Cap Fee Basics and News from the Legal Front

Association of Idaho Cities

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1. ALTERNATIVE APPROACHES TO CAP FEE CALCULATIONS

(This discussion was prepared by Chris Meyer but relies heavily on materials provided by John Ghilarducci of FCS GROUP.)

A. Key issues to be addressed in any cap fee methodology

(1) Original cost vs. replacement value

For existing system costs (both used capacity and excess capacity), there is a choice between basing the cap fee on the original cost vs. the replacement value.

Naturally, the replacement value will likely be substantially higher, particularly for system components that are older. Using replacement value will offset to some extent the depreciation of older system components.

(2) Gross cost vs. depreciated cost

For existing system costs (both used capacity and excess capacity), there is question of whether to deduct depreciated value from the gross cost or gross replacement value.

The depreciation issue does not apply to future expansion costs, because there is nothing to depreciate.

If costs or replacement value is depreciated, this, in turn, leads to a choice of depreciation methods. The two primary methods are discussed below.

(a) Straight line depreciation

Straight line depreciation simply takes into account the age of each system component. The cost (or replacement value) of each system component is divided by the ratio of the remaining useful life over the original useful life of the component. Thus, if something cost $100 and will last 100 years, it will depreciate at $1 per year (its value declining in a straight line).

(b) Unfunded depreciation

Unfunded depreciation takes into account that the user paying the cap fee is buying into a fund set aside by the city or other local government that may be used for system replacement. 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.

(3) 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.

(4) 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."

It is generally deemed appropriate to include surface restoration in the calculation of system costs because, in order to install or replace sewer infrastructure, it is necessary to remove and restore road and other hard surfaces.

(5) Earlier contributed capital and other funding sources

Another issue for both existing system and future expansion costs is whether to exclude from system valuation any funding (cash or in kind) that has previously been contributed by other developers or provided by other sources (such as federal grants).

(6) Credit for required contributions and 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.

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.

(7) Bonding

If the capital improvements have been or will be funded by revenue bonds, the debt associated with the bonds (remaining bond principle) is typically subtracted from the cost or replacement value of the system.

(8) 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 4 inches of excess capacity).

Depending on the methodology selected, it may be necessary to separate the cost attributable to each category of use.

(9) Planning period and geographic scope

For any of the methodologies that include valuation of future system expansion (Methods 2, 3 and 4, below), 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 must match the numerator (see table in section 9 below).

(10) Number of customers

Whatever valuation is developed for the system cost, the next step is to divide by the number of customer units. 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."

B. Five examples of cap fee methodologies

Methodology		Numerator			Denominator
		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 = (replacement value of existing system less unfunded depreciation) 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 4 of In *N. Idaho Bldg. Contractors Ass'n* ("*NIBCA*") *v. City of Hayden*, 158 Idaho 79, 82 n.2, 343 P.3d 1086, 1089 n.4 (2015) and footnote 4 of *Loomis v. City of Hailey*, 119 Idaho 434, 443 n.4, 807 P.2d 1272, 1281 n.4 (1991). Specifically, the Court endorsed a cap fee based on replacement value less unfunded depreciation.

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 service provided. Thus, there is an argument that failing to provide such a credit would amount to double charging (constituting an unconstitutional taking).

2. IMPACT FEES, EXACTIONS, AND THE "ILLEGAL TAX" ISSUE

(The discussion in this section and the next are the work of Chris Meyer of Givens Pursley LLP.)

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 years, 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 buy-in fees, impact fees and other exactions are authorized under the police power and municipal taxation power provisions of Idaho's Constitution, or whether they are ultra vires. It does not address the separate question of regulatory takings[1] or the question of whether local ordinances imposing fees or other

[1] 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. 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.

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.

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).[2]

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. 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

[2] 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).

and funding 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.[3]

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.[4] Home rule cities, in

[3] 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) 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) was styled an "inclusionary fee."

[4] 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 prevent it. We know of no limitation on this right so far as the

contrast, hold broader authority to legislate with 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.[5]

The term "home rule," however, can mean different things. The most extreme form of home rule is one espoused by Judge Cooley[6] 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.

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:

> 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.)).

[5] 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.

[6] Thomas Cooley, *A Treatise on the Constitutional Limitations* 189-90 (Boston 1868).

> 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.)).

Dillion 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 Idaho 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, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980) (Donaldson, C.J.) (citations omitted).

> 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 . . . [and i]f 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. 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. "However, that taxing authority is not self-executing and is limited to that taxing power given to the municipality by the legislature." *Idaho Building Contractors Ass'n v. City of Coeur d'Alene* ("*IBCA*"), 126 Idaho 740, 742, 890 P.2d 326, 328 (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*, 109 Idaho 424, 427, 708 P.2d 147, 150 (1985) (Donaldson, J.) (upholding the local option resort city tax law, Idaho Code §§ 50-1043 to 40-1049).

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.

The delegation 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 property owners 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 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 2.F at page 54.) 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 Building 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. Does Idaho Code § 50-301 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.[7] In 1976, the Idaho Legislature amended the statute to read as follows:

> 50-301. CORPORATE <u>AND LOCAL SELF-GOVERNMENT</u> 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

[7] 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).

> 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.

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").[8] 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*, 101 Idaho 158, 160, 610 P.2d 517, 519 (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.

[8] 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 *North Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA*"), 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*, 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* decision puts to rest the argument that Idaho cities enjoy home rule.

E. Lawful fees and exactions

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), *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.

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 (authorizing user fees), the Idaho Revenue Bond Act, Idaho Code §§ 50-1027 to 50-1042 (authorized 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 fee or a tax. Whatever it is, it has been authorized, and that is all that Dillon's Rule requires.[9]

Over the years, the Idaho Supreme Court has recognized three broad 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), and

(3) 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).

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 authority for the third (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. We discuss each in turn below.

(1) 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*, 115 Idaho 502, 504, 768 P.2d 765, 767 (1988) (Shepard, J.).[10]

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[9] 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).

[10] "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).

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.

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 an incidental regulatory fee); *Brewster v. City of Pocatello*, 115 Idaho 502, 505, 768 P.2d 765, 768 (1988) (Shepard, J.) (giving fees for "the recording of wills or the filing of legal actions" as examples of appropriate incidental regulatory fees).

To be a proper regulatory fee, however, 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, 115 Idaho at 504, 768 P.2d 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 Building Contractors Ass'n v. City of Coeur d'Alene* ("*IBCA*"), 126 Idaho 740, 743, 890 P.2d 326, 329 (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, 36 Idaho 713, 722, 213 P. 358, 361 (1923) (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*, 106 Idaho 884, 684 P.2d 286 (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*, 63 Idaho 201, 219, 118 P.2d 721, 728 (1941) (Ailshie, J.), the owner of a furniture store challenged the city's authority to install parking meters on the public street in front of 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 Inc., 63 Idaho at 219, 118 P.2d 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*, 115 Idaho 502, 768 P.2d 765 (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, 115 Idaho at 504, 768 P.2d at 767.[11]

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, 115 Idaho at 504, 768 P.2d at 767.

(Note that the *Brewster* decision dealt both with incidental regulatory fees and user fees for services. See discussion below under that heading.)

Seven years later, in *Idaho Building Contractors Ass'n v. City of Coeur d'Alene* ("*IBCA*"), 126 Idaho 740, 890 P.2d 326 (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,[12] 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*, 126 Idaho at 741, 890 P.2d 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*, 126 Idaho at 741-42, 890 P.2d at 327-28. The city defended the fee as an exercise of its police power. *IBCA*, 126 Idaho at 743, 890 P.2d at 329. The Court analyzed it as an incidental regulatory fee, and found it fell short.

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[11] *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 therefore 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).

[12] 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 2.F at page 407) 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.

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 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, 126 Idaho at 743-44, 890 P.2d 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 a 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*, 115 Idaho 502, 503, 505, 768 P.2d 765, 766, 768 (1988) (Shepard, J.). Likewise, Coeur d'Alene's impact fee was struck down "no matter how rationally and reasonably drafted" it was. *IBCA*, 126 Idaho at 745, 890 P.2d 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*, 126 Idaho at 744, 890 P.2d 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. 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.

(2) 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 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 local government may engage in a proprietary functions that are germain to their governmental role (*e.g.*, providing water, sewer, and garbage collection) absent express statutory authorization. To put it differently, one would think that doing so 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 relatively recent 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.

In a 1989 case, the Idaho Supreme Court reiterated that the provision city services for a fee does not fall under the police power, but is a "proprietary" function:

> 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, 116 Idaho 535, 538, 777 P.2d 1208, 1211 (1989) (Johnson, J.) (emphasis supplied ; citations omitted).

In *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (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, 119 Idaho at 437-38, 807 P.2d at 1275-76.

In *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 149 Idaho 187, 233 P.3d 118 (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, 149 Idaho at 193, 233 P.3d 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*, 139 Idaho 810, 813, 87 P.3d 297, 300 (2004) (Trout, J.).

The reason this matters is that local governments may not engage in proprietary functions absent a grant of legislative authority.

> 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).

Accordingly, the sections below explore a variety of statutory authorities for user fees.[13]

(b) Authorization of user fees in Idaho Code §§ 63-1311(1) and 31-870(1).

Since 1980 there has been express legislative authority for all "taxing districts" (including cities) to charge fees for services provided:

[13] Idaho Code § 63-1311 and the Revenue Bond Act have received most of the attention in cases involving user fees. In *North Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA*"), 158 Idaho 79, 343 P.3d 1086 (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*., 118 Idaho 136, 143, 795 P.2d 298, 305 (1990) (Boyle, J.) and *City of Grangeville v. Haskin*, 116 Idaho 535, 777 P.2d 1208 (1989) (J. Johnson, J.)). The *NIBCA* Court found no merit in the argument.

> (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).[14]

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 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).[15] (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.)

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[14] 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*, 115 Idaho 502, 503, 768 P.2d 765, 766 (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.

[15] 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 vehicle registration. 1999 Idaho Sess. Laws ch. 90 § 1.

The underlined portion of the statutes was added in 1988. See footnote 16 at page 28. This amendment was a codification of the Idaho Supreme Court's holding in *Brewster v. City of Pocatello*, 115 Idaho 502, 768 P.2d 765 (1988) (Shepard, J.) discussed below.

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."[16]

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[16] 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 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 Minus (Mar. 16, 1988).

It is unclear why both sections 31-870 and 67-1311 are needed. Both cities and counties are taxing districts,[17] 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.

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.).[18] 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[19]). *Brewster*, 115 Idaho at 503, 768 P.2d at 766.

The 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 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

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[17] 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).

[18] 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 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.

[19] 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.

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.

Brewster, 115 Idaho at 505, 768 P.2d at 768 (emphasis supplied).[20]

On February 26, 2015, the Idaho Supreme Court handed down its decision in *North Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA*"), 158 Idaho 79, 343 P.3d 1086 (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. 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

[20] 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*, 115 Idaho at 502, 768 P.2d 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*, 115 Idaho at 504, 768 P.2d 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*, 115 Idaho at 503, 768 P.2d at 766.

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 Idaho 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).

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 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, 158 Idaho at 81, 343 P.3d 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, 158 Idaho at 81, 343 P.3d 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 Idaho Revenue Bond Act), the Court expressly provided that the fee may be based on current replacement cost 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 Idaho 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 24 at page 33.)

(c) Capitalization fees authorized under 42-3212

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.[21] 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 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.[22]

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[21] A reference in the case to 42-4201 should be to 42-3201.

[22] "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 nl.4, 233 P.3d 118, 124 n.4 (2010) (Eismann, C.J.).

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.

The case is of limited precedential value, because 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. Thus, the case did not address the question of whether the such fees could be used to fund system expansion. That question was left for the *Kootenai County Property Owners* and *NIBCA* cases.

(d) User fees authorized by Idaho Revenue Bond Act.

The Idaho Revenue Bond Act, Idaho Code §§ 50-1027 to 50-1042, was enacted in its present form in 1967.[23] It authorizes cities (but not other governmental entities[24]) to issue revenue bonds for the construction, acquisition, or improvement of specified works. It contains provisions authorizing user fees:

> In addition to the powers which it may now have, <u>any city shall have power</u> under and subject to the following provisions:
>
> (a) To acquire by gift or purchase and <u>to construct, reconstruct, improve, better or extend any works within or without the city</u>, 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

[23] 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.

[24] Another statute, the Irrigation District Bond Act (Idaho Code §§ 43-1906 to 43-1920) provides the same authority to irrigation districts. A provision in the Irrigation District Bond Act (Idaho Code § 43-1909(a)) that is identical to section 50-1030(a) was relied on in *Viking* to support the city's authority to use its connection fee for future expansion of the system. *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 149 Idaho 187, 197, 233 P.3d 118, 128 (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 Idaho Revenue Bond Act. *Viking*, 148 Idaho at 191, 233 P.3d at 122 (this statute "authorizes charging a connection fee to connect to an irrigation district's domestic water system.").

> 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 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).[25]

[25] The Idaho 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 Idaho 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*, 149 Idaho at 191-92, 233 P.3d 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

The term "works" referenced in subsection 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.)

Read together, these provisions make clear that cities are authorized to charge user fees for the specified "works," and that revenue from those fees may be used for future expansion of the "works." This is confirmed by Idaho case law.

In *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991) (Boyle, J.), the City of Hailey approved revenue bonds to fund improvements in the city's sewer system.[26] 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 v. City of Hailey*, 119 Idaho 434, 439 n.2, 807 P.2d 1272, 1277 n.2 (1991) (Boyle, J.) (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*, 119 Idaho at 436, 807 P.2d at 1274. Nor were the funds used to retire the bond indebtedness. *Loomis*, 119 Idaho at 439, 807 P.2d 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.

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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.

[26] 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*, 119 Idaho at 440, 807 P.2d 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*, 119 Idaho at 439, 807 P.2d at 1277.

The Court recognized that some fees may be upheld as incidental regulatory fees.[27] 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 2.E(2)(a) at page 24.) 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 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 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, 119 Idaho at 438, 807 P.2d at 1276.

The Court launched into a detailed discussion of what was allowed under the Idaho Revenue Bond Act and found that the city's connection fee was consistent with the statute's requirements.[28] 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.[29] It held that it was appropriate

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[27] 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*, 119 Idaho at 437, 807 P.2d at 1275.

[28] In *Loomis*, the plaintiffs relied on *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d 672 (1956) (Porter, J.) to support its contention that the City of Hailey was unlawfully circumventing bonding requirements under the Idaho 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*, 78 Idaho at 325, 303 P.2d 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*, 119 Idaho at 440, 807 P.2d 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.

[29] A subsequent case, *City of Chubbuck v. City of Pocatello*, 127 Idaho 198, 899 P.2d 411 (1995), also addressed the subject 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

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*, 119 Idaho at 443, 807 P.2d at 1281 (cited with approval in *Viking*, 149 Idaho at 194, 233 P.3d at 125) (emphasis supplied).

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*, 119 Idaho at 439 n.3, 807 P.2d at 1277 n.3. Yet, on the very next page the Court noted that the Idaho Revenue Bond Act expressly authorizes use of fee revenue for "*replacement and depreciation* of such works . . . including *reserves therefor*." *Loomis*, 119 Idaho at 440, 807 P.2d at 1278 (emphasis and ellipses original).

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*, 119 Idaho at 440, 807 P.2d at 1278. The Court noted that the outcome would be different if the funds were used for general purposes. *Loomis*, 119 Idaho at 441, 807 P.2d 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 Idaho Revenue Bond Act gives cities broad flexibility in setting fees, and that the city's approach was not unreasonable. *Loomis*, 119 Idaho at 441-44, 807 P.2d at 1279-82.

In *Waters Garbage v. Shoshone County,* 138 Idaho 648, 67 P.3d 1260 (2003) (Eismann, J.), the county was sued by a private solid waste disposal firm that competed with the county's landfill. 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 private firm 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 Property Owners* that the 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 Property Owners* (that all humans send waste to the local landfill)

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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*, 127 Idaho at 202, 899 P.2d at 415.

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 *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 149 Idaho 187, 233 P.3d 118 (2010) (Eismann, C.J.), a land developer challenged a domestic water system connection fee (including an "equity buy-in"[30]) of $2,700 per home imposed by an irrigation district.[31]

Viking did not arise under the Idaho 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.[32] Accordingly, *Viking* is good authority for how both the Irrigation District Bond Act and the Idaho Revenue Bond Act are construed.

Although the irrigation district 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 Idaho Revenue Bond Act, Idaho Code § 50-1030(f),[33] 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. "According to Viking,

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[30] "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.

[31] Unlike many irrigation districts, this one also provided domestic water supplies.

[32] 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), 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 Idaho 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.

[33] 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 Idaho 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 <u>such</u> works."

'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.'" *Viking*, 149 Idaho at 191, 233 P.3d at 122.[34] The Idaho Supreme Court squarely rejected Viking's argument. The Court construed the Irrigation District Bond Act, whose relevant provisions are identical to the Idaho Revenue Bond Act. The Court found that the act's express authority for cities "to construct, reconstruct, improve, better or extend any works" includes future expansion of the system. *Viking*, 149 Idaho at 197, 233 P.3d at 128 (construing Idaho Code § 43-1909(a), which is identical to Idaho Code § 50-1030(a)).

The Court ruled that the meaning of the bond act was clear on its face and that it unambiguously authorized user fees irrespective of whether bonds were issued:

> By its terms, it is not limited to a district issuing bonds . . . . . 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-[1]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. § 43-1909(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. <u>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.</u>

Viking, 149 Idaho at 193, 233 P.3d at 124 (emphasis supplied).[35] (Section 43-1909(e) corresponds to section 50-1030(f) of the Idaho Revenue Bond Act.)

In so ruling, the Court noted its ruling in *Loomis* and the similarity of the provisions in the two revenue bond acts. Thus, it follows that cities may rely on the authority in Idaho Code

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[34] 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.

[35] 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."

§ 50-1030(f) to justify user fees for "works" defined under the act irrespective of whether they issue revenue bonds for those "works."

The *Viking* Court ruled that the city has considerable discretion in calculating its connection fee. Specifically, 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 of building new infrastructure in the future 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, 149 Idaho at 194, 233 P.3d 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*, 149 Idaho at 197, 233 P.3d 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*, 149 Idaho at 194, 233 P.3d 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*, 149 Idaho at 195, 233 P.3d at 126.[36] 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 source of revenue to the governmental entity. *Viking*, 149 Idaho at 196, 233 P.3d 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."

[36] 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.

Viking, 149 Idaho at 196, 233 P.3d 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."[37] *Id*.

In *Loomis*, the Idaho Supreme Court 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, 149 Idaho at 197, 233 P.3d at 128. In other words, even cities 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 Idaho 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*, 149 Idaho at 194, 233 P.3d 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 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.[38] The funds collected were used to fund the city's street sweeping, maintenance of the

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[37] 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).

[38] 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

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 both as an incidental regulatory fee under the police power and as a service fee under the Idaho Revenue Bond Act. The Court rejected both arguments. First, it 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 Independent*, 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 Independent*, 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 Property Owners*, and *Loomis*, noting that they dealt with the application and interpretation of specific statutory authorizations.

In *Lewiston*, the plaintiff argued, contrary to the express holding in *Viking*, that the Idaho 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. "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." *Lewiston Independent*, 151 Idaho at 808, 264 P.3d at 915. The Court elsewhere observed, "The Revenue Bond Act is not applicable because no revenue bonds were issued by the City." *Lewiston Independent*, 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 briefed. Neither the appellant's brief nor the respondents' brief contains any reference to *Viking*.

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 Independent*, 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

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systems or because their neighborhoods are not connected to the stormwater system." *Lewiston Independent*, 151 Idaho at 802, 264 P.3d at 909.

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 sum, to be valid, the user fee under the Idaho Revenue Bond Act must reasonably reflect the cost of the service provided to the user. (The same, of course, is true for a user fee authorized under any statute.) But this does not mean that it correspond precisely to 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 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 Property Owners Assn. v. Kootenai County, 115 Idaho 676, 678-79, 769 P.2d 553, 555-56 (1989) (Bakes, J.).

> 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).

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).[39]

In 2015, the Idaho Supreme Court handed down *North Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA*"), 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 Idaho Revenue Bond Act.

The *NIBCA* Court began its discussion under the Idaho 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 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 <u>at that point in time</u>." *Id*. at 441, 443, 807 P.2d at 1279, 1281.

NIBCA, 158 Idaho at 82, 343 P.3d at 1089 (emphasis supplied).

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[39] 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)).

Moreover, the *NIBCA* 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, 158 Idaho at 82, 343 P.3d at 1089.[40]

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*, 158 Idaho at 82, 343 P.3d at 1089.

The Court went on to reiterate what it had previously held in *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 149 Idaho 187, 233 P.3d 118 (2010) (Eismann, C.J.), that "connection fees collected by [the governmental entity] could be spent to extend the domestic water system." *NIBCA*, 158 Idaho at 82, 343 P.3d at 1090 (emphasis original). In other words, the *NIBCA* plaintiffs' contention that fee revenue could not be expended for future system expansion was wrong.

In other words, the government may charge a buy-in fee based on the 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.

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[40] In a footnote, the *NIBCA* 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*, 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* by Justice Jim Jones joined in by Chief Justice Burdick urged that the footnote 2 discussion in *NIBCA* "may be correct but it seems to me that expert opinion below should address that issue." *NIBCA*, 158 Idaho at 87, 343 P.3d at 1094.

> 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].

NIBCA, 158 Idaho at 83, 343 P.3d at 1090.[41]

In a footnote, the *NIBCA* Court described the particular methodology that should be employed in calculating the replacement value:

> Under [the cost method of valuing property], 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.

NIBCA, 158 Idaho at 82 n.2, 343 P.3d at 1089 n.2 (quoting *Loomis*, 119 Idaho at 443, 807 P.2d at 1281).[42]

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*, 158 Idaho at 84, 343 P.3d at 1091 (referring to the provision in the Idaho Revenue Bond Act that the city shall not "operate any such works primarily as a source of revenue.")

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[41] 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 . . . ."

[42] The concurrence suggested that it was premature for the majority to engage in this level of specificity in describing the property methodology. *NIBCA*, 158 Idaho at 87, 343 P.3d at 1094 (concurrence).

(e) Authorization of user fees in Idaho Code § 31-4404.

In 1989, the Court upheld Kootenai County's mandatory solid waste disposal fee in *Kootenai County Property Owners Assn. v. Kootenai County,* 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 Property Owners Assn. v. Kootenai County, 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 Property Owners*, 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 Property Owners, 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 Property Owners*, 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 *North Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA*"), 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J.), the Court limited the part of the holding in *Kootenai Property Owners* 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*, 158 Idaho at 84, 343 P.3d at 1091. This is in contrast, the Court said, to the Idaho Revenue Bond Act, which authorizes fees only based on the replacement cost of existing infrastructure.

(f) 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 United Water Idaho). 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.

(3) 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.[43]

The Idaho Supreme Court has never had occasion to address the propriety of such actions.[44] Courts in other states, however, 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).[45]

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*, §

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[43] "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).

[44] The closest the court came was in *KMST, LLC v. County 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.

[45] "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).

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).[46]

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").[47]

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

[46] 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, unlike Idaho, municipalities have broad inherent powers to tax, and/or (2) local governments are acting pursuant to authorizing legislation.

[47] 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.

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 Corporations*, § 25.118.50 (1999), which echoes Professor Martinez's conclusion that "impact fees and exactions cannot simply result from ad hoc bargaining."

(4) Express statutory authority to impose CUP conditions dealing with mitigation and/or public facilities and services (Idaho Code §§ 67-6512(d)(6) and (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 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).

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 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 Commission*, 483 U.S. 825, 860 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)). But it is not a *per se* taking as an illegal tax, because such conditions are authorized by LLUPA.

Moreover, the *Buckskin* Court made this 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(6) and (8) authorize such conditions without enactment of an IDIFA-complaint ordinance is reinforced by dictum in *Burns Holdings, LLC v. Teton County 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. 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 provides 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 carves out the imposition of "[c]onnection or hookup charges" and "[a]vailability charges." Idaho Code §§ 67-8203(9)(b) and (c). 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. Thus, a sewer capitalization fee or other connection fee need not (and indeed cannot) be implemented via IDIFA.

(5) Outright denial of a rezone or a permit based on inadequate services or infrastructure

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 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, 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).

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).

F. Franchise fees

In *Alpert v. Boise Water Corp*., 118 Idaho 136, 795 P.2d 298 (1990) (Boyle, J.), the Court upheld the right of cities to enter into franchise agreements with utilities. The agreements at issue required the utilities to pay a franchise fee to the city which, in turn, was passed along to consumers. Consumers challenged the agreements on various grounds including antitrust. The Court, relying on *Denman v. Idaho Falls*, 51 Idaho 118, 4 P.2d 361 (1931), found that Idaho antitrust law is not applicable to municipal corporations. *Alpert*, 118 Idaho at 141-42, 795 P.2d at 303-04. Despite this sweeping statement of exemption, the Court allowed that "municipalities, 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*, 118 Idaho at 141, 795 P.2d at 303. The Court found such a policy, however, expressed in various statutes authorizing cities to provide utility services and enter into franchise agreements. *Id*.

The *Alpert* court also rejected an argument that the franchise fee was really a disguised tax. In so ruling, the Court distinguished *Brewster v. City of Pocatello*, 115 Idaho 502, 768 P.2d 765 (1988), which had held that street restoration and maintenance fee imposed by Pocatello was not a service charge or an incidental regulatory fee but was instead an illegal, disguised tax for general public purposes.

In *Alpert*, customers of Boise Water Corporation and other utilities challenged various cities that had entered into franchise agreements with the utility. The franchise agreements imposed a three percent franchise fee paid by the utility to the city and, in turn, passed along to the utility customer as part of the rate structure. The utility customers challenged this on various grounds, including that it was a disguised and illegal tax.

The *Alpert* court began by recognizing, once again, that cities may exercise only those powers granted to them by the Constitution or the Legislature. That test, however, was easily met here; 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*, 118 Idaho at 142, 795 P.2d at 304. The Court went on to recognize that franchise agreements are lawful contracts and that a franchise fee is a legitimate consideration for the contract. Finally, the Court rejected the utility customers' argument that the franchise fee was, in reality, a disguised tax such as that struck down in *Brewster*. The Court distinguished *Brewster* noting that the franchise fee passed along to the consumer is based on consumption of the service:

> The water and gas services provided by the utilities in this case are based on consumption and use by the resident. As noted in *Brewster*, the providing of sewer, water, electrical and other utility services to residents based on consumption of the commodity is a charge for a direct public service as compared to a tax which is a forced contribution by the public-at-large for revenue raising purposes. 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. We hold that the three percent fee charged to the customers of the various gas and water utilities is a valid franchise fee and not a prohibited tax.

Alpert, 118 Idaho at 145, 795 P.2d at 307.

Note that Idaho Code § 50-329A sets parameters for franchise fees imposed by cities on utilities providing water, electricity, and natural gas.

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.[48] 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 counties 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 pursuant to article VII of the Idaho Constitution. Thus, this constitutional issue is moot.[49]

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.[50]

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[48] 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.

[49] 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.

[50] 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.

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 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).

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.

The prohibition against double-dipping appears also in the section of IDIFA dealing with the calculation of the impact fee. It provides the 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.[51] 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).[52] Note that workforce housing is not among them.[53]

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[51] 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).

[52] "'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

(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). 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 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.[54] The governmental entity appoints the members of the committee, which shall consist of at least five members. At

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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).

[53] 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).

[54] 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).

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.

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"[55] 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).[56] Detailed

[55] 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.

[56] 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.

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.[57] The Act's operative provision reads: "Governmental entities which 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

[57] 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).

> 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).[58]

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,[59] as does IDIFA.[60] 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).

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[58] 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 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.

[59] "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).

[60] "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).

(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) 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 2.E(4) at page 51.

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").

3. 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. County of Ada,* 138 Idaho 577, 67 P.3d 56 (2003) (Eismann, J.), a developer brought a civil action[61] 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, 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

[61] 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.

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.[62]

For reasons that are unclear, the developer did not pursue its appeal of the county's decision.[63] 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 County 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.[64]

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 voluntary.[65] 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.

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[62] 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. 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.

[63] 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.

[64] "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.

[65] Technically one might argue that this was dictum, but Justice Eismann's language made it clear that the Court intended it as a ruling.

> 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.[66] 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.

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,[67] due to a special provision in LLUPA exempting certain taking claims from exhaustion, Idaho Code §

[66] ACHD is the only road district in the State with the authority to impose impact fees. See footnote 50 at page 408.

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 County,* 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 0 at page 9), 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 (2004) (Schroeder, J.). But *KMST* did not directly answer that question.

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

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[67] 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.

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 (2004) (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.[68] In *BHA II*, the district court dismissed a claim by a different set of plaintiffs because they had not paid the fee under protest.[69] This was 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*.

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[68] 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*.

[69] 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.

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.[70] 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.

[70] 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.

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:

> 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 County,* 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.[71] It further held that while IDIFA is one way that

[71] "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

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.[72]

> 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

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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.

[72] 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.

> 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. County 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 County,* 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.[73] Ultimately, the developer signed an annexation agreement stating it agreed that the fees were "fair and

[73] 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.

equitable" and "agreed upon as consideration for the City providing essential governmental and utility services." *Old Cutters* at *3.[74] 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*.[75] (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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[74] 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.

[75] 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 2.D at page 16.) 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."[76] 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. 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.

[76] 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.

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), 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 County,* 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.[77]

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.[78] 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.

[77] 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.

[78] 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.

ATTACHMENT A: ABOUT THE AUTHORS

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For more than three decades, Chris has practiced water law, planning and zoning law, constitutional law, natural resources law, road and public access law, constitutional law, and legislative matters.

Best Lawyers in America has named him "Lawyer of the Year" four times. He is described in the Idaho Yearbook Directory as "centrally located in the world of Idaho public affairs" and "a key figure in Idaho water law." He serves on the Board of Advisors to the National Judicial College's "Dividing the Waters" water law program for judges.

His clients include Fortune Ten companies, municipal water providers, cities, counties, highway districts, energy companies, food producers, mining companies, and land developers. Before joining Givens Pursley in 1991, Chris taught water law and negotiation at the University of Colorado Law School. Prior to that, he practiced environmental law as counsel to National Wildlife Federation in Washington, D.C.

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John is an FCS GROUP principal and shareholder with over 28 years of professional experience, including 25 years with FCS GROUP, focusing on all aspects of financial and cap fee studies, from technical modeling and public involvement to ordinance drafting and implementation. Furthermore, John understands the multiple issues (operations, engineering, capital, regulatory, etc.) that must be considered and analyzed to perform a comprehensive financial study.

He has formed stormwater and transportation utilities and has developed water, sewer, stormwater, transportation and parks rates and charges for hundreds of clients. Mr. Ghilarducci offers a broad knowledge of public policy and finance, and a thorough understanding of the institutional issues and options underlying the formation of utilities and the design of supporting rate and charge structures.

John is also a recognized regional leader in cap fees and has served as a League of Oregon Cities trainer on the subject since 2005 and most recently in June of 2016. John's article, "Building a Solid System Development Charge Methodology" was published in LOC's July 2013 issue of Local Focus. He is currently working on a cap fee update for the City of Nampa.