places of public accommodation and commercial facilities are both subject to Subchapter III's requirements, but places of public accommodation must also comply with Subchapter II requirements, such as nondiscriminatory eligibility criteria, reasonable modifications in policies, practices, and procedures, and removal of barriers in existing facilities. 28 C.F.R. § 36.102-36.104. However, if the public accommodation can demonstrate that a modification would fundamentally alter the nature of the goods, services, or facilities it provides, it is not required to make the modification. 28 C.F.R. § 36.102-36.104. Public accommodations are also required to remove barriers if it is "readily achievable" to do so. 28 C.F.R. § 36.102-36.104. This means that it must be easily accomplishable and able to be done without much difficulty or expense. 28 C.F.R. § 36.102-36.104. This obligation to remove barriers is continuing, so over time, barrier removal that initially was not readily achievable may later be required because of changed circumstances. 28 C.F.R. § 36.102-36.104.

[794] This subchapter does not apply to state and local government entities, which are covered by Subchapter II.

To be a public accommodation with Subchapter III obligations, the entity must be private and it must own, lease, lease to, or operate a place of public accommodation. 28 C.F.R. § 36.102-36.104. In addition, a place of public accommodation is a facility whose operations affect commerce and fall within at least one of the following twelve categories:

> (1) Places of lodging (*e.g.*, inns, hotels, motels) (except for owner-occupied establishments renting fewer than six rooms);
> (2) Establishments serving food or drink (*e.g.*, restaurants and bars);
> (3) Places of exhibition or entertainment (*e.g.*, motion picture houses, theaters, concert halls, stadiums);
> (4) Places of public gathering (*e.g.*, auditoriums, convention centers, lecture halls);
> (5) Sales or rental establishments (*e.g.*, bakeries, grocery stores, hardware stores, shopping centers);
> (6) Service establishments (*e.g.*, laundromats, dry-cleaners, banks, barber shops, beauty shops, travel services, shoe repair services, funeral parlors, gas stations, offices of accountants or lawyers, pharmacies, insurance offices, professional offices of health care providers, hospitals);
> (7) Public transportation terminals, depots, or stations (not including facilities relating to air transportation);
> (8) Places of public display or collection (*e.g.*, museums, libraries, galleries);
> (9) Places of recreation (*e.g.*, parks, zoos, amusement parks);
> (10) Places of education (*e.g.*, nursery schools, elementary, secondary, undergraduate, or post-graduate private schools);
> (11) Social service center establishments (*e.g.*, day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies); and
> (12) Places of exercise or recreation (*e.g.*, gymnasiums, health spas, bowling alleys, golf courses).

42 U.S.C. § 12181 (West 1995); Hummel Architects, P.A. Accessibility Guidelines and Technical Assistance Manual.

Both the ADA and FHA can cover public accommodations, and the analysis for determining whether a facility is covered by the ADA is separate from the analysis for determining whether the FHA covers it. For example, a facility could be

a residential dwelling under the FHA but still be covered by one of the twelve categories of places of public accommodation. Hummel Architects, P.A. Accessibility Guidelines and Technical Assistance Manual.

(b) Commercial facilities

Subchapter III requirements for new construction and alterations cover commercial facilities, which are defined as nonresidential facilities, such as office buildings, factories, and warehouses, whose operations affect commerce. 28 C.F.R. § 36.102-36.104. This covers many potential places of employment not covered as places of public accommodation. 28 C.F.R. § 36.102-36.104. For example, a building may contain both commercial facilities and places of public accommodation. Hummel Architects, P.A. Accessibility Guidelines and Technical Assistance Manual. Commercial facilities do not include facilities covered by the FHA, so residential dwelling units, for example, are not commercial facilities. 28 C.F.R. § 36.102-36.104. In addition, facilities expressly exempt from the FHA are not commercial facilities. 28 C.F.R. § 36.102-36.104. For example, owner-occupied rooming houses with living quarters for four or fewer families are not commercial facilities. Hummel Architects, P.A. Accessibility Guidelines and Technical Assistance Manual.

(3) New construction

Newly constructed places of public accommodation and commercial facilities must be readily accessible to and usable by disabled individuals to the extent it is not structurally impracticable. This requirement, as well as the requirement for accessible alterations, is the only requirement applicable to commercial facilities. 28 C.F.R. § 36.401; 36.406. Readily accessible means that the facility must be built in compliance with the ADAAG and there is no cost defense to these requirements. 28 C.F.R. § 36.401; 36.406.

New construction requirements apply to facilities first occupied after January 26, 1993, "for which the last application for a building permit or permit extension is certified as complete after January 26, 1992." 28 C.F.R. § 36.401; 36.406.

(4) Alterations

An alteration to a place of public accommodation or commercial facility begun after January 26, 1992 must be readily accessible to and usable by disabled individuals in accordance with ADAAG to the extent feasible. 28 C.F.R. § 3.402-36.406.[795] An alteration includes changes that affect usability, such as remodeling, renovation, etc. Hummel Architects, P.A. Accessibility Guidelines and Technical Assistance Manual.

[795] The fact that alterations may increase costs does not mean compliance is not feasible.

(5) Enforcement

The ADA establishes two ways the requirements of Subchapter III may be enforced: (1) private suits by individuals who are discriminated against or have reasonable grounds for believing they are about to be discriminated against; (2) suits by the Attorney General, whenever it has reasonable cause to believe a pattern or practice of discrimination exists. 42 U.S.C. § 12181 (West 1995).

C. The Interstate Land Sales Full Disclosure Act

(1) Potential liability

Developers should be aware of potential liability under the Interstate Land Sales Full Disclosure Act (Act), 15 U.S.C. § 1701 *et seq.* (West 1998), which was enacted to prohibit and punish fraud in land development enterprises. *McCown v. Heidler*, 527 F.2d 204 (Okla. 1975). It insures that a buyer, prior to purchasing certain kinds of real estate, is informed of facts that will enable him to make an informed decision about purchasing the property. *Law v. Royal Palm Beach Colony, Inc.*, 578 F.2d 98 (Fla. 1978). To fulfill this goal, the Act establishes rigorous disclosure provisions and requirements. *Konopisos v. Phillips*, 226 S.E.2d 522 (N.C. Ct. App. 1976). It prevents abuse by real estate developers through interstate commerce and the use of mail in the promotion and sale of properties offered as part of a common promotional plan. *Nargiz v. Henlopen Developers*, 380 A.2d 1361 (Del. Super. Ct. 1977).

The Act applies when, through interstate commerce, subdivided property is offered for sale or lease. Kennedy, E. Richard, *Litigation Involving the Developer, Homeowners' Associations, and Lenders*, 39 Real Prop. Prob. & Tr. J. 1 (2004). "Subdivision" is defined as "any land which is located in any State or in a foreign country and is divided or is proposed to be divided into lots, whether contiguous or not, for the purpose of sale or lease as part of a common promotional plan." 15 U.S.C. § 1701 (1998). The Act applies to unimproved lots, and generally imposes three duties upon a developer selling property through interstate commerce: (1) the developer is required to register the property with the Department of Housing and Urban Development, Kennedy, *supra* note 61; (2) the developer cannot distribute information to prospective purchasers that is inconsistent with the registered materials, Kennedy, 39 Real Prop. Prob. & Tr. J. 1 (2004) (citing 15 U.S.C. § 1703(a)(2)); and (3) the developer may not use any device, scheme, or artifice to defraud or make a false statement of a material fact regarding the sale or lease of the property. Kennedy, 39 Real Prop. Prob. & Tr. J. 1 (2004) (citing 15 U.S.C. § 1703(a)(1)(D)).

(2) Enforcement

An individual may pursue a private cause of action against a developer if a property sale or lease violates provisions of the Act. Kennedy, 39 Real Prop. Prob. &

Tr. J. 1 (2004). In addition, it is unnecessary for an individual to establish the developer's intent to violate the act, but must only establish a material omission or misrepresentation, however innocent or unintentional. Kennedy, 39 Real Prop. Prob. & Tr. J. 1 (2004).

41. BASICS OF URBAN RENEWAL LAW FOR DEVELOPERS

The Idaho Urban Renewal Law of 1965, Idaho Code §50-2001 (Michie 2000), grants cities and counties the authority to create urban renewal agencies to improve "deteriorated and deteriorating areas. . . which constitute a serious and growing menace, [and are] injurious to the public health, safety, morals and welfare of the residents of the state." Idaho Code §50-2002. Under this law, a municipality may create a program for utilizing private and public resources to eliminate and prevent slums and urban blight, "to encourage needed urban rehabilitation, or to undertake such aforesaid activities or other feasible municipal activities as may be suitably employed to achieve the objectives of such. . . program." Idaho Code §50-2004.

A. Urban renewal agencies

Urban renewal agencies execute urban renewal projects, which by definition includes activities relating to the improvement of structures and acquisition of property. Idaho Code § 50-2018(j). This seems to indicate that the purpose of urban renewal agencies is to improve buildings and structural issues affecting the health, safety, morals and welfare of residents of the municipality. Idaho Code § 50-2018(j).

B. Creation and operation of urban renewal agencies in Idaho

To create an urban renewal agency, a municipality (an incorporated city or town or county in Idaho) must adopt a resolution finding that a deteriorated[796] or deteriorating[797] area exists in the municipality, the rehabilitation, conservation, or redevelopment of the area is necessary for public health, safety, morals or welfare of

[796] "Deteriorated area" is defined as "an area in which there is a predominance of buildings or improvements, whether residential or nonresidential, which by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, or crime, and is detrimental to the public health, safety, morals or welfare." Idaho Code § 50-2018(h).

[797] "Deteriorating area" is defined as "an area which by reason of the presence of a substantial number of deteriorated or deteriorating structures, predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility or usefulness, insanitary or unsafe conditions, deterioration of site or other improvements, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions of title, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs or arrests the sound growth of a municipality, retards the provision of housing accommodations or constitutes an economic or social liability and is a menace to the public health, safety, morals or welfare in its present condition and use; provided, that if such deteriorating area consists of open land the conditions contained in the proviso in section 50-2008(d), Idaho Code, shall apply; and provided further, that any disaster area referred to in section 50-2008(g), Idaho Code, shall constitute a deteriorating area." Idaho Code § 50-2018(i).

the residents of the municipality, and an urban renewal agency is needed in the municipality. Idaho Code § 50-2005.

If the local governing body has made the findings required under section 50-2005, an urban renewal agency is created for the municipality and has the powers necessary to execute urban renewal projects. Idaho Code §§ 50-2006, 50-2007. An urban renewal agency itself or any person or agency may create an urban renewal plan, which the local governing body submits to the planning commission of the municipality for review. Idaho Code § 50-2008. The planning commission then submits its written recommendations to the local governing body, and a public hearing is held on the proposed urban renewal project. Idaho Code § 50-2008. After the public hearing, the local governing body may approve the project if it finds that (1) a feasible method is available for the location of families who will be displaced from the area, (2) the urban renewal plan conforms to the general plan of the municipality, (3) the urban renewal plan gives adequate consideration to the provision of adequate park and recreational areas and facilities that are desirable for neighborhood improvement, and (4) the urban renewal plan will provide maximum opportunity for the rehabilitation or redevelopment of the urban renewal area by private enterprise. Idaho Code § 50-2008.

Urban renewal agencies may prepare a renewal plan for urban renewal areas for a period of time up to ten years. Idaho Code § 50-2009. An agency may also acquire interests in real property by negotiation or condemnation if the property is needed for an urban renewal project. Idaho Code § 50-2010. In addition, urban renewal agencies may "sell, lease, or otherwise transfer real property or any interest therein acquired by it for an urban renewal project, and may enter into contracts with respect thereto." Idaho Code § 50-2011. To finance an urban renewal project, urban renewal agencies have the power to issue bonds, "including. . . the payment of principal and interest upon any advances for surveys and plans or preliminary loans, and. . . to issue refunding bonds for the payment or retirement of such bonds previously issued by it." Idaho Code § 50-2012.

C. Capital City Development Corporation[798]

An example of a redevelopment agency in Idaho is the Capital City Development Corporation (CCDC), which focuses on improving various urban areas in Boise, both independently and collaboratively with public agencies and private entities. More specifically, CCDC prepares and implements master plans adopted by the Boise City Council within certain urban districts. The redevelopment activities in the urban renewal districts include both private and public projects, and the public projects are primarily funded by tax increment financing, which utilizes the taxes

[798] Information obtained from http://ccdcboise.com.

generated by increasing property values in an urban renewal district to pay for the public improvements.

42. COMMON LAW DEDICATION AND IMPLIED EASEMENTS

Real estate developments invariably include many restrictions on property rights: deeds; conditions, covenants, and restrictions; easements; plats; entitlement conditions; and so on. Many of these restrictions are voluntary; others are required as conditions of government development approvals.

In addition to formal, statutory dedications, these restrictions may come in the form (1) implied easements and (2) common law dedication.

Implied easements are created by written or spoken representations made by the property owner. Most developers expect that easements can be created only by the express recordation of an easement document in the public record. However, there are circumstances where easements can be implied from a property owner's words or conduct without any document ever being made of record. This form of implied easement is potentially a significant trap for the unwary.

In the section above regarding subdivisions, we discussed the process of statutory dedication whereby roads, parks, open space, and so on may be dedicated to the public in a subdivision plat. Courts have traditionally invoked the doctrine of common law dedication for plats created pre-statute and to address technically deficient plats (*e.g.*, a signature is missing or the plat is not recorded). However, common law dedication may sometimes extend beyond this purpose based on the facts of the case.

These important topics are addressed in the *Idaho Road Law Handbook*. Although they often apply to roads, they apply in many other contexts as well.

43. ENDOWMENT LANDS

A. History and special status

See *Idaho Road Law Handbook* for an introduction to endowment lands.

The Idaho Admission Act provided that "all lands herein granted for educational purposes shall be disposed of at public sale." Idaho Admission Act, 26 Stat. 215, 216, § 5 (July 3, 1890), amended by 56 Stat. 48 (1942).

Idaho's Constitution repeated and broadened the restriction that lands may be sold only at auction, while adding other mandates respecting the management of endowment lands. Idaho Const. art. IX, § 8.[799] Notably, these provisions are not limited to lands granted for education purposes. They apply to "all the lands heretofore, or which may hereafter be granted to or acquired by the state by or from the general government."[800] *Id*.

The Land Board and its lawyers have provided useful summaries of this framework.

> As it was deliberating the Idaho Admissions Act in 1889, the United States Congress displayed uncommon wisdom by granting what would become the Union's 43rd member approximately 3,600,000 acres of land for the sole purpose of funding specified beneficiaries.
>
> The Idaho Constitution was crafted to include Article IX, Section 8, which mandates that the lands will be managed "…in such manner as will secure the maximum long-term financial return to the institution to which [it is] granted."

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[799] Our Supreme Court has noted this interplay between the Idaho Admission Act and our Constitution.

> We note that the subject mining claims are located on school endowment lands. Both the Idaho Admission Act and the Idaho Constitution provide that school endowment lands, such as the subject property in this case, may be disposed of only "at public sale." Idaho Const. art. IX, § 8; Idaho Admission Act § 5; 26 Stat. 215, 216.

Silver Eagle Mining Co. v. State, 153 Idaho 176, 182 n.5, 280 P.3d 579, 685, n.5 (2012) (Horton, J.).

[800] Idaho's Constitution predates admission and was approved upon admission. It was adopted by the Framers at the Constitutional Convention on August 6, 1889, ratified by the people of Idaho in November 4, 1889, and approved by Congress on July 3, 1890 in the Idaho Admission Act, § 1.

Idaho Department of Lands, Brief History of Idaho's Endowment Trust Lands (www.idl.idaho.gov/land-board/lb/documents-long-term/history-endowment-lands.pdf).

Two constitutional provisions are pertinent. First is the provision that endowment lands shall be "held in trust, subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made." Idaho Const. art. IX, § 8. The second is that the Land Board "shall provide for the location, protection, sale or rental of all the lands . . . in such manner as will secure the maximum long-term financial return to the institution [for whose benefit the land was] granted."[801] *Id*.

B. Endowment lands are exempt from LLUPA control

Under LLUPA, local land use ordinances apply to the State of Idaho. The Idaho Transportation Board is required to consult with local land use agencies on site plans and design of transportation systems. But certain activities, including mining leases, on state endowment lands are exempt by statute. *State ex rel. Kempthorne v. Blaine Cnty.,* 139 Idaho 348, 79 P.3d 707 (2003); OAG 91-3. It is an open question whether other income-generating activities on state endowment lands are exempt based on the state's constitutional obligation to maximize income on those lands. Idaho Const. art. IX, § 8. The Attorney General offers that local agencies are urged to work closely with state agencies on land use matters. OAG 92-5. Idaho Code § 67-6528.

[801] The words in brackets are substituted for the words "to which." This conforms to the generally understood meaning of this oddly phrasing provision.

44. WATER RIGHTS AND LAND USE PLANNING

The following topics are covered more extensively in the *Water Law Handbook*, available from Givens Pursley.

A. H.B. 281 – mandating non-potable water irrigation systems

In 2005, the Idaho Legislature enacted House Bill 281, a law requiring planning and zoning commissions to require developers to fully utilize available surface water before making any use of ground water.[802] In other words, land developers are required to employ separate, non-potable water lawn irrigation systems using available surface water. The bill is not directed to the Idaho Department of Water Resources ("IDWR"). Instead, it amended the Local Land Use Planning Act, Idaho Code §§ 67-6501 to 67-6538, to require that a land use applicant use surface water as the primary source of supply if it is "reasonably available."

B. S.B. 1353 – exclusive authority of IDWR

In 2006, the Idaho Legislature enacted S.B. 1353. 2006 Idaho Sess. Laws, ch. 256 (codified at Idaho Code § 42-201(4)). The bill delegates to IDWR "exclusive authority over the appropriation of the public surface and ground waters of the state" and prohibits any other agency from taking any "action to prohibit, restrict or regulate the appropriation" of water.

[802] 2005 Idaho Sess. Laws, ch. 338 (codified at Idaho Code § 67-6537(1) and (2)). See discussion in *Water Law Handbook*.

45. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

A myriad of state and federal laws regulate environmental conditions and activities on private lands. Whether certain property is subject to any of these laws depends on a wide variety of factors, including: (1) the presence of wetlands, endangered species, hazardous substances, or petroleum; (2) the impact of construction activities on wetlands, endangered species, air quality, or water quality; and (3) the actual use of the property once developed and whether that use will emit pollutants affecting air or water quality or will involve hazardous materials. This section provides an overview of state and federal environmental laws that may affect private land use and suggests practices for limiting liability under such laws.

A. Clean Water Act: regulation of property with streams, wetlands, irrigation ditches, and storm water discharges

The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 - 1387, enacted in 1972, prohibits the discharge of a pollutant from a point source into navigable waters without a permit issued under Section 402 of the CWA (National Pollutant Discharge Elimination System, or NPDES, permit) or under Section 404 of the CWA (for discharge of dredged or fill material). 33 U.S.C. §§ 1311(a), 1362(12). In 1987, Congress enacted Section 402(p) of the CWA, establishing a program to regulate municipal, industrial, and construction storm water discharges. 33 U.S.C. § 1342(p).

(1) Discharges of dredged or fill material into streams, wetlands, and irrigation ditches

Any person intending to discharge dredged or fill material into navigable waters must first obtain a permit from the United States Army Corps of Engineers ("Corps") under Section 404 of the CWA, 33 U.S.C. § 1344. The Corps broadly defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). Precisely what constitutes "waters of the United States" is a hotly contested issue, as indicated in the discussion *infra* regarding the *SWANCC* decision and its progeny.

Under Section 404, the Corps may issue two kinds of permits authorizing discharge activities: individual and general. 33 U.S.C. § 1344(a), (e). Individual permits are issued on a case-by-case basis and apply to specific proposals to discharge material into navigable waters. 33 U.S.C. § 1344(a). General permits are issued on a state, regional, or nationwide basis for categories of activities the Corps determines "are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e)(1).

(a) When is a Section 404 permit required?

The CWA expressly exempts the following activities from the mandate of Section 404, unless the express purpose of those activities is to affect wetlands:

> (A) … normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
> (B) … maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;
> (C) … construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;
> (D) … construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;
> (E) … construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized….

33 U.S.C. § 1344(f).

Additionally, land-clearing and excavation activities that cause a de minimis redeposit of dredged material (or "incidental fallback") into navigable waters do not constitute a "discharge of dredged or fill material" and thus do not require a Section 404 permit. The 1998 decision in *Nat'l Mining Congress v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), answered a decade-long debate over the validity of regulations, collectively known as the "Tulloch Rule," in which the Corps asserted Section 404 jurisdiction over activities that caused incidental fallback. The D.C. Circuit invalidated the Tulloch Rule on the basis that the CWA regulates only the discharge of pollutants that are added, not withdrawn, from navigable waters. The conflict has been revived by a new regulation, referred to as Tulloch II, which "regards" the use of mechanized earth-moving equipment as resulting in a discharge of dredged or fill material unless "project specific evidence shows that the activity results in only incidental fallback." The National Association of Home Builders and National Stone Sand and Gravel Association challenged the new regulation, arguing it improperly regulates activities that are not "discharges" under the CWA because they do not result in an "addition" of dredged material to waters of the United States.

Nat'l Ass'n of Homebuilders v. U.S. Army Corps of Engineers, 311 F. Supp. 2d 91 (D.D.C. 2004). The court dismissed the challenge as not ripe, and the case in now on appeal to the D.C. Circuit.

The big question in determining whether a Section 404 permit is required is whether or not the water body one is discharging into constitutes "navigable waters" (i.e. "waters of the United States"). Initially, the Corps construed the CWA to cover only waters that were navigable in fact. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). However, Corps regulations and a series of court decisions eventually expanded the term to include waters that are tributary or adjacent to navigable waters and, then, to any waters having some nexus with interstate commerce—even intrastate isolated wetlands so long as they were used by migratory birds. *See e.g., United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (Corps has Section 404 jurisdiction over wetlands that are adjacent to a navigable waterway); 51 Fed. Reg. 41217 (1986) (announcing Corps regulation dubbed the "Migratory Bird Rule").

After decades of progressive expansion of the Corps' jurisdiction, a 2001 decision by the United States Supreme Court invalidated the migratory bird justification for jurisdiction and called into question the Corps' jurisdiction over all isolated wetlands. In *Solid Waste Agency of Northern Cook Cnty. v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), the Court considered whether the Corps had jurisdiction over an abandoned sand and gravel pit that was isolated from other navigable waters but that provided habitat for migratory birds. The Supreme Court ruled that the use of a water body by migratory birds does not in and of itself constitute a basis for Corps Section 404 jurisdiction over that water body. In reaching this holding, the Court questioned but did not absolutely resolve whether regulatory authority under the CWA generally extends to isolated wetlands or other waters that are not adjacent to navigable waters.

Courts interpreting *SWANCC* have been split as to the decision's effect. A minority of courts have held that *SWANCC* limits jurisdiction under the CWA to waters that are actually navigable or immediately adjacent to open bodies of navigable water. *See, e.g., In re Needham*, 354 F.3d 340 (5th Cir. 2003) (holding that a hydrological connection between tributaries and navigable waters is not itself sufficient to bestow Corps jurisdiction over tributaries that are not themselves navigable or truly adjacent to navigable waters); *FD & P Enters., Inc. v. United States Army Corps of Engineers*, 239 F. Supp. 2d 509, 516 (D.N.J. 2003) (finding that *SWANCC* barred the argument that hydrological connection alone can form the basis for Corps jurisdiction); *United States v. RGM Corp.*, 222 F. Supp. 2d 780, 785-86 (E.D. Va. 2002) (similar).

Other courts, including the Ninth Circuit, have held that *SWANCC* applies only to truly isolated waters and does not otherwise alter the jurisdiction of the CWA.

In others words, these courts generally held that Corps jurisdiction extends to any waters that have a surface hydrological connection to waters that are actually navigable. *See, e.g., Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (finding irrigation canals to be tributaries subject to Corps jurisdiction and not isolated waters as in *SWANCC*) (discussed in more detail below); *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003) (asserting Corps jurisdiction over wetlands that "are adjacent to, and drain into, a roadside ditch whose waters eventually flow into the navigable Wicomico River and Chesapeake Bay"); *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003) (finding that a sufficient nexus existed between particular wetlands and navigable-in-fact waters for the Corps to have jurisdiction, where water flowed intermittently from the wetlands through a series of natural and manmade waterways, crossing under an interstate highway, and eventually finding its way 2.4 miles later to traditional navigable waters); *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003) (asserting Corps jurisdiction over wetlands that flow into a man-made drain, which in turn flows into a creek, which in turn flows into a navigable river); *United States v. Buday*, 138 F. Supp. 2d 1282, 1292 (D. Mont. 2001) (finding Corps had jurisdiction to prosecute landowner for discharging pollutants during unauthorized excavation adjacent to a tributary, even though the tributary itself and wetlands surrounding it were not navigable in fact and did not connect with a navigable waterway for at least 235 miles).

Recently, the United States Supreme Court has denied three petitions for certiorari addressing this issue of whether Corps jurisdiction covers only navigable and immediately adjacent waters or any waters that have some surface level hydrological connection to navigable waters. *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), cert. denied, 124 S. Ct. 1874 (2004); *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003), cert. denied, 124 S. Ct. 1874 (2004); *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003), *cert. denied*, 124 S. Ct. 1875 (2004).

Of particular importance for Idaho land use activities is the 2001 decision in *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001). In deciding whether an NPDES permit was required to discharge a toxic herbicide into an irrigation canal, the Ninth Circuit held that irrigation canals were "tributaries" to waters of the United States and subject to CWA jurisdiction where the canals exchanged water with a natural stream or lake.[803] The court expressly distinguished *SWANCC*:

[803] An NPDES permit, or National Pollutant Discharge Elimination System permit is required under Section 401 of the CWA for the discharge of a pollutant into "navigable water." 33 U.S.C. § 1311(a). Although the *Talent* Court interpreted the term "navigable water" in the context of Section 401 of the CWA, such interpretation presumably applies in the Section 404 context because the term usage and meaning is the same.

> The irrigation canals in this case are not "isolated waters" such as those that the [*SWANCC*] Court concluded were outside the jurisdiction of the Clean Water Act. Because the canals receive water from natural streams and lakes, and divert water to streams and creeks, they are connected as tributaries to other "waters of the United States."

Headwaters, 243 F.3d at 533. The Ninth Circuit further held that the connection between the canal and a natural stream need not be continuous but could be intermittent (*e.g.,* flowing only during the irrigation season). *Headwaters*, 243 F.3d at 534. Thus, where an aquatic herbicide was applied to irrigation canals and evidence showed that the herbicide reached a natural stream, the canal also was deemed a water of the United States and an NPDES permit was required to apply the herbicide to the canal.

A threatened lawsuit and resulting settlement forced the Corps to incorporate the *Talent* decision into its *permitting* regulations.[804] The April 6, 2004 Settlement Agreement resolves a threatened lawsuit by the National Wildlife Federation (and other environmental groups) ("NWF") against Costco Wholesale Corporation (and related business entities) ("Costco") and the Corps. NWF claimed the Corps violated the CWA when they allowed Costco to fill 7.4 acres of wetlands that were directly adjacent to an agricultural drain ditch that flowed into a tributary of the Columbia River. The Corps had determined the wetlands were "isolated wetlands" and, therefore, were not deemed to be "waters of the United States" or subject to the Corps' Section 404 jurisdiction. As a result of the settlement, the Corps agreed, among other things, to post on its website a statement to the effect that "irrigation canals that receive water from natural streams and lakes, and divert water to streams and creeks, are connected as 'tributaries' to those other waters. . . . As tributaries, the canals are 'waters of the United States,' and are subject to the CWA and its permit requirements." Additionally, the Corps is in the process of developing a regional "general" permit to cover work within irrigation and drainage districts.

Discrepancies as to which wetlands and are waters are subject to the Corps' Section 404 jurisdiction are apparent not just among judicial districts, but also among Corps and EPA district offices. In March 2004, the United States General Accounting Office released a report entitled *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, which found the criteria used to determine jurisdiction under the CWA are unevenly interpreted and applied. The report urged the Corps and EPA to survey their 38 district offices, determine the extent of the problem, and develop a plan to coordinate the varied jurisdictional determinations.

[804] The CWA has a citizen suit provision at 33 U.S.C. § 1365.

The *SWANCC* decision and its progeny of case law and administrative actions are significant for landowners and users. If Corps jurisdiction no longer applies to a wetlands-fill project, numerous other environmental laws that apply only where there is a federal action—including the Endangered Species Act, National Environmental Policy Act, National Historic Preservation Act, and state water quality certification—no longer come into play. However, in light of the *Talent* decision and the expected outfall from the NWF settlement (i.e., a new regional permit), Idaho land users likely can expect a more limited interpretation of *SWANNC* and thus broader Corps jurisdiction. Specifically, Section 404 permits may be required for discharging into (1) arguably isolated wetlands, even if their only connection to navigability is that they are adjacent to a man-made irrigation ditch, and (2) the irrigation ditch itself. Before proceeding with any fill activities, a developer should obtain the opinion of a competent consulting engineer that a wetland, irrigation ditch, or drain does not have a hydrologic connection to a natural stream or lake. If it does, the developer will need to obtain from the Corps either a non-jurisdictional determination or a Section 404 permit.

(b) How to obtain a Section 404 permit

(i) General permits

General permits are issued when the Corps adopts them after publishing them in the federal register and taking public comment. 33 U.S.C. § 1344(a), (e). Once adopted, the general permit authorizes the specified category of activity without the need for a proponent to secure an individual permit. The Corps has implemented its general permit authority by adopting a regulatory program, codified in 33 C.F.R. Part 330, which governs the issuance and applicability of general permits for certain categories of discharge activities on a nationwide basis. In accordance with these regulations, the Corps has issued several nationwide permits and several general conditions applicable to all nationwide permits.

While the nationwide permit program is designed to "regulate with little, if any, delay or paperwork certain activities having minimal impacts," 33 C.F.R. § 330.1(b), some proponents seeking coverage under a nationwide permit must notify the Corps of the proposed project through a pre-construction notice ("PCN") that describes the project and carefully delineates each of the proposed fills. 33 C.F.R. § 330.1(e). Most often, it is the size of the proposed fill that triggers the requirement for a PCN.

The purpose of this case-by-case inter-agency review of PCNs is to determine whether the fills indeed will cause no more than "minimal adverse environmental effects" as mandated by the CWA. 33 U.S.C. § 1344(e)(1), 33 C.F.R. § 330.1(e)(2). In the PCN review process, as in the individual permit process, the Corps must verify that the state in which the fill is proposed believes the project will not violate state water quality standards, 33 C.F.R. § 330.4(c), and the Corps must ensure the

proposed fills will not jeopardize the continued existence of any listed species under the Endangered Species Act, 33 C.F.R. § 330.4(f). As a result of the PCN review, the Corps may require project amendments or add conditions, including, among other things, the implementation of a mitigation plan, to ensure compliance with a nationwide permit or to minimize adverse effects. 33 C.F.R. § 330.1(e)(2), (3).

In March 2000, the Corps announced a revised nationwide permit program eliminating Nationwide Permit 26 and making other changes. 65 Fed. Reg. 12,818-99. Nationwide Permit 26—the most widely used and controversial nationwide permit—allowed any activity to occur as long as the wetlands impacted were less than a certain acreage and occurred in isolated areas. The Corps proposed five new nationwide permits and modified six existing nationwide permits to replace Nationwide Permit 26. The new and modified nationwide permits generally limit allowed impacts to one-half acre, provide additional instances where an applicant must notify the Corps prior to undertaking an activity, and require mitigation in more instances than previously. In 2002, the Corps renewed these nationwide permits, which remain valid until March 2007. 67 Fed. Reg. 2020-01 (2002). The Headquarters Regulatory Staff will begin revising the existing permits during the winter of 2004-2005.

(ii) Individual permits

If you do not qualify for a general permit, then you need an individual permit. An applicant for an individual Section 404 permit must meet the following criteria: (1) no practical alternative is available; (2) no significant adverse impacts will occur; (3) all reasonable mitigation measures will be used; and (4) other statutory requirements are met. 40 C.F.R. § 230.10(a)-(d). To assess whether the applicant satisfies these criteria, the agency considers: (1) the characteristics of the receiving waters; (2) the source and composition of the material discharged; and (3) the characteristics of the discharge activity. 33 C.F.R. §§ 230.6(a), 230.11.

Additionally, the Corps considers the effect of proposed activities on the broad public interest. 33 C.F.R. § 320.4(a). This means that the Corps may prohibit the filling of wetlands, or any other activity requiring a Section 404 permit, if it determines the project's site-specific and cumulative impacts are not in the public interest. Courts tend to defer to the Corps' public interest determinations, making it difficult to challenge Corps decisions.

Finally, the Corps is obligated to consider whether the application satisfies a handful of other laws, including the Endangered Species Act's prohibition against jeopardizing listed species, the appropriate state's water quality certification standards, and the National Historic Preservation Act's protection of historically-significant artifacts. 33 C.F.R. § 320.4.

(2) Storm water discharges

The federal EPA and state IDEQ regulate discharges of storm water[805] under Section 402(p) of the CWA and applicable regulations. 33 U.S.C. § 1342(p); 40 C.F.R. §§ 122.26 through 122.28. The primary impact of these requirements on property development is on construction activities, but there might also be requirements imposed on the final development. Municipalities and industrial sites also are subject to storm water permit requirements.

For all construction activities (i.e. "clearing, grading, and excavating," 40 CFR § 122.26(b)(15)(i)) that disturb greater than one acre, a developer must comply with the construction general storm water permit proposed by EPA and certified by IDEQ. Construction activities disturbing less than one acre but that are part of a "larger common plan of development or sale" also are subject to the construction general permit requirements.

To obtain coverage under the construction general permit, an applicant must: (1) develop and implement a storm water pollution prevention plan ("SWPPP"), (2) submit a notice of intent to EPA before commencing construction, and (3) comply with the terms of the general permit. The general permit contains extensive guidance about the contents of the SWPPP, which normally is prepared by the project engineer or contractor. Essentially, the SWPPP guidance requires that the operator of a construction site use best management and engineering practices to contain storm water runoff and prevent erosion at the construction site. Examples of best management practices, or BMPs, include silt fences, hay bales, gravel bags, and track pads. Once construction has commenced, implementation of the SWPPP requires record-keeping, ongoing inspections, reporting releases, and updating the SWPPP with any modifications. If the operator of a construction site changes during the construction activities, then certain procedures must be followed, including filing a notice of termination and a new notice of intent.

Idaho is one of only a handful of states which do not have delegated authority to issue storm water permits. Under Idaho Code § 39-118, however, IDEQ does have authority to review the plans and specifications for certain SWPPPs.

The construction general permit and associated materials are available on EPA's website at http://cfpub1.epa.gov/npdes/stormwater/const.cfm. Any person wishing to be covered by the general permit must file the notice of intent form available on the EPA website at least 48 hours before construction begins. The current version of the construction general permit was issued in 2003 and expires on July 1, 2008. 68 Fed. Reg. 39087 (July 1, 2003).

[805] EPA regulations define "storm water" to mean storm water runoff, snow melt runoff, and surface runoff and drainage. 40 CFR § 122.26(b)(13). The term is not defined in the CWA.

Regulated storm water discharges that are not eligible for coverage under a general permit must obtain an individual permit from EPA. Developments in areas that could have particularly large impacts on the environment might not be able to use the general permit and instead must apply for an individual permit from EPA.

Storm water requirements also can apply to a completed development. In Boise and some other communities, this might not be an issue, as municipal ordinances might require that all storm water from new developments be retained on site. *See* City of Boise Stormwater Management and Discharge Control Ordinance, Chapter 8-15 of the Boise Municipal Code. These requirements have resulted in certain design requirements for developments, including the inclusion in many developments of storm water swales to allow storm water to percolate back into the ground. However, these systems are beginning to get a closer look from IDEQ because of potential ground water impacts.

If the municipality in which a development is located has a separate storm water system, the permitting requirement would fall on the municipality, although it might impose design or maintenance requirements on the developer as a condition to connecting to the system. As of December 1999, storm water control requirements apply not only to communities with a population greater than 100,000, but also to certain smaller "urbanized areas." 64 Fed. Reg. 68,723.

If a discharger fails to obtain a permit or fails to comply with the terms of a permit, then it could be subject to an administrative, civil, or criminal enforcement action by EPA or pursuant to a citizen suit. 33 U.S.C. §§ 1319, 1365. Monetary penalties are available to EPA if it pursues permit violations. 40 CFR § 19.4. EPA has filed complaints against construction sites for failure to obtain a permit, failure to implement or maintain BMPs, failure to prevent excessive runoff, and failure to adequately train on-site personnel, among other violations. Penalties have ranged from $15,000 for single violations at small sites to $3.1 million for multiple violations at a large site. Recently, EPA has stepped up its efforts to enforce its storm water regulations, primarily against two types of large scale construction operations: (1) commercial development of "big box" stores and their associated developers and (2) large national residential developers.

B. Endangered Species Act: regulation of property with endangered and threatened species

Private property owners and developers need to be aware of applicable laws protecting endangered and threatened species if their development or other land use activities require federal permitting (such as a permit to fill wetlands), are taking place within the designated critical habitat of a listed species, or might harm or kill a listed species.

(1) Overview of the Endangered Species Act

Passed in 1973, the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* ("ESA"), has been described as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). The ESA applies to fish, wildlife, and plants. This includes insects but excludes microbes.

The ESA serves three principal functions: (1) Section 4 of the Act establishes a process for identifying threatened and endangered species, 16 U.S.C. § 1532; (2) Section 7 of the Act requires federal agencies to avoid actions that would jeopardize listed species and directs them to use their authorities to promote species recovery, 16 U.S.C. § 1536; and (3) Section 9 of the Act prohibits all persons from taking (harming) listed species, 16 U.S.C. § 1538. Each of these functions of the Act may impact private property development.

The ESA is administered by two federal agencies. The United States Fish and Wildlife Service ("USFWS"), in the Department of Interior, administers terrestrial (i.e. land) species and inland water species (*e.g.*, bull trout). The National Marine Fisheries Service ("NMFS"), in the Department of Commerce, administers marine and anadromous species (*e.g.*, salmon and steelhead).

The ESA provides for both civil and criminal penalties for violations of the Act. 16 U.S.C. § 1540(a)(1). The federal Administrative Procedure Act, 5 U.S.C. § 706(a)(2) ("APA"), governs judicial review of USFWS and NMFS decisions implementing the ESA. Under the APA, actions may be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(a)(2).

(2) ESA § 4 – listing decisions and designation of critical habitat

Section 4 of the ESA and associated regulations set forth the process and criteria for listing a species as endangered or threatened and for designating a listed species' critical habitat area. Private landowners are affected by listing decisions and critical habitat designations because these decisions form the basis for the Act's major provisions in Sections 7 and 9, discussed *infra*, which apply to actions that affect listed species or critical habitat.

A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A species is listed as "threatened" if it is likely to become an endangered species in the foreseeable future. 16 U.S.C. § 1532(20). One of the factors that triggers listing a species as endangered or threatened is the present or threatened destruction, modification, or curtailment of the species' habitat or range. 16 U.S.C. § 1533(a)(1)(A).

Anyone who presents adequate evidence of the endangered status of a species may propose additions or deletions to the list of endangered or threatened species.[806] The criteria for listing a species as endangered or threatened must be based solely on biological evidence and the best scientific and/or commercial data available. Economic considerations are expressly excluded from the listing decision. Distinct population segments of a species may be listed even if that species is abundant in other portions of its range.

Once a species is listed, the listing agency designates as "critical habitat" any habitat generally occupied by the species or habitat that is "essential to the conservation of the species" based on the best scientific data available, 16 U.S.C. § 1532(5)(A), *and* based on the economic impact of the designation, 16 U.S.C. § 1533(b)(2). Thus, unlike the listing decision, economic considerations play a role in the agency's decision about which habitat area to designate as critical.

(3) ESA § 7 – consultation on federal actions

A federal agency must consult with USFWS or NMFS before undertaking any action that may jeopardize an endangered or threatened species "or result in the destruction or modification of critical habitat." 16 U.S.C. § 1536(a)(2). This requirement could impact a private landowner any time they engage in a federal permitting action. For example, certain development activities that impact wetlands require a permit from the Army Corps of Engineers pursuant to Section 404 of the Clean Water Act. If the Corps-permitted wetlands activity might jeopardize a listed species or modify its critical habitat, then the Corps must "consult" with either USFWS or NMFS (depending on the type of species impacted) before the wetlands permit may be issued.

The consultation process between an action agency (i.e., the Corps, in the wetlands permitting example) and an administering agency (i.e. USFWS or NMFS) is briefly summarized here. To assess potential impacts of the proposed federal action, the action agency prepares a Biological Assessment. 50 C.F.R. § 402.12. If the Biological Assessment reveals evidence of an adverse impact on a listed species, then formal consultation begins, 50 C.F.R. § 402.14, and the administering agency must prepare a Biological Opinion to evaluate whether the proposed action is likely to jeopardize the continued existence of the species. 16 U.S.C. § 1536(b). If the proposed action is likely to jeopardize the species, the administering agency must suggest any "reasonable and prudent alternatives" that will allow the action to proceed without jeopardizing listed species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14. The administering agency must also specify whether the action will cause an

[806] A current index of terrestrial and inland water species listed by USFWS can be found at http://endangered.fws.gov/wildlife.html#Species. A current index of marine and anadromous species listed by NMFS can be found at www.nmfs.noaa.gov/prot_res/species/ESA_species.html.

"incidental taking" of the species in violation of Section 9 of the ESA, discussed *infra*. An Incidental Take Statement must accompany any finding of incidental taking in the Biological Opinion.

Although the consultation decision is made by a federal agency, the public (including private landowners whose development projects are at stake) may play a role in the process through public comment and, ultimately, through judicial review if someone wants to challenge the final agency decision. Local land use permitting decisions contingent upon compliance with state and federal laws could be delayed by the ESA consultation process. Local land use decision-makers may require proof of such compliance (*e.g.*, a Section 404 permit under the CWA to fill wetlands) before allowing a final plat to be filed for a subdivision or PUD.

(4) ESA § 9 – ban against "taking" any listed species

Section 9 of the ESA prohibits the "take" of endangered species of fish and wildlife. 16 U.S.C. § 1538(a)(1). This ban does not apply to plants, though a separate prohibition makes it unlawful to remove from federal jurisdiction or to maliciously damage endangered plants. 16 U.S.C. § 1538(a)(2). Although Section 9 only bans the taking of endangered species, listing decisions under Section 4(d) regularly include regulations extending the ban to threatened fish and wildlife species. *See* 50 C.F.R. § 17.31(a); 50 C.F.R. § 223.203.

Because the prohibition on taking listed species is broadly defined ("harming" species is enough) and applies to everyone's actions (not just federal agencies), it could have a significant impact on land uses that impact a listed species or a listed species' critical habitat.

The ESA defines "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (emphasis added). Regulations promulgated by USFWS and NMFS define the term "harm" as an act that kills or injures a species or significantly modifies habitat such that essential behavior patterns (breeding, spawning, rearing, migrating, feeding, or sheltering) are impaired. 50 C.F.R. § 17.84; 50 C.F.R. § 222.102. Habitat degradation in and of itself is not necessarily a take, without some reasonable certainty that the modification will actually kill or injure a listed species. Such injury may be caused by habitat modification that significantly impairs essential behavior patterns of the species. Habitat modification that merely impedes recovery of a species, but does not actually bring a species closer to extinction, does not constitute "harm" under the Act.

Exemptions to Section 9's take prohibition may be obtained in certain circumstances. USFWS or NMFS may grant an Incidental Take Permit to an individual if their taking is incidental, the impacts are mitigated, funding is provided for the mitigation, and "the taking will not appreciably reduce the likelihood of the

survival and recovery of the species." 16 U.S.C. § 1539(a)(2)(B). To apply for an Incidental Take Permit, an individual must submit a Habitat Conservation Plan describing the likely impact and planned mitigation to minimize the impact. 16 U.S.C. § 1539(a)(2)(A).

Private citizens or government agencies may bring suit to enjoin violations of Section 9. 16 U.S.C. § 1540(a), (b), (e), and (g). If a take enforcement case is brought against a land user, the plaintiffs will bear the burden of proving that a habitat-modifying action is reasonably certain to significantly impair an essential behavioral pattern of a listed species. Difficult questions of proximity (i.e. what is "reasonably certain"?) and degree (i.e. what is "significantly impair"?) will have to be addressed on a case-by-case basis. In some circumstances, cooperation and mitigation may be a better avenue for landowners than litigation. If a landowner's development or other land use activities are taking place within the critical habitat area of a listed species, they may need to seek an Incidental Take Permit through development of a Habitat Conservation Plan or other settlement options to avoid potential Section 9 enforcement litigation and resulting penalties.

Examples of the ESA's impact on private development include the following:

Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987): 440-room hotel and convention center and high-rise residential buildings on San Diego Bay; highway and flood control project (species = California Least Tern and Light-Footed Clapper Rail);

Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 876 (9th Cir. 1985): 2,235 residential unit development on San Bruno Mountain (species = Mission Blue Butterfly); and

Maine Audubon Society v. Purslow, 672 F. Supp. 528 (S. Maine 1987), *aff'd* 907 F.2d 265 (1st Cir. 1990): 17-lot residential subdivision (species = Bald Eagle).

(5) Citizen suits under the ESA

The ESA contains a citizen suit provision requiring the plaintiff to provide 60 days advance notice to the Department of the Interior and to the alleged violator. 16 U.S.C. § 1540(g)(1). It authorized suits in three contexts:

To enjoin any person (including the government) from violations of the ESA.

To compel the Secretary of the Interior to take action to enforce takings prohibitions.

Against the Secretary of the Interior where there is alleged a failure of the Secretary to undertake a nondiscretionary listing action.

The third category of citizen suit is appropriate for actions challenging the government's failure to meet fixed deadlines and other procedural requirements, which sometimes blend over to substantive requirements (such as the requirement to perform an economic analysis). However, listing decisions and other action involving the exercise of discretion may be challenged under the Administrative Procedure Act, which does not contain a 60 day notice requirement. In *Bennett v. Spear*, 540 U.S. 154, 171-74 (1997) (Scalia, J.), the Supreme Court ruled that the plaintiff properly challenged the failure of the U.S. Fish and Wildlife Service to consider economic factors in its listing decision (as specifically mandated by the ESA), but that a challenge to the Service's Biological Opinion can only be brought under the APA.

C. Air pollution and land use

The federal Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, is the primary law governing air pollution control in the United States. However, the focus of the CAA is large industrial facilities emitting, generally speaking, over 100 tons per year of regulated air pollutants or smaller thresholds of designated hazardous air pollutants. The federal requirements are unlikely to impact real property developments.

Certain state air regulations, however, might impact real property development. IDEQ regulations require a permit for the construction of an emissions unit emitting regulated air pollutants, such as heating, ventilating and air conditioning units in office buildings and permanent emergency generators. IDAPA 58.01.01.201. The Idaho air pollution rules offer some exemptions for these types of sources. IDAPA 58.01.01.220 through 58.01.01.225. The primary exemptions are for (1) sources with very small potential emissions, IDAPA 58.01.01.220; (2) heating equipment using natural gas, propane gas, or liquefied petroleum gas exclusively with a capacity of less than 50 million btu's per hour input, IDAPA 58.01.01.223.03.c.; (3) other fuel burning equipment for indirect heating with a capacity of less than one million btu's per hour input, IDAPA 58.01.01.223.03.d.; and (4) small emergency generators, IDAPA 58.01.01.221.04.c.

There is some likelihood that, in the future, local ordinances will impose air pollution controls on property development activities, particularly in areas that are not in attainment with federal air quality requirements (known as "non-attainment areas"). The main pollutant of concern for property development is particulate matter. Local governments may be required to adopt transportation control measures in non-attainment areas, or the local transportation agency may be prohibited from spending federal highway funds in the area except for certain very narrow categories of projects. Transportation control measures in Ada County currently include emissions testing on automobiles and controls on wood stoves. These control measures likely will be implemented in Canyon County as well. In addition, both counties might adopt construction dust control measures in the not-too-distant future.

These measures could impose dust control conditions as part of a development approval or at least as part of a grading permit. Finally, in light of numerous recent ozone exceedences in Ada and Canyon Counties, developers may see additional future controls on ozone-related activities.

D. Landowner liability for hazardous wastes

Under federal and state law, current and former owners of contaminated property may be liable for cleanup costs even if they did not cause the contamination. The cleanup costs, as well as the potential civil and criminal liabilities for failing to comply with laws regulating cleanup, can be substantial. Recent amendments to federal hazardous waste laws seek to soften this regulatory hammer somewhat, but a prospective landowner/developer still needs to proceed cautiously when dealing with any potentially contaminated property. The following sections discuss the potential liability of owners and other parties associated with real property under federal and state law.

(1) Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): liability for property contaminated with hazardous waste

(a) Overview of CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"),[807] is the primary statute used by the federal government to undertake or order cleanup of, and to allocate liability for, environmentally contaminated property. CERCLA requires a person in charge of a facility or vessel that causes an unpermitted release of a hazardous substance into the environment to report that release to the National Response Center. 42 U.S.C. § 9603. Exceptions include federally-permitted releases, such as releases permitted under the Clean Water Act, the Clean Air Act, or the Resource Conservation and Recovery Act. Failure to report such a release may result in penalties. 42 U.S.C. § 9603(b).

CERCLA gives the federal government authority to undertake remediation (i.e., cleanup) when improper releases are discovered. Under Section 9604 of the Act, the United States Environmental Protection Agency ("EPA") may pursue either a removal action or a remedial action. In general, a removal action is a short-term solution and a remedial action is a longer-term and more permanent solution. EPA may also seek reimbursement of its own cleanup costs from any responsible party under Section 9607 of the Act. Or, rather than do the dirty work itself, EPA may

[807] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, *amended by* the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended primarily at 42 U.S.C. §§ 9601-9675, but also scattered sections of the Internal Revenue Code and Titles 10, 29 and 33).

order responsible parties to remediate the site under Section 9606 of the Act. CERCLA also has a citizen suit provision that allows citizens to sue to force the government to perform non-discretionary duties under the Act. 42 U.S.C. § 9659(a)(2).

CERCLA is a strict liability statute. If an improper release has occurred and a person fits within the definition of a responsible party, then they are liable unless a specific statutory defense applies, regardless of whether or not they caused the release. Responsible parties include: (1) current owners and operators of the facility or vessel at which an actual or threatened release of a hazardous substance is present; (2) owners and operators of facilities at the time of disposal of a hazardous substance (i.e. former owners and operators); (3) persons who own or possess a hazardous substance for which they contracted transportation, disposal, or treatment at any facility not owned or possessed by them (i.e. arrangers for disposal of a hazardous substance); and (4) persons who transport a hazardous substance to a site at which an improper release occurs. 42 U.S.C. § 9607(a)(1)-(4).

Statutory defenses to liability apply if the release results *solely* from: (1) an act of God (i.e. natural disaster); (2) an act of war; or (3) an act or omission of a third party. 42 U.S.C. § 9607(b). The key issue that can make these defenses difficult to utilize is the requirement that the listed events be the *sole* cause of the release. An additional defense, added to CERCLA in the 1986 amendments to the Act, is the "innocent purchaser defense." This defense exempts from liability persons who unknowingly buy property where a release has occurred, after taking appropriate steps to determine the property's condition. Year 2002 amendments to the Act, discussed *infra* regarding Brownfields, help to clarify exactly what due diligence is required to satisfy this defense.

(b) Present owners and operators

CERCLA imposes hazardous waste cleanup liability on an "owner or operator" of a "facility." 42 U.S.C. § 9607(a)(1). CERCLA's definition of "facility" is very broad and means any building, structure, installation, equipment, pipe or pipeline, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, aircraft, or site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. 42 U.S.C. § 9601(9). Vacant land can qualify as a "facility," so long as a hazardous substance has come to be located on the land.

The concept of "owner or operator" is similarly broad. An "owner or operator" is basically any person with any ownership in the facility or who exercises any control over the facility. Thus, an "owner" may include (1) a tenant-in-common or joint tenant with only a small percentage ownership interest in the property; (2) a partner in a general partnership owning the property; (3) a condominium unit owner with respect to common areas of the condominium project; (4) (possibly) a trustee of

a contaminated property; (5) a mortgagee or deed of trust beneficiary under certain circumstances; (6) corporate officers; and (7) parent corporations.

An "operator" may include (1) a tenant, subtenant, contractor or licensee who has the right to enter upon and use the property; (2) a mortgagee or deed of trust beneficiary that assumes the business decisions of the facility or otherwise operates the facility; (3) condominium associations and homeowners' associations responsible for maintaining common areas; (4) a court-appointed receiver or the secured party for whose benefit the receiver is appointed; (5) property managers if they exercise "control" over the property; and (6) general contractors and subcontractors who perform work at the property and exercise "control" over the site.

(c) Past owners and operators

The owners and operators of a facility at the time of a release of a hazardous substance are also liable under CERCLA. If a person owned or operated a facility at the time of a release of a hazardous substance onto the property, that person will continue to be liable indefinitely even after transfer of the property. 42 U.S.C. § 9607(a)(2). The mere passage of time or transfer away of the property will not shield a former owner or operator of the facility.

Liability for intermediate landowners is not as clear. These are persons who buy contaminated property, do not add additional hazardous substances, and then sell the property. If the prior contamination (i.e. release of a hazardous substance) truly ended before the intermediate owner purchased the property, then the intermediate owner is off the hook. It is less clear, however, whether EPA can go after a prior owner who did not cause the release but who owned the property while the release was still occurring (*e.g.*, because it was still leaking from a tank or migrating through the ground). The Circuits are split on this issue of whether "passive migration" constitutes disposal (and thus a release) under the Act or whether it has to be active disposal. However, recent decisions by the Ninth Circuit and the U.S. District Court in Idaho offer some direction for landowners in Idaho.

In *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001), the Ninth Circuit ruled that the gradual passive migration of contamination through soil that allegedly took place during a former owner's ownership of the property was not a release under CERCLA. In a nutshell, the court ruled that if the release were still occurring (i.e. still leaking from a tank) during a person's ownership, then that person would be liable even if they did not cause the leaking; but, if the release were simply seeping into or migrating through the ground, then the owner at that time would not be liable. As a result, the inquiry in each case presented will be very fact-specific. Indeed, in an unpublished decision, the U.S. District Court in Idaho relied on *Carson Harbor* to note that an ongoing leak from an artificially-created mound (as opposed to a tank or barrel) may not be enough to impose CERCLA liability on a former owner because this is more akin to seepage through the ground. *Monarch*

Greenback LLC v. The Doe Run Resources Corp., Case No. CV 98-0354-S-EJL (Sept. 30, 2002) (Judgment at page 11).

Another recent decision by the U.S. District Court in Idaho considers the passive migration issue from the perspective of prior owners who did cause the release but who caused the release before the enactment of CERCLA in 1980. *Coeur d'Alene v. Arsarco Inc.*, 280 F. Supp. 2d 1094 (D. Idaho 2003). Because damages cannot be sought based on a release that occurred wholly before CERCLA was passed, 42 U.S.C. § 9607(f)(1), the court had to consider whether a pre-1980 release was still occurring after the law's enactment. The court ruled that the passive water migration of hazardous substances, even though unaided by human contact and not actually "leaking" from any container, constituted a "release" under CERCLA and thus the pre-1980 releasers were liable for damages.

Although *Arsarco* did not involve intermediate owners, its broader interpretation of the level of passive migration that constitutes a release (seeping through ground water) could be problematic for them. The *Carson Harbor* limitation on a former landowner's liability for passive migration (that migration through natural earth is not enough) is certainly more favorable to intermediate landowners.

A person who contributed little contamination (*e.g.*, possibly an intermediate owner), may be able to reach an accommodation with EPA under Section 9622(g) of CERCLA, which provides for expedited settlement procedures with so-called "de minimis" contributors. To qualify for a de minimis settlement, the past owner or operator or a present owner or operator must show that the amount and/or toxicity or other hazardous effects of the substances contributed by that party to the facility were minimal.

(d) Arrangers & transporters – liability for moving contaminated dirt

Both CERCLA and the federal Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* ("RCRA"), which regulates the transportation and disposal of hazardous waste, impose liability on "persons" who "arrange for disposal" or "contribute to disposal" of hazardous wastes. CERCLA, 42 U.S.C. § 9607(a)(3); RCRA, 42 U.S.C. § 6973. Some grading and other contractors have been held liable for "arranging" for the disposal of hazardous substances where the contractors disturb, knowingly or unknowingly, contaminated soil on a site. The courts have relied on the theory that, if the contractor exercised sufficient control over excavation activities, the contractor thereby arranged to move the contaminated material from its location and dispose of it elsewhere on site. *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988) (finding potential arranger liability); *City of North Miami v. Berger*, 828 F. Supp. 401 (E.D. Va. 1993) (imposing arranger liability on a demolition company but refusing to impose arranger liability on an engineering firm).

Some courts, including the Ninth Circuit, have upheld the potential of transporter liability under CERCLA Section 9607(a)(4) on similar theories. *Kaiser Aluminum & Chem. Corp. v. Catellus Development Corp.*, 976 F.2d 1338 (9th Cir. 1992) (finding that excavator who extracted contaminated soil from excavation site and spread it over uncontaminated areas of property could be liable under CERCLA as an operator and a transporter); *Danella Southwest, Inc. v. Southwestern Bell Telephone Co.*, 775 F. Supp. 1227 (E.D. Mo. 1991) (affirmed in unpublished decision, 978 F.2d 1263 (8th Cir. 1992)) (imposing transporter liability on the contractor, but, after an analysis of equitable factors, determining the contractor was not responsible for contribution for any of the cleanup costs).

(2) Resource Conservation and Recovery Act (RCRA): landowner liability and corrective action

(a) Landowner liability

Congress enacted the Resource Conservation and Recovery Act (RCRA) in 1976 to regulate hazardous *waste* handling and disposal. In 1984, Congress enacted the Hazardous and Solid Waste Amendments (HSWA), which significantly expanded the scope and requirements of RCRA.

Section 7003 of RCRA authorizes EPA to bring an action in federal court against any person who has contributed or is contributing an imminent and substantial endangerment to health or the environment by their handling, storage, treatment, transportation, or disposal of solid or hazardous waste. RCRA § 7003(a), 42 U.S.C. § 6973(a). In other words, RCRA applies to past or present generators and transporters of solid or hazardous waste, as well as past or present owners and operators of facilities that handle such waste. Specifically, EPA might require a liable person to take actions such as: constructing barriers to prevent leakage of waste from the property and to restrict access to the property; paying to assess and, possibly, remediate the site by treating or removing the contaminated soils; and providing an alternate drinking water source for nearby users.

Section 7002(a)(1)(B) of RCRA provides a citizen suit provision for any person to bring an action in federal court against the same parties and for the same cause as in Section 7003. RCRA § 7002, 42 U.S.C. § 6972(a)(1)(B). This citizen suit provision potentially could be significant because, as more defenses become available under CERCLA (innocent purchaser, bona fide prospective purchaser, contiguous property owner), private parties seeking to force remediation of contaminated sites might increasingly rely on RCRA claims, which are not subject to these defenses. As a practical matter, however, it is unlikely a court would find RCRA liability for the same situation in which an owner qualifies for a CERCLA liability defense.

There is limited legal precedent for RCRA liability to apply to passive owners and operators who did not themselves engage in waste handling activities at a site. In *United States v. Price*, 688 F.2d 204 (3d Cir. 1982), the EPA sued site owners who bought contaminated property several years after the waste disposal activities had stopped. The court found that the present owners were "sophisticated investors" with a duty to investigate the actual conditions that existed on the property and, further, that upon discovery of the past disposal, the present owners did not attempt to abate the hazardous conditions. However, these facts are fairly severe. In all likelihood, if an innocent purchaser of contaminated property did take appropriate action to abate a discovered problem and met the other criteria to qualify for a defense under CERCLA, then also EPA would not assert and a court would not find RCRA liability.

In light of the potential double-enforcement hit under CERCLA and RCRA, EPA presently is working to develop a "One Cleanup Program" to harmonize all of the agency's remediation authorities in a single remediation program that will satisfy all federal legal requirements applicable to a site. Also, under the proposed program, all federal authorities regulating contaminated properties would agree not to pursue an enforcement action where a property owner has complied with a state response program. If this comes to fruition, it will be a positive step for landowners and users. Until then, landowners should understand their potential liability exposure under both statutory schemes.

(b) Corrective action program

Activities at facilities that treat, store or dispose of hazardous wastes have sometimes led to the release of hazardous waste or hazardous constituents into soil, ground water, surface water, or air. Owners or operators of treatment, storage or disposal (TSD) facilities are responsible for investigating and, as necessary, cleaning up releases at or from their facilities, regardless of when the releases occurred. EPA refers to this cleanup of TSD facilities under these statutory authorities as RCRA Corrective Action.

When a TSD facility is obtaining a permit, or when a facility has an existing permit, EPA may incorporate corrective action into the permit requirements under various RCRA authorities:

Section 3004(u), which addresses releases from solid waste management units (SWMUs) in a facility's permit. An SWMU is any unit where solid or hazardous wastes have been placed at any time, or any area where solid wastes have been routinely and systematically released.

Section 2004(v), which addresses releases that have migrated beyond the facility boundary.

Section 3005(c)(3), which allows EPA or an authorized state agency to include any requirements deemed necessary in a permit, including the requirement to perform corrective action.

Additional authorities under which EPA may order corrective action include:

Section 3008(h), which is an administrative enforcement order or lawsuit that addresses releases at interim status facilities.

Section 7003, which applies to all facilities, whether or not they have a RCRA permit, that may present an imminent and substantial endangerment to health or the environment. Under this provision, EPA can waive other RCRA requirements (*e.g.*, a permit) to expedite the cleanup process.

Cleanup at a RCRA-regulated facility depends on site-specific conditions. The six components of the corrective action process are:

RCRA Facility Assessment (RFA), to compile existing information on environmental conditions at a given facility, including information on actual or potential releases.

Phase I RCRA Facility Investigations (RFIs) also known as Release Assessment (RA), to confirm or reduce uncertainty about areas of concern or potential releases identified during the RFA.

RCRA Facility Investigation (RFI), to assess the nature and extent of contamination of releases identified during the RFA or Phase I RFI.

Interim Measures (IM), short-term actions to control ongoing risks while site characterization is underway or before a final remedy is selected.

Corrective Measures Study (CMS), to identify and evaluate different alternative measures to remediate the site.

Corrective Measures Implementation (CMI), includes detailed design, construction, operation, maintenance, and monitoring of the chosen remedy.

On February 14, 2003, EPA released a guidance document entitled EPA Guidance on Completion of Corrective Action Activities at RCRA Facilities, 68 Fed. Reg. 8757 (Feb. 25, 2003). This guidance document establishes standards and procedures for EPA completeness determinations with respect to RCRA corrective action requirements.

(3) Idaho laws imposing cleanup and liability for contaminated property

Idaho does not have a general environmental liability law equivalent to the federal CERCLA. However, IDEQ does assert broad authority under its statutes and

rules to require responsible parties, including owners who did not cause contamination, to clean up contaminated properties.

(a) The Environmental Protection and Health Act (EPHA): Idaho's "organic" environmental enforcement authority

Idaho's environmental enforcement program is premised largely on the Idaho Environmental Protection and Health Act ("EPHA"). Idaho Code §§ 39-101 to 39-119. This is IDEQ's organic statute. It contains several broad grants of environmental rulemaking authority to the agency:

> The director shall ... formulate ... rules as may be necessary to deal with problems related to water pollution, air pollution, solid waste disposal, and licensure and certification requirements pertinent thereto ....

Idaho Code § 39-105(2).

> The board ... may adopt, amend or repeal rules codes and standards of the department, that are necessary and feasible in order to carry out the purposes and provisions of this act and to enforce the laws of the state.

Idaho Code § 39-107(7).

> The director of the department of environmental quality may develop and recommend for approval by the board through rulemaking, ambient ground water quality standards....

Idaho Code § 39-120 (4).

The statute's expansive rulemaking authority is coupled with equally broad enforcement authority. EPHA, Idaho Code §§ 39-108, 39-109, and 39-116 provide for administrative and civil enforcement of violations of EPHA and its implementing rules. The authority under this broad mandate, however, is entirely inchoate. The EPHA itself imposes no obligation or liability; it simply authorizes IDEQ to promulgate rules and creates enforcement tools and procedures.[808] Under Idaho law, administrative rules must be approved by the state legislature before they become

[808] Idaho Code §§ 67-5291 to 67-5292; *Mead v. Arnell*, 117 Idaho 660, 791 P.2d 410 (1990); Phillip M. Barber, *Mead v. Arnell: The Legislative Veto and Too Much Separation of Powers*, 27 Idaho L. Rev. 157 (1991); Dale D. Goble, *Through the Looking-Glass and What the Idaho Supreme Court Found There*, 27 Idaho L. Rev. 81 (1990). See discussion in section 46 on page 932 of this Handbook.

effective. For this reason, the various enforcement programs adopted pursuant to this authority find all their specifics (standards, procedures, deadlines, etc.) in the rules, not in the statute.[809]

Finally, the EPHA contains no express private cause of action for citizen suits and, apparently, may only be enforced by the state. However, EPHA expressly preserves all common law claims. Idaho Code § 39-108(7).

(b) Hazardous Waste Management Act (HWMA): Idaho's version of RCRA

Idaho has received authorization from the federal Environmental Protection Agency (EPA) (57 Fed. Reg. 24,757 (June 11, 1992)[810] to administer its own hazardous waste program under the Hazardous Waste Management Act of 1983 (HWMA), Idaho Code §§ 39-4401 to 39-4432, in lieu of the federal hazardous waste program under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901 *et seq.* HWMA and its implementing rules, IDAPA 58.01.05, rely in large part on the adoption by reference of the RCRA Subtitle C rules, Idaho Code § 39-4404. Thus, a waste will be hazardous under the Idaho program only if it is hazardous under RCRA.

The purpose of HWMA is to protect public health and safety and the environment through management of hazardous wastes from the time they are generated through transportation, treatment, storage, and disposal. Idaho Code § 39-4402(2). Under HWMA, a person must obtain a permit from IDEQ to store, handle, or dispose of hazardous waste. Idaho Code § 39-4408(1).

Like RCRA upon which it is modeled, HWMA is focused primarily on governmental regulation of ongoing hazardous waste handling and disposal operations, rather than cleanup of existing sites. However, the state operating through HWMA may exercise control over contaminated sites through corrective action requirements imposed in HWMA permits. Idaho Code § 39-4409(5). Additionally, IDEQ asserts authority under HWMA to impose corrective action requirements against property owners of sites that are *de facto* disposal facilities—for example, where a dry cleaner operator improperly disposes of hazardous waste on site instead of sending it to a HWMA-permitted facility.

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[809] Of particular note are the following rules adopted pursuant to EPHA: The rules governing discharges to surface waters are found in the Water Quality Standards and Wastewater Treatment Requirements Rule, IDAPA 58.01.02. This rule includes within it (1) the Hazardous Material Spills Rule, IDAPA 58.01.02.850, and (2) the Petroleum Storage Tank (PST) rules, IDAPA 58.01.02.851 – .852.

The Ground Water Quality Rule, IDAPA 58.01.11, was adopted in 1997 and is limited to groundwater contamination. Ground water quality standards are set out in IDAPA 58.01.11.200.a.

[810] Authorization does not include Indian lands, which remain under EPA jurisdiction.

Note also that HWMA (unlike EPHA) has a citizen suit provision.[811]

(c) IDEQ Uses the hazardous material spills rule to impose remediation liability on owners

The Hazardous Material Spills rule, IDAPA 58.01.02.850—along with the Petroleum Storage Tank (PST) rules, IDAPA 58.01.02.851-851—are contained within the Water Quality Standards,[812] which were developed pursuant to the EPHA. The Hazardous Material Spills rule provided, in full, as follows:

> 850. HAZARDOUS MATERIAL SPILLS.
> In the case of an unauthorized release of hazardous materials to state waters or to land such that there is a likelihood that it will enter state waters, responsible persons in charge must:
> 01. *Stop Continuing Spills*. Make every reasonable effort to abate and stop a continuing spill.
> 02. *Contain Material*. Make every reasonable effort to contain spilled material in such a manner that it will not reach surface or groundwaters of the state.
> 03. *Department Notification Required*. Immediately notify the Department or designated agent of the spills.
> 04. *Collect, Remove and Dispose*. Collect, remove, and dispose of the spilled material in a manner approved by the Department.

IDAPA 58.01.02.850 (emphasis added).

"Hazardous materials" are broadly defined to include any material which, when discharged in any quantity into state waters, presents a potential hazard to

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[811] HWMA specifically authorizes "any person who has been injured or damaged by an alleged violation of any permit" to bring suit or intervene in an ongoing enforcement action. Idaho Code §§ 39-4416(1) and (2). The Act does not specify what relief may be sought. This might be read to leave the door open for any related claims against the permit violator, including response cost recovery. If that is the case, HWMA's citizen suit provision is broader than RCRA's. This is curious in that the Idaho Legislature has specifically provided that IDEQ "may not promulgate any rule or regulation that would impose conditions or requirements more stringent or broader in scope than RCRA." Idaho Code § 39-4404. But it was the Legislature, not IDEQ, which provided the citizen suit provision, so there is no violation of the "no more stringent" standard. On the other hand, HWMA's failure to specifically authorize cost recovery actions against other responsible parties may be read to preclude such actions, in much the same way that some courts have read RCRA. The paucity of case law under HWMA makes it difficult to say how this provision will be interpreted.

[812] IDAPA 58.01.02. The Hazardous Material Spills rules predate the PST rules. The former was originally termed "Hazardous Material and Petroleum Product Spills" and was first adopted on January 1, 1980. On December 6, 1982, the petroleum component was broken out into its own section and the new PST rules were created.

human health or the environment. IDAPA 58.01.02.003.49. This definition is broader than under the federal CERCLA. "Responsible persons in charge" includes any person who:

> a. By any acts or omissions, caused, contributed to or exacerbated an unauthorized release of hazardous materials;
> b. Owns or owned the facility from which the unauthorized release occurred and the current owner of the property where the facility is or was located; or
> c. Presently or who was at any time during an unauthorized release in control of, or had responsibility for, the daily operation of the facility from which an unauthorized release occurred.

IDAPA 58.01.02.003.101.

Like the federal CERCLA, this rule imposes cleanup responsibility on owners, regardless of whether or not the owner generated or otherwise caused the contamination. IDEQ has adopted a policy of not enforcing against landowners where it is demonstrated that the contamination originated offsite. *Policy Toward Owners of Property Containing Contamination*, IDEQ Policy No. PM95-4 (1995).

(d) Ground water quality rule imposes broad liability, allows cleanup to site-specific standards

Since its adoption in 1996, IDEQ only minimally has used the Ground Water Quality Rule to require hazardous waste cleanups. The Rule's under-utilization is indicative of the state's fairly recent focus on ground water quality. Indeed, the agency does not yet have a specific ground water quality program.

The language of the Ground Water Quality Rule, however, is far-reaching. The operative language provides:

> No person shall cause or allow the release, spilling, leaking, emission, discharge, escape, leaching, or disposal of a contaminant into the environment in a manner that: (a) Causes a ground water quality standard to be exceeded; (b) Injures a beneficial use of ground water; or (c) Is not in accordance with a permit, consent order or applicable best management practice, best available method or best practical method.

IDAPA 58.01.11.400.01.

"Contaminant" is broadly defined as any material that does not occur naturally in ground water. IDAPA 58.01.11.007.10. The enforcement and remediation language of the Rule provides:

> The discovery of any contamination exceeding a ground water standard that poses a threat to existing or projected future beneficial uses of ground water shall require appropriate actions, as determined by the Department, to prevent further contamination. These actions may consist of investigation and evaluation, or enforcement actions if necessary to stop further contamination or clean up existing contamination, as required under the Environmental Protection and Health Act, Section 39-108, Idaho Code.

IDAPA 58.01.11.400.03. This language is modeled on the Ground Water Quality Protection Act of 1989, Idaho Code § 39-102(3)(b) (an amendment to the EPHA).

Under this Rule, landowners who did not themselves release any contamination could be held liable for "causing" or "allowing" a release, for instance, by allowing a tenant to operate a dry cleaning operation. Likewise, a purchaser of contaminated property may be held liable for "causing" or "allowing" the land to continue to leach contaminants.

The Rule provides some flexibility as to what standard contaminated ground water quality must be remediated. The general (and, typically, stricter) cleanup standard is the maximum contaminant level (MCL) set by the federal EPA under the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-11, and adopted by IDEQ in the Ground Water Quality Rule, IDAPA 58.01.11.200.01.a. As with other EPHA programs, there does not appear to be a private cause of action for enforcement of MCLs.

The site-specific (and, typically, more lenient) cleanup standard under the Ground Water Rule is determined by a site-specific risk-based assessment. IDAPA 58.01.11.400.05. IDEQ initially developed the risk-based assessment program for remediation of petroleum releases from PSTs. *See, Risk Based Corrective Action: Guidance Document for Petroleum Releases*, IDEQ, Remediation Bureau (Aug. 1996). As of August 1, 2004, the risk-based program is being expanded to apply to approximately 185 chemicals. *See, Risk Evaluation Manual*, IDEQ, Remediation Bureau (Aug. 2004).

(e) IDEQ relies on nuisance statute to force remediation

IDEQ has relied on a 1976 nuisance statute to force landowners to clean up contaminated properties. The statute provides in full: "Every successive owner of

property who neglects to abate a continuing nuisance upon, or in the use of such property, created by a former owner, is liable therefore in the same manner as the one (1) who first created it." Idaho Code § 52-109.

The statute falls outside the ambit of the agency's organic legislation, and IDEQ's official enforcement manual does not list the nuisance statute among its enforcement authorities. *Enforcement Procedures Manual*, IDEQ §§ 1.2, 1.5, 1.6, 1.7 (May 2000). The only statutes it lists are EPHA and HWMA. Nonetheless, IDEQ has used the statute successfully in civil action to abate ground water pollution.

(4) Federal versus state enforcement

Generally speaking, if a state and/or federal enforcement action for a release of a hazardous substance is imminent, a landowner may be well advised to negotiate a consent decree with the state IDEQ in the hopes that the federal EPA's role will be limited to approving the state's action. Enforcement under federal authorities (CERCLA and its regulations) involves more rigid requirements, higher penalties, and more stringent oversight than enforcement by the state. The state is more likely to accept a longer timeframe for compliance and, given the state's more limited resources and authorities, may exercise less oversight and impose less rigid controls on the cleanup.[813]

E. Petroleum and other contaminants

(1) Petroleum underground storage tanks

Discovering leaking underground storage tanks is a distressingly common occurrence in real property development. While abandoned tanks are not required to be permitted, they may require removal and remediation at the property owner's expense, regardless of who actually operated the tanks. The current owner of property where an underground storage tank is or was located is responsible for the investigation into and remediation of any release of petroleum.

The federal government, through EPA, regulates the installation, operation, maintenance, and closure of underground storage tanks ("USTs") containing petroleum. 40 C.F.R. Part 280. Unlike most other states, Idaho has not adopted a set of comprehensive rules to regulate USTs.[814]

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[813] Idaho's authority for entering consent decrees is in Idaho Code § 39-108. The IDEQ Enforcement Procedures Manual, available on IDEQ's website at http://www.deq.state.id.us/pubs/epm/epm.htm, describes the agency's authorities, procedures, and penalty matrixes for enforcement actions and consent decrees.

[814] IDEQ proposed legislation to accomplish such regulation during the 2003 legislative session, but the Idaho Legislature rejected the legislation in whole.

Idaho, through IDEQ, does regulate the release, reporting, and cleanup requirements for leaking petroleum underground storage tanks. IDAPA 58.01.02. Idaho's Leaking Underground Storage Tank ("LUST") rules regulate releases from both above- and below-ground storage tanks. The first part of the regulatory program governs "petroleum release reporting, investigating and confirmation." IDAPA 58.01.02.851. The second part addresses "petroleum release response and corrective action." IDAPA 58.01.02.852. This program generates a significant amount of regulatory activity in Idaho for properties on which service stations are currently or formerly located.

To remediate petroleum releases, liable parties may either clean up to IDEQ's water quality standards or utilize IDEQ's Risk-Based Corrective Action guidance,[815] which allows parties to cleanup to a lesser standard when site-specific investigation shows that a lesser cleanup is still protective of human health and the environment. It is important for liable landowners to hire a professional consultant familiar with IDEQ's Risk-Based guidance to help evaluate whether costly site-specific investigation will or will not result in a lesser cleanup standard.

(2) Idaho considers asbestos a special waste but does not regulate its use or removal

Under Idaho law, asbestos is considered a "special waste" requiring special treatment and handling at an approved disposal site. *See* Idaho Code § 39-7402. Builders of residential buildings must provide owners or occupants with written notice of potential indoor air contaminants, including asbestos. Idaho Code § 44-2301. However, Idaho does not provide comprehensive regulations for the removal or abatement of asbestos in buildings.[816]

(3) Idaho has registration requirements that apply to remediation professionals

Environmental professionals engaged in site investigation or remediation activities are subject to the registration requirements for professional geologists and engineers.[817]

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[815] *See, Risk Based Corrective Action: Guidance Document for Petroleum Releases*, IDEQ, Remediation Bureau (Aug. 1996), available online at www.deq.state.id.us/waste/RBCA/rbca.htm. IDEQ currently is developing a Risk Evaluation Manual, to be implemented by the end of 2004, to expand application of the risk-based approach beyond petroleum to 185 chemicals. *See, Risk Evaluation Manual*, IDEQ, Remediation Bureau (Aug. 2004).

[816] The Idaho Department of Labor and Industrial Services has adopted rules regarding asbestos abatement workers, contractors, supervisors and designers. IDAPA 17.07, Ch. A.

[817] Idaho Code §§ 54-1201 *et seq.* and 54-2801 *et. seq.*

F. Spills of hazardous substances must be reported

(1) Spills must be reported to the state and federal governments

Under Idaho's Hazardous Substance Emergency Response Act, Idaho Code §§ 39-7101 to 39-7115, any person responsible for reporting a hazardous substance release under Section 103 of CERCLA, 42 U.S.C. § 9603, or the federal Emergency Planning and Community Right-to-Know Act of 1986 (SARA Title III) (EPCRA), Pub. L. No. 99-499, Title III, 100 Stat. 1728 (codified at 42 U.S.C. §§ 11001, 11001 note, 11002 to 11005, 11021 to 11023, 11041 to 11050 (1986), must also notify the Emergency Response Commission of a reportable release as soon as practicable.

Rules implementing Idaho's Hazardous Waste Management Act (HWMA) also mandate reporting of releases of hazardous wastes to the State Communications Center (1-800-632-8000). IDAPA 58.01.05.006.02. These rules also reference the federal reporting requirements under RCRA, which have been incorporated by reference into Idaho's hazardous waste rules.

In addition, any release of "hazardous materials" (under the Idaho definition, included in IDAPA 58.01.02.850) reaching or likely to reach state waters must be reported "immediately" to IDEQ. Hazardous Material Spills Rule (part of the Water Quality Standards and Wastewater Treatment Requirements Rule), IDAPA 58.01.02.850. Idaho's definition of "hazardous materials," IDAPA 58.01.02.003.44, is broader than the more tightly defined concept under CERCLA of listed or characteristic hazardous wastes. The Idaho definition of "hazardous materials" encompasses any material that is a "potential hazard to human health, public health, or the environment."

Finally, note that the rule governing releases is different and stricter for owners and operators of petroleum storage tanks. They must report any releases, or unusual operating conditions and monitoring results indicating a release, to IDEQ within 24 hours and must undertake action to investigate, confirm and abate the petroleum release. IDAPA 58.01.02.851.01.

Practice Tip. Any verbal report of a release should be followed up promptly with written notification to document when the report was made.

The 24-hour hotline for the State Communication Center is 800-632-8000.

The federal government's National Response Center may be reached at 800-424-8802.

Transportation incidents should be reported to 911.

Releases from Petroleum Storage Tanks are to be reported to the appropriate regional office of IDEQ. The state headquarters' number is 208-373-0502.

Releases of hazardous materials into state waters are to be reported to the appropriate regional office of IDEQ. The state headquarters' number is 208-373-0502.

Any failure to report to IDEQ is viewed by the agency as a violation of its rules, subjecting the party to a potential administrative or civil enforcement action under the Environmental Protection and Health Act (EPHA). Idaho Code § 39-108(3)(a).

(2) Parties responsible for a spill are liable to the state for emergency response costs

State emergency response teams and local emergency response authorities that assist in responding to a spill may submit a claim for reimbursement to the Idaho Bureau of Hazardous Materials. Idaho Code § 39-7109. Cities and Counties also designate local emergency response authorities. Idaho Code § 39-7105. Any person who owns, controls, transports, or causes a release of a hazardous substance is strictly liable for the costs of responding to the incident, except that there is no liability for the acts or omissions of a third party where the potentially liable person exercised reasonable care with respect to the hazardous substance and took precautions against the foreseeable acts of the third person and against foreseeable consequences. Idaho Code § 39-7111. The state Attorney General may bring a cost recovery action for expenses incurred in responding to the incident against any party responsible for the spill. Idaho Code § 39-7112.

Significantly, the state's emergency response program applies only to hazardous substance incidents, defined as emergency circumstances requiring containment or confinement but not including any necessary follow-up site

remediation or cleanup. Idaho Code § 39-7103(3). Therefore, this law does not provide the state with authority to order site cleanups, to undertake its own site remediation or to recover costs other than those incurred strictly in responding to an emergency situation.

G. Idaho's pre-transfer disclosure law applies only to residential properties

Idaho has no general pre-transfer disclosure law applicable to commercial properties. However, the Idaho Property Condition Disclosure Act, Idaho Code §§ 55-2501 to 55-2518, mandates disclosure of defects in residential properties offered for sale.

> **Practice Tip.** The Idaho Property Condition Disclosure Act requires disclosure of environmental defects only on residential properties. However, "residential real property" is defined to include properties with mixed residential and commercial use. Consequently, the seller would be subject to the act for the sale of an otherwise commercial property if it also contains an apartment, supervisor's residence, or the like. The Disclosure Act excludes apartment complexes and other multiple unit residences of over four units.

The Disclosure Act requires disclosure of all defects in the property known to the seller. The act mandates use of a *Seller Property Disclosure Form* (which is set out in the statute). The form contains a question about "hazardous materials" and another catch-all question about other legal or physical "problems" with the property.

H. Environmental due diligence for developers

To discover whether problematic environmental conditions exist on a particular piece of property, preferably *before* purchasing the property, a potential developer should undertake an environmental assessment of the property as part of their due diligence investigation. This assessment should be conducted by professional environmental consultants and supervised by knowledgeable legal counsel and in-house staff. If performed in stages, the scope of the assessment will depend on the extent of damaging environmental conditions discovered at each phase. The American Society for Testing and Materials has developed guidelines for environmental assessments, entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process (ASTM E1527-97) and Transaction Screen Process (ASTM E1528-96)."

In addition to a professional environmental assessment of the property, other sources of information may be helpful in determining a property's environmental

condition, including: (1) the seller of the property, who may offer environmental information through warranties or other disclosures; (2) title company reports regarding chain of title and, if possible, a history of the property's prior uses; (3) state, federal, and local agency records, which may include building and operation permits, construction documents, inspection reports, enforcement actions, aerial photographs, and maps; (4) physical inspection of property, which may offer clues of environmental contamination such as stained soils, discolored waters, unusual odors, or depressions in the land; and (5) neighbors of the property and employees of prior owners of the property, who may have noticed these same clues or who may have information about past uses.

The Idaho Department of Environmental Quality ("IDEQ") has a program to help small businesses—who often lack the time and resources—navigate the various environmental standards, permits and procedures that may apply to their operations. The phone number for IDEQ's Small Business Environmental Assistance Program is (208) 373-0472.

If environmental contamination is discovered, then a prospective buyer/developer of the property should be wary. However, landowners or prospective landowners of contaminated property may want to explore opportunities to work with their local governments to obtain funding for clean-up and redevelopment through new federal and state Brownfields programs, discussed in the following section.

(1) Developing contaminated properties – Brownfields initiatives

As discussed *supra*, CERCLA holds the current owner of a contaminated property liable even if they did not cause or contribute to the contamination. 42 U.S.C. § 9607. This strict liability has made prospective buyers/developers reluctant to buy contaminated property because the potential cleanup costs are unknown and could easily exceed the fair market value of the property. As a result, buyers/developers increasingly have opted to buy undeveloped or "greenfields" properties, and the contaminated or "brownfields" properties—often located in the center of a community—increasingly have been abandoned.

To encourage redevelopment of these brownfields properties, federal and state governments have initiated various programs to limit liability for prospective purchasers of the properties (who are not otherwise liable for the contamination) and to provide some funding for the cleanup of the properties. This section addresses the current federal and Idaho brownfields initiatives.

(a) Federal Brownfields Program – Federal Small Business Liability Relief and Brownfields Revitalization Act

On January 11, 2002, President Bush signed the Federal Small Business Liability Relief and Brownfields Revitalization Act, Public Law 107-118 ("Brownfields Revitalization Act"), which significantly expanded EPA's brownfields program. The Brownfields Revitalization Act authorizes new and increased funding for cleanup of brownfields properties. Further, the Act amends key CERCLA provisions that affect private landowner liability by creating new liability exemptions for bona fide prospective purchasers and contiguous property owners and by clarifying the innocent landowner defense. Although not discussed here, the Act also created new liability exemptions for *de micromis* contributors of hazardous substances and certain generators of municipal solid waste.

Section 211(a) of the Brownfields Revitalization Act amends Section 101 of CERCLA to add a definition of "brownfield site." In general, a "brownfield site" includes "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." The definition identifies certain contaminated facilities—such as those that are subject to a planned or ongoing cleanup action—that do not qualify as brownfield sites.

Section 221 of the Brownfields Revitalization Act exempts from CERCLA's strict liability current owners who own land contaminated solely by a release from contiguous property owned by someone else if such persons can demonstrate they: (1) did not cause or contribute to the release or threatened release; (2) are not potentially liable or affiliated with any other person potentially liable; (3) exercised appropriate care in respect to the release; (4) provided full cooperation, assistance, and access to persons authorized to undertake a response action; (5) complied with all land use controls and did not impede the performance of any institutional controls; (6) complied with all information requests; (7) provided all legally required notices regarding releases of hazardous substances; and (8) conducted all appropriate inquiry at the time of purchase and did not know or have reason to know of the contamination. Persons who do not qualify for this exemption may still qualify for either the bona fide prospective purchaser exemption or innocent landowner defense, discussed below.

Perhaps the most significant of the Brownfields Revitalization Act's changes to CERCLA is in Section 222. Section 222 of the Act exempts from CERCLA's strict liability for current owners persons who are bona fide prospective purchasers (and their tenants). The exemption applies to purchases of property after January 11, 2002. A bona fide prospective purchaser is a person who can show they: (1) purchased the property after all disposal took place; (2) made all appropriate inquiry;

(3) exercised appropriate care with respect to any release; (4) provided full cooperation, assistance and access to persons authorized to take response actions; (5) complied with all land use restrictions and did not impede the performance of any institutional controls; (6) complied with all information requests; (7) provided all legally required notices regarding releases of hazardous substances; and (8) are not potentially liable or affiliated with any other person potentially liable.

The Act does impose a financial limitation on properties falling within the bona fide prospective purchaser exemption so that the purchaser—although not liable for the expense of cleaning up the contamination—does not receive any windfall from the United States' cleanup efforts. Where the United States has unrecovered response costs for a site and the response action increases the fair market value of the property, the Act imposes a lien against the property in favor of the United States. The lien allows the United States to recover the property's increase in value up to the amount of unrecovered response costs.

Finally, Section 223 of the Brownfields Revitalization Act clarifies what actions landowners must take to satisfy the "all appropriate inquiries" standard of CERCLA's innocent landowner defense. Added to CERCLA in 1986, the innocent landowner defense has provided a narrow exception to liability if the purchaser can prove he or she did not know or have reason to know of the contamination despite undertaking "all appropriate inquiries." The Brownfields Revitalization Act attempts to end a fifteen-plus year debate as to what exactly satisfies the "all appropriate inquiries" standard by requiring EPA to promulgate regulations setting forth standards and practices for when a landowner has "reason to know" of prior contamination. For property purchased before EPA adopts these new regulations but after May 31, 1997, the Act provides that a purchaser can satisfy the "appropriate inquiries" standard by following environmental site assessment procedures developed (in May 1997) by the American Society for Testing and Materials. If undertaking the appropriate inquiries causes a prospective purchaser to know of contamination, then they are not protected by the innocent landowner defense and may want to try to qualify as a bona fide prospective purchaser. The Act also adds a new requirement to the due diligence required for the innocent landowner defense: the purchaser must take reasonable steps to stop any continuing release and to prevent future contamination.

(b) State Brownfields programs

(i) Idaho Brownfields funding program

Each year since 2003, IDEQ has received grant funds under CERCLA Section 128, to establish its own brownfields program. The ultimate goal of this state program is to facilitate reuse and redevelopment of properties that are contaminated or perceived as contaminated. The program encourages reuse and redevelopment by offering state-funded assessments, implementing a risk-based approach to cleanup,

inventorying and marketing Idaho's brownfield sites, and developing additional IDEQ authorities and policies aimed at streamlining IDEQ oversight of site assessments and cleanups.

This program also assists Idaho's "eligible entities" when applying to EPA for a piece of the $50 million in federal brownfield grant funds annually available through EPA under the federal Brownfields Revitalization Act. These grant funds are available for assessments, cleanups, or to set up a Revolving Loan Fund. Under the Brownfields Revitalization Act, "eligible applicants" for these federal grants include governments, tribes, and certain non-profit entities.

In 2004, EPA awarded four Idaho applicants a total of $600,000 in assessment and cleanup grant funds. In 2005, EPA awarded $3 million in grant funds to a coalition of the state program and Idaho's six Economic Development Districts to capitalize a "Brownfield Cleanup Revolving Loan Fund" ("RLF"). The coalition will use the grant money to provide low-to-no interest loans and limited sub-grants to fund brownfield cleanups. In 2006, EPA awarded $200,000 in assessment grant funds to the Capital City Development Corporation (Boise's urban renewal agency) to help spur redevelopment of underutilized properties, and $200,000 in cleanup grant funds to the Idaho Department of Parks and Recreation to help develop park sites on former mine properties in the Historic Bayhorse Mining District in Custer County, Idaho.

Though not eligible as direct recipients of EPA's grant funding, private individuals may still benefit from brownfields programs. For example, private parties may obtain loans through the RLF. Additionally, developers interested in a city-owned brownfield site could work with the city to apply for funding to assess the site. If the assessment identifies environmental liabilities, the city could apply to EPA for a cleanup grant. If the assessment shows the property is environmentally safe, the developer could then purchase the "clean" site. In addition, private individuals who redevelop brownfields properties benefit from the state program's efforts to streamline IDEQ oversight of site assessments and cleanups.

Parties who own or would like to redevelop contaminated properties should explore opportunities to obtain federal funds and, possibly, liability protection through this state program.

(ii) Idaho Land Remediation Act

The 1996 Idaho Land Remediation Act, Idaho Code §§ 39-7201 *et seq.*, together with associated IDEQ rules, IDAPA 58.01.18, is aimed at promoting the remediation of brownfields. However, the Act provides limited protections for owner liability. Consequently, since its adoption in 1996, only a handful of individuals have utilized the Act's Voluntary Remediation Program, making it difficult to assess the actual benefits of the program.

The Act generally consists of two parts. The first part, administered by IDEQ, provides regulatory flexibility and protection from environmental enforcement actions for persons entering into approved agreements under the Voluntary Remediation Program. This part also contains some lender liability protections. The second part, administered by the Idaho State Tax Commission, contains a limited property tax break for properties cleaned up under the program. IDAPA 35.01.03.628.

The Act applies to almost any type of contamination, including petroleum or hazardous substances. Idaho Code §§ 39-7202, 39-7203, 39-7204(4)(b). IDEQ has discretion under the Act to limit eligibility if contaminated sites (1) are subject to remediation requirements under another statute, or (2) pose an imminent and substantial threat to human health or the environment. Idaho Code § 39-7204(4). For example, where a property owner or potential purchaser has just discovered (and reported to IDEQ) contamination, no enforcement action will yet be ongoing; so long as the contamination is not so severe as to pose an imminent public threat, IDEQ is likely to accept a voluntary cleanup proposal from the owner in lieu of beginning an enforcement action.

Once IDEQ determines a project is eligible for the Voluntary Remediation Program, the applicant submits a proposed Work Plan and negotiates a Voluntary Remediation Agreement (VRA) with IDEQ. Idaho Code § 39-7205. Upon satisfactory completion of the agreed-upon terms of assessment and cleanup of the site, the participant will receive a Certificate of Completion and may request a Covenant Not To Sue. Idaho Code § 39-7207; IDAPA 58.01.18.024.04. The Covenant Not To Sue protects current and future owners and operators who did not cause, aggravate or contribute to the contamination. Idaho Code § 39-7207; IDAPA 58.01.18.025.[818]

The Act's tax exemption entitles the owner to a fifty percent reduction in local property taxes on the "remediated land value." This term is defined as the difference (i.e. increase) in the assessed value of the land before and after the remediation. Idaho Code § 63-602BB(2); IDAPA 35.01.03.628.01.f. Because improvements to the property are not considered in the increased value, the amount of the tax exemption is unlikely to amount to much. This tax incentive is rendered even more marginal by the Act's provision that the exemption does not apply if the property is sold. Idaho Code § 63-602BB(4)(b); IDAPA 35.01.03.628.04.b.

Aside from the minimal tax incentive offered under the Act, it is not clear whether a landowner gains anything by using the Act's Voluntary Remediation Program that they could not already obtain by negotiating a consent order with

[818] IDEQ puts a similar provision in all of its consent orders. *See* Idaho Code 39-108(3)(a)(r).

IDEQ. However, it might fit the bill for the right situation. An example of this could be when an important potential lender for a redevelopment project demands the more certain protection from liability that the Idaho Land Remediation Act can provide. In such a case, the tax advantages, if not enough to independently tip the balance, might at least cover the transaction costs entailed in providing the required up-front certainty.

(2) Developing contaminated properties – transactional issues

Below is a laundry list of potential issues that may arise in the context of structuring a real estate transaction around potential environmental problems. The presence of contamination need not kill a transaction if the property has sufficient equity for the transaction to make economic sense and the environmental problems can be quantified and the risk of liability allocated among the parties.

1. Representations and warranties about what is known.
    a. Environmental reports and audits.
    b. Permits, notices of violation, and correspondence with agencies.
    c. Compliance with law.
    d. The presence of hazardous substances, asbestos, underground storage tanks, etc.
2. Investigation (finding out what is not known).
    a. Phase One, Phase Two and Phase Three Assessments.
    b. Control of investigation.
        (1) Right to review scope of work.
        (2) Right to see data and drafts.
        (3) Right to obtain split samples.
        (4) Right to review notice of when work is to be performed.
        (5) Indemnity from contractor.
        (6) Right to control end product of investigation.
        (7) Will recommendation be made?
    c. Confidentiality.
        (1) Termination on close of escrow.
        (2) Relation to financing or permits.
        (3) Disclosure as required by law.
3. Indemnities and warranties (allocating the risk).
    a. Burden of proof (e.g., buyer takes risk of all contamination except that occurring before the close of escrow).
    b. Establish a baseline.
    c. Who pays for investigation?
    d. Controlling the scope of clean up.
        (1) Dollar cap.
        (2) Trigger of clean up obligation.

e. When is it finished?
f. The right to control the cleanup negotiations with agencies.
g. Duration of indemnity (sunset clause).
h. Does the indemnity or release run to successors in interest? Does the indemnity run with the land?
i. Insurance subrogation.
j. Responsibility for legal costs.
k. Survival of Indemnity Through Subdivision of Parcel.
l. Availability of Insurance.

4. Inducing enforcement and negotiating with responsible (non-contracting) parties.

I. Irrigation and drainage ditches

Numerous properties in Idaho are subject to an irrigation or drainage ditch right-of-way or easement held by a water delivery entity.[819] As new residential subdivisions and other developments occur on former agricultural lands served by irrigation districts, conflicts between landowners and ditch owners are becoming more common. It is important for landowners and developers to understand their rights vis-à-vis the right-of-way or easement holder's rights. A synopsis of these rights and applicable law follows:

Right-of-way and to right to enter. Under Idaho Code § 42-1102, owners or claimants of water rights are entitled to enter the lands of another for irrigation purposes. This right-of-way includes the right to enter upon the land to maintain the ditch, canal, pipe or other conduit.

Landowner's right to move or cross ditch. Under Idaho Code § 42-1207, a landowner has the right to move an irrigation or drain ditch so long as they cause no harm; however, in light of recent amendments to the statute, the landowner first must obtain written permission from easement holder (ditch owner). Under Idaho Code § 42-1108, anyone has the right to cross a ditch so long as they cause no harm. Citing concerns with providing an uninterrupted supply of irrigation water and retaining sufficient access to maintain ditches, water delivery entities are increasingly demanding more conditions up front before they agree to let a developer, or even the county highway district, relocate or cross an irrigation or drain ditch.

Size of easement. An easement may not encompass more than is necessary to fulfill the easement. *Villager Condominium Assoc. v. Idaho Power Co.*, 121 Idaho

[819] For a detailed description of the powers of water delivery and management entities and for other information relating to water law and administration, see the *Water Law Handbook: The Acquisition, Use, Transfer, Administration and Management Of Water Rights in Idaho* by Jeffrey C. Fereday, Christopher H. Meyer, and Michael C. Creamer, all attorneys at Givens Pursley LLP.

986, 988, 829 P.2d 1335, 1337 (1992) (quoting *Abbott v. Nampa Sch. Dist. No. 131*, 119 Idaho 544, 548, 808 P.2d 1289, 1293 (1991)).

Exclusivity. An easement is not an exclusive right:

> There is not the same necessity for exclusive possession of a right of way by canal companies as by railroads. The reasons for according to railroads the right to the exclusive possession are not applicable to canal companies. [citation omitted]. The use of right of way for a ditch or canal does not require the exclusive possession of, or complete dominion over, the entire tract which is subject to the 'secondary' as well as the principal easements.

Abbott v. Nampa Sch. Dist. No. 131, 119 Idaho 544, 549, 808 P.2d 1289, 1294 (1991) (quoting *Coulsen v. Aberdeen-Springfield Canal Co.*, 47 Idaho 619, 627, 277 P. 542, 544-45 (1929)).

Duty to maintain. The ditch owner must maintain the ditch (or buried pipe) in good repair and could be held liable for any damage caused to the property as a result of any failure to do so. Idaho Code §§ 42-1102, 42-1202, 42-1204, and 42-1303. This is true even when the servient landowner uses the ditch. *Sellers v. Powell*, 120 Idaho 250, 251, 815 P.2d 448, 449 (1991). If the servient landowner's use of the easement increased the cost of repairs and maintenance, then the landowner is responsible for the increased portion of the costs.

Secondary easement. A secondary easement is implied giving the ditch owner sufficient access to maintain the ditch. Courts recognize that canal owners need a secondary easement in order to "repair and maintain their primary easement," the canal itself, but such secondary easements "cannot be used to enlarge the burden to the servient estate." *Abbott v. Nampa Sch. Dist. No. 131*, 119 Idaho 544, 549, 808 P.2d 1289, 1294 (1991). Courts especially demand that a "grant indefinite as to width and location must impose no greater burden than is necessary." *Conley v. Whittlesey*, 133 Idaho 265 (1999) (quoting *Coulsen v. Aberdeen-Springfield Canal Co.*, 47 Idaho 619, 628, 277 P. 542, 544-45 (1929)).

Landowner's rights to use servient estate. A landowner is entitled to make other uses of the property that do not unreasonably interfere with the use and enjoyment of the easement. *Nampa & Meridian Irrigation Dist. v. Washington Fed. Savings*, 135 Idaho 518, 522, 20 P.3d 702, 706 (2001) (Walters, J.); *Carson v. Elliott*, 111 Idaho 889, 890, 728 P.2d 778, 779 (Ct. App. 1986). Whether a particular use of the land by the landowner is a reasonable use is a question of fact. *Carson*, 111 Idaho at 890, 728 P.2d at 779; *City of Pasadena v. California-Michigan Land & Water Co.*, 110 P.2d 983 (1941). In *Nampa & Meridian*, the Idaho Supreme Court

held that a sidewalk and proposed fence alongside an irrigation canal (and within the irrigation entity's easement) did not interfere with the irrigation district's use of its easement. A landowner is entitled to make reasonable regulations concerning the use of the easement. *See Marshall v. Blair*, 130 Idaho 675, 682, 946 P.2d 975, 982 (1997) (allowing servient estate to construct gate on road, allowing in only easement holders; "There is nothing in this Court's case law that prohibits a servient estate from limiting the use of the easement to authorized users.")

Third parties' rights to use ditch. "[A] third party may obtain a license from an easement holder to use the easement without the notice to and consent from the servient estate owner so long as, and expressly provided that, the use of the easement is consistent with and does not unreasonably increase the burden to the servient estate." *Abbott v. Nampa Sch. Dist. No. 131*, 119 Idaho 544, 551, 808 P.2d 1289, 1296 (1991) (upholding the irrigation district's right to enter into a license agreement with the school district to install a concrete inlet structure and safety screen on a ditch located on Abbott's property). The *Abbott* Court reasoned that the licensed improvements were consistent with the nature of the ditch use and did not constitute an enlargement of the easement or the burden on the servient estate. *Abbott*, 119 Idaho 544, 551, 808 P.2d 1289, 1296 (1991). The Court noted, however, "The irrigation district obviously could not allow a utility company to use its easement for a power line or a cable television firm to utilize the ditch easement because the addition of power lines and poles would certainly not be within the scope of the easement." *Id.*

Irrigation entities' right to approve development. Idaho Code § 31-3805 requires cities and counties to act with the advice of the irrigation entity when considering the delivery of water to subdivisions. However, advice does not equal veto power. Zoning decisions rest solely in the hands of city and county officials and cannot be delegated. *Gumprecht v. City of Coeur D'Alene*, 104 Idaho 615, 618 (1983), *overruled on other grounds by City of Boise City v. Keep the Commandments Coalition*, 143 Idaho 254, 257, 141 P.3d 1123, 1126 (2006). Improper delegation of zoning authority would violate the due process clause of the 14th Amendment of the U.S. Constitution. *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928). The distinction between a local government seeking the advice of an irrigation district and delegating veto power to that district over a land use proposal is not always clear. For example, the City of Caldwell Subdivision Ordinance provides that an "[i]rrigation system must be approved by the appropriate district and must be installed in accordance with the standards of that district." 11-04-05(9).

Pressurized irrigation. Idaho Code § 43-330A allows an irrigation district to contract with a subdivision developer to supply pressurized irrigation. Section 43-330B sets forth specific conditions that must be included in such a contract, including the grant of an easement to the irrigation district for maintenance, repair, etc. Section 43-330D requires the contract to be recorded. Section 43-330E directs that the

pressurized irrigation system constructed pursuant to such a contract shall be owned by the district. Section 43-330F provides that the district shall operate and maintain the system and may assess costs against lot owners. Numerous city ordinances regulate the specifications of and water requirements for pressurized irrigation system.

46. LEGISLATIVE VETO AND SUNSET OF ADMINISTRATIVE RULES

A. Introduction

The term "legislative veto" is shorthand for the power of a legislative body to overrule rules adopted by executive agencies. The term "sunset" is shorthand for the automatic termination of laws, ordinances, or rules. In this context, sunset provisions are used to require annual legislative re-approval of agency or public health district rules.

The Idaho Administrative Procedure Act, Idaho Code §§ 67-5201 to 67-5292 ("IAPA" or "Idaho's APA"), is the statute that sets out procedures governing Idaho state agencies. The IAPA includes both a legislative veto provision and a sunset provision for agency rules.[820]

Idaho's legislative veto statute dates to 1969.[821] The sunset provision was added in 1990.[822] Both have been amended on a number of occasions.

B. Constitutionality

Statutes authorizing legislative vetoes have been challenged as being violative of the separation of powers (interference by the legislature with executive branch agencies) and of the presentment clause (where the veto mechanism does not require presentment of a bill to the Governor or President).

A legislative veto was struck down by the U.S. Supreme Court in *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (Burger, C.J.). In contrast, Idaho's legislative veto was upheld by the Idaho Supreme Court a few years later. *Mead v. Arnell*, 117 Idaho 660, 791 P.2d 410 (1990) (dealing with a rule promulgated by the Board of Health and Welfare that was vetoed by the Legislature in 1989).[823]

Mead v. Arnell was a 3-2 decision. There had been some concern in the Legislature that it might someday be overruled. To prevent that possibility, the Idaho

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[820] These statutory provisions are discussed in Florence A. Heffron, *Legislative Review of Administrative Rules Under the Idaho Administrative Procedure Act*, 30 Idaho L. Rev. 369 (1993/94). This article provides a good overview of the procedures. Note, however, the statute has been amended since the article was written, so some material in the article is out-of-date.

[821] The IAPA was enacted in 1965. 1965 Idaho Sess. Laws, ch. 273. Four years later, it was amended to add the legislative veto authority. 1969 Idaho Sess. Laws, ch. 185 (initially codified to Idaho Code § 67-5218, now codified to Idaho Code § 67-5291).

[822] This sunset provision was first enacted by 1990 Idaho Sess. Laws, ch. 22 (initially codified to Idaho Code § 67-5219, now codified at Idaho Code § 67-5292).

[823] The *Chadha* and *Mead* cases are discussed in Phillip M. Barber, *Mead v. Arnell: The Legislative Veto and Too Much Separation of Powers*, 27 Idaho L. Rev. 157 (1991); Dale D. Goble, *Through the Looking-Glass and What the Idaho Supreme Court Found There*, 27 Idaho L. Rev. 81 (1990).

Constitution was amended in 2016 (after earlier failed attempts) to add Article III, section 29.[824] That provision constitutionalizes the Legislature's legislative veto authority.

The constitutionality of sunset provisions for administrative rules has not been questioned.

C. Why both veto and sunset provisions?

One might ask: If the Legislature has the power to reject rules at any time (both pending rules and previously adopted final rules), what is the need to sunset the rules each year? Isn't that redundant?

Yes, it is largely redundant.[825] But there is an historical reason for its adoption. Shortly after the *Chadha* decision in 1983, several state legislative veto statutes were declared unconstitutional. Idaho's Legislature grew fearful that its legislative veto statute would meet the same fate. Accordingly, in 1990 (while *Mead v. Arnell* was being litigated), the Legislature preemptively adopted the sunset provision (which did not suffer the same risk of being found unconstitutional). The sunset provision was a "belt-and-suspenders" means of assuring legislative oversight over rulemaking. If the legislative veto were eliminated, the sunset provision would fill the gap by requiring affirmative legislative action to extend the life of every stage agency rule every year. Indeed, as noted in footnote 825, the sunset requirement is more "powerful" than the veto in that an extension of the rules is easier to block.

To the Legislature's surprise, *Mead v. Arnell* upheld Idaho's legislative veto provision. And, as noted above, the legislative veto is now enshrined in Idaho's Constitution. Yet the largely redundant sunset provision has remained on the books ever since. The result is that rules promulgated by Idaho executive agencies are now subject to both the legislative veto and sunset requirements. This entails a substantial commitment of administrative resources—which many consider a wasteful and pointless expenditure of tax dollars—to re-promulgate every rule every year. Add to that the uncertainty imposed on the regulated community which is unable to know until the end of each legislative session what rules are in place.

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[824] "The legislature may review any administrative rule to ensure it is consistent with the legislative intent of the statute that the rule was written to interpret, prescribe, implement or enforce. After that review, the legislature may approve or reject, in whole or in part, any rule as provided by law. Legislative approval or rejection of a rule is not subject to gubernatorial veto under section 10, article IV, of the constitution of the state of Idaho." Idaho Const. art. III, § 29 (added by 2016 Idaho Sess. Laws, H.J.R. No. 5, § 1).

[825] The sunset provision is not perfectly redundant. It differs from the legislative veto in that it requires a legislative act (including presentment to the Governor) to extend the rules. Thus, either house acting alone may prevent the extension. In contrast, the legislative veto requires both houses to approve a concurrent resolution in order to rescind a rule, and there is no presentment to the Governor.

Meanwhile, a number of other states have jettisoned or limited the once-popular annual sunset provisions, finding them "an expensive, cumbersome and disappointing method for enhancing legislative control." Florence A. Heffron, *Legislative Review of Administrative Rules under the Idaho Administrative Procedure Act*, 30 Idaho L. Rev. 369, 370 (1993/1994).

D. Idaho APA provisions on veto and sunset

(1) APA terminology

We use the term "regular rules" to describe rules adopted in the ordinary course of rulemaking. The Idaho APA also authorizes "temporary rules" which may be fast tracked and are of limited duration.

In the regular rulemaking process, agencies are required to publish "proposed rules" and solicit public comment on them prior to their promulgation. Idaho Code §§ 67-5201(16), 67-5221, 67-5222, and 67-5224(1).[826] When a rule is adopted by the agency, it becomes a "pending rule" as it awaits legislative review. Idaho Code §§ 67-5201(14) and 67-5224.

If the pending rule survives the legislative veto process and becomes effective, it is called a "final rule." Idaho Code § 67-5201(9).

Rules imposing a fee or charge (which we refer to here as "fee rules") are treated differently than rules that do not involve a fee or charge (which we refer to here as "non-fee rules").

Idaho Code § 67-5202 establishes the office of "rules coordinator." This is the state official responsible for managing the bulletin and administrative code, in which notices and rules are published. The Office of Administrative Rules Coordinator is currently housed within the Division of Financial Management (within the Governor's Office). It was previously housed within the Department of Administration.

(2) Legislative veto

(a) Regular rules

The first step in the legislative veto process is to get proposed rules (rules that have not yet been adopted by the agency) before the Legislature. Idaho Code § 67-5223 requires the rules coordinator to forward to the Legislature notice of each

[826] This process is required only for regular rulemaking. For "temporary rules," in contrast, the agency is required only to "proceed with such notice as is practicable." Idaho Code § 67-5226(1)

proposed rule.[827] The agency is also required to provide a statement of economic impact and other information. Idaho Code § 67-454 creates a procedure whereby specially created subcommittees of each germane committee may provide feedback on all proposed rules.

The second step is to delay the effectiveness of pending rules (rules that have been adopted by the agency) until the Legislature has an opportunity to review them.

- Idaho Code §§ 67-5224(5)(a) and (b) provide that pending non-fee rules (other than temporary rules and error corrections) do not become effective until the end of the legislative session in which they were submitted or upon legislative approval, whichever comes first. If the Legislature does adopt a concurrent resolution rejecting the pending non-fee rule (in whole or in part), it will go into effect at the end of the session. Idaho Code §§ 67-5224(5)(a) and 67-5291.[828] In other words, while the Legislature may choose to approve a non-fee rule, approval is not required for the rule to become effective.

- Pending fee rules, in contrast, do not go into effect unless the Legislature approves them by concurrent resolution. Idaho Code § 67-5224(5)(c).

- This delay in effectiveness applies only to regular rules,[829] not to temporary rules. Idaho Code § 67-5226(1) provides that an agency is authorized to make temporary rules immediately effective. This is so notwithstanding the fact that temporary rules are subject to legislative veto, Idaho Code § 67-5291(1).

The legislative veto process applies not only to pending rules, but also to final rules (rules that have survived legislative veto and are now in effect) and to temporary rules. Thus, the Legislature may not only block a new rule from going into effect, it may also reach back to reject a previously adopted rule that has been in effect for some time.

The Legislature may veto a rule, but it is not authorized to modify the text of a rule. Its only options are (1) to approve the rule in whole or in part or (2) to reject the

[827] The requirements in section 67-5223 do not apply to temporary rules, so long as the rules coordinator sends a copy of the temporary rules to the director of the legislative services office. Idaho Code § 5226(5).

[828] Section 67-5224(5) is referenced in the last sentence of section 67-5291(1).

[829] The delay in effectiveness provided in Idaho Code § 67-5224 applies only to pending rules. Pending rules are defined as rules adopted in the regular rulemaking process. Idaho Code § 67-5201(14).

rule in whole or in part.[830] Approval or rejection of a rule is undertaken by concurrent resolution (which requires adoption by both houses of the Legislature but does not include presentment to the Governor).

In sum, if the Legislature is silent with respect to a pending non-fee rule, it goes into effect at the end of the session in which it was presented. A pending fee rule goes into effect if and only if it is approved by a concurrent resolution. If affirmatively approved, fee rules and non-fee rules go into effect immediately upon approval.

(b) Temporary rules

Idaho Code § 67-5226(1) authorizes the Governor, upon making certain findings, to allow agencies to adopt temporary rules that become effective immediately (before they have been submitted to the Legislature). Even temporary rules involving a fee or charge may go into effect immediately, so long as the Governor makes a finding that this is necessary to avoid immediate danger. Idaho Code § 67-5226(2). Temporary rules, like pending or final rules, may be rejected by legislative veto. Idaho Code § 67-5291(1). The key difference is that temporary rules go into effect without delay.

When an agency promulgates temporary rules, it must also commence promulgation of a proposed regular rule on the same subject (unless the temporary rule will expire before the proposed rule could become final). Idaho Code § 67-5226(6).

Temporary rules have their own sunset provision resulting in their expiration at the end of "the next succeeding regular session of the legislature." Idaho Code § 67-5226(3). Temporary rules that will remain in effect for the following year are typically adopted near the end of the legislative session (in case there is no "going home bill" as discussed in section 46.E below). If so, they expire in the spring of the following year when the next session ends.

(c) Correction of errors

Idaho Code § 67-5228 allows agencies to correct typographical and other errors in rules without going through rulemaking procedures. Idaho Code § 67-5224(5)(a) allows these corrections to go into effect immediately.

(3) Sunset provisions for final rules

The sunset statute states that all agency rules adopted after 1990 "shall automatically expire on July 1 of the following year unless the rule is extended by

[830] The meaning of rejecting a rule "in part" is addressed in Idaho Code § 67-5291(2). The explanation is obscure, but it appears to be saying that the Legislature may not freely edit out words, but may only reject entire sections.

statute." Idaho Code § 67-5292(1). Note that this requires full statutory enactment (including presentment to the Governor), not just a concurring resolution.

Thus, all final rules remain in force in subsequent years if and only if the Legislature enacts a statute each year extending them until July 1 of the following year. Final rules that are extended by legislative act "continue to expire annually on July 1 of each succeeding year." Idaho Code § 67-5292(1).

The expiration language states that every rule "shall automatically expire on July 1 of the following year." For rules previously extended by statute, the new extension keeps the rule in effect until July 1 of the year following the extension. For new rules that survive legislative veto and go into effect for the first time during or at the end of a legislative session, they, too, would remain in effect until July 1 of the following year.[831]

E. The legislative failure to enact a "going home bill" beginning in 2019

For nearly two decades following the enactment of the sunset statute in 1990, the Legislature routinely enacted one-year extensions of most rules each year. This was done by way of something commonly referred to as the "going home bill" (since it was commonly adopted at or near the end of the session).[832]

Beginning in 2019, the Idaho Legislature failed to enact a going home bill.[833] As a result, all rules expired on July 1, 2019. As a result, state agencies have been put through a costly annual exercise involving both the adoption of temporary rules and the re-promulgation of new pending rules.

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[831] The language in Idaho Code § 67-5292(1) saying that rules "expire on July 1 of the following year" can be confusing if not understood in context. What year does this refer to? The only sensible reading is that it expires on July 1 of the calendar year following the year that it went into effect or was extended. This conclusion is reinforced by Idaho Code § 67-5292(2) which provides that rules adopted prior to June 30, 1990 shall expire on July 1, 1991. Thus, a rule that went into effect during the 1990 legislative session would have a full year—until July 1 of the next year—before expiring. The referenced "year" cannot sensibly refer to the year in which the rule was promulgated by the agency. If that were the case, a pending rule that survives legislative veto would expire on July 1 just a couple of months later.

[832] An example of a going home bill is H.B. 666 (2018).

[833] The Legislature's refusal to extend the rules is said to reflect the view of some influential legislators that the legislative veto provision is not strong enough. Instead of requiring a concurrent resolution of both houses to reject a rule, some legislators believe that either house, acting alone, should have the power to veto a rule. Note that authority to veto by concurrent resolution means that one house may not act alone. But a requirement to approve a rule (as found in the sunset provision) means that either house can block the approval. Of course, failure to enact a going home bill does not solve this perceived shortcoming in the veto provision. But, apparently, it has the effect of "making a point" of some sort.

The first step, pursuant to Idaho Code § 67-5226(1), is for the Governor to authorize agencies to adopt temporary rules to replace the existing rules set to expire on July 1 following the legislative session. As noted above, the Governor may authorize temporary rules that go into effect immediately to replace both fee rules and non-fee rules. Idaho Code § 5226(2). Agencies must then move swiftly to adopt temporary rules prior to July 1.

As discussed above, temporary rules must be accompanied by promulgation of proposed replacement rules. Idaho Code § 5226(6). Accordingly, each year when there is no "going home bill," agencies are required to promulgate many thousands of pages of rules—both temporary rules and identical replacement proposed rules (which will be pending rules at the time of the next session).[834]

So long as the Legislature does not affirmatively reject the temporary rules by concurrent resolution (under Idaho Code § 67-5291), the temporary rules remain in effect until the end of the following legislative session (under Idaho Code § 67-5226(3). To the extent any of the new pending rules survived legislative review during that year (by approval or inaction, depending on whether they were fee-bills or non-fee bills), they would remain in effect until July 1 of the following year. But if there continued to be no "going home bill," the temporary rule and pending rule process would need to be repeated in subsequent years for any bills not approved in that session.

From the 2019 session to the 2021 session, the Legislature by and large did not veto the temporary rules, thus allowing them to operate until the end of the current session. However, the Legislature did not approve any of the pending fee rules. Nor did not enact any going home bills. Thus, each year, the cycle described above was repeated.

In 2022, the Legislature again failed to enact a "going home bill." However, it did adopt a series of so-called "omnibus" concurrent resolutions that approved many (but not all) pending rules. For those bills, there will be a one-year reprieve under the sunset provision—remaining in effect until July 1 of 2023. Thus, the massive set of temporary rules adopted by the agencies in 2022 were unnecessary (at least as to those rules included in the "omnibus" approval resolutions). However, if there is no "going home bill" in 2023, a new round of temporary rules and proposed rules will be required. In anticipation of that possibility, agencies will be required to prepare temporary rules again in 2022. Thus, the omnibus approval resolutions accomplished virtually nothing, except to give the agencies a few extra months to promulgate a new batch of temporary rules and proposed rules in time for the 2023 legislative session.

[834] Agencies must re-publish the full text of these rules. They are prohibited from merely incorporating by reference into a temporary rule the text of an expiring rule. Idaho Code § 67-5229(1)(d).

F. Legislative review and sunset provisions applicable to public health districts

On occasion, Idaho public health districts ("PHDs") adopt rules that affect land development. In at least one case, this includes requirements limiting the density of homes that rely on septic systems.[835] The practical effect of these rules is to encourage new residential developments to be connected to a public sewer system. Beginning in 2019, these rules became enmeshed in the Legislature's failure to annually re-authorize agency rules (by enactment of a "going home bill," as discussed above).

In order to sort this out, the first step is to identify which statutes govern PHD rulemaking. Idaho's APA applies only to state agencies. PHDs are not state agencies.[836] PHDs have their own organic statute, which provides them rulemaking authority. Idaho Code § 39-416. The statute is difficult to decipher, but it appears that PHD rules are subject to legislative veto in some form—either by its reference to the APA or under its own terms (under a 2010 amendment). There is a strong argument, however, that PHD rules adopted prior to 2010 are not subject to sunsetting. Hence, if they were lawfully promulgated prior to 2010 and have not thereafter been affirmatively vetoed by the Legislature, they remain in effect.

PHDs derive their rulemaking authority from Idaho Code § 39-416(1) which authorizes public health districts to "adopt, amend, or rescind rules and standards" to carry out their statutory responsibilities. However, Idaho Code § 39-416(2) requires that the adoption, amendment, or rescission of PHD rules "shall be done in a manner conforming to the provisions of chapter 52, title 67, Idaho Code [the Idaho APA]."

Given that submission of pending rules to the Legislature is part of the rule promulgation process set out in the APA, it appears that PHD rules must comply with the legislative submission process and are subject to legislative veto. This conclusion is reinforced by a provision in the PHD statute that describes other procedural review requirements and then says that those steps shall occur "[a]t the same time that proposed rules are transmitted to the director of legislative services." Idaho Code § 39-416(3). (This language was part of the PHD statute prior to the 2010 amendment discussed below. So it must be referring to the legislative veto process under the APA, not the post-2010 process in section 39-416(5).)

By the same reasoning, it appears that section 39-416(2) requires that PHD rules should be published in IDAPA in a manner conforming to the APA. Likewise,

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[835] IDAPA 41.01.01 (rules of the Panhandle Public Health District #1) (allowing one septic system per five acres of land).

[836] In addition to not meeting the definition of "agency" in Idaho's APA (Idaho Code § 67-5201(2), the PHD statute expressly states that PHDs are not state agencies (Idaho Code § 67-401).

the APA's provisions regarding the adoption of temporary rules should also be applicable to PHDs. In other words, despite the fact that PHDs are not state agencies, their organic statute (Idaho Code § 39-416(2)) instructs and authorizes them to adopt rules in the same manner as state agencies.

In any event, the question of whether the APA legislative veto provisions apply to PHD rules via Idaho Code § 39-416(2) is now academic, due to a 2010 amendment to the PHD statute. In that year, the Legislature added a new subsection expressly subjecting PHD rules to a special form of legislative veto and sunset. H.B. 667a, 2010 Idaho Sess. Laws, ch. 310 (codified at Idaho Code § 39-416(5)). It states:

> Public health districts shall have all proposed rules regarding environmental protection or programs administered by the department of environmental quality submitted for review and comment to the state board of environmental quality and such rules must be approved by adoption of a concurrent resolution by both houses of the legislature or such rules shall expire at the conclusion of a regular session of the legislature. It is the intent of the legislature that standards and rules relating to subsurface sewage systems, wastewater treatment, sewage systems and water quality be consistent statewide.

Idaho Code § 39-416(5) (emphasis added).

Thus, under the 2010 amendment, all proposed PHD rules dealing with the environment must be affirmatively approved by concurrent resolution. If not so approved, these proposed rules expire at the end of the next legislative session. Saying that unapproved proposed rules "shall expire at the conclusion of a regular session of the legislature" indicates that the rules go into effect immediately upon promulgation by the agency, but quickly expire if not approved.[837]

In any event, only proposed rules (i.e., new rules) are required to be submitted to the Legislature for review. And only "such rules" are subject to sunset. Section 39-416 has no requirement that existing PHD rules be submitted to the Legislature for review and approval. Hence, existing PHD rules (promulgated prior to 2010) are not subject to the sunset provision contained within section 39-416(5).

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[837] This is different from state agency rules under the APA legislative veto provision. Section 39-416(5) is not a "veto" provision, it is an "approval" provision. No veto is necessary because PHD rules promulgated after 2010 expire automatically if not approved. It is also different from how both fee rules and non-fee rules are treated under the APA. As discussed in section 46.D(2)(a) at page 934, fee rules do not go into effect until the end of the session; non-fee rules do not go into effect unless affirmatively approved.

This conclusion is reinforced by the legislative history of the 2010 amendment adding Idaho Code § 39-416(5). As initially proposed, H.B. 667 would have voided all PHD rules dealing with septic systems and other water quality requirements.[838] (Indeed, a statement to that effect is included in the "Statement of Purpose" for the bill.[839]) But that that provision was stricken from the bill before it was enacted. The resulting bill, as enacted, provides only that proposed rules (new rules) are subject to legislative approval and sunset.

As discussed above, section 39-416(2) requires that PHD rules be promulgated in a manner conforming to the APA. That provision probably sweeps in the APA's veto provision because legislative review is part of the APA's rule promulgation process. However, there is a strong argument that PHD rules are not subject to the APA's sunset provision. This is because the requirement in section 39-416(2) only requires that the "adoption, amendment, or rescission" of PHD rules be done "in a manner conforming to" the APA. It says nothing about those rules expiring in a manner conforming to the APA.

At the end of the day, the statute remains difficult to apply and the analysis provided here might not be the one adopted by a court. At best, the "no sunset" argument applies only to PHD rules that were promulgated prior to the 2010 enactment of section 39-416(5). And there is no doubt that rules promulgated after 2010 survive no longer than the end of the legislative session following their promulgation.

Since 2019, PHDs (like executive agencies) have engaged in the process of re-promulgating temporary rules and proposed rules each year. In 2022, the Governor once again authorized PHDs to adopt temporary rules. Given the uncertainty over how the statutes work, compounded by current legislative conditions, PHDs are well advised to take advantage of that opportunity and continue the process of promulgating temporary and proposed rules.

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[838] As introduced, H.B. 667 began with this provision: "Notwithstanding the foregoing or any other provision of law, all rules of public health districts relating to subsurface sewage systems, wastewater treatment, sewage systems and water quality shall be null, void and of no force and effect at the conclusion of the first regular session of the sixty-first Idaho legislature."

[839] The Statement of Purpose for H.B. 667 read in part: "This bill would make all existing district rules null, void, and of no force and effect. Thereafter public health districts shall have the approval of the Board of Environmental Quality to promulgate rules relating to subsurface sewage systems, wastewater treatment, sewage systems and water quality and such rules must be approved by both houses of the legislature."

47. CONVEYANCING AND THE STATUTE OF FRAUDS

In the case of *Lexington Heights v. Crandlemire*, 140 Idaho 276, 92 P.3d 526 (2004) (Eismann, J.), the Idaho Supreme Court imposed a rigorous standard for specificity of the lands to be conveyed. (Although the case dealt with the sale of land, presumably it would apply equally to water right deeds.) The Court invalidated a real estate contract that identified 95 acres of land for sale, but excluded 5 acres around a house "the precise boundaries of which to be mutually agreed by the parties after a survey." The Court said this violated the statue of frauds, because it left a critical aspect of the contract undecided.

In agreements conveying a portion of a water right, it is often contemplated that the parties will designate, at a subsequent time, exactly which acres of land within the farm property are to be dried up. Although the Court did not offer such an example, it may be that such a subsequent designation would meet the *Lexington Heights* test so long as the seller (or the buyer) may unilaterally select the acres. In this way, there is a definitive mechanism – described within the four corners of the conveyance document – to define this essential term.

On the other hand, a niggardly reading of *Lexington Heights* might throw even this arrangement into question. Consequently, the safer approach may be to build in an additional back-up mechanism, such that, if the designated party fails to specify the land and water rights by a specified time, some previously designated description will apply by default.

In any event, an agreement calling for the acres to be selected pursuant to a subsequent mutual agreement plainly would run afoul of *Lexington Heights*, rendering the contract unenforceable under the statute of frauds.

Today, *Lexington Heights* is but one of many cases addressing this issue.[840]

[840] The courts' long-held standard requires a writing to "contain a description of the property, either in terms or by reference, so that the property can be identified without resort to parol evidence." *Ray v. Frasure*, 200 P.3d 1174, 1177 (Idaho 2009) (finding that a street address was not an adequate property description because "[t]he physical address gives no indication of the quantity, identity, or boundaries of the real property." *Id.* at 1179). *See also, Allen v. Kitchen*, 100 P. 1052 (Idaho 1909) (ruling that a description failed to satisfy the Statute of Frauds where it stated "Lots 11, 12, and 13, in block 13, Lemp's addition" and "Lot 27, Syringa Park addition, consisting of 5 acres" yet failed to indicate "the city, county, state, or other civil or political division or district in which any of the property is located." *Id.* at 1053); *White v. Rehn*, 103 Idaho 1 (1982) (striking down as inadequate an agreement describing the land to be conveyed as "all land west of road running south to the Rehn farmstead containing 960 acres. Exact acreage to be determined by survey." *Id.* at 3); *Garner v. Bartschi*, 139 Idaho 430 (2003) (finding that the reference to three tax notices and a county plat was not an adequate property description because "one cannot tell exactly what property was being conveyed by the Bartschis merely by the descriptions contained in those referenced documents" and "there is not a copy of the "Bear River County Plat" in the record." *Id.* at 435-36).

In *616 Inc. v. Mae Properties*, 2023 WL 1807737 (Feb. 2, 2023, Idaho) (Brody, J.), the Court doubled down on *Lexington Heights*. In this case, the owner of a commercial property (a print shop) within a multi-unit building entered into a contract (the "APA") for sale of the business assets (including such things as shop equipment, raw materials, customer lists, etc.) for $150,000. The APA referenced an Asset List enumerating the various items of business assets to be included in the sale, but that document was not finalized until a few months after the sale was consummated. In section 6 of the APA, the seller of the business assets "hereby agrees to lease the Business Premises to Buyer" for a renewable term of five years, specifying the monthly rent and other terms. Apparently, the parties contemplated that the lease itself would be negotiated thereafter. After the APA was executed, the buyer moved into Suite 100 of the subject property and began paying rent. However, after 18 months, they failed to agree on lease terms, whereupon the buyer sued the seller seeking a declaratory judgment (and other relief) to the effect that the APA itself created a lease. The seller counter-claimed.

Relying on *Lexington Heights*, *Ray*, and other precedent, the Court found that the terms of section 6 of the APA fell short of meeting the standards under the statute of frauds applicable to leases of one year or more. Notably, the property was inadequately described and the term and manner of lease payments were not sufficiently specific.

In 2009, the United States District Court for the District of Idaho concluded, "this requirement is exacting." *Magnolia Enterprises, LLC v. Schons*, 2009 WL 1658022, *4 (D. Idaho 2009) (unpublished). The District Court went on to invalidate two agreements regarding the sale of a particular property. *Id.* at *5 ("While the parties' agreements provided for a survey of the conveyed property to be conducted after the contracts had been signed, there is no explicit provision as to how the conveyed property was to be distinguished from the retained property. As such, the agreements did not make a clear and unambiguous reference to an extrinsic document containing a precise legal description of the "Seller's retained property.")