Idaho Land Use Handbook

Appendices

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January 2, 2023

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Printed January 5, 2023 (632161_21.doc)

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Tab A LIST OF STATUTES, COURT RULES, AND CONSTITUTIONAL PROVISIONS

For the convenience of the reader, the table below sets out the statutes, court rules, and constitutional provisions governing land use planning and judicial review thereof in Idaho.

LLUPA	The Local Land Use Planning Act ("LLUPA"), Idaho Code §§ 67-6501 to 67-6538, was enacted in 1975. It authorizes cities and counties to engage in land use planning and zoning activities and establishes the governing rules of procedure and substance. LLUPA incorporates by general reference the judicial review provisions of the IAPA. Idaho Code §§ 67-6519(4) and 67-6521(1)(d).[1] LLUPA does not identify particular sections of the IAPA, but refers generally to the judicial review provisions under the IAPA. Presumably this includes Idaho Code §§ 67-5270 to 67-5279. However, LLUPA does not incorporate other provisions of the IAPA, such as the provision authorizing motions for reconsideration (Idaho Code §§ 67-5246(4) and (5)). *Arthur v. Shoshone County*, 133 Idaho 854, 858-59, 993 P.2d 617, 621-22 (Ct. App. 2000).
IAPA	The Idaho Administrative Procedure Act ("IAPA"),[2] Idaho Code §§ 67-5201 to 67-5292, was first enacted in 1965 and was substantially re-written in 1992. 1992 Idaho Sess. Laws ch. 263. The IAPA's judicial review provisions are found in Sections 67-5270 to 67-5279. Section 67-5279 contains the provisions governing the standard of review. The IAPA applies only to state agencies, not to local governments. Idaho Code § 67-5202(2); *Highlands Development Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008); *Giltner Dairy, LLC v. Jerome County*, 145 Idaho 630, 632, 181 P.3d 1238, 1240 (2008); *Petersen v. Franklin County*, 130 Idaho 176, 182, 938 P.2d 1214, 1220 (1997); *Allen v. Blaine County*, 131 Idaho 138, 140, 953 P.2d at 578, 580 (1998); *Arthur v. Shoshone County*, 133 Idaho 854, 859, 993 P.2d 617, 622 (Ct. App. 2000). However, other statutes, such as LLUPA, make the IAPA's judicial review provisions applicable to local governments. *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 126, 176 P.3d 126, 131 (2007). Thus, the judicial review provisions of the IAPA (but not the rest of the IAPA) applies to those local planning and zoning decisions that are subject to review under LLUPA.
Annexation	Idaho's annexation statute is not part of LLUPA. It is found in Idaho Code § 50-222. Section 50-222(6) contains the act's own judicial review provision, authorizing judicial review Category B and C annexations pursuant to the IAPA standards (Idaho Code § 67-5279).

[1] A parallel provision is found in Title 31 (Counties and County Law). It provides that all decisions of the board of county commissioners are reviewable pursuant to the IAPA. Idaho Code § 31-1506(1).

[2] The Idaho Supreme Court inconsistently employs the shorthand "APA," "IAPA," or "IDAPA." The latter should not be confused with the compilation of agency rules commonly referred to as IDAPA or the "Administrative Code." Idaho Code § 67-5201(1).

I.R.C.P. 84	In addition to LLUPA and the IAPA, judicial review is governed by procedures set out in Idaho Rule of Civil Procedure 84 ("I.R.C.P. 84"). It governs judicial review of all actions by state agencies and local governments (such as land use agencies), unless otherwise provided by statute. I.R.C.P. 84 sets out ten pages of detailed procedures including deadlines that are operative unless "a different time or procedure is prescribed by a statute." I.R.C.P. 84(b)(1). I.R.C.P. 84(a)(1) provides that judicial review is not available "unless expressly authorized by statute."
I.A.R. 34, 35	I.R.C.P. 84(p) incorporates by reference the appellate rules governing the form, arrangement and timing of briefs, deviating only in providing that one copy of the brief is sufficient for filing and service.
I.A.R. generally	I.R.C.P. 84(r) incorporates by reference any other appellate rules with respect to any procedure not covered in Rule 84.

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Idaho and U.S. Constitutions	***Due Process***: "[N]or shall any state deprive a person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1. A separate due process guarantee is found in the Fifth Amendment is applicable to actions of the federal government. "No person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law." Idaho Const. art. I, § 13. These provisions are applicable to land use and zoning actions. *Gay v. County Comm'rs of Bonneville County*, 103 Idaho 626, 628, 651 P.2d 560, 562 (1982). ***Equal Protection***: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; . . ." Idaho Const. art. I, § 2. ***Takings***: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Fifth Amendment is applicable to the states via the due process clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1. *County of Ada v. Henry*, 105 Idaho 263, 265, 668 P.2d 994, 996 (1983); *Chicago Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897). "Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor." Idaho Const. art. I, § 14. ***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. ***Municipal Taxing 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." Const. art. VII, § 6.

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Tab B EXAMPLE OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact and Conclusions of Law

The following are proposed findings of fact and conclusions of law for inclusion in the City's approval of the annexation and zoning of the development.

1. **Proposed Findings of Fact and Conclusions of Law – Annexation**

   a. **Conclusions of Law:** The properties to be annexed are contiguous or adjacent to the City, and lie within the City's area of city impact, in compliance with the statutory requirements for annexation as provided for in Idaho Code § 50-222(a).

      Findings of Fact: The properties are located near the intersection of _____ Road and _____ Road in the City's area of impact. Parcel B abuts the City limits on the west side. Parcel B abuts Parcel A at the southwest corner of Parcel B and the northwest corner of Parcel A, as shown on the legal description and the plans in the applications.

   b. **Conclusions of Law:** The property to be annexed shall be subdivided and platted, in accordance with all applicable statutes and ordinances, into tracts not exceeding five (5) acres as provided for in Idaho Code § 50-222(a).

      Findings of Fact: The development agreement shall include this condition for all plats within the development.

   c. **Conclusions of Law:** The property to be annexed and zoned is within the City's Urban Service Planning Area as set forth in the City's Comprehensive Plan, pursuant to the City's Zoning Ordinance.

      Findings of Fact: See Section 3.a. above.

2. **Proposed Findings of Fact and Conclusions of Law – R-4 Zoning.**

a. **Conclusions of Law:** The (R-4) zoning designation for Parcel A is harmonious with and in accordance with the Comprehensive Plan.

Findings of Fact: Parcel A is located in an area for which the Comprehensive Plan permits single family residential development.

b. **Conclusions of Law:** The development on Parcel A is consistent with the requirements of the R-4 zone including construction of only single-family homes, maximum density of four units per acre, and the requirement for connection with the municipal water and sewer systems of the City.

Findings of Fact: The development includes only single-family dwellings. The zone permits conditional uses for Planned Residential Developments including modifications for dimensional requirements as provided in the development application. The overall gross density of the development is 3.5 units per acre, within the 4 unit per acre maximum permitted in the R-4 District, not including density bonuses. The development will connect to the municipal water and sewer systems of the City.

3. **Proposed Findings of Fact and Conclusions of Law – L-O Zoning.**

a. **Conclusions of Law:** The (L-O) zoning designation for Parcel B is harmonious with and in accordance with the Comprehensive Plan.

Findings of Fact: Parcel B is located in an area designated for mixed use, in which the Comprehensive Plan permits office development. Comprehensive Plan at _____.

b. **Conclusions of Law:** The L-O zone is appropriate for Parcel B under the criteria set forth in the zoning ordinance, which are 1) that the L-O zone shall act as a transitional buffer between more intense non-residential uses and high density residential uses and 2) that connection to the City's municipal water and sewer system is required.

Findings of Fact: The property to the west of Parcel B is zoned light industrial (I-L) and is part of a light industrial PUD. Parcel B borders _____ Road on the east. Office development on Parcel B therefore would buffer the residential properties across _____ from the light industrial area. Municipal water and sewer connections are available to Parcel B.

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

DAVISCO FOODS INTERNATIONAL, INC., DBA JEROME CHEESE COMPANY Plaintiff, v. GOODING COUNTY, a political subdivision of the State of Idaho Defendant.	Case No.: CV-01-00542 **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

I. FINDINGS

This suit for declaratory relief was brought by Davisco Foods International, Inc., a Minnesota corporation, acting through its Idaho division, Jerome Cheese Company (hereinafter "Jerome Cheese" or the "Company"). On September 1, 2000, Jerome Cheese applied to the Gooding County Planning and Zoning Commission for a special

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT - 1

use permit for an environmental project now known as the "Reclaimed Water Irrigation Project" (the "Project").[1]

The Project is intended to recycle the Company's principal wastewater streams, producing clean water that, in turn, may be used for irrigation. The Company obtained an environmental permit for the Project from the Idaho Department of Environmental Quality, but has been unsuccessful, to date, in obtaining the required special use permit from the County.[2] The Company's application is now on appeal to the County Commission. Before acting on the appeal, however, the County Commissioners' granted the Company's petition to initiate mediation under a recently adopted statute, Idaho Code § 67-6510.[3] Mediation was initiated shortly thereafter, and remains underway.

The Gooding County Commissioners, acting on the advice of the County Prosecutor, approved the selection and appointment of a professional mediator and the

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[1] The Project was initially referred to as the "Wastewater Management Project."

[2] Following a public hearing, the Planning and Zoning Commission denied the Company's first application for special use permit by a 5-0 vote on November 29, 2000. The Company filed an appeal to the County Commission. Before acting on the appeal, the County granted the Company's request for remand back to the Planning and Zoning Commission. Shortly thereafter, the Company withdrew its first application and substituted a new application. The Planning and Zoning Commission conducted another public hearing and denied that application as well, this time on a 2-2 vote, with one commissioner rescuing himself.

[3] Jerome Cheese requested the initiation of mediation on June 19, 2001. The Board of County Commissioners voted to approve the request for mediation on June 25, 2001.

mediation panel.[4] The mediation panel is consists of 12 members. In addition, counsel for the County and the Company have participated in the mediation.

Panel members were selected on the basis of satisfying one or more of the following three criteria: One, a high level of involvement in the application process (including active opponents of the Project). Two, critical technical or regulatory expertise. Three, decision-makers from both the County Commission and the Planning and Zoning Commission.

In the latter category, three members were selected: Tom Faulkner, a County Commissioner; Joe Pavkov, a Planning and Zoning Commissioner who voted "yes" on the last application; and Pam Wascher, a Planning and Zoning Commissioner who voted "no" on the last application.[5] No additional commissioners were invited to participate in order to avoid violation of the open meetings act, Idaho Code §§ 67-2340 to 67-2347.

At the outset of the mediation, the mediator and participants in the mediation agreed to a set of ground rules and procedures designed to facilitate unfettered discussion, without undue public exposure, while maintaining a sufficient record of the discussion to enable non-participants in the process to understand what had occurred and comment

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[4]By agreement with the County, Jerome Cheese Company is paying for all expenses of the mediator as well as incidental costs (such as meeting rooms, meals and refreshments) associated with the mediation. The Company understands that it is entitled to no special consideration or treatment in exchange for undertaking these expenses. No compensation, fees or expenses are being paid to any mediation panel member.

[5]The Court is advised that Ms. Wascher has not participated in any meetings of the mediation panel, although she has twice submitted written questions and comments to the panel. Given the Court's ruling

thereon. These ground rules and procedures, including a set of minutes submitted under seal, have been made available to the Court.

This case arose as a result of concerns expressed by some in the community that inclusion of potential decision makers on the mediation panel renders the mediation an ongoing "*ex parte* communication" among interested parties and decision makers. Assuming that it does, the question arises whether those members of the Planning and Zoning Commission and the County Commission who participate in the mediation should recuse themselves from subsequent deliberation of and voting on the Company's application (or successor applications).

This suit was brought to resolve these issues in a timely fashion so that the affected Commissioners might not have to guess as to the proper action and in order to avoid the need for subsequent litigation on the issue. The suit was contested by Gooding County, through the Gooding County Prosecutor.

Each member of the mediation panel was made aware of this lawsuit. No person or entity sought to intervene or otherwise appeared in the suit.

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in this matter, it does not matter whether Ms. Wascher is deemed to be a member of the mediation panel, or not.

II. DECLARATORY ORDER

The Court hereby declares and orders as follows:

1. The Parties are properly before the Court. The Parties have raised, briefed and argued issues that properly frame a real case and controversy. This Court has jurisdiction to decide the matter.

2. The material facts are not in dispute. The issues presented are ripe for resolution by summary judgment.

3. Gooding County properly initiated the above-described mediation in response to a petition by the Jerome Cheese Company pursuant to Idaho Code § 67-6510.

4. The inclusion on the mediation panel of potential decision makers from both the Planning and Zoning Commission and the County Commission, although not required, is consistent with the legislative intent under the mediation statute. As a practical matter, their participation may be helpful in reaching an effective solution.

5. The Court deems it appropriate for mediation panel members to shield themselves from ongoing public scrutiny during the course of the mediation. Undue media attention, for instance, might inhibit the free and open exploration of ideas essential to an effective mediation. The Court rules that the ground rules and procedures

adopted by the mediation group appropriately serve these goals while, at the same time, preserving a sufficient record of the discussion to enable meaningful public input at a subsequent hearing.

6. The Court takes notice that the ground rules of the mediation dictate that no promises, contracts or "quid pro quo" agreements are to result from the mediation. This is an appropriate instruction. The Court hereby orders that no participant in the mediation shall pledge support or opposition to the application on the basis of any promise. Each party may freely take into account what they heard and learned during the course of the mediation, but they are also free to reconsider the evidence at any subsequent hearing.

7. Because the mediation process necessarily allows communication between interested parties and potential decision makers outside the regular hearing process, it constitutes, by definition, an *ex parte* communication.

8. In quasi-judicial proceedings, *ex parte* communications are not improper or unethical, so long as proper disclosures are made, as outlined below.

9. Decision makers participating in the mediation are bound by the conflict of interest rules set out in Idaho Code § 67-6507. These

rules prohibit decision-makers from voting on matters in which they have an "economic interest" as defined under the statute. However, these rules do not prohibit decision makers from engaging in discussions outside the hearing process with the project applicant regarding mitigation measures or other aspects of the application benefiting the public or particular public constituencies, so long as those decision makers do not seek or obtain economic benefits for themselves, their kin or their business associates (as set out in the statute). Consequently, participation in such discussions should not, in itself, disqualify decision makers from voting. As outlined below, however, any such discussion must be fairly disclosed on the record at the time of any subsequent hearing on the matter.

10. The determination of due process requirements in the context of administrative proceedings requires, at the outset, that the administrative proceeding be classified as "judicial," "legislative," or "quasi-judicial."

11. Proceedings before the Gooding County Planning and Zoning Commission (and any appeals thereof to the Gooding County Board of County Commissioners) dealing with special use permits for individual applicants constitute "quasi-judicial" proceedings.

12. In contrast, the adoption of zoning ordinances and other actions affecting broad segments of the community constitute "legislative" proceedings. "Judicial" proceedings in the administrative context occur only under the rubric of contested cases under the Idaho Administrative Procedure Act. Contested cases (with trial-type procedures) are not employed in zoning matters.

13. The due process standards for quasi-judicial proceedings and the required procedures for dealing with *ex parte* communications set out in *Idaho Historic Preservation Council, Inc. v. City Council of Boise ("IHPC")*, 134 Idaho 651, 8 P.3d 646 (2000), and cases cited therein.

14. In order to satisfy due process concerns in a quasi-judicial proceeding, the Planning and Zoning Commission must conduct a fair, on-the-record public hearing prior to considering and debating the application.

15. The record must include the application, all information properly submitted for the record by the applicant and interested parties, any other correspondence, documents or materials used by or relied upon by the Commission (including any staff reports or summaries), a fair summary of the content and source of any and all *ex parte* communications with any member of the Planning and Zoning

Commission, appropriate documentation summarizing any site visits or other information-gathering activities, a record of all public notices, a transcribable record of the public hearing and any deliberations of the Commission.

16. Finally, due process requires that the Planning and Zoning Commission's decision be limited to matters in the record (including information gained through properly disclosed *ex parte* communications, site visits, or other information gathering activities).

17. If these guidelines are followed, the public will be afforded a fair and adequate opportunity to respond to any *ex parte* communications at the hearing, thereby satisfying due process concerns.

18. Under Gooding County's current zoning ordinance, appeals to the County Commissioners are conducted on the record. Because the record is closed at the time of the appeal to the County, it is not possible to properly disclose subsequent *ex parte* communications and to allow public response thereto.

19. Consequently, if the Company were to elect to proceed directly with its pending appeal before the County Commission, I hereby order that the County Commissioner who participated in the mediation

(Tom Faulkner) shall recuse himself from debating or voting on the appeal.

20. If, on the other hand, the Company elects to withdraw its appeal and obtains a remand of the matter to the Planning and Zoning Commission, I hereby order the Planning and Zoning Commission to take appropriate steps to comply with the procedures outlined in paragraphs 14 through 17 above. Specifically, the Planning and Zoning Commission shall place on the record a summary of the mediation that fairly captures the substantive issues explored by the mediators without unnecessarily disclosing the internal dynamics of the debate. The Commission shall then conduct a properly noticed public hearing on the application prior to further deliberation and voting. At that hearing, all interested members of the public shall be afforded ample opportunity to respond to issues raised in the mediation summary.

21. The conclusions stated in the preceding paragraph are applicable on a remand before the Planning and Zoning Commission regardless of whether the Company proceeds with its current application, or withdraws it and re-initiates the process with a new application.

22. Although not required, the Company may wish to consider withdrawing its current application and submitting a new, revised

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application in order to avoid any question of impropriety with respect to *ex parte* communications. Filing a new application re-has the effect of restarting the process with a clean slate, thereby curing any prior impropriety with respect to prior *ex parte* communications. If this course is followed, it is not necessary to disclose *ex parte* communications associated with the mediation of the prior application. However, the Commissioners may choose to do so if they wish.

23. The mediation statute, Idaho Code § 67-6510(5) states that the "mediation process shall not be part of the official record regarding the application." I hereby rule that this prohibits the inclusion of a transcribable record or other unduly detailed account of mediation proceedings in the record, but does not prohibit the inclusion of a mediation summary as required under paragraphs 15 and 20 above.

24. If the steps outlined above in Paragraph 20 or Paragraph 22 are followed in good faith, and if there is no showing of other improper conduct or circumstances, then the two Planning and Zoning Commissioners who were selected for participation on the mediation panel (Joe Pavkov and Pam Wascher[6]) shall <u>not</u> be required to recuse themselves from any subsequent deliberation or voting in

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connection with further action on the pending application or any successor application. Moreover, the one County Commissioner who was selected for participation on the mediation panel (Tom Faulkner) shall not be required to recuse himself from any deliberation or voting in connection with a subsequent appeal with respect to the pending application or any successor application. In other words, the restriction placed on Mr. Faulkner in paragraph 19 above is not applicable so long as there has first been proper disclosure of the mediation and a public hearing with opportunity for public response, as spelled out above.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED this 11 day of January, 2002.

R. BARRY WOOD

S/

BARRY WOOD, District Judge

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[6] As noted above in footnote 5, Ms. Wascher may or may not be a member of the mediation panel.

Tab D REPORT TO LEGISLATURE ON TRANSFERABLE DEVELOPMENT RIGHTS

A LEGISLATIVE REPORT:

TRANSFERRABLE DEVELOPMENT RIGHTS (TDRs)

Submitted by

Idaho Association of Counties

January 10, 2000

LEGISLATIVE REPORT: TRANSFER OF DEVELOPMENT RIGHTS (TDRs)

In compliance with I.C. Section 67-6515A, the Idaho Association of Counties (IAC) hereby submits its "report to the Senate Local Government and Taxation Committee and the House Local Government Committee concerning systems for the transfer of development rights being proposed for adoption in counties throughout the state." This initial report includes a legislative history of HB 323, a copy of this legislation, comments and issues pertaining to the legislation, an inventory of counties developing TDR ordinances and their status in the process, copies of adopted and proposed ordinances, TDR workshops or educational activities performed by the IAC. Although not required by I.C. Section 67-6515, the report includes data provided by the Association of Idaho Cities (AIC) on TDR programs that have been developed by cities as well.

Legislative History

Passed during the 1999 session of the Idaho Legislature, HB 323 provided a new section to the Local Land Use Planning Act, Section 67-6515A. This section enabled Idaho counties and cities to create by ordinance procedures authorizing landowners to voluntarily transfer development rights subject to certain conditions. The purpose of the legislation was two-fold: (1) to provide a tool by which counties and cities could promote sound growth management and preserve agricultural lands and open spaces; and (2) to provide a means by which landowners retain use of and title to their property, yet realize economic gain by selling development potential in the form of marketable rights.

Blaine County was instrumental in the development and introduction of the enabling legislation. The county sought enabling legislation before developing its TDR program. A joint hearing before House Local Government and Senate Local Government and Taxation committees was held where testimony explaining the nature of TDRs was presented. Don Elliott of Clarion Associates defined TDRs and demonstrated their use. He listed areas in the country with TDR programs in place and assessed their effectiveness. Various landowners and county and city officials testified, sharing their concerns and questions regarding usage of TDRs. On February 3, 1999 Representatives Wendy Jaquet and Jim Kempton introduced HB 157 in the House Local Government Committee. Subsequent to that hearing, amendments were incorporated and the bill was reintroduced to House Local Government Committee as HB 323 on March 2, 1999. The bill passed the House on a vote of 46-23-1. Following introduction in the Senate, HB 323 passed 26-8-1, and was signed by the governor on March 26, 1999.

The legislation provides:

1. A voluntary system;
2. A market analysis to designate sending and receiving areas;
3. A deed restriction to be in effect in perpetuity, unless extinguished by the city or county;

4. Applications and permits not conditioned on TDR acquisition when in conformance with the comprehensive plan;
5. A ten (10) year limit within which a TDR must be used, unless a city or county extends the limit five (5) additional years;
6. Protection of water rights;
7. Consent of lienholder and parties with interest in property before TDR is authorized; and
8. Submission of annual report of county activity by Idaho Association of Counties.

Comments Regarding Enabling Legislation. (Section 67-6515A)

On August 8, 1999 Blaine County and the City of Hailey held an organizational meeting to discuss the implementation of TDR agreements which would be "interjurisdictional" between the county and the incorporated cities within the county. Mr. Don Elliott, a planning consultant with Clarion Associates of Denver, Colorado, was present and addressed elements of the enabling legislation:

Section 67-6515A(1.b) He addressed the pitfalls of a voluntary system: lack of understanding of the system; lack of liquidity (sellers but no buyers); inadequately sized receiving areas; and failure to calibrate the need for TDRs and provide incentives for their use. He offered remedies which could be incorporated into a TDR agreement which could increase the effectiveness of a voluntary system: education; creation of a "bank" to purchase TDRs; realistic and adequate planning before programs are implemented; detailed economic analysis of receiving and sending areas.

Section 67-6515A(3) He cautioned the "perpetuity" clause should not restrict future zoning boards, as planning and growth pressures forty or fifty years from now are unknown. Although this clause permits local government to "elect to extinguish such provision," future amendments may want to state how this flexibility is to be implemented.

Section 67-6515A(4) He warned that entitled zoning and subdivision approvals, such as upzones, would limit the success of a TDR program. He suggested that comprehensive plan zones (Agriculture, Industrial, Residential, Commercial) designate density maximums on accompanying land use maps. The purchase of TDRs would be required before a density increase could be granted. In instances of annexation or upzones, approval could be contingent on the purchase of TDRs.

Section 67-6515A(5) The ten-year grace period, or reversionary clause, allowing TDRs to revert to the landowner if unused, is intended to compel use of TDRs in a receiving area and avoid their retirement, thus maintaining the integrity of the TDR program. However, this could result in an unearned windfall as the landowner stands to profit twice when the development rights are resold. The legislature may want to amend the enabling legislation to prohibit retirement of

TDRs, or reconsider the necessity of the reversionary clause, thus allowing TDR retirement. Mr. Elliott considers Idaho's legislation unique, as other states' legislation do not contain a reversionary clause. Internally, this clause conflicts with the "perpetuity clause" of Section 3, as it allows reversion of a development right, while Section 3 stipulates a permanent forfeiture by deed restriction.

There are no amendments to I.C. Section 67-6515A for the legislature to consider at this time, but, given Mr. Elliott's comments, future changes may be recommended, as Idaho counties and cities further develop and implement TDR programs.

TDR Development and Implementation in Idaho Counties

There has been minimal activity at the county level regarding the implementation of TDR programs. However, there are two counties with existing programs, four conducting informal discussions, and one taking formal action. The attached table identifies each county and its current TDR status. As indicated, most Idaho counties have not considered the use of TDRs in their planning scheme.

Ada County and Boise City have had informal discussions regarding development of an interjurisdictional TDR program titled Foothills TDRs. Sending areas are located within the eastern and central foothills area, and receiving areas are in the western foothills. Boise City will establish a TDR bank for the purchase of development rights. A draft of the proposed ordinance is attached. They expect to hold public hearings within the year. Likewise, Blaine County has been conducting informal discussions with its cities toward the development of an interjurisdictional TDR agreement. Bingham, and Kootenai Counties have also informally visited this issue. Informal discussions may have occurred in a joint meeting between affected local governments or as a discussion item at a commissioners' meeting.

Clark County is in the process of taking formal action on a TDR ordinance. A copy of this proposal is attached. The county expects to conclude formal action in January 2000. The plan will allow TDR exchanges only within the same planning area, such as Rural zones. Hence, the sending and receiving areas are located in the same zone. Landowners will be allowed to transfer rights between any sites within their holdings or sites held by others. Focusing on residential dwelling units, landowners without the maximum dwelling units provided under the zone can sell this right to a landowner who wishes to increase his maximum dwelling units under the same zone. TDR exchanges will be recorded and are voluntary.

Fremont and Payette counties currently have TDR programs in effect. In 1992, Fremont County approved a TDR program which allows transfers to sites within a single landowner's holdings or sites held by others, regardless of the zoning. One (1) transaction has occurred to date. Payette County implemented a TDR program in 1990 which allowed transfers to sites within a single landowner's holdings. This program was revised in 1998 allowing transfers to sites held by others. Transfers are limited to residential dwelling units within Agriculture zones, only. Thirteen (13) transactions

occurred in 1999. Both county programs require transfers to be recorded. Payette County, however, does not prohibit the land from being rezoned and new development rights created. This may be inconsistent with the enabling legislation, as the land is not restricted in "perpetuity." If rezones are requested, this will require clarification. Payette and Fremont County assumed authority to institute TDR programs previous to enactment of Section 67-6515A. The codification of the enabling legislation guarantees this authority.

TDR Development and Implementation in Idaho Cities

The interjurisdictional TDR program being developed by Ada County and Boise City, referred to previously, is the only activity being reported by the Association of Idaho Cities at this time.

Education

One educational session was conducted in June, 1999 for the Idaho Association of Commissioners and Clerks.

Conclusion

Clearly, the TDR programs implemented and being proposed for implementation in Idaho reflect the flexibility of a TDR program, as they are customized to the individual needs of the subject county or city. The Idaho Association of Counties will continue to submit annual reports on the extent and character of TDR program development within the State as required by I.C. 67-6515A. The next report will be presented in January, 2001.

TDR ACTIVITY BY COUNTY

County	No Activity	Informal Discussion	Formal Action	Ordinance	Transactions
Ada		x			
Adams	x				
Bannock	x				
Bear Lake	x				
Benewah	x				
Bingham		x			
Blaine		x			
Boise	x				
Bonner	x				
Bonneville	x				
Boundary	x				
Butte	x				
Camas	x				
Canyon	x				
Caribou	x				
Cassia	x				
Clark			x		
Clearwater	x				
Custer	x				
Elmore	x				
Franklin					
Fremont				1992	1
Gem	x				
Gooding	x				
Idaho	x				
Jefferson	x				
Jerome	x				
Kootenai		x			
Latah	x				
Lemhi	x				
Lewis	x				
Lincoln	x				
Madison	x				
Minidoka	x				
Nez Perce	x				
Oneida	x				
Owyhee	x				
Payette				1998	13
Power	x				
Shoshone	x				
Teton	x				
Twin Falls	x				
Valley	x				
Washington	x				

HOUSE BILL NO. 323

View Daily Data Tracking History
View Bill Text
View Statement of Purpose / Fiscal Impact

Text to be added within a bill has been marked with Bold and Underline. Text to be removed has been marked with Strikethrough and Italic. How these codes are actually displayed will vary based on the browser software you are using.
This sentence is marked with bold and underline to show added text.
~~*This sentence is marked with strikethrough and italic, indicating text to be removed.*~~

Daily Data Tracking History

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H0323.............................................by REVENUE AND TAXATION
DEVELOPMENT RIGHTS - Adds to existing law to provide that a county or city
governing body may, by ordinance, create development rights and establish
procedures authorizing landowners to voluntarily transfer development
rights; and to provide requirements for and restrictions upon transfers of
development rights.

03/02    House intro - 1st rdg - to printing
03/03    Rpt prt - to Loc Gov
03/05    Rpt out - rec d/p - to 2nd rdg
03/08    2nd rdg - to 3rd rdg
03/09    3rd rdg - PASSED - 46-23-1
      AYES -- Alltus, Bieter, Black, Boe, Bruneel, Callister, Chase, Clark,
      Crow, Cuddy, Deal, Denney, Field(13), Gagner, Hammond, Hansen(23),
      Hansen(29), Henbest, Hornbeck, Jaquet, Jones, Judd, Kellogg, Kempton,
      Kunz, Lake, Mader, Marley, Meyer, Montgomery, Pischner, Pomeroy,
      Reynolds, Ridinger, Ringo, Robison, Sellman, Smith, Smylie, Stone,
      Taylor, Tilman, Tippets, Watson, Williams, Zimmermann
      NAYS -- Barraclough(Barraclough), Barrett, Bell, Campbell, Ellsworth,
      Field(20), Geddes, Gould, Hadley, Kendell, Limbaugh, Linford,
      Loertscher, McKague, Mortensen, Moyle, Sali, Schaefer, Stevenson,
      Stoicheff, Wheeler, Wood, Mr Speaker
      Absent and excused -- Trail
    Floor Sponsor - Jaquet
    Title apvd - to Senate
03/10    Senate intro - 1st rdg - to Loc Gov
03/16    Rpt out - rec d/p - to 2nd rdg
03/17    2nd rdg - to 3rd rdg
    Rules susp - PASSED - 26-8-1
      AYES--Andreason, Boatright, Bunderson, Burtenshaw, Crow, Danielson,
      Darrington, Davis, Dunklin, Ingram, Ipsen, Keough, McLaughlin, Noh,
      Richardson, Riggs, Risch, Sandy, Schroeder, Sorensen, Stegner,
      Stennett, Thorne, Twiggs, Wheeler, Whitworth
      NAYS--Branch, Cameron, Deide, Frasure, Geddes, Hawkins, King, Lee
      Absent and excused--Parry
    Floor Sponsor - Stennett
    Title apvd - to House
03/18    To enrol
03/19    Rpt enrol - Sp signed - Pres signed
03/23    To Governor
03/26    Governor signed
         Session Law Chapter 363
         Effective: 07/01/2000
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Bill Text

H0323

LEGISLATURE OF THE STATE OF IDAHO
Fifty-fifth Legislature First Regular Session - 1999

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 323

BY REVENUE AND TAXATION COMMITTEE

AN ACT

RELATING TO LOCAL LAND USE PLANNING; AMENDING CHAPTER 65, TITLE 67, IDA CODE, BY THE ADDITION OF A NEW SECTION 67-6515A, IDAHO CODE, TO PROVI THAT A COUNTY OR CITY GOVERNING BODY MAY, BY ORDINANCE, CREATE DEVELOPME RIGHTS AND ESTABLISH PROCEDURES AUTHORIZING LANDOWNERS TO VOLUNTARI TRANSFER DEVELOPMENT RIGHTS SUBJECT TO CERTAIN CONDITIONS, TO REQUIRE MARKET ANALYSIS BEFORE A CITY OR COUNTY DESIGNATES SENDING AND RECEIVI AREAS, TO PROVIDE THAT A CITY OR COUNTY SHALL NOT REQUIRE A PROPERTY OWN IN A SENDING AREA TO SELL DEVELOPMENT RIGHTS, TO PROVIDE THAT A TRANSF OF DEVELOPMENT RIGHTS ONCE EXERCISED SHALL BE A RESTRICTION ON THE DEVE OPMENT OF THE PROPERTY IN PERPETUITY UNLESS THE CITY OR COUN EXTINGUISHES THE RESTRICTION, TO PROVIDE WHEN AN APPLICATION FOR A PERM OR A ZONING DISTRICT BOUNDARY CHANGE MAY NOT BE CONDITIONED ON THE ACQU SITION OF DEVELOPMENT RIGHTS, TO REQUIRE THAT DEVELOPMENT RIGHTS BE EXE CISED WITHIN TEN YEARS OF ACQUISITION UNLESS EXTENDED BY THE CITY COUNTY FOR AN ADDITIONAL FIVE-YEAR PERIOD, TO PROVIDE THAT A TRANSFER OF DEVELOPMENT RIGHT SHALL NOT AFFECT A WATER RIGHT APPURTENANT TO THE PRO ERTY FROM WHICH A DEVELOPMENT RIGHT IS TRANSFERRED, TO PROVIDE THAT T TRANSFER OF A WATER RIGHT SHALL REMAIN SUBJECT TO TITLE 42, IDAHO CODE, PROVIDE THAT ORDINANCES AUTHORIZING A TRANSFER OF DEVELOPMENT RIGHTS SHA REQUIRE THE CONSENT OF LIENHOLDERS AND PARTIES WITH AN INTEREST OF RECO IN THE PROPERTY AND THAT A TRANSFER OF DEVELOPMENT RIGHTS WITHOUT SU CONSENT IS VOID, TO PROVIDE THAT A TRANSFERRED DEVELOPMENT RIGHT IS INTEREST IN REAL PROPERTY AND THAT AN UNEXERCISED DEVELOPMENT RIGHT SHA NOT BE TAXED AS REAL OR PERSONAL PROPERTY AND TO PROVIDE DEFINITION PROVIDING THAT THE IDAHO ASSOCIATION OF COUNTIES PROVIDE AN ANNUAL REPO TO THE SENATE LOCAL GOVERNMENT AND TAXATION COMMITTEE AND THE HOUSE LOC GOVERNMENT COMMITTEE CONCERNING SYSTEMS FOR THE TRANSFER OF DEVELOPME RIGHTS IN COUNTIES THROUGHOUT THE STATE; AND PROVIDING AN EFFECTIVE DATE

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 65, Title 67, Idaho Code, be, and the same hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 67-6515A, Idaho Code, and to read as follows

67-6515A. TRANSFER OF DEVELOPMENT RIGHTS. (1) Any city or county gover ing body may, by ordinance, create development rights and establish procedur authorizing landowners to voluntarily transfer said development rights subje to:

(a) Such conditions as the governing body shall determine to fulfill t goals of the city or county to preserve open space, protect wildlife hab tat and critical areas, and enhance and maintain the rural character lands with contiguity to agricultural lands suitable for long-range far ing and ranching operations; and

(b) Voluntary acceptance by the landowner of the development rights a

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any land use restrictions conditional to such acceptance.

(2) Before designating sending areas and receiving areas, a city county shall conduct an analysis of the market in an attempt to assure th areas designated as receiving areas will have the capacity to accommodate t number of development rights expected to be generated from the sending areas

(3) Ordinances providing for a transfer of development rights shall n require a property owner in a sending area to sell development rights. Once transfer of development rights has been exercised it shall constitute restriction on the development of the property in perpetuity, unless the ci or county elects to extinguish such restriction pursuant to the provisions this chapter.

(4) A city or county may not condition an application for a permit which an applicant is otherwise entitled under existing zoning and subdivisi ordinances on the acquisition of development rights. A city or county may n condition an application for a zoning district boundary change which is co sistent with the comprehensive plan on the acquisition of development right A city or county may not reduce the density of an existing zone and thereaft require an applicant to acquire development rights as a condition of approvi a request for a zoning district boundary change which would permit great density.

(5) A person may not acquire a development right without the intent exercise that right within a receiving area within ten (10) years of the da of acquisition. Upon a showing of good cause, a city or county may extend t right to exercise the development right for an additional period not to exce five (5) years. If the development right is not used before the end of t time period herein provided and any extension thereof, the development rig will revert to the owner of the property from which it was transferred.

(6) No transfer of a development right, as contemplated herein, sha affect the validity or continued right to use any water right that is appurt nant to the real property from which such development right is transferre The transfer of a water right shall remain subject to the provisions of tit 42, Idaho Code.

(7) (a) Ordinances providing for the transfer of development righ shall provide that no transfer of development rights may occur without t written consent of all lienholders and other parties with an interest record in the property from which development rights are proposed to transferred. Transfers of development rights without such consent shall void.

(b) A development right which is transferred shall be deemed to be interest in real property and the rights evidenced thereby shall inure the benefit of the transferee, his heirs, successors and assigns. unexercised development right shall not be taxed as real or personal pro erty.

(8) For the purposes of this section:

(a) "Development rights" shall mean the rights permitted to a lot, parc or area of land under a zoning or other ordinance respecting permissib use, area, density, bulk or height of improvements. Development rights m be calculated and allocated in accordance with such factors as area, flo area, floor area ratios, density, height limitations, or any other crit ria that will effectively quantify a value for the development right in reasonable and uniform manner that will carry out the objectives of th section.

(b) "Receiving area" shall mean one (1) or more designated areas of la to which development rights generated from one (1) or more sending are may be transferred and in which increased development is permitted

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occur by reason of such transfer.

(c) "Sending area" shall mean one (1) or more designated areas of land which development rights may be designated for use in one (1) or mo receiving areas.

(d) "Transfer of development rights" shall mean the process by whi development rights are transferred from one (1) lot, parcel or area land in any sending area to another lot, parcel or area of land in one (or more receiving areas.

SECTION 2. REPORT TO THE LEGISLATURE. In January 2000, the Idaho Associ tion of Counties shall provide a report to the Senate Local Government a Taxation Committee and the House Local Government Committee concerning syste for the transfer of development rights being proposed for adoption in counti throughout the state. Commencing January 2001, and annually thereafter, t Idaho Association of Counties shall provide a report concerning systems f the transfer of development rights which have been adopted and those propos for adoption in counties throughout the state.

SECTION 3. The provisions of Section 1 of this act shall be in full for and effect on and after July 1, 2000.

Statement of Purpose / Fiscal Impact

STATEMENT OF PURPOSE

RS09165

The purpose of this legislation is to amend Chapter 65, Title 67 by adding a new Section, Section 67-6515A. This legislation would allow any county or city governing body to establish a program in which the transfer of development rights may be utilized as an option to protect significant land resources while compensating the property owner. A Transfer of Development Rights Program involves the transfer of future development away from a resource protection area to an area appropriate for development. The governing body determines the amounts and conditions of such TDRs to fulfill the goals of the county or city pertaining to preservation and conservation of significant resources.

FISCAL NOTE

This legislation will have no fiscal impact on any state revenue or appropriation. By itself, this authorizing legislation will have no fiscal impact on any local government revenue or appropriation. If a local government chooses to adopt a Transfer of Development Rights Program under the authority of this legislation that government may incur some additional administrative costs. However, such costs should not require a significant expenditure of local funds.

CONTACT: Representative Wendy Jaquet
332-1000
Representative Jim Kempton
332-1000

STATEMENT OF PURPOSE/ FISCAL NOTE Bill No. H 323

Boise City / Ada Co.

October 13, 1999

Ms. Debbie Bloom
Association of Idaho Cities

Foothills Transfer of Development Rights Ordinance Process

When Boise City adopted its *Foothills Policy Plan* on October 8, 1997, it contained policies directing the city to implement an ordinance for the transfer of development rights (TDRs) as quoted below. The primary purpose of the TDRs is to preserve wildlife habitat and open space in the Eastern Foothills Planning area. The general plan is to send density from the Eastern to the Western Planning area in the Foothills.

> * The transfer of density rights from one parcel to another is allowed and encouraged under this plan. The method of calculating the available density on a given parcel for transfer to another parcel will be detailed in a future implementing ordinance.

In response to that the Boise City Planning and Zoning Commission directed staff to develop such an ordinance earlier this year. The Mayor and Council also made this as a priority for the staff.

The attached draft ordinance proposal is a first attempt to create such and ordinance. Any such ordinance will have to be jointly developed and adopted by Ada County. The two staffs have been working together to formulate a draft ordinance workable for both jurisdictions.

Questions about this may be directed to either Hal Simmons or Bruce Eggleston at Boise Planning and Development Services, 384-3830.

Foothills Transfer of Development Rights Ordinance

1.0 Statement of Purpose

As a means of protecting habitat values on sensitive lands and minimizing traffic impacts on downhill neighborhoods, the Boise Foothills Policy Plan supports the regulated transfer of development rights between non-contiguous parcels in the foothills. This ordinance provides a mechanism and a process for the transfer of development rights (TDR Credits) from one parcel to another, regardless of ownership or adjacency of either parcel. This ordinance may only be applied to Eligible Sending and Receiving areas in the foothills which are located within the Boise City Area of Impact. Projects which receive TDR's must be annexed to the City at the time of development approval. This ordinance does not pertain to the internal transfer of density within a development project or between co-applicants of contiguous projects.

1.1 Eligible Areas for Sending and Receiving TDR's

Eligible TDR Sending Areas shall be non-publicly owned developable properties in the Central and East Foothills planning areas as defined in the Foothills Policy Plan and depicted in Figure 1.

Eligible TDR Receiving Areas shall be developable properties in the Western Foothills planning area as defined in the Foothills Policy Plan and depicted in Figure 1.

1.2 TDR Density Allowances on Receiving Sites

Base density on an Eligible TDR Receiving Area property is one unit per 40 acres and may not be increased unless a density bonus for open space provision is requested consistent with the requirements of the Boise Foothills Policy Plan and Foothills Cluster Development Ordinance.

Any project located within an Eligible TDR Receiving Area which qualifies for a density bonus for open space provision may also receive a waiver for up to 80% of the required open space, provided that adequate TDR Credits are purchased from an Eligible TDR Sending Area property. Each TDR credit shall allow the construction of one additional dwelling unit at a density of 1.50 units per acre on the "waived" open space area. TDR Credits may not be used for development on slopes greater than 25%, within designated floodway zones or within the Open Space Preservation Priority areas identified in Section 11-06-05.7.4.C of the Foothills Planned Development ordinance.

1.3 TDR Credit Determination on Sending Area Sites

Any developable proper
ty located within an Eligible TDR Sending Area may establish the number of TDR Credits available for sale by applying the following formula:

Outside the Boise City Area of Impact - One Unit per 40-acres plus one unit per allowable lot split.

Inside the Boise City Area of Impact - 0.75 units per acre for all land which is less than or equal to 25% slope and which is one acre or more in size, plus 1 unit per 40 acres for all land which is greater than 25% slope. When calculating density credits, partial units shall be rounded down to the next whole number.

A CAD mapping program consistent with the requirements of the Foothills Cluster Ordinance shall be used to provide documentation of the allowable TDR Credits for any property.

1.4 TDR Credit Transfer Process

TDR Credits may only be transferred to a receiving area site during the application review and approval process for a foothills development. All developments which receive TDR's shall adhere to the requirements of the Boise Foothills Policy Plan and Foothills Cluster Development Ordinance. As part of the PUD and Development Agreement for the project, the amount of TDR Credits purchased and the location and amount of required open space "waived" for the placement of the TDR's in the project shall be documented. TDR's shall not be used to avoid compliance with Foothills Plan policies for protection of critical habitat areas, for development in unsafe areas or to exceed adopted street capacity standards.

The required CAD mapping and documentation of the formula used to determine available TDR Credits from the TDR Sending Area shall be submitted concurrent with the development application.

A record of survey, deed restriction and any required easements on the TDR Sending Area property shall be approved by the City concurrent with approval of the development on the TDR Receiving Area property and shall be recorded by the County Recorder and submitted to the City prior to issuance of grading permits on the TDR Receiving Area property.

1.5 Residual Value of TDR Sending Sites

All or part of the allowable TDR Credits may be sold from an Eligible TDR Sending Area property to an Eligible TDR Receiving Area property. If only a portion of the total TDR Credits are sold, the portion of the sending property from which TDR credits have been sold shall be designated on a map and permanently deed-restricted to prevent future development. The TDR Sending Area property owner shall retain the ability to develop the remaining land which is less than or equal to 25% slope pursuant to compliance with the requirements of the Foothills Policy Plan and Foothills Cluster Development Ordinance.

If all of the TDR Credits are sold from an Eligible TDR Sending Area property, the entire property shall be deed-restricted to prevent future development.

Some or all of the TDR Sending Area property may be retained by the original owner for grazing, farming or other non-development uses consistent with the goals and policies of the Foothills Policy Plan and the limitations of the deed restriction. Alternatively, any land from which TDR credits have been sold may be offered for sale or gifted to a land trust or other suitable agency for ownership and maintenance consistent with the goals and policies of the Foothills Policy Plan and the limitations of the deed restriction.

As part of the deed restriction resulting from the sale of TDR's, Boise City may require trail and/or habitat corridor easements pursuant to the Ridge to Rivers Trail Plan and/or the recommendations of the Open Space Management Plan (when adopted). Flexibility in defining buildable area for purposes of determining available TDR credits, consistent with the flexibility granted in the Foothills Cluster Development Ordinance for Priority Open Space preservation, may be used when similar priority open spaces is to be preserved in TDR sending areas.

1.6 TDR Credit Value

The value of TDR Credits shall be determined by the free-market and by negotiation between a willing seller and a willing buyer. As a general rule, a real-estate appraiser should determine the value of the credits based upon the location of the land, availability of public services and utilities, ease or difficulty of development engineering, an assumption of compliance with the requirements of the Foothills Policy Plan and Foothills Cluster Ordinance and other appropriate factors.

1.7 TDR Tracking

Boise City shall retain a record, including a digital map, of all parcels which have sold or purchased TDR Credits. In the case of TDR Receiving Area sites, the City shall retain the Development Agreement which identifies the number of TDR Credits purchased, where and who they were purchased from, and how much required open space was waived as a result of the TDR purchase.

In the case of TDR Sending Area sites, the City shall retain a copy of a map depicting the location of all land from which TDR Credits have been sold, a copy of the deed restricting future development on that land and a copy of any easements granting access to the public for trails or habitat corridors.

1.8 TDR Banking

Boise City shall create and maintain a fund for the purchase of TDR's from willing sellers in designated sending areas. The City may hold the TDR's and resell them to willing buyers in receiving areas at the current market value as demand arises. Boise City purchase of TDR's for banking purposes shall be dependent upon fund availability, site priority and other factors to be determined by the City.

I permit procedure are fulfilled. Also, the development right (i.e. the one dwelling unit) assigned to such a parcel may be transferred. The acceptable proof of the prior existence of a parcel shall be actual separate ownership, as shown by recorded deeds or other instruments of conveyance. No separate parcels exist within contiguous lands held by a single owner, regardless of how those lands are or have been described for any other purpose. Multiple subdivision lots held by a single owner are a single parcel for the purposes of development, but each existing, undeveloped subdivision lot is assigned one development right.

2. In order to promote land use compatibility, the present lot size of existing platted subdivisions may be extended to adjoining lands that are:

a. less than 20 acres in extent, and

b. surrounded on three sides by the existing subdivision/s and/or major natural barriers.

TABLE VIII.3. RESIDENTIAL DENSITY ASSIGNMENTS BY LAND TYPE

site characteristics	*average density, one dwelling unit per*
wetlands, slopes over 30%	25 acres
stream corridors, critical wildlife habitat, slopes of 15-30%	10 acres
other areas	2.5 acres
maximum number of units, including bonus units	0.5 per acre

Notes: Where site characteristics overlap, the most restrictive density assignment shall apply. State health regulations may prevent a development from attaining the average density or minimum lot size permitted by these regulations. Remember that these densities are averages, allowing the developer substantial flexibility in the actual arrangement of lots.

RR. Density Transfer to Cluster Developments. Development rights may be transferred to any development that meets the criteria established by VIII.UU.

1. Transfers may be made only from parcels of productive cropland, wetlands, stream corridors, wildlife habitat, or visually sensitive areas that are located within the Island Park Zoning District or the City of Island Park.

2. Where a transfer will result in development of a parcel including productive cropland, wetlands, stream corridors, wildlife habitat, or visually sensitive area, the transfer must protect land that is more productive, or has higher functional value as a wetland, stream corridor, wildlife habitat, or scenic area.

3. Where such a transfer of density is made, the developer shall provide a complete and accurate legal description of the parcel/s from which the transfer is made. Where the transfer involves multiple ownerships, copies of the instruments of conveyance shall be provided.

EXAMPLE

TRANSFER OF DEVELOPMENT RIGHTS

The purpose of this instrument is to attest to a transfer of development rights, as provided by the *Fremont County Development Code,* VI.MM., VII.PP., or VIII. RR., and supporting language.

WHEREAS:

1. (Name/Names) are the owners of (number) of development rights assigned to (insert or attach legal description of the "sending" parcel).

2. (Name/Names) desire to transfer these development rights to (insert or attach legal description of the "receiving" parcel), a Class II Permit for the development of which, including use of the transferred development rights, was approved by Fremont County on (date).

3. (Name/Names) have obtained consent for this transfer of development rights from all parties with a real interest in the parcel described in 2., above, and that consent is attested by the signatures below.

   NOW, THEREFORE: in consideration of the density bonus approved by Fremont County, (Name/Names) Extinguish (number) development rights assigned to (insert or attach legal description of the sending parcel) and transfer those rights to (insert or attach legal description of the receiving parcel).

IN WITNESS WHEREOF, we set our hands on (date).

(signatures)

STATE OF IDAHO
County of Fremont

This instrument was acknowledged before me on (date) by (Name/Names).

(Notary Public)

My commission Expires: (date)

only done 1

Payette County

ORDINANCE 1998-7

AN ORDINANCE OF PAYETTE COUNTY, IDAHO, AMENDING SECTIONS 8-5-10: A. AND 8-5-10: E. OF THE PAYETTE COUNTY CODE BY DELETING THE REQUIREMENT THAT PROPERTY WHICH DOES NOT QUALIFY AS A RESIDENTIAL BUILDING SITE IS EXCHANGED FOR PROPERTY WHICH QUALIFIES AS A RESIDENTIAL BUILDING SITE BE ABUTTING PROPERTY; ESTABLISHING CRITERIA; REPEALING SECTION 8-5-10: H. WHICH IS THE DEFINITION OF ABUTTING PROPERTY; PROVIDING FOR A REPEALER; PROVIDING FOR SEVERABILITY; PROVIDING FOR PUBLICATION BY SUMMARY; SETTING AN EFFECTIVE DATE;

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF PAYETTE COUNTY, IDAHO;

SECTION 1: Section 8-5-10 of the Payette County Code is hereby amended to read as follows:

> 8-5-10: A. Exchange: In the event that a person desires to maintain a parcel of agricultural land, which land is zoned A and which qualifies for a single family dwelling building permit, and if there exists a parcel of property which does not qualify to receive a single family dwelling permit but which is more suited for residential use, upon application and after hearing, the person may be allowed to transfer the right to build on a qualifying site to a site or parcel of property which would otherwise not qualify as a building site.

SECTION 2: Section 8-5-10 E. is here by amended to read as follows:

> 8-5-10 E. Criteria: (1) Before allowing an exchange as described in Section 8-5-10 A., to occur, the Board of County Commissioners shall consider the following factors. A) the comparative quality of the soils B) the desirability of the locations for farming operations C) existing uses D) surrounding uses, potential or future uses E) the comparative sizes of the parcels and F) such other information as may be relevant to a decision. If after considering the criteria set forth above, the Board concludes that by permitting the exchange to occur the Board will be protecting prime agricultural lands within the County, the Board may then enter an order permitting the exchange to take place. The Board may refuse to allow the transfer for any reason as long as the reason is not a constitutionally prohibited reason.

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(2) Before issuing a permit which allows the exchange to occur, the Board must make a finding that the parcel to be built upon meets minimum lot size requirements, is more suited for residential use than the parcel from which the development right is being transferred, or with proper facilities can support higher density development. In addition, the Board shall require the party requesting the exchange to sign an agreement in a form approved by the Administrator acknowledging that the transfer has occurred and that the parcel of property which formerly qualified for a residential dwelling building permit, shall no longer qualify for such a permit.

(3) In the event a residential building permit is transferred into a city impact area, before the transfer is permitted the affected city shall be given notice of the application and hearing.

SECTION 3: Section 8-5-10: H is hereby repealed.

SECTION 4: Within one (1) month of passage the Ordinance or a summary thereof shall be published in a newspaper of general circulation in Payette County in accordance with Idaho Code.

SECTION 5: This Ordinance shall be in full force and effect immediately upon publication following passage and approval.

SECTION 6: Any portions of any Ordinances which are in conflict this Ordinance are hereby repealed in so far as the conflict exists.

SECTION 7: If any portion of this Ordinance is found to be unconstitutional or unenforceable for any reason, that portion shall be stricken from this Ordinance and the remainder shall be considered as that Ordinance which was passed.

Passed and approved by the Board of County Commissioners of Payette County, Idaho on this 13th day of April, 1998.

BOARD OF COUNTY COMMISSIONERS OF PAYETTE COUNTY, IDAHO

By Arnold Howard
Arnold Howard, Chairman

ATTEST:

Laura L. Strickle
Payette County Clerk

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C-21-99

PAYETTE COUNTY
TRANSFER OF DEVELOPMENT RIGHTS
1999

1. TRANSFER OF BUILDING SITE, by John & Vea Loy Ross. "To" property located near 2815 Hwy 52, Payette "From" property located near 2760 Killebrew Dr., Payette. Approved, 2/99.

2. TRANSFER OF BUILDING SITE, by Ron Ray. "To" property located off SW 4th and Hwy 30S, "From" property located off SW 2nd Ave and Hwy 30 S. Approved, 3/99.

3. TRANSFER(S) OF DEVELOPMENT RIGHT(S) by Leroy & Lorrie Tracy. The "To" property is located near 1405 Echo Ave, Parma. The "From" property is located near 6100 Blaine Rd, New Plymouth. Approved, 8/99.

4. TRANSFER OF DEVELOPMENT RIGHT by Leroy & Lorrie Tracy. The "To" property is located south of 5478 Hwy 52, New Plymouth. The "From" property is located near 6100 Blaine Rd, New Plymouth. Approved, 8/99.

5. TRANSFER DEV RITE by Clayne Cooper - Harold Lamb. "To" property near 1368 SW 3rd Ave, Fruitland. "From" property near 4750 SE 3rd Ave, NP Approved, 7/99.

6. TRANSFER DEV RITE by Clayne Cooper - Joe Levanger. "To" property near 1368 SW 3rd Ave, Fruitland. "From" property near 4300 SW 4th Ave, NP. Approved, 7/99.

7. TRANSFER OF DEVELOPMENT RIGHT by Ralph Dykema. "To" property is located near 3830 SW 4th Ave, NP.. "From" property owned by Danny King is located 1/4 mile off SW 4th Ave, NP. Approved, 7/99.

8. TRANSFER OF DEVELOPMENT RIGHT by Steve Griffin. "To" property near 4852 SE 3rd Ave, NP. "From" property owned by Jim Opdahl, is located near 10871 N. Iowa, Payette. Approved, 7/99.

9. TRANSFER OF DEVELOPMENT RIGHT by Steve Griffin. "To" property near 4852 SE 3rd Ave, NP. "From" property owned by Doug & Kerry White, is located near 5866 Hwy 30 S, NP. Approved, 7/99.

10. TRANSFER OF DEVELOPMENT RIGHT by Richard Clow. "To" property is located near 2900 NW 4th Ave, Fruitland. "From" property owned by Eldred Farms, Inc. is located adjacent to 3232 SW 2nd Ave, Fruitland. Denied, 8/99.

11. TRANSFER OF DEVELOPMENT RIGHT by Craig and Karen Dolven. "To" property near 5900 Hwy 52, NP. "From" property owned by Stephen & Stephanie Bochenek, is located on Cassia Road, NP. Approved, 1/99.

Clark County

Board of Commissioners shall review and approve all proposals for large-scale industrial development, including proposals for the storage or disposal of hazardous or nonhazardous waste.

B. Approval of any application for an industrial or commercial development will be conditioned upon compliance with all applicable federal and state laws. Clark County may also require applications for large-scale industrial developments to be accompanied by studies, conducted at the developer's expense, which:

i. identify the quantities, types, points of origin, and method of transportation and ultimate disposal of any wastes involved;

ii. assess the potential impacts of the proposed facility on local custom, culture, historical use, and public access; and

iii. assess the potential short and long term effects on public health, public safety, the environment, and future land use.

C. Commercial development in rural areas must be consistent with the level of access and other public services available, and compatible with neighboring uses (see also Chapter 14).

11 - EXTENT OF RURAL RESIDENTIAL DEVELOPMENT

Clark County had just 0.4 residents per square mile in 1990 (and well over half the population was concentrated in Dubois, leaving the rest of the county with a density of less than 0.2 persons per square mile). It will take very little development to change the frontier character that goes with such a low density. The amount of development permitted will also affect ground and surface water resources, wildlife habitat, scenic views, neighboring farm and ranch operations, and the cost of providing public facilities and services.

Clark County will limit development in its unincorporated areas to: protect ground and surface water quality and other natural resources; limit conflict with agriculture and other traditional activities, like logging and mining; limit the need to provide additional public facilities and services in remote areas; and maintain the rural character the county's residents cherish. In limiting development, the county will respect owners' rights to a reasonable use of their property and provide the maximum flexibility consistent with the goals adopted in this plan for those who wish to develop.

These goals can be accomplished only by ensuring that large parts of Clark County's landscape remain undeveloped, and in a traditional use. This can best be done using an "open space development pattern" that has the elements listed below.

POLICIES

A. Balance the Total Number of Lots Created with Undeveloped Lands. The number of new building sites created must be kept in balance with the continuing viability of neighboring land uses, infrastructure capacity, and the character of the area. Column 2 in Table 2 shows the number of new lots or parcels that can be created in the different planning areas in Clark County. An entry of "1:40" in that column indicates that a landowner may create one new lot for each 40 acres in his or her holdings.

EXCEPTIONS: This requirement will not apply to the creation of new parcels of over 160 acres in size. Lots of less than the required acreage that were in existence on the effective date of this plan will still have one development right.

Table 2 - Development Factors

Column 1: Planning Area	*Column 2: Lots/Acreage*	*Column 3: Minimum Average Lot Size*
Kilgore	1:40	2.5 Acres
Spencer	1:20	2.5 Acres
Medicine Lodge-Crooked Creek	1:20	2.5 Acres
Birch Creek	1:20	2.5 Acres
Snake River Plain	1:20	2.5 Acres
Area of City Impact	development permitted only via annexation	development permitted only via annexation

The planning areas listed on this chart are shown on the map on page 21.

B. But Do Not Require Large Minimum Lot Sizes. Requiring a farmer or rancher to sell 20–40 acres to create a building site will result in the

rapid conversion of land from agriculture to rural residential use. Requiring a large minimum lot size will also result in: i. an extensive edge between agricultural and nonagricultural uses, increasing the potential for conflict; ii. pressure for the development of naturally hazardous or sensitive lands because many owners will have large areas that consist primarily of areas with a seasonally high water table, wildlife habitat, or steep slopes; and iii. higher costs for the developer, because an extensive road and utility network is required to serve very large lots. Table 2 sets a minimum average lot size of 2.5 acres. That should be spacious enough -- as long as development is limited to small clusters of homes by the lot:acreage ratio -- to avoid a suburban appearance and, if the lots are properly sited, minimize the threat of groundwater contamination by on-site sewage disposal systems.

The color plates inserted between pages 20 and 21 show how the flexibility offered by this policy can result in attractive open space developments, where lots are clustered in suitable locations, leaving most of the rural landscape intact. The first plate shows a site in eastern Clark County divided into five-acre lots (the density permitted by the zoning that prevailed before this plan was adopted). That hypothetical development clearly does not fulfill the goals of this plan. The second plate shows an alternative that allows the landowner to take advantage of the market for rural lots, while helping maintain the scenic ranching landscape.

~~C. Permit Voluntary Transfer of Development Rights. Policies 11.A. and 11.B. encourage open space development, in which residential lots are clustered on suitable sites, leaving the remainder of the property in agricultural use or as common open space that can be enjoyed by all lot owners. Landowners should also be allowed to transfer development rights from productive lands or sites that have natural limitations to:~~

~~1. suitable sites on noncontiguous parcels they own, or~~

~~2. suitable sites owned by others.~~

~~Transfer of development rights between owners will be presumably be based on a mutually beneficial private agreement. Clark County will require that all such transfers be recorded. Transfers of development rights shall also be limited to the same planning area.~~

D. Require Every Lot to Include a Suitable Building Site. Naturally hazardous and sensitive lands are best left in agriculture or another open space use. Such lands may be included in a development -- as part of large lots or common open space areas -- but every lot must include a building site that is not exposed to natural hazards and that does not intrude into special flood hazards areas, areas with a high water table, or

other sensitive lands. See also 5.P. and 5.Q.

Naturally ***hazardous*** *lands include specialflood hazard areas mapped by the Federal Emergency Management Agency; other known flood hazard areas, including sites near the apex of an active alluvial fan; wildfire hazard areas (which can be identified based on fuel loading, slope, etc. - Clark County should be able to obtain assistance in assessing this hazard from the Forest Service or BLM); slopes over 30%; and other slopes that are clearly unstable, including the landslide surfaces that are common in the mountainous part of Clark County. Parts of the county are also exposed to an earthquake hazard, but that would best be addressed through the adoption of building codes, rather than regulating the creation of lots.* ***Sensitive*** *lands include riparian corridors, areas with a high water table, and other sites where development could adversely impact water quality. This term could also include important wildlife habitats, moderate slopes (15-30% - which may be subject to some hazard of slope failure, but where the main concerns raised by development are the downslope and downstream impacts of accelerated runoff and erosion, the visibility of the development, wildfire, etc.), and scenic areas.*

CHAPTER XI - RURAL ZONING DISTRICT

A. Purpose of This Zoning District. The purpose of the Rural Zoning District (RZD) is to promote continued agricultural use of most rural private lands within Clark County, while also providing for other traditional rural activities, including small-scale mining (large mining operations are industrial uses), logging, and home businesses, that are compatible with farm and ranch operations. This zoning district also permits limited development of rural residences and commercial uses.

B. Permitted Uses. The permitted uses in the RZD shall be:

1. agriculture: crop and livestock production, including

   a. initial sorting, grading, shipping, and storage of agricultural commodities; and

   b. for-fee hunting on agricultural lands (guest ranches, lodges, and outfitting services may be permitted as home businesses, see XI.B.6.); but not

   c. confined animal feeding operations, farm service enterprises, food processing, or other industrial uses, which must be located in the IZD.

2. timber harvest, including thinning and other forest practices needed to produce timber, but not wood products manufacturing, which must be located in the IZD;

3. mining, but not industrial activities based on mining, which must be located in the IZD;

   EXCEPTION: A Class II permit shall be required for certain mines, as per XI.C.

4. lot splits, as permitted by XI.E.;

5. one, one or two family dwelling per parcel, on parcels larger than 160 acres, lots created by lot splits, or lots platted in approved subdivisions;

   EXCEPTION: One, one family dwelling shall also be permitted on each nonconforming lot, provided that an on-site sewage disposal system for that dwelling is approved by the District 7 Health Department.

6. home businesses, in compliance with the detailed performance standards of Appendix E;

7. accessory uses and buildings customarily associated with the uses permitted in this zoning district, including the conditional uses; and

8. minor utility installations.

A Class I permit shall be required for the establishment of any new permitted use or building, unless that use or building is exempted from the requirement for a permit by Chapter III.

C. Conditional Uses. The conditional uses that may be permitted in the RZD shall be:

1. residential subdivisions, as provided by XI.E.;
2. commercial uses, as provided by XI.E.; and
3. large-scale mining operations.

D. Specification Standards.

1. The specification standards for residential development within the RZD shall be as shown in Table 3.

2. The specification standards for commercial development within the RZD shall be the same as for the HCZD. See Table 1.

3. The specification standards for agricultural accessory buildings within the RZD shall be the same as for the IZD. See Table 1.

Table 3 - Specification Standards for the Rural Zoning District

Minimum lot size	See Table	Minimum front setback	50 feet
Minimum side setback	20 feet	Minimum rear setback	20 feet
Maximum lot coverage	30%	Maximum building height	35 feet

Definitions are provided in Table 1.

E. Performance Standards. Development in the RZD shall be subject to the general performance standards of Chapter XVI, as applicable, and the additional specific performance standards adopted here.

1. Residential Development in the RZD. Residential development shall be permitted in the RZD, but only within the limits established here, which are intended to keep rural residential development in balance with neighboring agricultural uses, the limited infrastructure capacity of rural Clark County, and the character of the area. Column 2 in Table 4 shows the number of new lots or parcels that may be created in the different planning areas in Clark County. An entry of "1:40" in that column indicates that a landowner may create one new lot for each 40 acres in his or her holdings.

a. A maximum of four lots or parcels of less than 160 acres in size may be created from each original parcel in the RZD as lot splits. A Class I permit shall be required for each lot split.

b. Any further land divisions shall be part of a platted subdivision, for which a Class II permit has been approved. The total number of land divisions, including both lot splits and subdivision lots, made from any original parcel shall be limited to the number permitted by Table 4.

2. Minimum Lot Size for Residential Development in the RZD. Column 3 in Table 4 shows the minimum lot size in each planning area.

3. Open Space Development Pattern. The difference between the number of new lots or parcels that may be created in the different planning areas and the minimum lot size is intended to encourage a development pattern in which open space is maintained by clustering the residential lots on a relatively small portion of the site and leaving the remainder in agricultural use or as open space for the enjoyment of the development's residents. This ordinance does not make clustering mandatory.

~~4. Transfer of Development Rights.~~

~~a. The development rights assigned by Table 4 may be transferred to any suitable site within the owner's holdings. Both a map and a full legal description of the lands from which any such transfer is proposed shall accompany the application for a permit.~~

~~b. The development rights assigned by Table 4 may be transferred to other properties within the same planning area. Both a map and a full legal description of the lands from which any such transfer is proposed shall accompany the application for a permit, as shall a statement of consent to the transfer signed by all owners involved. The instruments necessary for transfer of development rights shall be recorded before a certificate of compliance is issued.~~

5. Status of Open Space. This ordinance does not require that a conservation easement be recorded on the undeveloped portions of open space developments. Additional development rights could be assigned through the amendment of the comprehensive plan and this ordinance.

Table 4 - Development Factors in Rural Clark County

Column 1: Planning Area	*Column 2: Lots/Acreage (development rights)*	*Column 3: Minimum Average Lot Size*
Kilgore	1:40	2.5 acres
Spencer	1:20	2.5 acres
Medicine Lodge-Crooked Creek	1:20	2.5 acres
Birch Creek	1:20	2.5 acres
Snake River Plain	1:20	2.5 acres
Area of City Impact	development permitted only via annexation	development permitted only via annexation

6. Resource Management Easement. No permit for a new dwelling in the RZD shall be approved until a resource management easement has been recorded. The resource management easement appears in Table 5.

7. Site Suitability. Every lot created and every commercial development shall include a building site that is not exposed to natural hazards and that does not intrude into sensitive areas. Small areas of hazardous or sensitive lands may be included within a development, but only as part of a large lot that also includes a suitable building site or in a common open space area.

8. Accessory Buildings. Accessory buildings are subject to the setback requirements of Table 3. Accessory buildings shall also be separated from other buildings on the same

lot by at least five feet.

9. Livestock on Residential Premises. Livestock may be kept on residential lots in the RZD, but only in compliance with these standards.

a. All areas within which livestock is kept shall be surrounded by a legal fence, as defined by state law.

b. All areas in which livestock are kept shall be maintained so as not to create a nuisance impacting neighboring properties with noise, odors, insects, or dust.

10. Landscaped Buffers. Mining operations and commercial developments in the RZD shall retain (where sufficient native vegetation exists) or install and maintain, or provide for the maintenance of, landscaped buffers for adjoining dwellings (including seasonal dwellings) or adjoining areas that have been platted for residential development, but are not yet occupied.

a. The buffer requirement for mining operations shall be the same as for a buffer between the IZD and the LDRZD: see Table 2 and Appendix F.

b. The buffer requirement for commercial developments shall be the same as for a buffer between the HCZD and the LDRZD: see Table 2 and Appendix F.

11. Internal Circulation. Commercial developments that include multiple occupancies shall provide a safe system of internal circulation that is maintained by the owner or operator, or an owners' association. Internal circulation systems shall comply with the detailed performance standards of Appendices G and H.

F. Where Can This Zoning District Be Mapped. The RZD covers all unincorporated areas of Clark County except those mapped as IZD.

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Tab E PARTIAL LIST OF IDAHO STATUTES ON EMINENT DOMAIN POWERS

- Idaho Code § 21-106 (establishing, operating and maintaining state airports by the Idaho Transportation Department)
- Idaho Code § 21-508 (acquisition of air rights for airport approach protection)
- Idaho Code § 21-807(3) (regional airport authority board of trustees vested with eminent domain power)
- Idaho Code § 31-806 (acquisition of property for parks or recreational purposes by board of county commissioners, including by eminent domain)
- Idaho Code § 31-4114 (acquisition of real or personal property by television translator district which is necessary or convenient for its purposes)
- Idaho Code §§ 31-4204(d); 31-4214 (county housing authorities vested with eminent domain power)
- Idaho Code § 31-4906(6) (board of directors for a regional solid waste district vested with eminent domain power)
- Idaho Code § 33-601(8) (school district board of trustees vested with eminent domain power)
- Idaho Code § 33-2122(d) (dormitory housing commissions in each junior college district is vested with eminent domain power)
- Idaho Code § 33-3804(c) (state educational institutions are vested with eminent domain power)
- Idaho Code § 36-104(b)(7) (fish and game commission vested with power of eminent domain)
- Idaho Code § 39-1331(j) (board of health and welfare vested with power of eminent domain)
- Idaho Code § 39-2804(e) (mosquito and vermin abatement district board of trustees vested with power of eminent domain)
- Idaho Code § 40-313(3) (Idaho Transportation Board vested with eminent domain power re: "restoration, preservation, and enhancement of scenic beauty, for use as informational sites, and for rest and recreation of the traveling public")
- Idaho Code § 40-506 (Idaho Transportation Department vested with power of eminent domain re: advertising displays required to be removed)
- Idaho Code § 40-606 (condemnation of highway rights-of-way by county commissioners)
- Idaho Code § 40-1307 (highway districts vested with power of eminent domain)
- Idaho Code §§ 42-1106; 42-1107 (persons desiring right of way for ditch, canal or conduit for water may proceed under eminent domain if any other owner refuses passage thereof; same true for location of drains for the purpose of carrying away excess water)
- Idaho Code § 42-1734(9) (Idaho Water Resource Board vested with eminent domain power)
- Idaho Code § 42-2939 (drainage districts vested with eminent domain power)
- Idaho Code § 42-3115(11) (board of commissioners of flood control districts vested with eminent domain power)
- Idaho Code § 42-3212(j) (board of directors of a sewer district vested with eminent domain power)
- Idaho Code § 42-3708(6) (directors of a watershed improvement district vested with eminent domain power)
- Idaho Code § 42-5224(13) (board of directors for groundwater districts vested with eminent domain power)
- Idaho Code §§ 43-304; 43-908 (board of directors for an irrigation district vested with eminent domain power)
- Idaho Code §§ 50-311; 50-320; 50-1030 (cities have various eminent domain powers)

- Idaho Code § 50-1914 (city housing authorities have eminent domain power)
- Idaho Code §§ 50-2007(c); 50-2010 (city urban renewal agencies have eminent domain power)
- Idaho Code § 50-2706 (city shall not delegate eminent domain power to public corporations)
- Idaho Code § 67-4604 (county or city historic preservation commissions are NOT vested with eminent domain power to acquire historic lands)
- Idaho Code § 67-6206(g) (housing and finance associations vested with power of eminent domain) Idaho Code § 67-6521(2)(b) ("affected persons" may seek a judicial determination of whether a zoning action constitutes an exercise of eminent domain)
- Idaho Code § 70-1903; 70-1907 (all port districts wherein industrial development district have been established are vested with eminent domain power)

FILED A.M. P.M. 3:35
JUL - 3 2007
Jolynn Drage, Clerk District Court Blaine County, Idaho

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

PHIL AND LYNN SCHAEFER, Plaintiffs/Counterdefendants, v. CITY OF SUN VALLEY, IDAHO, a Political subdivision of the State of Idaho Defendant/Counterclaimant.	Case No. CV-06-882 **DECISION ON SUMMARY JUDGMENT**

Plaintiffs/Counterdefendants, Phil and Lynn Schaefer Lane Ranch Partnership filed this lawsuit on October 18, 2007, challenging the City of Sun Valley's imposition of an in-lieu fee on the Schaefers, pursuant to Ordinance 364, the Workforce Linkage Ordinance. This matter came before the Court by Oral Argument on May 3, 2007. Christopher Meyer appeared for and on behalf of plaintiffs/counterdefendants Phil and Lynn Schaefer, and Mr. Rand Peebles and Geoffrey M. Wardle appeared for and on behalf of the defendant/counterclaimant the City of Sun Valley. The Court has discussed this matter at oral argument, reviewed the briefs, and conducted independent research on the matter, and renders the following decision.

DECISION ON SUMMARY JUDGMENT - 1

FACTUAL BACKGROUND

The following facts are undisputed. On April 21, 2005 the City of Sun Valley adopted Ordinance No. 363 and Ordinance No. 364. Both ordinances sought to address the growing need for affordable workforce housing in Sun Valley. Ordinance 363 applies to residential and multi-family development, and Ordinance 364, known as *Workforce Housing Linkage Ordinance,* applies to single-family construction. Ordinance 363 is not at issue in the present lawsuit.

Ordinance 364 provides that all applications for Design Review in the City of Sun Valley "shall require an approved Workforce Housing Linkage Plan such that a percentage of the employee housing demand generated by the application will be provided as Workforce Housing Units." Sun Valley, Idaho Ordinance No. 364, § 9-9F-2. Permit approval for residential development requires the applicant to either "develop or ensure development of twenty percent (20%) of the employee housing unit demand generated by the application either onsite or on an Eligible Site prior to or concurrent with the issuance of any building permits for proposed new construction." *Id.* at 9-9F-4(B). The ordinance then sets forth a formula to compute the total on-site workforce housing units a home-builder must provide. The formula is based upon the size of the residential development, how many employees will be required, and how many employees will reside in a unit.

Ordinance 364 also provides "[w]here alternatives to the on-site provision of such housing is determined to be more practical, efficient, and equitable, this Article will set forth standards for Eligible Site housing, the conveyance of land, or a payment in-lieu

fee." *Id.* at § 9-9F-1. For instance, if the formula yields a fraction of a unit a home-builder has the option to either build a full unit or pay a fee in-lieu. An in-lieu fee may also be provided where the City Council finds on-site housing to be inappropriate or impractical. Once collected, the fees must be deposited into a Workforce Housing Fund and used "solely to increase and improve the supply of rental and/or for sale workforce housing…"

Plaintiffs/Counterdefendants Phil and Lynn Schaefer owned a lot in Sun Valley and sought to obtain design review approval and a building permit for a new home. The City assessed an "in-lieu" fee of $11,989.97 against the Schaefers pursuant to the Linkage Ordinance. The Schaefers filed this lawsuit and moved for summary judgment challenging the constitutionality of Ordinance 364. Sun Valley filed a counterclaim seeking a declaration that Ordinance 364 is a permissible constitutional exaction pursuant to the police power of Article XII, § 2 of the Idaho Constitution.

STANDARD OF REVIEW

Summary Judgment is proper if the "pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), I.R.C.P. Ordinarily, the Court liberally construes all disputed facts in favor of the non-moving party, and draws all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion. *Bonz v. Sudweeks,* 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). If the evidence reveals no disputed issues of material fact, the trial court should grant the motion for summary judgment. *Farm Credit Bank v. Stevenson,* 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994). The fact that both parties

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move for summary judgment does not in and of itself establish that there is no genuine issue of material fact. *Kromrei v. AID Ins. Co.*, 110 Idaho 549, 551, 716 P.2d 1321 (1986).

The parties appear to agree that no facts are at issue.

ISSUES

In the present case the primary issue is whether, as the City of Sun Valley argues, the in-lieu fees provided by Ordinance 364 are a proper exercise of authority under the police powers granted to municipalities by the Idaho Constitution. In the alternative, the City of Sun Valley argues that the Local Land Use Planning Act (LLUPA) provides the City with the authority to assess in-lieu fees for the purpose of affordable housing. In response, the Schaefers first argue that Ordinance 364 is an unconstitutional tax. Secondly, the Schaefers contend there is no legislation that permits the City to assess the in-lieu fee. Further, the Schaefers claim the only arguable legislation that would permit in-lieu fees would be the Idaho Development Impact Fee Act (IDIFA). IDIFA addresses the city's authority to assess charges on new growth and development, and importantly, does not allow the imposition of in-lieu fees for affordable housing. Therefore, the Schaefers claim, the IDIFA pre-empts the area of impact fee assessment.

The Court will analyze both issues in turn.

ANALYSIS

At the outset, a brief review of the law regarding a municipality's authority to assess charges on the public is necessary. "Idaho has long recognized the proposition that a municipal corporation, as a creature of the state, possess 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." *Caesar v. State*, 101 Idaho 158, 610 P.2d 517, 520 (1980). (citations omitted).

Consequently, there are three limited methods by which a municipality may impose charges on the public or particular persons. *Idaho Bldg. Contractors Assoc. v. City of Coeur d'Alene*, 126 Idaho 540 (1995). Under Art. 12, § 2 of the Idaho Constitution, a municipality may enact regulations pursuant to its police power, for the furtherance of the public health, safety or morals or welfare of its residents. *Brewster v. City of Pocatello*, 114 Idaho 502, 503-504, 768 P.2d 765, 766-67 (1988). Under its police powers, a municipality may "provide for the collection of revenue incidental to the enforcement of that regulation." *Idaho Bldg. Contractors Assoc.*, 126 Idaho at 743, P.2d at 329.

Also pursuant to a municipality's police power, Art. 8 § 3 of the Idaho Constitution permits the imposition of rates and charges to provide revenue for public works projects. *Loomis v. City of Hailey*, 119 Idaho 434, 438, 807 P.2d 1272, 1276 (1991). Under this constitutional grant of authority, the Idaho Legislature enacted the Idaho Revenue Bond Act, which allows cities to vote to approve the issuance of revenue bonds to finance the cost or maintenance of public works. *Id.* In the present action it is undisputed that Sun Valley did not attempt to hold an election to provide a bond to finance affordable housing.

Finally, a municipality may assess charges on the public pursuant to specific legislation permitting a municipality to fund a particular project through the assessment of taxes or fees. *Id.* This municipal authority arises from Art 7, § 6 of the Idaho Constitution, which "allows the legislature to invest in the corporate authorities… the

power to assess and collect taxes for all purposes of the corporation." *Sun Valley Co. v. City of Sun Valley*, 109 Idaho 424, 427, 708 P.2d 147, 150 (1985). This grant of authority however, is not self-executing. A municipality may only exercise this taxing power pursuant to, and limited by the authority granted by the legislature.

The first issue of contention is the scope of authority possessed by municipalities. The City of Sun Valley claims a municipality's authority is much broader than Dillon's rule, whereby a city's exercise of authority is only improper if it conflicts with the general laws of the state. Therefore, the City may enact Ordinance 364 so long as it does not conflict with the state's general laws. The City cites the recent Supreme Court decision of *Plummer v. City of Fruitland*, 139 Idaho 810, 87 P.3d 297 (2004), as support for this proposition. When considering a municipality's police power, the Court in *Plummer* stated that, "the burden falls upon the party challenging the exercise of this power to show that such an exercise is either in conflict with the general laws of the state or that it is unreasonable or arbitrary." *Id.* at 813.

While the City is correct that *Plummer* does set forth the law for a municipality's police power, a municipality's authority to tax requires separate authority. A City's police power does not authorize a city to *tax* the public, but rather *regulate* the public and in some instances assess a fee incidental to the regulation. As the Court recently made clear in *Potts Construction Company v. North Kootenai Water District*, "a municipal corporation's *taxes* on the general public require specific legislative authorization." 141 Idaho 678, 681, P.3d 8, 11 (2005). Therefore, the distinction lies in whether a city has imposed a general tax, in which specific authorizing legislation is required, or acted pursuant to their police power, where a broader grant of authority exists.

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The second issue that must be resolved prior to the assessing the constitutionality of Ordinance 364 regards the difference between a tax and an exaction. The City spends a considerable amount of time arguing that the in-lieu fee is an exaction rather than an impact fee. The import of this argument is two-fold; first, that an exaction is constitutionally distinct from a fee, and second, because the in-lieu fee is an exaction rather than an impact fee, LLUPA doesn't apply. The City, however, cites no Idaho law supporting these propositions and this Court can find none. The analysis is the same whether it is labeled fee or an exaction. A municipality may regulate within its police collect revenue if it is incidental to the enforcement of that regulation. *Brewster*, 115 Idaho 504. The first requirement is whether the municipality may lawfully regulate pursuant to their police power. If the regulation fails to satisfy this requirement, then the Court need not address whether the revenue is incidental to the regulation. Here, the regulation is an ordinance requiring development to mitigate its effect on the housing market. The revenue at issue is an in-lieu fee. Whether the revenue is labeled an exaction or an in-lieu fee does not remove it from the requirements of a valid exercise of police power.

With regard to the argument that an in-lieu fee is an exaction and not an impact fee, and therefore LLUPA is inapplicable, the Court's holding is the same. The label is not the distinguishing factor. The question is whether the Idaho Legislature has specifically authorized the collection of revenue. Thus, for purposes of this analysis, whether the charge is labeled an in-lieu fee or an exaction is inconsequential.

I. Ordinance 364 is not a lawful exercise of the City of Sun Valley's Police Power.

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The City of Sun Valley argues that Ordinance 364 is merely a "regulation of development to ensure that new development adequately mitigates its effect on the supply of affordable workforce housing," and as such, falls within a city's established police power authority to regulate for the furtherance of the public health, safety or morals or welfare of its residents. Further, since a municipality may impose fees incidental to police power regulation, charging an in-lieu fee is permissible. The Schaefers argue that Ordinance 364 is nothing more than a general tax, and thus requires specific legislative authorization.

A municipality's police power arises from the Idaho Constitution, Art. XII, § 2, which provides:

> 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.

As stated above, pursuant to a municipality's police power, a city may provide for a fee incidental to the enforcement of that regulation. *Brewster*, 115 Idaho at 504, P.2d at 767. The funds generated must "bear some reasonable relationship to the cost of enforcing the regulation." *Idaho Bldg Contractors Assoc.*, 126 Idaho at 743, P.2d at 329. However, if the regulation's purpose is to raise revenue rather than regulate, it is a tax, and may only be upheld under the power of taxation. *Id.* The Idaho Supreme Court cautiously reviews whether the collection of revenue is incidental to the enforcement of that regulation, to ensure that the police power is not "resorted to as a shield or subterfuge, under which to enact and enforce a revenue-raising ordinance or statute." *Id.* *Foster's Inc. v. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941).

In *Brewster v. City of Pocatello*, the Idaho Supreme Court analyzed the difference between a fee and a tax. Generally, the Court considered a fee as revenue incidental to police power regulations, and a tax to include ordinances enacted for the purpose of raising revenue. See generally *Brewster*, 504 Idaho at 502, 768 P.2d at 676. In that case, the Court held invalid an ordinance that imposed a charge for the restoration and maintenance of streets on all owners or occupants of property in the city, as an unconstitutional tax. The charge was calculated pursuant to a formula reflecting the traffic estimated by that particular property. *Id* at 502. Initially, the Court noted that the ordinance had no terms of regulation. The Court compared the alleged "fee" to a fee upheld in *Foster's Inc. v. Boise City* as an example of a revenue incidental to a valid police power regulation. In *Foster's*, the operation of parking meters was found to be incidental to the city's police power to regulate traffic and parking. However, the Court found the revenue from the Pocatello ordinance had "no necessary relationship to the *regulation* of travel over its streets, but rather [was] to generate funds for the non-regulatory function of repairing and maintaining streets." *Id.* at 504.

In other cases distinguishing a fee from a tax, the Idaho Supreme Court has placed emphasis on the terms of the ordinance regarding who will benefit from the revenue collected, whether it be the particular consumer or the public at large. In *Idaho Building Contractors Assoc.* v. *City of Coeur D'Alene*, 126 Idaho 740, 890 P.2d 326 (1995), the Court reviewed a case with facts similar to the present case, where contractors challenged an ordinance that required payment of impact fees from new builders to pay for the cost of development as a precondition to the receipt of a building permit. The Contractors claimed that the City lacked authority to collect the fees without authorizing legislation,

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and the City defended its ordinance by arguing the fee was a valid exercise of police power. In differentiating a fee from a tax, the Court defined a fee as "a charge for direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs." 126 Idaho at 744, 890 P.2d at 330. The Court held the charge to be a tax because it benefited all those who live in Coeur d'Alene equally, yet only newcomers were responsible for the cost. *Id.* As the Court stated "[t]he 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." *Id.* Similarly, in *Brewster*, the Court viewed the street fee to be a charge on the occupants or owners of property for the privilege having a public street abut their property, which is no different from a privilege shared by the general public in the usage of public streets. *Brewster*, 115 Idaho at 504, 768 P.2d at 767.

The Court in *IBCA* also expressed concern that the revenues collected pursuant to the ordinance were paid into a general fund to be used "for capital improvements throughout the City by all residents, and not solely for the benefit of those seeking the building permit." *Idaho Bldg Contractors Assoc.*, 126 Idaho at 330, 890 P.2d at 330. Because those funds were not earmarked for use based on the demand created by development, they could not possibly relate to any specific regulation, but rather raise revenue for all public facility infrastructure.

The Idaho Supreme Court has found ordinances requiring payment for water services to be a valid exercise of a municipality's police power. In *Loomis v. City of Hailey*, the Court found fees valid under the city's police power that were segregated and used to repair and replace water system components used by the city. 119 Idaho 434, 807

P.2d 1272 (1991). Again in *Potts Construction Company v. North Kootenai Water District*, the Court found the purpose of water and sewer districts are to "serve a public use and promote health, safety, prosperity, security and general welfare of the inhabitants of said district." 141 Idaho 678, 682, 116 P.3d 8 12 (2005). The Court found the fee to be used toward the water district's system and reasonably and rationally related to the purpose of the city's regulatory function of "insuring clean and safe water for those users of the district's system." *Id.* Thus the ordinance was upheld the by the Court.

In the present case, this Court finds that the purpose of Ordinance 364 is more similar to a general tax than a fee because its clear purpose is to raise revenue rather than regulate. In order for an ordinance to regulate, it must exercise some control by a rule or a restriction. Blacks Law Dictionary (7th) 2000. For example, in *Foster's* the Court found that operating the parking meters was an essential part of the city's authority to *control* traffic and parking. In contrast, in *Brewster* the Court found the street fee was not tailored to control anything regarding streets, but raise revenue for maintenance and repair of the streets. Similarly, Ordinance 364 is not designed to exercise control or regulate the building of community housing, but merely generates revenue.

Sun Valley also argues that it would be inconsistent to prohibit in-lieu fees while allowing restrictions on development with regard to off-street parking, setback and height regulations, and provide for on-site and off-site improvements necessitated by new growth. The Court finds nothing inconsistent with the above scenario. It is well settled that municipalities are able to *regulate* development. Setbacks and height regulations are valid regulations of a city's police power. *Sprenger, Grubb and Associates v. City of Hailey*, 127 Idaho 576, 903 P.2d 741 (1995). Furthermore, municipalities have been

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legislatively authorized to enact zoning regulations pursuant to the Local Land Use Planning Act. Parking restrictions are proper regulations under the city's recognized police power to regulate traffic and parking. The in-lieu fees assessed in Ordinance 364, as discussed above, do not assess fees incidental to police power *regulations*, but instead generate revenue.

As stated above, another factor in establishing whether Ordinance 364's in-lieu fee is a tax, is determining who will benefit. As *Brewster* stated, generally a tax benefits the public at large and a fee is payment by a particular consumer for a public service. According to Sun Valley, Ordinance 364 seeks to address the lack of workforce housing in the Wood River Valley, and its effect on local employer's ability to attract and retain employees. *Memo in Support of Sun Valley's Motion for Summary Judgment and Memorandum in Opposition to Schaefers' Motion for Summary Judgment*, p.4. It is clear that the benefit of the ordinance serves new home-builders and the general public equally. This Court cannot distinguish this situation from the one that existed in *Brewster* or *Idaho Building Contractors Association*, where the Court stated "the assessment here is no different than a charge for the privilege of living in the City..." Similar to *Brewster*, where the City utilized a formula to determine the amount of the charge based on the traffic estimated by that particular property, the City of Sun Valley attempts to distinguish Ordinance 364 from a general tax by including a formula to calculate the amount of the fee for each home-builder to ensure the builder does not bear an inordinate amount of the cost. Despite the city's effort, the problem remains. The lack of workforce housing, like the improvement of city streets, has an effect on the public, and thus the public should bear the cost. As the Supreme Court stated in *Idaho*

Building Contractors Assoc., "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." 126 Idaho at 744, 890 P.2d 330.

As an alternative argument, the City then asserts that there is a particular benefit received by the Schaefers, which is the relief from constructing and dedicating a complete workforce housing unit as required by the Ordinance. By paying the in-lieu fee, the City claims, the Schaefers are saving money by paying Sun Valley to assume the costs associated with workforce housing. The City is likely correct. However, the City's options really only provide one feasible selection to the average person. The alternative options, such as on-site housing, eligible site housing or a conveyance of land to Workforce Housing, are all unrealistic to the average applicant. For example, if the formula calculating the number of units the applicant shall provide produces a fractional number, either the applicant must build an entire unit, or pay an in-lieu fee. Further, if the P&Z finds on-site housing to be impractical or inappropriate, or that it would be more practical for the required units to be pooled with housing units from other projects in the City, or a more viable project may be constructed elsewhere, then an applicant may either pay an in-lieu fee or convey another piece of property. Ord. 364, § 9-9F-4.D. However, the conveyance of land option is only possible if (1) the applicant owns another piece of property in Sun Valley, and (2) the property is properly zoned, (3) the value of the property is enough to offset the City's development costs, and finally (4) the proposal is accepted by the Sun Valley City Council. In addition, the developer must appraise the property, and the City may require, prior to approval, that the property contain roads, water supply, sewage disposal, an environmental report and other basic services. Ord.

364, 9-9F-4.D.2. Due to the numerous obstacles an applicant would confront by choosing any other alternative options, the City has effectively required an applicant to pay an in-lieu fee. Consequently, it is unreasonable to claim that Schaefers have received the benefit of not being required to choose the other three options.

Sun Valley's claims that Ordinance 364 does not suffer from the same flaws as *Idaho Building Contractors Association* because Ordinance 364 specifically segregates and allocates the in-lieu fees, and limits their use to fund the workforce housing created by the new development. The Court agrees that the ordinance does not fail in this regard. As stated above, the Court in *Idaho Building Contractors Association* partially based its invalidation of the Coeur d'Alene ordinance on the fact that the fees were accumulated into a general fund. The Court was concerned that an impact fee could be assessed and the benefit would go toward an unrelated public need. Here, Ordinance 364 serves only to mitigate the portion of the demand for affordable workforce housing directly caused by the new development. Revenue provided from in-lieu fees are to be deposited into an interest bearing Workforce Housing Fund, and solely used to "increase and improve the supply of rental and/or for sale workforce housing affordable to moderate and low income households and whose income is derived from employment within Sun Valley or when found appropriate by the City, employed in Blaine County commonly known as the North Valley, including the City of Ketchum and River Run." Ordinance, 364, § 9-9F-4B.D.1. Although Ordinance 364 satisfies this one component of a valid police power regulation, it fails on the grounds discussed above.

This Court finds, therefore, that the Ordinance 364 in-lieu is in reality an imposition of a tax, and not a valid exercise of a municipality's police power.

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I. The City's charge of an in-lieu fee pursuant to Ordinance 364 is not specifically authorized by the Idaho Legislature.

As discussed above, a municipality may also impose taxes or fees on the public by *specific* authorization from the Idaho legislature. *Idaho Bldg Contractors Assoc*,126 Idaho at 742, 890 P.2d 328. Therefore, the *only* proper question for this Court is whether any specific authorization from the legislature exists. The City of Sun Valley identifies the Local Land Use Planning Act ("LLUPA") as the source of the City's authority. The Schaefers argue that Ordinance 364 is without legislative authorization. The Schaefers further contend that Ordinance 364 is preempted by Idaho law, particularly the Impact Fee Act.

The Schaefers' argument is two fold. First, the Idaho Legislature did not specifically authority the City to assess in-lieu fees. Second, the IDIFA preempted the area of impact fees, and therefore the City could not assess in-lieu fees. Here, the Court need not proceed to Schaefer's second argument on preemption at this time. The question to address is whether the Idaho Legislature specifically authorized a municipality to assess fees or taxes for affordable housing. If so, the ordinance would be upheld on that basis. If no legislative authority exists, then no preemption argument is necessary because the state did not grant specific authorization to the city.

Furthermore, preemption generally serves as a limitation of authority granted to municipalities by the Idaho Constitution. *Caesar*, 101 Idaho at 161. "The city cannot act in an area which is so completely covered by general law as to indicate that it is a matter of state concern. Nor may it act in an area where, to do so, would conflict with the state's general laws." *Id.* For instance, a city's police power is limited in areas where the State has either directly preempted an ordinance or preempted the field. The Schaefers appear

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to concede that the preemption argument would apply only if the Court found Ordinance 364 to be a proper exercise of a municipality's police power. Only then could it be argued that the State has preempted the area of impact fees, and the city is prohibited from acting in that field. Since this Court found Ordinance 364 to be outside the authority of a municipality's police power, the Court need not decide whether IDIFA preempted the ordinance. Therefore, since it is undisputed that IDIFA does not provide the necessary authority from the legislature, the Court will focus on the LLUPA.

The City defends Ordinance 364 by arguing that LLUPA provides the authority necessary for a municipality to assess in-lieu fees for affordable housing. This Court cannot find that LLUPA provides the City with any such authority.

The Idaho Supreme Court has reviewed other challenges to County ordinances where the County defended by identifying a specific grant of authority by the legislature. One such lawsuit, *Kootenai County Property Ass'n v. Kootenai County* involved a municipality's attempt to charge the public fees to establish, maintain and operate a solid waste disposal system. In that case the Court upheld the assessment of fees on the basis that the Idaho legislature permitted the municipality to fund a particular project through the assessment of taxes or fees. 115 Idaho 676, 769 P.2d 553 (1989). The legislation at issue was entitled Solid Waste Disposal Sites, Title 31, Chapter 44, which granted county commissioners the authority "to acquire, establish, maintain and operate such solid waste disposal systems as are necessary and to provide reasonable and convenient access to such disposal systems by all the citizens." I.C. § 31-4402. Further, the statute provides the board of county commissioners the following options to fund the waste disposal

system: levy a tax, collect fees, use existing revenues, or collect money from any other source, or any combination thereof. I.C. § 31-4404(1).

In contrast, the City of Sun Valley fails to point to any language in the Local Land Use Planning Act that specifically grants authority to assess fees or taxes. It is evident from the Solid Waste Disposal Sites Act that the legislature provides revenue collection authority with specific language. In contrast, the City of Sun Valley cites the Court to several sections of LLUPA as support for the legislature's broad grant of authority. These sections provide cities with the authority to promote the general welfare of the people of Idaho by identifying and assessing the need for affordable housing, and requiring cities to address such issues by implementing regulations and standards. I.C. § 67-6508, I.C. § 67-6511. Indeed, LLUPA provides a city with broad authority to regulate in the context of land use. However, notably absent from LLUPA is language permitting a city to assess taxes or fees.

Further, it is not at all clear that Ordinance 364 is of the type that LLUPA applies to. "LLUPA establishes explicit and express procedures to be followed by the governing boards or commissions when considering, enacting and amending *zoning* plans and ordinances." *Reardon v. Magic Valley Sand and Gravel, Inc.*, 140 Idaho 115, 119, 90 P.3d 340, 344 (2004). Further, zoning regulations "are divided into two classes; first, those which regulate the height and bulk of buildings within certain designated districts, and second, those which prescribe the use to which buildings within certain designated district may be put." *O'Connor v. City of Moscow*, 69 Idaho 37, 202 P.2d 401 (1949). The standards listed in the LLUPA are consistent with the above definition of zoning regulations, listing "such things as building design; blocks, lots, and tracts of land; yards,

courts, greenbelts, planting strips, parks, and other open spaces; trees; signs; parking spaces; roadways, streets, lanes, bicycleways, pedestrian walkways, rights-of-way, grades, alignments, and intersections; lighting; easements for public utilities; access to streams, lakes, and viewpoints; water systems; sewer systems; storm drainage systems; streets numbers and names; house numbers; schools, hospitals, and other public and private development." I.C. § 67-6518. The common theme of the above standards is the *regulation* of land use. Ordinance 364 does not impose standards related to the regulation of land use, but rather seeks to impose fees upon landowners seeking a building permit.

In sum, the Court cannot find that the LLUPA specifically grants the City of Sun Valley the authority to assess fees or taxes on the public. Therefore, Ordinance 364 cannot be upheld on the basis that the City of Sun Valley may assess an in-lieu fee pursuant to specific legislative authorization.

IDAHO TORT CLAIM ACT

The Schaefers seek a refund of the $11,989.97 in-lieu fee pursuant to the Idaho Tort Claim Act, I.C. § 6-901 to 6-929. The City claims no refund is due because the city acted "without reckless, willful and wanton conduct as defined in 6-904C, Idaho Code." I.C. § 6-904A. This Court cannot find that the City of Sun Valley enacted Ordinance 364 willfully or recklessly, and therefore denies any refund pursuant to this act.

The Schaefers also seek a refund on the basis that the state was unjustly enriched by receipt of an unconstitutional tax. The Court in *BHA Investments, inc., v. State*, 138 Idaho 348, 355, 63 P.3d 474, 481 (2003), acknowledged such a claim may be appropriate where the state charges an unconstitutional fee. A claim of unjust enrichment requires

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(1) a benefit is conferred upon defendant by plaintiff, (2) appreciation by the defendant of the benefit, and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment of the value thereof. *Gibson v. Ada County*, 142 Idaho 746, 133 P.3d 1211 (2006). In the present action, the City collected and appreciated receipt of $11,989.97 from the Schaefers. Further, as a result of this Courts ruling regarding the constitutionality of the ordinance, acceptance of the charge by the City would be inequitable. Thus, this Court finds the City to have been unjustly enriched in the amount of $11,989.97 and the Schaefers are HEREBY entitled to a refund in that amount.

In conclusion, because Ordinance 364 is not a valid exercise of a municipality's police power, nor specifically authorized pursuant to a specific legislative enactment, the Schaefer's Summary Judgment is HEREBY GRANTED, and thus the City of Sun Valley's Summary Judgment is DENIED.

It is so ordered.

July 3, 2007

Robert J. Elgee
District Judge

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Case No. _____ Inst. No. _____
Filed _____ A.M. 5:00 P.M.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

MOUNTAIN CENTRAL BOARD OF REALTORS, INC., an Idaho Non-Profit Corporation,

Plaintiff,

vs.

CITY OF MCCALL, a municipal corporation of the State of Idaho,

Defendant.

Case No. CV 2006-490-C

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

David Gratton and Victor Villegas, for the Plaintiff
William A. Morrow, Christopher D. Gabbert, and Jill S. Holinka, for the Defendant

This matter came before the Court for oral argument on July 13, 2007, regarding Plaintiff's Motion for Summary Judgment. On July 14, 2007, Plaintiff filed a Notice of Supplemental Authority.

FACTUAL AND PROCEDURAL BACKGROUND

The facts and procedural history of this case were set forth in more detail in the Court's previously filed Memorandum Decision and Order Denying the Defendant City of McCall's Motion for Summary Judgment on the issue of standing. Essentially, Plaintiff is challenging the constitutionality of two ordinances passed in February of 2006 by the City of McCall: Ordinance No. 819 which is an inclusionary zoning ordinance, and Ordinance No. 820 which is the residential linkage or community

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housing fee ordinance.[1] Such ordinances were enacted to ensure and provide for affordable housing in the City of McCall.

Under Ordinance No. 819, all applications for new subdivisions are required to submit an inclusionary housing plan providing that twenty percent (20%) of lots and houses be permanently deed-restricted as affordable community housing as a precondition to plat approval. Specifically, Ordinance No. 819 is designed to provide for "community housing to be affordable to City of McCall households with incomes in categories III and IV as defined in subsection 2, Community Housing by Income." City of McCall Ordinance No. 819, § 9.7.10(A). These categories define moderate to middle income. Category III includes households with incomes greater than one hundred percent (100%) but not more than one hundred twenty percent (120%) of the Valley County median household income. Category IV includes households with incomes greater than one hundred twenty percent (120%) but not more than one hundred sixty percent (160%) of the Valley County median household income.

There are four ways by which an applicant for subdivision approval may meet the requirements of Ordinance No. 819: (1) the first priority is to permanently deed restrict twenty percent (20%) of the land within the subdivision for affordable housing, called "on-site" housing; (2) the second priority is to construct such housing "off-site" from the proposed subdivision;[2] (3) the third priority is to convey land; and (4) the fourth priority is to pay a fee in lieu of the previous three options.

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[1] Although Ordinance No. 819 is referred to as the inclusionary zoning ordinance and Ordinance No. 820 is the linkage ordinance, the Court generally refers in this decision to both ordinances as inclusionary zoning ordinances.

[2] If community housing is constructed off-site, the required percentage of land allocated to affordable housing increases from twenty percent (20%) of the subdivision land to one hundred twenty-five percent (125%) if the housing is built within the city of McCall; or to one hundred fifty percent (150%) if the housing is built within the city limits of another municipality located in Valley or Adams Counties; or to two hundred percent (200%) if the housing is built within unincorporated Valley or Adams Counties.

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Under Ordinance No. 820, all applicants for a building permit are required to pay a community housing fee for each residential dwelling unit that is proportional to the demand for community housing created by the dwelling unit. Ordinance No. 820 is designed to benefit employees of low or moderate income in categories I and II who are needed to maintain and service the residential dwelling unit.[3] Low income is defined in Category I as households with incomes greater than fifty percent (50%) but not more than eighty percent (80%) of the Valley County median household income. Income Category II includes households with incomes greater than eighty percent (80%) but not more than one hundred percent (100%) of the Valley County median household income. Certain residential development is exempted under Ordinance No. 820 such as redevelopment, remodeling or relocation of any legally pre-existing residential unit, expansion up to 500 square feet, mobile homes, skilled nursing facilities, retirement or assisted living homes, foster homes, and community housing units. City of McCall Ordinance No. 820, § 3.8.21(C).

Plaintiff filed a Verified Complaint on September 22, 2006, seeking declaratory relief that the City of McCall's Ordinance Numbers 819 and 820 violate both State and Federal laws and constitutions, and seeking a permanent injunction enjoining the City from enforcing such ordinances against its members. Defendant filed an Answer on October 18, 2006, asserting a number of affirmative defenses including no justiciable case or controversy, ripeness, standing, failure to join an indispensable party,

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[3] Ordinance No. 820 defines the community housing fee as follows:

> The community housing fee shall be commensurate with the current community housing subsidy amount required to develop and construct community housing for fifty (50) percent of the employees needed to maintain and service the dwelling unit and who have incomes in Income Categories I and IX. The number of employees needed to maintain and service the residential unit varies based on the size of the unit.

City of McCall Ordinance No. 820, § 3.8.21(D)(1)(a).

and no irreparable injury.

Plaintiff filed a Motion for Summary Judgment along with a Motion to File Brief Exceeding Twenty-Five (25) Pages on November 20, 2006. This Court entered an Order Granting Plaintiff's Motion to File Brief Exceeding Twenty-Five (25) Pages on November 29, 2006. On December 6, 2006, the parties filed a Stipulated Litigation Schedule. Defendant filed a Stipulation to Exceed Page Limit on February 7, 2007, allowing Defendant to file a Response Brief in excess of the twenty-five page limit.

On May 22, 2007, this Court issued a Memorandum Decision and Order Denying the Defendant City of McCall's Motion for Summary Judgment, holding that the Plaintiff did have "associational" standing to pursue its claim. On May 31, 2007, the parties filed a Stipulation to Amend Litigation Schedule. Also on that date, Plaintiff filed an Amended Notice of Hearing.

STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56 provides that summary judgment is proper when the court is satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c). All disputed facts are to be resolved and all reasonable inferences drawn in favor of the non-moving party. *See Stafford v. Klosterman*, 134 Idaho 205, 206, 998 P.2d 1118, 1119 (2000); *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 719, 918 P.2d 583, 588 (1996). If reasonable persons could reach different findings or draw conflicting inferences from the evidence, the motion must be denied. *Jordan v. Beeks*, 135 Idaho 586, 590, 21 P.3d 908, 912 (2001); *Smith*, 128 Idaho at 718, 918 P.2d at 587.

The district court as the trier of fact may draw reasonable inferences based upon the evidence before it and may grant summary judgment despite the possibility of conflicting inferences. *Karterman v. Jameson*, 132 Idaho 910, 913, 980 P.2d 574, 577 (Ct. App. 1999) (citing *Cameron v. Neal*, 130 Idaho 898, 900, 950 P.2d 1237, 1239 (1997)). *See also* Idaho Code Ann. § 10-1201 (2005). Where the matter

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would be tried without a jury, the court is "free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts." *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991); *accord Steiner v. Ziegler-Tamura Ltd.*, 138 Idaho 238, 241, 61 P.3d 595, 598 (2002). If the evidentiary facts are not in dispute, the trial court may grant summary judgment despite the possibility of conflicting inferences, because the court alone will be in the position of resolving the conflicting inferences at trial. *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982).

In order to challenge the constitutionality of a statute or ordinance, the plaintiff has the burden of showing the invalidity of such statute or regulation and must overcome the strong presumption of validity. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990); *see also Wyckoff v. Board of County Commissioners*, 101 Idaho 12, 14, 607 P.2d 1066, 1068 (1980). "It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional." *Olson*, 117 Idaho at 709, 791 P.2d at 1288. The party asserting a facial challenge to an ordinance must demonstrate that the "law is unconstitutional in *all* of its applications. . . . [And] that no set of circumstances exists under which the [law] would be valid." *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources*, 143 Idaho 862, ___, 154 P.3d 433, 441 (2007) (internal quotes omitted).

DISCUSSION

Inclusionary zoning ordinances appear to be a recent trend in the efforts of local communities, especially in seasonal economy-based communities, to address the needs of providing affordable housing for the local workforce. Inclusionary zoning or inclusionary housing ordinances generally require a residential developer to set aside a specific percentage of new housing units for low or moderate income

households. *Home Builders Ass'n of Northern California v. City of Napa*, 108 Cal.Rptr.2d 60, 62 n.1 (Cal. Ct. App. 2001) (citing Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at its Viability*, 23 Hofstra L. Rev. 539, 540 (1995)).[4]

While a number of jurisdictions have case law discussing the constitutionality of inclusionary zoning ordinances, there is no case precedent which has been established in Idaho. Furthermore, there is no legislative authority in Idaho providing for inclusionary zoning provisions. Although not controlling, this Court is aware that a Decision on Summary Judgment was filed July 3, 2007, in Blaine County regarding an as-applied challenge to the City of Sun Valley's Workforce Housing Linkage Ordinance No. 364, in *Schaefer v. City of Sun Valley, Idaho*, Case No. CV-06-882.

In the case before this Court, there are no genuine issues of material fact. The dispositive issue is the purely legal question of whether Ordinance Nos. 819 and 820 are proper police power regulations of the City of McCall. This Court defers to the City of McCall's determination of a lack of affordable housing and to their laudable intention to address the issue; the question for this Court, however, is whether the methods of remedying this housing shortfall pass legal muster.

In Idaho, "a municipal corporation may exercise only those powers granted to it by either the state constitution or the legislature . . . ." *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980). Article 12, Section 2 of the Idaho State Constitution provides for any county, city, or town to make and enforce all such local police, sanitary, and other regulations which are not in conflict with its charter or with the general laws. Idaho Const. Art. 12 § 2. The Idaho Supreme Court has recognized that "[t]he

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[4] *Home Builders Association of Northern California* illustrates the trend toward inclusionary zoning ordinances, especially in California where there is extensive legislation providing for affordable housing incentives. See Cal. Gov't Code § 65580 et seq. This case relied upon by the City of McCall is of little assistance to courts in Idaho where there is not extensive legislative authority for inclusionary zoning ordinances.

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power to restrict the uses of property is within the police power of the state, delegable to its municipal subdivisions, and is not per se repugnant to the Constitution of the United States." *White v. City of Twin Falls*, 81 Idaho 176, 182, 338 P.2d 778, 781-82 (1959). Therefore, the power to zone derives from the police power of the state, and local legislative entities are authorized to enact zoning ordinances restricting the use of property within the corporate limits of the legislative entity. *City of Lewiston v. Knieriem*, 107 Idaho 80, 83, 685 P.2d 821, 824 (1984); *see also Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506, 511, 567 P.2d 1257, 1262 (1977).

The Local Land Use Planning Act (LLUPA), at Idaho Code Section 67-6501 *et seq.*, was enacted in 1975. The Idaho Supreme Court has found that under LLUPA, "the legislature intended to give local governing boards broad powers in the area of planning and zoning." *White v. Bannock County Commissioners*, 139 Idaho 396, 400, 80 P.3d 332, 336 (2003) (citing *Worley Hwy. Dist. v. Kootenai County*, 104 Idaho 833, 663 P.2d 1135 (Ct. App. 1983)). Such zoning power is not unlimited, but must bear a reasonable relation to the goals of the state pursuant to the state's police powers. *Sprenger, Grubb & Assocs, Inc. v. City of Hailey*, 127 Idaho 576, 583, 903 P.2d 741, 748 (1995) (citing *City of Lewiston v. Knieriem*, 107 Idaho 80, 83, 685 P.2d 821, 824 (1984)); *see also Dawson Enterprises, Inc.*, 98 Idaho at 511, 567 P.2d at 1262.

> The governmental power to interfere by zoning regulations with the general rights of the land owned by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.

Dawson Enterprises, Inc., 98 Idaho at 511, 567 P.2d at 824 (citing *Cole-Collister Fire Protection Dist. v. City of Boise*, 93 Idaho 558, 468 P.2d 290 (1970) (quoting *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1927))).

The Idaho Supreme Court has recognized that LLUPA is the exclusive and mandatory source for a municipality's planning and zoning authority. *Sprenger, Grubb & Assocs, Inc. v. City of Hailey*, 133 Idaho 320, 321, 986 P.2d 343, 344 (1999). Under the LLUPA, a governing board, consisting of either a city council or a properly delegated planning and zoning commission, is given the powers authorized under the LLUPA. Idaho Code Ann. § 67-6504. Under section 67-6508, the planning and zoning commission is to conduct a comprehensive planning process designed to prepare a comprehensive plan which outlines the desirable goals and objectives for each planning component including in pertinent part:

> An analysis of provisions which may be necessary to insure that land use policies, restrictions, conditions and fees do not violate private property rights, adversely impact property values or create unnecessary technical limitations on the use of property and analysis as prescribed under the declarations of purpose in chapter 80, title 67, Idaho Code.[5]

Idaho Code Ann. § 67-6508(a).[6] Furthermore, the comprehensive plan should include a provision relating to housing containing:

> An analysis of housing conditions and needs; plans for improvement of housing standards; and plans for the provision of safe, sanitary, and adequate housing, including the provision for low-cost conventional housing, the siting of manufactured housing and mobile homes in subdivisions and parks and on individual lots which are sufficient to maintain a competitive market for each of those housing types and to address the needs of the community.

Idaho Code Ann. § 67-6508(j).[7] The LLUPA expressly identifies the need to maintain a balance between protecting property rights and providing for affordable housing by stating that one of its

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[5] Title 67, chapter 80 of the Idaho Code is known as the Idaho Regulatory Takings Act, which establishes a review process to evaluate regulatory takings.

[6] Subsection (a) on property rights was added in 1995. Local Land Use Planning—Property Rights—Planning and Zoning Commissions, ch. 181, sec.4, § 67-6508, 1995 Idaho Sess. Laws H.B. 212.

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purposes is "[t]o protect property rights while making accommodations for other necessary types of development such as low-cost housing and mobile home parks." Idaho Code Ann. § 67-6502(a).

With respect to zoning ordinances, the LLUPA provides that the governing board shall "establish standards to regulate and restrict the height, number of stories, size, construction, reconstruction, alteration, repair or use of buildings and structures; percentage of lot occupancy, size of courts, yards, and open spaces; density of population; and the location and use of buildings and structures." Idaho Code Ann. § 67-6511. Furthermore, the governing board may "require or permit as a condition of rezoning that an owner or developer make a written commitment concerning the use or development of the subject parcel." Idaho Code Ann. § 67-6511A.

The inclusionary zoning ordinances at issue in this case go well beyond the traditional zoning standards relating to height, size, construction, zoning areas, open space requirements, density, and location. The City of McCall argues it is regulating the use to which certain land or housing may be put by requiring developers to deed restrict a percentage of new development as affordable or community housing. There is no doubt that the City of McCall determined there exists a need for affordable housing in McCall. Although LLUPA specifically allows a city to include within its comprehensive plan regulations affecting property rights and housing conditions, LLUPA does not specifically address whether the City of McCall or any other city may enact inclusionary zoning ordinances. Given the relatively recent trend towards inclusionary zoning ordinances since LLUPA has been enacted in Idaho, it is not surprising that LLUPA does not specifically address inclusionary zoning ordinances. Thus,

[7] Also in 1995, the Legislature inserted the language regarding low-cost housing. Local Land Use Planning—Property Rights—Planning and Zoning Commissions, ch. 181, sec. 4, § 67-6508, 1995 Idaho Sess. Laws H.B. 212.

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whether the City of McCall may require affordable housing through a land use regulation is a matter of first impression which this Court must decide.

A. Restrictions on the City of McCall's Police Powers

The Idaho Supreme Court has recognized three general restrictions on a municipality's police powers: (1) the ordinance must be confined to the limits of the governmental body enacting the same; (2) such ordinance must not be in conflict with other general laws of the state; and (3) such ordinance must not be an unreasonable or arbitrary enactment. *Hobbs v. Abrams*, 104 Idaho 205, 207, 657 P.2d 1073, 1075 (1983) (citing *State v. Clark*, 88 Idaho 365, 374, 399 P.2d 955, 960 (1965)).

1. Regulation Within the City Limits of McCall

In *Hobbs*, the county passed an ordinance which prohibited the sale of beer in kegs in "Franklin County," and also prohibited the possession of beer in kegs within the "unincorporated areas of Franklin County." 104 Idaho at 207, 657 P.2d at 1075. The plaintiff in that case owned two businesses licensed to sell beer in Franklin, Idaho and Preston, Idaho. The Idaho Supreme Court held that the plaintiff did not have standing to challenge the ordinance since his businesses were within an incorporated city and the county did not have the authority to regulate activities within incorporated cities. *Id.* at 208, 657 P.2d at 1076. Similarly, in the underlying case, the City of McCall's Ordinance Nos. 819 and 820 only have power and effect within the limits of the City of McCall. Although the ordinances repeatedly state that such ordinances have been implemented in partnership with Valley County, Adams County, and the communities of Cascade, Donnelly, and New Meadows, Ordinance Nos. 819 and 820 can only regulate land use permits in the City of McCall.[8] Therefore, Ordinance Nos. 819 and 820 would not apply to a landowner who owns and wishes to subdivide land located outside the city limits of McCall.

[8] Pursuant to Ordinance No. 819, if a developer provides community housing off-site, the developer is required to provide 125 percent of the amount of land which would

2. Not in Conflict with Other General Laws of the State

Under the second prong of *Hobbs*, this Court must determine whether Ordinance Nos. 819 and 820 are in conflict with other general laws of the state. The stated purpose of these ordinances is to provide a "reasonable supply of affordable, deed restricted workforce housing (community housing)" to "ensure that critical professional workers, essential service personnel, and service workers live within proximity to their work to provide municipal and private sector services." In order to obtain a building permit to subdivide land and build houses or dwelling units, a landowner must designate at least twenty percent of the land or lots as deed-restricted community housing under Ordinance No. 819. Furthermore, in order to build residential dwelling units, a landowner is required to pay a community housing fee for a building permit under Ordinance No. 820.

Pursuant to Ordinance No. 819, upon applying for subdivision approval, a developer must submit an Inclusionary Housing Plan which designates that at least twenty percent of all the lots and houses in the subdivision have been permanently deed-restricted[9] as community housing and affordable to households in McCall with moderate or middle incomes in categories III and IV. Ordinance No. 819 specifically states that providing on-site community housing within the new subdivision is the first priority. However, if a landowner or developer is not able to designate community housing within the proposed subdivision, the second priority is for the developer to designate community housing outside

have been required on-site, if the off-site housing is "within the city limits of the City of McCall." Alternatively, if the off-site housing is located "within the city limits of another municipality located in Valley or Adams County," the developer is required to provide 150 percent of the amount which would have been required on-site. To the extent that the City of McCall attempts to regulate housing outside its city limit, such provision is without effect and therefore null and void.

[9] Ordinance No. 819 also provides that as an alternative to permanent deed restriction, the developer may request that up to twenty-five percent of the lots and houses be subject to an "Equity-Builder" program.

the subdivision, or "off-site." The third priority is for a developer to convey land to the City of McCall for community housing. And the fourth priority is to pay a fee in lieu of community housing. Essentially, the McCall City Council decides pursuant to the priority list if on-site community housing is impractical.

Under the first two priorities, a landowner still retains ownership of such community housing units but is restricted regarding selling or renting community housing units.[10] The third and fourth priorities are reserved for situations in which it is not practical for the landowner to develop community housing either on or off site because the required community housing units results in less than one housing unit.[11] Under the third and fourth priorities, the landowner either conveys land calculated at fair market value, or pays a fee equal to the total subsidy amount for the required community housing units. Additionally, if the number of required community housing units result in a fraction under the first or second priority, the landowner must pay an in lieu fee equal to the subsidy amount for that fraction.

For any community housing units provided under the first or second priorities, the developer must enter into a Community Housing Agreement which sets forth, among a number of other requirements, the sales or rental terms and the restrictions to ensure the permanent affordability and compliance with the Community Housing Guidelines. The McCall Planning & Zoning Commission and the City Council have the power to review and approve the Inclusionary Housing Plan. If the City Council collects in lieu fees pursuant to the fourth priority, or fees for any fractional amount of community housing, such funds are to be deposited into the Community Housing Trust Account to be

[10] Potential buyers or renters must meet the requirements established by the City of McCall to qualify for affordable housing.

[11] Because the developer is required to set aside twenty percent of the units as community housing, the minimum number of units a developer must develop under the first or second priorities would be five units, of which one unit must be community

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spent for planning, subsidizing, or developing community housing units in McCall. A landowner may petition for a refund of the in lieu fees if such fees have not been expended by the City of McCall within five years, provided the City has not already earmarked the funds and extended the time period another five years.

Furthermore, the City of McCall may adjust or waive the requirements under Ordinance No. 819 if the developer demonstrates and the City Council finds there is "no reasonable relationship between the housing impact of the proposed residential subdivision and the requirements of this section." City of McCall Ordinance No. 819, § 9.7.10(A)(13)(a). The developer has the burden of providing economic information or data necessary to establish that there is no reasonable relationship.

Ordinance No. 820 requires that every landowner seeking a building permit for a residential dwelling unit, not exempted by the ordinance,[12] is required to pay a community housing fee. This fee represents the subsidy amount required to develop and construct community housing for fifty percent of the employees needed to maintain and service the dwelling unit and who have low to moderate incomes in categories I and II. Such fees are also deposited in the Community Housing Trust Account and similarly to Ordinance No. 819, a landowner may request a refund of such fees if they have not been

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housing. Subdivisions with less than five units presumably would be subject to either the third or fourth priorities.

[12] The following residential development units are exempted from the community housing fee:

1. The redevelopment, remodeling, or relocation of a legally pre-existing residential unit provided no new or additional residential unit is created.
2. The expansion up to five hundred square feet of gross floor area of a legally pre-existing residential dwelling unit.
3. Mobile homes.
4. Skilled nursing facilities.
5. Retirement or assisted living homes.
6. Foster and group homes.
7. Community housing units.

See City of McCall Ordinance No. 820. § 3.8.21(C).

spent within five years unless the City has earmarked such funds and extended the time an additional five years. An applicant may also apply for a reduction or waiver of the community housing fee if such person receives income within the Income Categories identified above or believes the residential unit does not relate to the purposes and standards of Ordinance No. 820.

Plaintiff argues that Ordinance Nos. 819 and 820 exceed the City's zoning authority because they attempt to regulate ownership as opposed to use of the property. Furthermore, Plaintiff argues that such ordinances violate the general laws of the state because regulations relating to community housing have been preempted by other state law, that such ordinances unconstitutionally control rent, that such ordinances are disguised impact fees, or that they impose illegal taxes.

a. Whether the Authority to Implement Affordable Housing has been Impliedly Preempted by State Law

While Article 12, Section 2 of the Idaho Constitution is a grant of local police powers to Idaho cities, this police power is limited in at least two important respects. First, cities cannot act in an area which is so completely covered by general law as to indicate that it is a matter of state concern. Second, cities may not act in an area where to do so would conflict with the state's general laws. *Chase v. State*, 101 Idaho 158, 161, 610 P.2d 517, 520 (1980). Under the doctrine of implied preemption, where a state has acted in an area in such a pervasive manner, it is assumed that the state intended to occupy the entire field of regulation despite the lack of any specific language preempting regulation by local government entities. *Id.* (citing *United Tavern Owners of Philadelphia v. School Dist. of Philadelphia*, 272 A.2d 868, 870 (Pa. 1971)).

In 1967, the Idaho Legislature enacted the Housing Authorities and Cooperation Law at Idaho Code Section 50-1901 *et seq.* By enacting this statute, the Legislature recognized the need for sanitary and safe dwelling accommodations for persons of low income. *See* Idaho Code Ann. § 50-1902(a).

Essentially, a housing authority is created as an independent public body corporate and politic by a resolution of the governing body of the city, but is not an agency of the city. Idaho Code Ann. § 50-1905; *see also* Idaho Code Ann. § 31-4205 (county housing authorities).[13] The housing authority is imbued with a number of powers necessary or convenient to carry out and effectuate the purposes and provisions of the act. Specifically, a housing authority has the power to contract with other housing authorities for services, create bylaws, rules and regulations, prepare, carry out, acquire, lease, and operate housing projects, lease or rent dwellings, establish and revise rents, own, hold and improve real or personal property, and acquire real property through eminent domain. Idaho Code Ann. § 50-1904(a), (b), and (d).

Overall, Chapter 19, Title 50 of the Housing Authorities and Cooperation Law discusses a housing authority's ability to own and acquire real property. Subsection (d) grants the housing authority broad power with respect to leasing, renting, owning, purchasing, acquiring by gift, grant, bequest, devise, or eminent domain, and selling, exchanging, transferring, assigning, pledging or disposing of any real or personal property. Idaho Code Ann. § 50-1904(d). This is quite different from any "interest" the City of McCall may have in a landowner's real property which is required to be earmarked as community housing under the first two priorities of Ordinance No. 819.

This Court believes that the Idaho Legislature has carefully designated powers within a housing authority in Chapter 19, Title 50 and Chapter 42, Title 31, of the Idaho Code (created either by a city or a county) to address housing problems and provide for affordable housing to low income households. Pursuant to those code sections, a housing authority may acquire real property primarily through two mechanisms: the power of eminent domain and the issuance of bonds upon proper resolution. Idaho

[13] Chapter 19, Title 50 of the Idaho Code which governs city housing authorities is essentially identical to Chapter 42, Title 31 governing county housing authorities.

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Code Ann. §§ 50-1914, -1916; 31-4214, -4216. With such bonds, a housing authority may purchase or obtain real property.[14] A housing authority may also acquire real property by gift, grant, bequest or devise. Alternatively, a housing authority may also acquire real property through loans. Idaho Code Ann. §§ 50-1904(i); 31-4204(i). Furthermore, a city or county may lend or donate money to the housing authority. Idaho Code Ann. §§ 50-1909; 31-4209. And the federal government may also loan, contribute or provide grants or other financial assistance to housing authorities. Idaho Code Ann. §§ 50-1923; 31-4223.

If a city or county finds that there exist "insanitary or unsafe" dwelling accommodations or that there is a shortage of safe and sanitary dwelling accommodations available to low income households, "[t]he governing body shall adopt a resolution declaring that there is a need for a housing authority." Idaho Code Ann. §§ 50-1905; 31-4205. Although a city or county is not required to create a housing authority, it seems apparent that if the city or county is faced with a need to address affordable housing, the appropriate mechanism for governing affordable housing is through a housing authority pursuant to either section 50-1901 *et seq.*, or section 31-4201 *et seq.*[15] Essentially, these statutes provide the framework in which local governments are to address affordable housing.

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[14] If low income housing is owned by a non-profit organization such as a housing authority, it would be eligible to be exempt from taxation under Idaho Code Section 63-602GG. The Idaho Impact Fee Act, Idaho Code Section 67-8201 et seq., also contains an incentive for affordable housing. Local governments may waive all or part of any impact fees as an incentive for developers to include affordable housing. Idaho Code § 67-8204(10).

[15] By Resolution 10-06, Valley County and Adams County created a county housing authority known as VARHA pursuant to Idaho Code Section 31-4205. Under that section, a county may authorize the creation of a housing authority, with the ability to transact business and exercise powers, pursuant to a proper resolution declaring the need for an authority to function. Resolution 10-06 was adopted on January 23, 2006, signed by the Valley County Commissioners. While the City of McCall did not expressly authorize a city housing authority, it appears to rely on the findings and expertise of VARHA. Prior to the creation of VARHA, the City of McCall passed Resolution 05-19 providing for a community housing policy which was signed by Mayor Kirk L. Eimers on September 22, 2005. Ordinance Nos. 819 and 820

In 1972, the Idaho Legislature enacted Idaho Code Section 67-6201 *et seq.*, which created a state agency, the Idaho Housing and Finance Association, to address the issue of affordable housing. Essentially, the state housing association is empowered to conduct its business, make and execute agreements or contracts, and to lease, sell, construct, finance, any housing projects and to establish and revise rents or charges. Idaho Code Ann. § 67-6206(a), (b), (e), and (f). The state housing association is also empowered to own, hold and improve real property, purchase, lease, and obtain options upon, acquire by gift, grant, bequest, devise, eminent domain or otherwise any real property and to sell, lease, exchange, transfer, assign, pledge, or dispose of such property. Idaho Code Ann. § 67-6206(g), (h). Housing projects are to be subject to the local planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality of the housing projects. Idaho Code Ann. § 67-6209. Similar to housing authorities, the state housing association has the power of eminent domain and the power to issue bonds to achieve its purpose of providing affordable housing. Idaho Code Ann. § 67-6206.

The Legislature has also created the Idaho Housing Trust Fund for the purpose of providing a "continuously renewable resource known as a housing trust fund from the private and/or public moneys to assist low-income and very low-income citizens in meeting their basic housing needs, and that the needs of very low-income citizens should be given priority." Idaho Code Ann. § 67-8101. The housing trust funds are to be used to assist a variety of activities, including but not limited to:

> (a) New construction, rehabilitation, or acquisition of housing units for occupancy by low-income and very low-income households;
> (b) Rent subsidies in new construction or rehabilitated multifamily units for low-income and very low-income households;
> . . .

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rely on Community Guidelines enacted by VARHA and to the extent that the City of McCall's Resolution allowed the City of McCall to enact inclusionary zoning ordinances, the administration of such ordinances is governed by VARHA.

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(e) Administrative costs for housing assistance groups or organizations which provide housing when such grant or loan will substantially increase the recipient's access to housing funds other than those available under this chapter;

. . .

(i) Acquisition of housing units for the purpose of preservation as housing for low-income and very low-income households;

Idaho Code Ann. § 67-8103(2). Local governments and local housing authorities may receive assistance from the state housing association. Idaho Code Ann. § 67-8104. Specifically, the Idaho Housing Trust Fund Act applies to low and very low income households; and defines low-income households as those with a median income of more than fifty percent but less than eighty percent of the median income of the area, and very-low income households as those with less than fifty percent of the median income. Idaho Code Ann. § 67-8102(9), (10).

The Plaintiff argues the Legislature specifically chose to address affordable housing in separate and distinct statutes. The statutes cited above do not make it an absolute requirement to build affordable housing. Rather, the Plaintiff argues such statutes limit a local government's ability to provide affordable housing through bonds or eminent domain or to offer incentives such as tax or impact fee exemptions to developers. The City of McCall, on the other hand, argues that none of the above statutes prohibit the City from passing legislation to provide for housing that is affordable to the City's workforce. What the above statutes make clear is that the Legislature has enacted provisions both through the Idaho Housing and Finance Association as well as local housing authorities at the city and county level to *regulate* affordable housing.

However, the Idaho Supreme Court has held that "[a] local ordinance which merely goes further than a state statute in imposing additional regulation of a given conduct does not conflict with state law." *Voyles v. City of Nampa*, 97 Idaho 597, 601, 548 P.2d 1217, 1221 (1976). Furthermore, under LLUPA, "[w]henever the ordinances made under this chapter impose higher standards than are

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required by any other statute or local ordinance, the provisions of ordinances made pursuant to this chapter shall govern." Idaho Code Ann. § 67-6518. Although there is extensive statutory regulation regarding community or affordable housing for low income households, this Court does not find that the Legislature impliedly preempted the entire field of affordable housing. While such legislation may provide the framework for regulations relating to affordable housing, there is nothing in these statutes which appears to prevent a city from enacting a zoning ordinance with respect to affordable housing.

b. Whether Ordinance No. 819 Operates as an Unauthorized Rent Control Provision

Under Ordinance No. 819, if a developer constructs community housing units as rentals, the developer is required to enter into a Community Housing Agreement which provides the construction specifications, sales and/or rental terms, and the restrictions placed on the units to ensure their permanent affordability and compliance with the Community Housing Guidelines. Such housing is permanently deed-restricted affordable housing subject to the regulations governing potential renters with qualifying income levels. VARHA recommends rental or sale prices to the City of McCall, although the City has the ultimate authority on price or rent restrictions. Such deed restrictions and affordable housing classification remain tied to the property and run with the land to future owners. The City of McCall argues it retains an interest in the deed-restricted community housing through the community housing agreement entered into by the property owners and through the regulations which ensure that such housing remains affordable, thus preserving the governmental interest in such property. Plaintiff argues that such rent restrictions amount to a violation of Idaho Code Section 55-307(2).

Idaho Code Section 55-307 provides in pertinent part as follows:

> A local governmental unit shall not enact, maintain, or enforce an ordinance or resolution that would have the effect of controlling the amount of rent charged for leasing private residential property. This provision *does not impair the right of any local governmental unit to manage and control residential property in which the local governmental unit has a property interest.*

Idaho Code Ann. § 55-307(2) (emphasis added). The statute expressly allows a local governmental unit to enact a resolution that would have the effect of controlling rent if the governmental unit has a "property interest" in the residential property. The City argues it has an interest in such affordable housing, explaining that its interest, while not a possessory interest, is a regulatory and administrative interest "applied through VARHA, to maintain the upkeep and usefulness of such affordable housing units and to ensure that such units are utilized only by those individuals qualifying for the low income housing."

Under Idaho Code Section 50-1904, a city housing authority has the power to "lease or rent any dwellings . . . embraced in any housing project . . . [and] to establish and revise the rents or charges therefore." Idaho Code Ann. § 50-1904(d); *see also* Idaho Code Ann. § 31-4204(d) (county housing authority). Furthermore, these provisions provide a housing authority with the power to acquire such real property through eminent domain or with funds obtained through issuance of a bond. *See* Idaho Code Ann. §§ 50-1914, -1916; 31-4214, -4216. A housing authority would clearly have a "property interest" in such property and the authority to control rents. *See* Idaho Code Ann. §§ 50-1913 and 31-4213. This Court does not conclude that the City of McCall possesses the same interest as a housing authority which owns real property.

The City of McCall admits it has only a regulatory or administrative interest. This Court is not convinced that such interest amounts to a "property interest" under section 55-307(2). The landowner or developer of affordable housing would retain a property interest subject to regulation. To hold that a local government entity has a property interest in real property when it exercises only a regulatory or administrative function would essentially eviscerate Idaho Code Section 55-307, which prohibits a local government from controlling rent charged for leasing private residential property.

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c. Whether the Ordinances Exact an Unauthorized Tax or are Disguised Impact Fees

Initially a distinction must be drawn with respect to Ordinance Nos. 819 and 820. These ordinances are essentially attempting to *provide* for affordable housing rather than *regulate* affordable housing. Although the Court defers to the City of McCall's findings relating to the need for affordable housing and the City's sincere efforts to provide for such, this Court is being asked to decide the constitutionality of the means the City of McCall is utilizing to provide for affordable housing. The City of McCall has meticulously engineered a land use provision which requires landowners and developers to give over something of value in exchange for the right to develop a subdivision or build a residential unit. While the City of McCall argues that Ordinance Nos. 819 and 820 merely regulate the growth of residential housing in McCall, it is undeniable that the stated goals of such ordinances are to provide for "a reasonable supply of affordable, deed restricted workforce housing (community housing)." Such ordinances contemplate that in exchange for approval and issuance of a building permit a landowner or developer must give over something of *value*, whether it be an agreement to provide deed- restricted inclusionary housing, the conveyance of land, or a fee under Ordinance Nos. 819 or 820. Therefore, this Court must determine whether the City of McCall has authority for exacting such "fee."[16]

[16] When the Court uses the term "fee" it is referring to *any* and all of the priorities listed under Ordinance No. 819, and not merely the "in lieu fee" under the fourth priority. Furthermore, it is understood that under Ordinance No. 820, the community housing fee is a "fee" in any general sense of the word. The Court's analysis is not restricted to the fact that under the first two priorities of Ordinance No. 819, the landowner is not relinquishing control over his or her property. This does not mean that the landowner is not in essence paying a price or a "fee" to the City of McCall for the privilege of subdividing or erecting improvements on his or her land. This Court recognizes the fact that the City of McCall has characterized such requirement as a "subsidy amount," as defined by the provisions for land conveyance and the in lieu fee. *See* City of McCall Ordinance No. 819, § 9.7.10(A)(4)(e) and § 9.7.10(A)(5)(b). Therefore, it is appropriate for this Court to find that the requirements under any of the four priorities in Ordinance No. 819 constitute a "fee."

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Municipalities are allowed pursuant to the Idaho Constitution to enact fees or impose taxes to fund projects. Generally, there are two primary ways in which a municipality may impose charges on the public or on particular persons: (1) by legislative enactment which specifically permits the municipality to fund a project through the assessment of taxes or fees; or (2) pursuant to the police power for the collection of revenue incidental to the enforcement of a regulation. *See Idaho Building Contractors Ass'n v. City of Coeur D'Alene*, 126 Idaho 740, 742-43, 890 P.2d 326, 328-29 (1995).

Article 7, section 6 of the Idaho Constitution expressly provides that a city has the power to assess and collect taxes for all purposes of the city corporation. Idaho Const. Art. 7 § 6. While Article 7, section 6 of the Idaho Constitution permits a municipal corporation to assess and collect taxes for the purposes of the corporation, that taxing authority is not self-executing and is limited to that taxing power given to the municipality by the Idaho Legislature. *Id.* at 742, 890 P.2d at 328 (citing *Brewster v. City of Pocatello*, 115 Idaho 502, 503-04, 768 P.2d 765, 766-67 (1988)). Neither party has asserted any statutory authority which would permit the City of McCall to impose a tax through Ordinance Nos. 819 and 820. In fact, the City of McCall denies that the fees or costs imposed upon landowners in either Ordinance Nos. 819 or 820 constitute a tax. Rather, the City argues such fees are lawful pursuant to its police powers.

Under Article 12, section 2 of the Idaho Constitution, a municipality may enact regulations pursuant to its police power for the furtherance of the public health, safety, morals, or welfare of its residents. Idaho Const. Art. 7 § 6. Pursuant to those police powers, a municipality may provide for the collection of revenue incidental to the enforcement of a regulation. *Idaho Bldg. Contractors Ass'n*, 126 Idaho at 742-43, 890 P.2d at 328-29. However, such municipal fees must be rationally related to the cost of enforcing the regulation and cannot be assessed purely as a revenue-generating scheme. *Brewster v. City of Pocatello*, 115 Idaho 502, 504, 768 P.2d 765, 767 (1988). If the fee or charge is imposed

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primarily for revenue raising purposes, it is in essence a tax and can only be upheld under the power of taxation. *Idaho Bldg. Contractors Ass'n*, 126 Idaho at 743, 890 P.2d at 329.

The City of McCall argues that Ordinance Nos. 819 and 820 are not revenue raising mechanisms, but rather land use regulations enacted through the City's police powers to control zoning regulations within the City's jurisdiction because such ordinances control a specific use of land and development. Just as the City of Coeur D'Alene argued in *Idaho Building Contractors Association*, the City of McCall argues that Ordinance Nos. 819 and 820 have been enacted for the purposes of promoting the health, welfare, safety, and morals of the residents of McCall. *See Idaho Bldg. Contractors Ass'n*, 126 Idaho at 743, 890 P.2d at 329.

In *Brewster*, the Idaho Supreme Court addressed the validity of an ordinance passed by the City of Pocatello charging a street restoration and maintenance fee upon all owners or occupants of property in the City of Pocatello pursuant to a formula reflecting the traffic which was estimated to be generated by that particular property. *Id.* at 502, 768 P.2d at 765. The Court held 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." *Id.* at 504, 768 P.2d at 767. The fee imposed by the ordinance in *Brewster* effectively was a general tax rather than an incidental regulatory fee. "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." *Id.* at 505, 768 P.2d at 768.

Under Ordinance No. 819, the subsidy created either by requiring landowners to deed restrict a percentage of units as community housing, to convey land, or to pay an in lieu fee appears to be an innovative way of creating or generating affordable housing. Quite plainly, even the fees collected

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pursuant to Ordinance No. 820 are for the purpose of "planning, subsidizing, developing or constructing community housing." City of McCall Ordinance No. 820, § 3.8.21(E)(4). To be a valid fee, the fee must be incidental to the enforcement of the regulation and bear a reasonable relationship to the cost of enforcing such regulation. *Brewster*, 115 Idaho at 504, 768 P.2d at 757; *see also Foster's Inc. v. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941).

The City of McCall argues it has specific statutory authority under the LLUPA to require a subsidy under Ordinance No. 819, or a fee under Ordinance No. 820, to provide for safe, affordable housing. Generally speaking, the LLUPA governs zoning regulations such as setbacks, density, and height regulations. *See Spranger, Grubb & Assocs. v. City of Hailey*, 127 Idaho 576, 903 P.2d 741 (1995). However, as discussed previously, the LLUPA does not provide the City with any authority for enacting ordinances which require that developers provide affordable housing, let alone authority to impose a fee or require a subsidy from landowners to further such goals. To the contrary, LLUPA provides that:

> Fees established for purposes of mitigating the financial impacts of development must comply with the provisions of chapter 82, title 67, Idaho Code. Denial of a subdivision permit or approval of a subdivision permit with conditions unacceptable to the landowner may be subject to the regulatory taking analysis provided for by section 67-8003, Idaho Code, consistent with the requirements established thereby.

Idaho Code Ann. § 67-6513. Chapter 82 is the Idaho Development Impact Fee Act,[17] and provides for the imposition by ordinance of development impact fees as a condition of development approval. Idaho

[17] The Idaho Development Impact Fee Act defines "affordable housing" as "housing affordable to families whose incomes do not exceed eighty percent (80%) of the median income for the service area or areas within the jurisdiction of the governmental entity. Idaho Code Ann. § 67-8203(1). Furthermore, the act defines "development requirement" as "a requirement attached to a developmental approval or other governmental action approving or authorizing a particular development project including, but not limited to, a rezoning, which requirement compels the payment, dedication or contribution of goods, services, land, or money as a condition of approval." Idaho Code Ann. § 67-8203(10). Under section 67-8204,

Code Ann. § 67-8204. A development impact fee is "payment of money imposed as a condition of development approval to pay for a proportionate share of the cost of system improvements needed to serve development." Idaho Code Ann. § 67-8203(9). Such fees "shall not exceed a proportionate share of the cost of system improvements." Idaho Code Ann. § 67-8204(1).

The critical language in the Idaho Development Impact Fee Act is that the purpose of such act is to provide funds necessary for "planning and financing public facilities needed to serve new growth and development . . . necessary . . . to promote and accommodate orderly growth and development and to protect the public health, safety and general welfare." Idaho Code Ann. § 67-8202. Public facilities are defined as water works, waste facilities, roads, streets, and bridges, storm water collection, parks and capital improvements, as well as public safety facilities such as law enforcement, fire, emergency medical and rescue and street lighting facilities. Idaho Code Ann. § 67-8203(24). Ultimately, while the Idaho Development Impact Fee Act allows an exception to imposing a development impact fee on affordable housing, the Act does not contemplate the imposition of development impact fees to ensure an adequate affordable housing supply or to develop such. Therefore, this Court is unable to conclude

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> A development impact fee ordinance may exempt all or part of a particular development project from development impact fees provided that such project is determined to create affordable housing, provided that the public policy which supports the exemption is contained in the governmental entity's comprehensive plan and provided that the exempt development's proportionate share of system improvements is funded through a revenue source other than development impact fees.

Idaho Code § 67-8204(10). Essentially, a city may provide an incentive for the creation of affordable housing by exempting the development impact fee, provided that such exemption is within the city's comprehensive plan and that such proportionate share of system improvements is funded through another source such as state or federal funding of affordable housing.

If the fees imposed under Ordinance Nos. 819 and 820 are development impact fees, such fees would be contrary to the stated legislative intention to provide an exception to the imposition of such fees under section 67-8204 for the development of affordable housing.

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that either such subsidy under Ordinance No. 819, or fee under Ordinance No. 820, is appropriate under the Idaho Development Impact Fee Act.

Additionally, the Idaho Supreme Court in *Idaho Building Contractors Association* found that the fee imposed by the city's 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." *Id.* In *Idaho Building Contractors Association*, the City of Coeur D'Alene had enacted an ordinance which required a capitalization fee to pay for a proportionate share of the cost of improvements needed to serve development. The capitalization fee was imposed on all building permits, in an attempt to have growth pay for growth. Relying on the analysis in *Brewster*, the Court held:

> [T]he 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.* 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.

Idaho Bldg. Contractors Ass'n. 126 Idaho at 744, 890 P.2d at 330 (emphasis added).

The Idaho Supreme Court distinguished taxes from fees, stating that "taxes serve the purpose of providing funding for public services at large, whereas a fee serves only the purpose of covering the cost of the particular service provided by the state to the individual." *Id.* (citing *Alpert v. Boise Water Corp.*, 118 Idaho 136, 145, 795 P.2d 298, 307 (1990)). Quoting the *Brewster* Court, the Idaho Supreme Court acknowledged its previous holding stating:

> It is only reasonable and fair to require the business, traffic, act, or thing that necessitates policing to pay this expense. To do so has been uniformly upheld by the courts. *On the other hand, this power may not be resorted to as a shield or subterfuge, under which to enact and enforce a revenue-raising ordinance or statute.*

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Id. (quoting *Brewster*, 115 Idaho at 504, 768 P.2d at 767). In *Idaho Building Contractors Association*, the Idaho Supreme Court affirmed the district court's decision holding that the municipal ordinance imposing fees was not authorized by the Development Impact Fee Act and that such fee was essentially a tax providing funding for public services at large. *Id.* at 743-44, 890 P.2d at 329-30.

Likewise, the City of McCall is attempting to have growth in McCall pay for growth. Essentially, landowners and developers are being charged a premium, by way of either a subsidy or a fee, to live in the City of McCall. There has been no suggestion that the landowner or developer enjoys some benefit, other than a benefit ostensibly to be realized by the public at large, from paying the subsidy or building permit fee under Ordinance Nos. 819 and 820.[18] While the landowner or developer may be denied a permit to develop a subdivision or build a residential unit if he or she fails to provide the subsidy or pay the fee, the "benefit" he or she receives in subdividing his or her land does not distinguish the subsidy or fee from a tax. Admittedly, the benefit provided is to assure "a reasonable supply of affordable, deed restricted workforce housing (community housing) being made available . . . [to] critical professional workers, essential service personnel, and service workers" who are able to live within proximity to their work. Whatever benefit the landowner receives is no different than a benefit received and shared by the public at large. The lack of affordable workforce housing is a problem for which the public should bear the cost to remedy rather than imposing the burden on a few landowners or

[18] The City of McCall attempts to argue that the benefit to the landowner is two-fold: (1) assurance that "critical professional workers, essential service personnel and service workers live within proximity to their work to provide municipal and private sector services;" and (2) incentives such as density bonuses, equity builder programs, and priority in sewage and water hookups. The benefit of essential workforce services is a benefit shared by the public at large. As to the incentives a landowner receives, such incentives are not clearly outlined in the ordinances themselves and this Court is not persuaded that such incentives are provided in exchange for the subsidy or fees paid pursuant to Ordinance Nos. 819 and 820.

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developers. Therefore, the purpose of the subsidy or fee under Ordinance Nos. 819 and 820 is for the benefit of public services at large rather than a benefit to the individual assessed.

The City of McCall urges that this Court's analysis, in determining whether the fees imposed are disguised taxes, should focus on whether the funds collected are disbursed in accordance with the stated purpose of the regulation. However, this step in the analysis should come only *after* a determination that the City of McCall had authority to impose such fees. In *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991), and also in *Schmidt v. Village of Kimberly*, 74 Idaho 48, 256 P.2d 515 (1953), the Idaho Supreme Court found that the fees imposed were collected pursuant to the Idaho Revenue Bond Act. Under those circumstances, the Court was required to determine whether the fees were collected under the guise of the Act and allocated and spent otherwise on projects not related to the ordinance. Such is not the situation in the underlying case. Therefore, unless the Court finds the fees imposed under Ordinance Nos. 819 and 820 are properly enacted pursuant to the City's police powers, it need not determine whether such fees are being properly disbursed in accordance with the stated purposes of the ordinances.

3. Whether Ordinance Nos. 819 and 820 are Unreasonable or Arbitrary

The third prong under *Hobbs* is to determine whether Ordinance No. 819 is a reasonable or arbitrary enactment. The Plaintiff argues that Ordinance No. 819 operates as a regulation of ownership rather than a land use regulation. As an ordinance regulating a landowner's ownership rather than use, it is an arbitrary and unreasonable exercise of the police powers and violates the constitutional protection given by the due process clause. The Plaintiff relies on *O'Connor v. City of Moscow*, 69 Idaho 37, 202 P.2d 401 (1949), for the proposition that a zoning ordinance may only regulate use, not ownership, of property. *Id.* at 43, 202 P.2d at 404 ("A zoning ordinance deals basically with the use, not ownership, of property.").

In *O'Connor*, the Court recognized that generally, zoning regulations are divided into two classes: "first, those which regulate the height and bulk of buildings within certain designated districts, and second, those which prescribe the use to which buildings within certain designated districts may be put." *Id.* at 41, 202 P.2d at 403. The City of Moscow attempted to restrict certain businesses to one area of the business district in downtown by adopting an ordinance that provided any change of ownership would constitute a new or additional business. Therefore, any non-conforming business which attempted to sell to a new owner would be prohibited from operating such business as it was a "new or additional" business.

Specifically, the *O'Connor* Court held that the provision of the ordinance declaring a change of ownership to be a new business was void as being an arbitrary and unreasonable exercise of the city's police power violating the constitutional protections given by the due process clause. *Id.* at 43, 202 P.2d at 404. By enacting an ordinance relating to the business district and the uses of property within certain limits of the city, the City of Moscow was regulating the use of such properties. However, attempting to make a change in ownership a "new business" was arbitrary and unreasonable.

Likewise, the City of McCall can designate the use of specific property in zoning areas as residential or commercial. However, the City of McCall's requirement that twenty percent of new subdivisions be deed-restricted as community housing regulates much more than a landowner's "use" of his or her property. The restrictions for community housing dictate the price for which the property may be sold and to whom the property may be sold. Even if the landowner builds rental units, the restrictions that twenty percent of the units be community housing also limit how much rent a landowner may charge and to whom the units may be rented. These restrictions go much further than merely regulating the use of property; instead, they essentially regulate ownership of the property by dictating to whom a unit may

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be sold or rented. This Court concludes such "regulation" is arbitrary and unreasonable as a land use provision.

This Court is convinced that the imposition of the subsidy or fee required under Ordinance Nos. 819 and 820 are, in reality, a tax, and not a regulation. Through such ordinances, the City of McCall has attempted to provide for affordable housing either by requiring developers to pay for such by subsidizing the housing market or by requiring landowners to pay a community housing fee for new residential building permits. There is nothing which regulates the use of land other than requiring a landowner to pay such subsidy or fees. Therefore, this Court finds that Ordinance Nos. 819 and 820 impermissibly exceed the City's police powers as they impose a tax without legislative authority allowing the City of McCall to enact such tax. Furthermore, to the extent that such ordinances attempt to regulate ownership (i.e. restricting a landowner's right to sell or rent lots and units by requiring affordable housing provisions), such ordinances are arbitrary and unreasonable.

Given these conclusions, there is no need to address the remaining issues or challenges by the Plaintiff of violation of the Equal Protection Clause, the unconstitutional "taking" analysis, or the ability of the City of McCall to contract with VARHA.

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CONCLUSION

For the foregoing reasons, this Court hereby GRANTS the Plaintiff's Motion for Summary Judgment, finding City of McCall Ordinance Nos. 819 and 820 exceed the City of McCall's police powers as they provide for unauthorized taxes and are, therefore, void and without force and effect. Counsel for Plaintiff shall submit any proposed judgments consistent with this decision, subject to the right of Defendant's counsel to review for form.

AND IT IS SO ORDERED.

Dated this 19th day of January, 2008.

Thomas F. Neville
District Judge

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Feb. 20. 2008 9:30AM No. 8598 P. 1

CERTIFICATE OF MAILING

I hereby certify that on this 19 day of February, 2008, I mailed (served) a true and correct copy of the within instrument to:

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Valley County, Idaho

Deputy Clerk

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FILED A.M. P.M. 4:37
JUN 03 2008
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

COVE SPRINGS DEVELOPMENT, INC., a Nevada corporation, and REDSTONE PARTNERS, L.P., a Nevada limited partnership, Petitioners/Plaintiffs, v. BLAINE COUNTY, a political subdivision of the State of Idaho, and JOHN DOES 1 THROUGH 20, Whose True Names Are Unknown, Respondents/Defendants, TOM O'GARA, JOHN STEVENSON, and GERRY BASHAW, Intervenors.	Case No. CV2008-22 ORDER ON SUMMARY JUDGMENT ON COUNTS 2 AND 3

This matter came on for hearing before the Court on May 29, 2008. Appearing at that hearing on behalf of the Plaintiffs Cove Springs Development, Inc. and Redstone Partners, L.P. were Chris Meyer, Boise, Idaho, Martin Hendrickson, Boise, Idaho, and Martin Flannes, Hailey, Idaho. Appearing on behalf of the Defendant Blaine County was Tim Graves, Hailey, Idaho. Also appearing at the hearing but not participating was Ned Williamson, Hailey, Idaho on behalf of Intervenors Tom O'Gara, John Stevenson, and Gerry Bashaw. The Court, having reviewed and considered the Petitioners/Plaintiffs' Motion for Summary Judgment on Counts 2 and 3, the supporting pleadings, and the briefing with respect to the motion, and having heard and considered the oral argument of respective counsel, finds and rules as follows:

Count 2 – Threshold, PUD, and CD Standards for Conformance with Comprehensive Plan (2004 Ordinance)

1. In its Answer, the County admitted paragraphs 211, 212, 213, 214, and 215 of Cove Springs' Complaint, which state as follows:

> 211. County Subdivision Threshold Standard § 10-5-2B states that no application shall be approved unless the Board determines that: "The proposed subdivision of land conforms to and is in accordance with the comprehensive plan text and map."
>
> 212. County Subdivision Planned Unit Development Standard § 10-6-8A.10 states that a planned unit development is contingent upon the Board's determination: "That the PUD will conform to the comprehensive plan."
>
> 213. County Subdivision Cluster Development Standard § 10-9-8E states that a cluster development is contingent upon the Board's determination: "That the A-20 CD conforms to the goals, recommendations and conclusions in the Blaine County comprehensive plan."
>
> 214. Under Idaho law, the purpose of a comprehensive plan is to serve as a general guide in instances involving zoning decisions such a[s] revising or adopting a zoning ordinance.
>
> 215. Under Idaho law, the County may not elevate its comprehensive plan to the level of controlling zoning law.

2. The County admitted Paragraphs 211, 212, 213, 214, and 215 of Cove Springs' Complaint. These are accurate statements of the law. *Urrutia v. Blaine County*, 134 Idaho 353, 358, 2 P.3d 738, 743 (2000).

3. Subdivision Ordinance §§ 10-5-2.B, 10-6-8.A.10, and 10-9-8.E, as written in 2004, apply to the Cove Springs applications. These ordinances remain in effect throughout Blaine County today with minor changes under the 2025 Ordinances which do not affect the analysis or conclusions reached in this order.

4. The Local Land Use Planning Act, Idaho Code §§ 67-6501 to 67-6537 ("LLUPA") contemplates that the comprehensive plan shall serve as a planning document to guide the adoption of zoning and other ordinances. Comprehensive plans are forward-looking, visionary documents. Although LLUPA requires that land use ordinances adopted by the County should generally reflect the broad goals and aspirations of the comprehensive plan, not all of the specific provisions in a comprehensive plan are necessarily reflected in current zoning ordinances. *Giltner Dairy, LLC v. Jerome County*, 2008 WL 803001 (Mar. 27, 2008). Thus, the standards and conditions spelled out in its adopted land use ordinances constitute the County's articulation as to how the comprehensive plan is to be applied to subdivision applications, including the Cove Springs Applications. Cove Springs and all citizens of Blaine County are entitled to rely on that articulation. Thus, individual zoning and subdivision permit applications are to be measured against the specific criteria set out in the applicable ordinances.

5. The following statement by the Idaho Supreme Court is controlling here:

> It is to be expected that the land to be subdivided may not agree with all provisions in the comprehensive plan, but a more specific analysis, resulting in denial of a subdivision application based solely on non-compliance with the comprehensive plan **elevates the plan to the level of legally controlling zoning law**. Such a result affords the Board unbounded discretion in examining a

> subdivision application and allows the Board to effectively re-zone land based on the general language in the comprehensive plan. As indicated above, the comprehensive plan is intended merely as a guideline whose primary use is in guiding zoning decisions. Those zoning decisions have already been made in this instance. . . . Thus, . . . the Board [may not rely] completely on the comprehensive plan in denying these applications, and should instead have crafted its findings of fact and conclusions of law to demonstrate that the goals of the comprehensive plan were considered, but were simply used in conjunction with the zoning ordinances, the subdivision ordinance and any other applicable ordinances in evaluating the proposed developments.

Urrutia, 134 Idaho at 358-59, 2 P.3d 743-44.

6. There is no issue before the Court on these present motions as to whether and what extent the County may consider its comprehensive plan in passing upon a subdivision application. More particularly, what weight Blaine County chooses to give to its comprehensive plan in considering or passing upon a subdivision application, or the question of whether the County can give its comprehensive plan any weight in passing upon a PUD or a Cluster Development or a Subdivision Application, (as opposed to adopting a new ordinance, or considering a conditional use permit, etc.) are not before the Court.

7. County ordinances are law. By including in its ordinance 10-5-2.B a *requirement* that "No application shall be approved" unless the Board "determines the proposed subdivision conforms to and is in accordance with the comprehensive plan," Blaine County has elevated its comprehensive plan "to the level of legally controlling zoning law." Therefore, this particular provision of this ordinance violates *Urrutia v. Blaine County,* 134 Idaho 353, 358, 2 P.3rd 738, 743 (2000), and is contrary to law on its face.

8. By including in its ordinance 10-6-8.A.(10) a *requirement* that a planned unit development is "contingent upon the Boards determination" that "the PUD will conform to the comprehensive plan," Blaine County has elevated its comprehensive plan "to the status of legally

controlling zoning law." Therefore, this particular provision of this ordinance violates *Urrutia*, and is contrary to law on its face.

9. By including in its ordinance 10-9-8.E a *requirement* that a Cluster Development is "contingent upon the Boards determination" that the "A-20 CD conforms to the goals, recommendations, and conclusions in the Blaine County comprehensive plan," Blaine County has elevated its comprehensive plan "to the status of legally controlling zoning law." Therefore, this particular provision of this ordinance violates *Urrutia* and is contrary to law on its face.

The Court therefore ORDERS, ADJUDGES, AND DECREES that Blaine County Code Sections 10-5-2.B, 10-6-8.A.10, and 10-9-8.E are contrary to law and are therefore null, void, and without further force and effect.

Count 2 - Unauthorized Exactions in Threshold, PUD, and CD Standards (2004 Ordinance)

10. In its Answer, the County admitted paragraphs 219, 221, 223, 225, 226, 227, 228, 229, 230, 231, 233, 234, 235, 236, 240, 241, 243, 244, and 249 of Cove Springs' Complaint, which state as follows:

> 219. County Subdivision Threshold Standard § 10-5-2.C states that no application shall be approved unless the Board determines that: "The proposed subdivision shall not adversely affect the quality of essential public services and facilities to current residents, including but not limited to school facilities, school bus transportation, police and fire protection, emergency services, and roads, and shall not require substantial additional public funding in order to meet the needs created by the proposed subdivision. The applicant shall be required by the Board to mitigate the adverse effects of the proposed subdivision, which may include, without limitation, contributions for additional capital improvements, on-going maintenance, and labor costs. The plan for, timing of, and proposed phasing of the mitigation shall be in a form acceptable to the Board."

221. County Subdivision Planned Unit Development Standard § 10-6-8.A.9 states that a planned unit development is contingent upon the Board's determination: "That the developer will finance the improvement of the road network outside of the PUD where traffic generated by the PUDs increased densities make such improvements necessary."

223. County Subdivision Cluster Development Standard § 10-9-8.D makes approval of a Cluster Development contingent upon a determination: "That where off-site impacts are found to result from the proposed development of the A-20 CD, the developer has proposed improvements to mitigate said impacts. Such improvements may include but not be limited to the road network (road improvements not limited to surfacing, school bus turnarounds, widening, intersections, bridges, culverts, and drainage facilities), fire protection facilities, and trails/recreation."

225. Idaho is a Dillon's Rule state.

226. Under Dillon's Rule, counties have no inherent authority to regulate or to tax.

227. Under Dillon's Rule, the authority of Idaho counties to tax derives from grants found in or necessarily implied by the Idaho Constitution and state statutes.

228. The Idaho Constitution contains a grant of police power to Idaho counties.

229. The grant of police power to counties contained in the Idaho Constitution does not include a general authority to tax.

230. The police power includes the authority to impose regulatory fees that are incidental to proper regulatory programs for the purpose of funding such programs.

231. The police power includes the authority to charge user fees for services provided by the County to a user of those services.

233. Development impact fees and other measures whose primary purpose is to generate revenue for services and capital improvements benefiting the public in general are not incidental regulatory fees.

234. Development impact fees and other measures whose primary purpose is to generate revenue for services and capital improvements benefiting the public in general are not user fees for services.

235. Development impact fees and other measures whose primary purpose is to generate revenue for services and capital improvements benefiting the public in general are not the sort of traditional exactions authorized under the police power in association with dedications within and primarily benefiting the development.

236. Development impact fees and other measures whose primary purpose is to generate revenue for services and capital improvements benefiting the public in general are taxes.

240. Article VII, § 6 of the Idaho Constitution is not self-executing. Any power of taxation authorized under this section must be implemented by legislation.

241. The only statute authorizing counties to assess development impact fees is the Idaho Development Fee Act, Idaho Code §§ 67-8201 to 67-8216 ("IDIFA").

243. County Ordinances §§ 10-5-2.C, 10-6-8.A.9 and 10-9-8.D do not comply with the procedural and substantive requirements of IDIFA.

244. The County did not enact County Ordinances §§ 10-5-2.C, 10-6-8.A.9 and 10-9-8.D pursuant to or in reliance on IDIFA.

249. The County has no authority to enforce a void ordinance or to apply a void ordinance to the Development Applications.

11. The County admitted Paragraphs 219, 221, 223, 225, 226, 227, 228, 229, 230, 231, 233, 234, 235, 236, 240, 241, 243, 244, and 249 of Cove Springs' Complaint. These are accurate statements of the law. *Idaho Building Contractors Ass'n v. City of Coeur d'Alene* ("*IBCA*"), 126 Idaho 740, 890 P.2d 326 (1995); *Brewster v. City of Pocatello*, 115 Idaho 502, 768 P.2d 765 (1988).

12. Subdivision Ordinance §§ 10-5-2.C, 10-6-8.A.9, and 10-9-8.D, as written in 2004, apply to the Cove Springs applications. These ordinances remain in effect throughout Blaine County today with minor changes under the 2025 Ordinances which do not affect the analysis or conclusions reached in this order.

13. Subdivision Ordinance §§ 10-5-2.C, 10-6-8.A.9, and 10-9-8.D establish development impact fees that the County seeks to impose without compliance with IDIFA.

14. The County has no inherent authority to impose taxes under its police power. The County must impose development impact fees pursuant to IDIFA or not at all.

15. The County could have imposed development impact fees to recover certain costs associated with new developments pursuant to IDIFA, but apparently elected not to do so.

16. The fees imposed under these ordinances are not incidental regulatory fees or user fees, but are intended to raise revenues for public purposes benefiting the County as a whole. Accordingly, the fees imposed under these ordinances constitute illegal taxes in violation of the Idaho Constitution and are, therefore, null and void.

> 17. "Approval of a plat may <u>not</u> be conditioned upon payment by the subdivider of a specified portion of the cost of improvements if no power to exact such a payment is delegated by the statutes. The county has a duty to keep all roads in reasonable repair and may not discharge that duty by imposing the costs on local developers, absent statutory authority; thus, <u>requiring a developer to pave a county road as a condition for approving a site plan is ultra vires.</u>"
>
> 83 Am. Jur. 2d *Zoning and Planning* § 485, at 420 (2003) (emphasis added).

18. In addition, even if the County had inherent authority to impose taxes (which it does not), Subdivision Ordinance §§ 10-5-2.C, 10-6-8.A.9, and 10-9-8.D are void because they have been preempted by IDIFA. IDIFA is a broad regulatory program that comprehensively addresses development impact fees in Idaho and was intended "to occupy the entire field of

regulation." *Envirosafe Services of Idaho v. County of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987).

19. Specifically, with regard to designated paragraph 223, the County argues that compliance with Standard § 10-9-8.D is voluntary. While part of that may be true, the County has made approval "contingent" on whether the proposed development has voluntarily agreed to contribute to mitigate off site impacts. When viewed in context, the County has conditioned approval upon an agreement by the developer to contribute to offsite improvements for clearly designated public purposes. In other words, the County has conditioned approval upon the developer's agreement to voluntarily pay a tax. In that regard, the County seeks to do indirectly, (by coercing payment of a fee for mitigation of offsite public impacts) what it may not do directly (levy an "exaction" or tax for precisely the same purpose).

Idaho Code 67-6513 requires that: "Fees established for purposes of mitigating the financial impacts of development must comply with the provisions of chapter 82, title 67, Idaho Code." Additionally, the Idaho Development Impact Fee Act ("IDIFA") provides, at section 67-8204(17): "A development impact fee ordinance shall include a schedule of development impact fees for various land uses per unit of development." Blaine County's ordinance includes no such fee schedule, an omission the County seeks to get around by arguing their fees are "voluntary", that the County does not need to enact or set a fee, (because they have placed the burden on the developer to set a fee[1]), and that the County may or may not actually set a fee requiring any payment in any particular instance. The issue is not whether the County *will or might* set a fee; the statute *demands* that they set a fee. This attempt by the County (to avoid setting fees as

[1] Blaine County Ordinance 10-9-8.D provides that approval is contingent upon a determination that "...the developer has proposed improvements to mitigate such impacts."

called for by IDIFA) runs afoul of IDIFA. Another subsection of the same statute sets forth the result. 67-8204(25) provides:

> "Any provision of a development impact fee ordinance that is inconsistent with the requirements of this chapter *shall be null and void and that provision shall have no legal effect.* A partial invalidity of a development impact fee ordinance shall not affect the validity of the remaining portions of the ordinance that are inconsistent with the requirements of this chapter."

The Court therefore ORDERS, ADJUDGES, AND DECREES that Sections 10-5-2.C, 10-6-8.A.9, and 10-9-8.D are contrary to law and are therefore null, void, and without further force and effect.

Count 3 –Road Mitigation Fee (2025 Ordinance)

19. In its Answer, the County admitted paragraphs 225, 226, 227, 228, 229, 230, 231, 233, 234, 235, 236, 240, and 241 of Cove Springs' Complaint, which are quoted above.

20. In its Answer, the County admitted paragraphs 256, 257, and 258 of Cove Springs' Complaint, which state as follows:

> 256. The Road Mitigation Fee [defined in paragraph 254 of the Complaint as Public Ways and Property Ordinance § 6-1-4 as amended in 2007] does not fall within the scope of IDIFA.
>
> 257. The Road Mitigation Fee does not comply with the procedural and substantive requirements of IDIFA.
>
> 258. The County did not enact the Road Mitigation Fee pursuant to or in reliance on IDIFA.

21. The County admitted Paragraphs 225, 226, 227, 228, 229, 230, 231, 233, 234, 235, 236, 240, 241, 256, 257, and 258 of Cove Springs' Complaint. These are accurate statements of the law.

22. The Road Mitigation Fee required under Public Ways and Property Ordinance § 6-1-6, (sometimes referred to as 6-1-4 in Cove Springs documents) as amended in 2007, establishes a development impact fee that the County seeks to impose without compliance with IDIFA.

23. The County has no inherent authority to impose taxes under its police power. The County must impose development impact fees pursuant to IDIFA or not at all.

24. The County could have imposed development impact fees to recover costs associated with roads pursuant to IDIFA, but elected not to do so.

25. The Road Impact Fee is not an incidental regulatory fee or user fee, but is intended to raise revenues for public purposes benefiting the County as a whole. Accordingly, the fees imposed under this ordinance constitute illegal taxes in violation of the Idaho Constitution and are, therefore, null and void. The County may not use an applicant's failure to pay an illegal fee as a basis for denial of a permit application.

26. In addition, even if the County had inherent authority to impose taxes (which it does not), the Road Impact Fee is void because it has been preempted by IDIFA. IDIFA is a broad regulatory program that comprehensively addresses development impact fees in Idaho and was intended "to occupy the entire field of regulation." *Envirosafe Services of Idaho v. County of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987).

The Court therefore ORDERS, ADJUDGES AND DECREES that Section 6-1-6 of the Blaine County Code is contrary to law and is therefore null and void, and without further force and effect.

Count 3 – Inclusionary Housing Fee (2025 Ordinance)

27. In its Answer, the County admitted paragraphs 225, 226, 227, 228, 229, 230, 231, 233, 234, 235, 236, 240, and 241 of Cove Springs' Complaint, which are quoted above.

28. In its Answer, the County admitted paragraphs 265, 266, 267, 268, and 269 of Cove Springs' Complaint, which state as follows:

> 265. Subdivision Ordinance § 10-5-4 adopted in 2006, provides, in relevant part: "INCLUSIONARY HOUSING: Twenty percent (20%) of the lots and houses in all subdivisions, including condominium subdivisions, approved and platted after the adoption date hereof shall be permanently restricted as community housing . . . ."
>
> 266. Pursuant to Subdivision Ordinance § 10-5-4, an applicant for subdivision approval may propose and the Board may approve, any of four (4) options, or a combination thereof, for providing community housing that is required by the ordinance, as follows: (1) the applicant build community housing on the site of the subdivision; (2) the applicant build community housing off the site of the subdivision; (3) the applicant convey land, either within the subdivision or off the site of the subdivision, for community housing; or (4) the applicant pay a fee in lieu for community housing.
>
> 267. Subdivision Ordinance § 10-5-4 does not fall within the scope of IDIFA.
>
> 268. Subdivision Ordinance § 10-5-4 does not comply with the procedural and substantive requirements of IDIFA.
>
> 269. The County did not enact Subdivision Ordinance § 10-5-4 pursuant to or in reliance on IDIFA.

29. The County admitted Paragraphs 225, 226, 227, 228, 229, 230, 231, 233, 234, 235, 236, 240, 241, 265, 266, 267, 268, and 269 of Cove Springs' Complaint. These are accurate statements of the law.

30. The Inclusionary Housing Fee imposed under Subdivision Ordinance § 10-5-4 establishes a development impact fee that the County seeks to impose without compliance with IDIFA.

31. The County has no inherent authority to impose taxes under its police power. The County must impose development impact fees pursuant to IDIFA or not at all.

32. IDIFA authorizes certain categories of development impact fees, to wit:

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). Affordable workforce housing is not among them.

33. Accordingly, the County has no authority to impose a development impact fee for affordable workforce housing, even if it complied with the procedural requirements of IDIFA. If the County wishes to provide affordable workforce housing, it must do so through the expenditure of property tax revenues or other authorized means. The Legislature has not authorized the County to shift the cost of building affordable housing from the community as a whole to individual developers and property owners.

34. The County has no inherent authority to impose taxes. The Inclusionary Housing Fee is not an incidental regulatory fee or user fee, but is intended to raise revenues for public purposes benefiting the County as a whole. Accordingly, the fees imposed under this ordinance constitute illegal taxes in violation of the Idaho Constitution and are, therefore, null and void.

35. In addition, even if the County had inherent authority to impose taxes (which it does not), the Inclusionary Housing Fee is void because it has been preempted by IDIFA. IDIFA is a broad regulatory program that comprehensively addresses development impact fees in Idaho

and was intended "to occupy the entire field of regulation." *Envirosafe Services of Idaho v. County of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987).

The Court therefore ORDERS, ADJUDGES, AND DECREES that Section 10-5-4 of the Blaine County Code is contrary to law, is therefore null and void, and without further force and effect.

Count 3 - Wildlife Overlay District (2025 Ordinance)

36. In its Answer, the County admitted paragraphs 262 and 263 of Cove Springs' Complaint, which state as follows:

> 262. The Wildlife Overlay District includes all "Classified Lands" as defined in Zoning Ordinance § 9-20-4.
>
> 263. "Classified Lands" are defined in Zoning Ordinance § 9-20-4 solely by reference to determinations made by the IDFG [Idaho Department of Fish and Game].

37. The County admitted Paragraphs 262 and 263 of Cove Springs' Complaint. These are accurate statements of the law as enacted by Blaine County.

38. Zoning Ordinance § 9-20-4 defines "Classified Lands" in terms of elk winter habitat, mule deer winter habitat, elk migration corridors, mule deer migration corridors, and other areas identified by IDFG. The ordinance provides:

- "Elk migration corridors in Blaine County are designated by IDF&G."
- "Elk winter habitat in Blaine County is designated by IDF&G."
- "Mule deer migration corridors are designated by IDF&G."
- "Mule deer winter habitat in Blaine County is designated by IDF&G."

39. Zoning Ordinance § 9-20-5 provides: "Prior to the planning or designating of any subdivision, the applicant shall contact IDF&G and any other applicable agency or professional as determined by the administrator to identify any classified lands on the subject property."

40. LLUPA authorizes and mandates the establishment of zoning districts. Idaho Code § 67-6511.

41. LLUPA does not require creation of a zoning map in so many words, but it does require the designation of zoning districts which, as a practical matter, may be displayed on a zoning map.

42. A zoning map describes current zoning. It is not to be confused with the land use map that is part of the comprehensive plan.[2]

43. LLUPA does not expressly authorize overlay districts, which are special zones imposed on top of an underlying zoning district. However, zoning districts and overlay districts are permissible forms of zoning, so long as they comply with statutory, common law, and constitutional requirements for land use zoning. One of the requirements inherent in all zoning is that landowners and other affected parties be informed of the boundaries of the zones. This may be accomplished either by mapping or by the establishment of objective, textual standards that allow persons to determine with reasonable certainty which zones apply to a given property.

44. Accordingly, the County's adoption of a Wildlife Overlay District without mapping its boundaries does not, in itself, violate LLUPA.

45. However, the Wildlife Overlay District fails to provide any objective criteria (or any criteria at all) to define its boundaries, other than "references used by IDF&G." Accordingly, there is no way for a person to determine whether a property is within or outside of

[2] The operative provision simply refers to this as a "map." Idaho Code § 67-6508(e). It is referred to as a "land use map" in Idaho Code § 67-6509(d).

the Wildlife Overlay District other than to ask for a determination by a third party (an IDFG employee) who answers to no one within the County and who can issue a conclusory determination on a case-by-case basis unbounded by any fixed, articulated standards or criteria. Furthermore, the ordinance allows IDFG to modify such "references" from time to time without any notice to and/or input from affected landowners.

The County argues that "wildlife move" which makes the adoption of a map difficult. Petitioners argue that the County had a map that was used prior to the adoption of this ordinance. At different times, in different years, virtually everyone in Hailey, Bellevue, or Ketchum has seen moose in the streets, elk in their yards or subdivisions, elk or deer wintering on surrounding hillsides, bears along the river, etc. Yes, wildlife move, and they move in different quantities to different locations in different years; however, the county has sought in this instance to avoid responsibility for fixing or studying or ascertaining the general movement of various animals, and/or zoning in accordance with general movements of particular populations, by delegating this entire responsibility to the Idaho Department of Fish and Game.

Fish and Game undoubtedly has more expertise than the County Commissioners in this area, but Fish and Game has no authority to set and/or designate zoning boundaries. The setting of zoning boundaries is a function that rests entirely with the designated agents of Blaine County.

In making this delegation, the County has unlawfully delegated *all* of its authority to officially designate the boundaries of a zoning district, the Wildlife Overlay District, to a non elected non county agent that needs to hold no hearings, accepts no public input, can change its designations of "classified lands" (and therefore the zoning boundary line) daily, weekly, or monthly, without notice, be subject to differing opinions and criteria within Fish and Game itself, and are not required to set forth their designations in a published map or guide for the benefit of

landowners, buyers, sellers, developers, or the general public. The boundaries of the zoning district don't even shift with the wildlife; they shift with the opinions of unknown persons in an amorphous state agency.

Blaine County has wholly abandoned its exclusive statutory obligation to establish a zoning boundary in this instance. The fact that the public can find out where these boundaries exist by contacting Idaho Fish and Game, or possibly obtain a waiver from the County administrator, or address grievances or complaints about the process or how Fish and Game exercises its discretion, before the Board of Commissioners does not save the ordinance. Contrary to the County's arguments, the Board of Commissioners, in this circumstance, is not able to control the ability of Fish and Game to exercise discretion. It is too late for there to be any discussion regarding an exercise of discretion once Fish and Game has made a designation. That comes about because Blaine County has delegated to Fish and Game the ability *to set and establish law* – the boundary of a zoning district, which may not be delegated. Any challenge after that is not a challenge to someone's exercise of discretion, it becomes a challenge to legislative authority, something quite different.

46. The delegation of land use planning and zoning authority contained in LLUPA is a complete, comprehensive, and exclusive delegation to local city and county governments. "The LLUPA provides both mandatory and exclusive procedures for the implementation of planning and zoning." *Sprenger, Grubb & Associates v. Hailey*, 133 Idaho 320, 321, 986 P.2d 343, 344 (1999) ("*Sprenger Grubb II*"). "[LLUPA] directs cities and counties to plan and zone. . . . Exercise of the authority to zone and plan, whether by governing board or by the established [planning and zoning] commissions, is made mandatory by I.C. § 67-6503." *Gumprecht v. City of Coeur d'Alene*, 104 Idaho 615, 617, 661 P.2d 1214, 1216 (1983), overruled on other grounds,

City of Boise City v. Keep the Commandments Coalition, 143 Idaho 254, 257, 141 P.3d 1123, 1126 (2006). "The legislature clearly intended that the authority to enact comprehensive plans, establish zoning districts and adopt amendatory ordinances be exercised exclusively by city and county legislative or governing bodies and pursuant to specific prescribed procedures." *Gumprecht*, 104 Idaho at 618, 661 P.2d at 1217 (1983). "We conclude that the power to approve a subdivision application in the impact area resides exclusively with the County." *Blaha v. Bd. of Ada County Commr's*, 134 Idaho 770, 777, 9 P.3d 1236, 1234 (2000) (only the county has the authority to approve applications in the area of impact, even if the county wished to cede or delegate that authority to a city).

47. IDFG is charged by the Legislature with the regulation of fishing and hunting and with wildlife research. Idaho Code §§ 36-101 to 36-124. It has no regulatory authority over habitat on private lands.

48. Zoning Ordinance § 9-20-4 constitutes an unlawful delegation of regulatory authority by the County to another agency. *Gumprecht*, 104 Idaho at 617, 661 P.2d at 1216 (holding that the City of Coeur d'Alene may not, in effect, delegate its planning and zoning responsibilities under LLUPA to the people by holding an initiative election on zoning issues).

49. LLUPA preempts Zoning Ordinance § 9-20-4, because the ordinance violates LLUPA's assignment of decision-making authority to local officials and authorizes non-elected officials outside of county government to make binding determinations that affect the land use entitlement process.

50. If the County desires to make use of the expertise of IDFG, the U.S. Fish and Wildlife Service, the University of Idaho, the USDA Extension Service, or any other expert, it should invite their views in the context of a hearing process that accommodates rebuttal of

evidence and which reserves the final decision to the County, as mandated by LLUPA. The result of that process should be the adoption of a map or objective criteria that clearly define the boundaries of the zone.

51. Accordingly, Zoning Ordinance § 9-20-4 is inconsistent with fundamental principles of zoning law. Zoning Ordinance § 9-20-4 on its face violates both LLUPA and the due process clauses of the Idaho and federal constitutions. The Court hereby declares, adjudges, and decrees it is void and of no further force and effect.

Therefore, the Court ORDERS, ADJUDGES, AND DECREES that Blaine County Code section 9-20-4 is contrary to law and is therefore null and void, and without further force and effect.

IT IS SO ORDERED.

DATED this 3rd day of June, 2008.

ROBERT J. ELGEE
District Judge

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on this 3 day of June, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jim J. Thomas Timothy K. Graves Blaine County Prosecuting Attorney's Office 201 2nd Ave. South, Suite 100 Hailey, ID 83333	____ U. S. Mail X Hand Delivered ____ Overnight Mail ____ Facsimile ____ E-mail
David R. Lombardi Christopher H. Meyer Martin C. Hendrickson GIVENS PURSLEY LLP 601 West Bannock St. P.O. Box 2720 Boise, Idaho 83701-2720	X U. S. Mail ____ Hand Delivered ____ Overnight Mail ____ Facsimile ____ E-mail
Martin A. Flannes FLANNES LAW, PLLC P.O. Box 1090 Hailey, Idaho 83333	X U. S. Mail ____ Hand Delivered ____ Overnight Mail ____ Facsimile ____ E-mail
Ned C. Williamson Williamson Law Office, PPLC 115 Second Avenue South Hailey, ID 83333	X U. S. Mail ____ Hand Delivered ____ Overnight Mail ____ Facsimile ____ E-mail

Lindsay Fisus
Deputy Clerk

LAW OFFICES

GIVENS PURSLEY LLP

MEMORANDUM

TO: Susan E. Buxton – Moore Smith Buxton & Turcke, Chartered
Nancy A. Wolff – Morris & Wolff PA

FROM: Gary G. Allen

RE: Powderhorn Ranch contiguity
Our File No. 8925-2

DATE: June 27, 2008

Powderhorn Ranch, LLC recently obtained additional information regarding the contiguity of its property ("Powderhorn Ranch") to the City of Harrison (the "City"), which we thought would be of interest to you.

I. THE CITY'S BOUNDARY CURRENTLY EXTENDS TO ¼ MILE BEYOND THE LOW-WATER MARK.

Idaho Code § 50-221 ("Section 50-221") provides that a city bordering on the shoreline of a navigable lake "shall have power by ordinance to fix, determine or extend its corporate boundaries or limits over the waters of such lake[] ... for a distance of one fourth (¼) of a mile from the low-water mark." In reliance upon this authority, the City passed Ordinance 284 on October 4, 1983 to extend its corporate boundaries "over the waters of Lake Coeur d'Alene for a distance of 1,320 feet, as measured from the low water mark of said Lake."

Ordinance 284 did not include a map or discuss the location of the low-water mark or extended corporate boundaries. Therefore, in order to assess the effect of Ordinance 284, we must first identify the low-water mark.

A. The low-water mark is the average low-water elevation over a period of years.

"Low-water mark" is not defined in Section 50-221. In fact, it is not defined anywhere in the Idaho Code other than the Lake Protection Act, which states that the low-water mark is "that line or elevation on the bed of the lake marked or located by the average low water elevations

over a period of years." I.C. § 58-1302(e).[1] Although this definition is not directly applicable to Section 50-221, it provides the best available basis for determining the low-water mark of Lake Coeur d'Alene. In *Payette Lakes Protective Association v. Lake Reservoir Co.*, 68 Idaho 111 (1948), the Idaho Supreme Court quoted with approval from a Virginia Supreme Court case that interpreted "low-water mark" in a manner consistent with the Lake Protection Act: "The term 'low-water mark,' used in the statute, means ordinary low water, not spring tide or neap tide, but normal, usual, customary, or ordinary low water, uninfluenced by special seasons, winds, or other circumstances." *Id.* at 125 (quoting *Scott v. Doughty*, 97 S.E. 802, 804 (Va. 1919)). We have found no other Idaho case discussing how a low-water mark is to be determined.

Section 50-221 does not directly address whether corporate boundaries extending over water may vary over time with the low-water mark. However, it indicates that corporate boundaries are to be "fix[ed]" or "determine[d]" by ordinance, which suggests that the low-water mark should be fixed at the time of the ordinance. Such an interpretation seems best from a practical standpoint, as well; there could be a host of problems associated with fluctuating corporate boundaries. Accordingly, it seems reasonable that the low-water mark should be fixed as of the date of the ordinance extending the corporate boundaries (in this case, October 4, 1983).

B. The low-water mark is 2122 feet above sea level.

The best available information shows that the low-water mark for Lake Coeur d'Alene on October 4, 1983 was 2122 above sea level. The Lake Protection Act does not identify what "period of years" is appropriate for calculating a low-water mark, but it would seem prudent to account for as many years as possible. We therefore averaged the annual low-water marks depicted in hydrographs from 1893 (the first year for which we have data) through 1983[2] and arrived at 2122.42 feet. Consequently, we are confident that the low-water mark of Lake Coeur d'Alene is 2122 feet above sea level for the purposes of Ordinance 284.

C. The low-water mark extends the City's boundary to within one parcel of Powderhorn Ranch.

To illustrate the City's boundary, we have attached as Exhibits A and B maps depicting the 2122-foot elevation along Lake Coeur d'Alene and the corresponding extension of the City's corporate boundaries pursuant to Ordinance 284. These maps illustrate that the City's northwestern boundary abuts Government Lot 3 in Section 35 ("Lot 3"), a 36-acre parcel directly adjacent to Powderhorn Ranch that is owned by the State of Idaho.

Thus, the City is contiguous with Lot 3 and the question becomes whether the City could annex Lot 3 with Powderhorn Ranch. Legal counsel for the Idaho Department of Lands ("IDL") has indicated to us that such annexations have occurred in the past and that IDL asks only for notice of any annexation proceedings. Idaho Code Section 50-222 does not require the consent of government landowners in order to annex their property.

---

[1] Consequently, this definition is also incorporated into the Idaho Department of Lands' rules regarding navigable lakes. *See* ID-ADC 20.03.04.010(13).

[2] We would gladly furnish copies of these hydrographs upon request.

II. THE LAW SUPPORTS THE CITY'S AUTHORITY TO ANNEX LOT 3 AND POWDERHORN RANCH.

We offer below our thoughts on how the annexation statute applies to what we now know about the City's boundary and its proximity to Powderhorn Ranch.

A. The Lot 3/Powderhorn Ranch annexation meets the requirements of Idaho Code Section 50-222.

The power to annex lies with the state. The state has the power to delegate that authority, and in Idaho has done so by adopting Idaho Code Section 50-222 ("Section 50-222").[3] *Willows v. City of Lewiston*, 93 Idaho 337, 341, 461 P.2d 120, 124 (1969). Thus, Section 50-222 governs the City's power to annex.

An annexation ordinance is a legislative act of a city in which the city enjoys broad discretion. *See Crane Creek Country Club v. City of Boise*, 121 Idaho 485, 487 (1990) ("annexation is a legislative act of city government"); *Burt v. City of Idaho Falls*, 105 Idaho 65, 68 (1983) ("in the annexation of land … the city council acted in a legislative manner"). If challenged in court, an annexation ordinance is presumed to be valid and the challenger bears the burden of proving its invalidity. *Ore. Shortline R.R. Co. v. City of Chubbuck*, 93 Idaho 815, 816 (1970), and *Hendricks v. City of Nampa*, 93 Idaho 95, 98-99 (1969).

Section 50-222 states as follows: "Cities have the authority to annex land into a city upon compliance with the procedures required in this section." I.C. § 50-222(2). The Powderhorn Ranch annexation would be a voluntary annexation known as a Category A annexation. The City has the power to undertake Category A annexations where two criteria are met:

(1) "[A]ll private landowners have consented to annexation," I.C. § 50-222(3)(a) (effective July 1, 2008), and
(2) The land lies "contiguous or adjacent" to the city boundaries at the time it is annexed. I.C. § 50-222(5)(a).

The Lot 3/Powderhorn Ranch annexation meets the first criterion as Powderhorn Ranch, the only private landowner, has consented to annex. In addition, Lot 3 is contiguous or adjacent to the City and Powderhorn Ranch is contiguous or adjacent to Lot 3. Therefore, the contiguity/adjacency requirement is met and the Lot 3/Powderhorn Ranch annexation meets both requirements of the statute.

B. *People v. Burley* supports the annexation of Lot 3 and Powderhorn Ranch.

People ex rel. Redford v. City of Burley, 86 Idaho 519 (1964), addressed the City of Burley's authority to annex land on the north side of the Snake River from Burley's then-existing

[3] As discussed above, the state also delegated the authority to annex up to ¼ mile from the low-water mark in Idaho Code Section 50-221, but that section does not pertain to this discussion.

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boundary on the south side of the river. The existing city was located entirely in Cassia County; the annexation added land in Minidoka County.

Then, as now, the annexation was governed by an annexation statute. The statute at that time required that the land to be annexed had to be "laid off into lots or blocks, containing not more than five acres of land each . . ." 86 Idaho at 522. With this background, the court stated the appellant's contentions as follows: "(1) that the land lying under the Snake River was not laid out in lots or blocks as mentioned in said statute, therefore it could not be annexed, and (2) since the bed or channel of the river could not be annexed, neither could the land lying north of the river be annexed, since it was not contiguous or adjacent to the city of Burley."

The court first held that the requirement that the land be laid off into five acre lots or blocks did not apply to the river bed, which was not susceptible to subdivision. On this basis, the court upheld the annexation of the river bed. 86 Idaho at 521-22.

The remainder of the case analyzes the "adjacent or contiguous" requirement. In doing so, the court upholds the annexation of the north shore properties. The dominant theme of the discussion is that cities can annex across bodies of water because the submerged lands underlying the water body were also annexed, thus bridging the gap in the city's boundaries. *E.g.* 86 Idaho at 523 ("The annexation [in *Blanchard v. Bisset*, 11 Ohio St. 96] consisted in an extension of the original boundaries of the City of Toledo so as to include the whole of the river and a considerable tract of land on its southeast side."); 86 Idaho at 524 ("The river is also included in the land annexed, and is therefore not a break to contiguity . . .") (quoting *Vestal v. City of Little Rock*, 15 S.W. 891 (Ark. 1891)); 86 Idaho at 524 ("The plat of the annexed territory introduced in evidence shows area 'A' extending to the eastern bank of the Ashley River. There is therefore, no intervening space between the annexed area and the former city boundaries.") (quoting *Tovey v. City of Charleston*, 117 S.E.2d 872 (S.C. 1961)).

The court also mentions but does not analyze a "general rule" that annexations across water are permissible when the watercourse is or may be spanned by a bridge. 86 Idaho at 523. However, nothing in the court's discussion indicates that the ability to span the distance between the land and the city boundary (which is clearly true for the Lot 3/Powderhorn Ranch annexation) is necessary to permit annexation. Further, this "general rule" no longer appears as black letter law in the American Jurisprudence series. *See* 56 Am.Jur.2d, Municipal Corporations, Etc. § 52 (this section is the current counterpart to that cited in *Burley*, but it does not mention the ability to span as a criterion for annexing across a waterway).

The *Burley* case has been followed consistently in other jurisdictions. For example, in *Anne Arundel County v. City of Annapolis*, 721 A.2d 217 (Md. 1998), the Maryland Supreme Court cited *Burley* in support of its conclusion that a peninsula separated on three sides by rivers flowing into the Chesapeake Bay was nonetheless contiguous to land on the other side of the rivers. "Other states that have addressed this issue have concluded that municipal corporations may extend their boundaries across a waterbody even if the annexed land would be separated

completely from the original city or town limits by that body of water." *Anne Arundel*, 721 A.2d at 230. Many other cases have reached the same conclusion.[4]

In sum, our analysis is that *Burley* supports the annexation of Lot 3 and Powderhorn Ranch because there is no gap in contiguity.

C. The Lot 3/Powderhorn Ranch annexation does not violate the purpose of the annexation statute.

A final concern we have analyzed is whether the annexation of Lot 3 and Powderhorn Ranch would violate the purposes of the annexation statute. In particular, the concern is whether such an annexation would open the door to annexations across water bodies to distant and completely disconnected areas. The Lot 3/Powderhorn Ranch annexation does not create such an issue.

Idaho Code Section 50-222(1) states the purpose of the legislature's annexation authority as follows:

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

See Hendricks v. City of Nampa, 93 Idaho 95, 98 (1969) (test of reasonableness governs annexation); *see also Town of Delavan v. City of Delavan*, 176 Wis.2d 516, 528-29 (Wis. 1993) (upholding the annexation of a peninsula separated by 400 feet of water from the city; the court invoked a "Rule of Reason," distinguishing between the permissible annexation at issue and the impermissible annexation of "distant lakeshore property").

Our view is that the Lot 3/Powderhorn Ranch annexation would support the purposes of the annexation statute for several reasons:

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[4] *See, e.g., Johnson v. Rice*, 551 So.2d 940, 945 (Ala. 1989); *Garner v. Benson*, 272 S.W.2d 442, 445 (Ark. 1954) (permissible to annex lands on opposite side of creek); *Vogel v. City of Little Rock*, 15 S.W. 836, 836-37 (Ark. 1891), *aff'd* 19 S.W. 13 (1892) (permissible to annex lands on opposite side of river); *Vestal v. City of Little Rock*, 15 S.W. 891, 892 (Ark. 1891) (permissible to annex lands on opposite side of river); *Denver v. Coulehan*, 39 P. 425 (Colo. 1894) (permissible to annex lands on opposite side of natural stream); *McGraw v. Merryman*, 104 A. 540 (Md. 1918) (permissible to annex lands on opposite side of river); *State ex rel. Taylor v. North Kansas City*, 228 S.W.2d 762, 773 (Mo. 1950) (permissible to annex lands on opposite side of river); *Blanchard v. Bissell*, 11 Ohio St. 96, 99 (1860) (permissible to annex lands on opposite side of river); *Beauford County v. Thrask*, 349 S.C. 522, 527 (S.C. Ct. App. 2002) ("the separation between the City and the Thrask property by the waters and marshes of the Beaufort River did not destroy contiguity"); *Bryant v. City of Charleston*, 368 S.E.2d 899, 901 (S.C. 1988); *Tovey v. City of Charleston*, 117 S.E.2d 872, 876 (S.C. 1961) (permissible to annex lands on opposite side of river); *Point Pleasant Bridge Co. v. Town of Point Pleasant*, 9 S.E. 231 (W. Va. 1889).

1. The City and Kootenai County both already recognize that Powderhorn Ranch is a logical extension of the City in that a significant portion of Powderhorn Ranch is already included in the area of city impact ("ACI"). The determination to include land in the ACI expressly requires consideration that the land "can reasonably be expected to be annexed to the city in the future." I.C. § 67-6526(b).

2. Powderhorn Ranch is readily accessible by car from the City via Highway 97, which crosses the Coeur d'Alene River a short distance away.[5] The South Carolina appellate court addressed a nearly identical situation in *Pinckney v. City of Beaufort*, 296 S.C. 142 (S.C. Ct. App. 1988). In *Pinckney*, the court upheld the annexation of two lots on an island separated from the city by a river and tidal creek despite the fact there was no bridge directly connecting them. The court found that a nearby bridge was sufficient to allow the "complete amalgamation between the City and the annexed parcels." This was so despite the fact that there would be "automotive traffic proceeding for a short distance through un-annexed or county property." *Pinckney*, 296 S.C. at 147.

3. There is a strong probability that Powderhorn Ranch and the City would share infrastructure such as potable water and sewer, thus supporting "the efficient and economically viable provision of tax-supported and fee-supported municipal services." I.C. § 50-222(1).

4. The property taxes and tax increment that Powderhorn Ranch would generate would support the provision of services in the City that would benefit the City.

5. Powderhorn Ranch residents would create demand for commercial uses in the City, to the benefit of existing City residents.

III. CONCLUSION

In sum, the new information regarding the location of the City's boundary clarifies that that an annexation of Lot 3 and Powderhorn Ranch would be contiguous to the City.

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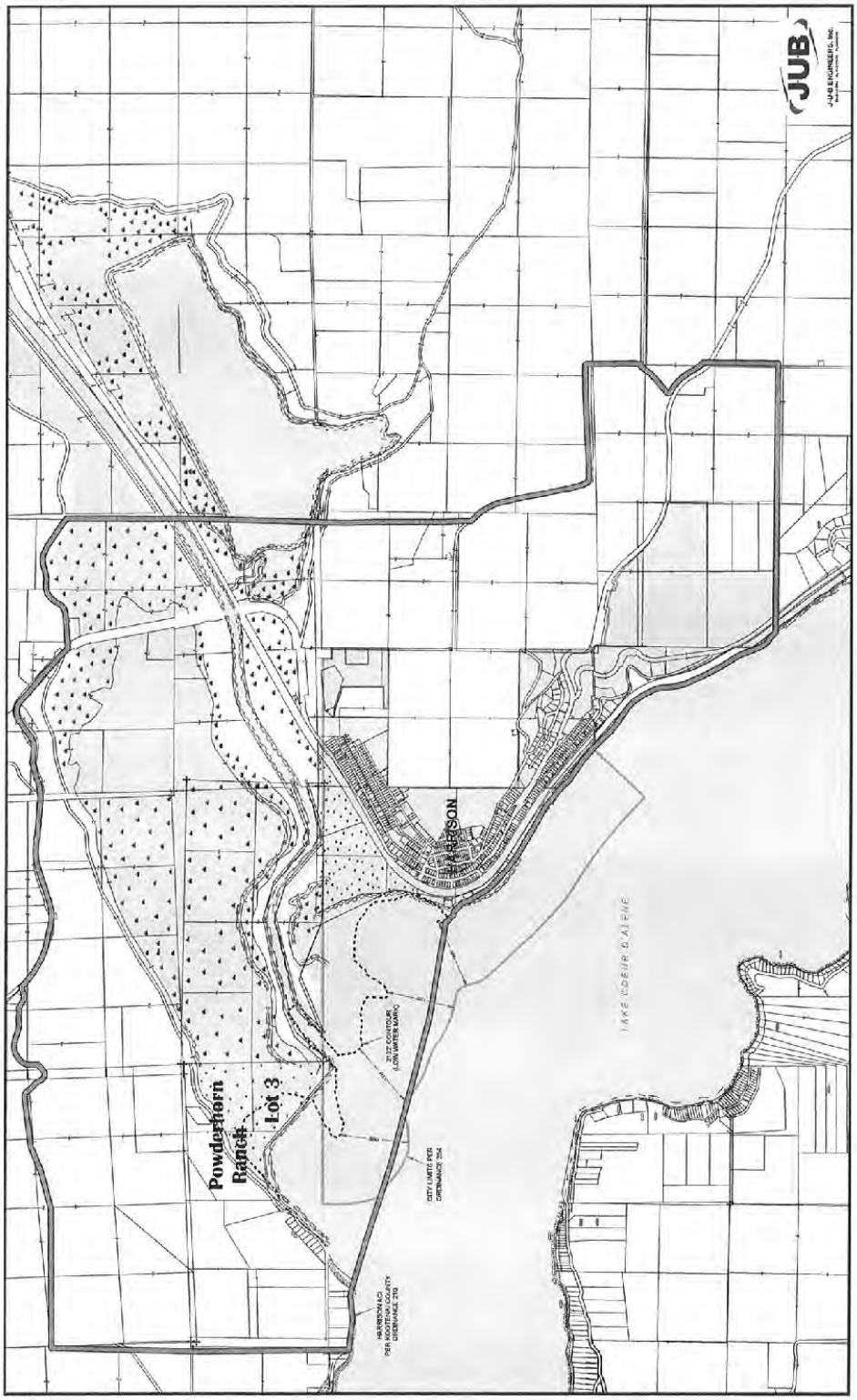
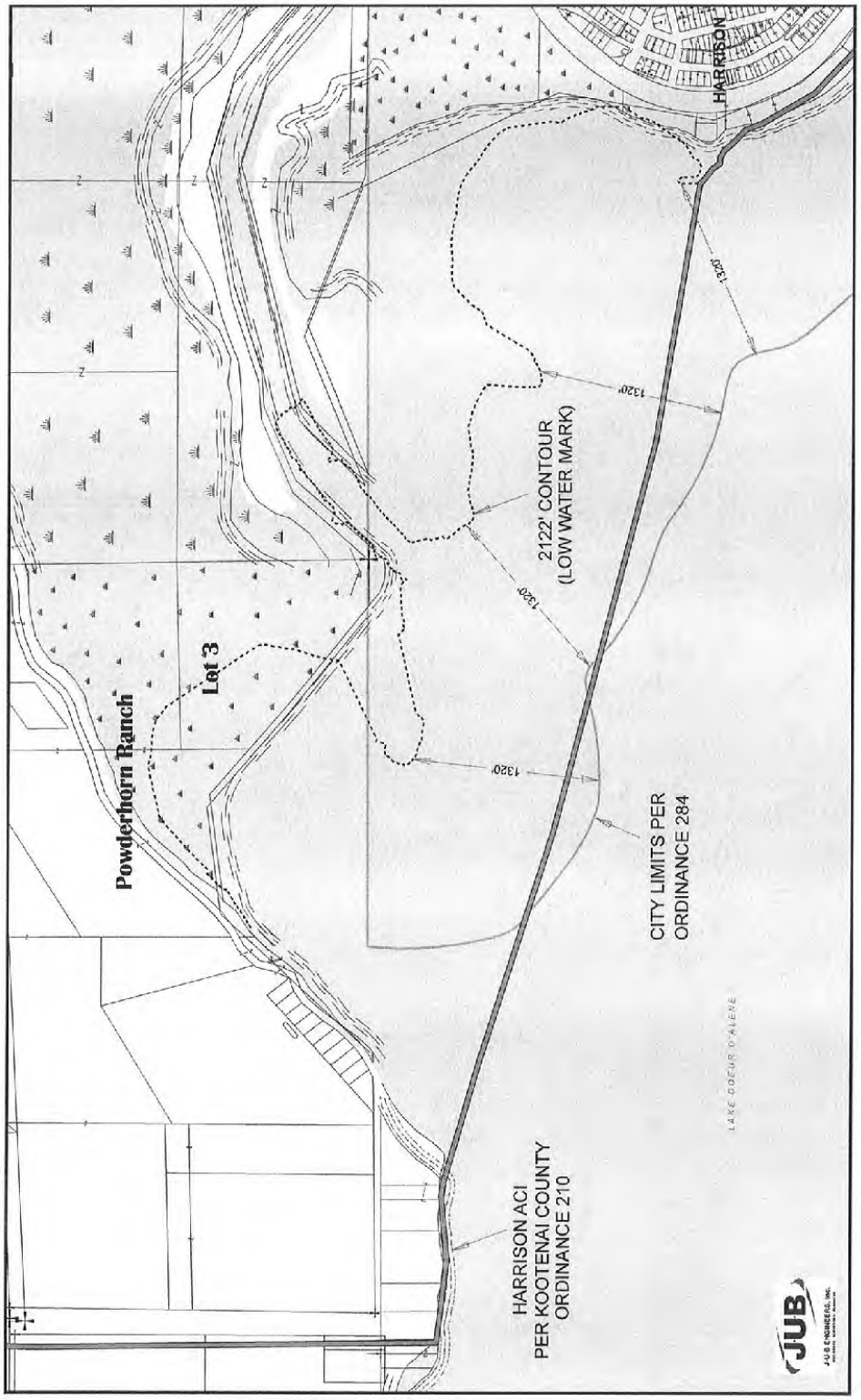
[5] The connecting road does not pass through another municipality, as was the situation in the readily distinguishable case of *Ocean Beach Heights v. Brown-Crummer Investment Co.*, 302 U.S. 614 (1938). In that case, the Court found no contiguity where a municipality on one side of Biscayne Bay sought to annex a detached tract on the other side of the bay such that residents on one side would be required to cross through another municipality to reach the other part of the city.


Powderhorn Ranch
Lot 3
HARRISON
LAKE COEUR D'ALENE
CITY LIMITS PER ORDINANCE 354
HARRISON & KI PER KOOTENAI COUNTY ORDINANCE 193
JUB ENGINEERS, INC.



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Office of the Attorney General

Idaho Regulatory Takings Act Guidelines

SEPTEMBER 2012

LAWRENCE WASDEN
Attorney General
700 West Jefferson Street
Boise, ID 83720-0010
www.ag.idaho.gov

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State of Idaho
Office of Attorney General
Lawrence Wasden

Dear Fellow Idahoans:

Property rights are most effectively protected when government and citizens understand their respective rights. The purpose of this pamphlet is to facilitate that understanding and provide guidelines to governmental entities to help evaluate the impact of proposed regulatory or administrative actions on private property owners.

One of the foundations of American democracy is the primacy of private property rights. The sanctity of private property ownership found expression in the 5th Amendment to the U.S. Constitution, written by James Madison, and in Article I, § 14 of the Idaho Constitution. Both provisions ensure private property, whether it be land or intangible property rights, and will not be arbitrarily confiscated by any agency of government.

Madison wrote in Federalist Paper 54, that "government is instituted no less for the protection of the property than of the persons of individuals." As your Attorney General, I feel a responsibility to ensure that the Constitution and state laws protecting the property rights of Idahoans are enforced. I am committed to ensuring that every state agency, department and official complies with both the spirit and letter of these laws.

In furtherance of this goal, the Idaho legislature enacted, and the Governor signed into law, Chapter 80, Title 67 of the Idaho Code. Originally passed in 1994, the law required the Attorney General to provide a checklist to assist state agencies in determining whether their administrative actions could be construed as a taking of private property. In 1995, the legislature amended the statute to apply to local units of government. Idaho Code § 67-6508 was also amended to ensure that planning and zoning land use policies do not violate private property rights. In 2003, Idaho legislators amended Chapter 80, Title 67 of the

Idaho Code, allowing a property owner to request a regulatory takings analysis from a state agency or local governmental entity should their actions appear to conflict with private property rights. Combined, these laws assure Idaho property owners that their rights will be protected.

My office has prepared this informational brochure for your use. If you have any questions, feel free to call your city or county prosecuting attorney.

LAWRENCE G. WASDEN
Attorney General

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IDAHO REGULATORY TAKINGS LAWS

Idaho Constitutional Provisions

Article I, section 13. Guaranties in criminal actions and due process of law. In all criminal prosecutions, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend in person and with counsel.

No person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law.

Article I, section 14. Right of eminent domain. The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.

Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.

Idaho Statutory Provisions

67-8001. Declaration of purpose. -- The purpose of this chapter is to establish an orderly, consistent review process that better enables state agencies and local governments to evaluate whether proposed regulatory or administrative actions may result in a taking of private property without due process of law. It is not the purpose of this chapter to expand or reduce the scope of private property protections provided in the state and federal constitutions. [67-8001, added 1994, ch. 116, sec. 1, p. 265; am. 1995, ch. 182, sec. 1, p. 668.]

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67-8002. Definitions. -- As used in this chapter:

"Local government" means any city, county, taxing district or other political subdivision of state government with a governing body.

"Private property" means all property protected by the constitution of the United States or the constitution of the state of Idaho.

"State agency" means the state of Idaho and any officer, agency, board, commission, department or similar body of the executive branch of the state government.

"Regulatory taking" means a regulatory or administrative action resulting in deprivation of private property that is the subject of such action, whether such deprivation is total or partial, permanent or temporary, in violation of the state or federal constitution. [67-8002, added 1994, ch. 116, sec. 1, p. 265; am. 1995, ch. 182, sec. 2, p. 668; am. 2003, ch. 141, sec. 1, p. 409.]

67-8003. Protection of private property.

1. The attorney general shall establish, by October 1, 1994, an orderly, consistent process, including a checklist, that better enables a state agency or local government to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property. The attorney general shall review and update the process at least on an annual basis to maintain consistency with changes in law. All state agencies and local governments shall follow the guidelines of the attorney general.

2. Upon the written request of an owner of real property that is the subject of such action, such request being filed with the clerk or the agency or entity undertaking the regulatory or administrative action not more than twenty-eight (28) days after the final decision concerning the matter at issue, a state agency or local governmental entity shall prepare a written taking analysis concerning the action. Any regulatory taking analysis prepared hereto shall comply with the process set forth in this chapter, including use of the checklist developed by the attorney general pursuant to subsection (1) of this section and shall be provided to the real property owner no longer than forty-two (42) days after the date of the filing of the request with the clerk or secretary of the agency whose action is questioned. A regulatory taking analysis prepared pursuant to this action shall be considered public information.

3. A governmental action is voidable if a written taking analysis is not prepared after a request has been made pursuant to this chapter. A private real property owner, whose property is the subject of governmental action, affected by a governmental action without the preparation of a requested taking analysis as required by this section, may seek judicial determination of the validity of the governmental action by initiating a declaratory judgment action or other appropriate legal procedure. A suit seeking to invalidate a governmental action for noncompliance with subsection (2) of this section must be filed in a district court in the county in which the private property owner's affected real property is located. If the affected property is located in more than one (1) county, the private property owner may file suit in any county in which the affected real property is located.

4. During the preparation of the taking analysis, any time limitation relevant to the regulatory or administrative actions shall be tolled. Such tolling shall cease when the taking analysis has been provided to the property owner. Both the request for a taking analysis and the taking analysis shall be part of the official record regarding the regulatory or administrative action. [67-8003, added 1994, ch. 116, sec. 1, p. 265; am. 1995, ch. 182, sec. 3, p. 669; am. 2003, ch. 141, sec. 2, p. 409.]

67-6508. Planning duties. It shall be the duty of the planning or planning and zoning commission to conduct a comprehensive planning process designed to prepare, implement, and review and update a comprehensive plan, hereafter referred to as the plan. The plan shall include all land within the jurisdiction of the governing board. The plan shall consider previous and existing conditions, trends, compatibility of land uses, desirable goals and objectives, or desirable future situations for each planning component. The plan with maps, charts, and reports shall be based on the following components as they may apply to land use regulations and actions unless the plan specifies reasons why a particular component is unneeded.

(a) Property Rights -- An analysis of provisions which may be necessary to ensure that land use policies, restrictions, conditions and fees do not violate private property rights, adversely impact property values or create unnecessary technical limitations on the use of property and analysis as prescribed under the declarations of purpose in chapter 80, title 67, Idaho Code.

67-6523. Emergency ordinances and moratoriums. If a governing board finds that an imminent peril to the public health, safety, or welfare

requires adoption of ordinances as required or authorized under this chapter, or adoption of a moratorium upon the issuance of selected classes of permits, or both, it shall state in writing its reasons for that finding. The governing board may then proceed without recommendation of a commission, upon any abbreviated notice of hearing that it finds practical, to adopt the ordinance or moratorium. An emergency ordinance or moratorium may be effective for a period of not longer than one hundred eighty-two (182) days. Restrictions established by an emergency ordinance or moratorium may not be imposed for consecutive periods. Further, an intervening period of not less than one (1) year shall exist between an emergency ordinance or moratorium and reinstatement of the same. To sustain restrictions established by an emergency ordinance or moratorium beyond the one hundred eighty-two (182) day period, a governing board must adopt an interim or regular ordinance, following the notice and hearing procedures provided in section 67-6509, Idaho Code. [67-6523, added I.C., sec. 67-6523, as added by 1975, ch. 188, sec. 2, p. 515; am. 2003, ch. 142, sec. 6, p. 415.]

67-6524. Interim ordinances and moratoriums. If a governing board finds that a plan, a plan component, or an amendment to a plan is being prepared for its jurisdiction, it may adopt interim ordinances as required or authorized under this chapter, following the notice and hearing procedures provided in section 67-6509, Idaho Code. The governing board may also adopt an interim moratorium upon the issuance of selected classes of permits if, in addition to the foregoing, the governing board finds and states in writing that an imminent peril to the public health, safety, or welfare requires the adoption of an interim moratorium. An interim ordinance or moratorium shall state a definite period of time, not to exceed one (1) calendar year, when it shall be in full force and effect. To sustain restrictions established by an interim ordinance or moratorium, a governing board must adopt a regular ordinance, following the notice and hearing procedures provided in section 67-6509, Idaho Code. [67-6524, added I.C., sec. 67-6524, as added by 1975, ch. 188, sec. 2, p. 515; am. 2003, ch. 142, sec. 7, p. 415.]

ADVISORY MEMORANDUM

STATE OF IDAHO ATTORNEY GENERAL'S ADVISORY MEMORANDUM FOR EVALUATION OF PROPOSED REGULATORY OR ADMINISTRATIVE ACTIONS TO IDENTIFY POTENTIAL TAKINGS OF PRIVATE PROPERTY

The Office of the Attorney General is required to develop an orderly, consistent internal management process for state agencies and local governments to evaluate the effects of proposed regulatory or administrative actions on private property. I.C. § 67-8003(1).

This is the Attorney General's recommended process and advisory memorandum. It is not a formal Attorney General's Opinion under I.C. § 67-1401(6), and should not be construed as an opinion by the Attorney General on whether a specific action constitutes a "taking." Agencies shall use this process to identify those situations requiring further assessment by legal counsel. Appendix A contains a brief discussion of some of the important federal and state cases that set forth the elements of a "taking."

State agencies and local governments are required to use this procedure to evaluate the impact of proposed administrative or regulatory actions on private property. I.C. § 67-8003(1). Upon the written request of an owner of real property that is the subject of such action, a state agency or local governmental entity shall prepare a written taking analysis concerning the action. Appendix B contains a form that can be used to request a taking analysis. Appendix C contains a sample form for completing a regulatory taking analysis. The written request must be filed ***not more than*** twenty-eight (28) days after the final decision concerning the matter at issue and the completed takings analysis shall be provided to the property owner ***no longer than*** forty-two (42) days after the date of filing the request with the clerk or secretary of the agency whose action is questioned. Idaho law also provides that "a regulatory taking analysis shall be considered public information." *See* I.C. § 67-8003(2).

Should a state agency or local governmental entity not prepare a regulatory taking analysis following a written request, the property owner may seek judicial determination of validity of the action by initiating legal action. Such a claim must be filed in a district court in the county in which the private property owner's affected real property is located. *See* I.C. § 67-8003(3).

General Background Principles

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. Article I, section 14 of the Idaho State Constitution provides in relevant part:

> Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.

Thus, under both the federal and state constitutions, private property may not be taken for public purposes without payment of just compensation.

Courts have recognized three situations in which a taking requiring just compensation may occur: (1) when a government action causes physical *occupancy* of property, (2) when a government action causes physical *invasion* of property, and (3) when government *regulation* effectively eliminates all economic value of private property. A "taking" may be permanent or temporary.

The most easily recognized type of "taking" occurs when government physically occupies private property. This may happen when the government exercises its eminent domain authority to take private property for a public use. Property owners must be paid just compensation when the government acquires private property through eminent domain authority. The types of public uses that may be the subject of eminent domain authority under state law are identified in Section 7-701, Idaho Code. Clearly, when the government seeks to use private property for a public building, a highway, a utility easement, or some other public purpose, it must compensate the property owner.

Physical invasions of property, as distinguished from physical occupancies, may also give rise to a "taking" where the invasions are of a recurring or substantial nature. Examples of physical invasions include, among others, flooding and water-related intrusions and overflight or aviation easement intrusions.

Like physical occupations or invasions, a regulation that affects the value, use, or transfer of property may also constitute a "taking," but only if it "goes too far." Although most land use regulation does not constitute a "taking" of property, the courts have recognized that when regulation divests an owner of the essential attributes of ownership, it amounts to a "taking" subject to compensation.

Regulatory actions are harder to evaluate for "takings" because government may properly regulate or limit the use of private property, relying on its authority and responsibility to protect public health, safety and welfare. Accordingly, government may abate public nuisances, terminate illegal activity, and establish building codes, safety standards, or sanitary requirements generally without creating a compensatory "taking." Government may also limit the use of property through land use planning, zoning ordinances, setback requirements, and environmental regulations.

If a government regulation, however, destroys a fundamental property right – such as the right to possess, exclude others from, or dispose of property – it could constitute a compensable "taking." Similarly, if a regulation imposes substantial and significant limitations on property use, there could be a "taking." In assessing whether there has been such a limitation on property use as to constitute a "taking," the court will consider both the purpose of the regulatory action and the degree to which it limits the owner's property rights.

An important factor in evaluating each action is the degree to which the action interferes with a property owner's reasonable investment-backed development expectations; in other words, the owner's expectations of the investment potential of the property and the impact of the regulation on those expectations. For instance, in determining whether a "taking" has occurred, a court might, among other things, weigh the regulation's impact on vested development rights against the government's interest in promulgating the regulation.

If a regulation prohibits all economically viable or beneficial uses of property, there may be liability for just compensation unless government can demonstrate that laws of nuisance or other pre existing limitations on the use of the property prohibit the proposed uses.

If a court determines there has been a regulatory "taking," the government has the option of either paying just compensation or withdrawing the regulatory limitation. If the regulation is withdrawn, the government may still be liable to the property owner for a temporary "taking" of the property.

Attorney General's Recommended Process

1. State agencies and local governments must use this evaluation process whenever the agency contemplates action that affects privately owned property. Each agency and local government must also use this process to assess the impacts of proposed regulations before the

agency publishes the regulations for public comment. In Idaho, real property includes land, possessors' rights to land, ditch and water rights, mining claims (lode and placer), and freestanding timber. I.C. §§ 55-101 and 63-108. In addition, the right to continue to conduct a business may be a sufficient property interest to invoke the protections of the just compensation clause of the Idaho Constitution. For example, see I.C. §§ 22-4501 to 22-4504.

2. Agencies and local governments must incorporate this evaluation process into their respective review processes. It is not a substitute, however, for that existing review procedure. Since the extent of the assessment necessarily depends on the type of agency or local government action and the specific nature of the impacts on private property, the agency or local government may tailor the extent and form of the assessment to the type of action contemplated. For example, in some types of actions, the assessment might focus on a specific piece of property. In others, it may be useful to consider the potential impacts on types of property or geographic areas.

3. Each agency and local government must review this advisory memorandum and recommended process with appropriate legal counsel to ensure that it reflects the specific agency or local government mission. It should be distributed to all decision makers and key staff.

4. Each agency and local government must use the following checklist to determine whether a proposed regulatory or administrative action should be reviewed by legal counsel. If there are any affirmative answers to any of the questions on the checklist, the proposed regulatory or administrative action must be reviewed in detail by staff and legal counsel. Since the legislature has specifically found the process is protected by the attorney-client privilege, each agency and local government can determine the extent of distribution and publication of reports developed as part of the recommended process. However, once the report is provided to anyone outside the executive or legislative branch or local governmental body, the privilege has been waived.

Attorney General's Checklist Criteria

Agency or local government staff must use the following questions in reviewing the potential impact of a regulatory or administrative action on specific property. While these questions also provide a framework for evaluating the impact proposed regulations may have generally, takings questions normally arise in the context of specific affected property. The public review process used for evaluating proposed regulations is another tool that the agency or local government

should use aggressively to safeguard rights of private property owners. If property is subject to regulatory jurisdiction of multiple governmental agencies, each agency or local government should be sensitive to the cumulative impacts of the various regulatory restrictions.

Although a question may be answered affirmatively, it does not mean that there has been a "taking." Rather, it means there could be a constitutional issue and that the proposed action should be carefully reviewed with legal counsel.

1. Does the Regulation or Action Result in a Permanent or Temporary Physical Occupation of Private Property?

Regulation or action resulting in a permanent or temporary physical occupation of all or a portion of private property will generally constitute a "taking." For example, a regulation that required landlords to allow the installation of cable television boxes in their apartments was found to constitute a "taking." *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164 (1982).

The acquisition of private property through eminent domain authority is distinct from situations where a regulation results in the physical occupation of private property. The exercise of eminent domain authority is governed by the procedures in chapter 7, title 7, Idaho Code. Whenever a state or local unit of government, or a public utility, is negotiating to acquire private property under eminent domain, the condemning authority must provide the private property owner with a form summarizing the property owner's rights. Section 7-711A, Idaho Code, identifies the required content for the advice of rights form.

2. Does the Regulation or Action Require a Property Owner to Dedicate a Portion of Property or to Grant an Easement?

Carefully review all regulations requiring the dedication of property or grant of an easement. The dedication of property must be reasonably and specifically designed to prevent or compensate for adverse impacts of the proposed development. Likewise, the magnitude of the burden placed on the proposed development should be reasonably related to the adverse impacts created by the development. A court also will consider whether the action in question substantially advances a legitimate state interest.

For example, the United States Supreme Court determined in Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141 (1987), that compelling an owner of waterfront property to grant a public

easement across his property that does not substantially advance the public's interest in beach access, constitutes a "taking." Likewise, the United States Supreme Court held that compelling a property owner to leave a *public* green way, as opposed to a private one, did not substantially advance protection of a flood plain, and was a "taking." Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994).

3. Does the Regulation Deprive the Owner of All Economically Viable Uses of the Property?

If a regulation prohibits all economically viable or beneficial uses of the land, it will likely constitute a "taking." In this situation, the agency can avoid liability for just compensation only if it can demonstrate that the proposed uses are prohibited by the laws of nuisance or other preexisting limitations on the use of the property. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886 (1992).

Unlike 1 and 2 above, it is important to analyze the regulation's impact on the property as a whole, and not just the impact on a portion of the property. It is also important to assess whether there is any profitable use of the remaining property available. *See* Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994). The remaining use does not necessarily have to be the owner's planned use, a prior use or the highest and best use of the property. One factor in this assessment is the degree to which the regulatory action interferes with a property owner's reasonable investment-backed development expectations.

Carefully review regulations requiring that all of a particular parcel of land be left substantially in its natural state. A prohibition of all economically viable uses of the property is vulnerable to a takings challenge. In some situations, however, there may be pre existing limitations on the use of property that could insulate the government from takings liability.

4. Does the Regulation Have a Significant Impact on the Landowner's Economic Interest?

Carefully review regulations that have a significant impact on the owner's economic interest. Courts will often compare the value of property before and after the impact of the challenged regulation. Although a reduction in property value alone may not be a "taking," a severe reduction in property value often indicates a reduction or elimination of reasonably profitable uses. Another economic factor courts will consider is the degree to which the challenged regulation

impacts any development rights of the owner. As with 3, above, these economic factors are normally applied to the property as a whole.

A moratorium as a planning tool may be used pursuant to Idaho Code § 67-6523—Emergency Ordinances and Moratoriums (written findings of imminent peril to public health, safety, or welfare; may not be longer than 182 days); and Idaho Code § 67-6524—Interim Ordinances and Moratoriums (written findings of imminent peril to public health, safety, or welfare; the ordinance must state a definite period of time for the moratorium). Absence of the written findings may prove fatal to a determination of the reasonableness of the government action.

The Idaho moratorium provisions appear to be consistent with the United States Supreme Court's interpretation of moratorium as a planning tool as well. In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S. Ct. 1465 (2002), the Court held that planning moratoriums may be effective land use planning tools. Generally, moratoriums in excess of one year should be viewed with skepticism, but should be considered as one factor in the determination of whether a taking has occurred. An essential element pursuant to Idaho law is the issuance of written findings in conjunction with the issuance of moratoriums. *See* Idaho Code §§ 67-6523 to 67-6524.

5. Does the Regulation Deny a Fundamental Attribute of Ownership?

Regulations that deny the landowner a fundamental attribute of ownership -- including the right to possess, exclude others and dispose of all or a portion of the property -- are potential takings.

The United States Supreme Court recently held that requiring a public easement for recreational purposes where the harm to be prevented was to the flood plain was a "taking." In finding this to be a "taking," the Court stated:

> The city never demonstrated why a public greenway, as opposed to a private one, was required in the interest of flood control. The difference to the petitioner, of course, is the loss of her ability to exclude others. . . . [T]his right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994).

The United States Supreme Court has also held that barring the inheritance (an essential attribute of ownership) of certain interests in land held by individual members of an Indian tribe constituted a "taking." Hodel v. Irving, 481 U.S. 704, 107 S. Ct. 2076 (1987).

6. (a) Does the Regulation Serve the Same Purpose That Would Be Served by Directly Prohibiting the Use or Action; and (b) Does the Condition Imposed Substantially Advance That Purpose?

A regulation may go too far and may result in a takings claim where it does not substantially advance a legitimate governmental purpose. Nollan v. California Coastal Commission, 483 U.S. 825, 107 S. Ct. 3141 (1987), Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994).

In Nollan, the United States Supreme Court held that it was an unconstitutional "taking" to condition the issuance of a permit to land owners on the grant of an easement to the public to use their beach. The Court found that since there was no indication that the Nollans' house plans interfered in any way with the public's ability to walk up and down the beach, there was no "nexus" between any public interest that might be harmed by the construction of the house, and the permit condition. Lacking this connection, the required easement was just as unconstitutional as it would be if imposed outside the permit context.

Similarly, regulatory actions which closely resemble, or have the effects of a physical invasion or occupation of property, are more likely to be found to be takings. The greater the deprivation of use, the greater the likelihood that a "taking" will be found.

APPENDIX A: SIGNIFICANT FEDERAL AND STATE CASES

Summaries of Significant Federal "Takings" Cases

Stop the Beach Renourishment, Inc. v. Fla. Dept. of Env. Prot., 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010).

The United States Supreme Court considered a judicial taking challenge to a decision by the Florida Supreme Court. A Florida state agency granted a permit under state law to restore a beach. The beach was eroded by hurricanes, and the permit would have allowed the restoration of the beach by adding sand to the beach. A non-profit corporation comprised of beachfront landowners challenged the agency decision in state court arguing the decision eliminated the littoral rights of landowners to receive accretions to their property and the right to have contact of their property with water remain intact. The Florida Supreme Court reversed a lower court and held the state law authorizing the beach restoration did not unconstitutionally deprive littoral rights. The non-profit corporation claimed the Florida Supreme Court's decision itself effectuated a taking of its members' littoral rights.

The United States Supreme Court unanimously held that the Florida Supreme Court did not take private property without just compensation in violation of the Fifth and Fourteenth Amendments. The Court recognized two property law principles under Florida law:

1. The State owned the seabed and was allowed to fill in its own seabed; and

2. When an avulsion exposes land seaward of littoral property that had previously been submerged, the land belongs to the State even if it interrupts the littoral owner's contact with water.

Therefore, when the State filled in previously submerged land for beach restoration, the State treated it as an avulsion for purposes of ownership. The non-profit members' right to accretions was therefore subordinate to the State's right to fill in its land. The United States Supreme Court did not reach a majority on the judicial taking question.

Kelo, et al. v. City of New London, Connecticut, et al., 545 U.S. 469, 125 S. Ct. 2655 (2005).

The United States Supreme Court held that a city's exercise of eminent domain power in furtherance of its economic development plan

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satisfied the Constitution's Fifth Amendment requirement that a taking be for public use. To effectuate its plan, the city invoked a state statute that specifically authorized the use of eminent domain to promote economic development. The Court observed that promoting economic development is a traditional and long accepted governmental function that serves a public purpose. Although the condemned land would not be open in its entirety to actual use by the general public, the purpose of its taking satisfied the constitutional requirement that a taking be for public use.

In response to the Kelo decision, the Fifty-eighth Idaho Legislature enacted House Bill No. 555 adding a new section, 7-701A, to the Idaho Code that specifically prohibits the use of eminent domain power to promote or effectuate economic development except where allowed by existing statute.

Tahoe-Sierra Preservation Council, Inc., et al. v. Tahoe Regional Planning Agency, et al., 535 U.S. 302, 122 S. Ct. 1465 (2002).

The United States Supreme Court held that imposition of a moratorium lasting thirty-two (32) months restricting development within the Lake Tahoe Basin was not a compensable taking. The Court noted the importance of Lake Tahoe in that it is one of only three lakes with such transparency of water due in large part to the absence of nitrogen and phosphorous which in turn results in a lack of algae. The Court also noted the rapid development of the Lake Tahoe area. In noting this development, the Court recognized the uniqueness of the area, and the importance of planning tools to the preservation of Lake Tahoe. The Court further noted that the geographic dimensions of the property affected, as well as the term in years, must be considered when determining whether a taking has occurred. Finally, the interest in protecting the decisional process is stronger when the process is applied to regional planning as opposed to a single parcel of land. Noteworthy is the extensive process that was followed by the Tahoe Regional Planning Agency along with the uniqueness of the Lake Tahoe region. The balance of interests favored the use of moratorium.

Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994).

In this case, the United States Supreme Court held that reconditioning an issuance of a permit on the dedication of bond to public use violated the Fifth Amendment. The city council conditioned Dolan's permit to expand her store and pave her parking lot upon her agreement to dedicate land for a public greenway and a

pedestrian/bicycle pathway. The expressed purpose for the public greenway requirement was to protect the flood plain. The pedestrian/bicycle path was intended to relieve traffic congestion. The United States Supreme Court held that the city had to make "some sort of individualized determination that the required dedication [was] related both in nature and extent to the impact of the proposed development" in order to justify the requirements and avoid a "takings" claim. In this case, the Court held that the city had not done so. It held that the public or private character of the greenway would have no impact on the flood plain and that the city had not shown that Dolan's customers would use the pedestrian/bicycle path to relieve congestion.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886 (1992).

Lucas was a challenge to the 1988 South Carolina Beach Front Management Act. The stated purpose of this Act was to protect life and property by creating a storm barrier, providing habitat for endangered species and to serve as a tourism industry. To accomplish the stated purposes, the Act prohibited or severely limited development within certain critical areas of the state's beach-dune system.

Before the Act's passage, David Lucas bought two South Carolina beach front lots intending to develop them. As required by the Act, the South Carolina Coastal Council drew a "baseline" that prevented Mr. Lucas from developing his beach front property. Mr. Lucas sued the council, alleging its actions under the Act constituted a "taking" requiring compensation under the Fifth Amendment. The trial court agreed, awarding him $1,232,387.50. A divided South Carolina Supreme Court reversed, however, holding that the Act was within the scope of the nuisance exception.

The United States Supreme Court reversed. Justice Scalia's majority opinion held that a regulation which "denies all economically beneficial or productive use of land" will be a "taking" unless the government can show that the proposed uses of the property are prohibited by nuisance laws or other pre existing limitations on the use of property. This opinion noted that such total takings will be "relatively rare" and the usual balancing approach for determining takings will apply in the majority of cases.

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Hodel v. Irving, 481 U.S. 704, 107 S. Ct. 2076 (1987).

Where the character of the government regulation destroys "one of the most essential" rights of ownership -- the right to devise property, especially to one's family -- this is an unconstitutional "taking" without just compensation.

In 1889, portions of Sioux Indian reservation land were "allotted" by Congress to individual tribal members (held in trust by the United States). Allotted parcels could be willed to the heirs of the original allottees. As time passed, the original 160-acre allotments became fractionated, sometimes into very small parcels. Good land often lay fallow, amidst great poverty, because of the difficulties in managing property held in this manner. In 1983, Congress passed legislation that provided that any undivided fractional interest that represented less than two percent of the tract's acreage and which earned less than $100 in the preceding year would revert to the tribe. Under the statute, tribal members who lost property as a result of this action would receive no compensation. Tribal members challenged the statute. The United States Supreme Court held this was an unconstitutional "taking" for which compensation was required.

Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141 (1987).

The United States Supreme Court held that it was an unconstitutional "taking" to condition the issuance of a permit to land owners on the grant of an easement to the public to use their beach.

James and Marilyn Nollan, the prospective purchasers of a beach front lot in California, sought a permit to tear down a bungalow on the property and replace it with a larger house. The property lay between two public beaches. The Nollans were granted a permit, subject to the condition that they allow the public an easement to pass up and down their beach. On appeal, the United States Supreme Court held that such a permit condition is only valid if it substantially advances legitimate state interests. Since there was no indication that the Nollans' house plans interfered in any way with the public's ability to walk up and down the beach, there was no "nexus" between any public interest that might be harmed by the construction of the house and the permit condition. Lacking this connection, the required easement was just as unconstitutional as it would be if imposed outside the permit context. (The Court noted that protecting views from the highway by limiting the size of the structure or banning fences may have been lawful.)

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Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164 (1982).

The United States Supreme Court ruled that a statute that required landlords to allow the installation of cable television on their property was unconstitutional. The Court concluded that "a permanent physical occupation authorized by government is a 'taking' without regard to the public interest that it may serve." The Court reasoned that an owner suffers a special kind of injury when a "stranger" invades and occupies the owner's property, and that such an occupation is "qualitatively more severe" than a regulation on the use of the property. The installation in question required only a small amount of space to attach equipment and wires on the roof and outside walls of the building.

Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646 (1978).

The United States Supreme Court upheld the constitutionality of a New York City historic preservation ordinance under which the city had declared Grand Central Station a "landmark." In response to Penn Central's takings claim, the United States Supreme Court noted that there was a valid public purpose to the city ordinance, and that Penn Central could still make a reasonable return on its investment by retaining the station as it was. Penn Central argued that the landmark ordinance would deny it the value of its "pre existing air rights" to build above the terminal. The Court found that it must consider the impact of the ordinance upon the property as a whole, not just upon "air rights." Further, under the ordinance in question, these rights were transferable to other lots, so they might not be lost.

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994) *cert. denied,* 513 U.S. 1109, 115 S. Ct. 898 (1995) (Florida Rock IV).

This is a Clean Water Act case. There have been several court decisions, and the most recent one affirms the holding that in the absence of a public nuisance, economic impact alone may be determinative of whether a regulatory "taking" under the Fifth Amendment has occurred. If the regulation categorically prohibits *all* economically beneficial use of land, destroying its economic value for private ownership, and the use prohibited is not a public nuisance, the court held that regulation has the effect equivalent to permanent physical occupation, and there is, without more, a compensable "taking."

In 1972, a mining company purchased 1,560 acres of wetlands (formerly part of the Everglades, but now excluded by road, canal and levee) for the purposes of mining limestone. In 1980, the company applied to the U.S. Army Corps of Engineers for a "section 404" permit for the dredging and filling involved in the mining operation. The Corps of Engineers denied the application, primarily for the purpose of protecting the wetlands. While several courts had previously held that the United States had unconstitutionally taken the mining company's property, and required the government to compensate the company, the Federal Circuit ruled that the evidence did not support a finding that the permit denial prohibited *all* economically beneficial use of the land or destroyed its value. On remand, the Court of Federal Claims held that permit denial resulted in a compensable partial regulatory taking of property and that a "partial taking" occurs when a regulation singles out a few property owners to bear burdens, while benefits are spread widely across the community. Florida Rock Industries, Inc. v. United States, 45 Fed.Cl. 21, 49 ERC 1292 (1999).

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Summaries of Significant Idaho "Takings" Cases

REGULATORY TAKINGS UPDATES

City of Coeur d'Alene v. Simpson, 142 Idaho 839, 136 P.3d 310 (2006).

The Idaho Supreme Court ruled that regulatory taking claims were ripe, even though the landowners had not sought a variance under the ordinance. A regulatory takings claim accrues when the burden of the ordinance on the landowners' property is known, not upon the enactment of an ordinance.

Generally, if an ordinance provides a procedure for a variance, the landowner must seek the variance before filing a regulatory takings claim. The Court explained that landowners' failure to seek a variance was not fatal here because the city did not have discretion under the ordinances to grant a variance. The requirement for a variance was not fatal because a variance in this situation could not have provided the property owners with relief under the stated purposes of the city's ordinances.

The Court also considered the valuation of property when the basis for regulatory takings claims is that an ordinance deprives the property of all economically productive or beneficial uses, or alternatively, that the value of the property is diminished by city ordinances. The Court explained that the task is to compare the value of the property taken with the value that remains in the property. This process requires identifying the property to be valued as realistically and fairly as possible in light of the regulatory scheme and factual circumstances. In this case, the property in question was divided during the course of the litigation, and the parcels owned by separate entities. The lower court concluded that the transfer of the property had no effect on valuation and dismissed the regulatory takings claims. The Idaho Supreme Court reversed and remanded, concluding that, based on the current record, it was improper for the district court to disregard the separate ownership of the parcels for the purpose of determining the property taken and the value of the property.

Inama v. Boise County, 138 Idaho 324, 63 P.3d 450 (2003).

Boise County was not obligated to compensate the plaintiff for the loss of his front end loader because the Idaho Disaster Preparedness Act of 1975 created immunity for a subdivision of the state engaged in

disaster relief activities following a declaration of disaster emergency. First, the Idaho Supreme Court rejects the plaintiff's argument that the scope of immunity granted by Idaho Code § 46-1017 is narrowed by Idaho Code § 46-1012(3), which provides for compensation for property "only if the property was commandeered or otherwise used in coping with a disaster emergency and its use or destruction was ordered by the governor or his representative." The Court held that the statute was "clear and unambiguous," and since Idaho Code § 46-1017 does not specifically limit the scope of immunity to damages compensable under Idaho Code § 46-1012, Idaho Code § 46-1017 grants Boise County immunity from damages. Second, the Court held that compensation is not allowed for inverse condemnation under art. I, sec. 14 of the Idaho Constitution because of the immunity granted under Idaho Code § 46-1017.

McCuskey v. Canyon County Comm'rs, 128 Idaho 213, 912 P.2d 100 (1996).

The Idaho Supreme Court held that when a regulation of private property that amounts to a taking is later invalidated, the subsequent invalidation converts the taking to a "temporary" taking. In such cases, the government must pay the landowner for the value of the use of the land during the period that the invalid regulation was in effect.

The Idaho Supreme Court also discussed the application of the statute of limitations to takings and inverse condemnation actions. The Court ruled that a taking occurs as of the time that the full extent of the plaintiff's loss of use and enjoyment of the property becomes apparent. As a result, the Court ruled that the statute of limitations begins to run when the plaintiff's loss of use and enjoyment of the property first becomes apparent, **even if** the full extent of damages cannot be assessed until a later date.

Sprenger Grubb & Assoc. v. Hailey, 127 Idaho 576, 903 P.2d 741 (1995).

The Idaho Supreme Court held that the City of Hailey's decision to rezone a parcel of land from "Business" to "Limited Business" was not a taking because some "residual value" remained in the property. The rezone reduced the value of the plaintiff's property from $3.3 million to $2.5 million. In addition, the Idaho Supreme Court held that the rezone did not violate the "proportionality" standard set out in Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994), because none of the plaintiff's property was dedicated to a public use.

Brown v. City of Twin Falls, 124 Idaho 39, 855 P.2d 876 (1993).

The Idaho Supreme Court held that the placement of road median barriers by city and state, which restrained business traffic flow to a shopping center, was exercise of police power and did not amount to compensable taking, since landowners had no property right in the way traffic flowed on streets abutting their property.

Hayden Pines Water Co. v. Idaho Public Utilities Commission, 122 Idaho 356, 834 P.2d 873 (1992).

Without extensive discussion, the Idaho Supreme Court held that an Idaho Public Utilities Commission order requiring a water company to perform certain accounting functions (at an estimated cost of $15,000 per year), without considering those costs in the rate proceeding, was an unconstitutional "taking."

Coeur d'Alene Garbage Service v. Coeur d'Alene, 114 Idaho 588, 759 P.2d 879 (1988).

The just compensation clause of the Idaho State Constitution art. I, sec. 14, requires compensation be paid by a city, where that city either by annexation or by contract prevents a company from continuing service to its customers. The Idaho Supreme Court held that a company has a property interest protected by the Idaho Constitution in continuing to conduct business. In this case, a garbage company already operating in the city and providing garbage service to customers lost the right to continue its business when the city entered into an exclusive garbage collection contract with another company, permitting only that company to operate within the annexed areas.

Ada County v. Henry, 105 Idaho 263, 668 P.2d 994 (1983).

The Idaho Supreme Court held that property owners had no "takings" claim where the owners were aware of zoning restrictions before they purchased the property, even though the zoning ordinance reduced their property's value.

Nettleton v. Higginson, 98 Idaho 87, 558 P.2d 1048 (1977).

In times of shortage, a call on water that allows water right holders with junior priority dates to use water while senior holders of beneficial use water rights are not allowed to use water, is not a taking protected by the just compensation clause of the Idaho Constitution.

Dawson Enterprises, Inc. v. Blaine County, 98 Idaho 506, 567 P.2d 1257 (1977).

A zoning ordinance that deprives an owner of the highest and best use of his land is *not*, absent more, a "taking." There are two methods for finding a zoning ordinance unconstitutional. First, it may be shown that it is not "substantially related to the public health, safety, or welfare." Second, it may be shown that the "zoning ordinance precludes the use of . . . property for *any* reasonable purpose."

State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976).

The Idaho Supreme Court held that where statutory or regulatory provisions are reasonably related to an enactment's legitimate purpose, provisions regulating property uses are within the legitimate police powers of the state and are not a "taking" of private property without compensation. In this case, the Court upheld the permit, bonding, and restoration requirements of the Dredge and Placer Mining Protection Act. It found that they were reasonably related to the enactment's purpose in protecting state lands and watercourses from pollution and destruction and in preserving these resources for the enjoyment and benefit of all people.

Boise Redevelopment Agency v. Yick Kong Corporation, 94 Idaho 876, 499 P.2d 575 (1972).

The Idaho Supreme Court held that the Idaho Constitution grants a power of eminent domain much broader than that granted in most other state constitutions. According to the Idaho Supreme Court, even completely private irrigation and mining businesses can use eminent domain. It held that the state, both through the power of eminent domain and the police powers, may protect the public from disease, crime, and "blight and ugliness."

Unity Light & Power Co. v. City of Burley, 92 Idaho 499, 445 P.2d 720 (1968).

Once a supplier of a service lawfully enters into an area to provide that service, annexation by a city does not authorize an ouster of that supplier from that area without condemnation.

Johnston v. Boise City, 87 Idaho 44, 390 P.2d 291 (1964).

Where government exercises its authority under its police powers and the exercise is reasonable and not arbitrary, a harmful effect

to private property resulting from that exercise alone is insufficient to justify an action for damages. The court must weigh the relative interests of the public and that of the individual to arrive at a just balance in order that government will not be unduly restricted in the proper exercise of its functions for the public good, while at the same time giving due effect to the policy of the eminent domain clause of ensuring the individual against an unreasonable loss occasioned by the exercise of governmental power.

Roark v. City of Caldwell, 87 Idaho 557, 394 P.2d 641 (1964).

The Idaho Supreme Court held that certain height restrictions, which limited use of private land adjacent to an airport to agricultural uses or to single family dwelling units, was an unconstitutional "taking" if no compensation was provided. The Court held that a landowner's property right in the reasonable airspace above his land cannot be taken for public use without reasonable compensation.

Mabe v. State, 83 Idaho 222, 360 P.2d 799 (1961).

The Idaho Supreme Court held that destroying or impairing a property owner's right to business access to his or her property constitutes a "taking" of property whether accompanied by actual occupation of or confiscation of the property.

Anderson v. Cummings, 81 Idaho 327, 340 P.2d 1111 (1959).

The Idaho Supreme Court recognized individual water rights are real property rights protected from "taking" without compensation.

Hughes v. State, 80 Idaho 286, 328 P.2d 397 (1958).

The Idaho Supreme Court held that private property of all classifications is protected under the Idaho Constitution just compensation clause.

Robison v. Hotel & Restaurant Employees Local #782, 35 Idaho 418, 207 P. 132 (1922).

The Idaho Supreme Court held that the right to conduct a business is a property interest protected under the Idaho Constitution just compensation clause.

Idaho Regulatory Takings Act Guidelines
APPENDIX B: REQUEST FOR REGULATORY TAKING ANALYSIS

Recommended Form for:
REQUEST FOR TAKING ANALYSIS

Name: _____
Address: _____
City: _____ Zip Code: _____
County: _____

1. Background Information
   This form satisfies the written request requirement for a regulatory taking analysis from a state agency or local governmental entity pursuant to Idaho Code § 67-8003(2). The owner of the property subject to the government action must file this with the clerk or secretary of the agency whose act is questioned within twenty-eight (28) days of the final decision concerning the matter at issue. A regulatory taking analysis is considered public information. Such an analysis is to be performed in accordance with the checklist established by the Attorney General of the State of Idaho pursuant to Idaho Code § 67-8003(1). See page 7 of the *Idaho Regulatory Takings Act Guidelines* for a description of the checklist.

2. Description of Property
   a. Location of Property:
   _____
   b. Legal Description of Property:
   _____
   _____

3. Description of Act in Question
   a. Date Property was Affected:
   _____
   b. Description of How Property was Affected:
   _____
   _____
   _____
   _____
   c. Regulation or Act in Question:
   _____
   _____
   d. Are You the Only Affected Property Owner? ☐ Yes ☐ No
   e. State Agency or Local Governmental Entity Affecting Property:
   _____
   f. Address of Agency or Local Governmental Entity:
   _____
   _____

B-1

State of Idaho
Office of the Attorney General
Regulatory Takings Checklist

	Yes	No
1 Does the Regulation or Action Result in Either a Permanent or Temporary Physical Occupation of Private Property?	_____	_____
2 Does the Regulation or Action Require a Property Owner to Either Dedicate a Portion of Property or to Grant an Easement?	_____	_____
3 Does the Regulation Deprive the Owner of All Economically Viable Uses of the Property?	_____	_____
4 Does the Regulation Have a Significant Impact on the Landowner's Economic Interest?	_____	_____
5 Does the Regulation Deny a Fundamental Attribute of Ownership?	_____	_____
6 (a) Does the Regulation Serve the Same Purpose That Would Be Served by Directly Prohibiting the Use or Action?	_____	_____
(b) Does the Condition Imposed Substantially Advance That Purpose?	_____	_____

Remember: Although a question may be answered affirmatively, it does not mean that there has been a "taking." Rather, it means there could be a constitutional issue and that proposed action should be carefully reviewed with legal counsel.

This checklist should be included with a requested analysis pursuant to Idaho Code § 67-8003(2).

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Tab K ABOUT THE AUTHORS

BIOGRAPHICAL SKETCHES

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Gary is a hard-wired problem solver who thrives in complex matters at the intersection of law, politics and public policy. His practice focuses on land use and environmental law.

Gary has addressed entitlement, access and other land use issues before local government entities throughout Idaho. His land use experience includes commercial, residential, industrial and infrastructure projects, including some of the largest projects in the state. Gary has also handled many land use litigation matters, and is experienced in condemnation issues and inverse condemnation litigation. Gary is a lead author of the Idaho Land Use Handbook, which is a land use reference book widely used around the state.

Gary has also practiced environmental law throughout his career. His practice focuses on environmental compliance, permitting, transactions and complex problem resolution. His practice includes significant experience in institutional environmental compliance, water quality, air quality and hazardous waste permitting, environmental issues in property and business transactions, administrative law, rulemaking, administrative enforcement actions and Superfund, underground storage tank and other environmental litigation. Gary also has worked on Endangered Species Act listing issues. Prior to joining Givens Pursley, Gary worked for a major regional firm in Boise and for a large firm in southern California.

Gary is active in local and state-wide community affairs. Among other things, he is the Past President of Idaho Smart Growth and serves on the Advisory Committee of the Idaho Chapter of the Urban Land Institute. He is also the co-founder and immediate past president of the South Boise Village neighborhood association.

Practice Areas

- Administrative and Regulatory Law
- Environmental Law
- Natural Resources
- Real Estate and Land Use

Industries

- Agriculture
- Energy and Utilities
- Food Processing and Manufacturing
- Mining
- Real Estate Development, Construction and Investment
- State and Local Government

Recognition

- Chambers USA, America's Leading Lawyers for Business (Natural Resources/Environment) Chambers USA, America's Leading Lawyers for Business (Zoning/Land Use)
- Best Lawyers in America (Land Use & Zoning Law)
- Boise Best Lawyers Land Use & Zoning Lawyer of the Year (2012)
- Martindale-Hubbell - highest ranking (AV) in Zoning, Planning and Land Use, Eminent Domain, Environmental, Litigation and Real Estate
- Mountain States Super Lawyers (Environmental)
- Who's Who Legal - Environmental 2014 Idaho
- 2012 Idaho State Bar Pro Bono Award

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- Lead Author, Idaho Land Use Handbook

Education

- J.D., Stanford Law School (Editor, Stanford Environmental Law Journal), 1987
- B.A., Dartmouth College (Phi Beta Kappa, McLain-Bowler Scholar, Co-Captain Varsity Tennis), 1983 - magna cum laude

CHRISTOPHER H. MEYER

Chris Meyer is a partner at Givens Pursley LLP. For over three decades, Chris has been a leader in the fields of water law, planning and zoning law, constitutional law, and road and public access law. He has extensive litigation experience at the administrative, district court and appellate levels (including 21 Idaho Supreme Court cases). *Best Lawyers in America* has named him "Lawyer of the Year" seven times in the fields of land use, water, and natural resources. Super Lawyers placed Chris in the "Top 100 Lawyers" list for the Mountain West. Chris has played a significant role in shaping legislation and 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. For two decades, he served as President of the Idaho Environmental Forum. His clients include cities, counties, highway districts, municipal water providers, Fortune Ten companies, energy companies, food producers, mining companies, and land developers. Before joining Givens Pursley in 1991, Chris practiced natural resources law with the National Wildlife Federation in Washington, D.C. and later taught water law and negotiation at the University of Colorado Law School's environmental law clinic. Chris earned his law degree, cum laude, from the University of Michigan in 1981. He earned is A.B. degree from the same school with high honors in economics, Phi Beta Kappa, James B. Angell Scholar, and Osterweil Prize in Economics.

LEGAL EMPLOYMENT

GIVENS PURSLEY LLP, Boise, Idaho.
Partner. August 1991 to present.

UNIVERSITY OF COLORADO LAW SCHOOL, Boulder, Colorado.
Associate Professor Adjoint. August 1984 to July 1991. Held this teaching position while serving as counsel to NWF Natural Resources Clinic. Taught seminars in advanced water law, environmental law, and negotiation.

NATIONAL WILDLIFE FEDERATION, Washington, D.C.
Counsel. May 1981 to July 1984.

PROFESSIONAL RECOGNITION

Best Lawyers in America
(www.bestlawyers.com)

Listed since 2007 in four categories: water law, land use & zoning law, natural resources, and environmental law.

Named "Lawyer of the Year" in Boise, Idaho seven times in the last decade:

- 2019 – top natural resources lawyer
- 2018 – top land use and zoning lawyer
- 2017 – top water lawyer
- 2015 – top land use and zoning lawyer

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- 2014 – top natural resources lawyer
- 2013 – top environmental lawyer
- 2011 – top natural resources lawyer

Mountain States Super Lawyers
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Listed since 2007 for energy and natural resources law. Named to "Top 100 Lawyers" in the Mountain West in 2019.

Chambers USA
(www.chambersandpartners.com/guide/usa/5)
Listed since 2008 in Band 1 (highest ranking) for natural resources and environmental law.

Who's Who Legal - Environment
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One of only 11 environmental / natural resources lawyers recognized in Idaho.
Listed since 2010.

Litigation Counsel of America
(www.litcounsel.org)
Inducted in 2010 as fellow in honorary society composed of less than one-half of one percent of American lawyers.

Marquis' Who's Who in the World, Who's Who in America, and Who's Who in American Law
(www.marquiswhoswho.com)

Martindale-Hubbell
(www.martindale.com)
Listed since 1996 with highest ranking (AV).

Idaho Yearbook Directory (2001)
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Described as a "key figure in Idaho water law" and "centrally located in the world of Idaho public affairs."
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Dividing the Waters, the National Judicial College, a water law training program for judges.
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EDUCATION

University of Michigan, School of Law
Juris Doctor, 1981
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University of Michigan
Degree in economics, 1977
- High distinction (magna cum laude)
- Phi Beta Kappa
- James B. Angell Scholar
- Honors program in economics, class honors
- Osterweil Prize in Economics

Nemeth v. Shoshone County, Idaho Supreme Court Docket No. 46118-2018 (exclusivity of federal quiet title act in Idaho road matters).

N. Idaho Bldg. Contractors Ass'n v. City of Hayden, 164 Idaho 530, 432 P.3d 976 (2018) (Bevan, J.) (constitutionality of sewer capitalization fees).

Black Canyon Irrigation Dist. v. State, 163 Idaho 144, 408 P.3d 899 (2018) (Burdick, C.J.) (defending district court's rejection of late claims for refill water).

United States v. Black Canyon Irrigation Dist., 163 Idaho 54, 408 P.3d 52 (2017) (Burdick, C.J.) (defending district court's rejection of late claims for refill water).

Greater Boise Auditorium Dist. v. Frazier, 159 Idaho 266, 360 P.3d 275 (2015) (W. Jones, J.; Eismann, J., concurring) (defended district in constitutional challenge to government financing).

In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63, Idaho Department of Water Resources (Oct. 15, 2015) (Spackman, Director) (water rights).

N. Idaho Bldg. Contractors Ass'n v. City of Hayden, 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J.; J. Jones, J., concurring) (constitutionality of sewer capitalization fees).

Washington County v. Bilbao, Case No. CV-2014-1854 (Idaho, Third Judicial Dist., Dec. 8, 2014) (successfully represented Washington County in public access litigation).

County of Shoshone v. United States, 589 Fed. Appx. 834 (9th Cir. 2014) (per curium) (road law).

A&B Irrigation Dist. v. State, 157 Idaho 385, 336 P3d 792 (2014) (Burdick, C.J.) (water rights—single fill rule—Basin-Wide Issue No. 17).

In the Matter of Certified Question of Law – White Cloud v. Valley County, 156 Idaho 77, 320 P.3d 1236 (2014) (J. Jones, J.) (defended county in challenge to road development fees).

Hehr v. City of McCall, 155 Idaho 92, 305 P.3d 536 (2013) (Burdick, C.J.) (defended city in action involving impact fees – the Greystone Village case).

Alpine Village Co. v. City of McCall, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.) (defended city in action involving impact fees).

Buckskin Properties, Inc. v. Valley County, 154 Idaho 486, 300 P.3d 18 (2013) (J. Jones, J.) (defended county in constitutional challenge to development impact fees).

Idaho Conservation League v. U.S. Forest Service, 2012 WL 3758161 (Aug. 29, 2012) (Lodge, J.) (NEPA and forest management litigation involving mining exploration).

Sopatyk v. Lemhi County, 151 Idaho 809, 264 P.3d 916 (2011) (W. Jones, J.) (defended county's validation of Anderson Creek Road as a public road).

White Cloud v. Valley County, 2011 WL 4583846 (D. Idaho Sept. 30, 2011) (Lodge, J.); *White Cloud v. Valley County*, 2012 WL 13018504 (D. Idaho Aug. 8, 2012) (Lodge, J.) (defended county in challenge to road development fees). Subsequent to this decision, the surviving state law question was certified to the Idaho Supreme Court, which ruled in Valley County's favor, *In the Matter of Certified Question of Law – White Cloud v. Valley County*, 156 Idaho 77, 320 P.3d 1236 (2014) (J. Jones, J.), and the federal case was dismissed with prejudice (Case 1:09-cv-00494-EJL-CWD Document 162).

Alpine Village Co. v. City of McCall, 2011 WL 3758118 (D. Idaho 2011) (Winmill, C.J.) (defended city in action involving housing fees). The city sought removal to federal court. On remand, the city prevailed in *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.).

Mann v. Peters, Case No. CV-2011-57 (Idaho, Fifth Judicial Dist., Aug. 11, 2011) (upholding right to develop an "accessory dwelling unit" on property).

American Independence Mines and Minerals Co. v. USDA, 733 F. Supp. 2d 1241 (D. Idaho 2010) (Lodge, J.) (NEPA, standing, and road law issues).

In Re SRBA, Case No. 39576, Subcase Nos. 63-02779 et al. (Idaho, Fifth Judicial Dist., June 3, 2009), Subcase Nos. 63-02449 et al. (Fifth Judicial Dist., May 20, 2009) (secured partial decrees for each of the City of Nampa's water rights).

In Re SRBA, Case No. 39576, Subcase Nos. 29-00271 *et al*. (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (Melanson, J.), *aff'd, City of Pocatello v. State*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.) (upholding position of *amici curiae* regarding alternative points of diversion in City of Pocatello municipal water rights litigation).

Galli v. Idaho County, 146 Idaho 155, 191 P.3d 233 (2008) (W. Jones, J.; J. Jones, J., concurring) (amicus brief in public access case).

Cove Springs Development, Inc. v. Blaine County, Case No. CV2008-22 (Idaho, Fifth Judicial Dist., June 3, 2008) (Robert J. Elgee, D.J.) (declaring unlawful and unconstitutional various exaction and comprehensive plan ordinance provisions).

Schaefer v. City of Sun Valley, Case No. CV-06-882 (Idaho, Fifth Judicial Dist. July 3, 2007) (Robert J. Elgee, D.J.) (declaring unconstitutional Sun Valley's affordable housing fee).

American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources, 143 Idaho 862, 154 P.3d 433 (2007) (Trout, J.) (conjunctive management of ground and surface water).

Chisholm v. Idaho Department of Water Resources, 142 Idaho 159, 125 P.3d 515 (2005) (Burdick, J.) (water rights—local public interest).

Davisco Foods Int'l, Inc. v. Gooding County, 141 Idaho 784, 118 P.3d 116 (2005) (Schroeder, J.; J. Jones, dissenting) (land use).

Colorado Water Conservation Bd. v. City of Central, 125 P.3d 424 (Colo. 2005) (Martinez, J.) (article by Christopher Meyer cited by court).

Farrell v. Bd. of County Comm'rs of Lemhi County, 138 Idaho 378, 64 P.3d 304 (2002) (Schroeder, J.) (public road access—the Indian Creek Road case).

Potlatch Corp. v. United States, 134 Idaho 916, 12 P.3d 1260 (2000) (Schroeder, J.) (rejecting federal reserved water rights for wilderness).

State v. Hagerman Water Right Owners, Inc., 130 Idaho 727, 947 P.2d 400 (1997) (Schroeder, J.) (partial forfeiture water rights case).

Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J.) (interpretation of water right amnesty statute).

The Klamath Tribes, 135 I.B.L.A. 192, 1996 WL 518742 (Apr. 12, 1996) (prevailed in defending challenge by Indian tribe to cultural resource use permit).

State, ex rel. Higginson v. United States, 128 Idaho 246, 912 P.2d 614 (1995) (McDevitt, C.J.) (constitutionality of SRBA amendments—water law).

Nebraska v. Rural Electrification Administration, 23 F.3d 1336 (8th Cir. 1994) (Heaney, J.), aff'g, 1993 WL 662353 (D. Neb 1993) (scope of environmental trust's authority to litigate).

Sierra Club v. Yeutter, 911 F.2d 1405 (10th Cir. 1990) (Tacha, J.) (federal reserved water rights – amicus brief).

State v. Morros, 766 P.2d 263 (Nev. 1988) (per curiam) (prevailed in establishing recognition of instream flows under state law).

Catherland Reclamation Dist. v. Lower Platte North Natural Resources Dist., 433 N.W.2d 161 (Neb. 1988) (Fahrnbruch, J.) (water rights and state endangered species act).

Hitchcock and Red Willow Irrigation Dist. v. Lower Platte North Natural Resources Dist., 410 N.W.2d 101 (Neb. 1987) (Hastings, J.) (right to build water project).

Tulalip Tribes of Washington v. FERC, 732 F.2d 1451 (9th Cir. 1985) (East, J.) (hydropower licensing).

Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984) (mitigation for hydroelectric developments on public lands) (White, J.) (amicus curiae brief).

National Wildlife Fed'n v. Marsh, 568 F. Supp. 985 (D.D.C. 1983) (Parker, J.) (administrative law under NEPA).

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) (Stevens, J.) (ban on water export in violation of commerce clause) (amicus curiae brief available at 1982 WL 608572).

LEGISLATION

H.B. 1 (2019) (subordination of certain water storage rights).

Tax Deed Amendments of 2016 (easements), S.B. 1388.

Highway Funding and Detachment Amendments of 2014 (road law), H.B. 619a, 2014 Idaho Sess. Laws ch. 214, codified at Idaho Code §§ 40-709, 40-709A.

Public Access Amendments of 2013 (road law), H.B. 321, 2013 Idaho Sess. Laws ch. 239, codified at Idaho Code §§ 40-114, 40-202, 40-203, 40-208, 40-2312.

Exemption from water rights for land application of municipal effluent (water rights), H.B. 608, 2012 Idaho Sess. Laws ch. 218, codified at Idaho Code §§ 42-201(8), 42-221(P).

Local Public Interest Amendments (water rights), 2003 Idaho Sess. Laws ch. 298, codified at Idaho Code §§ 42-202B(3), 42-203A(5), 42-222(1), 42-240(5), 42-1763.

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Meyer, *The Effects of Labor Organization on the Functional Distribution of Income in Manufacturing Industries in the United States for the Years 1948 through 1972*, Senior Honors Thesis, University of Michigan (1978).

BAR MEMBERSHIPS

Member of the bars of Idaho, Colorado, and the District of Columbia.
Admitted to practice in federal courts in the District of Columbia, Eighth, Ninth, and Tenth Circuits.

PERSONAL

Born September 29, 1952, in Springfield, Missouri.
Married to Karen A. Meyer. One child, C. Andrew Meyer (graduate of Tulane Law School now practicing in Boulder, Colorado).
Chris has made his home in Boise, Idaho since 1991. He has lived in fifteen cities in thirteen states: Arkansas, Colorado, Florida, Idaho, Indiana, Iowa, Maryland, Michigan, Missouri, New York, Virginia, Washington, D.C., and Florence, Italy. He has lived in Boise for the last 27 years.

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Deborah E. Nelson

Partner (Executive Committee Member)

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(208) 388-1215

Deborah is a respected regulatory and land use attorney. She helps businesses get the permits and incentives they need to site, expand and operate.

Practice Areas

- Administrative and Regulatory Law
- Environmental Law
- Natural Resources
- Real Estate and Land Use

Industries

- Agriculture
- Energy and Utilities
- Food Processing and Manufacturing
- Real Estate Development, Construction and Investment
- State and Local Government

Deborah is a partner at Givens Pursley LLP, a law firm located in Boise, Idaho. She helps companies obtain the legal entitlements required for the siting, operation or expansion of a business or development. These entitlements include tax and workforce incentives, financing, real estate acquisition, land use and regulatory approvals, water rights and environmental permits. She has experience with energy, food processing, mining, industrial, commercial, agricultural, manufacturing, resort, large-scale residential and mixed-use projects. She handles permitting, contracting, operations and disputes and has experience in administrative, litigation and transactional settings.

Deborah is active in professional and community organizations. She serves on the Executive Committee of Givens Pursley and is the current Chair of the Board of Directors of the Boise Valley Economic Partnership. She previously has served on the Boards of the Andrus Center for Public Policy, Family Advocates, and Idaho Women Lawyers. She is a graduate of the Boise Metro Chamber's Leadership Boise program and past Chair of the COMPASS Public Participation Committee.

Deborah's professional accomplishments and civic contributions have been recognized by her peers. Chambers USA has recognized Deborah as a Zoning/Land Use and Natural Resources & Environment expert and Martindale-Hubbell has awarded her the highest ranking (AV). Mountain States Super Lawyers has recognized her as a Rising Star. She is a recipient of the Tribute to Women and Industry (TWIN) award (2009), Idaho Business Review's Women of the Year award (2008), Idaho Women Lawyers' distinguished Kate Feltham award (2008), and Idaho Business Review's Accomplished 40 Under 40 award (2003).

Deborah received her law degree from Northwestern School of Law in 1997 with a Certificate in Environmental and Natural Resources Law. She graduated from Rhodes College in 1994 with a degree in International Studies. Prior to joining Givens Pursley, she served as a Deputy Attorney General for the State of Idaho, where she specialized in water and environmental litigation.

Deborah lives in Boise with her husband and two children and spends her free time mountain biking, skiing and running in Idaho's beautiful outdoors.

Recognition

- Chambers USA, America's Leading Lawyers for Business - Zoning/Land Use
- Chambers USA, America's Leading Lawyers for Business - Natural Resources & Environment
- Martindale-Hubbell - Highest Ranking (AV)
- Mountain States Super Lawyers - Land Use/Zoning
- Tribute to Women in Industry Award from Women's and Children's Alliance
- Woman of the Year Award from Idaho Business Review
- Kate Feltham Award from Idaho Women Lawyers
- Accomplished 40 Under 40 Award from Idaho Business Review

Education

- J.D. Northwestern School of Law of Lewis and Clark College 1997, Certificate in Environmental and Natural Resources Law (Honors Moot Court Award; Law Review)
- B.A. Rhodes College 1994 (Bobby Doughty Memorial Award for Excellence in International Studies; President, International Studies National Honor Society)

Admissions

- Idaho
- U.S. District Court (Idaho)
- U.S. Court of Appeals for the Ninth Circuit

Memberships & Affiliations

- Executive Committee, Givens Pursley
- Board of Directors, Boise Valley Economic Partnership
- Past member, Board of Governors, Andrus Center for Public Policy
- Past member, Board of Directors, Family Advocates
- Alumna, Boise Metro Chamber of Commerce's Leadership Boise
- Past Chair, COMPASS Public Participation Committee
- Past President, Idaho Women Lawyers

Publications

- Brownfields Law and Practice (Idaho Chapter), Matthew Bender & Co., Inc. (2004-2013)
- Land Use Handbook: The Law of Planning, Zoning and Property Rights in Idaho (2017), Givens Pursley LLP (co- author)
- "Land Use Considerations for Siting an Energy Facility in Idaho", The Advocate (2011) (co-author)
- Numerous publications associated with speaking engagements

Franklin G. Lee

Partner

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Frank focuses on providing real estate, construction, land use, regulatory and corporate expertise to developers and businesses. He works extensively in matters involving the acquisition, entitlement, financing, development and disposition of large-scale projects, including industrial facilities, retail shopping centers, manufacturing facilities, power plants, medical facilities, planned communities, resort communities and housing projects. He primarily serves national and international businesses that are locating or expanding in Idaho, real estate developers, hospitals, homebuilders and others who are building or expanding in Idaho.

Practice Areas

- Business, Finance & Banking
- Real Estate and Land Use

Industries

- Agriculture
- Banking
- Energy and Utilities
- Food Processing and Manufacturing
- Healthcare
- Real Estate Development, Construction and Investment
- Technology

Frank regularly speaks on legal issues of importance for developers, architects, engineers, contractors and other development industry professionals. He is a member of the Real Property Section of the Idaho State Bar and an affiliate member of the American Institute of Architects. Frank received his law degree from the University of Idaho in 1999 and architecture degree from the University of Nebraska in 1992. He practiced with a Boise architectural firm for several years prior to entering law school.

Frank spends much of his time providing pro-bono services on capacity-expanding projects for charities dealing with housing, homelessness, families and sexual abuse.

Frank lives in Boise with his wife and two children, and spends his free time mountain biking and enjoying Idaho's beautiful outdoors.

Recognition

- Mountain States Super Lawyers (Real Estate)
- Chambers, USA, America's Leading Lawyers for Business (Real Estate)
- Best Lawyers in America (Construction Law)
- Idaho Business Review 2018 Leader in Law

Education

- J.D. (Magna Cum Laude), University of Idaho - College of Law 1999
- Bachelor of Architecture, University of Idaho 1994
- B.S. in Architectural Studies, University of Nebraska-Lincoln 1992

Admissions

- Idaho
- U.S. District Court (Idaho)

- Ninth Circuit Court of Appeals

Memberships & Affiliations

- Idaho Law Review, Member, Spring Edition Editor

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