Volume 1

Idaho Land Use Handbook

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

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1. INTRODUCTION TO LAND USE LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. THE PLANNING AND ZONING POWER

A. The constitutional source

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

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

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

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

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

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

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

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

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

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

Idaho Const. art. XII, § 2.

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

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

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

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

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

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

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

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

This constitutional grant of plenary police power to counties and cities provides a foundation for zoning laws that pre-date the express delegation contained in LLUPA or its predecessors (see footnote 8 on page 23). This avoids an issue that arises in zoning cases in other states. In some states, county and municipal governments have zoning power only if the state legislature specifically grants the power. 83 Am. Jur. 2d *Zoning and Planning* § 6 (2003).

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

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

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

B. The statutory source (LLUPA)

The current statutory basis for Idaho's planning and zoning law is the Local Land Use Planning Act of 1975 ("LLUPA") (see footnote 8 on page 23). LLUPA contains a broad grant of planning and zoning authority to local governments.[9] Indeed, it mandates that cities and counties must plan and zone. See discussion below in section 2.C(2) at page 26.

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

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

C. Powers and duties of the P&Z commission

(1) Enumerated powers

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

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

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

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

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

- To prepare and update a comprehensive plan for the area under its jurisdiction. (Discussed in section 3 beginning on page 36.)
- To adopt a zoning ordinance. Idaho Code § 67-6511.
- To issue conditional use permits (aka special use permits). Idaho Code § 67-6512.
- To issue permits for planned unit developments. Idaho Code § 67-6515.
- To grant variances from zoning criteria. Idaho Code § 67-6516.
- To recommend a "future acquisitions map" for roads, schools, airports, parks and lands for other public purposes. Idaho Code § 67-6517.
- To recommend areas for transferable development rights ("TDRs"). Idaho Code § 67-6515A.

LLUPA also articulates twelve specific purposes that underlie these enumerated powers. Idaho Code § 67-6502. This is a fairly comprehensive list ranging from protection of property rights to protection of "environmental features." Interestingly, protection or enhancement of aesthetic values is not specifically called out. Given that Idaho is a Dillon's Rule state (see discussion in Volume 2 of this Handbook), it appears that these powers and purposes circumscribe the authority of local land use bodies.

(2) Mandatory planning duties

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

For example, cities and counties must:

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

- Adopt a zoning ordinance including one or more "zoning districts" which are "in accordance with the policies set forth in the adopted comprehensive plan." Idaho Code § 67-6511.
- Adopt an ordinance governing the approval of subdivisions. Idaho Code § 67-6513. Further subdivision approval requirements are found in Idaho Code, Title 50, Chapter 13.
- Adopt an ordinance regulating the granting of variances. Idaho Code § 67-6516.
- Adopt a procedure for the granting of permits. Idaho Code § 67-6519(1).
- Issue written decisions in planning and zoning matters in the form of findings of fact and conclusions of law. Idaho Code § 67-6535(2).[14]
- Create and preserve a transcribable, verbatim record of all administrative proceedings. Idaho Code § 67-6536.

D. Preemption

(1) State preemption of local zoning laws, generally

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

The doctrine of preemption is grounded in Idaho's Constitution: "Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws." Idaho Const. art. XII, § 2 (emphasis supplied). The Idaho Supreme Court has repeatedly cited this constitutional provision in striking down ordinances that are in conflict with state statutes.[15]

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[14] Prior to 2010, Idaho Code §§ 67-6535(1), (2), and (3) were labeled 67-6535(a), (b), and (c). H.B. 605, 2010 Idaho Sess. Laws, ch. 175, § 4.

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

Preemption may be either direct or implied. "Of course, direct conflict (expressly allowing what the state disallows, and vice versa) is 'conflict' in any sense. Additionally, a 'conflict' between state and local regulation may be implied." *Envirosafe*, 112 Idaho at 689, 735 P.2d at 1000 (citations omitted).

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

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

Caesar v. State, 610 P.2d 517, 520 (Idaho 1980) (Donaldson, C.J.).[16]

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

Envirosafe Services of Idaho v. Cnty. of Owyhee, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987).[17]

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

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

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

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

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

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

Idaho Code § 67-6528.

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

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

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

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

A final possible area of preemption applies solely to those transmission facilities located in a "national interest electric transmission corridor" established by the U.S. Department of Energy under section 1221 of the Energy Policy Act of 2005,

16 U.S.C. § 824p. The Idaho Legislature enacted a section of the public utilities code to address a state's responsibility, where such corridors are established, to provide "efficient and timely review" of facilities proposed within such corridors. Idaho Code §§ 61-1701 to 61-1709. The authority expressly authorizes IPUC preemption of local government decisions. Idaho Code §§ 61-1703. However, as of this writing in early 2010, no such corridors have yet been established in Idaho.

(3) Federal preemption

As a general rule, state and local laws are preempted to the extent they are inconsistent with federal law.[18] While that general principle (arising under the Supremacy Clause[19]) is clear enough, the determination of whether there is sufficient inconsistency to give rise to preemption in a given case is a more uncertain task, complicated by the fact that there are as many as four theories of preemption.[20]

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

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

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

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

Other courts have applied, distinguished, and pared away *Ventura County*'s holding.[21] The most significant post-*Ventura* precedent, however, is the Supreme Court's ruling in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987). This case came down the other way, finding that the California Coastal Commission had authority to impose some environmental requirements on the holder of white limestone mining claims located in the scenic Big Sur area. The case was complicated by the fact that the state, too, was acting under authorities derived and funded in part by the federal government. Ultimately, the Supreme Court drew a distinction between the environmental controls imposed here and state land use controls (such as those involved in *Ventura County*)—which it assumed, arguendo, were preempted by the NFMA and FLPMA. *Granite Rock*, 480 U.S. at 585. "Justice O'Connor, conceding that no bright line separated environmental regulation from land use planning, nevertheless opined that differences between the two are ascertainable and that the state may regulate for environmental protection even though it cannot dictate federal land use." George Cameron Coggins, 1 Pub. Nat. Resources L. § 5:27 (2nd ed. 2010).

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

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

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

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

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

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

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

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

(1) Creation of P&Z commissions is optional

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

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

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

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

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

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

(3) Joint commissions (among neighboring communities)

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

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

As discussed above, LLUPA authorizes a city or county's governing body to create a planning and zoning commission and delegate much of its authority to the P&Z.[22] The only power that may not be delegated is "the authority to adopt ordinances or to finally approve land subdivisions." Idaho Code § 67-6504.[23] Therefore, matters that require the adoption of an ordinance, such as annexation, zoning or rezoning, adoption of development agreements, adoption of a future acquisitions map, and adoption of development standards require action by the city council or county board of commissioners, although planning and zoning commissions frequently offer recommendations on these matters.

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

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

Whether a city or county retains any review authority over P&Z decisions is entirely up to it. It may choose to give the P&Z the final say-so (with direct appeal to district court). Idaho Code § 67-6521(1)(d). Or it may elect to retain review authority over P&Z decisions. If so, it appears that it may elect to make that review broad (*de novo*) or narrow (appellate). (See footnote 22 at page 33.)

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

In deciding which of these models to adopt, each Idaho municipal body must weigh countervailing goals. *De novo* review obviously gives the county a freer hand and more control. That comes at a price, however. The easier it is for a county to revisit and second-guess the determinations of the P&Z, the more likely it is that every controversial decision will have to be re-evaluated and re-decided by the county. This can undermine the very purpose of having a P&Z in the first place.[24] Under LLUPA, municipal entities are allowed to weigh the benefits and burdens of various modes of review, and decide just how much appellate review is right for them. Once that decision is made, however, they are bound by their own ordinances.

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

(5) Non-delegation doctrine.

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

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

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

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

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

3. COMPREHENSIVE PLANS

A. Introduction

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

As its name implies, this plan is a comprehensive articulation of the conditions and objectives that will guide planning and zoning decisions within the municipality. "The plan shall consider previous and existing conditions, trends, desirable goals and objectives, or desirable future situations for each planning component." Idaho Code § 67-6508. The referenced "planning components" in the prior quotation are 17 specific areas of concern including such things as population, schools, natural resources, transportation, housing, and airports.[25] Idaho Code § 67-6508.

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

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

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

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

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

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

- Finally, LLUPA references comprehensive plans in the context of the requirement for a reasoned statement by the decision-maker explaining the basis for the approval or denial of a land use application. Idaho Code §§ 67-6535(1) and 67-6535(2).[26]

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

LLUPA not only authorizes but demands that every city and county engage in the visioning process that lies at the heart of sound land use planning and results in the development of a comprehensive plan. Idaho Code § 67-6508.[27]

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

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

> The Act [LLUPA] indicates that a comprehensive plan and a zoning ordinance are distinct concepts serving different purposes. A comprehensive plan reflects the "desirable goals and objectives, or desirable future situations" for the land within a jurisdiction. I.C. § 67-6508. This Court has held that a comprehensive plan does not operate as legally controlling zoning law, but rather serves to guide and advise the governmental agencies responsible for making zoning decisions. The

[26] Prior to 2010, Idaho Code §§ 67-6535(1), (2), and (3) were labeled 67-6535(a), (b), and (c). H.B. 605, 2010 Idaho Sess. Laws, ch. 175, § 4.

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

> Board may, therefore, refer to the comprehensive plan as a general guide in instances involving zoning decisions such as revising or adopting a zoning ordinance. A zoning ordinance, by contrast, reflects the permitted uses allowed for various parcels within the jurisdiction.

Urrutia v. Blaine Cnty., 134 Idaho 353, 357-58, 2 P.3d 738, 742-43 (2000) (Trout, C.J.) (emphasis supplied) (citations omitted).[28]

However, a comprehensive plan is more than an abstract planning document. The comprehensive plan is intended primarily to guide the development of zoning ordinances. For this reason, the adoption of a comprehensive plan is a legal prerequisite to the enactment of zoning ordinances.[29]

Not only must the comprehensive plan come first, LLUPA mandates that zoning ordinances must be "in accordance with" the comprehensive plan. Idaho Code§§ 67-6511 and 67-6535(1).[30] This requirement is discussed below in sections 3.B and 3.D starting on page 39. Consequently, developers and other interested parties seeking or opposing rezones must pay particular attention to the comprehensive plan.

Developers and interested parties should consult the comprehensive plan (as well as the applicable ordinances) from the outset. Where appropriate, the developer should consider modifying the proposed action to ensure a good fit with the

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

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

[30] Prior to 2010, Idaho Code §§ 67-6535(1), (2), and (3) were labeled 67-6535(a), (b), and (c). H.B. 605, 2010 Idaho Sess. Laws, ch. 175, § 4.

comprehensive plan. In some cases, changes in the plan may be required in order to authorize the specific zoning or other action sought.

The land use application should include a detailed, point-by-point recitation of the comprehensive plan provisions and how the proposed action squares with the comprehensive plan. Likewise, a project opponent should prepare a detailed critique of the proposed action based on the comprehensive plan. These analyses should be made part of the record and should serve as a guide for the decision-makers providing for a more defensible decision, in the event of an appeal.

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

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

LLUPA mandates that zoning ordinances be in accordance with the comprehensive plan. "The zoning districts shall be in accordance with the policies set forth in the adopted comprehensive plan." Idaho Code § 67-6511.[31]

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

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

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

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

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

The thrust of section 67-6535 is a procedural requirement that decision makers explain their decisions in writing to assist the parties and to facilitate judicial review. It appears unlikely that references to the comprehensive plan in this section were intended to create new substantive law regarding the plan. The more plausible reading of section 67-6535(1) and (2) would seem to be that they simply require decision makers to identify and discuss whatever standards are "appropriate" and "applicable" to the decision. Thus, in the case of a rezone, the decision-maker must include an explanation of how the rezone ordinance is in accordance with the comprehensive plan, as required under section 67-6511. In the case of a CUP , there should be a discussion of whether it is "in conflict" with the comprehensive plan, as required in section 67-6512(a). In some cases it is also appropriate for cities and counties to look to their comprehensive plans to interpret their own ordinances, as was done in *Sanders Orchard v. Gem Cnty.*, 137 Idaho 695, 52 P.3d 840 (2002). For

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

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

The Idaho Supreme Court has emphasized repeatedly:[32]

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

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

Idaho courts have tended to be deferential to the factual findings of land use agencies (particularly with respect to findings that actions conform to the

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all other applications (*e.g.*, PUDs and subdivisions), there would be no need to address the comprehensive plan, because LLUPA mandates no "accordance" or "not in conflict" requirement for them. In sum, section 67-6535 requires that the comprehensive plan be addressed where "appropriate" and "applicable," that is, in the case of a rezone or a CUP.

In a 1990 case, however, the Idaho Supreme Court applied the "accordance" requirement to a planned unit development. *South Fork Coal. v. Bd. of Comm'rs of Bonneville Cnty.* ("*South Fork II*"), 117 Idaho 857, 792 P.2d 882 (1990). The Court failed to explain why the requirement would even be applicable to a planned unit development. Perhaps the applicable local ordinance mandated this requirement, though the Court did not say so. The dissent to the earlier case of *South Fork Coalition v. Bd. of Comm'rs of Bonneville Cnty.* ("*South Fork I*"), 112 Idaho 89, 92, 730 P.2d 1009, 1012 (1986), suggests that the Court thought that the "in accordance with" requirement in section 67-6511 was applicable because the county's PUD ordinance essentially created "floating zones." In any event, this case predates the Court's more thorough treatment of the subject in *Urrutia*.

[32] See footnote 28 at page 38 for citations to other cases.

comprehensive plan) so long as the land use agency undertakes a "factual inquiry" on the accordance issue.

On the other hand, the Idaho Supreme Court has been willing to second-guess local governments when they use the comprehensive plan as a basis to deny an application, particularly in context of a non-zoning action. This is discussed in section 3.D at page 47.

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

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

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

Bone at 1052.

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

In *Love v. Bd. of Cnty. Comm'rs of Bingham Cnty.* ("*Love I*"), 671 P.2d 471 (Idaho 1983), the county approved a zone change from agricultural to manufacturing after concluding that the change would be consistent with the comprehensive plan. A neighbor appealed. The Idaho Supreme Court overturned the county's action, declaring that "the findings of fact are insufficient to support the conclusion that the amendment was in accordance with the comprehensive plan." *Love I*, 105 Idaho at 560, 671 P.2d at 473. The Court remanded the matter to the county. On remand, the county commission again approved the application, including lengthy findings of fact and conclusions of law. This time, the Court sided with the county, emphasizing that the rezone did not need to be "in exact conformance with the County's Comprehensive Plan." *Love v. Bd. of Cnty. Comm'rs of Bingham Cnty.* ("*Love II*"), 108 Idaho 728, 730, 701 P.2d 1293, 1295 (1985).[33] Without any analysis, the Court declared that it had read the 200 pages of testimony in the record and found that the county's findings were adequately supported by substantial and competent evidence. *Love II*, 108 Idaho at 731, 701 P.2d at 1296. The take home message here is that the "in accordance with" requirement is a pretty squishy one and that a county's conclusion that an action is in accordance with its comprehensive plan will be upheld so long as it has taken the time to adequately explain its decision. (As explained below, a county's decision to reject an application because the proposed action is <u>not</u> in accordance with its comprehensive plan may be accorded more rigorous scrutiny.)

Once again, in *Balser v. Kootenai Cnty. Bd. of Comm'rs,* 110 Idaho 37, 39, 714 P.2d 6, 8 (1986), the Court reinforced the conclusion that a zoning ordinance need not strictly conform to the land use designation of a comprehensive plan. In *Balser*, the comprehensive plan designated the property owner's property for industrial use. When the property owner sought to rezone the property as industrial,

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

the county denied the request, stating that the comprehensive plan stated future directions for development but did not mandate that current zoning immediately be conformed to the future industrial use. The Court agreed with the county that the decision to rezone was not "a purely ministerial duty" and that there might be good reasons for departing from the comprehensive plan. The Court did not discuss the factors in the record that supported the denial, but merely concluded that there was substantial evidence in the whole record to support the county's decision. *Balser*, 110 Idaho at 39, 714 P.2d at 8.

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

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

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

understand the underlying purposes of comprehensive plan and to explore whether the action was actually consistent with those goals.[34]

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

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

> In fact, there is a substantial difference between planning and zoning. Planning is long range; zoning is

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

> The rezoning of Power Engineers was adopted by the city because it posed no threats to the city since it was an engineering rather than a retail firm and, further, it would add employment opportunities to the area. The Rinker annexation was property lying close to the downtown area, which had been zoned commercial by Blaine County. By annexing these lots, the City of Hailey was able to gain control over the property's development, through the use of deed restrictions, restricting grocery stores, hardware stores and other retailers, with variances to be allowed only after the city's consideration and approval. Finally, the Northwest annexation involved property lying adjacent to the existing Hailey downtown business core. The annexation would square up the city boundaries; and, by annexing the property, which already had businesses on it (also zoned commercial by the county), the city hoped to gain some control over how this property, so close to its downtown area, would be developed.

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

> immediate. Planning is general; zoning is specific. Planning involves political processes; zoning is a legislative function and an exercise of the police power. Planning is generally dynamic while zoning is more or less static. Planning often involves frequent changes; zoning designations should not. Planning has a speculative impact upon property values, while zoning may actually constitute a valuable property right.
>
> It seems clear, therefore, that while zoning designations should generally follow and be consistent with the long-range designations established in the Comprehensive Plan, there is no requirement that zoning immediately conform to the Plan. The Plan is a statement of long-range public intent; zoning is an exercise of power which, in the long run, should be consistent with that intent. Planning is a determination of public policy, and zoning, to be a legitimate exercise of police power should be in furtherance of that policy.

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

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

Another provision of LLUPA, Idaho Code § 67-6512(a), requires that special or conditional use permits shall be issued only when "not in conflict with the [comprehensive] plan."[35] The reason for the special treatment of conditional use permits, presumably, is that by their nature, they allow uses not in accordance with the normal zoning for an area. Thus, conditional use permits are, in essence, mini-zones. Thus, the consideration given to whether the zoning for a property is in accordance with the comprehensive plan must be re-visited when an applicant seeks a conditional use permit. Note also that the requirement is more limited than the one set out under section 67-6511. Conditional use permits are not required to be "in accordance with" the comprehensive plan. Instead, it is sufficient that they not be "in

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

conflict" with the comprehensive plan. Thus, it appears, the conditional use need not satisfy every aspirational goal of the comprehensive plan, so long as it is not in direct conflict with specific prohibitions in the comprehensive plan.

In *Howard v. Canyon Cnty. Bd. of Comm'rs*, 128 Idaho 479, 480, 915 P.2d 709, 711 (1996), the Court upheld the county's determination that a conditional use permit for a 28-acre residential subdivision in an agricultural area conflicted with the comprehensive plan. The Court explained that one or two small residential developments might not threaten the agricultural character of the area, but that the county was justified in finding that this third subdivision was cumulatively too much.

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

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

In *Friends*, the Court upheld the issuance of two conditional use permits to a developer against a challenge that the CUPs were contrary to the county's comprehensive plan.[36] *Friends* 137 Idaho at 197, 46 P.3d at 14. *Friends* quoted at length from *Urrutia*, discussed below.

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

[36] Recall that Idaho Code § 67-6512(a) mandates that conditional use permits (aka special use permits) be consistent with the comprehensive plan.

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

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

In some cases, local zoning or subdivision ordinances have imposed their similar consistency requirements in the context of PUDs. Court decisions in actions arising under these ordinances have borrowed from the law applicable to zoning ordinances, but have also drawn important distinctions. The key point made by these decisions is that while zoning and subdivision ordinances are controlling law, comprehensive planning is forward-looking guidance. Planning documents establish visionary and aspirational goals for the local government. These goals are best implemented not by direct application of the comprehensive plan to land use decisions, but by the adoption of zoning and other ordinances. These ordinances operate as law; they control and affect property. Planning documents, in contrast, are not prescriptive regulatory documents and should not be used to restrict property rights and upset expectations based on applicable ordinances. Accordingly, while a comprehensive plan apparently may be taken into account at some level in decision-making on individual land use applications, comprehensive plans may not form the basis for denial of an application which otherwise satisfies requirements under the applicable ordinance.

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

In a 2000 decision, the Idaho Supreme Court laid out its most complete explanation to date of the "in accordance with" principle. In *Urrutia v. Blaine Cnty.*, 134 Idaho 353, 2 P.3d 738 (2000), the Court addressed a Blaine County subdivision

ordinance which conditioned subdivision approval upon, among other things, a finding that the subdivision "conformed" to the comprehensive plan.[37]

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

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

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

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

> As indicated above, the comprehensive plan is intended merely as a guideline whose primary use is in guiding zoning decisions. Those zoning decisions have already been made in this instance, and land subdivided into twenty-acre lots and used for single family residences is specifically permitted in this agricultural area. Thus, we

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

> agree with the district judge that the Board erred in relying completely on the comprehensive plan in denying these applications, and should instead have crafted its findings of fact and conclusions of law to demonstrate that the goals of the comprehensive plan were considered, but were simply used in conjunction with the zoning ordinances, the subdivision ordinance and any other applicable ordinances in evaluating the proposed developments.

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

In other words, the proper time to consider consistency with the comprehensive plan is when the city or county adopts its zoning ordinances, not when it applies those ordinances in the context of individual PUD or subdivision applications. To require consistency with the comprehensive plan at the latter stage would allow the local government unbridled discretion to revisit its zoning decisions on individual applicants.

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

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

Before reaching that conclusion, however, the Idaho Supreme Court also addressed the threshold question of whether the county had the authority under its

zoning ordinance to require central water and sewer in the first place. The zoning ordinance did not say, in so many words, that the county was authorized to require central water and sewer. But it came pretty close. It stated that the B-1 zone "shall be confined to areas which can be served by central water, and which may in the future . . . be served by central sewage systems." *Sanders Orchard*, 137 Idaho at 698, 52 P.3d at 843.[38] The developer contended that since the zoning ordinance did not expressly demand that central sewer and water be provided, the county had no discretion to impose the requirement. *Id.* The Idaho Supreme Court disagreed, declaring that the provision quoted above "would be meaningless unless central sewer could be required in B-1 zones." Again, this was an interpretation of the zoning ordinance, not of the comprehensive plan.

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

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

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

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

In sum, the comprehensive plan may play a role at the subdivision stage, but it is an extremely limited one. It may guide the interpretation and exercise of a specific authority articulated in the ordinance (*e.g.*, to require central water and sewer), but it

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

may not be used to create brand new requirements or obstacles at odds with land uses permitted under the ordinance.

In the same year as *Sanders Orchard*, the Court handed down two more "in accordance" cases, both dealing with conditional use permits. *Friends of Farm to Market v. Valley Cnty.*, 137 Idaho 192, 197, 46 P.3d 9, 14 (2002) and *Whitted v. Canyon Cnty. Bd. of Comm'rs*, 137 Idaho 118, 121, 44 P.3d 1173, 1176 (2002). These are discussed above in section 3.C at page 45. Both decisions quote at length from *Urrutia*.

E. Required "components" of a comprehensive plan

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

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

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

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

The *Sprenger Grubb II* case was affirmed but limited to some extent in *Neighbors for Preservation of Big and Little Creek Community v. Bd. of Cnty. Comm'rs of Payette County*, 159 Idaho 182, 358 P.3d 67 (2015) (Horton, J.). In

Neighbors, Alternate Energy Holdings Inc (AEHI) sought to develop a nuclear power plant in Payette County. A group of neighboring landowners (led by H-Hook) opposed the project. The neighbors opposed a proposed amendment to the comprehensive plan on the basis that it failed to address the component dealing with power plants and transmission lines. The County amended the comprehensive plan to include language saying that proposals for new energy facilities would be addressed on an ad hoc basis. The neighbors contended this fell short of the "analysis" required under LLUPA and *Sprenger Grubb II*. The Idaho Supreme Court disagreed, finding that the minimal discussion was sufficient.

> This case differs from *Sprenger*. As amended, the comprehensive plan addresses power plant siting, albeit on a case-by-case basis. Although we acknowledge that this language provides little guidance, it would be extraordinarily difficult, if not impossible, to develop detailed plans for the many different types of power plants (i.e., natural gas, coal, wind, solar, hydroelectric, biomass, geothermal, nuclear) that may be proposed, particularly since the size of such projects can be widely variable. We agree with the district court that the amended comprehensive plan satisfied the requirements of Idaho Code section 67–6508(h) as to power plant siting.

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

F. Manufactured homes

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

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

The fifth component listed in section 67-6508 ("(e) Land Use") mandates the inclusion of a land use map as part of the comprehensive plan. "A map shall be prepared indicating suitable projected land uses for the jurisdiction." Idaho Code §§

67-6508(e).[39] The land use map is a planning instrument providing a long term vision of the direction of future land use development. In other words, it is a guidance document displaying the municipal entity's current idea of how land uses and zoning may evolve in the future.

Being merely a guidance document, the land use map does not control current uses and should not be confused with the zoning map displaying the zones required to be established under section 67-6511.[40] The planning map reflects forward thinking (envisioning the future). "Thus, the land use map, in essence, is a goal or forecast of future development in the City." *Bone v. City of Lewiston,* 107 Idaho 844, 850, 693 P.2d 1046, 1052 (1984). The zoning map, in contrast, sets out the current, operative zoning districts that control what types of developments may be constructed in a given area. The Idaho Supreme Court has ruled that a local government is not bound to grant a rezone application simply because it is consistent with the future contemplated uses shown on the land use map. *Bone v. City of Lewiston,* 107 Idaho 844, 850, 693 P.2d 1046, 1052 (1984).

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

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

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

H. Geographic scope of plan

LLUPA says, simply, "The plan shall include all land within the jurisdiction of the governing board." In the case of cities, this may include the designated area of city impact outside the cities' boundaries. As discussed in section 9 starting on page 98, Idaho Code Section 67-6526 outlines how cities and counties decide which

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

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

jurisdiction's comprehensive plan applies in the area of impact. The city and county are obligated to reach an agreement between themselves as to which of their comprehensive plans will apply within the area of city impact.

I. Procedure for adoption of comprehensive plan

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

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

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

The P&Z hearing is mandatory. Idaho Code § 67-6509(a). The commission must give at least 15 days' notice prior to the hearing, including the time and place of the hearing and a summary of the plan. Idaho Code § 67-6509(a).[41] If the P&Z commission recommends a "material change" to the plan after it has conducted the hearing, it must give notice of the change and conduct another public hearing concerning the matter if the governing board is not going to conduct its own hearing. Idaho Code § 67-6509(a). At the conclusion of the P&Z process, the commission will make a recommendation to the governing board that the plan be adopted, amended, or repealed.

The governing board may simply act on that recommendation, or, at its option, it may conduct its own hearing on the comprehensive plan. Idaho Code § 67-6509(b). However, the governing board may not hold a public hearing until it has received a recommendation from the planning and zoning commission. Idaho Code § 67-6509(b). If the governing board holds its own hearing, its hearing notice must

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

include a description of the P&Z's recommendation. Idaho Code § 67-6509(a). The notice requirements are the same as the P&Z's. Idaho Code § 67-6509(b). If the governing board makes a material change to the recommendation, the governing board must also provide "further notice and hearing." Idaho Code § 67-6509(b).

Originally, LLUPA required that the plan be adopted by ordinance. It now provides for adoption by resolution. The plan is not effective until the governing board approves a resolution adopting the plan.[42]

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

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

K. Practical considerations for developers

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

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

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

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

Determining the governing board's inclinations regarding a comprehensive plan change is something of a touchy matter due to the difficulty in determining when *ex parte* contact limitations apply. (See discussion in Volume 2 of this Handbook.) Even if there is no limitation on contacting decision-makers on the comprehensive plan amendment itself, *ex parte* contact limitations almost certainly apply to other aspects of the application, such as rezoning, conditional use permits,

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

subdivision, or variances. The best practice is to avoid *ex parte* contacts with decision-makers, especially after an application has been filed, and work with the jurisdiction's staff to gauge whether a comprehensive plan amendment will be well received.

The second limitation with comprehensive plan amendments is that the planning and zoning commission can recommend amendments to the land use map only every six months, Idaho Code § 67-6509(d), and the governing board can only address and adopt amendments following the commission's recommendation. If that timeframe does not work for the developer, he or she should consider a different strategy for the project.[43]

A final set of issues arises if the comprehensive plan amendment affects development within an area of city impact. As discussed in section 9 starting on page 98, either the city's comprehensive plan and ordinances or the county's (or possibly some combination or special plan) may apply within the area of city impact. Special care will be required to determine what law applies and who must approve any change. Depending on what the applicable ordinances say, approval by both the city and county could be required.

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

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

[43] Another open question around the six-month limitation is whether a comprehensive plan land use map amendment before the planning and zoning commission on a six-month review can be deferred and separated from the rest of the amendment without waiting another six months. That is, assume there are several proposed map amendments before a planning and zoning commission on a six-month review. Several of the amendments move forward but the applicant wishes to defer one to resolve some issues. Arguably, it seems to be contrary to the statute's requirement that the planning and zoning commission may not recommend changes more frequently than every six months if a recommendation were made on this application a month or two after the others. On the other hand, since the application began with the others, one could argue it was part of the same batch, particularly if it were heard at the same time as the others before the governing board. If a developer finds himself or herself in this position, some discussion with the agency's staff is in order to make sure the comprehensive plan amendment is not unnecessarily delayed.

L. Discretionary authority to change comprehensive plan

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

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

M. Comprehensive plans and "future needs" water rights

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

4. ZONING ORDINANCES

A. Establishing zoning districts and rezoning

(1) Overview

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

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

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

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

What is the "uniformity" requirement?

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

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

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

What happens if property enters a jurisdiction unzoned?

The subsections below address these issues in turn.

(2) Grant of authority

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

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

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

(3) Procedural requirements for validity

Zoning ordinances must be adopted, amended, or repealed in accordance with the procedural requirements of Idaho Code § 67-6509, which are discussed in section 3.I starting on page 54. Section 67-6509(a) requires that the planning and zoning commission conduct at least one hearing prior to recommending the "plan, amendment, or repeal of the plan to the governing board." This dovetails with the requirement in Section 67-6511(b) that rezoning requests first be submitted to the planning and zoning commission.

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

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

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

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

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

(4) Consideration given to impacts on services

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

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

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

(5) Uniformity

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

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

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

In *KGF Development, LLC v. City of Ketchum*, 149 Idaho 524, 236 P.3d 1284 (2010) (J. Jones, J), the Court struck down Ketchum's TDA ordinance for two reasons. First, it exceeded the scope of the TDA ordinance (see discussion in section 5 on page 86). Second, the Court found the ordinance violated the uniformity requirement in section 67-6511. Ordinarily, a TDR ordinance contemplates that development rights on a property in the "sending area" may be purchased and transferred to a site in the "receiving area." The *KGF* Court found that Ketchum's TDA ordinance did not work this way.

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

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

(6) Vested rights: four-year entitlement

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

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

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

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

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

(8) Spot zoning

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

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

The common law concept of spot zoning overlaps substantially with the statutory requirement that zone changes (as well as certain other actions) be "in accordance" with the comprehensive plan. Idaho Code § 67-6511 (see discussion in section 3.B at page 39). Indeed, on occasion, the Idaho Supreme Court has made statements that suggest that the two are the same thing:

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

American Law Reports provides this useful summary of the doctrine:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Conditional use permits (aka special use permits)

(1) Overview

Idaho Code Section 67-6512(a) authorizes, but does not require, local jurisdictions to include provisions for the issuance of special or conditional use permits. These terms are synonymous[44]; some localities issue what they call conditional use permits, others call them special use permits. We will generally refer to them as conditional use permits.

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

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

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

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

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

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

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

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

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

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

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

Idaho Code § 67-6512(d).

The statute permits the jurisdiction to require studies "of the social, economic, fiscal, and environmental effects of the proposed special use." The issuance of a conditional use permit does not create a binding precedent to grant other conditional use permits. The permit is not transferable to another property. Idaho Code § 67-6512(e). Denial of a conditional use permit may be subject to a regulatory taking analysis pursuant to Idaho Code § 67-8003. Idaho Code §§ 67-6512(a) and 67-6535(3).[45]

(2) Standards for permit approval

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

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

Idaho Code § 67-6512(a).

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

[45] Prior to 2010, Idaho Code §§ 67-6535(1), (2), and (3) were labeled 67-6535(a), (b), and (c). H.B. 605, 2010 Idaho Sess. Laws, ch. 175, § 4.

Typical conditional use ordinances offer similar criteria, including consistency with the comprehensive plan, compatibility with neighboring uses, absence of an excessive burden on the transportation system, and the sufficient size of the site to accommodate the use and all yards, open space, etc. *See* Boise City Code Section 11-06-04.13. Ordinances often include specific criteria for specific kinds of conditional uses. *E.g.*, Boise City Code Section 11-06.

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

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

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

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

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

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

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

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

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

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

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

C. Planned unit developments

LLUPA expressly authorizes cities and counties to adopt ordinances to encourage planned unit developments ("PUDs"). Idaho Code § 67-6515. PUDs have been around for decades. They reflect the recognition that land use planning needs to be more flexible that the original Euclidian approach:[46]

> The planned unit development, in contrast to Euclidian zoning which divides a community into districts and explicitly mandates certain uses, is an instrument of land use control which permits a mixture of land uses on the same tract . . . .

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

> The planned unit development technique is a legislative response to changing patterns of land development and the demonstrated shortcomings of orthodox zoning regulations, intended to permit greater flexibility in development than is available under the general zoning ordinance provision. Thus, the planned unit development is essentially a mechanism which allows property owners the option of clustering or configuring lots in a plat to avoid development in sensitive areas, create open space, or achieve other environmental or aesthetic amenities.

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

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

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

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

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

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

The county's denial of an application for a PUD is subject to judicial review.[47]

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

D. Overlay districts, historical districts, and design review

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

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

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

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

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

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

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

[47] "Where an ordinance requires the granting of a planned development district application if the applicant complies with its standards and procedures, and the city council takes upon itself to determine whether the procedures are met, it is acting as an adjudicative body, and it is therefore proper for a court to review the record before the city council to determine whether evidence has been presented which justifies a decision to deny the application." 83 Am. Jur. 2d *Zoning and Planning* § 406, at 361 (2003) (footnotes omitted).

comply with statutory, common law, and constitutional requirements for land use zoning.

When an overlay district is established, its provisions and requirements do not replace those of the existing, underlying district. Rather, they add a new layer of control to the underlying district or districts. The practice of using overlay districts has arisen for various reasons, but is commonly used when a community does not wish to alter the preexisting pattern of acceptable uses in a given district. In Idaho, as in many other states, overlay districts have often been used in the preservation of historical buildings and neighborhoods, though their use has certainly not been limited to that purpose.

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

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

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

Although courts tend to give cities wide latitude in their authority to mandate design review, some courts have made it clear that a valid design review ordinance "must contain workable guidelines. Too broad a discretion permits determinations based upon whim, caprice, or subjective considerations." *Anderson v. City of*

Issaquah, 70 Wash. App. 64, 81, 851 P.2d 744, 754 (1993) (citing *Morristown Road Associates v. Mayor and Common Council and Planning Bd. of Borough of Bernardsville*, 163 N.J. Super. 58, 67, 394 A.2d 157, 163 (1978)). Another court held that a valid ordinance must impose standards capable of reasonable application and which effectively limit and define the board's discretion. *Old Farm Road, Inc. v. Town of New Castle*, 26 N.Y.2d 462, 259 N.E.2d 920 (1970); *see* 83 Am. Jur. 2d *Zoning and Planning* §155 (2003). Still, other courts have invalidated substantively similar ordinances that did not adequately describe the process of administrative decision or the criterion for judicial review. *See Morristown Road Associates v. Mayor and Common Council and Planning Bd. of Borough of Bernardsville*, 163 N.J. Super. 58, 394 A.2d 157 (1978). Because the design review board usually exists as a subcommittee of the planning and zoning commission, a decision by the review board can be appealed to that body and beyond.

E. Ground water and land use planning

In 2005, the Idaho Legislature enacted a law requiring planning and zoning commissions to require developers to fully utilize available surface water before making any use of ground water.[48]

F. Sexually-oriented businesses

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

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

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

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

> (A) "Obscene" material means any matter:
> (1) which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and
> (2) which depicts or describes patently offensive representations or descriptions of :
>
> (a) ultimate sexual acts, normal or perverted, actual or simulated; or
> (b) masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

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

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

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

Because "[e]xpressive materials, including motion pictures, are presumptively entitled to First Amendment protection," it is not always easy to identify obscene materials or materials harmful to minors. *Video Software Dealers Ass'n v. City of Oklahoma* City, 6 F. Supp. 2d 1292, 1296 (W.D. Okla. 1997) (citing *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989)). In most situations, an adversarial

hearing must take place before materials are condemned as obscene. *Chapman v. California*, 405 U.S. 1020 (1972) (citing *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968)). When the issue is brought before a court, sexually explicit books, magazines, and videos may fall under the First Amendment's freedom of speech and press protections. The U.S. Supreme Court has even acknowledged that erotic nude dancing falls "within the outer ambit" of the First Amendment's protections. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991); *Schad v. Mount Ephraim*, 452 U.S. 61, 66 (1981).

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

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

Time, place, and manner regulations generally are permissible because they are "content neutral," in that they are not directed at suppressing speech because of its content. Rather, such regulations are intended to prevent the negative secondary effects associated with peripherally speech-related businesses. Laws that regulate or prohibit speech based on its content are impermissible prior restraints. For that reason, regulatory attempts to require licensing of sexually oriented businesses based on the content of their goods or services have been commonly challenged. Content-based regulations are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992); *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 591 (2002) (Kennedy J. concurring). Such regulations are only constitutional if they promote a "compelling interest" and use "the least restrictive means to further articulated interest." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126

(1989). There are certain categories of speech, such as child pornography, that lie outside the protections of the First Amendment and thus can be prohibited by content-based regulation without fear of successful constitutional challenge.

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

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

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

When using content neutral time, place, and manner regulations, government entities should also be careful not to zone sexually oriented businesses out of town entirely. To ensure alterative avenues of communication, the Supreme Court explained that municipalities must "refrain from effectively denying . . . a reasonable opportunity to open and operate" a sexually oriented business. *City of Renton v.*

Playtime Theatres, Inc., 475 U.S. 41, 46 (1986). This can easily happen when, for example, a small town requires that relatively large distances separate sexually oriented businesses from churches, schools, or each other. These requirements may effectively leave no space for a sexually oriented business to locate.

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

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

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

In the legislative process, a municipality should be able show that it had pure motives in passing the ordinance, that is, that it was seeking to combat secondary negative effects, and not expressive conduct. It should also be able to show that it had a valid, reasonable basis for enacting the various provisions it enacted. While it is important for each municipality to carefully research and consider the potential

secondary effects that sexually oriented businesses will have on their particular community, the U.S. Supreme Court has stated clearly that municipalities need not perform their own, expensive studies, whether in the planning or litigation stages, to prove that negative secondary effects result from the proliferation of sexually oriented businesses. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). In *Renton*, a sexually oriented business challenged its city's reliance on studies from another city, when Renton chose to respond differently to those effects than the city that originally performed the studies. In summary, the Court explained that cities "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986), citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976).

G. Right To Farm Act

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

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

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

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

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

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

Court did not say whether the subdivision would have complied with the Act in the absence of these limitations.

In *McVicars v. Christensen*, 156 Idaho 58, 320 P.3d 948 (2014) (Burdick, C.J.), the Court which seems to say that the Right to Farm Act only applies if there is a change in the surrounding neighborhood. In other words, it only applies when urban growth "comes to the nuisance." On the other hand, this case focused on section 22-4503, and does not address section 22-4504 at all. On its face, section 22-4504 is not limited to "coming to the nuisance" scenario.

H. CAFOs

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

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

I. Group homes

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

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

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

The Idaho Supreme Court has recognized that the right to continue a nonconforming use derives from the due process clauses of both state and federal constitutions. *Glengary*, 106 Idaho at 89-90, 675 P.2d at 348-49; *see also O'Connor v. City of Moscow*, 69 Idaho 37, 202 P.2d 401 (1949). However, the Court explained that such right does not extend beyond the purpose of protecting an owner from abrupt termination of what had been a lawful activity or condition on the property. "Nonconforming uses have no inherent right to be extended or enlarged." *Glengary*, 106 Idaho at 90, 675 P.2d at 350.

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

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

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

area were substantially reduced despite the increased volume of output. *Gordon Paving Co. v. Blaine Cnty. Bd. of Cnty. Comm'rs*, 98 Idaho 730, 732, 572 P.2d 164, 166 (1977).

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

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

The aforementioned code section does not prohibit municipalities from "passing or enforcing any other law or ordinance for the protection of the public health, safety and welfare." Idaho Code § 67-6538(5). This right to pass and enforce

laws for the protection of the public health, safety and welfare is often referred to as the police power. The Idaho Supreme Court also made this exception to the rules surrounding nonconforming use clear when it indicated that the rights associated with due process do "not absolutely prevent the county from exercising its police power, even though the exercise may affect the preexisting use of property." *Heck v. Comm'rs of Canyon Cnty.*, 123 Idaho 826, 829, 853 P.2d 571, 574 (1993) (citing *Queenside Hills Realty Co. v. Sazl*, 328 U.S. 80 (1946)). The Court further clarified, quoting the U.S. Supreme Court, "in no case does the owner of property acquire immunity against exercise of the police power because [the owner] constructed it in full compliance with the existing laws. The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights." *Queenside Hills Realty Co. v. Sazl*, 328 U.S. 80, 82-83 (1946).

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

K. Variances

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

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

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

In *Burns Holdings, LLC v. Teton Cnty. Bd. of Comm'rs* ("*Burns Holdings II*"), 152 Idaho 440, 272 P.3d 412 (2012) (Eismann, J.), the Court held a variance is the only means by which cities and counties may grant relief from bulk and height restrictions and that such relief could not be provided by conditions in a conditional use permit. The proposed project was a concrete batch plant located in Teton County within the City of Driggs's area of city impact. The county first granted an application to change the zoning to accommodate the batch plant. Thereafter, Burns Holdings applied for a conditional use permit to exceed the height limitation or the new zone. The county denied the application, and Burns Holdings appealed to district court. In something of an afterthought, the county defended its denial on the basis that the city's ordinance (applied by the county) which authorized height variances through the conditional use process was unlawful. The Idaho Supreme Court agreed.

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

5. TRANSFERABLE DEVELOPMENT RIGHTS ("TDRS")

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In *KGF Development, LLC v. City of Ketchum*, 149 Idaho 524, 528, 236 P.3d 1284, 1288 (2010) (J. Jones, J), the Court struck down Ketchum's TDA ordinance, whose purpose "was to revitalize the downtown corridor while preserving historic buildings within that corridor." *KGF*, 149 Idaho at 529, 236 P.3d at 1289. The Court found the ordinance exceeded the authority for TDRs granted under Idaho Code § 67-6515A, which is limited to preserving open space, habitat, and the rural character of lands. "The language used in section 67–6515A does not indicate that the statute is intended to allow for the protection of historic properties." *KGF*, 149 Idaho at 528, 236 P.3d at 1288. Note: The *KGF* Court also found that the city's ordinance violated the uniformity requirement in Idaho Code § 67-6511. See discussion in section 4.A(5) on page 60.

6. CONSERVATION EASEMENTS

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

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

This Act expressly authorizes private parties to create conservation easements that permanently restrict land use.[49] In doing so, Idaho joined in what has become virtually universal recognition of the importance of this tool in land use planning. As of this writing, conservation easement acts of one sort or another have been enacted in all but three states.

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

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

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

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

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

Second, conservation easements may not impair any existing property right.[50] Thus, for example, a landowner could not impair the rights of a tenant by creating a conservation easement that restricted the tenant's rights under the lease. This makes in important for the parties to ascertain or promise that there are no encumbrances on the property that would be in conflict with the conservation easement. For instance, in an extreme example, if the land were subject to a 99-year ground lease allowing the construction of a hotel, restrictions in the conservation easement would not impair the ability of the lessee to undertake that development.

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

Fourth, land subject to a conservation easement is not entitled to a reduction in ad valorem property taxes because the owner has conveyed away the development rights.[51] Thus, for example, a farm with no conservation easement but great development potential would be taxed the same as an otherwise identical farm whose development rights were held by a land trust. In each case, the landowner (not the tax-exempt land trust) would pay the full tax rate. This provision ensures that local governments are not deprived of tax revenue through the creation of conservation easements.

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

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

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

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

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

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

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

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

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

8. MORATORIA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9. ANNEXATION

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

All land in Idaho is subject to local governmental control, either by a county government or by a city government.[52] Cities typically provide relatively comprehensive municipal services to the residents within their boundaries. County governments, in contrast, fill in the interstices, providing typically more limited municipal services to less developed and more lightly populated areas outside the boundaries of cities.[53]

Cities have planning and zoning authority only within their municipal boundaries.[54] Counties have planning and zoning authority over all unincorporated areas within the county. The planning and zoning power must be exercised "within [the] limits" of the entity. Idaho Const. art. XII, § 2. This allocation of authority between cities and counties precludes "jurisdictional overlaps." *Boise City v. Blaser,* 98 Idaho 789, 791, 572 P.2d 892, 894 (1977).

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

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

As cities grow, they annex "contiguous or adjacent" lands (typically but not always within the city's area of impact), detaching them from county government

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

[53] "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.

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

control and making them part of the city. This is often done involuntarily, that is without the consent of property owners within the annexed area and without the agreement of the county.

B. The power to annex

The Idaho Legislature's annexation power has been described as "absolute." Accordingly, the Legislature may enlarge the boundaries of a municipality "without the consent of the habitants of the property, and even against their wishes." *Willows v. City of Lewiston*, 93 Idaho 337, 341, 461 P.2d 120, 124 (1969).[55]

The annexation power is not an inherent power of cities but, rather, lies with the state.[56] The state may, and generally does, delegate to cities the power to annex, as in the case of Idaho's Annexation Statute, Idaho Code Section 50-222. *Willows v. City of Lewiston*, 93 Idaho 337, 341, 461 P.2d 120, 124 (1969).

Idaho's current Annexation Statute is codified at Idaho Code § 50-222.[57]

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

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

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

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

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

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

Idaho Code § 50-222(1).[58]

Municipalities may exercise only such annexation powers as are expressly granted by statute, or necessarily implied from the express grant.[59] Accordingly, compliance with the procedures and elements of Section 50-222 is a paramount concern.

In addition to meeting the procedural and substantive requirements of the Annexation Statute, a municipal annexation also must pass the judicially-imposed "test of reasonableness." See discussion in section 24.X(2) at page 434. (Presumably this test survives the 2002 amendment making Category B and C annexations subject to IAPA review.)

C. Effect of municipal annexation

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

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

If the municipality supplies services which had previously been supplied to the annexed lands by a district organized under state law, the annexation effects a

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

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

withdrawal of the annexed lands from the district, effective December 31 of the calendar year in which the annexation took place. Idaho Code § 50-224. The annexed lands are relieved of all levies, taxes, and assessments thereafter made by the district. Idaho Code § 50-224.

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

D. New zoning is required upon annexation

Newly annexed land is deemed unzoned, even if it was previously zoned by the county. See discussion in section 4.A(7) at page 61.

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

(1) Overview

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

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

Idaho's Annexation Statute, Idaho Code § 50-222, was completely revamped in 2002.[60] The 2002 amendment created three categories of annexation (designated

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

Categories A, B, and C) each with its own set of procedures. Idaho Code § 50-222(3). Here is a thumbnail sketch:

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

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

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

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

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

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

Summary of Annexation Statute (Idaho Code § 50-222)
This summary omits some details and special exceptions.[61]
The reader should consult the statute in its entirety.

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

(3) Category A annexations

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

The first is where all landowners within the annexed area have provided written consent to the annexation. See discussion in section 9.E(6) at page 106 regarding consent.

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

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

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

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

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

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

(4) Category B annexations

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

- A small annexation (specifically, lands containing fewer than 100 separate private ownerships and platted lots of record) where some or all do not consent to annexation.[62]

- A large annexation (specifically lands containing more than 100 separate private ownerships and platted lots of record[63]) where the majority of

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

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

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

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

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

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

- The land meets the "subdivision or sale" requirement (aka the "five-acre rule") under which either (1) the land has been subdivided or split entirely into parcels of 5 acres or less or (2) the owner has "begun to sell off" the land in tracts of 5 acres or less. This requirement is discussed below in section 9.E(7) at page 108.

or

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

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

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

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

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

(5) Category C annexations

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

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

(6) Written consent and implied consent

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

The statute defines written consent as follows:

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

Idaho Code § 50-222(4)(a).

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

The act defines implied consent as follows:

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

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

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

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

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

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

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

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

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

Highlands Dev. Corp. v. City of Boise, 145 Idaho 958, 188 P.3d 900 (2008) (Eismann, J.), presents an interesting question.[64] In that case the developer sought annexation and simultaneously requested what it incorrectly called a "rezone" (really an initial zone) seeking a zoning classification similar to the one previously imposed by the county. The city agreed to annex, but decided to impose a more restrictive zone until the developer laid out a more specific plan of what it intended to do with the property. The lesson here is that anyone seeking voluntary annexation of a property under Category A should be careful to declare in writing that its agreement to annexation is conditioned upon a particular zoning or other matters and that if those conditions are not met, the landowner does not consent to the annexation.

(7) Subdivision or sale of five-acre lots

(a) The five-acre rule

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

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

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

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

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

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

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

reiterate that that the "surrounded" requirement is both stricter and more lenient than the "enclave" requirement applicable to Category A. (Enclaves under Category A are limited to residential enclaves, but the definition of enclave is non-intuitive and includes some land outside the city. See discussion in in section 9.E(3) on page 103.)

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

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

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

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

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

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

In contrast, the sale prong requires that only one lot sold be five acres or less. If there has been "a single sale of five acres or less from the tract whether subdivided, platted, laid off or not, then the entire tract may be ripe for annexation, even though the remainder is greater than five acres." *Hendricks*, 93 Idaho at 99-100, 456 P.2d at 266-67.[65] Because the statute only requires that an owner have "begun to sell off" five-acre lots, Idaho Code § 50-222(3)(b)(ii), the statute might be satisfied even when a sale is merely being negotiated, but has not taken place. *See Finucane*, 86 Idaho at 203, 384 P.2d at 238 (stating that an annexation was invalid when the annexed agricultural lands "had never been laid off, nor sold, nor bargained for sale, in lots, blocks, or tracts not exceeding five acres") (emphasis added); *Boise City Development Co.*, 42 Idaho at 306, 238 P. at 1011 (parenthetically commenting that a purchase negotiation "unquestionably is the beginning of a sale"). In addition, a single five-acre lot sale satisfies the sale prong even if the landowner made such a sale with no intention of making further sales or otherwise subdividing or developing the property. *See Boise City Development Co.*, 42 Idaho at 317, 238 P. at 1014 ("the statute does not say anything about intention, merely that the owner has sold or begun to sell").

If the property meets the "sale" test, the entire property becomes subject to annexation, not just the portion sold. "[I]f the owner has platted land into lots or blocks containing not more than five acres each, and has sold the same, or has sold without platting, in tracts of not more than five acres, such lots or tracts together with the additional portions still remaining in the possession of the former owner of such platted lots, or metes and bounds tracts, may be annexed." *Boise City Development Co.*, 42 Idaho at 303-04, 238 P. at 1009.[66]

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

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

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

[66] Presumably, this applies only to the "sale" prong of the test. See footnote 65 above.

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

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

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

(c) Burdens of proof

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

(d) Statutory exceptions to subdivision or sale

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

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

(8) The contiguity requirement

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

All annexations (under any category) must be of lands "contiguous or adjacent" to the city. Idaho Code §§ 50-222(4); 50-222(5)(a), 50-222(5)(b)(i), 50-222(5)(c)(i). (See section 9.E(9) at page 117 for discussion of special exceptions relating to rail lines and airports.) The statute does not define "contiguous or adjacent." The two words, however, are considered to be synonymous. 49 A.L.R. 589, §§ 2[a], 3[a] (1973).

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

The Annexation Statute does not define "contiguous or adjacent." The Idaho Supreme Court[67] has held that the terms are to be understood "in their primary and obvious sense" and limits a city to annexing lands that are "adjoining, contiguous, conterminous or abutting":

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

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

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

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

(a) The shoestring issue

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

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

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

The only other Idaho case to deal with the shoestring issue is *Fox v. Bd. of Cnty. Comm'rs, Boundary Cnty.* ("*Fox II*"), 121 Idaho 686, 827 P.2d 699 (Ct. App. 1991) (Winmill, J. Pro Tem).[68] In that case, the Idaho Court of Appeals upheld the district court's decision invalidating a shoestring annexation of land containing a tavern located 25 miles from the city "connected to the city by a one-dimensional line." *Fox II*, 121 Idaho at 688, n.1, 827 P.2d at 701 n.1.

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

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

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

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

(b) The touching corners issue

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

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

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

(c) The crossing water bodies issue

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

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

In the *Burley* case, the Court noted that the city would annex not only the land across the river, but the Snake River itself which, of course, is owned by the State of Idaho. The Court noted that the rule (then applicable to all annexations) that the tract be subdivided into parcels of five acres or less makes no sense in the context of submerged lands not susceptible to subdivision, and therefore was inapplicable. The fact that that annexation did not hop over the river but included the river has been noted by commentators and other courts as a justification for why the contiguity test was satisfied.[69]

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

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

Indeed, decisions from numerous other jurisdictions have held that separation by water bodies does not violate the contiguity requirement.[70]

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

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

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

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

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

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

(d) The "single geographic unit" issue

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

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

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

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

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

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

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

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

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

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

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

(9) Annexation across county lines

LLUPA expressly authorizes areas of city impact to cross a county line, but only where there is "agreement of the city and county concerned."[71] This addresses only the extension of an impact area across a county line, not the subsequent annexation.

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

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

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

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

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

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

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

(10) Special cases

(a) Fairgrounds and recreational lands

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

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

(b) Railroads

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

(c) Airports

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

(11) Judicial review of annexations

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

See discussion in section 24.X (Judicial review of municipal annexation) at page 433 and section 24.M(4) (Actions not subject to judicial review may be challenged by way of declaratory judgment or other civil action.) on page 415.

(12) Annexation of state and federal lands

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

> The general power to annex includes the power to annex land including a state institution or land acquired by the United States for a governmental purpose. The

> annexation of territory by a city is not precluded by the fact that such territory is a United States military reservation under the exclusive jurisdiction and control of the United States, notwithstanding that the power of the city may be curtailed and even suspended during the time that the territory is under such jurisdiction and control.

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

(a) Federal law permits unilateral annexation of federal lands

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

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

Id. at 627.

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

or its cited cases[72] suggests that this power is dependent upon any particular facts or is otherwise conditional.

One appellate case suggests that the rule announced in *Howard* may not be absolute. In *U.S. v. McGee*, 714 F.2d 607 (6th Cir. 1983), the Sixth Circuit Court of Appeals upheld a district court decision that permanently enjoined the City of Dayton, Ohio, from annexing land belonging to the Wright-Patterson Air Force Base, which served as the headquarters for the Air Force's Logistical Command, its Aeronautical Systems and Foreign Technology Divisions, its Institute of Technology and its four Aeronautical Laboratories. *Id.* at 609. The Sixth Circuit distinguished *Howard* on the basis of the potential for friction between the city and the Air Force, reasoning that "the potential for friction between city and military officials is much greater in a situation involving the annexation of a key military base than it is with respect to the annexation of a mere ordnance plant." *Id.* at 612 n.1.[73] However, this discussion was *dicta*, as an Ohio statute specifically prohibited annexation of territory within a military base without the approval of the Secretary of Defense, and such approval had not been granted. *Id.* at 611. In addition, *McGee* was not appealed to the Supreme Court, so the Court never had an opportunity to address the Sixth Circuit's interpretation of *Howard*. Finally, even assuming that *McGee* was decided validly, the Sixth Circuit was clearly concerned that Dayton might "interfere with the base's essential task of national defense." *Id.* at 612.

(b) Idaho law permits unilateral annexation of public lands

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

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

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

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

upheld the annexation of state lands without discussing whether the State had provided consent.

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

(i) Category A

Under the 2002 amendment, the only prerequisite for voluntary Category A annexations was that "all private landowners raise no objection." 2002 Idaho Sess. Laws, ch. 333 (formerly codified at Idaho Code § 50-222(3)(a)). On its face, this language permitted cities to annex public lands unilaterally, although no reported case addressed this issue.

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

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

Idaho Code § 50-222(3)(a)(i).

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

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

Section 50-222 expressly permits annexation within a city's ACI when all private landowners have consented. Public landowners are not mentioned. We see

the only reasonable reading of this omission to be that consent of public landowners is not required for annexations within the ACI.

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

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

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

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

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

Despite the reference to "all property owners" in the Statement of Purposes (as well as before the committees), there is no indication that the Idaho Legislature had

governmental landowners in mind when it drafted the 2008 amendment to Section 50-222. The legislative history is devoid of allusions to governmental landowners, and Senator Fulcher explained to the Senate Local Government and Taxation Committee that—other than the elimination of implied consent (discussed below)—the bill "does not affect the current procedure." Minutes for March 5, 2008 at 7. Furthermore, the 2007 Joint Interim Land Use Study Group, which generated the recommendations that evolved into the 2008 amendment, did not discuss governmental landowners. *See* Minutes for August 16, 2007; Minutes for September 13, 2007; Minutes for October 25, 2007; Minutes for November 29, 2007; Minutes for December 20, 2007. It appears that the reference to "all landowners" simply was the result of careless draftsmanship, rather than a desire to require consent for annexation of public lands outside the ACI. In other words, the most reasonable interpretation is that the phrase "all landowners" in Section 50-222(3)(a)(i) is a shorthand reference to the operable phrase "all private landowners" in the preceding sentence.

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

Moreover, there are valid reasons for a statutory distinction between private and governmental landowners. Annexation has little effect upon governmental landowners. Unlike private landowners, governmental landowners do not pay municipal taxes and for the most part are not subject to municipal ordinances.[74] Because governmental landowners, particularly federal landowners, have few or no interests at stake in an annexation, there is no reason to require their consent.

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

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

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

"acceptance" and "acquiescence." *American Heritage Dictionary of the English Language* (4th ed., 2006).

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

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

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

(ii) Category B

The definition for Category B annexations reads:

> Category B: Annexations wherein:
>
> (i) The subject lands contain less than one hundred (100) separate <u>private</u> ownerships and platted lots of record and where not all such landowners have consented to annexation; or

> (ii) The subject lands contain more than one hundred (100) separate private ownerships and platted lots of record and where landowners owning more than fifty percent (50%) of the area of the subject private lands have consented to annexation prior to the commencement of the annexation process; or
> (iii) The lands are the subject of a development moratorium or a water or sewer connection restriction imposed by state or local health or environmental agencies; provided such lands shall not be counted for purposes of determining the number of separate private ownerships and platted lots of record aggregated to determine the appropriate category.

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

(iii) Category C

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

(13) De-annexation

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

> The boundaries of any city in this state may be altered and a portion of the territory thereof excluded therefrom, and the councils of such cities are hereby granted power to enact ordinances for that purpose. Such alteration shall not relieve any territory excluded from the limits of a city from its liability on account of any outstanding bonded or other indebtedness of such city or of any bonded or other indebtedness of any improvement district of which the excluded territory is an existing part at the time of the

> passage of such ordinance. For the purpose of collecting any of the indebtedness specified in this section, the territory so excluded shall be and remain under the jurisdiction of such city. Immediately after the passage, approval and publication of said ordinance, a copy thereof duly certified by the clerk of said city shall be filed in compliance with the provisions of section 63-215, Idaho Code. Thereafter, the boundaries of said city shall be as set forth in said ordinance.

Idaho Code § 50-225.

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

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

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

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

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

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

The development agreement at issue in *Wylie* included a de-annexation provision. The Court said: "The Agreement also provides that the terms of the Agreement are binding upon all successors in interest, and that the Property shall be

de-annexed if any conditions contained in the Agreement, its incorporated documents, or any City ordinance, are not met." *Wylie* at 703. This particular provision was not at issue in the case, but the fact that the Court called it out and later held that the agreement was enforceable strongly suggests that the Court is quite comfortable with the idea that de-annexation is a proper remedy for failure to comply with an annexation/development agreement.

10. AREAS OF CITY IMPACT ("ACIS")

A. Purpose and overview of ACIs

LLUPA requires that every Idaho city establish an area of city impact ("ACI"). Idaho Code § 67-6526(a). The ACI is located outside of, but adjacent to, the boundaries of a city. The ACI describes the area where a city anticipates growing and, more specifically, extending city services.[75] Thus, the ACI is conceptually shaped like a donut surrounding the city limits.

The establishment of an ACI is the first step toward annexation, which may occur soon or years later. Indeed, the "Sequencing Provision" (Idaho Code § 67 222(1)) adopted in 1996 mandates that a city must establish its ACI before conducting any further annexations. See discussion in section 11.E on page 136.

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

If the city's ordinances are designated to apply within the ACI,[76] persons living within the ACI are entitled to representation on the city's P&Z Commission. Idaho Code § 67-6526(g) ("P&Z Representation Provision"). Members of the P&Z commission are appointed by the mayor with approval by the city council. Idaho Code § 67-6504. Thus, the mayor is required to appoint P&Z commissioners that roughly reflect the proportion of population lying in within the ACI. The code is not very precise about how this work. It simply states that persons living within the ACI (i.e., outside of the city) are "entitled to representation" on the P&Z commission. Presumably that means that those commissioners live in the ACI (outside of the city).

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

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

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

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

An ACI may cross a county boundary if additional procedures are followed. "Areas of city impact, together with plan and ordinance requirements, may cross county boundaries by agreement of the city and county concerned if the city is within three (3) miles of the adjoining county." Idaho Code § 67-6526(a). This gives the neighboring county veto-power over a city's extension of its ACI across a county line. (See discussion in section 9.E(9) on page 117 regarding annexation across a county line.)

B. Which plans and ordinances apply

The city and county are required to adopt coordinated ordinances establishing the ACI's boundary and specifying what planning and zoning ordinance will apply. Idaho Code § 67-6526(a).[77] They are free to select either the city's, the county's, or some combination or variation. Idaho Code § 67-6526(a).[78]

Whatever plans and ordinances are made applicable within the ACI, they will be enforced by the county.[79] This is true even if the city's ordinances are declared applicable.[80]

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

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

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

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

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

345 (2004) (awarding attorney fees against a city and county for adopting ordinances which purported to authorize the city to exercise jurisdiction within its ACI.[81]

Reardon confirmed the earlier holding in *Blaha v. Bd. of Ada Cnty. Comm'rs ("Blaha II")*, 134 Idaho 770, 9 P.3d 1236 (2000) (Walters, J.).[82] In *Blaha I and II*, landowners sought to develop Buckwheat Acres within the City of Eagle's ACI. The city and county adopted ordinances requiring approval first by the city and then by the county. This process was followed, and, over a period of time, both the city and county approved applications for preliminary plat, final plat, and a variance. Two neighbors, Mr. and Mrs. Blaha, filed various appeals from both the city and county actions. The Idaho Supreme Court determined that the city and county properly construed the city's action as merely in the nature of a recommendation to the county and not a pre-condition of the county's approval. To do otherwise, said the Court, would be in violation of state statute as well as Idaho Const. art. XII, § 2 which provides that cities have no jurisdiction outside of their city limits.[83] Accordingly, the Court upheld the subdivision approval.

C. Mechanisms for resolving ACI disputes

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

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

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

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

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

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

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

If after all this, the city and county still fail to enact ordinances and adopt consistent maps, ordinances, and plans establishing the ACI, either the city or the county may seek a declaratory judgment. At that point, the district court is empowered to define the ACI and the applicable plan and ordinances.[84]

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

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

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

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

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

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

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

If either of the cities object to the county's proposal, the city may demand that the county conduct an election among the voters "residing in the overlapping impact area," allowing the voters to declare which city's ACI should apply. The results of the election are binding and conclusive.[85]

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

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

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

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

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

"shall apply" (meaning that either entity may ask the district court to establish the ACI).[86]

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

(4) Election vs. district court

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

(5) Implications for municipal water rights

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

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

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

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

A. Overview

Since 1993, the Annexation Statute has provided expressly that non-voluntary annexations are limited to land within the annexing city's ACI. See section 11.D on page 135 and section 11.F on page 137. This requirement was retained in the 2002 revamping of the statute (which added Categories A, B, and C). Idaho Code §§ 50-222(5)(b)(i) and 50-222(5)(c)(i)). Assuming compliance with the requirements in Idaho Code § 6526 that overlapping ACIs be avoided or fixed, the requirement to annex only within one's own ACI means it is not possible for a city to undertake a non-voluntary annexation into another city's ACI.

The harder issue is whether a voluntary Category A annexation may invade another city's ACI. The Annexation Statute expressly provides that a voluntary Category A annexation may reach beyond the annexing city's own ACI. Idaho Code § 50-222(3)(a)(i). It does not address whether a voluntary annexation my reach into another city's ACI. As explored below, the author's view is that this prohibition is implicit. If cities must adopt non-overlapping ACIs, how can it be that cities may invade each other's ACIs? See section 11.I(3) on page 140. But no court has answered this question. It may be resolved soon by legislation.

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

B. ACIs have been mandatory since 1975.

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

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

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

S.B. 1094, 1975 Idaho Sess. Laws, ch. 188 (codified as amended at Idaho Code § 67-6526(a)). The statute reads the same today, except that the reference to the deadline for compliance has been removed.[87]

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

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

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

Presumably in response to this decision, the Legislature enacted in 1996 the very linkage the Court of Appeals found lacking. (See discussion of Sequencing Provision in section 11.E on page 136.) Given these subsequently adopted express statutory linkages, the Court of Appeal's conclusion that there is no linkage between the ACI requirement and the power to annex is obsolete and the opposite is now true.

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

The Legislature's first statement addressing the interconnection between annexation and ACIs came in a 1993 amendment to the Annexation Statute. In that year, the Legislature adopted a requirement that a city may only annex land within its ACI, with an exception allowing voluntary annexations to occur outside of its ACI.[88]

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

[88] The 1993 amendment stated:

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

(This replaced much older language that also provided simplified procedures for voluntary annexations.[89])

This 1993 language pre-dated the establishment of annexation Categories A, B, and C in 2002. The 2002 revision to this provision (including the Category A Exception) is discussed beginning in section 11.F on page 137.

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

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

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

H.B. 641, 1996 Idaho Sess. Laws, ch. 641 (codified as amended at Idaho Code § 67-6526(a)). LLUPA's Sequencing Provision has not been amended since its enactment in 1996.[90]

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

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

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

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

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

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

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

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

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

The 2002 amendment expressly required that Category B and C annexations be of land within the annexing city's ACI (Idaho Code §§ 50-222(5)(b)(i) and 50-222(5)(c)(i)), but it included no comparable requirement for voluntary Category A annexations. S.B. 1391, 2002 Idaho Sess. Laws, ch. 333(codified at amended at Idaho Code §§50-222, 55-2505(12), 55-2508, and 67-6526).[91]

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

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

In 2008, the Legislature added what is informally called the "Category A Exception."[92] The Category A Exception made explicit what was implicit in the

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

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

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

2002 recodification. The 2008 amendment restated the statutory exception first adopted in 1993 allowing voluntary annexations to reach beyond a city's own ACI. The 2008 amendment also added a new requirement that the annexed land be within in the comprehensive plan.[93] It reads in full:

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

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

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

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

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

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

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

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

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

But these concerns melt away when:

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

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

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

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

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

The Annexation Statute addresses ACIs only in the context of when the annexed land must be within the city's own ACI and when annexation may extend beyond its ACI.[94] The Annexation Statute says nothing, one way or the other, about whether a city may annex into another city's ACI.[95]

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

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

In 2006, a bill was introduced that would have required approval of the county commissioners and of the other city council if a city proposed to annex lands within another city's ACI. The bill also laid out extensive criteria to be considered in such situations by the commissioners and city council. H.B. 856 (2006). The bill never received a hearing, so there is no legislative history.

In 2022, a bill was proposed that would have expressly authorized voluntary annexations that invade another city's ACI. H.B. 635 (2022). The bill was defeated in a floor vote in the Idaho

(2) LLUPA and the Annexation Statute should be read together.

The Annexation Statute and LLUPA must be read together. "Statutes and rules that can be read together without conflicts must be read in that way." *State v. Garner*, 161 Idaho 708, 711, 390 P.3d 434, 437 (2017).

The Idaho Court of Appeals found this was not the case in 1985. *Coeur d'Alene Indus. Park Property Owners Ass'n v. City of Coeur d'Alene*, 108 Idaho 843, 702 P.2d 881 (Ct. App. 1985) (Burnett, J.). (See discussion of this case in section 11.C on page 135.) Indeed, until 1993, the two statutes did not speak to each other. However, multiple amendments since then (discussed above) make clear that these statutes are now joined at the hip. Accordingly, it is appropriate to consider the question of annexation and ACIs in the context of both statutes.

(3) LLUPA's requirement that cities adopt non-overlapping ACIs before annexation necessarily conveys that cities may not unilaterally annex into other cities' ACIs.

The Legislature's mandate that cities establish non-overlapping ACIs is central to the goal articulated in the Annexation Statute of promoting the orderly development of Idaho's cities. This mandate is reflected in five requirements:

- The first is LLUPA's Mandatory ACI Provision (Idaho Code § 67-6526(a). Since its enactment in 1975, LLUPA has mandated that every Idaho city establish an ACI.

- The second is LLUPA's Sequencing Provision (Idaho Code § 67-6526(a)). It requires that a city must establish its ACI prior to annexing land. The Sequencing Provision states that it is "subject to" the Annexation Statute (which allows voluntary annexations by reach beyond the city's own ACI).

- The third is LLUPA's Fixed Boundary Provision (Idaho Code § 67-6526(d)). It states that ACI boundaries "shall remain fixed until both governing board agree to renegotiate." This provision provides that the renegotiation shall be undertaken pursuant to the ACI Conflict Resolution Procedures.

- The fourth is the P&Z Representation Provision (Idaho Code § 67-6526(g)) (applicable only if the city's ordinances shall apply).

Senate. The legislative history shows that the Senate felt that further evaluation of the situation was appropriate.

The requirement that the mayor appoint persons living within the ACI to serve on the city's Planning and Zoning Commission reflects the legislative expectation that citizens and the city will engage in and rely on long-term planning within the ACI.

- The fifth is LLUPA's ACI Conflict Resolution Procedures (Idaho Code §§ 67-6526(b) and (c)). These provisions set out detailed mechanisms to ensure that any overlap between ACIs is resolved by negotiation, judicial decision, or election—not by the unilateral action of one city.

These provisions compel the conclusion that cities are not authorized to invade each other's ACIs. If a city has a problem with another city's ACI, it is supposed to employ the ACI Conflict Resolution Procedures, and live with those results. If, instead, cities were free to annex across ACI boundaries anytime a landowner consents to the annexation, there would be no need for those dispute resolution mechanisms.

It is inconceivable that the Legislature would have declared that ACI boundaries are "fixed" until renegotiated, enacted elaborate dispute resolution mechanisms, and empaneled citizens living within the ACI to engage in planning decisions, only to allow those boundaries to be incrementally carved up by a neighboring city at will.[96] Doing so would undermine the very purpose of having ACIs, which is to resolve up-front the development path for every Idaho city, thus allowing city planners, investors, homeowners, and the community to rely on those boundaries.

As the Idaho Supreme Court said: "The object of this requirement [to establish ACIs] was to delineate areas of future contiguous growth in order to assure their orderly development and thereby reconcile potentially competing designs for boundary expansion with accepted land use planning principles." *City of Garden City v. City of Boise*, 104 Idaho 512, 514, 660 P.2d 1355, 1358 (1983) (Huntley, J.).

The Idaho Legislature also has recognized that the central purpose of the annexation process is to assure the orderly development of Idaho's cities. The legislative intent set out at the beginning of the Annexation Statute states:

> Legislative intent. The legislature hereby declares and determines that it is the policy of the state of Idaho that cities of the state should be able to annex lands which are reasonably necessary to assure the <u>orderly development of Idaho's cities</u> in order to allow efficient and economically viable provision of tax-supported and

[96] The Category A Exception is not a minor carve-out. Most annexations in Idaho are Category A annexations.

> fee-supported municipal services, to enable the orderly development of private lands which benefit from the cost-effective availability of municipal services in urbanizing areas and to equitably allocate the costs of public services in management of development on the urban fringe.

Idaho Code § 50-222(1) (emphasis added).[97]

Reading LLUPA and the Annexation Statute to allow one city to unilaterally invade another city's ACI whenever one of those cities accepted a developer's request for annexation would conflict with the stated goal promoting the orderly development of Idaho's cities articulated by both the Idaho Supreme Court and the Legislature.

(4) The "subject to" language in the Sequencing Provision does not grant cities the right to invade other cities' ACIs.

This conclusion is not altered by words in the Sequencing Provision stating that it is "subject to the provisions of section 50-222." Idaho Code § 67-6526(a). That proviso simply reinforces the conclusion that the two statutes work together and that nothing in LLUPA's Sequencing Provision is intended to override any requirement in the Annexation Statute. There is nothing in the Annexation Statute (when the Sequencing Provision was adopted in 1996, or now) that speaks to whether cities may or may not invade other cities' ACIs.

Indeed, at the time the Sequencing Provision was adopted in 1996,[98] there were no Category A, B, or C annexations. That breakdown was not adopted until the revamp of the Annexation Statute in 2002, and the Category A Exception was not adopted until 2008. Accordingly, at the time of its enactment, the "subject to" language in the Sequencing Provision was not referring to the Category A Exception.

What was the "subject to" language referring to? In addition to underscoring that the Sequencing Provision was not intended to modify anything in the Annexation Statute, it reinforces that cities may continue to engage in voluntary annexations beyond their own ACI boundaries. The Annexation Statute has allowed that since 1993 and continues to allow it under the Category A Exception. But the Annexation Statute has never said that cities may annex into other cities' ACIs. Thus, the "subject to" language cannot be read to override the requirement that cities not invade each other's ACIs.

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[97] This statement of legislative intent was added as part of the comprehensive re-write of the statute in 2002. S.B. 1391, Idaho Sess. Laws, ch. 333 (2002) (codified at Idaho Code § 50-222(1)).

[98] H.B. 641, 1996 Idaho Sess. Laws, ch. 641 (codified at Idaho Code § 67-6526(a)). See discussion of the Sequencing Provision in section 11.E on page 136.

In sum, the Sequencing Provision requires a city to establish its ACI before annexation. The Fixed Boundary Provision and ACI Conflict Resolution Procedures require that the ACI not overlap another city's ACI. The only exception to the Sequencing Provision is that it is "[s]ubject to the provisions of section 50-222." Section 50-222 says nothing about annexing into another city's ACI. Thus, the "subject to" language cannot be read to override the requirement that cities not invade each other's ACIs. The provision in LLUPA saying it is "subject to" the Category A Exception simply confirms that the right to annex land voluntarily outside of a city's ACI is not overridden by LLUPA's Sequencing Provision.

12. THE SUBDIVISION PROCESS

This treatment of subdivision law breaks into two main categories: (1) the subdivision and "platting" process, which is the process of securing approvals from the local jurisdiction to divide a parcel of land into smaller lots, and (2) restrictive covenants, which are generally recorded along with subdivision plats to control the nature and use of the lands within the subdivision.

A. Introduction

At its core, subdivision is simply "the division of a lot, tract or parcel of land into two or more lots, tracts, parcels or other divisions of land for sale or development." *Black's Law Dictionary* (Sixth Edition, 1990), p. 1424. Legal subdivision requirements emerged over a hundred years ago as a means of facilitating more convenient conveyance of property. It has now evolved into a more comprehensive body of planning law. Subdivisions are often used in tandem with, but are distinct from, zoning regulations. (Or they may be codified as a subset of the zoning regulations.) Where zoning regulations delineate the uses and the permissible ways in which land may be developed, subdivision regulations identify the procedures for dividing land and impose requirements for providing public infrastructure and other improvements when the land is developed.

The Fourth Circuit Court of Appeals summarized the evolution of subdivision regulations as follows:

> Land use controls over subdivisions date from the late nineteenth century. The original statute took the form of land platting legislation and were intended to provide a more efficient method of conveying property. Before subdivision control, land was sold by reference to metes and bounds, an unreliable system that often resulted in confusion and overlapping titles. Subdivision regulations avoided these problems by requiring land developers to record in the local records office a 'plat,' or map, of the property. The plat, which contained precise dimensions, subdivide the land into blocks and lots and indicated the location of roads and parks. Once the plat was recorded, individual lots could then be conveyed by reference to the lot, block, and plat name, thereby avoiding the confusion inherent in the metes and bounds system.
>
> Beginning in the 1920s, subdivision control became not only a mechanism to simplify the conveyance of individual lots, but also a means through which localities could regulate urban and suburban development through

> comprehensive planning. Localities began to use subdivision regulations to prevent the construction of new streets that were not well aligned with existing roads. Subdivision control also functioned to ensure that development did not result in platted lots of unusable sizes that remained vacant, or in the splitting of large holdings suited for industrial or agricultural uses into numerous parcels that a private person could not reassemble.
>
> Following the Second World War, localities used subdivision control to implement more extensive substantive regulation. With the expansion of suburban areas, subdivision regulation turned to ensuring the provision of adequate local governmental facilities and services. Thus, such regulation mandated the construction of parks and other recreational facilities as well as schools for area residents. Comprehensive planning also became concerned with structuring development to avoid serious off-site drainage problems and to avert the negative impact of development on the local environment. Subdivision regulation also became a mechanism to ensure that streets were properly constructed and were sufficiently wide for anticipated traffic. Finally, localities required each lot to have adequate access to public services and utilities, such as water, sewage, gas, electricity, telephone, and cable television.

Gardner v. City of Baltimore Mayor and City Council, 969 F.2d 63 (4th Cir. 1992) (citations omitted).

This law review article offered this summary of the evolution of subdivision requirements:

> As originally conceived, subdivision regulations served the primary purpose of making the recordation of land titles more efficient. Subsequently, with the publication of the Standard City Planning Enabling Act in 1928, the regulations expanded to include the concept of requiring the subdivider to provide internal improvements, such as streets and open spaces. The vast increase in demand for housing after World War II, and the accompanying explosive growth of residential subdivisions, led local governments to expand the scope of regulations even

> further by requiring subdividers to contribute to off-site improvements such as parks, roads, and schools.

Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513, 1523 (2006)

B. Idaho's Subdivision Statute

The subdivision of land is governed primarily by Idaho Code §§ 50-1301 to 50-1329 within Chapter 13 entitled "Plats and Vacations."[99] This statute, adopted in 1967, predates LLUPA. 1967 Idaho Sess. Laws, ch. 429. However, LLUPA cross-references the subdivision statute. Specifically, LLUPA requires local governments to adopt local ordinances providing "for standards and for processing of applications for subdivision permits under sections 50-1301 to 50-1329." Idaho Code § 67-6513. The subdivision statute also cross-references LLUPA. Idaho Code § 50-1308.

The subdivision statute defines a "subdivision" as a "tract of land divided into five (5) or more lots, parcels or sites for the purpose of sale or building development, whether immediate or future. . . ." Idaho Code § 50-1301(17) (formerly 50-1301(15)).

This statutory definition further provides: "Cities or counties may adopt their own definition of subdivision in lieu of the above definition."[100] *Id*. Nearly all cities and counties in Idaho have done so. Some jurisdictions have broadly defined subdivisions to include nearly <u>any</u> division of land. For example, Ada County defines a subdivision as "The division of a lot or parcel of land, into two (2) or more lots for the purpose of conveyance of ownership or for building development; and the recorded plat thereof." Ada County Code § 8-1A-1. Boise City defines a subdivision as "the division of a lot, tract or parcel of land into 2 or more lots for the purpose of sale, or building development, whether immediate or future, including dedication of streets." Boise City Code § 9-20-03. Thus, for all practical purposes any division of land in Ada County or Boise City must be processed as a subdivision, unless otherwise exempted (as discussed in the following paragraph).

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[99] The platting statutes are codified in Title 50, which is the portion of the Idaho Code dealing with cities. That is because, historically, plats were mostly limited to developed land within cities. But these platting statutes are not limited to cities. They are equally operative as to unincorporated land administered by counties.

[100] Plainly, the statute allows cities and counties to adopt more restrictive definitions of "subdivision." By its own terms, the statute also authorizes them to adopt less restrictive definitions. On the other hand, an argument could be made that local governments should not be allowed to adopt a definition of "subdivision" that violates the purpose of LLUPA's requirement that they adopt a subdivision ordinance. Idaho Code § 67-6513. Perhaps, for example, defining subdivision as a tract of land with over 200 lots might be seen as not meaningfully complying with LLUPA's requirement to have a subdivision ordinance. We are aware of no case law on this subject.

Many local jurisdictions have provided for certain, limited exclusions to their subdivision ordinances. For example, Ada County's subdivision ordinance exempts the following "divisions" from its subdivision requirements:

- a property boundary adjustment;[101]
- a "one-time division" of a parcel of land that was "of record" at the Ada County Recorder's office prior to January 1, 1985;[102]
- a court decree dividing a lot or parcel into separate, distinct ownership in the distribution of property;[103]
- a division of property as a result of condemnation;
- the expansion or acquisition of street rights-of-way by a public highway agency;
- creation of one residential parcel for conveyance pursuant to an approved farm development right;[104] and
- the division of abutting parcels held under common ownership.[105]

Boise City's subdivision ordinance exempts (i) one-time divisions, (ii) property boundary adjustments, and (iii) the division of land into parcels of five (5) acres or more, so long as it does not involve the dedication of public streets. *See* Boise City Code § 9-20-04.E. A one-time division and property boundary adjustment require an application and the recordation of a formal record of survey illustrating the new division or new property boundaries. *See* Boise City Code § 9-20-04.E.1 and 2. Furthermore, the resultant parcels from a one-time division must meet the minimum requirements for area, frontage, width and depth for the existing

[101] A "property boundary adjustment" is not really a division of land. Instead, it is a process where existing property boundaries between parcels are relocated without the creation of new parcels. This process is often used to modify an existing parcel or subdivision layout without going through the formal subdivision process.

[102] The resultant parcels must comply with applicable access and dimensional requirements.

[103] If the parcels created do not meet the applicable dimensional standards for their zoning designations, the parcels will be recognized for ownership transfer purposes only and will "not be eligible for development including any building permits for renovation or repair of an existing structure." Ada County Code § 8-4A-17.

[104] This process allows qualifying parcels in Rural Preservation zones that are at least 40-acres in area to split off one parcel for residential purposes, even if the resultant parcels will be below the minimum area requirements in the Rural Preservation zone. *See* Ada County Code § 8-2A-5.

[105] This is not really a division of property, but an exception to the automatic presumption that "abutting properties held in the same ownership shall be considered one property for development purposes." Ada County Code § 8-4A-8.

zone. The resultant parcels from a property boundary adjustment must also meet the dimensional requirements of the existing zone, unless the property was an allowed nonconforming parcel and the adjusted boundaries do not result in a decrease in any noncompliant dimension.

Other jurisdictions may exempt other divisions of property from subdivision requirements. One of the more common of these is a bona fide division for agricultural purposes.

C. The "platting" process

The platting process is governed by Idaho Code §§ 50-1301 to 50-1334, which is not part of LLUPA. It is, however, connected to LLUPA's provisions for subdivision in Idaho Code § 67-6513.

Idaho law requires "every owner creating a subdivision . . . shall cause the same to be surveyed and a plat made thereof which shall particularly and accurately describe and set forth all the streets, easements, public grounds, blocks, lots, and other essential information, and shall record said plat." Idaho Code § 50-1302. The detailed technical requirements for the surveying and verification of plats are set forth in Idaho Code §§ 50-1304 to 50-1306.

Note: See *Idaho Road Law Handbook* for additional background on the platting process.

Idaho law requires local jurisdiction approval of all plats prior to recordation. All local jurisdictions must enact a subdivision ordinance, and the Local Land Use Planning Act, Idaho Code §§ 67-6501 to 67-6538 ("LLUPA"), sets forth the procedures for reviewing and approving subdivision applications. If the local jurisdiction has established a planning commission, then all plats must be submitted to the planning commission. Idaho Code § 50-1308.

If a subdivision is located within the corporate limits of a city, it must be approved by the city council prior to recordation. If the subdivision is not within the corporate limits of a city, the board of county commissioners must approve the plat. However, if the subdivision lies within an officially designated area of city impact, it must be reviewed in accordance with whichever zoning and subdivision ordinances are made applicable pursuant to the area of impact ordinances of both jurisdictions. Idaho Code § 50-1306.[106] If no area of impact has been officially adopted and the subdivision lies within one mile of the corporate limits of a city, the county must

[106] This provision was significantly amended in 1999. 1999 Idaho Sess. Laws, ch. 391. Prior to 1999, the statute purported to give the city co-equal regulatory power within the area of city impact. Had this not been amended in 1999, it would not have survived the court's decision in *Blaha v. Bd. of Ada Cnty. Comm'rs*, 134 Idaho 770, 9 P.3d 1236 (2000). Curiously, the *Blaha* court quoted the pre-1999 statute (which applied to the application), but found it unnecessary to address its validity.

transmit the application to the city for review and comment. The city must use its "subdivision ordinance and/or comprehensive plan" as "guidelines" for their comments. Idaho Code § 50-1306. The county must consider the city's comments, but is not required to adopt them. (Areas of city impact are discussed further in section 10 at page 128.)

> **Practice Tip:** As each local jurisdiction has its own requirements and procedures for the review and processing of subdivision applications, it is imperative that you become familiar with the specific requirements and processes of the local jurisdiction prior to submitting a plat application. Some local jurisdictions require pre-application conferences and neighborhood meetings prior to submission of a subdivision application.

The local jurisdiction's subdivision ordinance must specify the requirements of, and approval process for, subdivision applications. Most local jurisdictions follow a two-step process for reviewing plats – a preliminary plat review and a final plat review.[107] In addition to public notice and hearings, most local jurisdictions provide for the formal review of all plat applications by its own departments, emergency service agencies, public utilities, irrigation and drainage districts, and other governmental and quasi-governmental entities.[108] Preliminary plats generally set forth the basic information necessary for the reviewing entity to determine if the subdivision plan generally complies with the applicable requirements. Although called "preliminary," in some jurisdictions, the approval of a preliminary plat may be "final as to all matters set forth in said preliminary plat" and subject to appeal under LLUPA. Ada County Code § 8-6-3.F. In any event, if the preliminary plat approval allows the applicant to take immediate steps to permanently alter the land before final approval, the preliminary plat approval is subject to appeal under LLUPA. *Rural Kootenai Organization, Inc. v. Bd. of Comm'rs, Kootenai Cnty.*, 133 Idaho 833, 837-39, 993 P.2d 596, 600-02 (2000).

> **Practice Tip.** If the local jurisdiction's ordinance designates a preliminary plat approval to be a final decision, or allows the applicant to take steps to immediately alter the land after the preliminary plat approval, the appeal period under LLUPA begins to run after such approval.

[107] Some jurisdictions allow the preliminary and final plats to be processed simultaneously for simple subdivisions.

[108] For example, Boise City sends all plats to at least eighteen different departments and agencies for review and comment, from the Ada County Assessor's office to the applicable cable system franchisee. *See* Boise City Code § 9-20-05.C.4.

Once preliminary plat approval is obtained, the applicant may prepare the final plat in compliance with the requirements of Idaho Code and the local jurisdiction. Most local jurisdictions require the final plat to be recorded within one or two years of the preliminary plat approval. Generally, an applicant is required to construct all required subdivision improvements (*e.g.*, streets, sidewalks, utilities, etc.) prior to applying for final plat approval. Some local jurisdictions will instead allow an applicant to provide a bond or other security guaranteeing that required subdivision improvements will be constructed within a certain time. To be eligible for recordation, the final plat must contain the following certificates and approvals:

- The owner must provide a certificate containing a correct legal description of the lands included in the subdivision, a statement as to its intentions to include the described lands in the plat and make an offer to dedicate all public streets and rights-of-way shown on the plat. *See* Idaho Code § 50-1309(1).
- The professional land surveyor making the survey must certify the correctness of the plat. Idaho Code § 50-1309(1).
- A certificate by the applicable health district verifying approval of sewer and water facilities. Idaho Code §§ 50-1326 through 50-1329.
- A certificate by the person filing the plat that the property will be served by a water supply (wells or otherwise). Idaho Code § 50-1334.
- If necessary, a certificate of acceptance from the local highway district, if any, of public streets, alleys and easements for public maintenance.[109]
- A certificate of approval by the city council (usually by the city clerk), if applicable.
- A certificate by the city engineer, if applicable.
- A certificate by the county surveyor.[110]

[109] *See* Idaho Code § 50-1312. No dedications or transfer of a private road to the public can be made without the specific approval of the appropriate public highway agency accepting such private road. "No dedication or transfer of a private road to the public can be made without the specific approval of the appropriate public highway agency accepting such private road." Idaho Code § 50-1309(2).

[110] The county's surveyor must "check the plat and the computations thereon" and certify that the plat meets the requirements of state law. Idaho Code § 50-1305.

- A certificate by the county treasurer within 30 days prior to recordation.[111]

The acknowledgement and recording of a plat "is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for public streets or other public uses, or as is thereon dedicated to charitable, religious or educational purposes." Idaho Code § 50-1312 (previously codified at 49-2205). (See *Road Law Handbook* for Idaho case law on this statute, which says that, in fact, an easement is conveyed by the dedication.)

The developer may not begin to sell the individual lots indicated on the plats until the final plat is recorded. The selling, or offering for sale, of any lots before the final plat has been duly recorded violates Idaho Code § 50-1316 (with a nominal, $100 penalty per lot) and may be subject to other penalties set by the local jurisdiction. For example, selling lots in violation of the Ada County Subdivision Ordinance is a misdemeanor. *See* Idaho Code § 67-6527 and Ada County Code § 8-7-8.A.

D. Vacation of plats, public streets and rights-of-way

Idaho Code Sections 50-1317 through 50-1324 set forth the statutory procedure to vacate a plat or a portion of a plat. Local jurisdictions and highway districts may have additional procedures and requirements. *See, e.g.* Idaho Code §§ 40-203, 40-208. Easements are vacated in the same manner as plats. *See* Idaho Code § 50-1325. Land exclusive of public rights-of-way need not be vacated in order to be replatted.

To vacate a plat, road, right-of-way or easement, the interested party must file a petition with the applicable jurisdiction. *See* Idaho Code § 50-1317. If the property is inside an incorporated city, the petition must be filed with the city. The city may grant the petition "with such restrictions as they deem necessary in the public interest." Idaho Code § 50-1306A(3). If the property is not inside an incorporated city, but within one mile of an incorporated city, the petition must be filed with both the city and county. *See* Idaho Code § 50-1306A(3) and Idaho Code § 50-1306A. If the property is more than one mile from an incorporated city, the petition must be filed with the county. *See* Idaho Code § 50-1317.

Public roads and rights-of-way under the jurisdiction of a highway district or county must be filed with the highway district or county. Idaho Code § 50-1317*;* Idaho Code § 40-203(a). If the highway district is within a city, the city must consent to the application. Idaho Code §§ 50-1306A(6), 50-1306A(4). To support a vacation, the highway district or county commissioners must find that maintaining

[111] A county treasurer may withhold certification only if property taxes are due, but not paid, on property within the subdivision. *See* Idaho Code § 50-1308.

the highway or right-of-way is "in the public interest." Idaho Code § 40-203(a) & (h). The decision "shall be written and shall be supported by findings of fact and conclusions of law." Idaho Code § 40-203(h). Otherwise, the vacation is accomplished "pursuant to the provisions of chapter 13, title 50, Idaho Code." Challenges to vacations by highway districts and counties are brought pursuant to Idaho Code Section 40-208. Idaho Code § 40-203(k).

The adjacent landowners must consent to the vacation of a public street or right-of-way in writing, unless the public street or right-of-way has not been open to the public for a period of five (5) years and the non-consenting owners have access to his property from some other public street, public right-of-way or private road. *See* Idaho Code § 50-1321. Furthermore, the jurisdiction must be satisfied that the non-consenting owners have been served with notice of the proposed abandonment in the same manner as a summons in an action at law. Idaho Code § 50-1321.

Notice of the public hearing on the vacation application must be provided to the public (by newspaper notice and public posting), as well as specific written notice to all landowners within 300 feet of the affected property. *See* Idaho Code §§ 50-1317 and 50-1306A(2). Easements for utilities, drainage and slope purposes may be vacated by the recording of a new or amended plat, provided that affected easement holders consent in writing. *See* Idaho Code § 50-1306A(5).

If the petition to vacate is granted, title to the vacated property shall vest in the "rightful owner", *i.e.*, the person or entity that would otherwise have legal title. For street vacations, title to the vacated street is distributed to the adjacent landowners. *See* Idaho Code §§ 50-1320 and 50-311. For public squares or common areas, the property will vest with the local jurisdiction, who may sell the property and retain the proceeds. Idaho Code §§ 50-1320 and 50-311. The vacation of streets and alleys do not impair the rights-of-way, easements and franchise rights of any lot owner or public utility. Idaho Code §§ 50-1320 and 50-311.

An aggrieved person must file an appeal of a city's decision on a vacation application within twenty days after publication or notice. *See* Idaho Code § 50-1322. Before a vacation of a plat can be recorded, the county treasurer must certify that all taxes due are paid. *See* Idaho Code § 50-1324(1). Any action to establish adverse rights or interest in the affected property, or determine the invalidity of the vacation, must be brought within six months after recordation of the vacation with the county recorder. *See* Idaho Code § 50-1323. Appeals of highway district or county vacation decisions proceed pursuant to Idaho Code Section 40-208. These appeals must be brought within 28 days of the decision. Appeals pursuant to Section 40-208 also include different procedural steps and standards of review than appeals under the IAPA.

E. Restrictive covenants

Generally, developers will find it desirable to place restrictive covenants against the subdivided lands to maintain or enhance the land's value or desirability. Some local jurisdictions also require restrictive covenants as part of the subdivision process. Restrictive covenants generally contain a detailed set of restrictions and covenants that control the nature of the use, development and occupancy of the lands. Restrictive covenants may also create an organization for the maintenance and operation of common facilities or amenities for the subdivision, such as private roads, clubhouses, open spaces, etc.

(1) Enforceability of restrictive covenants

Restrictive covenants are merely private contractual agreements and are generally enforced in the same manner as any contract or covenants. In *Brown v. Perkins*, 129 Idaho 189, 923 P.2d 434 (1996), the Idaho Supreme Court stated that:

> When a court interprets a restrictive covenant, it is to apply generally the same rules of construction as are applied to any contract or covenant. Where contract terms are clear and unambiguous, the interpretation of the contract's meaning is a question of law. . . . Where there is no ambiguity, there is no room for construction; the plain meaning of the language governs.

Brown v. Perkins, 129 Idaho 189, 192, 923 P.2d 434, 437 (1996) (citations omitted).

Restrictive covenants, like many contractual terms, occasionally suffer from ambiguity. When an ambiguity exists, the Court must attempt to "determine the intent of the parties at the time the instrument was drafted." *Brown*, 129 Idaho at 193, 923 P.2d at 438. A provision is ambiguous if "it is capable of more than one reasonable interpretation on a given issue," when the entire agreement is viewed as a whole. *Brown*, 129 Idaho at 192-93, 923 P.2d at 437-38. All doubts are to be resolved in favor of the free use of property. *Brown*, 129 Idaho at 192, 923 P.2d at 437. Courts will not implicitly create a limitation not clearly expressed in the language of the restrictive covenant. In general, courts decline to enforce restrictions that are not clearly expressed or where the relief sought is unreasonable or unexpected under a common sense reading of the restrictive language.

When an owner seeks enforcement of restrictive covenants, such as specific performance or injunctive relief against a prospective breach, courts will weigh the equities and "equitable principals will prevail and the rules of fair dealing and good conscience must be applied." *Smith v. Shinn*, 82 Idaho 141, 148, 350 P.2d 348, 351 (1960). The Idaho Supreme Court has found the interpretations and application of the covenants by the affected parties to be an important consideration. In *Smith v. Shinn*, 82 Idaho 141, 350 P.2d 348 (1960), the Idaho Supreme Court reversed and remanded a trial court's decision to strictly enforce a restrictive covenant where the

trial court refused to consider evidence from the defendant suggesting that the restrictions at issue may have been violated by other parties. The Court stated that:

> It would be inequitable to require appellants to comply with the restriction under an interpretation or construction different from that applied to other property owners. . . [If those seeking to enforce the restriction] have knowingly and without objection permitted several other grantees within the subdivision to violate the restrictions which they seek to enforce . . . equity will not assist them in such enforcement. Such rule rests upon the equitable ground that, if any one who has a right to enforce the covenant and so preserve the conditions which said covenant was designed to keep unaltered shall acquiesce in material alterations of those conditions, he cannot thereafter ask a court of equity to assist him in preserving them.

Smith, 82 Idaho at 148, 892 P.2d at 351-52 (citations omitted).

Under certain circumstances, significant changes in the lands encumbered by the restrictive covenants may lead a court to refrain from enforcing restrictions that no longer benefit any owners in the manner originally envisioned. *See Ada Cnty. Highway District, by and through Silva v. Magwire*, 104 Idaho 656, 662 P.2d 237 (1940). However, external changes are not sufficient to void a covenant:

> If a particular subdivision is subject to restrictive covenants restricting its use to residential, and the subdivision itself has not changed, then changes outside of the subdivision standing alone, even though adjacent, do not invalidate the restrictions. An increase in noise or traffic in the surrounding area, or even within the subdivision itself is not enough to indicate sufficient change in the character of the neighborhood to invalidate the restrictions. The fact that a particular piece of property would increase in value if used for a different purpose than that allowed in the covenant is not enough to invalidate the covenant.

Furthermore, the conduct and interpretations of those subject to the restrictions may result in unenforceability of the restrictions, or the adoption of the interpretations actually used by the affected persons. *See Ada Cnty. Highway District, by and through Silva v. Magwire*, 104 Idaho 656, 662 P.2d 237 (1940) *and Gabriel v. Cazier*, 130 Idaho 171, 938 P.2d 1209 (1997).

(2) Drafting considerations for restrictive covenants

(a) Reasonableness

Although restrictive covenants have become commonplace, not all Americans are willing to abide by the restrictions – or at least the more onerous ones. The enforceability of such restrictions becomes more difficult, practically and legally, if the restrictions are viewed as unreasonable or excessive. Some restrictive covenants contain strict prohibitions on the display of American flags, private speed limits, restrictions on the type and size of pets (including enforced weight restrictions), required seasonal decorations, limitations on the delivery of newspapers, limitations on the amount of time a garage door may be open, etc. The owners' association or affected neighbors must be willing to consistently and, at times, aggressively enforce the restrictions. Unreasonable or excessive restrictions may invite passive resistance or open rebellion. It is hard to identify precisely when restrictions cross the line from reasonable to unenforceable. Local custom, the character of the subdivision and the inclinations of the owners who will likely occupy the subdivision are relevant considerations. The developer must consider what kinds of restrictions will likely be palatable and desirable to his future lot owners, and therefore will be more likely to be enforced by the future lot owners.

Furthermore, most lot purchasers, especially purchasers of already completed homes, do not read the restrictive covenants without some amount of "encouragement" by the developer or owners' association. Lot owners who are not aware of, or familiar with, the restrictions will likely violate them inadvertently. A lot owner who inadvertently expends money on an improvement that violates a restrictive covenant is much more likely to fight the enforcement of the restrictions. The developer and owners' association should take steps to ensure each new owner is provided with a copy of the restrictions, preferably at or before the purchase of the lot, and becomes familiar with the restrictions.

(b) Flexibility

Restrictive covenants must be flexible enough to accommodate changes in the subdivision and changes in the preferences of lot owners. The covenants should provide for an amendment and/or variance procedure that is not unduly burdensome for lot owners. For example, some covenants contain strict architectural limitations on the type of building materials that may be used. Advancements in the building industry may create desirable building materials that are not permitted by the restrictive covenants. If the covenants do not provide an avenue for the new materials to be approved, or for the amendment of the covenants, lot owners will be prevented from taking advantages of newer and better materials.

(c) Consistency

In addition to being clear, restrictive covenants should be internally consistent and consistent with the actual development. Important terms should be carefully defined and used consistently throughout the document, and its related documents (*e.g.*, the plat and the articles of incorporation and bylaws of the owners' association).

(d) Enforcement mechanisms

Generally, the power to enforce restrictive covenants is initially vested in the developer (during the initial build-out of the subdivision) and, subsequently, vested in the owner's association. Many restrictive covenants go further and grant each owner the right to enforce the restrictions individually. The benefit of restrictive covenants can be frustrated if the enforcement provisions are inadequate, unclear or burdensome, or are only occasionally or arbitrarily enforced.

Because restrictive covenants are private, contractual rights, the enforcement remedies are private in nature. Ordinarily, a well-drafted restrictive covenant will grant the owners' association the power of self-help, and the power to fine or charge the offending lot owner and, if necessary, place liens against the offending owner's property and foreclose thereon. However, as it would be a private contractual lien, the owners' association must strictly comply with the foreclosure procedures. As most owners' associations are run by volunteer laypersons, undue difficulty, uncertainty and expense in the enforcement process will discourage its use.

13. THE PUBLIC HEARING PROCESS

A. Sequencing of development application

Depending on local requirements, development applications can be heard by a hearing examiner, a planning and zoning commission, or a city council or county commission. The process typically begins with the submission of one or more development applications to the appropriate entity. Hearings on multiple permit applications can be combined, Idaho Code § 67-6522; however, certain applications may have to be heard in sequence. For example, in *Price v. Payette Cnty. Bd. of Cnty. Comm'rs,* 131 Idaho 426, 958 P.2d 583 (1998) (Trout, C.J.), the Idaho Supreme Court invalidated the county commission's action because the commission failed to hold a hearing on a necessary comprehensive plan amendment prior to approval of a rezone which required the plan amendment as a pre-condition. In addition, cities and counties will typically sequence annexation and zoning requests so that the annexation is considered and approved prior to the zoning request, although the hearings on the two may be combined.

B. Typical hearing procedure

LLUPA requires governing boards to adopt hearing procedures that "provide an opportunity for all affected persons to present and rebut evidence." Idaho Code § 67-6534. This is commonly conducted in a "town hall" style format, which is far less formal than a trial-type format. Typically, the hearing begins with a staff presentation, followed by a developer presentation, followed by public testimony, followed by staff rebuttal, followed by developer rebuttal. This approach allows each of these affected groups an opportunity to present information and at least one opportunity to respond to information presented by opposing parties.

Some jurisdictions impose rather short time limits on testimony, particularly public testimony. An interesting question is whether these time limits violate the due process rights of affected persons. Problems in this regard are usually avoided because (1) the time limits are not strictly enforced, and (2) interested persons can supplement oral testimony with written testimony (a good idea in any case).

In *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 512, 148 P.3d 1247, 1259 (2006) (Burdick, J.), the Court found that the applicant's due process rights had not been violated because the applicant was allowed to speak at length. However, it offered this dictum: "However, although we hold that Cowan's due process rights were not violated, limiting public comment to two minutes is not consistent with affording an individual a meaningful opportunity to be heard." *Id*.

In *Whitted v. Canyon Cnty. Bd. of Comm'rs*, 137 Idaho 118, 121, 44 P.3d 1173, 1176 (2002), opponents of a subdivision complained that they were not afforded an opportunity to provide surrebuttal evidence following the applicant's rebuttal evidence. The Court did not reach the merits, ruling instead that the project

opponents failed to preserve the issue by requesting an opportunity for surrebuttal at the time of the hearing.

It would seem that the more local governments do to facilitate meaningful input and interaction, the less likely they will find themselves subject to a due process challenge. For example, they should make efforts to do the following:

- Assist the applicant and opponents to prepare for a meaningful hearing by providing a staff report sufficiently in advance of the hearing.
- Ensure that the staff report is sufficiently detailed and forthcoming to alert parties to the issues of concern.
- Provide an opportunity (and encouragement) for parties to submit written materials in advance.
- Consider employing a more iterative process (involving more than one hearing) so that parties may respond to concerns in project design and explore alternatives.
- Exercise reasonable flexibility in enforcing time limits.
- Allow a reasonable opportunity for rebuttal, particularly of newly presented information.
- Make the record available to the public as it is built, ideally through the internet.

C. Building the record

Judicial review of quasi-judicial planning and zoning decisions (as well as other administrative actions) is conducted on the record. See discussion in section 24.H at page 343.

The Idaho Administrative Procedure Act ("IAPA") sets out precisely what must be included in the agency's record.[112] Idaho Code § 67-5249. It is an inclusive list, designed to capture everything presented to or created by the agency or its staff in connection with the particular matter.

This means that, with rare exceptions, the reviewing court will be limited to consideration of the record that is built below. In addition, the local government is

[112] The IAPA specifies the type of record appropriate to each of the three types of agency action: rules, orders and statutorily imposed duties. These are listed at Idaho Code §§ 67-5201(3) and 67-5275(1). We focus here on the record appropriate to contested cases resulting in an order. Idaho Code §§ 67-5249 and 67-5275. These provisions, though designed for state agencies, are made applicable to municipal zoning bodies by LLUPA, which generally references and adopts all of the IAPA's provisions dealing with judicial review. Idaho Code §§ 67-6519 and 67-6521(1)(d).

required to base its decision on what is in the record. This does not mean that the agency may not take into account its own experience and judgment. However, the agency may not simply ignore the record and declare a result contradicted by the facts before it.

Section 67-5276 of the IAPA sets out the special circumstances in which the record may be supplemented on appeal to the district court. In all cases, leave of court must be obtained. If the party is able to demonstrate "good reasons for failure to present" the evidence before, the court may remand the matter to the agency to receive the additional information. Idaho Code § 67-5276(1)(a). If the party can point to "alleged irregularities in procedure before the agency," the court itself may hear the new evidence. Idaho Code § 67-5276(1)(b).

Because judicial review of planning and zoning decisions is conducted "on the record," creating the best possible record in the initial proceedings is critical to upholding or overturning an action in court.

Typically, land use hearings are tape-recorded. The agency should ensure that speakers identify themselves and speak clearly and audibly. *See Rural Kootenai*, 133 Idaho at 843-44, 993 P.2d at 606-07 (inaudible portions of recording did not render transcription inadequate when clarified by written testimony and minutes). Given the poor quality of recordings, a party may wish to make arrangements with the commission or council to provide a court reporter. So long as the party is willing to undertake the expense, the commission or council ought to cooperate. An accurate transcript can be a valuable asset on appeal.

The administrative record also includes written materials, including the permit application, staff reports, maps and any other information submitted into the record. These materials should become part of the record simply by submitting them to the decision-making body. However, local governments are sometimes less than meticulous in their maintenance of the record. It is a good practice to formally request inclusion in the administrative record of any material important to a matter. This may be accomplished in the forwarding cover letter or at the time of offering oral testimony.

Parties should also take care to ensure that materials offered by other parties are properly placed in the record. Such materials could be useful later, for instance, in documenting bias or extra-record communications.

Parties should make certain that the record reflects the basis of their own standing. They should also be certain to affirmatively document any irregularity or the lack thereof (depending upon their position). For instance, if there is reason to doubt that an opponent has standing, be certain to place an objection on the record and create a record showing the basis for the objection. Affirmatively invite the objection to be overcome by the person to whom it is directed. This way, if it can be

overcome, no further time is wasted on the issue. But if it is not overcome, the record will more clearly document the defect.

The commission or council also has an interest in building a solid record, in order to protect their decision on appeal. They should be careful to document that procedural rules were followed and that due process was accorded to all. In particular, they should provide for full and explicit disclosure of any bias, conflict of interest, or *ex parte* communications.

In a similar vein, if the commissioners or council members do not take the initiative to address the issues of conflict of interest, bias, and *ex parte* communication, the applicant or other interested parties should suggest that a record be made on the subject.

Testimony at a hearing should be planned, primarily to be persuasive, but also to put sufficient evidence in the record to support the position the testifying party wishes to support. A party should not accede to a perceived desire of the commissioners to "speed things up" at the expense of a complete record sufficient to sustain an appeal.

As discussed below, a decision can be overturned if it is not supported by substantial evidence in the administrative record. Therefore, it is very important to not only win enough votes, but to address each of the statutory and ordinance criteria with evidence and argument needed to support findings either of approval or denial under those criteria.

While it is important to cover each of the legal and technical bases, the successful party will also ensure that the testimony addresses the common sense side of the equation. The testifying party should paint a picture for the commissioners which is not only legally sufficient under the ordinance criteria, but also persuasive and compelling. The testimony must reach the listener and persuade her that the project is not just approvable, but genuinely good for the community, or in the case of an opponent, a genuine threat to the community. After all, the party who prevails in the administrative hearing is by far the most likely to prevail in the final result.

Presenting a persuasive case involves skill, personality, and resources. The party should think carefully about who should make the presentation, and how that presentation can be most effective. Visuals and other aids should always be employed.

The most important thing for an applicant, however, is to begin with a sound and defensible project. The party who views the planning process as legitimate, and seeks to develop the best possible project under the circumstances and constraints applicable, will fare better than the applicant whose attitude comes off as "try and make me."

D. Findings and conclusions: the "reasoned statement"

LLUPA requires that local officials support their decisions on permit applications with a written "reasoned statement" that discloses and explains the basis of the decision in a meaningful way and documents that the decision was based upon appropriate "standards and criteria."

This requirement applies to the "approval or denial of any application." Idaho Code § 67-6535(1).[113] Obviously, this applies when a governing board (a city council or county commission) renders a decision. In most instances, it also applies to decisions rendered by a P&Z commission (with the exception of recommendations made on ordinances and land subdivisions[114]).

By tradition, the reasoned statement typically takes the form of "findings of fact and conclusions of law." The issuance of the findings and conclusions, by the way, triggers the running of the time for appeal.

LLUPA provides:

> (1) The approval or denial of any application required or authorized pursuant to this chapter shall be based upon standards and criteria which shall be set forth in the comprehensive plan, zoning ordinance or other appropriate ordinance or regulation of the city or county. Such approval standards and criteria shall be set forth in express terms in land use ordinances in order that permit applicants, interested residents and decision makers alike may know the express standards that must be met in order to obtain a requested permit or approval. Whenever the nature of any decision standard or criterion allows, the decision shall identify aspects of compliance or noncompliance with relevant approval standards and criteria in the written decision.

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[113] Prior to 2010, Idaho Code §§ 67-6535(1), (2), and (3) were labeled 67-6535(a), (b), and (c). H.B. 605, 2010 Idaho Sess. Laws, ch. 175, § 4.

[114] As discussed in section 2.E at page 32, cities and counties have discretion to delegate certain planning and zoning functions under LLUPA to P&Z commissions. The exception is "the authority to adopt ordinances or to finally approve land subdivisions." Idaho Code § 67-6504. These final decisions may only be made by the governing board (the city or county), and any action taken by the P&Z commission would be only a recommendation. Accordingly, the Court ruled in *Cowan v. Bd. of Comm'rs of Fremont Cnty.,* 143 Idaho 501, 511, 148 P.3d 1247, 1257 (2006) (Burdick, J.), that the reasoned statement requirement in Idaho Code § 67-6535 does not apply to such recommendations. To be clear, other decisions by a P&Z commissions (*e.g.*, decisions on CUPs and other permits) do require a reasoned statement. These are approvals (not mere recommendations) by the P&Z commission, even though they are appealable to the governing board.

(2) The approval or denial of any application required or authorized pursuant to this chapter shall be in writing and accompanied by a reasoned statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record.

(a) Failure to identify the nature of compliance or noncompliance with express approval standards or failure to explain compliance or noncompliance with relevant decision criteria shall be grounds for invalidation of an approved permit or site-specific authorization, or denial of same, on appeal.

(b) Any applicant or affected person seeking judicial review of compliance with the provisions of this section must first seek reconsideration of the final decision within fourteen (14) days. Such written request must identify specific deficiencies in the decision for which reconsideration is sought. Upon reconsideration, the decision may be affirmed, reversed or modified after compliance with applicable procedural standards. A written decision shall be provided to the applicant or affected person within sixty (60) days of receipt of the request for reconsideration or the request is deemed denied. A decision shall not be deemed final for purposes of judicial review unless the process required in this subsection has been followed. The twenty-eight (28) day time frame for seeking judicial review is tolled until the date of the written decision regarding reconsideration or the expiration of the sixty (60) day reconsideration period, whichever occurs first.

(3) It is the intent of the legislature that decisions made pursuant to this chapter should be founded upon sound reason and practical application of recognized principles of law. In reviewing such decisions, the courts of the state are directed to consider the proceedings as a

> whole and to evaluate the adequacy of procedures and resultant decisions in light of practical considerations with an emphasis on fundamental fairness and the essentials of reasoned decision making. Only those whose challenge to a decision demonstrates actual harm or violation of fundamental rights, not the mere possibility thereof, shall be entitled to a remedy or reversal of a decision. Every final decision rendered concerning a site-specific land use request shall provide or be accompanied by notice to the applicant regarding the applicant's right to request a regulatory taking analysis pursuant to section 67-8003, Idaho Code. An applicant denied an application or aggrieved by a final decision concerning matters identified in section 67-6521(1)(a), Idaho Code, may, within twenty-eight (28) days after all remedies have been exhausted under local ordinance, seek judicial review under the procedures provided by chapter 52, title 67, Idaho Code. An appeal shall be from the final decision and not limited to issues raised in the request for reconsideration.

Idaho Code §§ 67-6535 (as amended in 2013).

Note that this section was not part of LLUPA as initially enacted in 1975, but was added by amendment in 1982. It was amended in 2013 to strengthen the obligation to articulate the standards and criteria and their application to the decision, and to add the reconsideration and tolling provisions discussed in section 24.P at page 423.

The requirement for such a reasoned statement is a common law principle rooted in constitutional due process requirements that predates LLUPA. In 1982, the Idaho Supreme Court held that insufficient findings are grounds to vacate the decision and remand for further proceedings. *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 38, 655 P.2d 926, 932 (1982) (applying the requirement as a common law principal, prior to its codification in an amendment to LLUPA in 1982).

Another common law based decision is *Love v. Bd. of Cnty. Comm'rs of Bingham Cnty.*, 105 Idaho 558, 560, 671 P.2d 471, 473 (1983). In *Love*, the Idaho Supreme Court threw out a finding by the county commission that a zoning change was consistent with the comprehensive plan because of the "Commission's failure to make findings in support of its conclusions."

The Court adopted a remarkably lenient approach to this requirement in *Evans v. Teton Cnty.*, 139 Idaho 71, 73 P.3d 84 (2003) (Kidwell, J.), saying that and

inadequate set of findings and conclusions might suffice if supporting documentation for the land use decision could be found in the record:

> Based on the totality of the record, the findings of fact and conclusions adopted by the Board of Commissioners satisfy the requirements of I.C. § 67-6535(b). …
>
> While the Board of Commissioners would be better served by more specifically and extensively articulating its findings of fact and conclusions, the required information can be found in the record produced during the application process.

Evans, 139 Idaho at 80-81, 73 P.3d at 93-94.[115] *Evans* was explained and limited (all but overruled) in cases in discussed below.

In *Davisco Foods Int'l, Inc. v. Gooding Cnty.*, 141 Idaho 784, 118 P.3d 116 (2005) (Schroeder, C.J.), the Supreme Court rejected the urging of a disappointed applicant for a special use permit that the Court engage in a rigorous review of county's findings and conclusions, which the applicant contended were conclusory and not supported by the record. Moreover, the Court ruled that it was not necessary for the county (which was sitting in an appellate capacity and which had reversed the planning and zoning commission) to say what was wrong with the planning and zoning commission's decision. Rather, the Supreme Court held, it was sufficient for the county to start from scratch in making its own findings.[116]

In *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 511, 148 P.3d 1247, 1257 (2006) (Burdick, J.), the Court reiterated, "Conclusory statements are not sufficient." However, the Court noted that the county may, if it chooses, simply adopt the findings and conclusions recommended by the planning and zoning commission.[117]

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[115] Prior to 2010, Idaho Code §§ 67-6535(1), (2), and (3) were labeled 67-6535(a), (b), and (c). H.B. 605, 2010 Idaho Sess. Laws, ch. 175, § 4.

[116] The dissent urged application of the principle announced in *Woodfield v. Bd. of Prof'l Discipline*, 127 Idaho 738, 746, 905 P.2d 1047, 1053 (1995), that a regulatory body must, at a minimum, explain what was wrong with the decision of the hearing officer. The dissent urged that the same thing is required of municipal entities under Idaho Code § 67-6535(b) (now 67-6535(2)), which requires a "reasoned statement." The majority did not address this point in its opinion, but, presumably, rejected the notion.

[117] The *Cowan* Court also ruled that the requirement to adopt a reasoned statement does not apply to the planning and zoning commission itself where it is not a decision-making body, but only a recommending body. However, this holding is limited to circumstances where the P&Z Commission is making a recommendation on a land subdivision or an ordinance. See discussion in Volume II of this Handbook.

In a 2007 decision, the Supreme Court demonstrated a greater willingness to take a hard look at the findings and conclusions. Even here, however, the reversal of the city's position was technically procedural. The case of *Crown Point Dev., Inc. v. City of Sun Valley*, 144 Idaho 72, 156 P.3d 573 (2007), involved Crown Point's applications for preliminary plat approval and design review on "Phase 5" of the Crown Ranch Subdivision development. In denying the applications, the city relied on "an analysis by several individuals of existing documents [the Phase 1-4 applications] in the City's possession, but not the existing documents themselves." *Crown Point*, 144 Idaho at 77, 156 P.3d at 578. The developer sought judicial review under LLUPA.

The Court found the city's findings and conclusions were not proper findings (as required by LLUPA), but mere "recitations of evidence." *Crown Point*, 144 Idaho at 78, 156 P.3d at 579. The developer had sought review of the findings, arguing that there was no substantial evidence in the record to support them. The Supreme Court did not reach the substantial evidence issue, ruling instead that the city's findings were not findings at all. "Instead, the 'findings' merely recite portions of the record which could be used in support of a finding. . . . By reciting testimony, a court or agency does not find a fact unless the testimony is unrebutted in which case the court or agency should so state." *Crown Point*, 144 Idaho at 77, 156 P.3d at 578. Accordingly, the Court remanded the case to the city so that it could "make proper factual findings." *Crown Point*, 144 Idaho at 78, 156 P.3d at 579.

This case sends a strong message to local governments that they need to take seriously their obligation to prepare meaningful findings and conclusions. Mere regurgitation of the record is insufficient. This is still not a particularly high standard. At a minimum, however, decision makers should identify whether the evidence is conflicting or not and, if so, say at least something about why they found that evidence more compelling than the contrary evidence.

In *Jasso v. Camas Cnty*, 151 Idaho 790, 264 P.3d 897 (2011) (Horton, J.), the Court found the county's reasoned statement supporting a land use decision was inadequate. The *Jasso* Court distanced itself from its statement in *Evans*, that that seemed to suggest that the government could rely on the record to fill in gaps in its reasoned statement. explained that *Evans* should not be read to excuse compliance with Idaho Code § 67-6535(2). "The findings and conclusions in *Evans* did not consist of mere bald conclusions, but rather addressed the applicable laws and explained the manner in which the approved zone change would comply with those laws." *Jasso*, 151 Idaho at 794, 264 P.3d at 901.

In *North West Neighborhood Ass'n v City of Boise*, 172 Idaho 607, 535 P.3d 583 (2023) (Brody, J.), the Court invalidated the City of Boise's approval of a rezone, PUD, and preliminary plat because the city failed to include an adequate "reasoned statement" under Idaho Code § 67-6535(2). The City submitted a one and

a half page explanatory statement accompanied by seven pages of conditions. The Court found the statement to be conclusory. For example, the Court objected to the city's failure "to address the fire service issue in any way." *North West*, 172 Idaho at 618, 535 P.3d at 594.

In *Veterans Park Neighborhood Ass'n v. City of Boise*, ___ Idaho ___, ___ P.3d ___, 2025 WL 259177 (2025), (Moeller, J.), a unanimous Court ruled against the city. Its written decision would give one the impression that the city had learned nothing from *North West*. In fact, the *North West* decision had not been handed down at the time Boise overturned its planning and zoning commission and granted a permit for a homeless shelter.[118]

The *Veterans Park* Court again rejected the city's reliance on *Evans*.

> However, in *Jasso*, this Court later clarified the holding in *Evans* and emphasized that the findings of the board cannot be "bald conclusions," and the written statement must nonetheless provide "the reviewing court with the guidance necessary to review the record because they contained a reasoned explanation of the grounds upon which the board's decision was based." *Jasso*, 151 Idaho at 794–95, 264 P.3d at 901–02. We reiterated that "[i]t is not the role of the reviewing court to scour the record for evidence which may support the decision-maker's implied findings and legal conclusions." *Id*. at 795, 264 P.3d at 902 (emphasis added).

Veterans Park, ___ Idaho at ___, ___P.3d at ___, 2025 WL 259177, *15 (2025) (emphasis by Court).[119] The Court continued to vent its frustration: "As we have repeatedly held in the past, we decline to dive into a sea of documents in search of hidden pearls that might bolster a governing body's unsupported decision." *Veterans Park*, ___ Idaho at ___, ___P.3d at ___, 2025 WL 259177, *16 (2025).

The Court's recent jurisprudence stands in juxtaposition to *Davisco Foods Int'l, Inc. v. Gooding Cnty.,* 141 Idaho 784, 786-87, 118 P.3d 116, 118-19 (2005) (Schroeder, C.J.), in which the majority approved the county's land use decision. It

[118] "Neither the City Council nor the district court had the benefit of the guidance we provided in North West Neighborhood Association when making their respective decisions." *Veterans Park*, ___ Idaho at ___, ___P.3d at ___, 2025 WL 259177, *18 (2025).

[119] The *Veterans Park* Court also distinguished its holding in *IDHW v. Doe*, 173 Idaho 32, ___, 538 P.3d 805, 816 (2023) (Bevan, C.J.) that "a reviewing court may overlook otherwise inadequate findings and conclusions if the record contains substantial and competent evidence to support the decision-maker's findings and conclusions." *IDHW v. Doe* was not a land use decision and did not involve Idaho Code § 67-6535(2).

reflects a growing willingness on the part of the Court to overturn municipal land use actions where the municipality fails to adequately explain its reasoning.

The bottom line practice point is this: In order to avoid a potential issue on appeal, it is important for a prevailing party to review the findings and conclusions, and to request changes if he or she believes the findings and conclusions are insufficient. Suggested changes should be favorably considered by the commission, as long as the changes are supported by the record and the final findings and conclusions are approved by the governing body. In contrast, a losing party usually has no motivation to fix weak findings and conclusions. He or she is probably better off appealing on the basis of defective findings and conclusions.

In any event, the failure to provide adequate findings and conclusions is a fertile source of appeals. In our experience, many findings and conclusions by land use agencies may be deficient under the criteria set out in LLUPA.

Note: LLUPA's requirements for a "reasoned statement" are in sharp contrast to the more lenient requirements for decisions by county and highway districts on road validations and vacations. "Likewise, the highway-validation statute is quite different from the Idaho Administrative Procedure Act, which requires that agency orders contain reasoned explanations of decisions and that factual findings 'shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings.' I.C. § 67-5248(1)(a). It also differs from the Local Land Use Planning Act, which requires written decisions, reasoning, and citation to the facts relied upon in a decision." *Sopatyk v. Lemhi County*, 151 Idaho 809, 816, 264 P.3d 916, 923 (2011) (W. Jones, J.). See discussion in the *Idaho Road Law Handbook.*

E. Alternatives: requirement to explain the actions the application could take to obtain a permit

In addition to Idaho Code §§ 67-6535(1) and (2) discussed above, there is another provision in LLUPA that has bearing on the obligation to provide meaningful findings and conclusions. LLUPA also requires the decision maker to explain to the applicant how the application could be changed to make it acceptable:

> (5) Whenever a governing board or zoning or planning and zoning commission grants or denies an application, it shall specify:
>
> (a) The ordinance and standards used in evaluating the application;
>
> (b) The reasons for approval or denial; and
>
> (c) The actions, if any, that the applicant could take to obtain approval.

Idaho Code § 67-6519(5) (emphasis supplied) (previously codified to section 67-6519(4)). See also Idaho Code § 67-6520, applying a similar requirement to decisions by hearing officers. Both of these provisions have been part of LLUPA since its enactment in 1975. By its terms, section 67-6519(4)(c) applies only to "permits" (a term that LLUPA applies to subdivision approvals as well), not to zoning decisions. Section 67-6520, in contrast, applies to decisions on "a permit or zoning district boundary change."

The language of the statute strongly suggests that the decision-maker cannot simply declare that a proposed action is "not good enough." Rather, if the application is denied, the decision-maker must say what, if anything, the applicant could do to make the application acceptable. Such an explanation would be helpful not only to the applicant (and to other interested parties), but to the reviewing court. Indeed, if the decision-maker declares that there is nothing the applicant could do to make the application acceptable, that, in itself, may provide a basis for appeal. However, there are no reported appellate decisions construing this requirement.

F. Reconsideration and tolling of the appeal period

Courts punish parties for failing to exhaust administrative remedies (see section 24.L at page 365). They also have been known to punish them for exhausting "too much." This section explores when one is allowed (or required) to seek reconsideration, and whether doing so will stay the deadline for seeking judicial review.

Prior to 2013, LLUPA contained no provision for seeking reconsideration of a planning and zoning decision. (This is in contrast to the Idaho Administrative Procedure Act ("IAPA") which has long provided for reconsideration of decisions by state administrative agencies.[120]) Some local planning and zoning ordinances provide mechanisms for reconsideration; others do not.

In *Arthur v. Shoshone County*, 133 Idaho 854, 993 P.2d 617 (Ct. App. 2000) (Lansing, J.), the appeals court ruled that attempting to exhaust a remedy that is unavailable under the local ordinance does not toll the 28-day clock for seeking judicial review. In *Arthur*, the Court held that LLUPA did not adopt the reconsideration provisions in the IAPA. *Arthur,* 133 Idaho at 858-59, 993 P.2d at 621-22. Consequently, the 28-day clock on a petition for review of a LLUPA decision was not tolled while the county considered a motion for reconsideration where the county ordinance provided no express authority for reconsideration. The 28-day deadline for seeking judicial begins to run "after all remedies have been

[120] The IAPA expressly provides that agencies may entertain motions for reconsideration. Although such motions are optional, they will stay the appeal clock. Idaho Code §§ 67-5246(4) and (5), 67-5273(2). But the IAPA applies only to state agencies, not to cities, counties, and other local governmental agencies.

exhausted under local ordinances." Idaho Code § 67-6521(1)(d). Thus, the Court reasoned, if the local ordinance does not expressly provide for reconsideration, a request for reconsideration will not toll the appeal clock.[121] Accordingly, Mr. Arthur's petition for review, filed 30 days after the county's denial of an application for a conditional use permit, was untimely.

In sum, prior to 2013, reconsideration was neither authorized nor required by LLUPA, and seeking it where not authorized by ordinance would result in blowing the deadline for judicial review. That changed dramatically in 2013 (though the full extent of that change is debatable).

In 2013, the Legislature added new provisions to section 67-6535 of LLUPA (which addresses the requirement of a "reasoned statement"). S.B. 1138, 2013 Idaho Sess. Laws, ch. 216 (codified at Idaho Code § 67-6535(2)).

The 2013 amendment strengthened the obligation that planning and zoning decisions be based on standards and criteria expressly articulated in local ordinances and that the findings and conclusions accompanying the decision fully articulate how those standards and criteria were applied in reaching the decision.

The amendment also overturned *Arthur* (at least to some extent) by providing that reconsideration is not only allowed, but required, when an applicant or affected person alleges noncompliance "with the provisions of this section." Idaho Code § 67-6535(2)(b) (emphasis supplied). In other words, seeking reconsideration is now a prerequisite to some or perhaps all LLUPA appeals.

The 2013 amendment also provides that where reconsideration is sought, the 28-day deadline for seeking judicial review is tolled (until a decision on reconsideration is rendered or 60 days have passed, whichever comes sooner). Idaho Code § 67-6535(2)(b).

It bears emphasis that the statutory obligation to seek reconsideration under the 2013 amendment is not tied to a local ordinance. Rather, this is a statutorily imposed obligation to seek reconsideration, which applies irrespective of whether the local ordinance authorizes requests for reconsideration. In other words, the disappointed party must seek reconsideration whether a local ordinance authorizes it or not.[122] The 2013 amendment does not address what happens when the local

[121] This decision is seemingly at odds with *Floyd v. Bd. of Comm'rs of Bonneville County,* 137 Idaho 718, 724, 52 P.3d 863, 869 (2002) ("*Floyd II*"). In that case, the Court concluded that county commissions have inherent authority under Idaho Code § 31-828 to reconsider their decisions and that such reconsideration stays the deadline for seeking judicial review under of road validation decisions under then applicable appeal statute, which has since been repealed and replaced.

[122] Thus, to the extent the party seeks to challenge "compliance with the provisions of this section [67-6535]," the 2013 amendment to the statute overrides the holding in *Arthur* (which keyed tolling of the 28-day appeal deadline to the existence of a local authorization for reconsideration).

ordinance does not provide for (or even precludes) requests for reconsideration. It would seem, however, that the statute overrides the local government's failure to provide for reconsideration.

Alas, determining when the reasoned statement and reconsideration/tolling provisions of the statute apply is tricky. It all comes down to two words. What does "this section" mean?

The requirement for a reasoned statement applies to "any application required or authorized pursuant to this chapter." Idaho Code § 67-6535(2) (emphasis supplied). "This chapter" refers to LLUPA, but not every time of land use decision is "required or authorized" by LLUPA. What constitutes an application required or authorized pursuant to LLUPA is discussed in section 24.E at page 326 (dealing with what actions are subject to judicial review). The judicial review provision of LLUPA employs identical language (applications "required or authorized" under LLUPA). Presumably, then, all applications that are subject to judicial review also trigger reasoned statement requirement in Idaho Code § 67-6535.

In contrast, subsection 2(b) (dealing with reconsideration and tolling of the 28-day deadline for judicial review) is more limited. It applies only when a person is "seeking judicial review of compliance with this section." Idaho Code § 67-6535(2)(b) (emphasis supplied).

Given that "this section" (section 67-6535) deals only with the obligation to adopt clear standards and criteria and to explain their application to the decision, a strict reading of the statute suggests that the opportunity (and obligation) to seek reconsideration (and the corresponding tolling of the 28-day deadline) comes into play only if a party challenges either the clarity of the standards and criteria in the local ordinance or the clarity of the findings and conclusions in explaining how they were applied.

In other words, because it is limited to challenges to "compliance with the provisions of this section," the reconsideration provision in section 67-6535 is not an across-the-board invitation or obligation to seek reconsideration of any planning and zoning decision. Unless the party is challenging the clarity of the local standards and criteria or the explanation of how they were applied, we are back in the land of *Arthur*. Requests for reconsideration are allowed only if authorized by local ordinance, and, as *Arthur* concluded, seeking reconsideration when not authorized to do so does not toll the 28-day deadline.

Sadly, this "legislative fix" is not much of a fix. It leaves parties facing the same conundrum that led to the harsh outcome in *Arthur*. If a party wishes to challenge a decision on procedural or substantive grounds other than compliance with the reasoned decision provisions of the Act, and there is no local ordinance

authorizing reconsideration, seeking reconsideration could result in blowing the 28-day deadline.

This is a strange result. Who knows whether it was intended by the Legislature.[123] It seems hard to imagine that it was intended. Yet we are stuck with the technically unambiguous reference to "this section."

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[123] The Statement of Purpose reads in full:

> This bill responds to concerns that some decisions rendered pursuant to the Local Land Use Planning Act (LLUPA) have failed to address clearly expressed decision criteria, have caused jurisdictional conflicts with state or federal agencies and have brought about a need for expensive and time-consuming appeals. The amendments to LLUPA set forth in this legislation would require specific standards in overlay zoning districts, prohibit overlay districts from causing regulatory taking, forbid abrogation of health district, state or federal jurisdiction by local ordinance, require that written land use decisions expressly address approval decision criteria and <u>provide an expeditious reconsideration process to allow affected persons to contest a final decision before a judicial appeal is allowed to proceed</u>.

Statement of Purpose, RS22144 (emphasis supplied). This reference to the reconsideration provision fails to address under what circumstances reconsideration is authorized and required. Yet it broadly suggests that the goal was to facilitate reconsideration, and it does not hint at limiting reconsideration to challenges to the "reasoned decision."

The presentation by the bill sponsor in the Senate committee is equally unenlightening:

> Senator Tippets said he was approached several months ago by a group of residents in Teton County. They expressed to him their frustrations with the local land use planning process in their county.
> . . .
> Senator Tippets said landowners and developers expressed they weren't sure what they needed to do to comply with zoning requirements. He said some had gone to great expense over an extended period of time only to find they were denied permits to build, and they were left wondering exactly what they would have to do to be allowed to build – if that were even possible.

Hearing Minutes, Senate Local Government & Taxation Committee, Mar. 6, 2013, p. 3. This comment seems aimed at the portion of the legislation calling for clearer criteria and a more articulate "reasoned decision." It does not address the reconsideration/tolling provision.

The measure was further explained by Jerry Mason of the Association of Idaho Cities, which supported the measure:

> Mr. Mason said one subject that has been repeatedly addressed by permit applicants is that once a permit is approved in final decision, any affected person claiming they are aggrieved can file an appeal. The appeal can go to the district court and potentially the supreme court, which can take 18 to 30 months. While that appeal is proceeding, the property owner is in limbo. <u>The reconsideration provision in this bill is designed to say if someone has a concern about the decision made in a certain matter, it should</u>

Cities and counties who do not wish to expend legal resources fighting over such jurisdictional matters are well advised to adopt ordinances that expressly provide for and require reconsideration. Doing so would moot the debate over what this statute means.

As of this writing in 2019, there is no appellate court decision construing the 2013 amendment. In *Lagerstrom v. City Council of the City of Eagle* (4th Jud. Dist., Idaho) (No. CVOC 14-02839) (Michael McLaughlin, J.), the district court dismissed a judicial review brought by neighbors challenging a development agreement. The court ruled that petitioners had failed to seek reconsideration as required by Idaho Code § 67-6535(2)(b). The district court embraced a broader interpretation of the statute than is suggested above—concluding that the 2013 amendment mandates reconsideration in all appealable land use matters.

> be addressed to the local decision makers who are closest to the matter and made the decision regarding it. He said now, in order to bring an appeal to the courts, one must first point out the alleged error to the people who first made the decision.
>
> . . .
>
> Vice Chairman Rice asked if this poses a burden for unsophisticated landowners who represent themselves and don't initially identify a problem with the decision and raise a different issue than they should have. That landowner then contacts an attorney to appeal to district court. He asked in a case like this, would their right to appeal be waived in this language.
>
> Mr. Mason said yes, as with anyone who does not raise a valid objection in the appropriate time, that would be the case. He said the current statute only provides 28 days, and all it takes is the cost of a complaint to be filed and a matter is locked into the courts until the matter is settled. Mr. Mason said the intent of the bill is to require that if errors are made, they need to be identified promptly.

Hearing Minutes, Senate Local Government & Taxation Committee, Mar. 6, 2013, p. 4 (emphasis supplied).

Mr. Mason's explanation (which continues for another three paragraphs) does not squarely address whether the prerequisite of seeking reconsideration is applicable only in the context of the bill's provisions requiring a clear articulation and application of the standards and criteria. However, what he says could be read to mean that reconsideration is mandated as a prerequisite to all judicial reviews.

14. MEDIATION

In 2000, the Legislature added a new mediation provision to LLUPA. Idaho Code § 67-6510. The statute permits an applicant, an affected person, the P&Z commission, or the governing board to request mediation.

The statute provides that mediation can occur "at any point during the decision-making process or after a final decision has been made." Idaho Code § 67-6510(1). Thus, parties may employ mediation even after the decision has been rendered. If mediation occurs after a final decision, any resolution of differences must be subject to another public hearing. Idaho Code § 67-6510(1).

All relevant time frames (including, presumably, the 28-day deadline for filing a judicial appeal) are tolled during mediation. Idaho Code § 67-6510(3). Unfortunately, the statute's drafters included some awkward exceptions to the tolling provision. First, the tolling ceases when any participant in the mediation states in writing he or she no longer wishes to participate. Idaho Code § 67-6510(3). Second, the tolling ends if no mediation session is scheduled for 28 days following the initial request for mediation.[124] Idaho Code § 67-6510(3). This limitation may prove to be a trap for the unwary and may not make a lot of sense. Twenty-eight days is a very tight time schedule to get official approval of the mediation, mediators appointed, and a session scheduled. Apparently the mere passage of time, without any demand or objection from any party, causes the tolling to expire. May the parties stipulate to an extension? The Legislature should clarify this issue.

In order to avoid the risk of having to litigate the effectiveness of the tolling provisions, the parties may wish to file any necessary protective appeals, and then seek a stay of proceedings to allow the mediation to proceed.

The statute requires the applicant and affected persons to participate in at least one mediation session if the governing board orders mediation, but neither the applicant nor affected persons have any further obligation to participate in mediation. The statute does not directly address the issue, but cities and counties in our experience interpret the statute not to require them to grant a request for mediation. To our knowledge, no court has addressed this question.

The governing board selects and pays the expense for the first mediation session, but the compensation for the mediator for future sessions must be decided among the parties at the initial session.

[124] The word "scheduled" in the statute is also ambiguous. Must the mediation session be scheduled for a date that falls within the first 28 days or simply scheduled (for any date) within the first 28 days. Presumably the latter is intended, but the statute could be clearer.

Mediation is allowed pursuant to the authority of the statute without a local enabling ordinance, but such ordinances are allowed. Idaho Code § 67-6510(4).

LLUPA provides, "The mediation process shall not be a part of the official record for the application." Idaho Code § 67-6510(5). It is not clear whether the Legislature meant by this simply that it is not required to make a tape or transcript of the hearing and include that in the record, or whether it actually meant to prohibit the inclusion of such a tape or transcript in the hearing. The former would make more sense, but the plain language seems to suggest the latter. This is somewhat problematic. After all, as a matter of due process, how can the Legislature prohibit an interested person from putting something in the record, so long as it is relevant?

Another concern is how to provide for adequate disclosure of *ex parte* communications (assuming that one or more of the decision-makers participated in the mediation) in the event of further proceedings following the mediation. One approach is for the parties to agree to provide a detailed summary of the mediation that would be made a part of the record on any remand.[125] As further insurance against procedural error, the parties could take the extra step recording the mediation process and making a tape or transcript available as a public record, but not as part of the record in the proceedings.

One of the issues that has been raised about the mediation process is whether members of the decision-making body (either the planning and zoning commission or city council or county commission) can participate in a mediation. The concern is that their participation could constitute an impermissible *ex parte* contact. In a declaratory judgment, in *Davisco Foods International v. Gooding Cnty.*, CV-01-0542 (attached as Appendix C), Judge Wood held that although such communications are, by definition, *ex parte*, there is nothing improper about the communications so long as they are fairly and fully disclosed.

The mediation provision of LLUPA does not say that mediations are exempt from the Open Meetings Act. The authors aware of no reported decision on the subject. Caution would suggest operating on the assumption that the Open Meetings Act applies to mediation.

[125] Please review the *Davisco v. Gooding Cnty.* District Court opinion at Appendix C for a reasonable way to implement this statutory directive without violating the public's due process rights.

15. RENT CONTROL AND AFFORDABLE HOUSING

In 1990, the Idaho Legislature amended Idaho Code § 55-307 (dealing with a landlord's right to change lease terms upon notice to the tenant), adding a new section (2) prohibiting local governments from enacting rent control ordinances:

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

Idaho Code § 55-307(2). As of this writing, there are no reported decisions addressing this part of the statute.

District court cases in 2007 and 2008 overturning ordinances requiring affordable housing as a condition of the approval of entitlement applications are discussed in Volume II of this Handbook.

More recently, some jurisdictions have enacted ordinances that encourage but do not require the provision of workforce housing by developers. These ordinances offer density bonuses and the like, without expressly mandating the provision of workforce housing. The authors are not aware of any legal challenges to these ordinances.

In 2022, the Legislature enacted a temporary law (effective until 2026) creating the Idaho Workforce Housing Fund, which is funded by State appropriations. Idaho Code 67-6227. The fund is designed to provide gap financing for workforce housing projects, including matching funds for local governments.

16. SMART GROWTH

In recent years, much attention has focused on improving the quality of development plans and urban planning. The term "Smart Growth" has been employed in an effort to describe these emerging principles of development. A parallel movement, "New Urbanism," combines Smart Growth principles with an additional focus on preserving traditional architectural design. What follows is a brief outline of Smart Growth concepts, implementation, and resources.

A. Principles of Smart Growth

(1) Mixed land uses

Smart Growth encourages mixed land uses where shopping, schools, recreation, transportation, and in some cases, the workplace are integrated into the same community. For example, a neighborhood may have buildings that share residential and commercial uses located near single-family homes and other business establishments.

During the industrial revolution, the first planning efforts in the United States sought to separate polluting factories from residential neighborhoods. Although this planning served its purpose, the separation of uses today has expanded to the extent that most retail establishments and schools are beyond a reasonable walking distance from residential neighborhoods. Through mixed-use development, Smart Growth can create vital neighborhoods that stand in contrast to the isolated development of modern suburban sprawl.

(2) Transportation choices

Smart Growth communities emphasize transportation choices such as riding bicycles, using public transportation, and especially walking. These communities strive to create attractive, comfortable, and safe walking environments, which enable those who desire an alternative to driving, or those who cannot drive (such as children, seniors and people with disabilities), to access daily activities on their own. Pedestrian friendly street design includes: buildings close to the street, homes with traditional front porch design, narrower streets, sidewalks separated from the curb, and hidden parking with entrances in non-critical areas. Because of these design elements, lively street frontages encourage pedestrian traffic, front porches create an opportunity to chat with neighbors, and narrower streets increase safety by slowing traffic. In addition, Smart Growth developers design streets and sidewalks in interconnected grids to reduce congestion and give walkers meaningful destinations (such as parks, shops, or the town square).

(3) Range of housing opportunities

Smart Growth communities incorporate a mix of housing types such as apartments, condominiums, townhouses, lofts, and single-family detached homes within the same neighborhood. These communities strive to have a range of housing sizes and prices to allow for age and income bracket diversity within a neighborhood. Rather than build "low-income" housing with inferior products and design, Smart Growth promotes creating high quality, affordable alternatives such as renovating existing structures and providing housing above retail establishments. In addition, a range of housing choices in a new development can be designed to have a comparable appearance through using similar exterior materials, windows, and building forms. For example, what from the outside appears to be a high-end single family home, may in reality be a condominium or an apartment complex.

(4) Compact building design

Smart Growth communities create environments that are compactly built and use space in an efficient and aesthetic manner. The size, shape, and location of buildings, as well as the uses contained within them, create a cohesive neighborhood filled with buildings that complement each other. In addition to narrow streets and front porch design, Smart Growth communities have smaller lots with shallow front yards that spatially define the street and create a sense of enclosure. The garages are hidden in back, usually accessible by alleyways. Other parking areas are concealed from the street frontage, except for on-street parking that acts as a shield for sidewalk traffic. Overall, these design elements are aesthetically pleasing and promote pedestrian and community interaction.

(5) Preserve Open spaces and natural resources

Smart Growth promotes the conservation of natural resources and the preservation of open space and farmland. Smart community design can help to accomplish these goals by reducing sprawl and encouraging energy efficiency and water conservation. In addition, Smart Growth also encourages alternatives to traditional farming such as Community Supported Agriculture (CSA). CSA involves a relationship of mutual support between local farmers and community members who pay an annual share fee in order to receive weekly seasonal produce. This arrangement guarantees the farmer financial support and can enable smaller scale farms to remain in business.

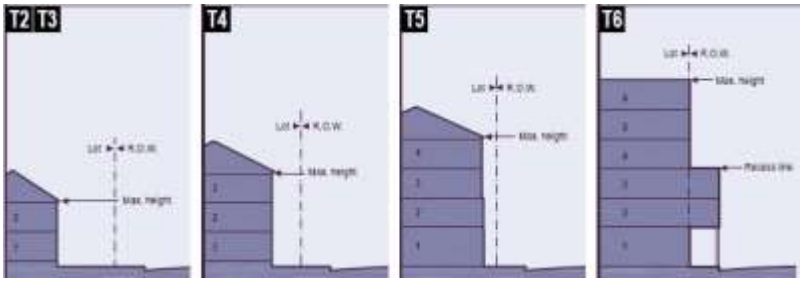
B. Model codes

(1) SmartCode

The SmartCode is a model zoning ordinance developed in 2001 by the Florida based architectural firm of Duany Plater-Zyberk & Company. The latest version, SmartCode 7.0, was released June 2005

(http://www.dpz.com/pdf/SmartCodeV7.0-6-06-05.pdf). The SmartCode depicts specific applications of New Urbanism based upon the concept of a "transect." The transect approach is a planning strategy that organizes and geographically allocates the elements of urbanism, such as lot size, land use, building types and streetscape, within six distinct environments or "transect zones." The zones, as depicted in Table 14 above, are arranged in a continuum that increases in urban intensity (T1-Natural Zone, T2-Rural Zone, T3-Sub-Urban Zone, T4-General Urban Zone, T5-Urban Center Zone and T6-Urban Core Zone). For example, T5 "is the equivalent of main street, including building types that accommodate retail, offices, row houses, and apartments. It is usually a tight network of streets, with wide sidewalks, steady street tree planting and buildings set close to the frontages." *See* Table 1 Transect Zone Descriptions.

The SmartCode has specific graphs and tables that detail the parking,



thoroughfare, streetscape, public frontages, public lighting, street trees, private frontages, building configuration, building disposition, building function, civic space, etc., that are permitted in each of the six zones. For example, Table 8 (illustrated on the left) depicts the building configuration permitted in each zone. The SmartCode also provides general standards for environmental requirements, streetscape requirements, civic functions, building disposition, building configuration, building function & density, parking, landscape, signage, ambient, and visibility that apply to all of the Transect Zones.

The SmartCode defines four different community types (Clustered Land Development, Traditional Neighborhood Development, Regional Center Development and Transit-Oriented Development) that are comprised of different proportions of the Transect Zones. For example, a Traditional Neighborhood Development (TND) community within a controlled growth sector includes, at a minimum, 10-30 percent of zone T3, 30-50 percent of zone T4 and 10-30 percent of zone T5. *See* Table 2 Sector/Community Allocation. Accordingly, a TND will have at its center the urban and main street components of T5, with the more rural components of T3 at its outer diameter.

C. Infill versus greenfield developments

(1) Infill advantages and challenges

Infill development is the use of vacant land, or the restoration or rehabilitation of existing structures or infrastructure, in already urbanized areas where water, sewer, and other public services are in place. One of the key advantages of infill development is the ability to build within existing infrastructure, not only utilizing the roadways and utilities but also schools and commercial areas. As a result, infill projects can bring new life into disinvested communities.

Infill projects face challenges in increasing densities due to zoning limitations and neighborhood resistance. At the outset, infill projects are more expensive than greenfield projects, primarily due to construction costs of demolishing and/or renovating existing buildings or building on small sites with little space for construction equipment.

(2) Greenfield advantages and challenges

Greenfield land is simply land that has not been developed before. Development of greenfield land is initially less expensive and involves fewer zoning complications than infill development. Greenfield development also allows the developer to design and implement Smart Growth components within a neighborhood or community at the outset of the project.

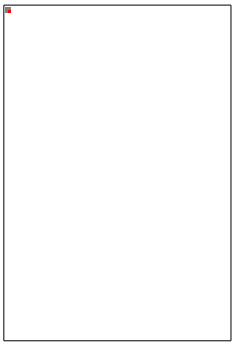
Greenfield development faces the long-term challenge of infrastructure costs as well as the consequential impact of the development. For example, greenfield development may fail to take into account the future sewage and school capacity needed for the region. In addition, greenfield communities may have fewer transportation alternatives if they are not served by a public transit system.

D. Idaho developments with Smart Growth components

(1) BoDo-Downtown Boise development

In 2003, developer Mark Rivers of BoDo Partners, LLC spearheaded a renovation project in the Eighth Street Marketplace just south of downtown Boise.

The multi-million dollar project, named BoDo (abbreviation for "Boise Downtown"), is a mixed-use development that spans four city blocks and includes the construction of two three-story buildings, consisting of 240,000 square feet of retail, dining and office space, and an 11-story tower that will comprise 110,000 square feet of retail, hotel and parking space. One of the three-story structures, the Capitol Gateway Building, also includes a multiplex movie theater and the downtown offices of Colliers International. While this project makes good use of existing infrastructure and mixed land uses, its plan for only four condominium units does not by itself provide a range of housing opportunities. However, the greater downtown area, within an eight-block radius of the BoDo project, does provide for other housing options.



(2) Bown Crossing

Bown Crossing is a mixed-use development on 35 acres between ParkCenter Boulevard and Boise Avenue. When complete, Bown Crossing will consist of high-end residential housing such as townhomes, patio homes, custom villas, and custom homes as well as a marketplace with lofts, shops, offices and retail businesses. Idaho Smart Growth gave this project an excellent smart growth neighborhood rating (see the Smart Growth Neighborhood Development Scorecard below). For a description of the development plans, visit http://www.bowncrossing.com/index.cfm.

(3) Courthouse Corridor

The Courthouse Corridor is a fourteen-acre, mixed-use project located in downtown Boise. This project is a partnership among Capitol City Development Corp. (CCDC), Ada County, and Civic Partners, a private developer. The anchor of the Courthouse Corridor is the Ada County Government Center comprised of the seven-story, 320,000-sq-ft. courthouse building with associated retail, parking, streetscape, and plaza improvements. The Center was completed in January 2002.

Another component of the Courthouse Corridor project is the Civic Plaza Apartments, completed in the summer of 2004. Civic Plaza Apartments consist of 307 units situated in two buildings and spanning approximately three acres. The apartments also offer retail space on the ground level.

The Idaho Water Center, also completed in the summer of 2004, is adjacent to the Civic Plaza Apartments. This 204,000 square foot project contains government, higher education and business offices involved in water quality and policy issues, as well as retail at the ground level. The building is owned by the Idaho State Building Authority and houses the University of Idaho, the Idaho Department of Water Resources, the U.S. Forest Service and private tenants. Overall, the Courthouse Corridor project combines commercial, retail and residential space in an urban setting. However, many of the design elements built to date may seem imposing on a human scale, which could detract from the intended pedestrian-friendly design.

(4) Crescent Rim

Boise developer Bill Clark has obtained approval from the City of Boise to build a two-to-four story, 79-unit residential condominium complex on the south side of Crescent Rim Drive between Peasley Street and Kipling Road. The complex offers spectacular views of downtown Boise and the Boise foothills. The project includes over 60 percent open space including water features, extensive landscaping, a vista seating area, pool, and two guest suites. Neighbors objected strongly to the project based on traffic and scale concerns, and the project was reduced from an original proposal of 98 units. For further information on the Crescent Rim project, please visit http://www.crescentrim.com/.

(5) Hidden Springs

The Hidden Springs Community is located in the Dry Creek Valley, twenty minutes north of Boise. Grossman Family Properties developed Hidden Springs based on a vision of building a rural community in the tradition of Idaho's small towns, while still preserving the natural surroundings. In 2000, the National Association of Home Builders recognized Hidden Springs with the Best Smart Growth Award.

The Hidden Springs' town center offers residents shopping and a café at the Dry Creek Mercantile, as well as a post office and library. In addition, the Hidden Springs Community also provides a charter school for children from kindergarten

through ninth grade. Other amenities include a fire station, sheriff's office, community pools, and miles of trails and pathways.

From a Smart Growth perspective, the project integrates various mixed uses and attractive design elements. However, questions have been raised about whether some of the later phases of the development are outside a convenient walking range of the town center. In addition, Hidden Springs may have difficulty linking with public transit due to its relatively remote location and to date has not had the necessary population base to support its retail components. A substantial expansion of Hidden Springs is planned, which may address these issues to some extent.

For more information on the Hidden Spring Community, please visit http://hiddensprings.com.

E. Planning processes affecting development patterns

(1) Blueprint for good growth

The Blueprint for Good Growth, which is currently being drafted, is designed to coordinate transportation and land use planning within Ada County. The Blueprint will compare two alternative land use scenarios (one of which includes smart growth principles) and analyze their impact on growth related demands for water, wastewater, open space and parks, housing and other public facilities and services. The Blueprint will serve as a tool for determining necessary changes to growth plans, zoning ordinances and planning policies that the cities within Ada County must make to ensure that growth is fiscally responsible and preserves quality of life as much as possible. The Blueprint is projected to be completed and implementation begun by mid-2006. For further information on the Blueprint, please visit http://www.blueprintforgoodgrowth.com/.

(2) Communities in motion

The Blueprint will work in concert with the COMPASS Long-Range Transportation Plan (Communities in Motion), also currently being drafted. Communities in Motion is a regional transportation plan through the year 2030 for the Treasure Valley, including Ada, Boise, Canyon, Elmore, Gem & Payette Counties. This plan also compares alternative land use scenarios and their impact on transportation needs. For further information on the plan, please visit http://www.communitiesinmotion.org/.

(3) Idaho's Joint Legislative Environmental Common Sense Committee, Subcommittee on Servicing Communities

At the initiative of Idaho's Joint Legislative Environmental Common Sense Committee (ECSC), a special subcommittee was established to address

environmental area of impact issues in Idaho. The goal of the Subcommittee on Servicing Communities is to develop recommendations on how local governments can improve sharing of infrastructure and services to ensure protection of the environment and the public health and safety of Idaho citizens. The subcommittee is investigating the potential for sharing infrastructure and services in Idaho and researching methods used by other states. This committee has not been active during 2005. More information on this committee is available at http://www.deq.idaho.gov/water/prog_issues/waste_water/impact_main.cfm.

F. Other resources

(1) Environmental Protection Agency

In 2004, the Environmental Protection Agency (EPA) agency announced the release of its coordinated Smart Growth Strategy. This Strategy is designed to promote the revitalization of brownfields and reduce the impact of development on air and water quality. The Strategy focuses on five target areas: (1) promote infill and redevelopment; (2) catalyze smart growth transportation solutions; (3) partner for innovative development and building regulations; (4) support state Smart Growth initiatives; and (5) ensure EPA policies recognize the environmental benefits of Smart Growth. The EPA plans to address these target issues through a variety of projects including an education and outreach campaign, building regulations and development review technical assistance, State Smart Growth initiatives and an infill and transit-oriented development initiative. For more information on the EPA's strategy to encourage smart growth and their proposed projects, please visit http://www.epa.gov/smartgrowth/.

(2) Smart Growth America

Smart Growth America's coalition of national organizations works to support citizen-driven planning that coordinates the development, transportation, and revitalization of older areas and the preservation of open space and the environment. For further information on Smart Growth America as well as other Smart Growth resources, please visit http://www.smartgrowthamerica.org/.

(3) Idaho Smart Growth

The mission of Idaho Smart Growth is to build the capacity of Idahoans to shape the future of their communities as they envision it, to increase public awareness of the links between land use, transportation, and the quality of life, and to promote thoughtful long range planning at local, regional, and state levels.

Idaho Smart Growth plans to accomplish its mission by helping individuals, citizen groups and public officials meet the concurrent challenges of enhancing community livability, protecting the environment, promoting economic vitality and accommodating growth. Idaho Smart Growth also provides education, promotes

public discourse on growth management issues, and advocates for citizen participation and better planning. For further information, please visit http://www.idahosmartgrowth.org/.

G. Smart Growth Development Scorecards

Idaho Smart Growth developed the following scorecards to rate commercial and neighborhood development projects. They are also currently drafting an infill development scorecard.

Smart Growth Commercial Development Scorecard
Rate each criteria on a scale of 0 to 4. Give the development in question a zero if it does not meet the criteria in any way and four if it meets the criteria perfectly.

Land Use Criteria		**Score**
1	The plan involves redevelopment, rehabilitation, or infill in a previously developed area.	
2	The project is integrated with existing and planned surrounding uses, not disconnected from them.	
3	The site is located in an area designated for commercial or mixed uses in the city's comprehensive plan (max. pts.) or is part of a master planned development.	
4	There is more than one use in the project. More uses in the project (or within ¼ mile of project) = higher score; *e.g.* retail, service, office, civic, residential.	
5	The ratio in height of buildings and trees to street width creates an "outdoor room" or sense of enclosure.	
6	Signs are in the field of vision of pedestrians, typically at window or awning height.	
7	The project creates or contributes to a compact center or district, rather than a commercial strip.	
8	The project includes ground floor windows across more than 50% of building frontages.	
9	Building heights transition or step down where mixed use or commercial buildings are next to or across the street from single family residential.	
10	Physical features and layout promote natural surveillance, maximizing the ability to see throughout the site.	

11	At least 10% of the site area is devoted to usable open space, such as plazas, small parks, and outdoor dining areas (not including landscape).	
12	10% of surface area devoted to off street parking for 10 or more cars is landscaped and includes canopy trees, (5% of parking areas for less than 10 cars).	
13	Building facades include human-scale details and modulation for aesthetic appeal, pedestrian comfort & compatibility with the design of the surrounding area.	
14	The project retains existing natural amenities, including tress, or includes constructed natural amenities, and they are accessible to pedestrians.	
15	The project approximates pre-development drainage conditions and reduces water pollution potential by using measures such as on-site biofiltration.	
16	The buildings use sustainable, energy efficient materials, appliances and design.	
17	Outdoor lighting is shielded to minimize light pollution. Lighting in walkable areas is at human scale.	
Land Use Criteria Subtotal		

Transportation Criteria		**Score**
18	There are attractive sidewalks and/or pathways leading to and through the site to promote comfortable safe walking between all destinations within the project.	
19	Streets are well connected within the project and to existing and planned adjacent street. Blocks are short (<400'). Streets integrate all modes of transportation.	
20	The site is currently served by transit or is planned to be served by transit. Protected transit waiting areas are provided and are dignified, dry and conveniently located.	
21	There is on-street parking on both sides of streets. Surface parking lots are shared by multiple uses.	

Transportation Criteria		Score
22	Parking and vehicle drives are located away from building entrances and not between entrances and the street, and don't inhibit direct pedestrian access to entrances.	
23	Parking is located behind or to the side of buildings and never at corners and is generally buffered by landscaping or walls with little street visibility.	
24	Streets have a 5-10' planter strip with shade trees planted an average of 30' on center, or sidewalks are >10' wide and have shade trees in tree wells.	
25	Driveway consolidation reduces vehicle-pedestrian conflicts and reduces impacts on roadway access.	
Transportation Criteria Subtotal		
Land Use Criteria Subtotal		
Grand Total (Land Use + Transportation Criteria)		

Now add up all of the scores and then add the subtotals to get a grand total. The highest possible score of 100 means the development meets smart growth principles 100%.

80-100 pts. — Congratulations. This is an excellent smart growth neighborhood.
50-79 pts. — Good effort, look for small modifications that might increase the score.
25-49 pts. — Needs major improvement to meet smart growth principles.
0-24 pts. — This is not a smart growth development.

Smart Growth Neighborhood Development Scorecard
Rate each criteria on a scale of 0 to 4. Give the development in question a zero if it does not meet the criteria in any way and four if it meets the criteria perfectly.

Land Use Criteria		Score
1	The project is inside city limits or will be annexed (4), is inside an area of city impact (2-3), is outside existing planning areas (0-1).	
2	The project defines a neighborhood(s) that is roughly a ten-minute walk from edge to edge (approx. ½ mile).	
3	Buildings are zoned by compatibility of building type first, use second; *e.g.* single family/home office or apartment/office are compatible if building form is similar.	

Land Use Criteria		Score
4	Street trees, sidewalks, front porches and front doors dominate streetscapes, not garage doors and driveways.	
5	There are a variety of housing types and sizes that at least two income levels can afford.	
6	Most lots are less than 70 feet wide. There is rear alley garage access.	
7	There is an elementary school with pedestrian access within one mile of the neighborhood.	
8	There is a variety of housing density and housing density is higher the closer you get to the neighborhood center.	
9	Small green spaces and playgrounds are located within a ¼ mile walk of every residential unit.	
10	Building setbacks are shallow, generally not more than one quarter the lot width, with a maximum of no more than 20'.	
11	There is a neighborhood center with retail (best), office, a public meeting space, and/or a park or other green space within ½ mile of all residents (may/may not be part of project).	
12	Commercial buildings front directly on the sidewalk with parking to the side or rear, and/or a park or other green spaces/parks are fronted by roadways rather than behind backyards.	
13	On street parking is encouraged. Parking lots are generally located behind street walk and buildings with little street visibility.	
14	The project works with the natural topography and minimizes grading. Most natural amenities are retained, or new amenities constructed.	
15	The project approximates pre-development drainage conditions and reduces water pollution potential by using measures such as on-site biofiltration.	
16	The buildings use sustainable, energy efficient materials, appliances and design.	

Land Use Criteria		Score
17	The site is developed to preserve as many existing trees as possible, especially specimen trees.	
Land Use Criteria Subtotal		

Transportation Criteria		Score
18	Streets integrate all modes of transportation, with safe and comfortable sidewalks and pathways throughout. The project has transit access (or access is planned).	
19	Streets are organized in a connected network internally and are connected to existing or planned adjacent streets. Blocks are short (<400').	
20	Cul-de-sacs are avoided except where absolutely necessary due to natural conditions.	
21	Traffic calming measures such as curb bulb-outs are incorporated.	
22	Roadways are relatively narrow (*e.g.* 29' from curb to curb for local residential streets) and parking is allowed on both sides of streets.	
23	Sidewalks are 4-5' wide and detached, or > 10' wide at the neighborhood center. 5-10' tree planter strips have shade trees planted an average of 30' on center.	
24	Buildings front on to collectors. Street section design of collectors and arterials is sensitive to the surrounding land use and usable by all transportation modes.	
25	There is a dry, dignified place to wait for transit in the neighborhood center.	
Transportation Criteria Subtotal		
Land Use Criteria Subtotal		
Grand Total (Land Use + Transportation Criteria)		

Now add up all of the scores and then add the subtotals to get a grand total. The highest possible score of 100 means the development meets smart growth principles 100%.

80-100 pts. — Congratulations. This is an excellent smart growth neighborhood.
50-79 pts. — Good effort, look for small modifications that might increase the score.
25-49 pts. — Needs major improvement to meet smart growth principles.
0-24 pts. — This is not a smart growth development.

17. PRIVATE RIGHT OF ACTION (OR CAUSE OF ACTION)

A. A plaintiff or petitioner must identify a cause of action

A cause of action (aka "private right of action") is a statute, constitutional provision, or common law that authorizes a particular type of suit. Statutes and constitutional provisions authorizing suits against the government also have the effect of waiving sovereign immunity for such a suit. [126]

A threshold question in every lawsuit alleging violation of a statute or the Constitution is whether there is a cause of action (or private right of action) allowing private parties to seek judicial redress. In other words, just because a statute says "the government shall do thus and so" that does not, in itself, authorize someone to bring a lawsuit when the government violates the statutory mandate. To put it bluntly, in some instances the government may violate a statue with impunity.

As the Idaho Supreme Court noted in 1915 that "the question whether or not the breach of a statutory duty gives a private right of action in any case must always depend upon the object and language of the particular statute." *State, for Use of Miles v. American Surety Co. of New York*, 26 Idaho 652, 672-73, 145 P. 1097, 1103 (1915).

For example, in *Middlesex Cnty. Sewerage Authority v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981), the Court found that the federal Clean Water Act creates no private right of action outside of its citizen suit provisions, and that the act preempts the common law of nuisance,[127] thereby leaving the plaintiffs without a remedy. It bears emphasis, however, that the Clean Water Act provides extensive citizen suit provisions. The only question in *Sea Clammers* was whether the Act also created other, implicit private rights of action.

Even in cases where the underlying statute provides no explicit or implicit private right of action, judicial review may be premised under the federal Administrative Procedure Act. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) ("The 'right of action' in such cases is expressly created by the Administrative Procedure Act . . . ."). This did not work in the *Sea Clammers* case, because the case was not framed as a judicial review of government decision-making. Instead, plaintiffs sought injunctive and monetary relief in an

[126] The federal Administrative Procedure Act (which authorizes judicial review of agency action) contains a waiver of sovereign immunity. 5 U.S.C. § 702. However, that section makes the waiver inapplicable if another statute limits jurisdiction. The interaction of the waiver in the APA and the waiver in the QTA (and its limitation as to tribal lands) is discussed in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012) (Kagan, J.).

[127] The preemption issue had been address previously in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

action against dischargers of sewage and other waste, alleging violation of federal permits under the Clean Water Act. The case also included claims against EPA and the Corps of engineers, which the Court described as "not clear." *Sea Clammers*, 453 U.S. at 12. Whatever they were, they were not APA actions.

B. The federal APA and IAPA provide a private right of action.

Unlike *Sea Clammers*, most environmental challenges to federal action arise under the APA. For example, in *Lujan v. Nat'l Wildlife Fed'n* ("*Lujan I*"), 497 U.S. 871 (1990) (Scalia, J), environmental plaintiffs alleged both substantive violations of the Federal Land Policy Management Act of 1976, 43 U.S.C. §§ 1701-1787 ("FLPMA") and procedural violations of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4370h. The Court observed, as a preliminary matter, that neither FLPMA nor NEPA[128] provide a private right of action.[129] Instead, the federal APA provides a private right of action for aggrieved parties harmed by "final agency action" in violation of FLPMA or NEPA. *Lujan I*, 497 U.S. at 882. The APA also waives sovereignty immunity.[130] Nevertheless, the Court rejected the lawsuit on standing grounds.

One commentator summarized the interaction between NEPA and the APA this way:

> NEPA contains no provisions providing either an explicit cause of action against federal agencies for alleged noncompliance with the statute or a basis for subject

[128] Most NEPA litigation is APA-based judicial review of the agency action. In other instances, plaintiffs have sought to use NEPA as a private right of action to enforce conditions or promises made by developers during the course of NEPA review. This has not worked. NEPA is a procedural statute and does not contain a private right of action for this purpose. *E.g., Noe v. Metropolitan Atlanta Rapid Transit Authority*, 644 F.2d 434 (5th Cir. 1981); *City of Blue Ash v. McLucas*, 596 709 (6th Cir. 1979); *Kyle v. Texas Dep't of Trans.*, 2006 WL 3691204 (W.D. Tex 2006); Maria Gillen, *NEPA: Not a Federal Private Nuisance Statute*, 24 Natural Resources & Env't 52 (2010).

[129] Another frequently litigated federal statute that does not contain its own private right of action is the National Forest Management Act ("NFMA"). Scott v. United States, 2009 WL 482893 (D. Idaho 2009); *see Native Ecosystems Council v. United States*, 418 F.3d 953, 960 (9th Cir. 2005). In recent years, this act has given rise to a number of challenges to "travel plans" (road access decisions) issued by the various National Forests.

[130] "The Administrative Procedure Act, 5 U.S.C. § 702, waives immunity only for claims alleging that an official's actions "were unconstitutional or beyond statutory authority." *Hou Hawaiians v. Cayetano*, 183 F.3d 945, 947 (9th Cir. 1999) (citing *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996)). "The APA generally waives the Federal Government's immunity from a suit 'seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.' 5 U.S.C. § 702." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2204 (2012) (Kagan, J.).

> matter jurisdiction over such claims. It is therefore well established that NEPA provides no private right of action for violation of its provisions. As a result, a plaintiff alleging NEPA noncompliance must base the cause of action on the Administrative Procedure Act. The availability of review under the APA is based on a provision stating that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved within the meaning of a relevant statute, is entitled to judicial review thereof."

Daniel R. Mandelker, *NEPA Law and Litigation*, § 3:3.1 (2009) (footnotes omitted).

Note that while the federal Administrative Procedure Act waives sovereign immunity and creates a private right of action, it does not confer subject-matter jurisdiction. 2 Am. Jur. 2d, *Administrative Law* § 389 (2014). In federal court, jurisdiction is typically founded on the general federal-question jurisdiction of federal courts. 2 Am. Jur. 2d, *Administrative Law* §391 (2014).[131]

Note also that the federal Civil Rights Act (aka § 1983) provides an express private right of action. *Maine v. Thiboutot*, 448 U.S. 1 (1980). See discussion in section 24.CC at page 442 regarding use of § 1983 actions in land use cases.

The federal Declaratory Judgment Act, 28 U.S.C. § 2201 does not create a private right of action. *North Cnty. Communications Corp. v. California Catalog & Technology*, 594 F.3d 1149, 1154 (9th Cir. 2010); *Nationwide Mut. Ins. Co. v. Liberatore*, 408 F.3d 1158, 1161 (9th Cir. 2005).

The differences between the concepts of "jurisdiction," "cause of action," and "standing" were summarized in a footnote by the U.S. Supreme Court:

> Thus it may be said that jurisdiction is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case, *see Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 384, 4 S. Ct. 510, 512, 28 L. Ed. 462 (1884); *Montana-Dakota Utilities Co. v. Northwestern Public Serv. Co.*,

[131] "Although the waiver of sovereign immunity found in the APA does not provide an independent grant of subject matter jurisdiction in the federal courts, the general federal-question jurisdictional statute, § 1331 of title 28 of the United States Code, confers authority upon the District Courts to review federal agency action, unless some other statute mandates exclusive jurisdiction in another forum." Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 Geo. Wash. L. Rev. 602, 617 (2003). In contrast, the Tucker Act and Little Tucker act waive sovereign immunity and grant jurisdiction (with respect to certain money claims against the United States), but do not create a cause of action.

> 341 U.S. 246, 249, 71 S. Ct. 692, 694, 95 L. Ed. 912 (1951); standing is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction, *see Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 2204, 45 L.Ed.2d 343 (1975); cause of action is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and relief is a question of the various remedies a federal court may make available. A plaintiff may have a cause of action even though he be entitled to no relief at all, as, for example, when a plaintiff sues for declaratory or injunctive relief although his case does not fulfill the "preconditions" for such equitable remedies. *See Trainer v. Hernandez*, 431 U.S. 434, 440-443, 97 S. Ct. 1911, 1916-1917, 52 L.Ed.2d 486 (1977).

Davis v. Passman, 442 U.S. 228, 239 n.18 (1979).

C. Deadline for seeking judicial review under the federal APA.

Unlike the Idaho Administrative Procedure Act (which requires that judicial review be sought within 28 days), the federal APA does not specify a deadline. "Where no time limit is specified in the applicable statute, the time for seeking review is subject only to the doctrine of laches." 2 Am. Jur. 2d, *Administrative Law* §508 at 467-68 (2014).

D. The ITCA does not provide a cause of action.

Fortunately, the issue does not arise often in the context of land use challenges in Idaho. First, Idaho courts have broad subject matter jurisdiction. Second, LLUPA expressly provides a private cause of action. Idaho Code §§ 67-6519(4) and 67-6521(1)(d). If that were not enough, the Idaho Administrative Procedure Act ("IAPA"), Idaho Code §§ 67-5201 to 67-5292, also provides a private right of action to persons challenging "agency" actions.

This private right of action issue would emerge, however, in the context of constitutional challenge to an allegedly illegal tax or fee that was not brought in the context of LLUPA or the APA. The Idaho Supreme Court has not addressed this, but it appears likely that there is an implied cause of action directly under the state Constitution, just as there is under the federal Constitution.

Although the ITCA waives sovereign immunity for tort claims, it does not create a new cause of action. Rather, the act simply removes the barrier to bringing

otherwise valid tort claims against the government or a government employee. "The Plaintiffs, then, must assert a tort under the common law or created by a separate statute in order to be eligible for relief. I.C. § 6–903(f)." *Stoddart v. Pocatello School Dist. #25*, 149 Idaho 679, 239 P.3d 784 (2010) (Horton, J.) (citing Idaho Code § 6-903(f) (now 6-903(6)) ("Nothing in this act shall enlarge or otherwise adversely affect the liability of an employee or a governmental entity.")).[132] In any event, it only applies to tort claims.

Likewise, Idaho Code § 50-219 (which expands the tort claim notice requirement to all damage claims against cities) does not create a cause of action. It is merely imposes a notice requirement.

Some specialized statutes authorize particular types of challenges.[133] But those statutes are not broad enough to support most constitutional taking claims based on allegedly illegal fees and taxes. Federal constitutional claims, of course, may be presented under § 1983.[134] But what about state constitutional challenges? To the authors' knowledge, the Idaho Supreme Court has not discussed this, particularly in the context of constitutional claims against cities.

In any event, what is clear is that illegal fee and tax cases are routinely litigated. So there must be a cause of action.

Many of these claims arise under LLUPA, the IAPA, or both. As noted, each of those statutes provide a cause of action against the government. In some instances, however, illegal fees and taxes are challenged in civil lawsuits rather than under the judicial review provisions of LLUPA and the IAPA.

There is, presumably, an implied cause of action for such claims under the Idaho Constitution itself. This would be a state counterpart to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). *Bivens*

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[132] The operative provision reads in pertinent part:

> Except as otherwise provided in this act, every governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment or duties . . . .

Idaho Code § 6-903(1) (emphasis supplied).

[133] For instance, the plaintiff in *Greenwade v. Idaho State Tax Comm'n*, 119 Idaho 501, 504-05, 808 P.2d 420, 423-24 (Ct. App. 1991) (Silak, J.) relied on Idaho Code § 63-3074, which authorizes certain actions against the Idaho State Tax Commission.

[134] If a party to a land use decision has been denied rights under the laws or Constitution of the United States by an entity acting under color of state law, he or she may bring an action under the Civil Rights Act of 1871, generally known as a "§ 1983 action." Section 1983 refers to the Civil Rights Act of 1871 also known as the Ku Klux Klan Act, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983). See discussion in section 24.CC at page 442 regarding use of § 1983 actions in land use cases.

actions are actions brought directly under the U.S. Constitution, without any authorizing legislation. In *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 314-15 (1987), the Court noted that federal taking claims may be brought directly under the Constitution.

Citing *First English* (which it referred to as *First Lutheran*), the Idaho Supreme Court recognized the principle that the takings clause of the Constitution is self-executing and impliedly provides a cause of action. *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 175 n.2, 108 P.3d 315, 322 n.2 (2004) (Eismann, J.). That observation, however, appears to be in the context of the federal taking claim. Presumably a similar principle authorizes suits under Idaho's constitutional provisions limiting the authority of local governments to tax.

The closest the Idaho Supreme Court appears to have gotten to the issue of whether the Idaho Constitution provides a cause of action is *Koch v. Canyon Cnty.*, 145 Idaho 158, 177 P.3d 372 (2008) (Eismann, C.J.). In *Koch*, the Court rejected an argument that plaintiffs lacked standing to challenge county's violation of a constitutional debt limitation: "For over one-hundred years this Court has entertained taxpayer or citizen challenges based upon that constitutional provision." *Koch*, 145 Idaho at 162, 177 P.3d at 376. "If this Court were to hold that taxpayers do not have standing to challenge the incurring of indebtedness or liability in violation of that specific constitutional provision, we would, in essence, be deleting that provision from the Constitution." *Koch*, 145 Idaho at 162, 177 P.3d at 376. Although this discussion arose in the context of standing, it would appear that, if the plaintiffs had standing, they also had a cause of action. (See further discussion of *Koch* in the chapter on taxpayer standing (section 18.E(1)(a)(ii) at page 204).

18. STANDING: WHO MAY BRING AN ACTION

A. The standing focuses on the person, not the merits of the claim.

Standing is a prerequisite of judicial review or other judicial action. While other legal doctrines address when to bring an appeal,[135] the law of "standing" addresses the question of who may initiate the litigation. "The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Miles v. Idaho Power Co.*, 778 P.2d 757, 763 (Idaho 1989) (Johnson, J.).[136] Another body of law dealing with "who" may litigate is the law of intervention.[137]

B. The federal constitutional foundation.

The federal law of standing derives from Article III of the federal constitution. Article III establishes federal courts, but these are not courts of general jurisdiction. Rather, the Constitution provides federal court jurisdiction that is limited to a list of specifically enumerated "Cases" and "Controversies." U.S. Const. art. III, § 2. Over the years, the federal courts have fashioned a complex body of constitutional law and prudential restraints describing the reach of this grant of judicial authority.

C. The Idaho Supreme Court has adopted principles of Article III standing notwithstanding that Idaho has no "case or controversy" provision.

Article III applies only to federal courts. Consequently, it is curious that the federal law of standing would apply at all in Idaho. Indeed, the U.S. Supreme Court consistently has stated that Article III limitations do not apply to state courts.[138]

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[135] For instance, the doctrines of exhaustion of administrative remedies, finality, primary jurisdiction and ripeness, all deal with "when" judicial review should occur.

[136] This is an oft-quoted statement. *E.g., Gifford v. West Ada Joint School Dist. #2*, 498 P.3d 1206, 1211 (2021) (Moeller, J.).

[137] The law of standing and the law governing the right to intervene both deal with the question of who may litigate. However, the two bodies of law are distinct. *Doe v. R*oe, 134 Idaho 760, 764, 9 P.3d 1226, 1230 (2000) (law of standing is "irrelevant" to determination of whether a statutory right of conditional intervention exists).

[138] "We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute." *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989) (Kennedy, J.).

The *ASARCO* plaintiffs were taxpayers and teachers challenging an Arizona statute that allows school lands to be leased for less than their full appraised value in violation of the Mexico-Arizona Enabling Act and Arizona's Constitution. They lacked Article III standing under long-

The question, then, is whether Idaho's Constitution contains a limitation of state court jurisdiction similar to Article III. It does not. Unlike federal courts, Idaho's courts are courts of general jurisdiction.[139] Accordingly, Idaho's Constitution contains no "case or controversy" limitation. Nevertheless, Idaho courts have embraced the federal jurisprudence of standing.[140] (This conclusion has been sharply criticized, without effect.[141])

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standing taxpayer-standing precedent because the injury they suffered was not particularized and was speculative. The U.S. Supreme Courts found that plaintiffs were not required to meet Article III standing, and affirmed the Arizona Supreme Court's ruling that the state statute violated federal law and the state Constitution.

[139] Idaho Const. art. V, § 2 ("judicial power of the state shall be vested in . . . a Supreme Court, district courts, and such other courts . . . ."); Idaho Const. art. V, § 20 ("The district court shall have original jurisdiction in all cases . . . ."); Idaho Const. art. V, § 1 ("Feigned issues are prohibited . . . .").

> Notably, Idaho's Constitution has no "case and controversy" clause like the federal Constitution. Rather, Idaho's Constitution speaks generally of the "judicial power," without defining its limits. Idaho Const. art. V, § 2. Furthermore, the Idaho Constitution empowers this Court to review any decision of the district courts. Idaho Const. art. V, § 9. And, the Legislature, exercising its limited authority to constitute inferior courts under Idaho Const. art. V, § 13, has directed the district courts to "hear [ ] and determin[e] all matters and causes arising under the laws of this state." I.C. § 1–701.

Wasden v. State Bd. Of Land Comm'rs ("*Wasden II*"), 153 Idaho 190, 280 P.3d 693 (2012) (J. Jones, J) (brackets original).

[140] "Idaho has adopted the constitutionally based federal justiciability standard." *State v. Philip Morris*, Inc., 158 Idaho 874, 881, 354 P.3d 187, 194 (2015) (Horton, J.) (quoting *ABC Agra, LLC v. Critical Access Grp., Inc.*, 156 Idaho 781, 783, 331 P.3d 523, 525 (2014)) (and citing *Koch v. Canyon Cnty*., 145 Idaho 158, 161, 177 P.3d 372, 375 (2008) ("When deciding whether a party has standing, we have looked to decisions of the United States Supreme Court for guidance.")).

The Idaho Supreme Court has cited such federal standing cases as *Valley Forge College v. Americans United*, 454 U.S. 464 (1982) (Rehnquist, J.) (cited in *Miles v. Idaho Power Co*., 778 P.2d 757, 763 (Idaho 1989) (Johnson, J.) and in *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002) (Trout, C.J.)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (Scalia, J.) (cited in *Young* at 105, 44 P.3d at 1159 and in *Boundary Backpackers v. Boundary Cnty.*, 128 Idaho 371, 383, 913 P.2d 1141,1153 (1996) (Johnson, J.)); *United States v. Students Challenging Regulatory Agency Procedures ("SCRAP")*, 412 U.S. 669 (1973) (Stewart, J.) (cited in *Miles* at 764); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978) (Burger, C.J.) (cited in *Miles*, 116 Idaho at 641, 778 P.2d at 763, in *Boundary Backpackers*, 128 Idaho at 382, 913 P.2d at 1152 (dissent by J. Schroeder), and in *Student Loan Fund of Idaho, Inc. v. Payette Cnty.*, 125 Idaho 824, 826, 875 P.2d 236, 238 (Ct. App. 1994) (Lansing, J.)).

[141] Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner,* 30 Idaho L. Rev. 273, 340-41 (1993); Melinda K. Harm, "*Was The Lorax A Professional Outfitter and Guide? A Shift In Idaho's Standing Doctrine: Boundary*

Some decisions have spoken of standing as if the requirement were inherent in the judicial power.[142] More recently, the Idaho Supreme Court has come to describe its adoption of federal standing law as a "self-imposed constraint."

> When determining whether a party has standing, this Court has looked to United States Supreme Court decisions for guidance. *Koch v. Canyon Cnty.*, 145 Idaho 158, 161, 177 P.3d 372, 375 (2008). In fact, the origin of Idaho's standing is a self-imposed constraint adopted from federal practice, as there is no "case or controversy" clause or an analogous provision in the Idaho Constitution as there is in the United States Constitution.

Coeur d'Alene Tribe v. Denney, 161 Idaho 508, 513, 387 P.3d 761, 766 (2015) (Burdick, J.).[143]

The Court reaffirmed its embrace of federal standing law in *Tidwell v. Blaine County*, 2023 WL 6450936 (Idaho 2023) (Bevin, C.J.), over a strong dissent by Justices Stegner and Trout.

On the other hand, the Idaho courts have departed from some federal precedent that limits the standing of litigants. For example, the Idaho courts apparently have not embraced the zone of interests test (discussed in section 18.S at page 246). The only Idaho case to address the zone of interests test is *Idaho Branch Inc. of Associated Contractors of America, Inc. v. Nampa Highway Dist. No. 1*, 123

Backpackers v. Boundary Cnty. and Selkirk-Priest Basin Ass'n v. State," 1997 Idaho L. Rev 127 (1997).

[142] "It is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's jurisdiction must have standing." *Van Valkenburg v. Citizens for Term Limits*, 135 Idaho 121, 124, 15 P.3d 1129, 1132 (2000) (Silak, J.) (quotation repeated in *Young v. City of Ketchum*, 137 Idaho 102, 44 P.3d 1157 (2002) (Trout, C.J.) and *Haight v. Idaho Dep't of Transportation*, 163 Idaho 383, 391, 414 P.3d 205, 213 (2018) (Bevan, J.); "Standing is a fundamental prerequisite to invoking this Court's jurisdiction." *Noh v. Cenarrusa*, 137 Idaho 798, 800, 53 P.3d 1217, 1219 (2002). One of the few early decisions to acknowledging that Idaho's Constitution is different from Article III, is *Glengary-Gamlin Protective Ass'n v. Bird*, 106 Idaho 84, 675 P.2d 344 (Ct. App. 1983) (Burnett, J.). In that case, the Idaho Court of Appeals acknowledged that Idaho has no "case or controversy" provision, but proceeded to apply federal standing law anyway. "Although some elements of standing in the federal system are colored by the peculiar requirements of a 'case' or 'controversy' under the federal constitution, nevertheless, the Supreme Court's analyses of organizational standing are instructive here." *Glengary-Gamlin*, 106 Idaho at 87, 675 P.2d at 347.

[143] This description of standing as a "self-imposed constraint" that may be relaxed in rare cases has been repeated in *Employers Resource Management Co. v. Ronk*, 162 Idaho 774, 777, 405 P.3d 33, 36 (2017) (Horton, J.), *Westover v. Idaho Counties Risk Management Program*, 164 Idaho 385, 389, 430 P.3d 1284, 1288 (2018) (Horton, J.), and *Regan v. Denney*, slip op., (Idaho Feb. 5, 2019) (Burdick, C.J.).

Idaho 237, 242, 846 P.2d 239, 244 (Idaho App. 1993) (Swanstrom, J.), in which the Court of Appeals concluded that the Idaho Supreme Court has not adopted that prudential test.

Because the application of Article III precedent is a self-imposed constraint in Idaho, it may be relaxed or waived altogether in cases of constitutional import. See discussion of the "*Koch* exception" in section 18.F at page 228.

D. Standing is decided as a preliminary matter, without looking to the merits.

As a general principle, the law of standing does not look to the merits of the case.

"A party's standing to bring an action is an issue that is entirely separate from the issue of whether the party will prevail on the merits of the action." *Bagley v. Thomason*, 149 Idaho 799, 802, 241 P.3d 972, 975 (2010). "Standing is a preliminary question to be determined by this Court before reaching the merits of the case." *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). "The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Miles v. Idaho Power Co.*, 778 P.2d 757, 763 (Idaho 1989) (quoted in *Gifford v. West Ada Joint School Dist. #2*, 498 P.3d 1206, 1211 (2021)).

> The common background of these procedural questions is clear. Article III standing is treated as an issue of subject-matter jurisdiction. All of the sensitivities that surround subject-matter jurisdiction are evident. The tie to subject-matter jurisdiction also means that in most circumstances standing should be decided without asking whether a plaintiff has stated a valid claim on the merits, although the questions blend into one when the question is whether the plaintiff states a claim within the "zone of interests" protected by a statute.

Wright & Miller, *Raising the Issue,* 13B Fed. Prac. & Proc. Juris. § 3531.15 (3rd ed.) (footnotes omitted).

E. The basic constitutional requirements: Injury in fact, causation, and redressability

Justice Douglas once said, "Generalizations about standing to sue are largely worthless as such." *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970). The Idaho Supreme Court has observed that "the doctrine is imprecise and difficult to apply." *Young v. City of Ketchum*, 44 P.3d 1157, 1159 (Idaho 2002) (Trout, C.J.). "While the doctrine is easily stated, it is imprecise and

difficult in its application." *Miles v. Idaho Power Co.*, 778 P.2d 757, 763 (Idaho 1989) (Johnson, J.). While these cautionary notes are true, there are some basic principles that meaningfully can be articulated.

The constitutional requirements for standing boil down to three requirements: injury in fact, causation, and redressability.

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection . . . Third, it must be "likely," as opposed to "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife ("*Lujan II*"), 504 U.S. 555, 560 (1992) (Scalia, J.) (citations and footnotes omitted).

This statement or some variation of it is now recited at the outset of countless standing cases in Idaho.

> Under the traditional standing analysis, "the plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'like[lihood]' that the injury 'will be redressed by a favorable decision.'"

Tucker v. State, 162 Idaho 19, 394 P.3d 54 (2017) (Burdick, C.J.) (quotation marks original) (citing *State v. Philip Morris*, Inc., 158 Idaho 874, 881, 354 P.3d 187, 194 (2015) (Horton, J.)).

(1) Injury-in-fact

The underlying principle of standing and the core of the injury-in-fact requirement is that only those with a concrete stake in the outcome of a contest should be allowed to challenge agency action. Mere bystanders, no matter how emotionally involved or concerned they may be with the principles at stake, are not proper litigants. The Idaho Supreme Court (quoting the U.S. Supreme Court) summarized it this way:

> The essence of the standing inquiry is whether the party seeking to invoke the court's jurisdiction has "alleged such a personal stake in the outcome of the controversy as to assure the concrete adversariness which

> sharpens the presentation upon which the court so depends for illumination of difficult constitutional questions." As refined by subsequent reformation, this requirement of "personal stake" has come to be understood to require not only a "distinct palpable injury" to the plaintiff, but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct.

Miles v. Idaho Power Co., 778 P.2d 757, 763 (Idaho 1989) (Johnson, J.) (quoting *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72 (1978) (Burger, C.J.).

In *Martin v. Camas Cnty. ex rel. Bd. of Comm'rs.*, 150 Idaho 508, 513, 248 P.3d 1243, 1248 (2011) (Burdick, J.), the Court quoted the definition of "palpable" from *Black's Law Dictionary*: "'Palpable' is defined as '[e]asily perceptible, plain, obvious, readily visible, noticeable, patent, district, manifest."

"Injury in fact requires the injury to be 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical." *Employers Resource Management Co. v. Ronk*, 162 Idaho 774, 777, 405 P.3d 33, 36 (2017) (Horton, J.) (internal quotation marks omitted).

This oft-quoted statement encompasses two tests: (1) that the injury be particularized and (2) that it already has occurred or is imminent. These are discussed in turn below.

(a) The injury must be particularized

To be "concrete and particularized," the injury also must be different from that felt by the community at large. "But even if a showing can be made of an injury in fact, standing may be denied when the asserted harm is a generalized grievance shared by all or a large class of citizens." *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002) (Trout, C.J.).

The concept of particularized injury arises in many other contexts (*e.g.*, taxpayer standing, environmental injury, land use matters, etc.). These are discussed in the sections below.

(i) Proximity

In land use cases, the issue sometimes comes down to how close the plaintiff lives (or owns property) from the affected property.[144] Not surprisingly, the Idaho

[144] Local ordinances often include notice requirements for landowners within a set distance from the proposed action. These provisions should not be confused with standing requirements; they

Supreme Court has laid down no rule of thumb. However, the Court has made clear that proximity matters.

The role of proximity was summarized nicely by the Idaho Supreme Court in 2003:

> Proximity is a very important factor. . . . However, this Court will not look to a predetermined distance in deciding whether a property owner has, or does not have, standing to seek judicial review of a LLUPA decision.

Evans v. Teton Cnty., 139 Idaho 71, 75, 73 P.3d 84, 88 (2003) (Kidwell, J.).

In *Bopp v. City of Sandpoint*, 110 Idaho 488, 716 P.2d 1260 (1986) (Bakes, J.), the plaintiff challenged the city's vacation of a road, which facilitated construction of a shopping mall. The Court found that the plaintiff lacked standing because he owned no property adjacent to the road. "In this case if the appellant Bopp can be said to have suffered some injury, it is one which is not special or peculiar to him; rather, it is one generally shared by all residents of the City of Sandpoint alike." *Bopp*, 110 Idaho at 490, 716 P.2d at 1262.

In *Butters v. Hauser* ("*Butters II*"), 131 Idaho 498, 501, 960 P.2d 181, 184 (1998) (Walters, J.), the Court found that this homeowner had standing to challenge approval of a cell tower because "she owns land in close proximity to the tower; the tower looms over her land; and its physical invasiveness affects here enjoyment of her property." *Butters II*, 131 Idaho at 501, 960 P.2d at 184.

While proximity is important, proximity alone is not sufficient to confer standing. In *Rural Kootenai Organization, Inc. v. Bd. of Comm'rs, Kootenai Cnty.* ("*RKO*"), 133 Idaho 833, 841, 993 P.2d 596, 604 (2000) (Schroeder, J.), a homeowners group challenged the approval of a preliminary plat for a residential subdivision. Among other things, the homeowners complained that the Board's failure to provide notice of two meetings violated their due process rights. The Court held the homeowners lacked standing to raise this particular issue.

> Simply because RKO's members may own property near the proposed subdivision, the location of their property alone does not confer standing. . . .
>
> . . . RKO has not presented any evidence that any of its members are abutting or otherwise affected real property owners. RKO has failed to present any evidence of a peculiarized harm. Thus, RKO lacks standing to raise this issue.

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neither confer nor demarcate who has standing to litigate. *See*, *Evans v. Teton Cnty.*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003) (Kidwell, J.) (describing the county's 300 foot rule as "arbitrary.")

RKO, 133 Idaho at 841, 993 P.2d at 604.

RKO is a head-scratcher. The Court found that RKO lacked standing to raise one procedural issue, but allowed it to pursue all other issues. In denying standing, the Court relied on Idaho Code § 67-6509(b), which deals with comprehensive plan approvals and has no bearing on these proceedings. The Court appears to have acted *sua sponte*. The briefing makes no reference either to standing or to section 67-6509(b).

In *Davisco Foods Int'l, Inc. v. Gooding Cnty.*, 141 Idaho 784, 786-87, 118 P.3d 116, 118-19 (2005) (Schroeder, C.J.), the Court ruled that potential odor impacts from a wastewater treatment facility on a homeowner three and a half miles from the site could give rise to standing. This case, however, did not deal with judicial standing, but with the standing requirement imposed by a county ordinance for an appeal from the planning and zoning commission to the county commission. The dissent commented on the remarkable degree of deference accorded to the county by the majority: "Read as the Board and majority have read it, practically any allegation a landowner might advance would bestow the right to appeal a decision, whether or not the landowner has shown any reasonable factual basis for the allegation." *Davisco*, 141 Idaho at 793, 118 P.3d at 125. In *Davisco*, the landowners offered no evidence other than a mere expression of their fears that odors might result. The county commission and the Court found sufficient evidence of standing in the applicant's own expert testimony that odors could be detected at that distance only under theoretical, melt-down circumstances coupled with a failure of to enforce each of the rigorous special conditions to which the applicant had agreed to ensure there would be no detectible odors. It is unclear whether the Court will apply this reasoning to judicial standing cases. If it does, the proximity factor will be liberalized considerably.

In *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 148 P.3d 1247 (2006) (Burdick, J.), the Court held that a next door neighbor had standing to challenge a subdivision approval because his property value might be affected by the development of the subdivision.

> The Board argues that Cowan has failed to allege a distinct palpable injury or particularized harm he has suffered, but has instead only alleged generalized grievances. . . . In response, Cowan points out that he has demonstrated his land will be adversely affected and presented evidence that the proposed development would adversely impact his property rights and diminish his property value. This, he argues, is enough to demonstrate standing pursuant to *Evans v. Teton County*, 139 Idaho 71, 73 P.3d 84 (2003).

> Cowan has standing. In *Evans* this Court determined that in land use decisions, a party's standing depends on whether his or her property will be adversely affected by the land use decision. *See Evans*, 139 Idaho at 75, 73 P.3d at 88. This Court held "[t]he existence of real or potential harm is sufficient to challenge a land use decision." *Id*. at 76, 73 P.3d at 89. Like the appellants in *Evans* whose rural homes might be adversely affected by the development of a large resort development adjacent to their properties, Cowan's property might be adversely affected by the construction of Eagle's Nest adjacent to his property. Therefore, Cowan has standing to pursue his claims.

Cowan, 143 Idaho at 509-10, 148 P.3d at 1255-56 (quoting *Evans v. Teton Cnty.*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003) (Kidwell, J.)).

In *Ciszek v. Kootenai Cnty. Bd. of Comm'rs*, 151 Idaho 123, 254 P.3d 24 (2011) (J. Jones, J.), the Court found that property owners suffered particularized harm and therefore had standing to challenge a zoning change allowing additional mining adjacent to their property. "Like *Butters*, Ciszek lives on, and owns, property located adjacent to property that has been approved for activities that are substantially different from those which previously existed on the Agricultural Lots." *Ciszek*, 151 Idaho at 129, 254 P.3d at 30.

(ii) Taxpayers and ratepayers

The requirement of a particularized injury leads consistently to the conclusion that taxpayers may not challenge the legislative actions of government where the only injury is impact on the level of taxation.[145] *Thomson v. City of Lewiston*, 137 Idaho 473, 476-77, 50 P.3d 488, 491-92 (2002) (Trout, C.J.) (taxpayer lacked standing to challenge urban renewal plan); *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002) (Trout, C.J.) (taxpayers lacked standing to challenge city's payments to the Chamber of Commerce); *Greer v. Lewiston Golf and Country Club, Inc.*, 81 Idaho 393, 342 P.2d 719 (1959) (Taylor, J.) (taxpayers lacked standing to challenge disannexation of golf course). In such cases where the burden is "shared by a large class of citizens" is that the "taxpayer's remedy is through the political process." *Gallagher v. State*, 141 Idaho 665, 668, 115 P.3d 756, 759 (2005) (Burdick, J.) (cigarette smoker lacks standing to challenge cigarette tax).

In the seminal case of *Miles v. Idaho Power Co.*, 778 P.2d 757, 763 (Idaho 1989) (Johnson, J.), the Court articulated the requirement that the injury may not be a

[145] The Idaho cases discussed here are consistent with federal precedent finding that taxpayers lack standing. The seminal federal case is *Frothingham v. Mellon*, 262 U.S. 447 (1923).

"generalized grievance shared in substantially equal measure by all or a large class of citizens." The Court went on to find that Idaho Power Company ratepayers, though a large class, were sufficiently distinct from the general population to have standing to challenge the Swan Falls Agreement. "This is more than a generalized grievance. It is a specialized and peculiar injury, although it may affect a large class of individuals. The political process obviously will be more unkind to injured ratepayers seeking to change legislation affecting the whole state of Idaho than to injured citizens and taxpayers." *Miles*, 116 Idaho at 642, 778 P.2d at 764.

The *Miles* decision was followed a year later in *Alpert v. Boise Water Corp.*, 118 Idaho 136, 795 P.2d 298 (1990) (Boyle, J.). In *Alpert*, the Court found that customers of the water company had standing to challenge a franchise fee imposed by the City of Boise on the water company. Relying on *Miles*, the Court recognized that the class of ratepayers is nearly as large as the class of taxpayers in general, but nonetheless found standing. "To deny standing to persons who are in fact injured simply because many others are also injured would mean that the most injurious and widespread Government actions could be questioned by nobody." *Alpert*, 118 Idaho at 139, 795 P.2d at 301 (quoting *Miles*, 116 Idaho at 642, 778 P.2d at 764, which in turn was quoting *United States v. SCRAP*, 412 U.S. 699, 687-88 (1973)).[146]

Note, however, that the outcome can be different if the statute at issue gives standing to taxpayers. This was addressed in the related cases of *Fox v. Bd. of Cnty. Comm'rs, Boundary Cnty.*, 114 Idaho 940, 763 P.2d 313 (Ct. App. 1991) ("*Fox I*"), and *Fox v. Bd. of Cnty. Comm'rs, Boundary Cnty.*, 121 Idaho 686, 827 P.2d 699 (Ct. App. 1991) ("*Fox II*"). In those cases, a taxpayer's standing was expressly granted by Idaho Code § 31-1509[147] authorizing taxpayer challenges to liquor license decisions. The Court specifically held that the requirement that the plaintiff show a harm "peculiar to himself and different from that experienced by other taxpayers" was overridden by the statute. *Fox II*, 121 Idaho at 689, 827 P.2d at 702.

In *V-1 Oil Co. v. State Tax Comm'n*, 98 Idaho 140, 559 P.2d 756 (1977) (Bakes, J.), retail and wholesale gas dealers challenged a motor fuel excise tax,

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[146] In SCRAP, the U.S. Supreme Court said that it no bar to standing that many suffer the same injury: "[T]he challenged agency action in this case is applicable to substantially all of the Nation's railroads, and thus allegedly has an adverse environmental impact on all the natural resources of the country. . . . But we have already made it clear that standing is not to be denied simply because many people suffer the same injury. . . . To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion." *SCRAP*, 412 U.S. at 687-88 (quoted with approval by the majority in *Massachusetts v. EPA*, 549 U.S. 497, 527 n.24 (2007)).

[147] The statute then in effect was Idaho Code § 31-1509. It was entirely replaced in 1993. 1993 Idaho Sess. Laws, ch. 103, § 2. It was amended in 1994. Idaho Sess. Laws, ch. 241, § 1. In 1995, it was recodified to Idaho Code § 31-1506. 1995 Idaho Sess. Laws, ch. 61, § 11.

contending that the State Tax Commission imposed the tax three months before the authorizing statute became effective. The Court held that both the retail and wholesale dealers had standing to seek summary judgment on the legality of the tax. However, only the wholesale dealer had standing to seek a refund of the tax because, under the terms of the statute, it was the wholesale dealer upon whom the tax was imposed. Standing was not affected by whether that dealer then passed along the tax to the next purchaser by increasing the price of the good. In other words, standing is not a function of which party bears the ultimate economic burden of the excise tax. All that matters is where the legislature initially places the tax. Note that this case did not discuss the limitation on standing known as the "taxpayer standing" rule (which sometimes precludes taxpayers from challenging a tax). Rather, the decision took as a given that the persons paying the tax had standing to challenge it and receive a refund of illegal taxes.

In *Brewster v. City of Pocatello*, 768 P.2d 765 (Idaho 1988) (Shepard, J.), the Court allowed citizen taxpayers to challenge the constitutionality of a street fee imposed on all property owners. The Court's conclusion on standing was based entirely on pragmatic considerations:

> We further note that the intervenors' argument of standing, if adopted, would prevent any judicial review unless and until an occupier or owner of property would refuse to pay the "fee" and collection was sought to be enforced by the city in a collection action. In any event, we view the decision of the district court on the standing issue as meritorious. Under the peculiar factual circumstances of the instant case it is in the interest of both the city and the plaintiffs-respondents that the question be resolved. Otherwise judicial review of a vexing question to both the city and the plaintiffs-respondents will be avoided with the only likely resolution being in the form of collection actions which will eventually require the resolution of the same question presented in the case at bar. Hence, we hold that in the instant case, and its unusual circumstances, justice is best served by resolution of the question.

Brewster v. City of Pocatello at 766.

In so ruling, the *Brewster* Court both substantially relaxed the requirement of particularized injury and navigated around the general rule that injuries common to all citizens in the community are not sufficient to confer jurisdiction.

Brewster was distinguished in *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002) (Trout, C.J.). In *Young*, a group of taxpayer-citizens in

Ketchum sought a judicial declaration that the City's payment of proceeds from a local option tax to the local Chamber of Commerce in connection with a professional services contract was unconstitutional and in violation of statute. "Plaintiffs have made no allegations that such an injury is any different or distinct from any other citizen or property owner in the Ketchum area." *Young*, 137 Idaho at 105, 44 P.3d at 1160. The *Young* Court contrasted the Ketchum taxpayers with the Pocatello fee payers in *Brewster*. "The plaintiffs in Brewster could show a distinct palpable injury because the various fees were assessed against them personally." *Young*, 137 Idaho at 105, 104, 44 P.3d at 1160.

(iii) Business competition alone is insufficient to confer standing

In *Ameritel Inns, Inc. v. Greater Boise Auditorium Dist*., 141 Idaho 849, 119 P.3d 624 (2005) (Eismann, J.), a hotel company who paid hotel taxes and a group of citizen taxpayers challenged advertising expenditures by the Greater Boise Auditorium District in support of a bond to expand the downtown auditorium. The Court found that the ordinary taxpayer-citizens had no standing to challenge the expenditures. "A citizen or taxpayer may not challenge a governmental enactment where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction." *Ameritel Inns*, 141 Idaho 849, 852, 119 P.3d at 627 (citing *Thomson v. City of Lewiston*, 137 Idaho 473, 50 P.3d 488 (2002) (Trout, C.J.). The Court also found inapplicable the special situation presented in *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 15 P.3d 1129 (2000) (Silak, J.) dealing with elections, because "[t]here is no allegation that the Auditorium District did anything that would invade the privacy and sanctity of the voting booth." *Ameritel Inns*, 141 Idaho 849, 852, 119 P.3d at 627.

However, the Court found that Ameritel Inns did have standing. It found that the hotel owner "is one of a limited number of taxpayers." *Ameritel Inns*, 141 Idaho 849, 853, 119 P.3d at 628 (citing *Miles v. Idaho Power Co.*, 778 P.2d 757, 763 (Idaho 1989) (Johnson, J.) and *Alpert v. Boise Water Corp*., 795 P.2d 298 (Idaho 1990) (Boyle, J.). It found that the allegation that the expanded convention center would compete with the hotels' meeting facilities was "an allegation of a particularized injury that is not suffered alike by all citizens within the boundaries of the Auditorium District." *Ameritel Inns*, 141 Idaho 849, 852-53, 119 P.3d at 627-28. And it found that it made no difference that the hotels passed the tax on to their guests. "That fact does not mean that Ameritel is not the taxpayer. . . . The statute authorizing the Auditorium District to impose the tax does not require a hotel or motel to increase their prices by the amount of the tax. Therefore, the legal incidence of the tax falls upon the hotels and motels within the Auditorium District." *Ameritel Inns*, 141 Idaho 849, 853, 119 P.3d at 628 (citing *V-1 Oil Co. v. State Tax Comm'n*, 98 Idaho 140, 559 P.2d 756 (1977)).

In *Martin v. Camas Cnty. ex rel. Bd. of Comm'rs.*, 150 Idaho 508, 248 P.3d 1243 (2011) (Burdick, J.), the Court explained and distinguished *Ameritel Inns*. Martin urged that *Ameritel Inns* stood for "the proposition that an increase in competition may constitute particularized injury." *Martin*, 150 Idaho at 514, 248 P.3d at 1249. The *Martin Court* admonished: "This Court has never held that increased competition alone is sufficient to confer standing." *Martin*, 150 Idaho at 514, 248 P.3d at 1249. Instead, the *Martin* Court explained, Ameritel had standing because two other factors were aggregated with the increased competition (which, alone, would have been insufficient): "(1) Ameritel's status as a taxpayer whose tax funds were being used to advocate in favor of approving the bond, and (2) the imminent and certain increase in the taxes Ameritel would be subjected to if the bond were passed." *Martin*, 150 Idaho at 514, 248 P.3d at 1249 (emphasis original).

Again, in *Coeur d'Alene Tribe v. Denney*, 161 Idaho 508, 513, 387 P.3d 761, 766 (2015) (Burdick, J.), the Court found that the Tribe lacked Article III standing because "increased competition alone" (from historical horse-racing gambling machines) is an insufficient to confer standing. The Court nonetheless ruled on the merits of the matter, essentially waiving the standing requirement where relief is sought on a matter of significant constitutional importance and no other party would have standing to bring the claim.

(iv) "Dog in the manger" or "no dog in the fight" cases

Aesop's fable of the dog in the manger tells the tale of a jealous dog who has no use for something—oats or barley in Aesop's tale[148]—but spitefully prevents other animals from having it. A number of standing cases fit this story (though they may also fit other boxes, such as business competition or speculative causation).

In *State v. Philip Morris, Inc.*, 158 Idaho 874, 354 P.3d 187 (2015), the Court never reached the merits of Idaho's claim. Rather, it found that Idaho lacked standing because, based on the facts, in had no dog in the fight (to mix metaphors). In that case, Idaho complained that an arbitration panel improperly gave some tobacco settlement money to some other states. The Idaho Supreme Court affirmed the District Court's finding that "Idaho does not allege and cannot demonstrate that it has or will suffer any injury as a result of the Partial Award's implementation of the post–2003 provisions of the Term Sheet." *Philip Morris*, 158 Idaho at 879, 354 P.3d at 192. The Court found that Idaho had no standing to complain that another state was getting too much tobacco money, when that had no impact on how much Idaho would receive. "[T]here is no threat to Idaho's claim to its share of funds in the

[148] "People frequently begrudge something to others that they themselves cannot enjoy. Even though it does them no good, they won't let others have it." The story of the envious dog, Steinhöwel's *Esopus* (1476) (a collection of Aesop's Fables). The parable is alluded to in Saying 102 of the apocryphal Gospel of Thomas in the New Testament.

DPA. . . . Simply put, the State's failure to receive funds to which it is not entitled to under the MSA does not constitute injury." *Philip Morris*, 158 Idaho at 882-83, 354 P.3d at 195-96.[149]

Another "dog in the manger" case is *Martin v. Camas Cnty. ex rel. Bd. of Comm'rs*, 150 Idaho 508, 509, 248 P.3d 1243, 1244 (2011). Like many standing cases, *Martin* is a business competition case. It involved a landowner/developer challenged zoning ordinances that upzoned neighboring properties. The Court found that Martin lacked standing because the upzoning of someone else's property did not impair his ability to develop his own property. "Martin has failed to show that he has suffered or is likely to suffer any injury; he merely speculates that increased competition will decrease the future value of his property. . . . Martin offers no argument that any neighboring properties which have been upzoned are being developed in such a way that Martin will be injured." *Martin*, 150 Idaho at 515, 248 P.3d at 1250.

(v) Injury based on environmental harm

In *Boundary Backpackers v. Boundary Cnty.*, 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996) (Johnson, J.), three environmental groups and 18 individuals sued the county challenging an ordinance that purported to extend control over public lands by requiring federal agencies to comply with a county land use policy. The Court rejected standing by all twenty-one of the plaintiffs save one, a commercial outfitter and guide. The guide's affidavit asserted that the challenged county ordinance, if enforced, would deprive him of access to a substantial portion of the open space he used for his guiding business. With little explanation (other than the observation that this qualified as an expert opinion), the Court declared that this affidavit was "an ample foundation to support Krmpotich's concluding statement of the injury he will suffer from the enforcement of the ordinance." *Boundary Backpackers*, 128 Idaho at 375, 913 P.2d at 1145. The Court offered no explanation as to what was inadequate about the other plaintiffs' standing. One is left to guess that they may have relied on mere aesthetic enjoyment, a conclusion that seems to have been confirmed in litigation involving the Selkirk-Priest Basin Association.

In *Selkirk-Priest Basin Ass'n v. State ex rel. Andrus* ("*Selkirk I*"), 127 Idaho 239, 241, 899 P.2d 949, 951 (1995) (McDevitt, C.J.), two environmental groups[150] sued the State Land Board over a timber sale in the Trapper Creek watershed above Priest Lake. They asserted standing based on (1) the interest held by their children and grandchildren in the school land trusts created by Idaho Const. art. IX, §§ 4, 8

[149] We offer no opinion as to whether Idaho's claim deserved the treatment it received. What is clear is that the Court perceived that Idaho had nothing to gain by overturning the award to the other states.

[150] The two groups were Selkirk-Priest Basin Association, Inc. ("SPBA") and Idaho Environmental Council ("IEC").

and (2) their environmental interest in the public trust in navigable waters. The Court found the environmental groups had no standing as to the first, because only schools and school districts are beneficiaries of those constitutional trusts.[151] In contrast, the Court found the environmental groups survived summary judgment in establishing standing to enforce the public trust based on a showing of environmental injury to waters below the high water mark.

The only injury asserted under the environmental groups' Article IX constitutional claim was that of injury to their members as parents and grandparents of school children.[152] They might have asserted environmental injury as a basis for standing in their constitutional challenge, too. But, for some reason, they did not. Their assertion of environmental injury was made only with respect to their public trust argument.[153] The Court found this assertion of injury to the public trust in submerged lands was sufficient.[154]

Selkirk-Priest Basin Ass'n v. State ex rel. Batt ("*Selkirk II*"), 128 Idaho 831, 834, 919 P.2d 1032 (1996) (Silak, J.) concerned a different timber sale on state endowment lands.[155] SPBA challenged two recently adopted statutes aimed at restricting judicial review of timber sales. It also sued under the IAPA alleging procedural and substantive violations, among them the Land Board's "failure to

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[151] "Neither environmental group represents a single school or school district. Consequently, the district court correctly ruled that the environmental groups lack the standing necessary to challenge the administration of school endowment lands trust assets." *Selkirk I*, 127 Idaho at 242, 899 P.2d at 952.

[152] "SPBA and IEC assert associational standing on behalf of their members as beneficiaries of the common school lands trust established by art. IX, § 8 of the Idaho Constitution." Opening Brief in *Selkirk I*, 1994 WL 16179832, at *18.

[153] "The public trust doctrine applies to this case because Trapper Creek is a navigable stream. This Court has consistently recognized the standing of environmental groups or associations of users of public lands to bring an action to protect public trust resources." Opening Brief in *Selkirk I*, 1994 WL 16179832, at *46.

[154] "Accordingly, we reverse the district court's ruling granting summary judgment in favor of the Land Board on the environmental groups' claim brought under the public trust doctrine only as it relates to public trust resources below the natural high water mark of Trapper Creek." *Selkirk I*, 127 Idaho at 245, 899 P.2d at 955.

Curiously, the *Selkirk I* decision contained no discussion of whether the environmental injury to SPBA and IEC was a particularized or a generalized injury. Indeed, the associations' affidavits showed only (1) the stream was navigable and (2) it was environmentally damaged. The affidavits quoted by the Court offered no claim that members of the associations were affected by the environmental damage. For some reason, that was sufficient in *Selkirk I*, while even more specific affidavits were not sufficient in *Selkirk II*.

[155] In *Selkirk I*, there were two plaintiffs, SPBA and IEC. Only SPBA participated in *Selkirk II*. In *Selkirk I*, the environmental groups challenged the Lower Green Bonnet timber sale in the Trapper Creek drainage. In *Selkirk II*, SPBA challenged the Bugle Ridge timber sale. Both were in the vicinity of Priest Lake.

manage endowment lands for long-term forest productivity and maximum long-term financial return." SPBA's Opening Brief in *Selkirk II*, 1995 WL 17199658 at *8. This is the same Article IX constitutional claim pressed in *Selkirk I*.

Plaintiffs in *Selkirk I* were represented by different counsel than represented SPBA in *Selkirk II*, and they took different approaches to standing. In *Selkirk II*, SPBA abandoned its contention that it had standing as a school lands beneficiary and instead asserted standing on grounds of environmental injury.[156]

In *Selkirk-Priest Basin Ass'n v. State ex rel. Batt* ("*Selkirk II*"), 128 Idaho 831, 834, 919 P.2d 1032 (1996) (Silak, J.), an environmental group, Selkirk-Priest Basin Association ("SPBA"), challenged a different timber sale on state endowment lands.[157] SPBA challenged two recently adopted statutes aimed at restricting judicial review of timber sales. It also sued under the IAPA alleging procedural and substantive violations, among them the Land Board's "failure to manage endowment lands for long-term forest productivity and maximum long-term financial return." SPBA's Opening Brief in *Selkirk II*, 1995 WL 17199658 at *8. This is the same constitutional claim pressed in *Selkirk I*. This time, however, SPBA set up its assertion of standing solely on grounds of environmental injury.[158]

The *Selkirk II* Court rejected the environmental injury grounds for standing on the basis that injury was too generalized.[159]

> The injury suffered by SPBA's members is at best a generalized grievance distinguishable from the injury suffered by the professional guide in *Boundary Backpackers*. SPBA's affidavits do not establish a

[156] "[The *Selkirk I*] opinion establishes that the lower court properly denied standing on that [trust beneficiary] basis. Yet SPBA also alleged standing on other grounds as well, including injury to its members' recreational and aesthetic uses of the area." Opening Brief in *Selkirk II*, 1995 WL 17199658, at *11.

[157] In *Selkirk I*, there were two plaintiffs, SPBA and the Idaho Environmental Council. Only SPBA participated in *Selkirk II*. In *Selkirk I*, the environmental groups challenged the Lower Green Bonnet timber sale in the Trapper Creek drainage. In *Selkirk II*, SPBA challenged the Bugle Ridge timber sale. Both were in the vicinity of Priest Lake in north Idaho. Plaintiffs in *Selkirk I* were represented by different counsel than represented SPBA in *Selkirk II*, and they took different approaches to standing.

[158] "[The *Selkirk I*] opinion establishes that the lower court properly denied standing on that [trust beneficiary] basis. Yet SPBA also alleged standing on other grounds as well, including injury to its members' recreational and aesthetic uses of the area." SPBA's Opening Brief in *Selkirk II*, 1995 WL 17199658, at *11.

[159] Oddly, the *Selkirk II* Court made no attempt to reconcile its characterization of SPBA's injury as "generalized" with the holding in *Selkirk I* that the same environmental injury was sufficient to establish standing for purposes of the public trust, at least at the summary judgment stage.

> peculiar or personal injury that is different than that suffered by any other member of the public. The affidavits indicate the members use the area for hiking and berry-picking and that such use is occasional at best, with the most regular contact being one member who visits the area two weeks out of the year. We do not believe that the members' occasional use of the area for recreational or aesthetic enjoyment creates a particularized injury such that SPBA's members have a "distinct palpable injury" not shared in substantially equal measure by all or a large class of citizens.

Selkirk II, 128 Idaho at 834, 919 P.2d at 1035.[160]

Boundary Backpackers and *Selkirk II* set a particularly high bar for environmental groups, and a lower one for those who base standing on economic impact.[161] Their message seems to be that occasional use of public land for mere aesthetic enjoyment—something that, apparently, everybody does—is too generalized of an interest on which to base standing.

The Idaho standard established by the *Boundary Backpackers* and *Selkirk* cases stands in sharp contrast to the federal standard. Cases like *Lujan v. Nat'l Wildlife Fed'n* ("*Lujan I*"), 497 U.S. 871 (1990) (Scalia, J) and *Lujan v. Defenders of Wildlife* ("*Lujan II*"), 504 U.S. 555, 560 (1992) (Scalia, J.) (see discussion in section 18.E(1)(a)(x) at page 218) require environmental plaintiffs to provide considerable specificity in their affidavits of injury. (For example, affidavits showing stating that members recreate "in the vicinity" of the affected area is insufficiently precise. *Lujan I*.) However, so long as that evidentiary foundation is laid that members regularly use the affected land for recreational purposes, the federal courts have not tossed out environmental plaintiffs simply because their injury is shared by many. Yet that is what the Idaho courts have done. This is a strange Idaho aberration.[162]

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[160] The *Selkirk II* Court then rejected the associations' two remaining standing theories. First, it said the broad grant of judicial review under the IAPA, Idaho Code § 67-5270, is foreclosed by another statute expressly precluding judicial review of timber sales. Second, it said that Idaho's Declaratory Judgment Act does not confer standing.

[161] The decision was thoughtfully and forcefully criticized in Melinda K. Harm, "*Was The Lorax A Professional Outfitter and Guide? A Shift In Idaho's Standing Doctrine: Boundary Backpackers v. Boundary Cnty. and Selkirk-Priest Basin Ass'n v. State*," 1997 Idaho L. Rev 127 (1997).

[162] The *Boundary Backpackers* and *Selkirk* decisions do not even mention these federal cases (though *Lujan II* is discussed in Justice Schroeder's dissent to *Boundary Backpackers*).

(vi) Injury in endowment land cases

Two cases arising in the 1990s dealt with challenges by environmental groups to timber sales, each alleging violations of the fiduciary duties of the Land Board. *Selkirk-Priest Basin Ass'n v. State ex rel. Andrus* ("*Selkirk I*"), 127 Idaho 239, 241, 899 P.2d 949, 951 (1995) (McDevitt, C.J.) and *Selkirk-Priest Basin Ass'n v. State ex rel. Batt* ("*Selkirk II*"), 128 Idaho 831, 834, 919 P.2d 1032 (1996) (Silak, J.). These cases are discussed above.

Here is the important part: Even though SPBA's claim of standing as a trust beneficiary was rejected in *Selkirk I* and abandoned in *Selkirk II*, the *Selkirk II* Court entertained the environmental injury standing allegation. Indeed, it did so even though SPBA continued to press its substantive argument that the timber sale violated the constitutional mandate to maximize long-term financial return.[163] Although the Court ultimately found that this plaintiff's environmental injury was too generalized to support standing, the decision shows that the proper plaintiff could establish standing to mount a constitutional challenge to the administration of the endowment trust lands on grounds other than being a trust beneficiary.[164] In other words, *Selkirk II* makes clear that, even though SPBA failed to show a sufficiently particularized injury, it is possible to establish standing to challenge violations of the Idaho Const. art. IX, § 8 by showing a particularized injury other than being a trust beneficiary.

It is hardly surprising that standing may be established for injuries unrelated the purpose of the constitutional or statutory violation. Consider the Idaho Supreme

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[163] The retention of the constitutional claim is evident in the decision itself. "[I]n this case we are asked to determine whether the alleged injury to SPBA's members' recreational and aesthetic use of land confers upon them standing to challenge the administration of the endowment trust lands." *Selkirk II*, 128 Idaho at 833, 919 P.2d at 1034.

"SPBA appeared before the Land Board challenging the sale's compliance with trust duties and various environmental laws." *Selkirk II*, 128 Idaho at 831, 919 P.2d at 1033. This constitutional claim is also identified in SPBA's briefing. "The third cause of action sets forth SPBA's challenges to the Bugle Ridge sale under the Idaho APA. . . . The substantive claims center on the Defendants' . . . failure to manage endowment lands for long-term forest productivity and maximum long-term financial return." SPBA's Opening Brief in *Selkirk II*, 1995 WL 17199658 at *8.

[164] This holding in *Selkirk II* is not at odds with the holding in *Selkirk I*. In *Selkirk I*, the Court rejected the environmental plaintiffs' standing based their status as trust beneficiaries, but allowed them to pursue their public trust claim based on environmental injury. Why weren't they allowed to pursue both claims based on environmental injury? Because they did not frame their case that way. For unknown reasons, they *Selkirk I* lawyers (who are different than the *Selkirk II* lawyer) alleged standing for their constitutional challenge solely on the plaintiffs' trust beneficiary status, while alleging separate standing grounds for their public trust claim. It was not until *Selkirk II* (and new legal counsel) that SPBA suggested that standing for its "maximum financial return" constitutional challenge could be premised on environmental injury.

Court's ruling in *AmeriTel Inns, Inc. v. Greater Boise Auditorium Dist*., 141 Idaho 849, 119 P.3d 624 (2005) (Eismann, J.). In that case, the Court found that a hotel company who paid hotel taxes had standing to challenge advertising expenditures by the Greater Boise Auditorium District ("GBAD") in support of a bond to expand its downtown auditorium. AmeriTel contended that this use of funds was a violation of GBAD's responsibility to use its funds solely for authorized purposes. AmeriTel was not an intended beneficiary of statutory constraints imposed on GBAD. Its injury was based on business competition—unrelated to the legislative constraints on GBAD's spending. That, combined with other factors, was sufficient to establish standing.[165] In other words, being a beneficiary of a trust or other obligations is one way to establish standing. But it is not the only way. The particularized injury need may or may not be related to the statutory or constitutional violation alleged.

(vii) Injury in political cases

In *Van Valkenburg v. Citizens for Term Limits*, 135 Idaho 121, 125, 15 P.3d 1129, 1133 (2000) (Silak, J.) the Court distinguished *Selkirk II* (with little explanation). In *Van Valkenburg*, four individuals challenged an Idaho statute, Idaho Code § 34-907B, that required the Secretary of State to note on the ballot whether Idaho candidates for U.S. Congress had or had not signed a term limits pledge. Idaho's Secretary of State challenged the standing of the petitioners on the grounds that any injury they suffered was no different from the injury suffered by any other Idaho citizen. The Court disagreed. It found that the petitioners suffered a "distinct injury" because "[t]hose who support the specific term limits pledge contained in the law are not injured by the use of the ballot legend, and it in fact benefits those who support the term limits pledge by increasing the likelihood their candidates will be elected." *Van Valkenburg*, 135 Idaho at 125, 15 P.3d at 1133.

Troutner v. Kempthorne, 142 Idaho 389, 128 P.3d 926 (2006) is seemingly at odds with *Van Valkenburg*. In *Troutner*, the Court ruled that two members of the Democratic Party lacked standing to challenge the appointment of a Republican to the Idaho Judicial Council. The plaintiffs complained that the appointment of a fourth Republican violated a statutory requirement that no more than three members of the council be of the same party. The Court found: "Neither of the Plaintiffs had asked to be nominated to the Judicial Council vacancy filled by Reberger. . . . Even if a court removed Reberger, there is no requirement that the Governor consider the Plaintiffs or any other Democrat for the position." *Troutner*, 142 Idaho at 392, 128 P.3d at 929. If the Court's point was that the plaintiffs' injury was speculative, that

[165] In *Martin v. Camas Cnty. ex rel. Bd. of Comm'rs.*, 150 Idaho 508, 514, 248 P.3d 1243, 1249 (2011) (Burdick, J.), the Court explained that Ameritel had standing because two other factors were aggregated with the increased competition (which, alone, would have been insufficient): "(1) Ameritel's status as a taxpayer whose tax funds were being used to advocate in favor of approving the bond, and (2) the imminent and certain increase in the taxes Ameritel would be subjected to if the bond were passed."

would make sense. The Court confused the matter, however, by describing this as a "lack of any distinct and palpable injury." *Troutner*, 142 Idaho at 393, 128 P.3d at 930.[166]

(viii) Injury based on procedural violations

Where the injury asserted is procedural in nature, such as a violation of NEPA, the rules are not fundamentally different:

> We have recognized that our analysis of Article III standing is "not fundamentally changed" by the fact that a petitioner asserts a "procedural," rather than a "substantive" injury. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004). In a "procedural injury" case:
>
> > to show a cognizable injury in fact, [a plaintiff] must allege ... that (1) the [agency] violated certain procedural rules; (2) these rules protect [a plaintiff's] concrete interests; and (3) it is reasonably probable that the challenged action will threaten their concrete interests.
>
> *Id*. (quoting *Citizens for Better Forestry v. U.S. Dept. of Agric*., 341 F.3d 961, 969-70 (9th Cir. 2003)) (alterations in original). "[A] cognizable procedural injury exists when a plaintiff alleges that a proper EIS has not been prepared under [NEPA] when the plaintiff also alleges a 'concrete' interest-such as an aesthetic or recreational interest-that is threatened by the proposed action." *Id*. (citing *Sierra Club v. Morton*, 405 U.S. 727, 738, 92 S. Ct. 1361, 31 L.Ed.2d 636 (1972)). The "concrete interest" test has been described "as requiring a 'geographic nexus' between the individual asserting the claim and the location suffering an environmental impact." *Ashley Creek Phosphate Co. v. Norton*, 420

[166] A concurring opinion by Justice Jim Jones pointed out that the plaintiffs missed the boat by framing the standing argument in terms of being denied the chance to serve on the council (which was speculative). The injury they should have alleged was the frustration of the statute's goal of preventing "a concentration of power by any one party." *Troutner*, 142 Idaho at 397, 128 P.3d at 934. "Any of those [minority] parties would obviously have a dog in this fight and would have standing to pursue it." Justice Jim Jones and the majority agreed, however, that the lawsuit lacked merit because one of the four Republican appointees no longer counts himself a member of that party.

> F.3d 934, 938 (9th Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3545 (U.S. Jan. 19, 2006) (No. 05-1209) (quoting *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001)).

Nuclear Information and Resource Service v. NRC, 457 F.3d 941, 949-50 (9th Cir. 2006).

A special case arises, however, where the plaintiff is a local governmental entity. In *Douglas Cnty. v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the Ninth Circuit found that a county had "zone of interests" standing based on a provision according procedural rights to local agencies:

> The County has been "accorded a procedural right" because NEPA provides that "local agencies, which are authorized to develop and enforce environmental standards" may comment on the proposed federal action. 42 U.S.C. § 4332(2)(C). The County is such a local agency because an Oregon Statute authorizes counties to "[p]repare, adopt, amend, and revise" land management plans that contain environmental standards. Or. Rev. Stat. § 197.175 (1993); see also Or. Admin. R. 660-06-000.

Douglas County, 48 F.3d at 1501.

(ix) A plaintiff is not required to submit proof of standing unless standing is challenged or the court requires further clarity or evidence.

The law governing when further evidence or clarification of standing allegations may be required was summed up in *Glengary-Gamlin Protective Ass'n, Inc. v. Bird*, 106 Idaho 84, 88, 675 P.2d 344, 348 (Ct. App. 1983) (Burnett, J.).

> In determining whether these tests have been satisfied, a court should examine the pleadings and any supplementary materials filed by the organization.
>
> For purposes of ruling on a motion to dismiss [a complaint] for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. [Citation omitted.] At the same time, it is within the trial court's power to allow or to require the

> plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.

Glengary-Gamlin, 106 Idaho at 88, 674 P.2d at 348 (brackets original) (quoting *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975)).

Two years later, in *Lujan v. Defenders of Wildlife* ("*Lujan II*"), 504 U.S. 555 (1992) (Scalia, J.), the Supreme Court summarized the rules governing the increasing evidentiary showing required at each stage of the proceeding:

> Since they [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial."

Lujan II, 504 U.S. at 561 (first brackets added; second brackets original) (quoting *Lujan v. Nat'l Wildlife Fed'n* ("*Lujan I*"), 497 U.S. 871, 889 (1990)).[167]

[167] A federal district court took *Lujan II* a step further:

> Plaintiff is correct that extra-record declarations may be used and, indeed, are required at the summary judgment stage to establish standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992) (noting that, at the summary judgment stage, a plaintiff 'must set forth by affidavit or other evidence specific facts' to demonstrate standing). Although

(x) How much specificity (geographic nexus) is required in pleading and affidavits

Sierra Club v. Morton, 405 U.S. 727 (1972), was the first Supreme Court case to address the question of how specific the plaintiff's allegations must be to survive a standing challenge. Sierra Club challenged a ski development in the Mineral King Valley in the Sierra Nevada Mountains, but premised its complaint on the club's general interest and involvement in the issue, specifically declining to make specific allegations that its members used the area.[168] The Court found this was not enough. "But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club*, 405 U.S. at 734-35. "It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. But a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." *Sierra Club*, 405 U.S. at 739. Ever since, plaintiffs have been careful to plead standing. This section addresses procedural questions regarding how the sufficiency of such pleadings and supporting affidavits may be challenged.

Having established that the plaintiff must demonstrate its use of the resource at issue, the question becomes how specifically that must be pled and how specifically it must be supported by evidence. The latter depends on the stage of the proceeding. A defendant may challenge a plaintiff's standing at the pleading stage by moving to dismiss or by motion for summary judgment. "In either case, the court

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> neither Defendants nor the Miners have contested Plaintiff's standing, to the extent that the Soto Declaration serves to establish standing, it is permissible. *Id.*

Karuk Tribe of California v. U.S. Forest Serv., 379 F. Supp. 2d 1071, 1088 (N.D. Cal. 2005), *rehearing en banc granted*, 658 F.3d 953 (9th Cir. 2011)

Both *Lujan I* and *Lujan II* dealt with motions for summary judgment filed by federal defendants challenging the standing of plaintiff environmental groups. Although the plaintiffs carried the burden of proof and were obligated to respond to these motions with affidavits (or declarations) showing their standing, there is no requirement that they anticipate such a motion and file affidavits in advance of a challenge. Indeed, Rule 56 and *Lujan I*, 487 U.S. at 894-98, make very clear that timely affidavits or declarations may, and must be, filed in response to such a motion for summary judgment. The federal district court's conclusion in *Karuk Tribe* that plaintiffs are entitled to file declarations attesting to their standing in the absence of a standing challenge does not follow from any rule or precedent and makes no sense. It may be that such voluntary declarations are harmless (and perhaps they were in *Karuk Tribe*), but the perceived "right" to file them should not serve to overcome limitations of supplementing the record on appeal.

[168] This was a test in case in which Sierra Club tested the limits of standing and lost. It could easily have plead specific facts regarding how its members used the particular area at issue. But it refused to do so, hoping to establish the general principle that concern with an environmental problem, rather than specific use of the resource, is the test. The strategy backfired.

must construe the facts alleged in the complaint that support standing in favor of the plaintiff, but the question is how specific the plaintiff's pleading must be." Daniel R. Mandelker, *NEPA Law and Litigation*, § 4:10 (2009).

In *United States v. Students Challenging Regulatory Agency Procedures ("SCRAP")*, 412 U.S. 669 (1973) (Stewart, J.),[169] the Court held that in a motion to dismiss on standing grounds, the allegations will be taken as true. The Court said that if the federal defendant believed the pleadings were a "sham," it should have taken steps to show this. "If the railroads thought that it was necessary to take evidence, or if they believed summary judgment was appropriate, they could have moved for such relief." *SCRAP*, 412 U.S. at 690 n. 15.[170] In other words, the plaintiff may rest on a well-pleaded complaint in response to a motion for summary judgment, but may be required to provide greater specificity as well as supporting evidence at summary judgment.

Such was the case in *Lujan v. Nat'l Wildlife Fed'n* (*"Lujan I"*), 497 U.S. 871 (1990) (Scalia, J.).[171] In this case, the Court rejected NWF's standing because the affidavits supporting standing were insufficiently specific. NWF had challenged the Bureau of Land Management's "land withdrawal review program" in which the government removed restrictive classifications on million acres of public land

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[169] In *SCRAP*, the plaintiff organization was formed by five law students who sought to challenge an order by the Interstate Commerce Commission allowing railroads to raise their rates. SCRAP contended that the rate increase would discourage recycling (by increasing shipping costs) thus harming forests, rivers, and the air used by members of SCRAP. SCRAP alleged that the order was defective because the government failed to prepare an EIS on the rate increase.

[170] In subsequent cases, the Supreme Court repeated and elaborated on the point first made in *SCRAP*. "Such a complaint withstood a motion to dismiss, although it might not have survived challenge on a motion for summary judgment." *Simon v. Kentucky Welfare Rights Organization*, 426 U.S. 26, 45, n. 25 (1976). In 1988, the Ninth Circuit cited back to the *SCRAP* footnote quoted above as well as the *Simon* case: "But in a critical footnote, the *SCRAP* court acknowledged that on a motion for summary judgment plaintiff might have had to show injury with greater specificity, *i.e.*, to name the specific forests that it uses and enjoys that would be affected by the challenged action. And the Court has since reiterated that SCRAP indeed might have come out differently had it been decided on a motion for summary judgment. In sum, while a motion to dismiss may be decided on the pleadings alone, construed liberally in favor of the plaintiff, a motion for summary judgment by definition entails an opportunity for a supplementation of the record, and accordingly a greater showing is demanded of the plaintiff." *Sierra Club v. Marsh*, 701 F. Supp. 886 (D. Me. 1988) (citations to *SCRAP* and *Simon* omitted).

[171] This case has a convoluted history. Initially, the federal defendant filed a motion to dismiss for lack of standing. Both the district court and the court of appeals found that NWF's pleadings and two affidavits were sufficient to survive the motion to dismiss. On remand, the district court took up a pending motion for summary judgment, also challenging standing. This time the district court found the two affidavits were insufficient (and refused to allow additional affidavits). The court of appeals reversed, and the matter then went to the Supreme Court on a writ of certiorari.

opening them up to mining claims and oil and gas leasing.[172] The Court ruled that when a plaintiff is defending a summary judgment standing challenge, he or she must show specific facts to establish standing. The affidavits here fell short because they only alleged that the individuals used lands somewhere in the vicinity of the lands affected by the government's action.[173] In one of the affidavits, for example, the National Wildlife Federation member claimed use "in the vicinity" of an area that itself covered 5.5 million acres. *Lujan I*, 497 U.S. at 887.[174]

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[172] In the first round of litigation, the district court granted a preliminary injunction and rejected the government's motion to dismiss on standing grounds. *Nat'l Wildlife Fed'n v. Burford*, 676 F. Supp. 271 (1985). On appeal, the court of appeals affirmed. *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305 (1987). Because the issue, at that time, was framed by the government's motion to dismiss, the appeals court applied a standard generous to the plaintiff in which all allegations are accepted as true and the complaint is construed in favor of NWF. The appeals court did mention, however, that two affidavits filed by NWF subsequent to issuance of the preliminary injunction reinforced the conclusion on standing. On remand, NWF sought a permanent injunction, and both parties filed motions for summary judgment. This time the district court applied a different standard, noting that in a motion for summary judgment (where the court may weigh the evidence to some extent necessary to determine whether material facts are in dispute), the plaintiff "might have to show injury with greater specificity." *Nat'l Wildlife Fed'n v. Burford*, 699 F. Supp. 327, 329 (1988). The district court found the two affidavits offered by NWF were insufficiently specific, because they merely recited that members of the organization used lands "in the vicinity" of those affected by the government's actions. The court of appeals reversed. *Nat'l Wildlife Fed'n v. Burford*, 878 F.2d 422 (1989). The U.S. Supreme Court reversed again, siding with the district court. In a motion for summary judgment, the Court said the burden shifts to the plaintiff to show "specific facts" to controvert the claim of no standing. The Court both distinguished and criticized *SCRAP*: "The *SCRAP* opinion, whose expansive expression of what would suffice for § 702 [APA] review under its particular facts has never since been emulated by this Court, is of no relevance here, since it involved not a Rule 56 motion for summary judgment but a Rule 12(b) motion to dismiss on the pleadings. The latter, unlike the former, presumes that general allegations embrace those specific facts that are necessary to support the claim." *Lujan I*, 497 U.S. at 889 (quoted in *Lujan v. Defenders of Wildlife* ("*Lujan II*"), 504 U.S. 555, 561 (1992) (Scalia, J.)).

[173] *Lujan I* was framed as a zone of interests test. *Lujan I*, 497 U.S. at 882-83. However, it did not probe the reach of that test, because the parties conceded and the Court accepted that if the plaintiff's members actually used the specific lands affected by the governmental action, their injuries would be within the zone of the interests protected by the relevant legislation. "The only issue, then, is whether the facts alleged in the affidavits showed that those interests *of Peterson and Erman* were actually affected." *Lujan I*, 497 U.S. at 886 (emphasis original). In other words, plaintiff's problem was not that its injury fell outside the zone of interests; its problem was that it didn't specifically describe its injury to demonstrate that it satisfied the zone of interests requirement.

[174] There was also a dispute over whether NWF should be allowed to submit additional affidavits later than called for under Rule 56. The Supreme Court found that the district court did not abuse its discretion in rejecting the untimely affidavits. *Lujan I*, 497 U.S. at 894-98. On the other hand, it is clear that a plaintiff may submit timely affidavits (or declarations) in response to a motion for summary judgment, and is not required to submit them at the outset of the case in anticipation of a standing challenge.

Two years later, in *Lujan v. Defenders of Wildlife* ("*Lujan II*"), 504 U.S. 555 (1992) (Scalia, J.), the Supreme Court summarized the rules governing the increasing evidentiary showing required at each stage of the proceeding. See discussion in section 18.E(1)(a)(ix) on page 216.

In *Lujan II*, the Court continued to ratchet down on the specificity with which environmental plaintiffs must demonstrate standing. This case involved plaintiffs' challenge to the Secretary of Interior's rescission of a rule requiring federal agencies to consult under the Endangered Species Act ("ESA") when their actions abroad might affect listed species.[175]

Affidavits were submitted showing that plaintiffs' members had visited such places as Egypt and Sri Lanka in order to see endangered species threatened by water projects in which the United States was involved, and that and "hoped" to return when conditions permitted. The Court concluded that the affidavits were insufficient to establish "injury in fact":

> They plainly contain no facts, however, showing how damage to the species will produce 'imminent' injury to Mses. Kelly and Skilbred. . . . Such "some day" intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the "actual and imminent" injury that our cases require.

Lujan II, 504 U.S. at 564 (emphasis original). In other words, even if species were extirpated as a result of unlawful federal action, the Court was not persuaded by the affidavits that the two women would ever get back to these countries to witness the loss. The Court went on to say that the affidavits fell short of meeting the redressability prong of the constitutional standing test. *Lujan II*, 504 U.S. at 568.

The distinction in the level of specificity required by the Court in *SCRAP* and *Lujan II* makes sense, by the way, if comparing a motion to dismiss under Rule 12(b)(6) with a Rule 56 motion for summary judgment, as the former is based on the pleadings and the latter allows affidavits. (See discussion in section 24.L(11) at page 395.) Indeed, the Court made this very point:

> Respondent places great reliance, as did the Court of Appeals, upon our decision in *United States v. Students*

[175] Unlike *NWF*, which addressed standing under the zone of interests test, In *Defenders*, plaintiffs' standing was challenged under Article III. As the court of appeals decision explained, *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988), the suit was brought under the ESA's citizen suit provisions (which waived any zone of interests requirement) and under the APA (whose zone of interests test plaintiffs easily met). So the only question was whether plaintiffs adequately pled and supported their constitutional standing.

> *Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S. Ct. 2405, 37 L.Ed.2d 254 (1973). The *SCRAP* opinion, whose expansive expression of what would suffice for § 702 review under its particular facts has never since been emulated by this Court, is of no relevance here, since it involved not a Rule 56 motion for summary judgment but a Rule 12(b) motion to dismiss on the pleadings. The latter, unlike the former, presumes that general allegations embrace those specific facts that are necessary to support the claim. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-102, 2 L.Ed.2d 80 (1957).

Lujan I, 497 U.S. at 889.

Motions to dismiss on Article III standing, however, are raised under Rule 12(b)(1) which, unlike Rule 12(b)(6), allows development and probing of the evidence where the challenge is "factual" as opposed to "facial." Thus, a factual challenge under Rule 12(b)(1) would seem to demand the same (higher) level of specificity by the non-moving plaintiff. In contrast, a facial standing challenged under Rule 12(b)(1) would be subject to the rule in SCRAP and would be tested on the basis of the pleadings alone.

On the other hand, Rule 12(b)(1) would not seem to be the proper vehicle to for a challenge based on "prudential," as opposed to jurisdictional, standing grounds. It would seem that the court should convert a prudential challenge made under Rule 12(b)(1) to a Rule 12(b)(6) motion,[176] which, in turn, could be converted by the court to a Rule 56 summary judgment motion if extrinsic facts were offered. Curiously, neither the opinions nor the briefs in SCRAP or subsequent cases talking about SCRAP mention whether the motion to dismiss was under Rule 12(b)(1) or 12(b)(6).

In *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009), the U.S. Supreme Court continued to hammer away at the requirement for specificity in the affidavits. In contrast to *Lujan I*, *Summers* (like *Lujan II*) considered the matter under the rubric of Article III. In *Summers*, the environmental plaintiffs challenged a specific timber sale and the regulations applicable to that sale. After winning a preliminary injunction barring the sale, they settled that portion of the case. With the specific controversy eliminated, the federal defendants pointed out that the plaintiffs lacks standing to pursue their generic challenge to the regulations.

[176] "Provided no prejudice is caused, courts often excuse a mislabeling of a Rule 12(b)(1) motion as a Rule 12(b)(6) failure to state a claim motion, and vice versa. In such an instance, the court will merely apply the appropriate legal standard and rule accordingly." Baicker-McKee, Janssen & Corr, *Federal Civil Rules Handbook*, at 417 (2007).

The Court agreed, ruling that once the plaintiffs settled the portion of the lawsuit dealing with a particular timber sale, they could no longer rely on affidavits relating to that timber sale. If they wished to pursue the portion of the lawsuit generically challenging the lawfulness of the regulation, they must produce affidavits showing a particular member of the environmental group who had concrete plans to visit an area that would be affected by the regulation. The Court then ruled that an affidavit of a member who "want[s] to go there" cannot meet the Article III standard for injury-in-fact. *Summers*, 129 S. Ct. at 1150 (internal quotation marks omitted). "This requirement of naming the affected members has never been dispensed with in light of statistical probabilities, but only where *all* the members of the organization are affected by the challenged activity." *Summers*, 129 S. Ct. at 1152 (emphasis original). The Court also noted that where standing is premised on a procedural wrong (here, a regulation that deprived them of the opportunity for notice and comment), the plaintiff must nonetheless point to "some concrete interest that is affected by the deprivation." *Summers*, 129 S. Ct. at 1151.

(b) The injury must be actual or imminent, not conjectural or hypothetical

The "actual or imminent" component of the injury-in-fact requirement means it is <u>not</u> required that the injury already has occurred. "Standing may be predicated upon a threatened harm as well as a past injury." *Schneider v. Howe*, 142 Idaho 767, 772, 133 P.3d 1232, 1237 (2006) (Burdick, J.). If the injury has not already occurred, it must be "imminent, not conjectural or hypothetical." *State v. Philip Morris*, Inc., 158 Idaho 874, 881, 354 P.3d 187, 194 (2015) (Horton, J.) (quoting *Lujan v. Defenders of Wildlife* ("*Lujan II*"), 504 U.S. 555, 560 (1992) (Scalia, J.)).

On several occasions, the Court has offered this explanation:

> This Court has explained that a justiciable controversy is distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot . . . . The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests . . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Philip Morris, Inc., 158 Idaho 874, 881, 354 P.3d 187, 194 (2015) (Horton, J.) (quoting *Davidson v. Wright*, 143 Idaho 616, 620, 151 P.3d 812, 816 (2006)) (quoting in turn *Weldon v. Bonner Cnty. Tax Coal.*, 124 Idaho 31, 36, 855 P.2d 868,

873 (1993), overruled on other grounds by City of Boise City v. Keep the Commandments Coal., 143 Idaho 254, 141 P.3d 1123 (2006)).

In *Student Loan Fund of Idaho, Inc. v. Payette Cnty.*, 125 Idaho 824, 875 P.2d 236 (Ct. App. 1994) (Lansing, J.), an owner of farm land (the Fund) brought a declaratory action to challenge an agreement between a city and a county calling for establishment of an area of city impact ("ACI") and the designation an "agriculture preservation zone" in the comprehensive plan. The Court of Appeals found that a landowner lacked standing to object to But this case does not stand for the proposition that ACIs may never be challenged. In fact, it stands for the opposite conclusion.

First, the court recognized that a challenge could be brought by way of a declaratory action.

> The Fund's action is for declaratory relief. Idaho's courts are authorized to determine by declaratory judgment the validity of contracts and municipal ordinances and the rights and status of persons thereunder. I.C. §§ 10–1201 and 10–1202.

Student Loan Fund, 125 Idaho at 825, 875 P.2d at 237.

Second, the court found that a landowner affected by a restrictive future land use designation might be able to demonstrate injury, but this plaintiff failed to plead facts showing injury.

> The deficiency in the Fund's status is not that its injury is undifferentiated from that suffered by the general populous of Payette County, but rather, that it has shown no injury at all.

Student Loan Fund, 125 Idaho at 828, 875 P.2d at 240.

Specifically, the problem was that the new designation (agriculture preservation) was essentially the same as the existing zoning (agriculture or rural zone). *Student Loan Fund,* 125 Idaho at 827, 875 P.2d at 239. And, more importantly, the Fund failed to allege any plans to develop the property. *Student Loan Fund*, 125 Idaho at 827 n.3, 875 P.2d at 239 n.3. In short, this was a pleading failure.

In *Martin v. Camas Cnty. ex rel. Bd. of Comm'rs.*, 150 Idaho 508, 512-13, 248 P.3d 1243, 1247-48 (2011) (Burdick, J.), a landowner/developer challenged zoning ordinances that upzoned neighboring properties, thereby increasing competition for development. The Court found that Martin lacked standing notwithstanding that he

owned property in the affected area, because his claim was based on speculative injury.

> Martin argues that the reasoning of *Butters* should be applied to his situation, since he is in the business of land development and property near the property that he owns was upzoned, while Martin's was not. This argument is unpersuasive; the plaintiff in Butters alleged that she suffered specific and palpable harm as a result of a conditional use permit that was issued under the challenged zoning ordinance. Martin has failed to show that he has suffered or is likely to suffer any injury; he merely speculates that increased competition will decrease the future value of his property. Martin states that "Martin, like Butters owns land that suffers a distinct injury, unlike that of the public generally", but fails to explain what that distinct injury is, merely offering an argument that Martin's property is "uniquely situated". Martin offers no argument that any neighboring properties which have been upzoned are being developed in such a way that Martin will be injured.

Martin, 150 Idaho at 514-15, 248 P.2d at 1249-50 (emphasis supplied).

In finding that Martin lacked standing, the Court also distinguished its holdings in *Ameritel Inns* and *Koch*. The *Martin* Court explained that a combination of factors supported Ameritel's standing. Business competition alone in insufficient. The *Martin* Court said *Koch* (which allows waiver of standing in some instances) was distinguishable because

> *Koch* has only been applied where failure to find that the appellants in question had standing would have resulted in no party having standing. Here, a party whose property had been downzoned by the 2008 zoning amendments would unquestionably have standing to bring this action, as would a property owner who could show a specific palpable harm that he would incur from the imminent development of an upzoned neighboring property.

Martin, 150 Idaho at 515, 248 P.3d at 1250.

It should be noted that this was not just a failure to prove, but a failure to plead: "Martin has not pled facts to support his contention that he cannot develop his

properties in the same manner that he could have prior to the 2007 and 2008 zoning amendments." *Martin*, 150 Idaho at 516, 248 P.3d at 1251.

In *Paslay v. A&B Irrigation Dist.*, 162 Idaho 866, 406 P.3d 878 (2017) (Brody, J.), several farmers sued the irrigation district that provided water to them. For many years, the irrigation district served some of its members with surface water and others with ground water. The plaintiffs received surface water (which was a more reliable supply). As ground water supplies declined, the district undertook an expensive project to bring surface water to some of the farmers within the district that historically had received only ground water. The plaintiffs complained that the project would "dilute" the limited surface supply by expanding the number of users it served, thus diminishing the supply they historically had enjoyed. The Court found this was not "a current or future harm, [but] merely the fear of one if the District abuses its discretion and mismanages water resources outside the boundaries of the law." *Paslay*, 162 Idaho at 870, 406 P.3d at 882. The Court explained that while it is intuitive that some dilution of supply would result, it was not willing also to assume the following would occur:

> . . . second, in the case where there is less surface water available, the amount will be substantial enough to threaten Appellants' allotment; third, in such a case, the District will still allocate some surface water to newly-converted Unit B farms during a season in which it provides less than the full allotment to Unit A farms.

Paslay, 162 Idaho at 870, 406 P.3d at 882. "This Court cannot decide based on such conjecture." *Id.*

(2) Causation and redressability

The requirements of causation and redressability boil down to requiring the litigant to show that the case is not an academic exercise: the injury suffered may be traced to actions of the defendant, and the relief requested is likely to lessen that injury.

As a practical matter, in most cases, the causation and redressability requirements are easily met. Moreover, the latter two tests may be relaxed to some extent in some circumstances.[177] Accordingly, much of the litigation over standing (and much of this chapter) focuses on the first requirement: injury in fact.

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[177] "To establish Article III standing, a plaintiff must also show causation and redressability; however, '[o]nce a plaintiff has established injury in fact under NEPA, the causation and redressability requirements are relaxed.' Instead, they 'need only establish the reasonable probability of the challenged action's threat to [their] concrete interest.'" *Nuclear Information and Resource Service v. NRC*, 457 F.3d 941, 950 (9th Cir. 2006) (citations and internal quotation marks omitted). "In NEPA cases, causation requirements are relaxed but still a constitutional necessity;

In *Knox v. State ex rel. Otter*, 148 Idaho 324, 223 P.3d 266 (2009), the Court found the plaintiffs lacked standing to challenge statutes authorizing video gaming machines at Fort Hall Indian Reservation. Even if the statutes were found unconstitutional, the machines would not be removed because the Tribe was immune from suit to remove the machines.

In *Ciszek v. Kootenai Cnty. Bd. of Comm'rs*, 151 Idaho 123, 254 P.3d 24 (2011) (J. Jones, J.), the Court found that property owners suffered particularized harm and that their injury was redressable. The county argued that there was no redressability because even if the Court overturned the zoning that allowed new mining activity, the plaintiffs would still be subject to mining activities on other nearby properties. The Court rejected this argument: "However, the BOCC provides no case law to support the proposition that a person who lives next to a property where mining activity already is taking place has no grounds for complaint where an adjoining property owner seeks to obtain approval for additional mining activity on additional land. Nor does the BOCC show how an increase in mining activity could not create new or heightened injuries that could be remedied in a declaratory judgment action." *Ciszek*, 151 Idaho at 129, 254 P.3d at 30.

In *Tucker v. State*, 162 Idaho 11, 394 P.3d 54 (2017) (Burdick, C.J.), criminal defendants sued various state defendants alleging Idaho's public defense system violated the state and federal constitutions. The Court found they had standing as to the State and the Public Defense Commission. It provided this helpful overview of causation and redressability, emphasizing that it is not necessary to prove redressability with certainty.

> Causation requires the injury to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court."

Tucker, 162 Idaho at 21, 394 P.3d at 64 (emphasis, brackets, and parenthetical are original) (citing *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (Scalia, J.)).

> Standing's redressability element ensures that a court has the ability to order the relief sought, which must create a substantial likelihood of remedying the harms alleged. *See Ciszek v. Kootenai Cnty. Bd. of Comm'rs*, 151 Idaho 123, 129, 254 P.3d 24, 30 (2011); *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982). Redressability requires a showing that "a favorable decision is <u>likely</u> to redress [the] injury, not that a

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[the plaintiff] must show a 'reasonable probability' that the alleged injury is caused by the challenged action." *Bell v. BPA*, 340 F.3d 945, 951 (9th Cir. 2003).

> favorable decision will inevitably redress [the] injury." *Beno v. Shalala*, 30 F.3d 1057, 1065 (9th Cir. 1994). However, it cannot be only speculative that a favorable decision will redress the injury. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.* (TOC), Inc., 528 U.S. 167, 181, 120 S.Ct. 693, 704, 145 L.Ed.2d 610, 627 (2000).
>
> Redressability and causation often overlap. *See, e.g., Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013). The concepts "are distinct insofar as causality examines the connection between the alleged misconduct and injury, whereas redressability analyzes the connection between the alleged injury and requested judicial relief. Redressability does not require certainty, but only a substantial likelihood that the injury will be redressed by a favorable judicial decision." *Id*. (citations omitted).

Tucker, 162 Idaho at 26, 394 P.3d at 69 (emphasis and brackets are original).

In *Employers Resource Management Co. v. Ronk*, 162 Idaho 774, 777, 405 P.3d 33, 36 (2017) (Horton, J.), a company sued the Idaho Department of Commerce challenging a state law that grants tax incentives for companies coming to Idaho. The Idaho Supreme Court found company demonstrated injury in fact (meeting the "competitor standing" test) as well as causation and redressability.

F. Relaxation or waiver of standing (from *Koch* to *Regan*)

As discussed above, Article III standing requirements are merely a "self-imposed constraint" in Idaho. As a consequence, standing constraints may be relaxed or waived altogether when deemed necessary. On several occasions, the Idaho Supreme Court has recognized that it may proceed to the merits, setting aside standing requirements, even where the plaintiff or petitioner plainly lacks Article III standing. This typically occurs in cases presenting important questions of constitutional law.

This began with a relatively narrow exception to restrictions on taxpayer standing. It has evolved to a more broadly articulated waiver of standing requirements where important constitutional questions are presented and no other potential parties have standing to raise them.

The seminal case for relaxation of standing requirements is *Koch v. Canyon Cnty.*, 145 Idaho 158, 177 P.3d 372 (2008) (Eismann, C.J.). *Koch* involved a non-appropriation lease challenged by taxpayers as violating Idaho Const. art. VIII, § 3. Although the Court ultimately found the case moot and did not reach the merits, the Court first established that taxpayers and citizens have standing to challenge alleged

violations of Idaho Const. art. VIII, § 3 notwithstanding the absence of particularized injury that would ordinarily deny them standing.[178]

The Court began by noted the general rule on taxpayer standing:

> As a general rule, a citizen or taxpayer, by reason of that status alone, does not have standing to challenge governmental action. "An interest, as a concerned citizen, in seeing that the government abides by the law does not confer standing."

Koch, 145 Idaho at 160, 177 P.2d at 374 (quoting *Troutner v. Kempthorne*, 142 Idaho 389, 391, 128 P.3d 926, 928 (2006)).

From there, the Court turned to the exceptions:

> In appropriate circumstances, however, taxpayers do have standing to challenge governmental action. . . . A party can also have standing even when the injury is indirect and is shared by a large group.

Koch, 145 Idaho at 161, 177 P.2d at 375.

> Even though standing is jurisdictional and may be raised at any time, including on appeal, *Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 130 P.3d 1138 (2006), this Court has never questioned the standing of a taxpayer to challenge expenditures that allegedly violate Article VIII, § 3.
>
> If this Court were to hold that taxpayers do not have standing to challenge the incurring of indebtedness or liability in violation of that specific constitutional provision, we would, in essence, be deleting that provision from the Constitution. The County acknowledged during oral argument that nobody would have standing. Other than a political subdivision invoking the provision when it does not want to pay for

[178] In a subsequent decision, the Court did reach the merits in a challenge involving this constitutional provision. *Greater Boise Auditorium Dist. v. Frazier* ("*GBAD*"), 159 Idaho 266, 360 P.3d 275 (2015) (W. Jones, J.; Eismann, J., concurring). The decision does not mention standing, presumably because standing to challenge a constitutional violation was established in *Koch*. The Auditorium District's brief acknowledged that the challenger had standing: "*Koch v. Canyon Cnty*., 145 Idaho 158, 177 P.3d 372 (2008) (Eismann, C.J.) also involved a non-appropriation lease, but the Court found the case moot and did not reach the merits. The *Koch* decision, however, established that taxpayers and citizens have standing to challenge alleged violations of Idaho Const. art. VIII, § 3." Appellant's Opening Brief in *GBAD*, 2015 WL 4151671, n.3 at *6.

> what it has received, *e.g., McNutt v. Lemhi Cnty.*, 12 Idaho 63, 84 P. 1054 (1906), there would be nobody who could require that political subdivisions comply with this constitutional provision.

Koch, 145 Idaho at 162, 177 P.2d at 376. Accordingly, the Court "carved out a narrow exception against the general prohibition against taxpayer standing." *Koch*, 145 Idaho at 161, 119 P.2d at 375.[179]

> The United States Supreme Court has held that a taxpayer has standing to challenge a congressional appropriation that violated a specific constitutional limitation upon the congressional taxing and spending power. There is no logical difference between making an appropriation that is specifically prohibited by the Constitution and incurring an indebtedness or liability that is specifically prohibited by the Constitution. We therefore hold that the Plaintiffs, who are electors and taxpayers of the County, have standing to challenge whether the lease agreement violated Article VIII, § 3.

Koch, 145 Idaho at 162-63, 177 P.2d at 376-77.

In *Coeur d'Alene Tribe v. Denney*, 161 Idaho 508, 513, 387 P.3d 761, 766 (2015) (Burdick, J.), the Court moved beyond taxpayer standing and recognized that any standing requirements may be relaxed in the appropriate case. In this case, the Tribe sought a writ of mandamus requiring the Secretary of State to recognize as law a gaming statue that was tardily vetoed by the Governor. The statute effectively eliminated a competitor to the Tribe's gambling operation. The Court found that the Tribe lacked Article III standing because "increased competition alone" (from historical horse-racing gambling machines) is an insufficient to confer standing. The Court nonetheless ruled on the merits of the matter, essentially waiving the standing requirement where relief is sought on a matter of significant constitutional importance and no other party would have standing to bring the claim. The Court said:

> *Beem* [*v. Davis*, 31 Idaho 730, 733, 175 P. 959, 960 (1918)] is consistent with this Court's willingness to relax ordinary standing requirements in other cases where: (1) the matter concerns a significant and distinct constitutional violation, and (2) no party could otherwise have standing to bring a claim. *See Koch*, 145 Idaho at

[179] The *Koch* Court based this exception on federal standing caselaw, citing *Flast v. Cohen*, 392 U.S. 83 (1968) and *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007).

> 162, 177 P.3d at 376; *see also State ex rel. Miller v. State Bd. of Educ.*, 56 Idaho 210, 217, 52 P.2d 141, 143 (1935). For instance, in *Koch*, this Court held that Canyon County taxpayers had standing to litigate whether Canyon County had incurred indebtedness or liability in violation of article VIII, section 3, of the Idaho Constitution. 145 Idaho at 162, 177 P.3d at 376. The Court recognized that if it held otherwise, it would essentially "be deleting that provision from the Constitution" because no party would have standing to enforce it. *Id*.
>
> . . .
>
> The public has a significant interest in the integrity of Idaho's democratic government, and a writ of mandamus is a remedy by which public officials may be held accountable to the citizens for their constitutional duties. If the Tribe does not have standing to bring this writ, the question would then become, who does?

Coeur d'Alene, 161 Idaho at 514, 387 P.3d at 767.

In *Tucker v. State*, 162 Idaho 11, 26, 394 P.3d 54, 69 (2017) (Burdick, C.J.), the Court once again recognized its authority to "relax ordinary standing requirements." In *Tucker*, criminal defendants sued various state defendants alleging Idaho's public defense system violated the state and federal constitutions. The Court found they had standing as to the State and the Public Defense Commission, but nevertheless explored their argument in the alternative they the "relaxed" standing analysis should apply. The Court found that "violations of right to counsel constitute significant and distinct constitutional violations" thus satisfying the first prong of the relaxed standing principle. *Tucker*, 162 Idaho at 26, 394 P.3d at 69. However, the Court found the criminal defendants did not meet the second requirement. In contrast to *Coeur d'Alene Tribe*, "Appellants are not the only ones who could bring this lawsuit. . . . "Because any one of those thousands of indigent defendants could bring this lawsuit." *Tucker*, 162 Idaho at 26-26, 394 P.3d at 69-70 (internal quotation marks omitted).[180]

In *Regan v. Denney*, ___ Idaho ___, ___ P.3d ___ (2019) (Burdick, C.J.), the Court, took a more direct approach. (This case involved a constitutional challenge to voter-approved initiative to expand the availability of Medicaid.) Rather than

[180] In addition to addressing the relaxation of standing requirements, the *Tucker* Court joined a number of sister states in carving out a waiver of sovereign immunity in constitutional challenges. The underlying reasoning is much the same: "Were we to accept Respondents' position that sovereign immunity shields the State from suit in this instance, we would leave parties unable to vindicate constitutional rights against the State. This we decline to do." *Tucker*, 162 Idaho at 18, 394 P.3d at 61.

lowering the bar for standing, the *Regan* Court waived the requirement outright, noting the urgency of the constitutional question. Citing *Koch* and *Coeur d'Alene*, the Court declared:

> However, even though Regan cannot demonstrate a distinct palpable injury sufficient to confer standing, due to the urgent nature of the alleged constitutional violations, we will relax the traditional standing requirements and consider Regan's petition.

Regan, ___ Idaho at ___, ___ P.3d at ___.

G. Legislative control over standing

Although the law of standing is rooted in the Constitution, the U.S. Supreme Court has recognized that Congress may affect through legislation the question of who has standing, at least to some extent. "Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions, or to entertain 'friendly' suits, or to resolve 'political questions,' because suits of this character are inconsistent with the judicial function under Art. III. But where a dispute is otherwise justiciable, the question of whether the litigant is a 'proper party to request an adjudication of a particular issue is one within the power of Congress to determine." *Sierra Club v. Morton*, 405 U.S. 727 (1972) (citations omitted). More recently, the Court has recognized that legislative bodies have the power to waive the non-constitutional, prudential tests for standing, as Congress did under the Endangered Species Act. *Bennett v. Spear*, 520 U.S. 154 (1997) (Scalia, J.). "Congress has the authority to waive application of these prudential requirements, even though it may not waive any of the constitutional standing requirements." Daniel R. Mandelker, *NEPA Law and Litigation*, § 4:9 (2009).

Justice Kennedy has noted in two concurrences that Congress, to some extent, can create standing: "In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Lujan v. Defenders of Wildlife* ("*Lujan II*"), 504 U.S. 555, 560 (1992) (Scalia, J.) (citations omitted) (this section referenced in *Earth Island Institute*, 129 S. Ct. 1142, 1153 (2009)). This is consistent with the Court's teaching in the seminal standing case, *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (Powell, J.) ("Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains . . . .").

The law on standing in Idaho is firmly rooted in the constitutional judicial power, and it is the Constitution that ultimately sets its bounds. "[T]he legislature

cannot, by statute, relieve a party from meeting the fundamental constitutional requirements for standing." *Evans v. Teton Cnty.*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003) (Kidwell, J.).[181] Thus, the Idaho courts treat the issue of standing as one of constitutional law, even though the Idaho Constitution does not, in its own words, limit courts to hearing cases and controversies, as does the federal Constitution.[182]

The Idaho Supreme Court's statement in *Evans* that the law of standing is based on the Constitution should not be understood to take away all power of the legislature to control standing. Indeed, two earlier decisions of the Idaho Court of Appeals held that a statute could remove some barriers to standing. See discussion of the *Fox I* and *Fox II* in section 18.E(1)(a)(ii) at page 204 ("Taxpayers and Ratepayers"). The *Evans* decision, however, does not mention *Fox I* or *Fox II*.

H. Standing under Idaho statutes

In *Ashton Urban Renewal Agency v. Ashton Memorial, Inc.*, 155 Idaho 309, 311, 311 P.3d 730, 732 (2013) (Burdick, C.J.), Fremont granted a hospital a significant tax exemption, the result of which was to significantly reduce tax revenue shared with the urban renewal agency. The agency challenged the exemption. The hospital challenged the agency's standing under the statute authorizing tax appeals. This was <u>not</u> a constitutional standing case. Rather, the case dealt with "standing under a statute." Specifically, it addressed whether the urban renewal agency was a "person aggrieved" in the context of Idaho Code § 63-511 (authorizing appeals to the Idaho Board of Tax Appeals). The hospital (whose tax exemption was challenged by the urban renewal agency) contended that the agency had no property interest in the taxes it would have received but for the exemption, and, hence, was not a "person aggrieved." The Court rejected that argument. It found that it was sufficient for the agency to show that it had a "pecuniary interest" (not a property interest) in the lost tax revenues.

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[181] Speaking of federal standing law, the U.S. Supreme Court has declared that the prudential standards may be changed by Congress, "unlike their constitutional counterparts [which cannot] be modified or abrogated by Congress." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (Scalia, J.). This echoes the same statement made in the seminal zone of interests test. "Congress can, of course, resolve the question [of prudential standing] one way or the other, save as the requirements of Article III dictate otherwise. *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970) (quoted in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 394 n.7 (1987)).

[182] In *Thomson v. City of Lewiston*, 137 Idaho 473, 478, 50 P.3d 488, 493 (2002), one of the parties argued that the law of standing had been altered by a particular statute. The Court found that the statute in question did not alter the law of standing—which the court referred to as "common law." The Court did not address whether the Legislature has the power to relax or eliminate the law of standing (though its discussion of the legislation seems to assume such power). Such an implication, however, is plainly at odds with the court's plain holding to the contrary in *Evans v. Teton Cnty.*

By the way, this case has nothing whatsoever to do with organizational standing. It does not address the question of whether an organization (which does not have a pecuniary interest) may bring a tax appeal on behalf of its members (who do have a pecuniary interest).

I. The Uniform Declaratory Judgment Act does not confer standing

The Uniform Declaratory Judgment Act, Idaho Code §§ 10-1201 to 10-1217, authorizes persons to seek declaratory relief. The Act provides authority for courts of record to declare rights, status and other legal relations. Idaho Code § 10-1201. Another section provides:

> Any person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Idaho Code § 12-1202.

Note that the term "person" is broadly defined in Idaho Code § 10-1213 to include "municipal or other corporation of any character whatsoever." Curiously, that definition does not include the state for federal government.

"[T]he Declaratory Judgment Act does not relieve a party from showing that it has standing to bring the action in the first instance." *Martin v. Camas Cnty. ex rel. Bd. of Comm'rs.*, 150 Idaho 508, 512-13, 248 P.3d 1243, 1247-48 (2011) (Burdick, J.) (quoting *Schneider v. Howe*, 142 Idaho 767, 772, 133 P.3d 1232, 1237 (2006)).

> Idaho courts are empowered to declare the rights, status and legal relations of persons affected by municipal ordinances. I.C. §§ 10–1201 & 1202. However, a court's power to make such determinations "does not relieve a party from showing that it has standing to bring the action in the first instance." *Schneider v. Howe*, 142 Idaho 767, 772, 133 P.3d 1232, 1237 (2006). "In order to satisfy the requirement of standing, the petitioners must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Id.* (internal quotation

omitted). A plaintiff can also meet this showing when a threatened or past harm is the basis of the injury. *Id*.

Ciszek v. Kootenai Cnty. Bd. of Comm'rs, 254 P.3d 24, 29, 151 Idaho 123, 128 (2011) (J. Jones, J.).

J. Standing under LLUPA, the IAPA, and other state statutes

The law of standing has also been codified, to some extent, in both the Idaho Administrative Procedure Act ("IAPA"), Idaho Code §§ 67-5201 to 67-5292, and the Local Land Use Planning Act ("LLUPA"), Idaho Code §§ 67-6501 to 67-6538. (See discussion of the Legislature's authority to do so in section 18.G at page 232.)

The IAPA provides that a "person aggrieved by final agency action . . . is entitled to judicial review . . . ." Idaho Code § 67-5270(2). The IAPA also provides that a "party aggrieved by final order . . . is entitled to judicial review . . . ." Idaho Code § 67-5270(3). This limitation to persons "aggrieved" appears to be little more than a legislative recognition of the law of standing.

LLUPA also provides a broad, but not unlimited, definition of who has standing. Under LLUPA, only an "affected person" may bring an appeal of a planning or zoning matter. Idaho Code § 67-6521(1)(d). An affected person is defined as "one having a bona fide interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development." Idaho Code § 67-6521(1)(a).

In sum, both LLUPA and the IAPA seem to embody the basic concepts of standing: Anyone who has a real stake in the decision may bring a challenge; it is insufficient that a person simply "believe" that a zoning decision is wrong, no matter how strongly that view is held. The only apparent departure from the traditional law of standing is the requirement under LLUPA that the challenger have an interest in real property (which presumably includes a tenancy). No appellate cases have explored the authority of the Legislature to impose this additional hurdle on litigants.[183]

Other provisions of the IAPA and LLUPA reinforce the idea that courts should not entertain appeals based on mere trifles. The IAPA states: "[A]gency action shall be affirmed unless substantial rights of the appellant have been prejudiced." Idaho Code § 67-5279(4). In a similar vein, LLUPA provides: "Only those whose challenge to a decision demonstrates actual harm or violation of fundamental rights, not the mere possibility thereof, shall be entitled to a remedy or

[183] In *Johnson v. Blaine Cnty.,* 2009 WL 540695 (2009), the court found that an adjacent landowner was an "affected person" within the meaning of the Act. The Court did not have occasion to address the question of whether the legislature has the power to restrict judicial review to landowners.

reversal of a decision." Idaho Code § 67-6535(3). See discussion in section 24.I(8)(b) at page 359.

LLUPA, however, appears to go beyond the law of constitutional standing by requiring that a challenger have an interest in real property that may be adversely affected by the land use decision. Idaho Code § 67-6521(1)(a). Thus, there is an argument that a non-property holder whose only interest in the land use decision is its impact on public recreational or environmental values would lack standing under the statute. While the Idaho Supreme Court held in *Evans* that the Legislature may not remove constitutional barriers to courts, perhaps it has the authority to add additional standing hurdles—as it apparently has done in LLUPA. To our knowledge, no Idaho court has been called upon to explore this question.

The CAFO statute (which is part of LLUPA) establishes an even stricter standing requirement. It provides: "Only members of the public with their primary residence within a one (1) mile radius of a proposed site may provide comment at a hearing. However, this distance may be increased by the board." Idaho Code § 67-6529(2). This provision has been upheld by at least one district court, but it has not yet been evaluated in a reported appellate decision.

In *City of Ririe v. Gilgen*, 170 Idaho 619, 515 P.3d 255 (2022) (Bevan, C.J.), the Court held that the city did not have standing under LLUPA (i.e., it did not fall within the meaning of and "affected person") to challenge a decision by Jefferson County granting a conditional use permit for a mobile home to a private landowner. The subject property fell within the city's area of city impact.

> However, LLUPA only provides for judicial review of the approval or denial of a land use application by an affected person aggrieved by a final decision. I.C. § 67-6521(1)(d). . . .
>
> . . .
>
> . . . LLUPA limits judicial review to "affected person[s]." I.C. § 67-6521(1)(d). LLUPA defines an affected person as "one having a bona fide interest in real property" which could be adversely impacted by a land-use decision. I.C. § 67-6521(1)(a); *see also* I.R.C.P. 84(a)(3)(D) (a "petitioner" must be a "person."). . . .
>
> . . .
>
> . . . We agree that cities can be significantly affected by what happens in an AOI. But that concern alone does not transform the City into an "affected person" for purposes of LLUPA. . . .
>
> . . . This Court has previously concluded "[a] city's exercise of jurisdiction in an impact area lying

> beyond a city's limits is inconsistent with the constitutional limitations placed on a city's powers by Article XII, § 2 of the Idaho Constitution." *Reardon v. City of Burley*, 140 Idaho 115, 119, 90 P.3d 340, 344 (2004), *overruled on other grounds by City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012); *see also Blaha v. Bd. of Ada County Comm'rs*, 134 Idaho 770, 777, 9 P.3d 1236, 1243 (2000); *Boise City v. Blaser*, 98 Idaho 789, 791, 572 P.2d 892, 894 (1977).
>
> A logical extension of these principles is that a city cannot have "a bona fide interest in real property" outside of its city limits because that is by definition property over which it has no jurisdiction.

Ririe, 170 Idaho at 626, 515 P.3d at 262 (emphasis original).

K. Standing in allegedly illegal fee and tax cases falls on those who bear the "incidence" of the fee or tax.

When an allegedly illegal fee or tax is paid, the payer often passes along the cost to the purchaser of the home or product. This raises the question, who has standing to challenge the fee or tax?

As Justice Jim Jones noted in his concurrence in *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 87, 343 P.3d 1086, 1094 (2015) (Eismann, J.; J. Jones, concurring), Idaho case law establishes that the "party must show that it bears the incidence of the tax in order to have standing." Intuitively, one would think that if a tax or fee is passed on to the purchaser through in increase in the sale price, the purchaser bears the "incidence" of the tax. That intuition logical, but it does not correspond to the law.

Barring a statute that says otherwise, the person or entity that initially paid the fee or tax has standing. It makes no difference that the burden of the fee or tax was shifted to someone else.

In *V-1 Oil Co. v. State Tax Comm'n*, 98 Idaho 140, 559 P.2d 756 (Bakes, J.), the Idaho Supreme Court found that only a gasoline wholesale dealer who paid an excise tax has standing to challenge the tax, notwithstanding the fact that the tax is passed onto the retail dealer who, in turn, passes it along to the consumer. The same result obtained in *Ameritel Inns, Inc. v . Greater Boise Auditorium District*, 141 Idaho 849, 119 P.3d 624 (2005) (Eismann, J.), in which hotel operators who paid a tax had standing to challenge it, not the guests who ultimately paid a higher hotel room charge. Another Idaho Supreme Court reaching the same decision is *Gallagher v. State*, 141 Idaho 665, 115 P.3d 756 (2005) (Burdick, J.) ,in which the plaintiff who purchased cigarettes challenged a cigarette tax paid by the wholesaler. The plaintiff

urged the Court to reconsider its prior rulings, but the *Gallagher* Court declined to do so. It concluded: "Individuals who are legislatively required to pay the tax (bearing the incident of tax) have standing. Even if the tax is passed on to another consumer (bearing the economic burden of the tax) those consumers lack standing." *Gallagher*, 141 at 668, 115 P.3d at 759.

These cases deal with taxes, not fees. But the authors are aware of no reason or precedent suggesting the same analysis would not apply to an illegal fee. Indeed, fees are often challenged as disguised taxes.

The result would be different if (1) there were a statute providing that the fee/tax payer must pass the fee/tax along to the purchaser or (2) a statute expressly authorizes refunds to the purchaser or current owner.

For example, there is a provision in the Idaho Development Impact Fee Act ("IDIFA"), Idaho Code 67-8211, authorizing refunds to the current landowner for certain IDIFA impact fees. But that provision would only apply to impact fees imposed pursuant to IDIFA.

Although standing to seek a refund is limited as described above, standing is broader with respect to those who may seek declaratory relief (seeking prospective relief to declare a statute or ordinance unlawful). The *V-1* case expressly provides that even if a plaintiff is not entitled to a refund, it may still have standing to seek a declaratory judgment.

The issue of who bears the ultimate burden of an allegedly illegal fee or tax may also be raised in contexts other than standing. For example, a municipality could raise an equitable defense noting that the payers of an allegedly unlawful building permit subsequently sold the properties and transferred the cost of the fees to the purchasers. Thus, if the fee payers were to be paid damages, they would be paid twice. And the homeowners would have to pay twice—once when they bought the property and again through higher taxes to satisfy the judgment. This may or may not be a meritorious defense, but it is not a standing defense and is thus permissible to make.

L. Associational standing (aka organizational standing)

(1) Federal law

A separate body of law governs the right of associations or organizations to litigate, either on behalf of their members or in their own right. This is referred to associational or organizational standing. We employ the latter term, as it seems more straightforward.

The seminal federal case on organizational standing is *Warth v. Seldin*, 422 U.S. 490 (1975) (Powell, J.).

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members. . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Warth at 511 (citations omitted).

Warth was followed by another important organizational standing case, *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). *Hunt* established a three-part test in which organizational standing may be established if "(a) [one or more of the organization's] members would otherwise have standing to sue in their own right; (b) the interests [the organization] seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

The three-part test first articulated in Idaho by *Hunt* was repeated more recently by the United States Supreme Court. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 181 (2000).

In *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996), the Supreme Court ruled that, while the first two parts of the *Hunt* test of organizational standing are constitutionally based, the third part is prudential and may be eliminated by statute, as it was here in a statute allowing unions to sue for damages on behalf of their members.

The third requirement under *Hunt* (no need for participation by individual members) means that associations typically may not obtain standing in damage cases. This is because damages are tailored to the individual. Thus, associational standing is generally limited to forward-looking claims seeking declaratory or injunctive relief.

A note in the *Virginia Law Review* provided this helpful commentary on the third test:

> The third prong of the *Hunt* test is often the most substantial barrier to associational standing. Under this prong, "neither the claim asserted nor the relief requested [can] require[] the participation of individual members in the lawsuit." . . .
>
> But such participation is often required when the relief requested is in the form of damages. Indeed, the nature of the relief requested is an important factor in determining whether associational standing is appropriate. As the *Warth* Court stated:
>
> > If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.
>
> *[Warth v. Seldin*, 422 U.S. 490, 515 (1975).]
>
> The Court then distinguished instances in which an association seeks damages: "[W]hatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof." [*Warth*, 422 U.S. at 515-16.] Because "damages claims usually require significant individual participation, which fatally undercuts a request for associational standing," as a practical matter, the third prong of the Hunt test has largely limited associational standing to claims for prospective relief. [*Pa. Psychiatric Soc'y v. Green Spring Health Serv., Inc.*, 280 F.3d 278, 284 (3d Cir. 2002).] Indeed, a number of courts have noted that no federal court has held that an association has standing to pursue damages claims on behalf of its members.

Christopher J. Roche, Note, *A Litigation Association Model to Aggregate Mass Tort Claims for Adjudication*, 91 Va. L. Rev. 1463, 1498-99 (2005) (footnote citations provided in brackets; other footnotes omitted; other brackets original).[184]

(2) Associational standing in Idaho

The seminal organizational standing case in Idaho is *Glengary-Gamlin Protective Ass'n, Inc. v. Bird*, 106 Idaho 84, 675 P.2d 344 (Ct. App. 1983) (Burnett, J.), in which the Court concluded that a citizens group had standing to oppose a conditional use permit for an air strip. In reaching its decision, the Idaho Court of Appeals relied primarily on the federal law of organizational standing.

> Our research has not disclosed a previously reported Idaho decision enumerating the elements of organizational standing. However, this task has been undertaken repeatedly during the past decade by the United States Supreme Court. Although some elements of standing in the federal system are colored by the peculiar requirements of a 'case' or 'controversy' under the federal constitution, nevertheless, the Supreme Court's analyses of organizational standing are instructive here."

Glengary, 106 Idaho at 87, 675 P.2d at 347. The Idaho court summarized and adopted the federal law of organizational standing, quoting from the three-part test set out in *Hunt*. *Glengary*, 106 Idaho at 87-88, 675 P.2d at 347-48 (quoting *Hunt* at 343).

The Idaho Supreme Court has continued to apply *Glengary* as the basis of organizational standing analysis.[185]

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[184] See also, Wright, Miller, Cooper, Freer, Steinman, Struve & Amar, 13A Federal Practice and Procedure, Jurisdiction § 3531.9.5 (3d ed. 2012) ("Organizational standing is particularly apt to be denied if damages are requested.")

[185] "In Idaho, the elements of associational standing are derived from the United States Supreme Court's analysis of this issue. *Bear Lake Educ. Ass'n v. Belnap*, 116 Idaho 443, 448, 776 P.2d 452, 457 (1989) (Huntley, J.) (citing *Glengary*). "The rule in Idaho, mirroring that laid down by the United States Supreme Court, is that an association may have standing to seek judicial relief not only to protect its own interests, but also those of its members." *Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 603, 130 P.3d 1138, 1141 (2006) (Burdick, J.) (with citations to *Bear Lake*, *Warth*, and *Hunt*). Both *Glengary* and *Bear Lake* are cited with approval in *Selkirk-Priest Basin Ass'n v. State, ex rel. Andrus* ("*Selkirk I*"), 127 Idaho 239, 241, 899 P.2d 949, 951 (1995) (McDevitt, C.J.) (environmental group lacked standing to challenge land board's decision to sell timber). *See also*, *Selkirk-Priest Basin Ass'n v. State, ex rel. Batt* ("*Selkirk II*"), 128 Idaho 831, 919 P.2d 1032 (1996) Silak, J.), dealing with another timber sale; this was an organizational standing

In *Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 603, 130 P.3d 1138, 1141 (2006) (Burdick, J.), the Idaho Supreme Court grappled with the third prong of the *Hunt* test. The *Beach Lateral* Court found that associations seeking only prospective relief (declaratory or injunctive relief) generally have little difficulty with the third prong, but that to quiet title it is necessary to have the affected individual members of the association as parties.

> When an association seeks some form of prospective relief, such as a declaration or an injunction, its benefits will likely be shared by the association's members without any need for individualized findings of injury that would require the direct participation of its members as named parties. . . .
>
> . . .
>
> The third element, that "neither the claim asserted, nor the relief requested, require the participation of individual members in the lawsuit," presents a greater difficulty. Although the Association avoided making any claim for damages, it did not restrict itself to a request for injunctive relief. . . . [T]he Association requested and received not only injunctive relief but also an order quieting title in the easement to the Association itself.
>
> . . . Because under these facts the Association's request to quiet title required the participation of the its individual members, the Association's request is unable to satisfy the third factor of the Hunt test and the Association lacked standing to bring that claim. The portion of the district court's ruling that quieted title in the ditch easement to the Association itself is consequently reversed.

Beach Lateral, 142 Idaho at 604, 130 P.3d at 1143.

It bears emphasis that the problem in *Beach Lateral* was that the association sought to quiet title in its own members. Perhaps, for example, an association would have standing to quiet title in one party (*e.g.*, the government) versus another party (*e.g.*, a mining company). So long as the government and the mining company were litigants, it would seem there would be no need for the association's members to be parties.

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case, too. However, it did not focus so much on the organization's standing as the lack of particularized injury of its individual members.

M. Standing may not be based on speculation

The Court has declared that anticipated harm (as opposed to harm that has already occurred) may be sufficient to confer standing. "The existence of real or potential harm is sufficient to challenge a land use decision." *Evans v. Teton Cnty.*, 139 Idaho 71, 76, 73 P.3d 84, 89 (2003) (Kidwell, J.). "We recognize that standing may be predicated not only upon a past injury but also upon a threatened harm." *Student Loan Fund of Idaho, Inc. v. Payette Cnty.*, 125 Idaho 824, 827, 875 P.2d 236, 239 (Ct. App. 1994).

However, this does not throw the courthouse doors open to litigate any harm one can conjure up. A purely speculative injury is insufficient to confer standing. As both the U.S. Supreme Court and the Idaho Supreme Court have said, the harm may be "actual or imminent, [but] not conjectural." *Lujan v. Defenders of Wildlife* ("*Lujan II*"), 504 U.S. 555, 560 (1992) (Scalia, J.). "Abstract injury is not enough. . . . [S]peculation is insufficient to establish the existence of a present, live controversy." *Los Angeles v. Lyons*, 461 U.S. 95, 101, 105 (1983) (no standing where injury was based on assumption that law would be violated). As the U.S. Supreme Court said over twenty years ago, "It is the reality of the threat . . . that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." *Lyons*, 461 U.S. at 107 n.8 (fear that police will break the law is insufficient to confer standing absent evidence that this may actually occur). Likewise, "mere 'general averments' and 'conclusory allegations'" were found inadequate to support standing in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 184 (2000) (citizens had standing to enforce Clean Water Act upon showing that one of them lived half mile from facility and had used river now being polluted by defendant).

In *Boundary Backpackers v. Boundary Cnty.*, 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996) (Johnson, J.), various environmental groups and individuals sued the county challenging an ordinance that purported to extent control over public lands by requiring federal agencies to comply with a county land use policy. The Court rejected standing by all twenty-one of the plaintiffs save one, a professional guide who asserted that the challenged county ordinance would deprive him of access to a substantial portion of the open space he used for his guiding business. The Court found that his opinion to this effect qualified as an expert opinion, "and, therefore, does not constitute speculation." *Boundary Backpackers*, 128 Idaho at 375, 913 P.2d at 1145.[186] The Court also ruled that the matter was ripe for judicial review, despite the fact that the ordinance had not yet been applied. The Court went on to invalidate the county ordinance on the basis of federal preemption.

[186] The case contains a strong dissent by Justice Schroeder who described the plaintiff's statement as a non sequitur that was hardly strengthened by being labeled an expert opinion. *Boundary Backpackers*, 128 Idaho at 381, 913 P.2d at 1151.

In contrast, where the impact is real and immediate, the courts have readily found standing. For instance, in *Glengary-Gamlin Protective Ass'n v. Bonner Cnty. Bd. of Comm'rs,* 106 Idaho 84, 88-89, 675 P.2d 344, 348-49 (Ct. App. 1983) (Burnett, J.), landowners whose airspace would be physically invaded by low-flying aircraft from a proposed commercial air base were found to have standing.

The Court's decision in *Davisco Foods Int'l, Inc. v. Gooding Cnty.,* 141 Idaho 784, 118 P.3d 116 (2005) (Schroeder, C.J.), casts some doubt on its commitment to principles of non-speculation. As noted above, however, that case did not deal with judicial standing. If the *Davisco* case is followed in the judicial standing context, it will erase traditional standing limitations. As the dissent noted: "In the judicial standing context, the court has indicated that the degree of likelihood of harm is a relevant factor in deciding whether a person 'may be adversely affected.'" *Davisco*, 141 Idaho at 793, 118 P.3d at 125. In *Davisco*, the record was undisputed: there was no possibility that the proposed facility would cause odors three and a half miles away, absent a complete breakdown both technology and in county and state odor enforcement. The majority nonetheless upheld the county's determination that odors could be detected under remote circumstances. That was sufficient to confer standing under the applicable county ordinance.

In *Noh v. Cenarrusa*, 137 Idaho 798, 53 P.3d 1217 (2002), the Court ruled that four petitioners lacked standing to challenge Indian Gaming Initiative, a voter referendum that would facilitate gambling on Indian reservations. The petitioners described various types of injury that would result if the initiative passed, ranging from increased bad checks to decline in moral values. The Court disposed of these alleged injuries noting: "The Petitioners have not alleged an injury in fact at this point. Proposition One may not pass. Any injury suffered is speculative. At this time it is not possible to determine the accuracy of the alleged future injuries. Under traditional standards for determining standing, the petitioners do not have standing." *Noh*, 137 Idaho at 800, 53 P.3d at 1219.

N. Justiciability

Our Supreme Court has stated on more than one occasion: "The doctrine of standing is a subcategory of justiciability." *Young v. City of Ketchum*, 44 P.3d 1157, 1159 (Idaho 2002) (citing *Miles v. Idaho Power Co*., 778 P.2d 757, 761 (Idaho 1989) (Johnson, J.). In *State v. Rhoades*, 820 P.2d 665 (Idaho 1991), the Court stated, "Justiciability is a question of the jurisdiction of the court over the matter at issue. It is axiomatic that a lack of jurisdiction may not be cured by means of stipulation or waiver by the parties." *Rhoades* at 672. Taken together, *Young*, *Miles* and *Rhoades* necessarily imply that a standing argument cannot be waived. Thus, in Idaho, a standing argument or objection may be raised at <u>any</u> stage in the proceedings. That is, it is not necessary to raise the issue before the agency whose action is being challenged.

O. Zoning ordinances

Finally, litigants should pay attention to the local land use ordinances pursuant to which they seek review. These ordinances vary greatly. Some of them, however, speak directly or by implication to the issue of standing.

P. Standing of agency employee to bring appeal

In *Cnty. of Ada v. Henry*, 105 Idaho 263, 267, 668 P.2d 994, 998 (1983), a landowner challenged the right of a member of the zoning staff to file an appeal of a P&Z determination to the county commission. The dissent referred to the person as "a disgruntled employee of the planning and zoning commission" who "snatched away" the landowner's permit. *Henry*, 105 Idaho at 268, 668 P.2d at 999. For procedural reasons, the Court did not rule on the issue. However, the Court noted "the potentially serious policy problems inherent in such a purported party's being permitted to file an appeal." *Id.*

Q. Standing of the prosecutor or attorney general to bring or defend actions on behalf of the people

In *State v. Fox*, 100 Idaho 140, 594 P.2d 1093 (1979), the Idaho Supreme Court found that a county prosecutor had standing to bring an action on behalf of the people of the State of Idaho to establish public rights in privately owned beachfront property on Lake Coeur d'Alene. The Court said that Idaho Code § 31-2604(1) (providing for the duties of the prosecuting attorney) constituted a "legislative grant of authority to the prosecuting attorney to prosecute actions in which the 'people are interested.'" *Fox*, 100 Idaho at 143, 594 P.2d at 1096. In so ruling, the Court distinguished the narrower grant of authority to the Attorney General in Idaho Code § 67-1401(1), which only authorizes the Attorney General to bring or defend actions on behalf of the State (or other entities) in their official capacity. This statute has since been amended, but not in a way that appears to change that result.

R. Standing to attack contract

In *Bentel v. Cnty. of Bannock*, 104 Idaho 130, 135-36, 656 P.2d 1383, 1388-89 (1983), the Court found that private landowners had no standing to challenge as ultra vires a contract entered into between a city and a county. "[P]laintiffs have not satisfactorily established a standing to assert the invalidity of the contract entered into by the City of Pocatello and thereby to mount what is essentially an indirect attack on the County's grant to the City of the right to construct the underground pipeline in the easement area . . . ." *Bentel*, 104 Idaho at 136, 656 P.2d at 1389.

S. Prudential standing

(1) Origins and basis of the zone of interests test

Note: Idaho courts apparently have not embraced the zone of interests test (discussed below). The only Idaho case to address the zone of interests test is *Idaho Branch Inc. of Associated Contractors of America, Inc. v. Nampa Highway Dist. No. 1*, 123 Idaho 237, 242, 846 P.2d 239, 244 (Idaho App. 1993) (Swanstrom, J.), in which the Court of Appeals concluded that the Idaho Supreme Court has not adopted that prudential test.

In addition to the constitutional limitations undergirding the law of standing, federal courts have imposed their own "prudential" limits on which parties should have access to the courts. Although there are other prudential rules, the one that receives the most attention is the so-called "zone of interests" test.[187] As noted above, however, the Idaho courts have not embraced the zone of interests test (see section 18.B at page 196).

The seminal zone of interests case is *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). In this case, a data processing trade group challenged a ruling by the Comptroller of the Currency allowing banks to provide data processing services to other banks and to their customers. The Court began by noting that the data processing companies were plainly "injured" economically by the rule allowing greater competition, thus passing the constitutional standing test of injury in fact. The Court went on, however, to say that the litigant must establish not only constitutional "injury in fact" standing, but must establish "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing*, 397 U.S. at 153. In this case, the Court created a new test, but found that the plaintiffs passed the test, because the banking statutes were aimed, at least in part, at protecting others from competition by banks. This conclusion was based, very simply, on the Court's reference to section 4 of the relevant statute, which provided: "No bank service corporation may engage in any activity other than the performance of bank services for banks." *Data Processing*, 397 U.S. at 155. The Court stated that it was unnecessary to probe the exact purpose

[187] "Supplementing these constitutional requirements, the prudential doctrine of standing has come to encompass 'several judicially self-imposed limits on the exercise of federal jurisdiction.' See *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324, 82 L.Ed.2d 556 (1984); see also *Flast v. Cohen*, 392 U.S. 83, 97, 88 S. Ct. 1942, 1951, 20 L.Ed.2d 947 (1968)." *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 552 (1996). *Local Food* dealt with the third prong of the test for organizational standing, which it found was prudential and therefore could be eliminated by Congress. See discussion of organizational standing in section 18.L at page 238.

and meaning of this statutory provision, because that goes to the merits. Instead, the Court concluded, "We do not put the issue in those words, for they implicate the merits. We do think, however, that § 4 arguably brings a competitor within the zone of interests protected by it." *Data Processing*, 397 U.S. at 156.

Note that the Court's ruling did not come in the form of greater restriction on access to the courts, but, rather, as a rejection of earlier restrictions that demanded that the plaintiff demonstrate the invasion of a "legal right."[188] *Data Processing*, 397 at 829-30. Although the Court replaced the "legal right" test with a new "zone of interests" test for litigants, the Court emphasized that the new test was not a high hurdle. "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action." *Data Processing*, 397 U.S. at 154. Noting the "generous review provisions" of the APA, the Court observed that "we have construed that Act not grudgingly but as serving a broadly remedial purpose." *Data Processing*, 397 U.S. at 156. It is ironic that the zone of interest test has been used by subsequent lower courts to re-impose the very bar to suits by business competitors in NEPA cases that *Data Processing* eliminated in the context of banking regulation. (*E.g.*, *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934 (9th Cir. 2005), discussed below.)

In 1987, the Supreme Court carefully reviewed the holding in *Data Processing*, concluding:

> In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

Clarke v. Securities Industry Ass'n, 479 U.S. 388, 399-400 (1987) (emphasis supplied) (holding securities brokers had standing to challenge ruling allowing banks

[188] The *Data Processing* Court attributed the "legal right" test to cases such as *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939), which disallowed competing power producers from challenging the TVA. This was an arcane standing case which found business competitors of an allegedly illegal and unconstitutional government-created corporation may suffer economic, but the harm is "damnum absque injuria" (or loss without injury). Although the *Tennessee Electric* case employed the term "standing" in discussing the legal right test, this was not standing in the modern sense of the word. The *Data Processing* Court swept away this arcane analysis and placed standing in the modern context of Article III plus a prudential zone-of-interests test.

to establish discount brokerages). The *Clarke* Court continued: "The Court approved the 'trend . . . toward [the] enlargement of the class of people who may protest administrative action." *Clarke*, 479 U.S. at 397. *Clarke* also noted that the evaluation of the "relevant statute" should occur "broadly"—observing that in *Data Processing* the zone of interests into which plaintiffs fell was not apparent on the face of the statute under which they sued, but was found only in legislative history to a different and subsequent statute. *Clarke*, 479 U.S. 378-879.[189]

If the zone of interests test is not especially demanding, who was it intended to exclude? Alas, as the Supreme Court has noted, "The 'zone of interest" formula in *Data Processing* has not proved self-explanatory." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 396 (1987). In *Clarke*, said, "The Court struck a balance in a manner favoring review, but excluding those would-be plaintiffs not even 'arguably within the zone of interests to be protected or regulated by the statute." *Clarke*, 479 U.S. at 397.

Lujan I provides this helpful hypothetical. "Thus, for example, the failure of an agency to comply with a statutory provision requiring 'on the record' hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be 'adversely affected within the meaning' of the statute." *Lujan I*, 497 U.S. 871, 883 (1990).

Where the plaintiff alleges violation of a federal statute that does not provide a private cause of action,[190] he or she may rely instead on the federal Administrative Procedure Act ("APA"), which provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (Section 10 the APA).[191]

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[189] The Ninth Circuit, too, has noted how low this standard is: "[The plaintiff] need only show that its interests share a 'plausible relationship' to the policies underlying each statute. Prudential standing is satisfied unless [the plaintiff's] 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 861 (2005) (holding that an environmental group easily met this test) (quoting *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987).

[190] Neither NEPA nor the National Forest Management Act ("NFMA") contain their own provisions for judicial review. See discussion under "private right of action" in section 13 at page 157.

[191] Nearly all of the zone of interests cases discuss this prudential standard in the context of the second half of section 702 ("adversely affected or aggrieved"). In *Kingman Reef Atoll Investments*, L.L.C. v. U.S. DOI, 195 F. Supp. 2d 1178, 1183-85 (D. Hawaii 2002), the district court concluded that the zone of interests test is equally applicable if the plaintiff premises its case under

This APA provision, however, simply loops back to the "relevant statute" (*e.g.*, NEPA) for purposes of the zone of interests analysis. "Rather, we have said that to be 'adversely affected or aggrieved . . . within the meaning' of a statute, the plaintiff must establish that the injury he complains of (his aggrievement, or the adverse effect upon him) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan I*, 497 U.S. 871, 883 (1990).

The Ninth Circuit explained it this way:

> Because NEPA does not provide for a private right of action, plaintiffs challenging an agency action based on NEPA must do so under the Administrative Procedure Act ("APA"). To meet the statutory requirements for standing under the APA, a plaintiff must establish (1) that there has been a final agency action adversely affecting it, and (2) that, as a result, it suffers legal wrong or that its injury falls within the zone of interests of the statutory provision the plaintiff claims was violated.

Nuclear Information and Resource Service v. NRC, 457 F.3d 941, 949-50 (9th Cir. 2006) (citations and internal quotation marks and brackets omitted).

At the end of the day, "the question [is] whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

There is considerable federal case law on the question of whether commercial interests have standing under the zone of interests test to challenge federal actions alleged to violate the National Environmental Policy Act ("NEPA") and/or the Endangered Species Act ("ESA"). Obviously, this line of cases is not relevant to matters litigated in Idaho under LLUPA. This discussion is included here, however, because development projects occasionally encounter these federal statutes.

(2) The zone of interests test in NEPA and ESA cases

Note: The materials in this section have been complied in connection with litigation now underway and on appeal to the Ninth Circuit. We include them in this handbook in the hope that these authorities cited may be of use to the reader. The reader is cautioned, however, that the commentary

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the first prong of section 702 ("legal wrong"—that is, where its legal interests are the direct object of the government action).

reflects the authors' viewpoint and advocacy on an issue that remains in very much in contention.

There is a long line of Ninth Circuit cases limiting access to courts by commercial clients challenging NEPA violations. It began with *Port of Astoria v. Hodel*, 595 F.2d 467, 475 (9th Cir. 1979), in which the Port sued BPA for failure to prepare an EIS on a power supply contract for a new aluminum plant located in another part of the state. If the new plant went forward, the Port stood to lose tax and other financial benefits from an older aluminum plant within the Port. The Ninth Circuit found the Port lacked standing because its "alleged injuries represent only pecuniary losses and frustrated financial expectations that are not coupled with environmental considerations." *Port of Astoria*, 595 F.2d at 475. In contrast, the court ruled that a concerned citizens group that was a co-plaintiff did have standing because they "advanced economic and social injuries that are directly brought into play by the plant's possible closing." In other words, "economic and social injuries" are sufficient to fall within the zone of interests protected by NEPA, but only if they are coupled with environmental considerations that would be addressed by the EIS.

The case of *Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713 (9th Cir. 1993), contains the most sweeping anti-standing language of all appellate decisions. This case was brought by a group of ranchers who held grazing leases on Forest Service land. When the Forest Service adopted a management plan reducing grazing in the Toiyabe National Forest, they sued contending the EIS on the plan was deficient. In a mere three paragraphs, the Ninth Circuit summarily dismissed the NEPA claim because "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA." *Nevada Land*, 8 F.3d at 716.

The U.S. Supreme Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997) (Scalia, J.) appears to reflect a seismic shift in the zone of interests law,[192] bringing it back to its foundational principals. *Bennett* dealt with standing under the Endangered Species Act ("ESA"), not NEPA. But its reasoning would seem to apply equally to NEPA. In *Bennett*, the Court ruled, unanimously, that in applying the zone of

[192] Daniel R. Mandelker, *NEPA Law and Litigation*, § 4:23 (2009) ("Whether the courts will grant standing based on economic injury in NEPA cases will depend on how they interpret the Supreme Court case of *Bennett v. Spear*."); William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After Bennett v. Spear*, 49 Admin. L. Rev. 763, 766 (1997) ("The end result of *Bennett* is a standing inquiry playing field that is tilted to the advantage of regulatory targets [businesses]. Regulatory beneficiaries [environmentalists] have likely lost the 'zone of interests' inquiry advantage and now face a more challenging set of constitutional standing requirements."); Todd W. Roles, Note, *Has the Supreme Court Armed Property Owners in Their Fight Against Environmentalists? Bennett v. Spear and Its Effect on Environmental Litigation*, 41 Ariz. L. Rev. 227 (1999) ("Perhaps the most encouraging effect of *Bennett* will be the ability of both sides, property owners and environmental groups alike, to have equal access to the courts. After years of frustrating inability to effectively challenge agency regulations, property owners rejoice at the judicial access provided in *Bennett*.").

interests test, courts must look not just to the overall goal of the statute (e.g. to protect the environment) but to the specific provision of the statute that allegedly was violated:

> Whether a plaintiff's interest is "arguably . . . protected . . . by the statute" within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question (here, species preservation), but by reference to the particular provision of law upon which the plaintiff relies. It is difficult to understand how the Ninth Circuit could have failed to see this from our cases.

Bennett, 520 U.S. at 175-76 (emphasis supplied). The effect of *Bennett* is to widen substantially the types of interests protected. In *Bennett*, the effect was to grant standing to ranch operators and irrigation districts challenging a decision involving an endangered fish. Although plaintiffs' interests in that case were purely economic, those purely economic interests were encompassed within the ESA's instruction to use the best commercial and scientific data available.

Although *Bennett* was an ESA case, the analogy to NEPA is obvious. *Nevada Land* boiled NEPA down to a single-minded purpose. "The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions." *Nevada Land*, 8 F.3d at 716.[193] *Bennett* turned this around, declaring the overarching purpose of the statute irrelevant to the zone of interests test. Instead, *Bennett* announced, the zone of interests test keys into the particular statutory provisions at issue in the litigation. In a NEPA case like this one, that provision is the requirement to prepare an EIS that explores "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity." NEPA § 102(2)(C)(iv), 42 U.S.C. § 4332(2)(C)(iv). Any doubt about the breadth of this requirement and its inclusion of social and economic, as well as environmental, impacts is resolved by the Council on Environmental Quality's ("CEQ") implementing regulations.[194]

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[193] *Nevada Land*'s single-purpose view of NEPA is difficult to reconcile with the broader goals of NEPA recognized by the Supreme Court and more recent Ninth Circuit decisions. "The goal of NEPA is two-fold: (1) to ensure that the agency will have detailed information on significant environmental impacts when it makes decisions; and (2) to guarantee that this information will be available to a larger audience." *Neighbors of Cuddy Mtn. v. Alexander*, 303 F.3d 1059, 1065 (9th Cir. 2002) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

[194] The broad scope of NEPA is evident in three CEQ regulations: "Effects include ecological . . ., aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8(b). "*Human environment* shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment." 40 C.F.R. § 1508.14 (italics original). "This means that the significance of an action must be

The Ninth Circuit has considered *Bennett* in two recent NEPA cases relevant here. Although it rejected the plaintiff's standing in those cases, it did so on far narrower grounds than employed in *Nevada Land*.

In *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934 (9th Cir. 2005), the Ninth Circuit found that a phosphate company in Utah had no standing to challenge the adequacy of an EIS prepared for a competitor's mine expansion near Soda Springs, Idaho. The court found that "Ashley Creek has no environmental stake in the phosphate mining project at issue, which is some 250 miles from the phosphate Ashley Creek controls. Indeed, its only interest is an economic one: if the project does not go forward, Ashley Creek speculates that it might become an alternate supplier of phosphate." *Ashley Creek*, 420 F.3d at 936. The case addressed both constitutional and prudential standing issues. As for the zone of interests test, the court held: "The bottom line is that Ashley Creek's interest in the EIS analysis is purely financial. NEPA, on the other hand, is directed at environmental concerns, not business interests." *Ashley Creek*, 420 F.3d at 939. That sounds like the old *Nevada Land* mantra. The court went on, however, to offer this key distinction:

> Under this long-standing rule against purely economic interests falling within NEPA's zone of interests, Ashley Creek fails to establish prudential standing. Rather, Ashley Creek has never claimed to be protecting an interest that is even remotely intertwined with the environment. Ashley Creek's sole interest is in selling phosphate to Agrium; Ashley Creek has not linked its pecuniary interest to the physical environment or to the environmental impacts of the project evaluated in the EIS. As the district court noted, Ashley Creek conceded as much, stating in its brief before that court that it "does not have an interest in the local Idaho environment."

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analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27(a). The Supreme Court emphasized in *Clarke* that the evaluation of the "relevant statute" should occur "broadly"—observing that in *Data Processing* the zone of interests into which plaintiffs fell was not apparent on the face of the statute under which they sued, but was found only in legislative history to a different and subsequent statute. *Clarke*, 479 U.S. 378-879. Given this, it is difficult to understand the reluctance of the Ninth Circuit to look to the CEQ regulations. This is particularly perplexing in light of the deference owed to agency interpretations of their own statutes as reflected in their regulations. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In any event, the Ninth Circuit stopped short of ruling that the CEQ regulations were not relevant to the zone of interests analysis, ruling instead that "courts should not use regulations to expand the zone of interests beyond what Congress intended." *Ashley Creek*, 420 F.3d at 944 n.4. The CEQ regulations simply codify well-settled NEPA law. The authors do not understand how the court in *Ashley Creek* then concludes that these regulations "demonstrate that purely economic considerations are not within that zone." *Ashley Creek*, 420 F.3d at 944.

Ashley Creek, 420 F.3d at 940 (emphasis supplied).

The Eighth Circuit held in *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.2d 1115 (8th Cir. 1999), that *Bennett* compels recognition of a broader zone of interests in a challenge to the adequacy of an EIS than in a challenge for failure to prepare an EIS at all. But in *Ashley Creek*, the Ninth Circuit declined to follow the Eighth Circuit's lead. The Ninth Circuit acknowledged the Supreme Court's instruction in *Bennett* to look at every part of the statute, not just the overarching purpose. And it noted the requirement in section 102 of NEPA that the EIS must consider "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity." But the Ninth Circuit found that this reference to "balance" and "productivity" does not give carte blanche to plaintiffs with purely economic concerns:

> While the use of the word "productivity" in subsection (iv) might be construed as requiring agencies to consider economic concerns, that provision requires a statement, not of all economic interests, but rather of the relationship between uses of the environment and productivity. It does not require a discussion of the impacts on productivity that are not intertwined with the environment. In short, nothing in the text of § 102(2)(C) suggests that an EIS must address an economic concern that is not tethered to the environment.

Ashley Creek, 420 F.3d at 943 (emphasis supplied). The court concluded that section 102 of NEPA embraces "consideration of economic interests that are *interrelated* with the environmental effects of an action." *Ashley Creek*, 420 F.3d at 944 n.4 (emphasis original).

The nuanced interpretation of *Bennett* in *Ashley Creek* is consistent with another Ninth Circuit decision issued five days earlier, *Ranchers Cattlemen Action Legal Fund, v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1102 (9th Cir. 2005). Here again the Ninth Circuit stepped away from the sweeping "only environmentalists can bring NEPA claims" concept of *Nevada Land*. In *Ranchers*, the court explained, "A plaintiff can, however, have standing under NEPA even if his or her interest is primarily economic, as long as he or she also alleges an environmental interest or economic injuries that are 'causally related to an act within NEPA's embrace.'" *Ranchers*, 415 F.3d at 1103.[195] "If a harm does not have a sufficiently close

[195] The "causally related" reasoning from *Ranchers Cattlemen* was embraced by Judge Winmill in a recent unpublished decision. *Scott v. United States*, 2009 WL 482893 (D. Idaho 2009). *Scott* is consistent with the new, broader view of standing reflected in the Ninth Circuit's more recent decisions and is readily distinguishable from the case at bar. As the court noted, "Indeed Scott's complaint does not even cite NEPA or mention any adverse environmental impacts of the closure

connection to the physical environment, NEPA does not apply." *Ranchers*, 415 F.3d at 1103 (citing *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 778 (1983)).

There are a few other district court decisions in the Ninth Circuit addressing the impact of *Bennett* on *Nevada Land*. A judge in Arizona applied a particularly narrow reading of *Bennett* in *Arizona Cattle Growers' Ass'n v. Cartwright*, 29 F. Supp. 2d 1100 (D. Az. 1998). The district court brushed aside the Supreme Court's powerful message in *Bennett*, concluding that "if *Bennett* altered *Nevada Land* in any way, it did so merely by altering the manner in which the court will likely reach the same result." *Arizona Cattle*, 29 F. Supp. 2d at 1108. The court found that since NEPA (unlike the ESA) is a procedural statute, every provision in it has the same goal: "The purpose is one and the same: protection of the environment." *Arizona Cattle*, 29 F. Supp. 2d at 1109. Indeed, the Ninth Circuit agreed with *Arizona Cattle* on this one point. *Ashley Creek*, 420 F.3d at 945.[196] However, the Ninth Circuit did not embrace the more sweeping declaration in *Arizona Cattle* that *Bennett* changes nothing and a plaintiff whose interests are solely economic can never bring a NEPA challenge. To the contrary, *Ashley Creek* and *Ranchers* offer a more careful reading of *Bennett* which bars NEPA claims by commercial plaintiffs only where they cannot demonstrate that their economic interests are not intertwined with the environmental issues in the EIS.

The U.S. Supreme Court touched on the issue of prudential standing again in *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2754 (2010). This case involved a challenge to the Department of Agriculture brought by various environmental groups and organic and conventional alfalfa farmers, collectively "organic farmers." They sued to challenge the government's approval of a petition brought by Monsanto its licensee to deregulate Roundup Ready Alfalfa (a variety of alfalfa that is tolerate of Monsanto's Roundup herbicide). They feared that the new genetically modified alfalfa would transmit its genetic immunity to other conventional alfalfa and to weeds that compete alfalfa. The action was brought on the basis of the agency's failure to prepare an EIS.

The district court ruled in favor of the environmentalists and requested the parties to submit proposed forms of judgment. At that point Monsanto and its

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order. Scott's NEPA challenge—first fully articulated in his summary judgment brief—does not seem calculated to protect the environment from an inadequate NEPA analysis in issuing the closure order over five years ago. Rather, Scott's NEPA challenge appears to be a last-ditch effort to invalidate the closure order on procedural grounds unrelated to his interests." *Scott* at *5 (emphasis supplied). Moreover, as Judge Winmill expressly noted, *Scott* was a summary judgment case. Rather than being limited to the pleadings like the case at bar, Scott was obligated to submit evidence, which he failed to do.

[196] The authors suggest that, in so holding, the district court and the Ninth Circuit have missed the point of *Bennett* altogether.

licensee sought and were allowed to intervene in the remedial phase of the litigation. Ultimately the district court vacated the government's action deregulating the new alfalfa (which had the effect of making its use illegal) and issued a permanent injunction prohibiting use of the new strain (except in very limited circumstances involving farmers who had already planted it) until an EIS was prepared. The federal government and Monsanto appealed the injunction but, arguably at least, not the vacatur. The Ninth Circuit affirmed. *Geertson Seed Farms v. Johanns*, 570 F.3d 1130 (9th Cir. 2009). Then, Monsanto and its licensee alone sought certiorari.[197]

Since no one challenged the lower courts' conclusion that the agencies violated NEPA, the appeal was focused on the appropriateness of the injunctive relief that implemented the district court's decision. Ultimately, the Court reached the merits, ruling that the injunction was inconsistent with the standard four-part test for injunctive relief and inappropriately tied the hands of the agency on remand. [198] The effect of vacatur was to make any planting of the genetically modified alfalfa illegal. The government should be allowed, or remand, to decide whether or not some partial deregulation in advance of a full-blown EIS was appropriate. The district court essentially got out in front of itself be providing guidance prematurely on how the government should act in the interim.

Before reaching the merits, however, the Court address dueling standing challenges raised by both sides. Monsanto contended that the plaintiffs lacked standing to seek injunctive relief (apparently conceding that they had standing to bring the original NEPA challenge).[199] The Court rejected this argument. As for Article III standing, the Court found that at least some of the farmers would have been affected by increased risk of gene flow and that an injunction would remedy that risk. The Court then turned to the zone of interests test.

> Petitioners appear to suggest that respondents fail to satisfy the "zone of interests" test we have previously articulated as a prudential standing requirement in cases challenging agency compliance with particular statutes. See Reply Brief for Petitioners 12 (arguing that protection against the risk of commercial harm "is not an interest that NEPA was enacted to address"); *Bennett v.*

[197] The government participated and argued as "Federal Respondents Supporting Petitioners" are also listed as "Federal Respondents in Opposition."

[198] The Court noted that, since *Winter v. Natural Resources Defense Council, Inc*., 555 U.S. 7 (2008), this test has been applied to NEPA cases. *Winter* overturned prior decisions which held that injunctive relief was more or less automatic in NEPA cases.

[199] The Court agreed that this is an appropriate question, citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing separately for each form of relief sought.") (internal quotation marks omitted).

> *Spear*, 520 U.S. 154, 162-163, 117 S. Ct. 1154, 137 L.Ed.2d 281 (1997). That argument is unpersuasive because, as the District Court found, respondents' injury has an environmental as well as an economic component. See App. to Pet. for Cert. 49a. In its ruling on the merits of respondents' NEPA claim, the District Court held that the risk that the RRA gene conferring glyphosate resistance will infect conventional and organic alfalfa is a significant environmental effect within the meaning of NEPA. Petitioners did not appeal that part of the court's ruling, and we have no occasion to revisit it here. Respondents now seek injunctive relief in order to avert the risk of gene flow to their crops—the very same effect that the District Court determined to be a significant environmental concern for purposes of NEPA. The mere fact that respondents also seek to avoid certain economic harms that are tied to the risk of gene flow does not strip them of prudential standing.

Monsanto, 130 S. Ct. at 2756. While this discussion falls short of a thorough probing of the issue, it does seem to be at odds with the simplistic view that NEPA litigation is unavailable to those whose predominant interest is economic. Indeed, it is interesting to note that no one questioned whether Monsanto could pass the zone of interests test. How is it that Monsanto, whose sole interest in the matter was its desire to make money by selling a product that arguably harms the environment, passes the test set out in *Nevada Land*?

Although the *Monsanto* Court did not address Monsanto's prudential standing, it did address its Article III standing. This arose in the most peculiar context owing to the fact that Monsanto failed to challenge the vacatur directly. (In other words, Monsanto had standing at the outset, but arguably lost it.) Environmentalists argued that the failure to challenge the vacatur essentially mooted the debate over the injunctive relief because planting would be illegal regardless of whether the injunction remained or was lifted. The Court rejected the argument. First, it ruled that technically Monsanto and its licensee had "adequately preserved their objection" despite failing to challenge the vacatur directly. Second, the Court ruled that, in any event, Monsanto had standing to challenge the forward-looking part of the injunction that went beyond the vacatur itself and prohibited the agency from undertaking a new partial deregulation during the course of completing the EIS review. These rulings have no particularly notable jurisdictional import. As noted above, the more interesting thing is that no one questioned Monsanto's prudential standing.

It may help to step back and view the issue more broadly. Some court decisions—particularly in the Ninth Circuit, blithely recite that NEPA is a one-sided

statute for the sole benefit of environmentalists—as if that is a perfectly sensible way of applying the zone of interests test. But this does not square with how we think about the zone of interests test in other contexts. For instance, if a narrow view of the zone of interests test were applied to the mining laws—which were enacted for the benefit of miners and the economic development of the nation—then environmentalists would not have standing to challenge violations of those laws. We know that is not the case.

Another example can be found in a recent First Amendment case, *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009). In this case, pharmacists challenged a rule requiring them to dispense the morning-after abortion pill. The Ninth Circuit ruled that they fell within the pharmacy statute's zone of interests, despite the fact that the statute was not designed to help pharmacists, but rather to help their customers. The myopic "us versus them" concept reflected in some of the Ninth Circuit decisions departs from how standing is analyzed in these examples. It ignores the fact that when Congress enacted NEPA it was not trying to help one side and hurt the other. A fair reading of the Act (and the CEQ regulations) makes it clear that its purpose is to foster free and open discussion by all impacted parties who have an interest in the subject. *Bennett* and recent Ninth Circuit decisions certainly point in this direction.

Another interesting standing case is *Diamond v. Charles*, 476 U.S. 54 (1986). In this case, a group of abortion doctors challenged an Illinois law tightening abortion restrictions. Another group of anti-abortion doctors ("Diamond") were allowed to intervene. The case dealt primarily with the issue of whether intervenors must demonstrate standing on appeal when no other party appeals. The Court held the anti-abortion doctors could not appeal, because they could not demonstrate standing. The anti-abortion doctors were nothing more than a well-intentioned and deeply concerned bystanders. The Court noted, "[T]he decision to seek review . . . is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond*, 476 U.S. at 63 (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973) (Stewart, J.). Notably, however, the Court found that the pro-abortion doctors (the plaintiffs) did have Article III standing because they "faced possible criminal prosecution." *Diamond*, 476 U.S. at 65.

This case dealt only with Article III standing, not prudential standing. It is interesting, however, that no prudential standing challenge was raised. If it had been, how could it be said that abortion doctors fall within the zone of interests to be protected by a statute restricting the availability of abortions? Are the abortion doctors not analogous to business interests challenging a NEPA violation?

Perhaps the explanation is that the zone of interests test was never intended to address people like those in *Diamond*. The zone of interests test was intended to exclude plaintiffs who, despite meeting the Article III standing test, really have no

dog in the fight being addressed by the legislation. Both pro- and anti-abortion doctors clearly have a dog in this fight (though one group lacks Article III standing). Thus, the zone of interests test, properly applied, should exclude persons whose interests are peripheral to the policy questions address by the legislation.

Thus, for instance, perhaps the landlord of an abortion clinic would lack prudential standing. At some point, as in the court reporter hypothetical offered by *Lujan*, the plaintiff's interests are simply too remote—that is, they are not within the zone of interests addressed by the legislation.

Where the Ninth Circuit and others got off on a wrong track was thinking that the zone of interests test was aimed at preferring one class of plaintiff over another based on whether their interests were aligned with the interests that the legislation sought to protect or promote. In other words, these courts ignored part of the underlined part of test set out in *Data Processing*: "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing*, 397 U.S. at 153 (emphasis supplied). The zone of interests test is not about looking for the party whose interests are in line with or favored by the legislation at issue. Rather, the test protects parties both "pro" and "con"—that is, "protected" or "regulated." Properly understood, the core of the test is not which side the plaintiff is on, but whether the plaintiff has a dog in the fight addressed by the legislation. Thus, the proverbial "little old lady" is excluded from the courtroom because she lacks Article III standing—she may be mad as hell about what she read in the newspaper, but she is not injured. The zone of interests gets at a similar but slightly different problem—the plaintiff who is injured, but suffers a kind of injury (like *Lujan*'s court reporter) whose injury is peripheral to the battleground addressed by the legislation.

T. Burden of proof is on plaintiff

The burden is on the party asserting standing to demonstrate that the tests have been met. "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defenders of Wildlife* ("*Lujan II*"), 504 U.S. 555, 561 (1992) (Scalia, J.).

Where, for instance, the plaintiff is the entity seeking a permit, standing is usually self-evident. "If he is [the object of the governmental action], there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan II* at 561-62. However, where the plaintiff is a person challenging the issuance of a permit to another, proof of standing can be a significant hurdle. As both the U.S. Supreme Court and the Idaho Supreme Court said: "Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan II* at 562, *quoted*

in Young v. City of Ketchum, 44 P.3d 1157, 1160, 137 Idaho 102, 105 (2002) (Trout, C.J.).

U. "Foot in the door" standing – the right to litigate and pursue other issues in the case

Once a plaintiff establishes standing with respect to one issue in the case, may that party pursue other aspects of the case? In the context of NEPA, at least, that seems to be the case, according to a noted commentator. "Plaintiffs who do show an injury in fact sufficient to confer standing may challenge other NEPA violations on which they do not have standing to sue." Daniel R. Mandelker, *NEPA Law and Litigation*, § 4:9 (2018) (footnote with citations omitted[200]).

On the other hand, in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (internal quotation marks omitted), the Court said, "[A] plaintiff must demonstrate standing separately for each form of relief sought." This statement was quoted with approval (but no analysis) in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153 (2010) (Alito, J.).

The U.S. Supreme Court recently explained that once a plaintiff settles the part of a lawsuit where he has established standing, he may not continue to pursue the rest of the lawsuit in which standing cannot be separately established. "We know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action (here, the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests." *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1149-50 (2009).

In *Selkirk-Priest Basin Ass'n v. State ex rel. Andrus* ("*Selkirk I*"), 127 Idaho 239, 241, 899 P.2d 949, 951 (1995) (McDevitt, C.J.), the Court held that environmental groups have standing to raise their public trust claim but lacked standing to challenge violation of constitutional requirements respecting endowment lands. That may be because the plaintiffs premised their standing as to the constitutional claims solely on the basis of representing members whose children attended public school. It is unclear why standing for the endowment claim could not also have been premised on environmental impact. Doing so might present a

[200] The footnote reads: *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978); *Citizens Committee Against Interstate Route 675 v. Lewis*, 542 F. Supp. 496 (S.D. Ohio 1982). *See Duke Power Co. v. Carolina Environmental Study Group, Inc*., 438 U.S. 59 (1978). *Cf. Vermont Public Interest Research Group v. U.S. Fish & Wildlife Service*, 247 F. Supp. 2d 495, 513 (D. Vt. 2002) (even though plaintiffs only showed that proposed release of lampricides would injure their use of one creek, they could challenge entire lampricide program for which FWS prepared a programmatic environmental impact statement).

prudential "zone of interests" issue, but not an Article III standing issue. As discussed elsewhere, Idaho has not adopted the zone of interests test.

V. "Foot in the door" standing – multiple plaintiffs

If one of the plaintiffs establishes standing, the Court will not require the other plaintiffs to establish standing (at least so long as they are not raising new issues). *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).[201] The *Bowsher* case did not analyze the principle, but simply declared that because one plaintiff had Article III standing "[w]e therefore need not consider the standing issue as to the Union or Members of Congress." *Bowsher*, 478 U.S. at 721.

In *Boundary Backpackers v. Boundary Cnty.*, 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996) (Johnson, J.), the Court analyzed standing separately for separate plaintiffs. Three environmental groups and 18 individuals sued the county challenging an ordinance that purported to extent control over public lands by requiring federal agencies to comply with a county land use policy. The Court rejected standing by all twenty-one of the plaintiffs save one, a commercial outfitter and guide. The guide's affidavit asserted that the challenged county ordinance, if enforced, would deprive him of access to a substantial portion of the open space he used for his guiding business. With little explanation (other than the observation that this qualified as an expert opinion), the Court declared that this affidavit was "an ample foundation to support Krmpotich's concluding statement of the injury he will suffer from the enforcement of the ordinance." *Boundary Backpackers*, 128 Idaho at 375, 913 P.2d at 1145. The Court offered no explanation as to what was inadequate about the other plaintiffs' standing. One is left to guess that they may have relied on mere aesthetic enjoyment, a conclusion that seems to have been confirmed in litigation involving the Selkirk-Priest Basin Association.

The Idaho Supreme Court made an oblique comment on this principle in a case holding that where different parties may have standing as to different parts of a case, all may be argued together in one brief. "All issues may be heard even if an individual issue may only relate to one appellant. That all appellants may not have standing to all issues in a brief written on behalf of all appellants is of no consequence if at least one appellant, as is the case, has standing for each issue

[201] *See also, Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) ("only one of the petitioners needs to have standing to permit us to consider this petition for review."); *Sec'y of the Interior v. California*, 464 U.S. 312, 319 n. 3 (1984) (no need to consider standing of environmental groups to sue under the Coastal Zone Management Act where the State of California was a party and it clearly had standing); *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 44-45 (1974) (no need to evaluate organizational standing of banking association when an individual bank was also a litigant and it clearly had standing); *Southern Utah Wilderness Alliance v. BLM*, 425 F.3d 735, 744 (10th Cir. 2005) (no need to evaluate standing of environmental group because BLM is a party and it clearly has standing).

argued." *Farrell v. Bd. of Cnty. Comm'rs of Lemhi Cnty.*, 138 Idaho 378, 383, 64 P.3d 304, 309 (2002) (Schroeder, J.).

W. Standing on appeal

A party must satisfy standing requirements to pursue an appeal. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("The standing Article III requires must be met by the persons seeking appellate review, just as it must be met by persons appearing in courts of the first instance.")

See also discussion below of *Diamond v. Charles*, 476 U.S. 54 (1986) (intervenors may "piggyback" if other parties appeal, but they must establish Article III standing if they are the only ones to appeal).

X. Federal intervention

(1) The governing rules

Intervention as of right is governed by Fed. R. Civ. P. 24(a), which provides:

> On timely motion, the court must permit anyone to intervene who:
> . . .
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a). "Rule 24 traditionally receives liberal construction in favor of applicants for intervention." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (citing *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)).

Permissive intervention is governed by Fed. R. Civ. P. 24(b). Under Rule 24(b), a district court may allow anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Permissive intervention lies within the sound discretion of the court. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110-11 (9th Cir. 2002). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). In addition, the Ninth Circuit has held that "a court may grant permissive intervention where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Northwest Forest Res. Council*, 82 F.3d at 839.

(2) Standing requirements for intervenors

There is some uncertainty in the law as to whether an intervenor (who can satisfy the requirements of intervention as of right or permissive intervention) must also satisfy the requirements Article III standing. On the other hand, it is clear that intervenors must establish standing on appeal if they are the only ones bringing the appeal. No case of which we are aware addresses whether intervenors must also meet prudential standing tests.

In *Diamond v. Charles*, 476 U.S. 54 (1986), a group of abortion doctors challenged an Illinois law tightening abortion restrictions. Another group of anti-abortion doctors ("Diamond") were allowed to intervene. When the state statute was struck down, the state declined to pursue the appeal to the U.S. Supreme Court. Instead, the anti-abortion doctors brought an appeal.[202] Because the case dealt with standing on appeal, the Court found it unnecessary to address what it acknowledged as a split in the circuits over whether intervenors must demonstrate standing at the district court level. *Diamond*, 476 U.S. at 68-69. Nevertheless, the Court expressed no great concern with "this ability to 'piggyback' on the State's undoubted standing." *Diamond*, 476 U.S. at 65. Moreover, the Court noted that as an intervenor, Diamond could have participated in an appeal brought by the defendant State of Illinois. The problem was that the State did not appeal. Thus, the issue in the case was whether Diamond, acting alone, could pursue the appeal to the Supreme Court. The Court held the anti-abortion doctors could not, because they could not demonstrate standing. "Diamond's status as an intervenor below, whether permissive or as of right, does not confer standing sufficient to keep the case alive in the absence of the State on this appeal. Although intervenors are considered parties entitled, among other things, to seek review by this Court, an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond*, 476 U.S. at 68 (citation omitted).[203]

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[202] Due to the posture of the case, this was pursued by an appeal, not by petition for writ of a *certiorari*.

[203] This case was not cited by the Court in *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010). However, it was cited by the respondents in their brief, and it appears to form the basis of the Court's determination that it was necessary for Monsanto and the other petitioners to establish their standing on appeal. Due to its peculiar posture, this case did not present the issue of whether an intervenor must demonstrate standing at the district court level. Here, Monsanto clearly had Article III standing at that stage. It was only due to its failure to appeal a portion of the district court's decision that it arguably lost its standing on appeal. Curiously, no one in the case raised the question of whether Monsanto met the prudential standing requirements—despite the fact that Monsanto itself challenged the prudential standing of its organic farmer opponents. Very possibly the environmentalists did not raise prudential standing because it was apparent that it would have been a

As noted above, the Court in *Bowsher v. Synar*, 478 U.S. 714, 721 (1986), held that it will not analyze whether each individual plaintiff has standing to bring a claim, so long as one of them plainly does. The so-called Bowsher doctrine was extended to intervenors in *McConnell v. FEC*, 540 U.S. 93, 233 (2003), in which the Court noted, simply: "It is clear, however, that the Federal Election Commission (FEC) has standing, and therefore we need not address the standing of the intervenor-defendants, whose position here is identical to the FEC's." *McConnell*, 540 U.S. 93 at 233. One might think that would be the end of it, but the circuit courts have continued to be inconsistent and uncertain with their application of this rule.

In *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989), the Ninth Circuit held that intervenors need only meet the test for intervention and need not also demonstrate standing.[204] "The plaintiffs urge us to find that a party seeking to intervene must have standing, as the D.C. Circuit has held. However, we in the past have resolved intervention questions without making reference to standing doctrine." *Portland Audubon*, 866 F.2d at 308 n.1 (citation omitted). Yet in *Prete v. Bradbury*, 438 F.3d 949, 955 n.8 (9th Cir. 2006), the Ninth Circuit said it has not yet settled the issue of "whether an intervenor-applicant must independently establish Article III standing to intervene as of right." *Prete* cites eight cases and authorities, but ignores *McConnell*.

In 2009 the Ninth Circuit noted that the issue is still up in the air:

> We have yet to decide whether putative intervenors must satisfy standing independently of the parties to the case. The circuits are split on this issue. See *Prete*, 438 F.3d at 956 n. 8 (citing cases). In any event, because the district court correctly denied the Campaign's motion to intervene under Rule 24, we do not consider standing here. See *id*. (noting that "we need not reach [the issue of standing] because ... the district court erred in granting intervenor-defendants' motion to intervene on grounds other than whether intervenor-defendants had independent standing"); *see also Portland Audubon Soc. v. Hodel*, 866 F.2d 302, 308 n. 1 (9th Cir. 1989) (noting that "we in the past have resolved intervention questions without making reference to standing doctrine").

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two-edged sword, eliminating both petitioners and some of the respondents whose interests in this NEPA case were fundamentally economic.

[204] Aside from the standing issue, the *Portland Audubon* case set up a very restrictive "federal defendant" rule for intervenors in NEPA cases. That rule was abandoned by the Ninth Circuit, siting *en banc*, in *The Wilderness Society v. U.S. Forest Serv.*, 2011 WL 117627 (9th Cir. 2011).

Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 950 n.2 (9th Cir. 2009).

The application of the Bowsher Doctrine in the context of intervention in the various circuits is analyzed in Elizabeth Zwickert Timmermans, Note, *Has the Bowsher Doctrine Solved the Debate?: The Relationship Between Standing and Intervention as of Right*," 84 Notre Dame L. Rev. 1411 (2009). The authors note that the circuits have largely ignored *McConnell* in analyzing standing requirements for intervenors.

As lower courts continue to struggle with the question, all of decisions we have encountered pose the question in terms of whether the intervenor-applicant must possess Article III standing. We have not encountered a case dealing with whether a would-be intervenor who has Article III standing but does not fall within the statute's zone of interests (*e.g.*, an "economic" interest in a NEPA case) may intervene. It would seem, however, even if the intervenor were required to have Article III standing (notwithstanding *McConnell*), there is ample reason to believe that the zone of interests test, at least, should be disposed of since it has been replaced by the requirements under Rule 24. It would seem that such an argument might resonate particularly in the Ninth Circuit. "Commentators argue that the Ninth Circuit is the most liberal circuit with regard to allowing intervention." Timmermans, at 1433.

(3) Intervention in NEPA cases – the demise of the "federal defendant only" rule.

The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h and the law of intervention are huge topics beyond the scope of this Handbook. However, we mention one recent and notable case dealing with intervention in NEPA cases. This case addresses the now abandoned "federal defendant only" rule, which has some interesting parallels to the prudential standing concept in NEPA cases. The federal defendant only rule categorically prohibited parties from intervening of right during the merits phase (i.e., the determination of liability) in NEPA litigation. A more relaxed approach to intervention then applied during the remedy phase, if a NEPA violation was established.

The federal defendant rule may be traced to the holding in *Portland Audubon Society v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989), which denied intervention to industry groups and others holding that "NEPA provides no protection for . . . purely economic interests." Accordingly, the court held, the would-be intervenors lacked a "significantly protectable interest" in the matter. In *Churchill Cnty. v. Babbitt*, 150 F.3d 1072, 1082, *as amended by* 158 F.3d 491 (9th Cir. 1988) and other cases, the rule was expressed in terms of a categorical rule that only the federal government could be a defendant in the merits phase of a NEPA challenge (although others are allowed to intervene in the remedial phase).

In *The Wilderness Society v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011), *remanded to* 2001 WL 1743781 (D. Idaho 2011), the Ninth Circuit, sitting *en banc* in a unanimous decision, abandoned the federal defendant rule. The case involved the Forest Service's adoption of a travel management plan designating roads and trails available for motorized use in the Sawtooth National Forest. Two conservation groups sued the Forest Service for NEPA violations. Three pro-road recreation groups then sought to intervene as defendants. The district court applied the federal defendant rule to deny intervention as of right to the pro-road groups. (It also denied permissive intervention on other grounds including failure to adequately participate in the administrative process.) The Ninth Circuit reversed, announcing that it was abandoning the federal defendant rule because it was inconsistent with the intervention statute itself and the broader body of intervention law:

> We now abandon the "federal defendant" rule. When considering motions to intervene of right under Rule 24(a)(2), courts need no longer apply a categorical prohibition on intervention on the merits, or liability phase, of NEPA actions. To determine whether putative intervenors demonstrate the "significantly protectable" interest necessary for intervention of right in a NEPA case, the operative inquiry should be whether the "interest is protectable under some law" and whether "there is a relationship between the legally protected interest and the claims at issue." [*Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993).] A putative intervenor will generally demonstrate a sufficient interest for intervention of right in a NEPA action, as in all cases, if "it will suffer a practical impairment of its interests as a result of the pending litigation." [*California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006).]

Wilderness Society, 630 F.3d at 1180.

It is unclear to what extent the court's rejection of *Portland Audubon* may have on similar statements (about NEPA providing no protection for purely economic interests) made in the context of standing cases. See discussion in section 18.S(2) at page 249.

On remand, the district court then allowed the pro-road groups to intervene. *The Wilderness Society v. U.S. Forest Serv.*, 2001 WL 1743781 (D. Idaho 2011).

(4) Permissive intervention and the "independent jurisdictional grounds" rule

In 2011 the Ninth Circuit clarified the limited applicability of the first test. "We therefore clarify that the independent jurisdictional grounds requirement does not apply to proposed intervenors in federal-question cases when the proposed intervenor is not raising new claims. *Freedom from Religion Foundation, Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011). The court explained its reasoning as follows:

> This [independent jurisdictional grounds] requirement stems, however, from our concern that intervention might be used to enlarge inappropriately the jurisdiction of the federal courts. See Fed. R. Civ. P. 82. This concern manifests itself most concretely in diversity cases where proposed intervenors seek to use permissive intervention to gain a federal forum for state-law claims over which the district court would not, otherwise, have jurisdiction.
>
> The jurisdictional requirement also prevents permissive intervention from being used to destroy complete diversity in state-law actions.
>
> But in federal-question cases, the identity of the parties is irrelevant and the district court's jurisdiction is grounded in the federal question(s) raised by the plaintiff. See 28 U.S.C. § 1331. The jurisdictional requirement, therefore, prevents enlargement of federal jurisdiction in such cases only where a proposed intervenor seeks to bring new state-law claims. Where the proposed intervenor in a federal-question case brings no new claims, the jurisdictional concern drops away.

Freedom from Religion, at 843 (two internal citations omitted; emphasis added). Accordingly, the court held that, because the plaintiff's case was based on federal question jurisdiction and the proposed intervenor was not bringing any additional claims, the proposed intervenor "is not required to make any further showing that his intervention is supported by independent jurisdictional grounds." *Freedom from Religion*, at 844.

Y. Article III's standing requirement does not apply to agencies.

In *Central Freight Lines v. ICC*, 899 F.2d 413 (5th Cir. 1990), a trucking company petitioned for and obtained a declaratory order from the ICC favorable to its position regarding anticipated future shipments. Another trucking company challenged the ICC order in court, and the State of Texas intervened. Texas

contended that, because the shipments had not yet begun the opinion was advisory. Accordingly, Texas contended the matter did not constitute a case or controversy under Article III of the federal Constitution, and the ICC therefore had no jurisdiction to issue the order.

The Fifth Circuit found rejected the argument, noting that the law of standing does not apply to agencies. "It is also well established that the case or controversy requirement of Article III 'does not restrict an agency's authority to issue declaratory rulings under 5 U.S.C. § 554(e) [the federal APA].'" *Central Freight*, 899 F.2d at 417 (quoting *Texas v. United States*, 866 F.2d 1546, 1551 (5th Cir. 1989)).

The sponsors of section 5(d) of the APA noted that agencies would "be as free to act irrespective of the technical rules of case or controversy as courts are." McCarran, Administrative Procedure Act—Legislative History, S. DOC. NO. 248, 79th Cong., 2d Sess. 204 (1946).

19. SOVEREIGN IMMUNITY

A. Basis of sovereign immunity

Under common law, the federal government and state governments are cloaked with sovereign immunity, meaning that they may not be sued for money damages (or anything else) unless sovereign immunity is waived. *Block v. North Dakota*, 461 U.S. 273, 280 (1983).

Note: See discussion in section Volume II of this Handbook regarding waiver of sovereign immunity in condemnation of governmental property.

"It has been settled since at least the mid-nineteenth century that the United States may not be sued without its consent. . . . The Constitution does not refer to sovereign immunity, and the rules pertaining to the defense are judge made." 14 Fed. Prac. & Proc. Juris. § 3654 (2016).

Ordinarily, sovereign immunity is waived by statute (e.g., the federal quiet title act, state tort claim acts, or statutes of limitation) or by constitutional provisions. In rare instances, the court itself will declare sovereign immunity inapplicable as a matter of common law. See discussion in section 19.D (In Idaho, sovereign immunity does not apply to suits alleging constitutional violations.) on page 271. Sovereign immunity may also be waived by contract or other actions.

See section 19.F on page 272 for a discussion of the applicability of sovereign immunity to local governments.

B. Idaho's recognition of sovereign immunity

Idaho first recognized the State's sovereign immunity in a 1903 decision:

> That a people in their collective capacity, exercising the rights, privileges, duties, and obligations of sovereignty, cannot be sued except by their consent, is a principle too well established to require discussion.

Hollister v. State, 9 Idaho 8, 71 P. 541, 542 (1903) (Ailshie, J.).

> The rule of law, known as sovereign immunity, was adopted by the Idaho Supreme Court early in its statehood. Hollister v. State, 9 Idaho 8, 71 P. 514 (1903). The case best articulating the reasoning behind Court's adoption of the rule of sovereign immunity is Davis v. State, 30 Idaho 137, 163 P. 373 (1917).

Smith v. State, 93 Idaho 795, 800, 473 P.2d 937, 942 (1970) (Donaldson, J.).

> The following propositions appear to be well recognized by both parties to this appeal: (1) The State of Idaho cannot be sued without its express consent, *Hollister v. State*, 9 Idaho 8, 71 P. 541 (1903); *Thomas & Faris v. State*, 16 Idaho 81, 100 P. 761 (1909); (2) This consent must be found in constitutional or statutory provisions, *Pigg v. Brockman*, 79 Idaho 233, 314 P.2d 609 (1957); (3) A statute authorizing suit against the state is in derogation of sovereignty and therefore must be strictly construed, *Pigg v. Brockman*, *supra*.

Petersen v. State, 393 P.2d 585, 586 (Idaho 1964) (McQuade, J.).

The real question is under what circumstances has Idaho consented to be sued. See discussions in the sections that follow and in Volume II of this Handbook.

C. Criticism of the doctrine

One may wonder why we fought a revolutionary war against the King, and then subjected ourselves to the same royalty-based limitations the King had imposed his subjects.

> The concept of sovereign immunity originates in the English common law principle that the English courts were created by, and therefore had no jurisdiction over, the King: "The King can do no wrong." This legal doctrine was known to lawyers in colonial America. How it came to be applied in the United States is a mystery, given that government in America existed at the pleasure of the people.

Sean Gray, Note, *Declaratory Relief and Sovereign Immunity in Oregon: Can Someone Tell Me If I Turned Square Corners?*, 40 Willamette L. Rev. 563, 568 (2004) (footnotes omitted).

> A doctrine derived from the premise that "the King can do no wrong" deserves no place in American law. The United States was founded on a rejection of a monarchy and of royal prerogatives. American government is based on the fundamental recognition that the government and government officials can do wrong and must be held accountable. Sovereign immunity undermines that basic notion.

Erwin Chemerinsky, *Against Ssovereign Immunity*, 53 Stanford L. Rev. 1201, 1202 (2001) (footnote omitted).

Although firmly part of Idaho law, the doctrine has been criticized by Idaho's own Supreme Court.

> The doctrine of sovereign immunity has its roots in the ancient common law which theorized that the king can do no wrong. But it was acknowledged that the king as the fountain of justice and equity, could not refuse to redress wrongs when petitioned to do so by his subjects.
>
> It was well recognized in the thirteenth century and later that while the king was not directly subject to the law, and that though ordinary writs did not lie against him in his court, he was morally bound to do the same justice to his subjects as they could be compelled to do to one another. In fact the Court of Exchequer had jurisdiction of equitable claims against the king. Concerning the history and effect of the doctrine of sovereign immunity, the California Supreme Court speaking through Chief Justice Traynor in the case of *Muskopf v. Corning Hospital District*, 55 Cal.2d 211, 11 Cal.Rptr. 89, 359 P.2d 457 (1961), had this to say:
>
> > '* * * At the earliest common law the doctrine of 'sovereign immunity' did not produce the harsh results it does today. It was a rule that allowed substantial relief. I t began as the personal prerogative of the king, gained impetus from sixteenth century metaphysical concepts, may have been based on the misreading of an ancient maxim, and only rarely had the effect of completely denying compensation. How it became in the United States the basis for a rule that federal and state governments did not have to answer for their torts has been called 'one of the mysteries of legal evolution.' * * *.' 55 Cal.2d 211 at 214, 11 Cal.Rptr. 89 at 90-91, 359 P.2d 457 at 458, 459 (1961).

Smith v. State, 93 Idaho 795, 799, 473 P.2d 937, 941 (1970) (Donaldson, J.) (footnotes omitted) (asterisks original).

D. In Idaho, sovereign immunity does not apply to suits alleging constitutional violations.

In *Tucker v. State*, 162 Idaho 11, 394 P.3d 54 (2017) (Burdick, C.J.), the Court considered the State's claim that sovereign immunity protected it from a challenge to Idaho's public defender system. The Court acknowledged the general common law principle of sovereign immunity. "It is the general rule that, under the doctrine of sovereign immunity, a governmental unit can only be sued upon its consent." *Tucker* at 60-61 (quoting *Bott v. Idaho State Bldg. Auth.*, 917 P.2d 737, 748 (Idaho 1996) (McDevitt, C.J.)). The Court then joined a number of sister states in carving out an exception for constitutional challenges.

> Though we have never addressed the issue, we have recognized that because sovereign immunity is a common law doctrine, the judiciary has the power to modify it. Were we to accept Respondents' position that sovereign immunity shields the State from suit in this instance, we would leave parties unable to vindicate constitutional rights against the State. This we decline to do. Accordingly, aligning with our sister jurisdictions identified above, we hold that sovereign immunity is inapplicable when constitutional violations are alleged.

Tucker, 162 Idaho at 18, 394 P.3d at 61.

Tucker was cited and followed in *Planned Parenthood Great Northwest v. State*, 171 Idaho 374, 400, 522 P.3d 1132, 1158 (2023) (Brody, J.) (allowing a suit challenging the abortion ban, but denying relief on the merits).

E. Section 1983 does not waive sovereign immunity

Although § 1983 provides a cause of action for certain violations of the federal law by those acting under color of state law (see discussion in section 24.CC at page 442), it does not waive sovereign immunity.

As discussed below, this is a complicating factor only in suits against states. A discussion of this subject is found in Nick Daum, Case Comment, *Section 1983, Statutes, and Sovereign Immunity, Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (en banc)*, 112 Yale L.J. 353 (2002).

> The key point, for Eleventh Amendment purposes, is the legal fiction that § 1983 suits against individual officers are not suits against a state. They thus do not, in theory, raise Eleventh Amendment issues at all. The state, although it serves as the "deep pocket," is liable only indirectly, usually through an indemnification contract or

> policy in which the state implicitly or explicitly agrees to reimburse monetary judgments against its officers. In this way, the courts have permitted what amounts to a modified regime of tort liability for state governments that violate federal law.

Daum, *Section 1983* at 355.

F. The doctrine of sovereign immunity extends to municipalities.

The doctrine of sovereign immunity is ordinarily framed in terms of protecting a State or the United States. However, local governments also enjoy sovereign immunity (subject to many exceptions, e.g., where it has been waived or the government is acting in its proprietary capacity).

McQuillin's 2022 treatise provides this useful summary:

> The fortunes of municipal immunity over the last two centuries have been closely tied to common-law sovereign or governmental immunity, even though strictly speaking municipalities, unlike states, are not sovereigns. "Sovereign immunity" is the historic immunity derived from the state's status as a sovereign and protects the state from suit, whereas "governmental immunity," "legislative immunity," or "judicial immunity" are defenses where as a matter of policy, the courts have foreclosed liability. In fact, counties, which predate the existence of the state and are considered direct political subdivisions of it, enjoy the same sovereign immunity as the state itself. So, simply put, the state's immunity is referred to as sovereign immunity, while that of political subdivisions of the State is referred to as governmental immunity. Local governmental immunity is comprised of immunity from both suit and liability: "immunity from liability" protects entities from judgments while "immunity from suit" deprives courts of jurisdiction over suits against entities unless the Legislature has expressly consented.

McQuillin, *The Law of Municipal Corporations* (3d. ed.), § 53.5 (2022) (footnotes omitted).

Idaho law comports with this. "It is the general rule that, under the doctrine of sovereign immunity, a governmental unit can only be sued upon its consent." *Bott v. Idaho State Bldg. Auth.*, 128 Idaho 580, 591, 917 P.2d 737, 748 (1996) (McDevitt,

C.J.). "It is a general precept of sovereign immunity that a governmental unit can be sued only upon its consent." *American Oil Co. v. Neill*, 90 Idaho 333, 338, 414 P.2d 206, 209 (1966) (Bistline, J.).

Indeed, it is because municipalities are cloaked in sovereign immunity that the Legislature found it necessary to enact the Idaho Tort Claims Act waiving that immunity to some extent. See discussion below. (The same goes for waivers of sovereign immunity found in statutes of limitation, notably, Idaho Code §§ 5-202 and 5-225. See discussion in *Idaho Road Law Handbook*.)

Note that there is language in some federal cases suggesting that the doctrine does not extend to municipalities. By and large, those cases deal with the different and complicated subject of Eleventh Amendment immunity.[205]

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[205] In 2006, the U.S. Supreme Court offered this confusing discussion (in which it is difficult to decipher the whether it is speaking of common law sovereign immunity, Eleventh Amendment sovereign immunity, or something else:

> This Court's cases have recognized that the immunity of States from suit "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden v. Maine*, 527 U.S. 706, 713, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999); see *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55–56, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–323, 54 S.Ct. 745, 78 L.Ed. 1282 (1934). Consistent with this recognition, which no party asks us to reexamine today, we have observed that the phrase " 'Eleventh Amendment immunity' . . . is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden*, 527 U.S. at 713, 119 S.Ct. 2240.
>
> A consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit is that only States and arms of the State possess immunity from suits authorized by federal law. See *id*., at 740, 119 S.Ct. 2240; *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Accordingly, this Court has repeatedly refused to extend sovereign immunity to counties. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979); *id*., at 401, n. 19, 99 S.Ct. 1171 (gathering cases); *Workman v. New York City*, 179 U.S. 552, 565, 21 S.Ct. 212, 45 L.Ed. 314 (1900); *Lincoln County v. Luning*, 133 U.S. 529, 530, 10 S.Ct. 363, 33 L.Ed. 766 (1890). See also *Jinks v. Richland County*, 538 U.S. 456, 466, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit"). This is true even when, as respondent alleges here, "such entities exercise a 'slice of state power.'" *Lake Country Estates*, *supra*, at 401, 99 S.Ct. 1171.

Northern Ins. Co. of New York v. Chatham County, 547 U.S. 189, 193 (2006) (Thomas, J.) (emphasis added). As of this writing, no reported decision in Idaho has referenced *Northern Ins. Co*.

20. IDAHO TORT CLAIM ACT ("ITCA")

A. Grant of authority to sue for torts

The Idaho Tort Claims Act ("ITCA"), Idaho Code §§ 6-901 to 6-929, contains a broad waiver of sovereign immunity, authorizing persons to sue the State or any political subdivision thereof for certain actions sounding in tort.[206]

The key provisions of the ITCA read:

> A "claim" means any written demand to recover money damages from a governmental entity . . . ."

Idaho Code § 6-902(7).

> All claims against a political subdivision [subdivision] arising under the provisions of this act and all claims against an employee of a political subdivision for any act or omission of the employee within the course or scope of his employment shall be presented to and filed with the clerk or secretary of the political subdivision within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later.

Idaho Code § 6-906.

> All claims presented to and filed with a governmental entity shall accurately describe the conduct and circumstances which brought about the injury or damage, describe the injury or damage, state the time and place the injury or damage occurred, state the names of all persons involved, if known, and shall contain the amount of damages claimed, together with a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six (6) months immediately prior to the time the claim arose. If the claimant is incapacitated from presenting and filing his claim within the time prescribed or if the claimant is a minor or if the claimant is a nonresident of the state and is absent during the time within which his claim is

[206] The ITCA is modeled on its federal counterpart, the Federal Tort Claims Act ("FTCA"), 26 U.S.C. §§ 1346(b), 2671-2680). For a comparison of how the federal and state court have interpreted these acts, see Michael S. Gilmore, *Olson and Rees: A Tale of Two Tort Claims Acts*, 50 Advocate (Idaho) 13 (2007).

> required to be filed, the claim may be presented and filed on behalf of the claimant by any relative, attorney or agent representing the claimant. A claim filed under the provisions of this section shall not be held invalid or insufficient by reason of an inaccuracy in stating the time, place, nature or cause of the claim, or otherwise, unless it is shown that the governmental entity was in fact misled to its injury thereby.

Idaho Code § 6-907.

> No claim or action shall be allowed against a governmental entity or its employee unless the claim has been presented and filed within the time limits prescribed by this act.

Idaho Code § 6-908.

> Within ninety (90) days after the filing of the claim against the governmental entity or its employee, the governmental entity shall act thereon and notify the claimant in writing of its approval or denial. A claim shall be deemed to have been denied if at the end of the ninety (90) day period the governmental entity has failed to approve or deny the claim.

Idaho Code § 6-909.

In short, the ITCA requires the injured party to file a "claim" (which is really a notice of a claim) with the local governmental entity within 180 days of the injury or damage (the date the claim arose or should have been discovered). This operates much like a six-month statute of limitations. The local governmental entity must then act on the claim within 90 days. Only then, if it is denied or not acted upon, may the injured party bring suit. A separate statute of limitations discussed below requires that the lawsuit be filed within two years.

The ITCA "abrogates the doctrine of sovereign immunity" but preserves immunity "in certain specific situations." *Eurlings v. Larson*, 156 Idaho 65, 70, 320 P.3d 1224, 1229 (2014) (Horton, J.) (quoting *Lawton v. City of Pocatello*, 126 Idaho 454, 458, 886 P.2d 330, 334 (1994)). Specifically, it provides for suits for "money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course of and scope of their employment or duties . . . ." Idaho Code § 6-903(a).

The ITCA applies to all local governments, including cities. However, another statute, Idaho Code § 50-219, makes the Ita's notice requirement applicable for all damage claims (not just torts) against cities. This is discussed further below.

The ITCA does not provide a cause of action. See discussion in section 17.D at page 193.

B. The ITCA does not apply to federal claims

Note that while state law claims are barred by failure to comply with the ITCA, federal claims are not. In *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 175-76, 108 P.3d 315, 322-23 (2004) (Eismann, J.), the Court found that the Ita's damage claim requirement is preempted as to federal taking claims.[207] In so ruling, the Court relied on its earlier ruling to this effect in *Sweitzer v. Dean*, 118 Idaho 568, 572-73, 572-73, 798 P.2d 27, 31-32 (1990) (Boyle, J.) and on the U.S. Supreme Court's decision in *Felder v. Casey*, 487 U.S. 131 (1988) (Brennan, J.).[208] Accordingly, the federal taking claim survived. In *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.), the Court followed this approach, applying the ITCA only to state constitutional claims.

In *BHA II*, the Court threw out the state law claims by the party who failed to file a timely notice of claim, but allowed that party to pursue its federal takings claim. In *BHA II*, neither the Court nor the parties addressed *Williamson County* and its progeny, which holds (under prong two) that failure to pursue an available state remedy results in forfeiture of the federal taking claim. This argument was presented in *N. Idaho Bldg. Contractors Ass'n v. City of Hayden*, 164 Idaho 530, 432 P.3d 976 (2018) ("*NIBCA II*") (Bevan, J.), but the Court rejected it without analysis, treating the matter as having been settled in *BHA II*.

[207] The plaintiff's failure in *BHA II* to effectively pursue its inverse compensation claim (by failing to file a notice under the ITCA) probably should have resulted in loss of its federal takings claim under prong two of *Williamson County*. That argument was not presented by the parties, and the Court did not raise it *sua sponte*. Indeed, *Williamson County* is not mentioned in the *BHA II* opinion.

[208] In other contexts, failure to file a notice of claim might result in loss of the state law claim which, in turn, could result in forfeiture of the federal claim. This result occurs under prong two of *Williamson County*, as held in *Pascoag, et al*. That analysis was not applicable here, and did not block the federal claim. This is because *Williamson County* only applies to federal takings claims. *Felder* did not involve a takings claim.

C. Exceptions to waiver of sovereign immunity (Idaho Code §§ 6-940, 6-904A)

While the ITCA broadly waives sovereign immunity for most tort claims against governmental entities, it carves out various exceptions whereby the government retains its immunity from suit. *E.g.*, Idaho Code § 6-904.

A seemingly broad imposition of immunity with respect to illegal tax claims is found in section 6-904A:

> A governmental entity and its employees . . . shall not be liable for any claim which:
> Arises out of the assessment or collection of any tax or fee.

Idaho Code § 6-904A(1).

Standing alone, that provision reads like a blanket protection against lawsuits seeking damages for any unlawfully imposed taxes or fees. However, the Idaho Supreme Court has ruled that the exception only applies where the cause of action sounds in tort. The Idaho Supreme Court reasoned that the imposition of liability must be read in the context of the definition of the word "claim":

> Our interpretation of I.C. § 6–904A must be undertaken within the context of the ITCA. The word "claim" as used in I.C. § 6–904A must be interpreted in accordance with the definition section of the ITCA, I.C. § 6-902, which provides that "claim"
>
> > . . . means any written demand to recover money damages from a governmental entity or its employee which any person is legally entitled to recover under this act as compensation for the negligent or otherwise wrongful act or omission of a governmental entity or its employee when acting within the course or scope of his employment.
>
> I.C. § 6–902(7). The term "claim," as used in the ITCA, describes claims for damages arising from tortuous conduct. Greenwade's claim for the return of property erroneously or illegally seized for the payment of taxes does not appear to fit the definition of a claim for tort damages, and thus would not be barred by I.C. § 6–904A.

Greenwade v. Idaho State Tax Comm'n, 119 Idaho 501, 504-05, 808 P.2d 420, 423-24 (Ct. App. 1991) (Silak, J.).[209]

In other words, because the ITCA only waives sovereign immunity for claims sounding in tort, the exceptions only provide immunity for tort claims falling within the exception. In *Greenwade*, the Court found the exception inapplicable to the government's allegedly unlawful seizure of an automobile for the payment of taxes, which the Court said "does not appear to fit the definition of a claim for tort damages, and would not be barred by I.C. § 6-904A." *Greenwade*, 119 Idaho at 505, 808 P.2d at 424. Because the plaintiff's claim arose under the Idaho Income Tax Act, which provides for a "cause of action that does not sound in tort," and because the definition of a claim under the ITCA is limited to tort claims, the ITCA is not applicable and could not be used by the State Tax Commission to avoid liability. *Greenwade*, 119 Idaho at 506, 808 P.2d at 425.

This conclusion is not altered by Idaho Code § 50-219[210] (discussed below), which expands the applicability of the notice requirement to all damage claims in suits against cities. Section 50-219 does not expand the waiver of liability under the ITCA or create new causes of action against cities. It simply imposes a new notice requirement for actions that may be brought under existing law. Accordingly, it does not alter or expand the immunity from liability provided in Idaho Code § 6-904A.[211]

Because section 6-904A only provides sovereign immunity for tax and fee claims sounding in tort, local governments remain subject to taking claims based on

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[209] The Court made the same point (that waiver is granted only as to tort claims) in the context of another exception to the ITCA. "In considering a motion for summary judgment requesting dismissal of a complaint against a governmental entity and its employees under the Idaho Tort Claims Act, the trial court must answer whether tort recovery is allowed under the laws of Idaho; and, if so, whether an exception to liability found in the tort claims act shields the alleged misconduct from liability . . . ." *Harris v. State, Dep't of Health & Welfare*, 123 Idaho 295, 298 n.1, 847 P.2d 1156, 1059 n.1 (1992) (McDevitt, J.) (emphasis supplied). *See also*, *Sherer v. Pocatello School Dist. No. 25*,143 Idaho 486, 490, 148 P.3d 1232, 1236 (2006) (Schroeder, C.J.) ("A plaintiff seeking to recover on a tort claim against a governmental entity must survive three stages of analysis. First, the plaintiff must state a cause of action for which tort recovery would be allowed under the laws of Idaho, that is, whether there is such a tort under Idaho law.") (citing *Carrier v. Lake Pend Orielle School Dist.*, 142 Idaho 804, 806-07, 134 P.3d 655, 657-58 (2006) (Burdick, J.)); *Farner v. Idaho Falls Sch. Dist. No. 91*, 135 Idaho 337, 341, 17 P.3d 281 (2000) (Trout, C.J.) ("The ITCA, however, only applies to tort claims.").

[210] "All damage claims against a city must be filed as prescribed by chapter 9, title 6, Idaho Code." Idaho Code § 50-219.

[211] In *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.), the Court ruled that section 50-219 embraces both section 6-906 (the 180-day notice requirement) and section 6-908 (barring claims where notice not timely filed). That makes sense, because 50-219 adopts the "filing" provisions the ITCA. Nothing in *Alpine Village* suggests that section 50-219 expands the scope of other provisions of the ITCA, such as section 6-904A.

allegedly unconstitutional taxes and fees. One might ask, what tax and fee claims sound in tort? Presumably, that would include a claim for conversion, which is a tort.[212] In any event, the exception appears to be quite narrow.

In *Hill-Vu Mobile Home Park v. City of Pocatello*, 402 P.3d 1041 (Idaho 2017) (Eismann, J.), the Court took an entirely different tack on this. Facing a challenge to its water and sewer charges, the City argued that it was immune from damage claims under Idaho Code § 6-904A(1). The Court rejected the defense, but not on the basis that section 6-904A is limited to challenges that sound in tort. Instead, the Court ruled more broadly that the statute cannot stand in the way of the protection of a constitutional right:

> To hold that an unlawful fee or charge is a "tax" as that term is used in section 6-904C would create a conflict between the statute and the Constitution. A statute cannot limit the right to recover for the taking of property in violation of the Constitution.

Hill-Vu at 1047. The Court's reasoning is difficult to follow,[213] but the conclusion is clear enough: Section 6-904A(1) is no defense to a claim of illegal fees or taxes.

D. Tort claim notice must be filed within 180 days

A litigant claiming damages against a local government is obligated to file a notice of tort claim with the secretary or clerk of the political subdivision. Idaho Code § 6-906. (A separate provision applies to actions against the State. Idaho Code § 6-905.) Such claims must be filed within 180 days of when the claim arose or reasonably should have been discovered. *Gibson v. Ada Cnty.*, 142 Idaho 746, 752, 133 P.3d 1211, 1217 (2006), *cert. denied*, 549 U.S. 994 (2006), *rehearing denied*, 549 U.S. 1159 (2007). Requirements for the filing of the claim are set out in Idaho Code § 6-907.

If a timely claim is not filed, the litigant loses its right to sue:

> The ITCA mandates that if a claimant does not provide the government with timely notice of its claim, it loses

[212] "An action for trespass to either chattels or land is a tort, as is an action for trover and conversion. When these torts are allegedly committed by a government employee acting within the course or scope of his employment, they fall within the purview of the ITCA." *Greenwade*, 119 Idaho at 503, 808 P.2d at 422 (footnote omitted).

[213] The Court goes on at length to make the point that the City's fee cannot be called a tax because it is illegal. But that ignores the fact that the statute immunizes cities from claims for the collection not just of taxes, but of "any fee or tax." Perhaps the Court is saying that section 6-904A(1) only immunized cities from charging legal fees and taxes. If that is what it meant, it could have said that more clearly.

> the right to assert the claim. I.C. § 6–908. Timely and adequate notice under the ITCA "is a mandatory condition precedent to bringing suit, the failure of which is fatal to a claim, no matter how legitimate."

Allied Bail Bonds, Inc. v. Cnty. of Kootenai, 151 Idaho 405, 410, 258 P.3d 340, 345 (2011) (Horton, J.) (quoting *McQuillen v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741, 744 (1987)).

Once the claim is filed, the governmental entity then has 90 days to notify the claimant of the approval or denial of the claim. Idaho Code § 6-909. Claims filed prematurely may be dismissed. *See, Farnworth v. Femling*, 125 Idaho 283, 288-89, 869 P.2d 1378, 1383-84 (1994). Thus, the act operates as a sort of cooling off period during which the governmental entity is given an opportunity to resolve the matter short of litigation.

In the case of county governments, the tort claim act applies only to claims sounding in tort. Constitutional taking claims are not torts. Thus, plaintiffs are not required to comply with the tort claim act for taking claims directed to counties. In *Allied Bail Bonds, Inc. v. Cnty. of Kootenai*, 151 Idaho 405, 409-10, 258 P.3d 340, 344-45 (2011), the Court dismissed the plaintiff sued the county alleging that the sheriff wrongfully diverted Allied's potential customers away from its bail bond business. The Idaho Supreme Court affirmed the dismissal of the action, finding that the "essence" of the claim sounded in tort (tortuous interference with business) despite the fact that the plaintiff also pled a violation of an obscure state constitutional provision dealing with debts of local governments.

In *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 174-76, 108 P.3d 315, 321-23 (2004) (Eismann, J.), plaintiffs brought an action for "taking of its property without just compensation in violation of the United States and Idaho Constitutions." *BHA II*, 118 Idaho at 172, 108 P.3d at 319. The issue in this case was whether plaintiffs' tort claim notice was timely. One of the plaintiffs (Splitting Kings)[214] filed a tort claim notice more than two years after paying the transfer fee. That plaintiff contended that it should be excused from the notice requirement under Idaho Code § 50-219 until the case law became more clear "because they could not reasonably have known they had a claim until January 30, 2003, when we issued our opinion in *BHA I*." *BHA II*, 141 Idaho at 174, 108 P.3d at 321. The Court rejected the argument that ignorance of a claim eliminates (or delays) the notice requirement: "That opinion did not create a cause of action where none previously existed. The phrase 'reasonably should have been discovered' refers to knowledge of the facts upon which the claim is based, not knowledge of the applicable legal theory upon

[214] *BHA II* involved consolidated cases. The plaintiffs in *BHA I* filed timely damage claim notices; the new plaintiffs in *BHA II* did not.

which a claim could be based." *Id*. Accordingly, the Court threw out the state takings claim (as well as a state unjust enrichment claim). *BHA II*, 141 Idaho at 174, 108 P.3d at 321.

E. ITCA's notice requirement is made applicable to all damage claims against cities by section 50-219.

As discussed above, the ITCA imposes a 180-day notice requirement for claims sounding in tort for which immunity is waived under the act. A separate statute, enacted in 1983, expands the scope of this notice requirement where the defendant is a city.[215] Idaho Code § 50-219 requires: "All claims for damages against a city must be filed as prescribed by chapter 9, title 6, Idaho Code [the Idaho Tort Claims Act, Idaho Code §§ 6-901 to 6-929]." The effect of this is that, all damage claims (not just tort claims) against cities are subject to the 180-day rule in Idaho Code § 6-906. *Turner v. City of Lapwai*, 157 Idaho 659, 662, 339 P.3d 544, 547 (2014) (J. Jones, J.); *Sweitzer v. Dean*, 118 Idaho 568, 571-73, 798 P.2d 27, 30-32 (1990) (Boyle, J.)[216]; *Scott Beckstead Real Estate Co. v. City of Preston*, 147 Idaho 852, 216 P.3d 141 (2009) (Eismann, C.J.).

This includes taking claims. *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 174-76, 108 P.3d 315, 321-23 (2004) (Eismann, J.).

In Brown v. City of Twin Falls, 124 Idaho 39, 40-41, 855 P.2d 876, 877-78 (1993), the Court noted that the trial court reached a contrary conclusion (that taking claims against cities are not subject to the ITCA's notice requirement because they are not torts). This trial court's ruling was plainly incorrect, because it overlooks

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[215] From 1967 until 1983, Idaho Code § 50-219 was a stand-alone notice requirement requiring 60-days notice to cities prior to filing suit. In 1983, it was amended to link it to the notice provision in the ITCA. 1993 Idaho Sess. Laws, ch. 93. Thus, prior to 1983, the notice requirement had no connection to the ITCA and would not have triggered the two-year statute of limitations provision in the ITCA.

[216] Mr. Sweitzer worked for the City of Post Falls as maintenance worker in the cemetery. He claimed that he suffered various ailments owing to the fact that that family and friends were buried there. He sued the city alleging that he was constructively discharged. The ITCA then provided a 120-day deadline. His notice of claim was filed ten months after the claim arose. Sweitzer contended that because section 50-219 referred to the entire ITCA, rather than just the 120-day rule, "the legislature in effect substituted the entire tort claim act for § 50-219" thereby limiting its notice requirement to tort claims. *Sweitzer*, 118 Idaho at 571, 798 P.2d at 30. The Idaho Supreme Court (and the district court) rejected this argument. The Court found the language of section 50-219 clear on its face. "Applying the plain meaning of the language contained in I.C. § 50-219 clearly demonstrates that the legislature's intent was to incorporate the notice requirements contained in chapter 9, title 6 so as to make the filing procedures for all claims against a municipality uniform, standard and consistent. To construe the language to mean that the Tort Claims Act is substituted for I.C. § 50-219 would render I.C. § 50-219 meaningless and essentially null." *Sweitzer*, 118 Idaho at 572, 798 P.2d at 31.

Idaho Code § 50-219. However, the Idaho Supreme Court decided the case on the merits and expressly withheld any ruling on the Idaho Tort Claims Act.

In *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.), the plaintiff argued that, while Idaho Code § 50-219 imposes the notice requirement under Idaho Code § 6-906 on all damage claims against cities, it does not make applicable Idaho Code § 6-908 (barring claims where notice was not timely provided). In essence, the plaintiff argued that while it was required to file a timely claim under Idaho Code § 6-906, there was no consequence for its failure to do so. It also argued that the notice of claim requirement is not jurisdictional and that McCall should be estopped from asserting the statute as a bar. The plaintiffs made no headway with Idaho Supreme Court.

First, the Court confirmed that, for actions against a city, Idaho Code § 50-219 encompasses Idaho Code § 6-908, thus making it applicable to the broader range of claims (*e.g.*, taking claims) encompassed by Idaho Code § 50-219. *Alpine Village*, 154 Idaho at 935, 303 P.3d at 622.

It also held that while the notice of claim requirement is not jurisdictional (in the sense of depriving courts of jurisdiction), it is nonetheless mandatory absent some "applicable exception." *Alpine Village*, 154 Idaho at 936, 303 P.3d at 623. The Court addressed two such possible exceptions (equal protection and quasi-estoppel), but found that neither were applicable.

The Court agreed with the City that the claim arose no later than the signing of a development agreement between the parties (which mandated contributions challenged in the suit), which occurred years before the notice of claim was filed. The Court concluded, "We hold that because Alpine's claims were filed more than 180 days after their cause of action accrued, the claims are untimely under I.C. § 50–219." *Alpine Village*, 154 Idaho at 936, 303 P.3d at 623. The effect of this is that the 180-day deadline operates, in practical effect, just like a statute of limitations at to state law claims. See discussion of statutes of limitation in section 22.D at page 292.

F. The ITCA's two-year statute of limitation

The ITCA's 180-day requirement operates, in practical effect, like a statute of limitations cutting off claims older than 180 days. In other words, the notice may only reach back to claims that are less than 180 days old.

In addition, the ITCA contains its own two-year statute of limitation. Idaho Code § 6-911. Thus, as to any claims that are properly noticed within 180 days, the plaintiff is still subject to the two-year statute of limitations as a deadline to file the action. See discussion of statutes of limitation in section 22.D at page 292.

G. Is failure to file a jurisdictional defect?

In *Madsen v. Idaho Dep't of Health and Welfare*, 116 Idaho 758, 761, 779 P.2d 433, 436 (Ct. App. 1989) (Walters, J.), the Idaho Court of Appeals held that a plaintiff's failure to file a notice of claim in accordance with the provisions of the ITCA, which was a mandatory condition precedent to maintaining an action, meant that the district court lacked subject matter jurisdiction over the action. "Because the action could not be maintained without compliance with the Tort Claims Act, the Court lacked subject matter jurisdiction and properly dismissed the action as to the Department." *Id*.

Likewise, in *McQuillen v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741, 744 (1987) (Bakes, J.), the Idaho Supreme Court held: "Compliance with the Idaho Tort Claims Act notice requirement is a mandatory condition precedent in bringing suit, the failure of which is fatal to a claim, no matter how legitimate." This statement was quoted with approval in *Banks v. University of Idaho*, 118 Idaho 607, 608, 798 P.2d 452, 453 (1990) (ITCA applied to the university).

In *Stevens v. Fleming*, 116 Idaho 523, 527, 777 P.2d 1196, 1200 (1989) (Huntley, J.), the Idaho Supreme Court held that notice "is prerequisite to maintaining a claim" and failure to file a timely notice means that "the claim against the Grimes failed for lack of jurisdiction."

In *Greenwade v. Idaho State Tax Comm'n*, 119 Idaho 501, 503, 808 P.2d 420, 422 (Ct. App. 1991) (Silak, J.), the district court found that plaintiff's failure to comply with the ITCA deprived it of jurisdiction. The Court of Appeals construed section 6-905, the corollary to section 6-906 applicable to state government. The district court ruled that plaintiff's failure to comply with the ITCA deprived the Court of jurisdiction. The Idaho Supreme Court affirmed. It said, "The language of this statute is mandatory. When it is read together with I.C. § 6–908, it is clear that failure to comply with the notice requirement bars a suit." *Greenwade*, 119 Idaho at 503, 808 P.2d at 422.

In 2009, the Court of Appeals cited *Greenwade* and observed again: "The language of this section [6-905] is mandatory and when it is read together with I.C. § 6–908, it is clear that failure to comply with the notice requirement bars a suit regardless of how legitimate it might be." *Driggers v. Grafe*, 148 Idaho 295, 297, 221 P.3d 521, 523 (Ct. App. 2009) (footnote omitted).

In *Allied Bail Bonds, Inc. v. Cnty. of Kootenai*, 151 Idaho 405, 409-10, 258 P.3d 340, 344-45 (2011) (Horton, J.), the district court ruled that plaintiff's failure to provide notice under the ITCA of its constitutional and other claims deprived it of subject matter jurisdiction. This Court affirmed, quoting the "condition precedent" language from *McQuillen*.

The federal district court, applying Idaho law, is in accord. *Community Housing, Inc. v. City of Boise*, 2008 WL 2857458 (D. Idaho 2008).

In *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.), the Court drew a semantic distinction with respect to jurisdiction. It is not correct to say that a court lacks jurisdiction to hear a claim when the plaintiff fails to meet ITCA's notice requirement. Technically, the court is not deprived of jurisdiction. However, even if the ITCA does not present a jurisdictional bar, it presents a procedural bar. The bottom line is that the claim is barred, whatever you call it. *Alpine Village*, 154 Idaho at 936, 303 P.3d at 623.

H. Content of claim

The ITCA requires that the notice of claim be "filed with the clerk or secretary of the political subdivision." Idaho Code § 6-906.

This is not a flexible requirement. In *Turner v. City of Lapwai*, 157 Idaho 659, 662, 339 P.3d 544, 547 (2014) (J. Jones, J.), the Court held that communications directed to "an independent auditing firm, the then-Mayor of Lapwai, and a single member of the Lapwai city council" did not satisfy the requirement that the notice be filed with the clerk or secretary. "That section does not state that a claim may alternatively be filed with any higher ranking official or with any official who is in a position to resolve the dispute at issue. By requiring the filing of claims with a particular party, the Legislature eliminated a difficult case-by-case inquiry into whether a communication with one official or another provided adequate notice to the political subdivision." *Id*.

"A 'claim' means any written demand to recovery money damages from a governmental entity . . . ." Idaho Code § 6-902(7).

The notice of claim must be more that a letter to the city raising concerns or complaining about something. The act specifically requires the claimant to set out the following items or descriptions, to the extent known:

- the conduct and circumstances which brought about the injury or damage
- the injury or damage
- the time and place the injury or damage occurred
- the names of all persons involved
- the amount of damages claimed
- the actual residence of the claimant at the time of presenting and filing the claim and for a period of six (6) months immediately prior to the time the claim arose

Idaho Code § 6-907.

In *Turner v. City of Lapwai*, 157 Idaho 659, 663, 339 P.3d 544, 548 (2014) (J. Jones, J.), the Court rejected an argument that communications with the city that failed to meet the technical requirements of the notice should suffice because "the City was not misled or prejudiced by such deficiencies." "Furthermore, this Court has held that the failure to file a claim in accordance with Section 6–906 bars that claim even if the relevant political subdivision was not prejudiced by the failure." *Turner*, 157 Idaho at 664-65, 339 P.3d at 549-50 (citing *Blass v. Cnty. of Twin Falls*, 132 Idaho 451, 974 P.2d 503 (1999)).

> In *Wickstrom v. North Idaho College*, 111 Idaho 450, 725 P.2d 155 (1986), we held that a demand letter sent by plaintiffs' counsel was insufficient to serve as a notice of claim under the statute because it did not include the plaintiffs' names and addresses. We stated, "The demand letter of August 21, 1984 failed to serve as notice of a claim pursuant to the I.T.C.A., since it failed to state the names and addresses of the claim-ants, the amounts of claimed damages and the nature of the injury claimed. The claim is, therefore, barred."

BHA II, 118 Idaho at 175, 108 P.3d at 322.

21. MANDATORY CLAIMS STATUTES FOR COUNTIES (IDAHO CODE §§ 31-1501 AND 63-1308(2))

An Idaho statute applicable to counties requires that claims against a county be presented within one year:

> The board of commissioners must not hear or consider any claim against the county unless accompanied by a receipt or documentation giving all items of the claim, duly certified by the authorized county official that the amount claimed is justly due or services were rendered. No claim shall be paid if not presented to the board within a year from the date the bill was generated.

Idaho Code § 31-1501.[217]

Note that the one-year deadline is for presentation of the claim to the county; this section does not set a deadline for filing suit. However, Idaho Code § 31-1506 makes the 28-day deadline under the Idaho Administrative Procedure Act applicable for "judicial review of any final act, order or proceeding of the board." Presumably, this would provide the mechanism and the deadline for challenging denial of any claim presented to the county.

Another provision, Idaho Code § 63-1308(2), provides an alternative procedure in the case of a taxpayer who makes a payment under protest. Under this statute, the taxpayer must file suit within 60 days after such payment.

Both provisions were discussed in *In the Matter of Certified Question of Law – White Cloud v. Valley Cnty.*, 156 Idaho 77, 320 P.3d 1236 (2014) (J. Jones, J.), which involved a challenge to a road development fee which the plaintiffs alleged was an illegal tax.

Relying on *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 176, 108 P.3d 315, 323 (2004) (Eismann, J.), the *White Cloud* Court held that "the payment under protest requirement does not apply to an illegal fee." *White Cloud*, 156 Idaho at 83, 320 P.3d. at 1242. Thus, because payment under protest is not required to challenge an allegedly illegal tax masquerading as a fee, section 63-1308(2) does not come into play (unless the payer elects to pay under protest). But the one-year deadline for filing documentation of a claim, is applicable.

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[217] This provision may be traced to territorial law. 1869 Idaho Terr. Sess. Laws § 12, p. 100. Its current codification at Idaho Code § 31-1501 dates to 1995. 1995 Idaho Sess. Laws, ch. 61 § 6. In 1919 it was codified to section 3506 of chapter 150, Idaho Compiled Statutes. It was later codified to Idaho Code Ann. § 30-1105. In 1973 it was codified to Idaho Code § 31-1506. 1973 Idaho Sess. Laws, ch. 288 § 1. In 1995, it was amended and re-codified to Idaho Code § 31-1501. 1995 Idaho Sess. Laws, ch. 61 § 5.

"However, I.C. § 31–1501 does apply to counties and imposes a one year cut-off for claims against the county." *White Cloud*, 156 Idaho at 84, 320 P.3d. at 1243.

Section 31-1501 does not say what "claims" are subject to the one-year requirement. The statute refers to claims in the context of "the amount . . . due or services . . . rendered" and "the date the bill was generated." Thus, one might think that the presentation requirement is limited to claims based on contract terms or similar obligations. Indeed, many of the cases arise in the context of amounts owed to service providers, county officers, and other contract holders. The decision, in *White Cloud*, however, makes clear that the statute applies more broadly than this.

Initially, the Court observes that "Idaho Code § 31-1501 applies to general claims asserted against the county." *White Cloud*, 156 Idaho at 83, 320 P.3d. at 1242. The Court then concludes: "It all boils down to this: a person wishing to challenge an allegedly illegal tax must either pay the tax under protest and then bring a cause of action in court within sixty days or file a claim with the board of county commissioners within a year." *White Cloud*, 156 Idaho at 84, 320 P.3d. at 1243. If this requirement applies to claims based on allegedly illegal taxes, presumably it applies, as well, to any taking claim. Indeed, the broad language of section 31-1501 ("No claim shall be paid") may be read to require timely presentation of <u>any</u> claim for money against a county.

In other words, this provision may be seen as a counterpart (applicable to <u>counties</u>) to the Idaho Tort Claim Act's requirement (applicable to <u>cities</u>) that notice of damage claims be filed within 180 days. Idaho Code §§ 6-901 to 6-929.[218] Indeed, the Court in *White Cloud* drew that very analogy:

> These seemingly short limitations provisions are not unreasonable when considered in context. This Court recently held that a developer requesting a refund of what was determined to be an illegal city tax had to file a claim for the refund within 180 days from the date the claim arose in order to pursue recovery. *Hehr*, 155 Idaho at 96, 305 P.3d at 540. . . .
> . . . Of course, I.C. § 50–219 does not apply to claims against counties. However, I.C. § 31–1501 does apply to counties and imposes a one year cut-off for claims against the county.

[218] The Idaho Tort Claim Act applies to all local governments, including cities. However, its scope is limited to tort claims, not other damage claims. Another statute, Idaho Code § 50-219, expands the applicability of the notice requirement in the tort claim act to all damage claims against cities. Thus, notice of taking claims against cities must be filed within 180 days. *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.).

White Cloud, 156 Idaho at 84, 320 P.3d. at 1243.

It bears emphasis that the one-year deadline in section 31-1501 may be eclipsed by the even shorter 28-day deadline to appeal under LLUPA, if that statute is applicable. Because the *White Cloud* case reached the Idaho Supreme Court via a narrow certified question from the federal district court, the Idaho Court was constrained not to answer the related question of whether the one-year deadline is preempted by LLUPA's 28-day deadline. Nevertheless, the Idaho Supreme Court strongly hinted (essentially in dictum) that this was the case. It repeatedly noted the applicability of the 28-day rule, even providing a pinpoint citation to its decision in *Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 493-94, 300 P.3d 18, 25-26 (2013) (J. Jones, J.).[219]

Following the Idaho Supreme Court's decision, the *White Cloud* plaintiffs dropped their federal case, stipulating that their claims should be dismissed with prejudice. Consequently, there was no federal court ruling on the question, and the prior intermediate decisions of the federal court in that case are without precedential value.

Prior to *White Cloud*, the Idaho Supreme Court applied the mandatory county claim statute in only a handful of cases, none of which provide much guidance on the statute's scope or application. In 1983 the Court noted: "A board of commissioners is forbidden to pay a claim asserted against it until certain procedures are followed." *Bingham Cnty. Comm'n v. Interstate Electric Co.*, 105 Idaho 36, 41, 665 P.2d 1046, 1051 (1983) (Bakes, J.) (applying predecessor statute, Idaho Code § 31-1506). In *Guiles v. Kellar*, 68 Idaho 400, 195 P.2d 367 (1948) (Givens, J.), the Court applied the predecessor statute, Idaho Code Ann. § 30-1105, to preclude recovery when no claim was filed against the county.

On other occasions, the Idaho Supreme Court found exceptions to the claim requirement. In 1924, the Court found the claim requirement "does not apply to a case where the liability and its extent are so clearly fixed by positive provisions of the statutory law that the question becomes purely one of law, leaving nothing for the

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[219] "Because we have not been requested to address the issue of exhaustion of remedies under LLUPA, we have further revised the question to make it clear that we do not opine on that issue." *White Cloud*, 156 Idaho at 80, 320 P.3d. at 1239. "Because the answer we give to the narrow question addressed to us depends on certain legal assumptions including but not limited to: . . . whether or not the fee should have been challenged in the zoning and planning process—it is important for this Court to state what we are not deciding." *White Cloud*, 156 Idaho at 81, 320 P.3d. at 1240. "We have not been asked to address the County's contention that the Plaintiffs failed to exhaust their administrative remedies under the LLUPA. We addressed the exhaustion issue in *Buckskin* (154 Idaho at 493-94, 300 P.3d at 25-26) but decline the County's invitation to address it here." *White Cloud*, 156 Idaho at 82, 320 P.3d. at 1241. "As previously mentioned, we decline to address how Plaintiffs' claim may be affected by the provisions of LLUPA." *White Cloud*, 156 Idaho at 84 n.6, 320 P.3d. at 1243 n.6.

commissioners to pass upon, and no room for the exercise of discretion." *Drainage Dist. No. 2 of Ada Cnty. v. Ada Cnty.*, 38 Idaho 778, 226 P. 290 (1924) (McCarthy, J.) (applying a predecessor statute, Idaho Compiled Stat. § 3506) (citing *Boise Valley Traction Co. v. Ada Cnty.*, 38 Idaho 350, 363, 222 P. 1035, 1039 (1923)). Given that the Court found section 31-1501 applicable in *White Cloud* (which involved the allegation that the County imposed a tax prohibited by the Idaho Constitution), it would seem that these exception cases should be narrowly applied and do not provide a ready escape hatch for taking claims.

The bottom line is that claims based on actions to which judicial review is available under LLUPA must be brought within 28 days. If LLUPA judicial review is not available or is excused under some exception, documentation of the claim must be presented to the county within one year and suit must be filed within 28 days after denial of the claim. Alternatively, if payment was made under protest, suit must be filed within 60 days of payment. These deadlines are applicable to counties. Cities, in contrast, are subject to the 180-day deadline for filing a tort claim notice. In short, even if a plaintiff is allowed an "end run" around LLUPA, that action must happen promptly.

22. STATUTES OF LIMITATION

A. Potentially applicable statutes of limitations

Statute	Time period	Subject
Idaho Code § 5-202	10 years	actions brought by Idaho governmental entities, "people of the state," involving title to government land (applicable to state and local governmental entities)
Idaho Code §§ 5-203, 5-204, 5-207, 5-210[220]	20 years (5 years before 2006)	adverse possession and prescriptive use
Idaho Code § 5-216	5 years	written contract
Idaho Code § 5-217	4 years	oral contract
Idaho Code § 5-218(2)	3 years	trespass on real property
Idaho Code § 5-219(4)	2 years	actions against officers, for statutory penalties, libel, slander, professional malpractice, or personal injury torts (federal precedent makes this personal injury statute applicable to federal taking claims under § 1983)
Idaho Code § 5-221	6 months	actions against county for claims rejected by board
Idaho Code § 5-224	4 years	catch-all limitation applicable to (i) state taking claims and (ii) non-personal injury tort actions, including tortious interference with contract
Idaho Code § 6-911	2 years	tort claims against governmental entity (ITCA)

Note also the requirement under the Idaho Tort Claims Act to file a claim with the governmental entity within 180 days, Idaho Code § 6-906. This is not a statute of limitations, but has a similar effect.

B. The policy underlying the statute of limitations

"'The policy behind statutes of limitations is protection of defendants against stale claims, and protection of the courts against needless expenditures of resources.'

[220] The change from five to 20 years was made in each of these statutes. Only the first is a statute of limitations. The others are substantive provisions describing the requirements of adverse possession. "Idaho Code section 5-210 is not a statute of limitations." *Schoorl v. Lankford*, 389 P.3d 173, 175 (Idaho 2017) (Eismann, J.). The *Schoorl* Court held that the change from 5 to 20 years in 2006 is applicable to adverse possession claims that have not vested and does not constitute retroactive legislation.

Johnson v. Pischke, 108 Idaho 397, 402, 700 P.2d 19, 25 (1985). Statutes of limitation are designed to promote stability and avoid uncertainty with regards to future litigation." *Wadsworth v. Idaho Dep't of Transportation*, 128 Idaho 439, 442, 915 P.2d 1, 4 (1996).

C. The statute of limitations may bar constitutional claims.

Occasionally plaintiffs bringing untimely suits have contended that the Legislature lacks the power to bar a constitutional claim (such as an inverse condemnation) based on a statute of limitations. The Idaho Supreme Court has rejected this argument. *Wadsworth v. Idaho Dep't of Transportation*, 128 Idaho 439, 441-42, 915 P.2d 1, 3-4 (1996).

D. State-law inverse condemnation claims are subject to Idaho's catch-all four-year statute of limitations (Idaho Code § 5-224) if no other statute of limitations is applicable.

There is no Idaho statute of limitations specifically addressing inverse condemnation claims (*i.e.*, taking claims). Accordingly, Idaho's four-year "catch all" inverse condemnation statute, Idaho Code § 5-224, will apply to state-law inverse condemnation claims where no other statute of limitations is applicable.[221]

Thus, for example takings claims against counties and highway districts are subject to the four-year statute of limitations. "The limitations period for inverse condemnation claims is contained in I.C. § 5-224 which is the statute of limitations for all actions not specifically provided for in another statute." *McCuskey v. Canyon Cnty. Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 216, 912 P.2d 100, 103 (1996) (Trout, J.). See also *C & G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 75 P.3d 194 (2003) (Kidwell, J.).

Likewise, the four-year statute of limitations applies to entities of the State. *Wadsworth v. Idaho Dep't of Transportation*, 128 Idaho 439, 442, 915 P.2d 1, 4 (1996) (Schroeder, J.); *Harris v. State, ex rel. Kempthorne*, 148 Idaho 401, 404, 210 P.3d 86, 89 (2009) (Burdick, J.).

For claims arising prior to 1983 (when Idaho Code § 50-219 was amended to make the ITCA applicable to all damage claims against cities, see footnote 215 at page 282.), the four-year statute of limitation was applicable to cities as well. *Intermountain West, Inc. v. Boise City*, 111 Idaho 878, 880, 728 P.2d 767, 769 (1986)

[221] See discussion in section 22.I at page for the limitation period applicable to federal inverse condemnation actions.

(Donaldson, C.J.)[222]; *Harkness v. City of Burley*, 110 Idaho 353, 359-60, 715 P.2d 1283, 1289-90 (1986) (Bistline, J.).

E. State-law inverse condemnation cases against cities are subject to the two-year statute of limitations in the ITCA.

There is a strong argument that the more specific two-year statute of limitations in the ITCA applies in state-law takings or other damage cases brought against cities subsequent to 1983. As noted, that is when Idaho Code § 50-219 was amended to make the ITCA applicable to all damage claims against cities. (See footnote 215 at page 282.)

The plain language of Idaho Code § 50-219 broadly applies all of the ITCA's requirements governing the filing of damage actions against cities: "All claims for damages against a city must be filed as prescribed by chapter 9, title 6, Idaho Code."

The ITCA sets out its own two-year statute of limitations. Idaho Code § 6-911. In addition, the 180-day notice of claim requirement also operates, in practical effect, like a statute of limitations. Both are applicable, but work a little differently. All claims (older than 180 days) are barred if a notice of claim is not filed within 180 days of accrual of the claim. As to any claims that are properly noticed (within 180 days of accrual), the plaintiff is still subject to the two-year statute of limitations as a deadline to file the action.[223]

In other words, the plaintiff has six months (180 days) to file the notice of claim and two years to file the complaint, both running from the date of accrual. For example, if a plaintiff waited until the last day to file the notice of claim, and the governmental entity took another three months (90 days) to deny the claim, the

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[222] The *Intermountain West* Court correctly applied the four-year statute of limitations to the state-law inverse condemnation claim, which arose before 1983. Inexplicably, the Court made no reference to Idaho Code § 50-219, which, even prior to 1983, should have barred the state-law claims under the 60-day notice requirement that had been in effect since 1967. The Court failed to draw any distinction between the statute of limitations applicable to state and federal inverse condemnation claims. Indeed, the Court failed to mention whether the claims arose under state or federal law.

[223] *See Noak v. Idaho Dep't of Correction*, 152 Idaho 305, 310, 271 P.3d 703, 708 (2012) (J. Jones, J.) (tort claim notice timely filed, but action not filed within two years of tort).

In *Harkness v. City of Burley*, 110 Idaho 353, 359-60, 715 P.2d 1283, 1289-90 (1986) (Bistline, J.), the plaintiff argued that he was not subject to what was then a 60-day notice requirement in Idaho Code § 50-219, because a separate four-year statute of limitations applicable to oral contracts (Idaho Code § 5-219) was more specific. The Idaho Supreme Court rejected this argument saying that the notice requirement is different from and in addition to any applicable statute of limitations. The *Harkness* Court did not mention the two-year statute of limitations at Idaho Code § 6-911. It would seem that if any statute of limitations would be applicable, it would be the two-year s statute, not the four-year statute. But the Court did not address that point, since any such statute was trumped by the 180-day notice requirement.

plaintiff would then have roughly another 15 months to file the lawsuit in order to meet the two-year statute of limitations.

Thus, it would appear from the plain language of the statute that the two-year statute of limitations in the ITCA supersedes other statutes of limitations, making the catch-all four-year statute of limitations inapplicable.

This is confirmed in *Noak v. Idaho Dep't of Correction*, 271 P.3d 703, 708 (Idaho 2012) (J. Jones, J.). Although this case did not involve a city, the suit was brought under the ITCA. The Court found that the two-year statute of limitations in the ITCA was applicable.

The case of *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 136 P.3d 310 (2006) (J. Jones, J.) is not contrary to this conclusion. It applied the four-year statute of limitations, but the case dealt only with a federal taking claim.[224]

In *Alpine Village Co. v. City of McCa*ll, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.), the City of McCall urged that the ITCA's two-year statute of limitations overrides the four-year statute of limitations applicable to condemnation actions, but the Court found it unnecessary to address the issue because the plaintiff also missed the 180-day deadline.

Another ruling in *Alpine Village*, though not directly on point, shows that section 50-219 incorporates more than the notice requirement.

> Alpine argues that I.C. § 50–219 only incorporates I.C. §§ 6-906 and 6-907, as they are the two subsections of chapter 9, title 6 that specifically address filing claims. However, this position ignores that I.C. § 6–908 outlines the ramifications for failing to timely file a claim, a function that would clearly bring it within the scope of I.C. § 50–219. Therefore, Alpine's claims must be timely as contemplated in I.C. §§ 6-906 and 6-908 or they will not be allowed under I.C. § 50-219.

Alpine Village, 154 Idaho at 935, 303 P.3d at 622. Thus, it is clear that section 50-219 incorporates more than the notice requirement. They must also be timely. It is difficult to fathom and difficult to reconcile with the plain words of section 50-219 (requiring that claims be "filed as prescribed by" the ITCA) how the act would

[224] As discussed elsewhere, it is unclear why the Court did not conclude that the federal claim was subject to Idaho's two-year statute of limitations.

demand timeliness as to the ITCA's notice requirement but not timeliness as to the ITCA's statute of limitations.[225]

F. The clock starts when a substantial interference with the plaintiff's property becomes apparent.

The words of the catch-all statute of limitations are: "An action for relief not hereinafter provided for must be commenced within four (4) years after the cause of action shall have accrued." Idaho Code § 5-224. Thus, in the words of the statute, the key question is: when did the cause of action accrue? In seven cases, the Idaho Supreme Court has found that claims of inverse condemnation run from the time that a substantial interference with the subject property becomes apparent.

The seminal case is *Tibbs v. City of Sandpoint*, 100 Idaho 667, 603 P.2d 1001 (1979) (Thomas, J. pro tem.). In this case, the plaintiffs alleged a taking based on the city's expansion of an airport and the adverse effects of increased air traffic on plaintiffs' property. The Court stated:

> The actual date of taking, although not readily susceptible to exact determination, is to be fixed at the point in time at which the impairment, of such a degree and kind as to constitute a substantial interference with plaintiffs' property interest, became apparent.

Tibbs, 100 Idaho at 671, 603 P.2d at 1005. This statement is often quoted and cited in cases dealing with the statute of limitations and the date of accrual.[226]

The first case to quote *Tibbs* was *Rueth v. State* ("*Rueth II*"), 103 Idaho 74, 79, 644 P.2d 1333, 1338 (1982) (McFadden, J.). Like *Tibbs*, *Rueth II* was an inverse

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[225] Nothing in *Sweitzer v. Dean*, 118 Idaho 568, 798 P.2d 27 (1990) (Boyle, J.) is to the contrary. In that case, the City of Post Falls argued that the reference in section 50-219 to the ITCA did not expand the notice requirement to all damage claims, but was limited to the language in the ITCA to the tort actions. The Court rejected that argument. "Applying the plain meaning of the language contained in I.C. § 50-219 clearly demonstrates that the legislature's intent was to incorporate the notice requirements contained in chapter 9, title 6 so as to make the filing procedures for all claims against a municipality uniform, standard and consistent. To construe the language to mean that the Tort Claims Act is substituted for I.C. § 50-219 would render I.C. § 50-219 meaningless and essentially null." *Sweitzer*, 118 Idaho at 572, 798 P.2d at 31. That holding has nothing to do with question of whether section 50-219 also incorporates the ITCA's statute of limitations.

[226] Curiously, the *Tibbs* case did not actually involve the statute of limitations. The case was an action for inverse condemnation where the impact on the neighboring property was gradual. The question in the case was how to value the decline in property value, and the reference to when the case arose was in the context of fixing the dates for determination of "the difference in the value of the property before and after the destruction or impairment of the access." *Tibbs*, 100 Idaho at 670, 603 P.2d at 1004.

condemnation case in which evaluating the extent of damages was at issue. And, like *Tibbs*, *Rueth I* did not deal with the statute of limitations. Both cases, however, dealt with the question of when the taking occurs and, hence, have laid the foundation for determining when statute of limitations begins to run.

In *Rueth II*, the plaintiffs operated a dairy farm whose land had gradually become saturated due to a water diversion structure built by the Idaho Department of Fish and Game. The Court recited the guidelines set out in *Tibbs* and concluded that it was appropriate for the trial court to select the date of a meeting in which the parties recognized "the severity of the problem":

> Because of the gradual nature of the taking in this case, and because of the character of a taking through a rising groundwater table, it would have been impossible to pick a specific date on which it could be said clearly that the taking occurred. Nonetheless, the agreement of the Department of October 4, 1974, to remove the boards from the irrigation check structure represents a recognition of the severity of the problem, and the evidence supports this date as a reasonable one for purposes of fixing the date of actual taking.

Rueth II, 103 Idaho at 79, 644 P.2d at 1338 (emphasis supplied).

The next case to quote *Tibbs* was *Intermountain West, Inc. v. Boise City*, 111 Idaho 878, 880, 728 P.2d 767, 769 (1986) (Donaldson, C.J.). This is the first time that the *Tibbs* guidance was applied in the context of the statute of limitations. The *Intermountain West* case was a downzoning case involving annexation in which a developer sued the city for issuing stop work orders. The Court rejected the inverse condemnation damage claims on the merits (it was a mere downzoning that did not amount to a taking) and under the statute of limitations. As to the latter, the Court said:

> In any event, it is clear that appellant's claim in inverse condemnation is barred by the statute of limitations. Guidelines expressed by this Court in *Tibbs v. City of Sandpoint*, 100 Idaho 667, 603 P.2d 1001 (1979) tell us that a cause of action in an inverse condemnation case accrues "after the full extent of the plaintiff's loss of use and enjoyment of [the premises] become[s] apparent." *Id*. at 671 (quoting *Aaron v. United States*, 311 F.2d 798, 802, 160 Ct. Cl. 295 (Ct. Cl. 1963)). The accrual of this action commenced no later than July 30, 1975, when the court issued an injunction against Intermountain.

Intermountain West, Inc. v. Boise City, 111 Idaho at 880, 728 P.2d at 769.[227] In other words, the Court found that the interference with the property was certainly apparent by the time the city secured an order requiring *Intermountain West* stop work. Note that the Court said that the cause of action accrued "no later" than that date. There was no need for the Court to trace back the accrual date any further.

A decade later, in *Wadsworth v. Idaho Department of Transportation*, 128 Idaho 439, 443, 915 P.2d 1, 5 (1996) (Schroeder, J.), the Court quoted the *Tibbs* guidance once again. *Wadsworth* involved a cross-claim for inverse condemnation filed by a landowner against the Department of Transportation alleging that the agency's gravel excavation many years earlier caused his island to erode.

The Court quoted *Tibbs*, highlighting the words "becomes apparent":

> This Court has stated that a cause of action in an inverse condemnation case "accrues after the full extent of the Plaintiff's loss of use and enjoyment of [the premises] becomes apparent." *Tibbs v. City of Sandpoint*, 100 Idaho 667, 671, 603 P.2d 1001, 1005 (1979). "The actual date of taking, although not readily susceptible to exact determination, is to be fixed at the point in time at which the impairment, of such a degree and kind as to constitute a substantial interference with plaintiff's property interest, *becomes apparent*." 100 Idaho at 671, 603 P.2d at 1005 (emphasis added).

Wadsworth, 128 Idaho at 442, 915 P.2d at 4 (emphasis added by *Wadsworth*).

The *Wadsworth* Court also reiterated its holding in *Rueth II*: "This Court held that a meeting between the parties was a 'recognition of the severity of the problem,' and fixed that date as the date of the actual taking." *Wadsworth*, 128 Idaho at 442-43, 915 P.2d at 4-5.

The Court concluded that, while Wadsworth may not have been aware of the impact of the excavation when it occurred 1962, the impact on his property must have been apparent when he filed a tort claim alleging specific damages in 1983—seven years before he filed suit. The Court summed up saying that the statute begins to run "when the impairment was of such a degree and kind that substantial interference with Wadsworth's property interest became apparent." *Wadsworth*, 128 Idaho at 443, 915 P.2d at 5.

In *McCuskey v. Canyon Cnty. Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 217-19, 912 P.2d 100, 104-06 (1996) (Trout, J.), the Idaho Supreme Court repeatedly

[227] The quotation of *Tibbs* by the Court in *Intermountain West* was slightly inaccurate, but of no consequence.

cited to *Tibbs*. In *McCuskey II*, the plaintiff claimed a temporary taking from the time Canyon County issued a stop work order to the time the Idaho Supreme Court voided the controlling ordinance in *McCuskey v. Canyon Cnty.* ("*McCuskey I*"), 123 Idaho 657, 851 P.2d 953 (1993) (Bistline, J.). In *McCuskey II*, the Court explained that the statute began to run from the day the county interfered with his property, not the day the Court ruled the interference was illegal.

> In determining when the cause of action for an inverse condemnation claim accrues we note that while a taking is typically initiated when government acts to condemn property, the doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. In such an informal taking this Court has decided that damages for inverse condemnation should be assessed at the time the taking occurs. The time of taking occurs, and hence the cause of action accrues, as of the time that the full extent of the plaintiff's loss of use and enjoyment of the property becomes apparent. In this case, McCuskey was fully aware of the extent to which Canyon County interfered with his full use and enjoyment of the property in question on November 13, 1986, the date that McCuskey was notified, via issuance of a stop-work order, that he could not build the convenience store.

McCuskey II, 128 Idaho at 216-17, 912 P.2d at 103-04 (citations omitted).[228]

McCuskey had contended that the statute did not begin to run until the Court had ruled the county's zoning action illegal, because only then did he know the full extent of damages for the temporary taking. The Court rejected this argument, explaining that the lack of quantification of the loss is not an excuse for delay in filing the lawsuit:[229]

> Moreover, it is well settled that uncertainty as to the amount of damages cannot bar recovery so long as the

[228] The Court also noted in a footnote that the claim was probably barred by res judicata because it should have been raised in the prior litigation. *McCuskey II*, 128 Idaho at 216 n.1, 912 P.2d at 103 n.1. The Court further noted, "It appears in this case that, under our rule, the County's downzoning of the subject property to rural residential was, in all probability, not a taking." *McCuskey II*, 128 Idaho at 216 n.2, 912 P.2d at 103 n.2.

[229] Thus, in *McCuskey II*, the Court traced the starting point back earlier than the issuance of the stop work injunction in *Intermountain West*. The cases are not inconsistent, however. As noted above, it was not necessary for the Court in *Intermountain West* to look back any earlier than the stop work injunction.

> underlying cause of action is determined. Besides, although McCuskey may not have known the full extent of his damages at the time the stop-work order was issued, he would have known with certainty what they were once a taking had been finally adjudicated.

McCuskey II, 128 Idaho at 218, 912 P.2d at 105 (citation omitted). Thus, the Court's earlier quoted reference to knowing "the full extent of the plaintiff's loss" should be understood to mean that the clock begins to run when interference with plaintiff's property is sufficiently apparent that a cause of action has arisen, regardless of whether the full extent of damages is then known.

The *Tibbs* guidance was applied again in *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 846, 136 P.3d 310, 317 (2006) (J. Jones, J.). In this case, the city filed suit seeking an injunction requiring a landowner to remove fences on lakefront property. The landowner counterclaimed under § 1983 for inverse condemnation. The Court found that the landowner's counterclaim was timely, despite the fact that the applicable ordinance had been on the books for more than four years. The Court explained that it was not the enactment of the ordinance but its application to the landowner that triggered the statute of limitations:

> A claim for inverse condemnation "accrues after the full extent of the impairment of the plaintiffs' use and enjoyment of [the property] becomes apparent." *Tibbs v. City of Sandpoint*, 100 Idaho 667, 671, 603 P.2d 1001, 1005 (1979) (quoting *Aaron v. United States*, 160 Ct. Cl. 295, 311 F.2d 798, 802 (1963)). In *Palazzolo* [*v. Rhode Island*, 533 U.S. 606, 608-09 (2001)], the United States Supreme Court held that a regulatory takings claim does not become ripe upon enactment of the regulation; indeed, it remains unripe until the landowner takes the reasonable and necessary steps to allow the regulating agency to consider development plans and issue a decision, thereby determining the extent to which the regulation actually burdens the property.

Simpson, 142 Idaho at 846, 136 P.3d at 317.[230]

[230] Curiously, *Palazzolo* does not even deal with the statute of limitations. Rather, it applied the specialized ripeness test in *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (Blackmun, J.). *Palazzolo* sets out the basic premise that *Williamson County* ripeness requires that the landowner go through proceedings resulting in a final decision. *Palazzolo* also created, however, a futility exception making this unnecessary where the ordinance leaves no room for discretion. "While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to

The *Simpson* Court concluded that the cause of action did not begin to run until the city initiated an enforcement action against the landowners. "More important, however, is the fact that the City brought this action in 1998 to require removal of the fences constructed by the Simpsons in 1997. The issue was joined at that time." *Simpson*, 142 Idaho at 846, 136 P.3d at 317. This makes sense in this context, where the city initiates an enforcement action under an ambiguous statute involving prosecutorial discretion. Thus, it would seem that while it is true that mere enactment of an unconstitutional ordinance does not start the statute of limitations running, the statute could begin to run where a landowner initiated an application process under a statute that absolutely (facially) required a taking in every instance.

The *Tibbs* guidance was quoted once again in *Harris v. State, ex rel. Kempthorne*, 147 Idaho 401, 405, 210 P.3d 86, 90 (2009) (Burdick, J.). This case grew out of confusion over whether the State of Idaho owned mineral rights to sand and gravel on the Harris's property in Latah County. In 1983, the State Land Board determined that the State owned the mineral rights, informed the Harrises, and required them to enter into a mineral lease under which they made payments to the State for sand and gravel removed. In 1999, the Idaho Supreme Court determined in an unrelated case that the State did not own the rights. The State then promptly informed the Harrises that it was disclaiming any interest in the property. The Harrises sued in inverse condemnation demanding reimbursement for payments made under the lease. The Harrises contended that the statute of limitations should be suspended during that time because the State had misinformed them as to the ownership of the mineral rights. The Idaho Supreme Court affirmed the district court's ruling that there is no such exception. The Court then ruled that the statute of limitations on inverse condemnation ran from the day the plaintiffs first entered into the mineral lease with the State, not the time they made payments to the State under the lease. It said:

> We affirm the district court's determination that the full extent of the Harrises' loss of use and enjoyment of the property became apparent when they entered into the Mineral Lease. At that point in time, the impairment constituted a substantial interference with their property interest because they signed an agreement promising to pay royalties and rents on the sand and gravel. Therefore, the Harrises are barred from recovering under their inverse condemnation claim by I.C. § 5-224.

Harris, 147 Idaho 405, 210 P.3d 90. Since they signed the lease 16 years before bringing suit, there was no need for the Court to explore whether the statute might

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permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Palazzolo*, 53 U.S. at 620.

have begun to run even earlier (such as when they were first informed of the State's ownership). The Court found that the mineral lease, in any event, was sufficient to satisfy the *Tibbs* standard that the interference with their property "became apparent." *Harris*, 147 Idaho at 405, 210 P.3d at 90 (quoting *Tibbs*).

A federal court has observed: "Under established federal law, a taking occurs when an option to take an easement is granted, not when the option is exercised." *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 383 (9th Cir. 2002), *cert. denied*, 537 U.S. 973.

G. "Project completion rule" for government construction projects

Note that a special rule applies in the case of certain physical takings resulting from government construction projects. There, the statute does not begin to run until the construction project is complete. *C & G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 75 P.3d 194 (2003) (Kidwell, J.).

This is referred to as the "project completion rule."[231] This rule makes sense where a government construction project will physically invade a person's property. In that situation (unlike an exaction case), the landowner does not have the ability to stop the government from the taking. In such cases, the key issue is the extent of damages. Consequently, it makes sense to wait until the project is completed. But in exaction cases, courts have the power to stop the exaction before it takes place. Hence, there is no need to know the exact dollar value of the exaction, and no reason to delay the accrual of a cause of action.

Indeed, the *C & G* court specifically noted: "This analysis should not be taken as a reversal of *McCuskey* where this Court refused to apply *Farber*'s project completion rule to determine when an inverse condemnation claim accrues." *C & G*, 139 Idaho 144, 75 P.3d 198.

H. Nuisance actions are subject to the four-year statute of limitation.

"It is well settled in Idaho that the four-year statute of limitations provided for by Section 5–224 applies to nuisance actions. *See Idaho Gold Dredging Corp. v. Boise Payette Lumber Co.*, 52 Idaho 766, 22 P.2d 147 (1933)."[232] *Aetna Casualty &*

[231] The lead opinion mentioned physical takings but spoke mostly about the role applying in the context of a "government construction project." The concurring opinion suggests more strongly that the holding may be applicable in any direct physical taking by the government. "I concur in the lead opinion of this Court. Adopting the 'project completion' rule puts Idaho in line with the majority of courts called upon to determine the time the statute of limitations begins to run in a direct physical taking/inverse condemnation case." *C & G*, 139 Idaho at 146, 75 P.3d at 200.

[232] Although the *Idaho Gold* declares that section 5-224 applies to nuisance actions, the claim referred to as nuisance in that case actually appears to be more in the nature of trespass,

Surety Co. v. Gulf Resources & Chemical Corp., 600 F. Supp. 797 (D. Idaho 1985). See discussion in J. Walter Sinclair, *The Laws of Nuisance and Trespass as They Impact Animal Containment Operations in Idaho*, 30 Idaho L. Rev. 485, 499 (1994).

In *Cobbley v. City of Challis* ("*Cobbley I*"), 138 Idaho 154, 59 P.3d 959 (2002) (Walters, J.), the Court held that actions involving separate, recurring events are treated like continuing torts for statute of limitations purposes.

> In the analogous circumstances of applying the statute of limitation to a nuisance claim, a continuing nuisance is treated like a continuing tort for which the limitations period begins to run anew for each repetition of the nuisance.

Cobbley I, 138 Idaho at 158, 59 P.3d at 963.

I. Two-year statute of limitations in § 1983 actions (including taking claims)

(1) Section 1983 actions are subject to the Idaho's statute of limitations for personal injury.

As discussed in section 24.CC(4) at page 447, federal taking claims must be brought pursuant to § 1983. Section 1983 does not contain its own statute of limitations. Accordingly, the determination of the appropriate statute of limitations is a matter of common law.

Federal law dictates which statute of limitations is applicable to federal claims and when that statute will begin to run. *Wallace v. Kato*, 549 U.S. 384, 387-88 (2007); *McCabe v. Craven*, 145 Idaho 954, 957, 188 P.3d 896, 899 (2008); 51 Am. Jur. 2d. *Limitation of Actions* § 121 (2000) ("If an action is brought in a state court on a federally created cause of action and there is an applicable federal limitation period, the state courts apply the federal period and any existing federal rules on tolling and other ancillary matters.")

In the case of § 1983, this led to confusion and uncertainty, as various courts applied various state statutes of limitation, by analogy, depending on the nature of the federal constitutional claim. Then, in 1985, the U.S. Supreme Court declared that all § 1983 actions should be subject to the state's statute of limitations for personal injury (aka torts) as opposed to the tort claims act, the general residual statute of limitation, or any other statute of limitations. *Wilson v. Garcia*, 471 U.S. 261, 266-

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particularly in light of the fact that this was a damage case. Be that as it may, it makes sense that the catch-all statute of limitations would apply to nuisance actions, and there appears to be no authority to the contrary.

67 (1985). This bright-line rule was reaffirmed in *Owens v. Kure*, 488 U.S. 235, 249-50 (1989) and *Wallace v. Kato*, 549 U.S. 384, 387 (2007).

The *Wilson* decision was summarized thusly:

> Finally, in 1985 the Supreme Court seized the opportunity to put an end to the "uncertainty and time-consuming litigation that is foreign to the central purposes of section 1983." In *Wilson v. Garcia*, the Court, affirming a decision of the Court of Appeals for the Tenth Circuit, decided that henceforth all section 1983 claims are to be characterized as personal injury actions for statute of limitations purposes, regardless of the underlying cause of action.

Robert M. Jarvis, *The Continuing Problem of Statutes of Limitations in Section 1983 Cases: Is the Answer Out at Sea?*, 22 J. Marshall L. Rev. 285, 287 (1988).

The rule established in *Wilson* was dictated (at least implicitly) by the Civil Rights Act itself. 42 U.S.C. § 1988; *Wilson* at 267. However, other courts have recognized that *Wilson* is not limited to § 1983 actions. See discussion in section 22.I(4) at page 308.

The *Wilson* Court dealt with a § 1983 claim in federal court. However, the *Wilson* decision was based on the simple premise that the selection of the statute of limitations is a matter for federal law. Thus, the *Wilson* rule applies equally to § 1983 cases brought in state court.

Wilson made quite clear that this one-size-fits-all approach applies even where the State's highest court has ruled that some other state statute of limitations should apply to the particular type of § 1983 action. In *Wilson*, the Court brushed aside a decision of the New Mexico Supreme Court holding that New Mexico's two-year limit in its tort claims act was the statute of limitations most analogous to § 1983 actions.[233]

On numerous occasions, Idaho courts have applied *Wilson* and held that Idaho's two-year statute of limitations (Idaho Code § 5-219(4)) applies to all federal damage claims actionable under § 1983. *Henderson v. State*, 110 Idaho 308, 310-11,

[233] This rule applies even where the state courts have ruled that some other statute of limitations applies to the specific alleged violation. *Banks v. City of Whitehall*, 344 F.3d 550, 553 (6th Cir. 2003) (applying Ohio's two-year statute of limitations for personal injuries to takings claim notwithstanding contrary Ohio law); *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651 (9th Cir. 2003) (applying California's statute of limitations for personal injury torts to plaintiff's takings claim under § 1983).

715 P.2d 978, 980-81 (1986) (Huntley, J.)[234]; *Herrera v. Conner*, 111 Idaho 1012, 1016, 729 P.2d 1075, 1079 (Ct. App. 1987) (Walters, C.J.)[235]; *Mason v. Tucker and Assoc.*, 125 Idaho 429, 436, 871 P.2d 846, 853 (Ct. App. 1994) (Lansing, J.)[236]; *Idaho State Bar v. Tray*, 128 Idaho 794, 798, 919 P.2d 323, 327 (1996) (Schroeder, J.)[237]; *Osborn v. Salinas*, 131 Idaho 456, 458, 958 P.2d 1142, 1144 (1998) (Schroeder, J.)[238]; *Gibson v. Ada Cnty.*, 142 Idaho 746, 756, 133 P.3d 1211, 1221(2006), *cert. denied*, 549 U.S. 994 (2006), *rehearing denied*, 549 U.S. 1159 (2007) (Schroeder, C.J.)[239]; *McCabe v. Craven,* 145 Idaho 954, 957, 188 P.3d 896, 899 (2008) (W. Jones, J.), [240] *N. Idaho Bldg. Contractors Ass'n v City of Hayden* ("*NIBCA II*"), 164 Idaho 530, 432 P.3d 976 (2018) (Bevin, J.).[241]

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[234] "In view of the holding in *Wilson*, 42 U.S.C. § 1983 actions in Idaho must now meet the two-year Idaho statute of limitations for personal injury actions, I.C. § 5-219(4)." *Henderson*, 110 Idaho at 311, 715 P.2d 981.

[235] In *Herrera*, the court noted: "Accordingly, the Idaho Supreme Court has held that § 1983 actions must meet the two-year statute of limitation for personal injury actions, I.C. § 5–219(4)." *Herrera*, 111 Idaho at 1016, 729 P.2d at 1079 (citing *Henderson*).

[236] In *Mason*, the court explained: "Congress provided no federal statute of limitation for an action brought under 42 U.S.C. § 1983 or § 1985. However, the United States Supreme Court has held that, because Section 1983 actions are analogous to actions for injuries to personal rights, they are subject to the state statute of limitation for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). The pertinent Idaho statute is I.C. § 5–219(4), which provides a two-year statute of limitation for actions based on personal injury." *Mason*, 125 Idaho at 436, 871 P.2d at 853.

[237] In *Tway*, the Idaho Supreme Court upheld the suspension of a lawyer's license based on his failure to recognize that § 1983 actions are subject to a two-year statute of limitations, as held in *Hendersion*.

[238] In *Osborn*, the Court stated: "Following the United States Supreme Court's decision in *Wilson*, Idaho courts have held that § 1983 actions must meet the two-year statute of limitations for personal injury actions set forth in I.C. § 5–219(4)." *Osborn*, 131 Idaho at 458, 958 P.2d at 1144 (citing *Henderson* and *Herrera*).

[239] In the *Gibson* case, the Court said: "In Idaho there is a two-year statute of limitations on all § 1983 claims similar to personal injury actions. I.C. § 5-219(4) (2004)." Elsewhere in the decision, the Court clarified that the two-year statute of limitations applies to not just those "similar to personal injury actions" but to all § 1983 claims. "Idaho has a two-year statute of limitations on all 42 U.S.C. § 1983 claims." *Gibson*, 142 Idaho at 756, 133 P.3d at 1221.

[240] In *McCabe*, the Court observed: "In a 42 U.S.C. § 1983 case, the applicable statute of limitations is found in Idaho Code § 5-219(4) above." *McCabe*, 145 Idaho at 957, 188 P.3d 899 (citing *Henderson*).

[241] In *NIBCA II*, the Idaho Supreme Court recited the district court's ruling that "any federal claims arising before the two-year statute of limitation (June 4, 2010) were barred." *NIBCA II*, 164 Idaho at 534, 432 P.3d at 980. NIBCA filed a cross appeal in that case, but did not challenge the two-year statute of limitations.

The federal court for the District of Idaho also has ruled that Idaho's two-year statute governs § 1983 actions. *White Cloud v. Valley County*, 2011 WL 4583846 (D. Idaho Sept. 30, 2011) (Lodge, J.).

Despite this strong line of precedent, there has been some inconsistency in Idaho as to whether the two-year or the four-year statute of limitations applies to federal taking claims. Some Idaho cases inexplicably have applied the four-year statute of limitations to federal takings claims. They all do so as a matter of rote, without addressing the controlling federal precedents or the Idaho cases following *Wilson* and its progeny.

An example of the Court's inconsistency is *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 136 P.3d 310 (2006) (J. Jones, J.). In *Simpson*, the Court noted that the district court applied the 4-year statute of limitations to this § 1983 case. The Court never addressed which statute to apply, however, because it did not matter. (The Court found that the cause of action accrued in the same year the action arose, so any statute of limitations was satisfied.) Other examples are set out in the footnote.[242]

With the exception of *Simpson*, none of the cases applying a four-year statute of limitations to federal takings claims reference § 1983. It may be that they were allowed to proceed outside of § 1983 (which would be incorrect, see discussion in section 24.CC(4) at page 447). In any event, the Court did not address the federal claims in terms of § 1983, and it is the federal common law applying § 1983 that causes the two-year statute of limitations to apply. The bottom line is that these cases are anomalies. They do not offer a sound basis for departing from the settled rule that all § 1983 actions in Idaho are subject to a two-year statute of limitations.

(2) When the statute begins to run

While state law supplies the statute of limitations for a § 1983 case, federal law determines when that state statute begins to run. Under federal law, the statute of limitations begins to run when the constitutional wrong becomes or should have

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[242]In *McCuskey v. Canyon Cnty. Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 216, 912 P.2d 100, 103 (1996) (Trout, J.), the Court held that the four-year statute of limitations (Idaho Code § 5-224) applies to federal takings claims. The Court offered no explanation or analysis for this conclusion, other than a citation to *Intermountain West, Inc. v. Boise City*, 111 Idaho 878, 880, 728 P.2d 767, 769 (1986) (Donaldson, C.J.). Likewise, *Intermountain West* applied the four-year statute of limitations to "the inverse condemnation claim." The *Intermountain West* Court drew no distinction between the statute of limitations applicable to state and federal inverse condemnation claims. Indeed, the Court failed to mention whether the claims arose under state or federal law or both. Moreover, the Intermountain West Court's statements with respect to the statute of limitations were dicta, because the Court rejected the taking claim(s) on its merits. Similarly, in *C & G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 75 P.3d 194 (2003) (Kidwell, J.), the Court applied a four-year statute of limitations based on to a reference to *McCuskey*.

become apparent. "Although state law governs the limitations period in this case, federal law determines when the limitations period begins to run." *Trotter v. International Longshoremen's & Warehousemen's Union*, 704 F.2d 1141, 1143 (9th Cir. 1983). "Federal law, however, determines when the state limitations period begins for a claim under 42 U.S.C. § 1983. A federal claim is generally considered to accrue when the plaintiff 'knows or has reason to know of the injury which is the basis of the action.'" *Norco Construction, Inc. v. King Cnty.*, 801 F.2d 1143, 1145 (9th Cir. 1986) (citations omitted).[243]

Ignorance of the right to sue is no excuse. "Her tardiness therefore was due not to the lack of a viable cause of action, but rather to an ignorance of her right to sue. Such ignorance is not a legally sufficient excuse for a delay in filing a claim." *Moore v. Exxon Transportation Co.*, 502 F. Supp. 583 (E.D. Ver. 1980) (dealing with tardy amendment of complaint; statute of limitations applied by analogy; not barred by laches due to lack of prejudice). "The phrase "reasonably should have been discovered" refers to knowledge of the facts upon which the claim is based, not knowledge of the applicable legal theory upon which a claim could be based." *BHA Investments, Inc. v. City of Boise* ("*BHA II*") (Eismann, J.), 141 Idaho 168, 174 108 P.3d 315, 321 (2004) (Eismann, J.) (in context of notice required under tort claims act). See also, *McCuskey II*, 128 Idaho at 218, 912 P.2d at 105, in which the Idaho Supreme Court rejected the plaintiff's contention that the statute of limitations for temporary takings did not begin to run until the court declared that the zoning action was unconstitutional.

In those jurisdictions where direct actions (independent of section 1983) are allowed, the suit is nevertheless subject to the personal injury statute of limitations. This is discussed further in section 22.I(4) at page 308.

(3) When does the federal cause of action accrue if it is unripe under *Williamson County*?

Note: On June 21, 2019, *Williamson County* was overruled in a five to four decision by *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019) (Roberts, C.J.).

The question of when the statute of limitations begins to run is complicated, however, by *Williamson County* As discussed in Volume II of this Handbook, *Williamson County* held that the federal claim is not ripe (at least in federal court as to prong two) until the plaintiff (1) obtains a final determination from the local authorities and (2) brings and loses a state inverse condemnation action.

[243] *Norco*, however, was a special case. A temporary takings case based on delay in action on an application. The statute of limitations did not begin to run until later when the county finally granted the application.

Accordingly, the Ninth Circuit has held that the statute of limitations does not begin to run if those tests are applicable and have been met.

> The conclusion that a claim is premature for adjudication controls as well the determination that the claim has not accrued for purposes of limitations of actions. In suits for wrongful deprivation of property under 42 U.S.C. § 1983, the same considerations that render a claim premature prevent accrual of a claim for limitations purposes, and the claim does not accrue until the relevant governmental authorities have made a final decision on the fate of the property. *McMillan v. Goleta Water District*, 792 F.2d 1453 (9th Cir. 1986).

Norco Construction, Inc. v. King Cnty., 801 F.2d 1143, 1146 (9th Cir. 1986).

"We further held in *Levald* that the date of accrual is either (1) the date compensation is denied in state courts, or (2) the date the ordinance is passed if resort to state courts is futile." *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003), *cert. denied*, 543 U.S. 1041 (2004 and 2005) (two petitions for certiorari denied) (citing *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993)).[244] On the other hand, if resort to state courts would be futile, bringing an inverse condemnation action would not be required and the statute of limitations would begin to run immediately upon the allegedly wrongful action. Thus, the plaintiff's action is subject either one bullet or the other. "Thus, . . . Hacienda's claim . . . will either fail because it is not ripe, or, if it is ripe, it will be barred by the statute of limitations." *Hacienda*, 353 F.3d at 655.

As discussed elsewhere, however, *San Remo* holds that a claim that is unripe in federal court under prong two may be brought in state court concurrently with the state inverse condemnation action. Thus, if the claim is viable in state court, the statute of limitations must be running. Thus, the conundrum described in *Hacienda* would not appear to be applicable when the federal claim is brought in state court pursuant to *San Remo*.

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[244] In *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993), the court of appeals first determined that the two *Williamson County* ripeness tests were inapplicable. (The first prong was inapplicable, because this was a facial challenge. The second prong was inapplicable, because, at the time, California did now allow inverse condemnation actions on regulatory takings, thus making resort to state court futile. *Levald*, 998 F.2d at 686.) With *Williamson County* out of the way, the Court then turned to the statute of limitations. It held that the statute of limitations on a federal takings claim in federal court does not ordinarily begin to the plaintiff has first sought recovery in state court and been denied. Here, however, resort to state court would have been futile, because, at the time, California did not allow inverse condemnation actions for regulatory takings. Thus, the statute had run and the facial claim was dismissed.

In other words, if a plaintiff could have brought a timely state inverse action claim, the statute of limitations was running in state court from the outset, even if the case is premature in federal court. While the state statute of limitations was running, the federal claim would not be ripe in federal court. However, if the plaintiff misses the statute of limitations for the state claim, the plaintiff has thereby forfeited the federal claim. At that point, it would seem that the claim is ripe in federal court, but defective, and the federal court would have subject matter jurisdiction to dismiss it for having failed to timely file a state inverse condemnation action.

In *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87 (1st Cir. 2003), *cert. denied*, 540 U.S. 1090 (2003), the Court rejected the plaintiff's argument that ripening the federal claim by first bringing a state takings claim would have been futile because the claim was barred by the statute of limitations.[245]

No court that we are aware of has addressed the interaction of prong one ripeness and the statute of limitations. It would seem that if the plaintiff failed to obtain a final decision in the sense of prong one but that it is now too late to cure, the federal claim would be not unripe but forfeited.

(4) Statutes of limitations in *Bivens* actions

Bivens actions are actions brought directly under the U.S. Constitution, as in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). Virtually every court in the nation, including those of the Ninth Circuit, have held that *Bivens* actions are subject to the same state statute of limitation for personal injury as are § 1983. *Bieneman v. City of Chicago*, 864 F.2d 463, 469 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989) (direct takings claim subject to two-year statute); *Van Strum v. Lawn*, 940 F.2d 406 (9th Cir. 1991) (James A. Redden, J.) (expressly adopting the *Bieneman* approach in the Ninth Circuit); *Chin v. Bowen*, 833 F.2d 21 (2nd Cir. 1987) (action brought directly under 14th Amendment); *S.W. Daniel, Inc. v. Urea*, 715 F. Supp. 1082, 1085 (N.D. Ga. 1989) ("The court therefore concludes, as has virtually every appellate court addressing the issue, that the teachings of *Wilson* should be applied to *Bivens* actions as well.") (footnote citations omitted); *McSurely v. Hutchinson*, 823 F.2d 1002 (6th Cir. 1987), *cert. denied*, 485

[245] In *Pascoag*, the State of Rhode Island sued to quiet title to land and lake access on a privately owned reservoir based on adverse possession. When the State prevailed, the reservoir owner turned around and sued the state in federal court alleging a federal taking (among other claims). The First Circuit dismissed the claim under *Williamson County* for failure to ripen the case via a state action. Here, the court was focused on the plaintiff's failure to allege in state court a state takings claim under Rhode Island's Constitution. *Pascoag*, 337 F.3d at 93. The First Circuit found it unnecessary to resolve the question of whether adverse possession can give rise to a right of compensation. The author of this section of the Handbook would opine that such a claim is ludicrous and contrary to the whole idea of adverse possession. For a contrary view, see Martin J. Foncello [Comment], *Adverse Possession and Takings Seldom Compensation for Chance Happenings*, 35 Seaton Hall L. Rev. 667 (2005).

U.S. 934 (1988). The only contrary case we are aware of is *Gibson v. United States*, 781 F.2d 1334, 1342 n. 5 (9th Cir. 1986) (declining the invitation to apply *Wilson*), but this precedent seems to have been overruled by the express embrace of *Bieneman* in *Van Strum*.

In *Bieneman*, the Seventh Circuit explained why it made sense to apply *Wilson* to *Bivens* cases, too:

> These considerations apply with equal force to claims invoking the Constitution directly. Actions under § 1983 and those under the principal fount of direct suits, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971), are identical save for the replacement of a state actor (§ 1983) by a federal actor (Bivens). No wonder the only two courts of appeals that have addressed questions concerning limitations under *Bivens* have held that the rules used for § 1983 suits will be applied in full force to Bivens cases. *Chin v. Bowen*, 833 F.2d 21, 23–24 (2d Cir. 1987); *McSurely v. Hutchison*, 823 F.2d 1002, 1004–05 (6th Cir. 1987). When the defendant is a state actor, § 1983 and direct litigation may be interchangeable, the choice between them adventitious. There is no reason to have a different period of limitations, and a strong reason not to: any difference would give the plaintiff an incentive to pick whichever jurisdiction provided the longer period, recreating the uncertainty that the Supreme Court sought to eliminate. We conclude, therefore, that there should be a single period of limitations for all suits in which the Constitution supplies the remedy..

Bieneman, 864 F.2d at 469.

Thus, in the event that an Idaho court declined to follow *Azul-Pacifico* and found that there is a direct cause of action under the U.S. Constitution for takings, the federal claims would nevertheless be subject to Idaho's two-year statute of limitations. Indeed, *Bieneman* is directly on point, because this Seventh Circuit decision assumed that *First English* allowed for takings challenges directly under the Constitution,[246] and found them nevertheless subject to the same state statute of

[246] "Bieneman attempts to avoid that outcome [application of a shorter statute of limitations] by insisting that the takings claim rests on the Constitution rather than § 1983. . . . We know from *First English Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 2386 n.9, 96 L.Ed.2d 250 (1987), that takings suits may be filed directly under the Constitution. It follows, Bieneman contends, that we should use as the limitations period the most analogous period

limitations as dictated for § 1983 cases in *Wilson*. *Bieneman* was expressly adopted by the Ninth Circuit in *Van Strum*, 940 F.2d at 410.

There is a question, however, as to when the two-year statute would begin to run. Assuming that the *Williamson County* ripeness tests apply even in a takings challenge brought directly under the U.S. Constitution (which follows from the fact that the ripeness tests derive from the theory of federal takings, not anything in § 1983), it would seem that the statute of limitations would not begin to run until the case was ripe. (This was the result dictated in the context of § 1983 in *Hacienda Valley* and *Norco*, described above). On the other hand, in *Bieneman*, the Seventh Circuit said that the statute begins to run from the original date of the "wrong."[247] Then again, *Bieneman* did not even mention *Williamson County*; it may have been unaware of those ripeness tests.

In any event, under *San Remo*, it is clear that the federal taking claim is ripe in state court. Thus, the statute of limitations will begin to run as to such an action from the outset.

In the case of a federal constitutional challenge not based on takings (for example, a due process challenge), it would seem clear that Idaho's two-year statute of limitations runs from the day the plaintiff becomes aware of the constitutional infringement. *Norco*, 801 F.2d at 1145 (quoting *Trotter v. International Longshoremen's & Warehousemen's Union*, 704 F.2d 1141, 1143 (9th Cir. 1983)). Presumably, this would be the case whether brought under § 1983 or not.

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drawn from state law—which, he submits, is the 20-year time allowed to bring adverse possession actions, a period applied to inverse condemnation suits against governmental units." *Bieneman*, 864 F.2d at 468.

[247] "So pleading this case as a claim directly under the Takings Clause leaves Bieneman exactly where pleading it under § 1983 would have left him: with five years from the wrong, or two years from *Wilson*, whichever is less, to file the complaint. Bieneman missed the time by three years, and the district court properly granted summary judgment for the defendants." *Bieneman v. City of Chicago*, 864 F.2d 463, 470 (7th Cir. 1988).

By the way, the court's reference to two years derives from the state's personal injury statute of limitations. The reference to five years was the rule under prior law, before *Wilson v. Garcia*, 471 U.S. 261 266-67 (1985). Recognizing reliance plaintiffs may have placed on prior precedent, the court essentially allowed the statute to restart on the date of *Wilson*. It would have been more logical for the court to have said "two years from the date of the wrong or *Wilson*, whichever is longer."

23. STATUTES OF REPOSE

Statutes of limitation and statutes of repose both operate to set time limits on when a lawsuit may be brought.[248] Such statutes are typically geared toward a particular category of lawsuits. For example, Idaho has separate statutes of limitations for torts, malpractice, contract claims, etc. Statutes of limitation provide a fixed number of years during which a lawsuit may be filed after the date of "accrual." The date of accrual—that is, the date when a lawsuit comes to life—is sometimes defined in the statute, but is also governed by case law. The accrual date typically does not arise until damages are incurred.

Many states also have enacted statutes of repose which also set an outer limit on particular types of lawsuits. In other states, statues of repose operate independently of the statute of limitation, typically setting a deadline for initiating litigation after a specified event, such as completion of construction—irrespective of when the cause of action accrues.

Idaho's version of a statute of repose governing improvements to real property, Idaho Code § 5-241, achieves the same result, but operates a little differently. Rather than operate as a stand-alone statute setting its own deadline, section 5-241 modifies the applicable statute of limitation to cause the date of accrual to be triggered within a fixed time. Given that section 5-241 is codified within the title setting out statutes of limitation and that it operates on the accrual date of a statute of limitation, one might say that it is not really a separate statute of repose. However, on at least one occasion, the Idaho Supreme Court has described it as a statute of repose. *West v. El Paso Products Co.*, 122 Idaho 133, 134, 832 P.2d 306, 307 (1992) (Bistline, J.).

Idaho has a number of statutes that are described as statutes of repose. For example, Idaho's product liability statute contains a provision expressly described in the statute itself as a statute of repose, Idaho Code § 6-1403. It sets a presumption as to the useful life of a product.

[248] The term "statute of repose" is not well defined or consistently used. Sometimes, it is used as a broad catch-all term for any statute the places limits on when a lawsuit may be filed, including statutes of limitation. For example, the Court in *Balivi Chemical Corp. v. Indus. Ventilation, Inc.*, 131 Idaho 449, 451 n.5, 958 P.2d 606, 608 n.5 (Ct. of App. 1998) (Schwartzman, J.), described Idaho's statute of limitations on oral contracts, Idaho Code § 5-217, as "a four-year statute of repose." More commonly, however, "statutes of limitation" and "statutes of repose" are given different meanings.

24. JUDICIAL REVIEW AND CIVIL ACTIONS

A. Statutes authorizing judicial review.

Judicial review is available only where authorized by statute.[249] Numerous Idaho statutes provide authorization for judicial review of particular governmental actions. Here are notable examples:

- The Idaho Administrative Procedure Act ("IAPA"), Idaho Code §§ 67-5270 to 67-5277 and 67-5279, authorizes review of actions by state agency.
- The Local Land Use Planning Act ("LLUPA")), Idaho Code §§ 67-6519(4) and 67-6521(1)(d), authorizes review of specified municipal land use decisions.
- The Annexation Statute, Idaho Code § 50-222(6), authorizes judicial review of Category B and C annexations.
- A separate judicial review provision (analogous to the IAPA) is applicable to all county decisions not addressed by other judicial review provisions, Idaho Code § 31-1506.[250] (See discussion in section 24.DD at page 453.)
- See the *Idaho Road Law Handbook* for a discussion of judicial review of road validation and vacation proceedings under Idaho Code § 40-208.

[249] The Idaho Constitution allows the legislature to delimit the district courts' appellate jurisdiction. Idaho Const. art. V, § 20. Without an enabling statute, the district court lacks subject matter jurisdiction. In addition, an Idaho court rule declares that actions by state agencies are not subject to judicial review unless expressly authorized by statute. I.R.C.P. 84(a)(1). See, *e.g.*, *In re Williams*, 149 Idaho 675, 678–79, 239 P.3d 780, 783–84 (2010) (dismissing a petition for review for lack of jurisdiction because no statute authorized an appeal); *Taylor v. Canyon Cnty. Bd. of Comm'rs*, 147 Idaho 424, 431–32, 210 P.3d 532, 539–40 (2009) (same); *cf. Regan v. Kootenai Cnty.*, 140 Idaho 721, 726, 100 P.3d 615, 620 (2004) (holding that a reviewable final order is necessary for subject matter jurisdiction); *Laughy v. Idaho Dep't of Transportation*, 149 Idaho 867, 870, 243 P.3d 1055, 1058 (2010) (W. Jones, J); *Stafford v. Kootenai Cnty.*, 150 Idaho 841, 847, 252 P.3d 1259, 1265 (2011) ("To obtain judicial review of final action under LLUPA, there must be a statute granting the right of judicial review.").

[250] In *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner II*"), 150 Idaho 559, 249 P.3d 358 (2011) (Horton, J.), the Idaho Supreme Court found that section 31-1506(1) does not provide an independent right to judicial review of matters governed by LLUPA. In essence, the Court determined that LLUPA's judicial review provisions are more specific and override the broader authorization contained in section 31-1506(1).

- A variety of other statutes provide for judicial review as well.[251]

Note that the mechanism for resolving overlapping area of city impact (ACI) boundaries may culminate in a declaratory action, but not in judicial review. Idaho Code § 67-6526(c).

In rare instances, statutes expressly take away the right of judicial review that would otherwise be available. *E.g.*, Idaho Code § 58-405 (eliminating judicial review under the IDAPA for decisions of the Idaho Board of Land Commissioners with respect to certain timber sales).

B. Judicial Review under the IAPA.

The IAPA applies to actions of Idaho agencies, not to local governments (except, as discussed below, to the extent other statutes, such as LLUPA, adopt its some of its provisions).

The IAPA authorizes judicial review of rules, orders in contested cases, and other agency actions. The provision authorizing judicial review is Idaho Code § 67-5270. Subsection 67-5270(3) authorizes judicial review by "a party aggrieved by a final order in a contested case." This excludes judicial review by interested persons and other non-parties who have failed to intervene. Subsection 67-5270(2) authorizes judicial review by "a person aggrieved by final agency action" (*i.e.*, it is not limited to parties). It applies in all other instances, *i.e.*, to judicial review of rules and of agency actions that are not orders in contested cases.

The term "agency action" is defined in Idaho Code § 67-5201. It expressly includes both actions and the failure to act. Subsections (a) and (b) cover rules and orders. Subsection (c) is the catch-all for everything else: "an agency's performance of, or failure to perform, any duty placed on it by law." An example falling into this third category (agency action that is neither a rule nor an order) is "the obligation [of the Idaho Department of Transportation] to adopt a uniform system of traffic-control devices." *Laughy v. Idaho Dep't of Transportation*, 149 Idaho 867, 871, 243 P.3d 1055, 1059 (2010) (W. Jones, J) (referring to Idaho Code § 49-201(3), which requires the Department to issue a manual and specifications for such a system).

Most practitioners tend to think of a "contested case" as a formal administrative proceeding.[252] In *Laughy*, a divided Idaho Supreme Court ruled that

[251] Some statutes reference the IAPA and some do not. Some are very narrow and specific, such as Idaho Code § 72-1368 (the Employment Security Law). Idaho's water code provides numerous authorizations for judicial review, the most notable being Idaho Code § 42-1701A. Decisions by the Idaho Board of Land Commissioners with respect to encroachment permits (for docks) is found in Idaho Code § 58-1306(c).

[252] Various statutes address contested cases. For example, the IAPA contains these provisions: Idaho Code § 67-5201(6) (definition of "contested case"); Idaho Code § 67-5240 to

any action by a state agency resulting in any determination of "the legal rights, duties, privileges, immunities, or other legal interests of one or more persons" is an order in a contested case, irrespective of whether any formal proceedings were initiated. *Laughy*, 149 Idaho at 871, 243 P.3d at 1059.[253] Thus, it appears, every request for a permit results in a contested case, even if the permit is issued based on purely informal, unopposed proceedings. The Court's conclusion is grounded in the language of the IAPA, which defines contested case as "a proceeding which results in the issuance of an order." Idaho Code § 67-5201(6). See also Idaho Code § 67-5240 ("A proceeding by an agency [excepting two agencies] that may result in the issuance of an order is a contested case . . . ."). This definition is repeated in various agency rules, *e.g.*, IDAPA 04.11.01.005.06 (applicable to the Attorney General and all agencies that do not adopt their own rules). For example, the rules of the Idaho State Board of Land Commissioners define contested case as "[a] proceeding which results in the issuance of an order." IDAPA 20.01.01.005.07.

C. Overview: Availability of judicial review under LLUPA

The issue of judicial review under the Local Land Use Planning Act ("LLUPA"), Idaho Code §§ 67-6501 to 67-6538, presents two fundamental questions: (1) Is judicial review under LLUPA, Idaho Code §§ 67-6519(5)[254] and 67-6521(1), available? (2) If so, is judicial review the exclusive means of seeking redress? The discussion in the following sections begins with the first question, turning to the second later.

Every law student has heard Professor Prosser's maxim that for every wrong, the law provides a remedy.[255] That has a nice ring, but it is not entirely true. Not

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67-5254 (contested case proceedings). Idaho Code § 58-122 sets out procedures for contested cases before the Idaho Department of Lands.

[253] In *Laughy v. Idaho Dep't of Transportation*, 149 Idaho 867, 876-77, 243 P.3d 1055, 1064-65 (2010) (W. Jones, J), the Court ruled that even informal permit-issuing activities by state agencies are contested cases and therefore not subject to review under Idaho Code § 67-5270(2) (for agency actions other than contested cases, review of which may be by any aggrieved person). Instead, they must be reviewed pursuant to Idaho Code § 67-5270(3) (for contested cases, review of which is limited to parties). In this case, however, the Court had no jurisdiction because there was no final agency order and the person filing the petition for judicial review had not obtained party status below. The message of this case is that if a person plans to challenge the issuance of a permit, it is insufficient merely to submits comments in opposition to the issuance of the permit. Rather, one must take steps to obtain formal party status and seek issuance of a final decision either by the agency head or a preliminary order meeting the statutory definition thereof.

[254] The judicial review provision in Idaho Code § 67-6519(5) was formerly codified to section 76-6519(4).

[255] "It is a settled and invariable principle in the laws of England, that every right when with-held must have a remedy, and every injury it's [sic] proper redress." 1 William Blackstone,

every statutory violation gives rise to a private cause of action. Nor does every potential litigant have standing. In addition, many procedural hurdles have been placed in the path of litigants, such as tort claim notices, statutes of limitation, and deadlines for judicial review. If that were not enough, there is the challenge of selecting the proper forum—a task that under LLUPA is fraught with danger. Before filing a lawsuit, the litigant must carefully consider whether relief should be sought by way of judicial review under LLUPA or by a separate civil action (such as an action for declaratory relief or an inverse condemnation seeking damages). Many an Idaho land use litigant has found his or her case thrown out when the lawyer chose the wrong means of judicial redress.

In broad brushstrokes, LLUPA provides a limited remedy for correction of certain land use decisions in the form of judicial review. Judicial review is an on-the-record appeal from the administrative body to the district court. The court's review is limited to the record below. Discovery is rarely allowed. The standard of review favors the administrative agency or municipal decision maker. Remedies are limited and damages are not among them. (In the ordinary case, the unavailability of damages of not of much consequence because relief is sought at the outset, before the damage occurs.) Appeal deadlines are very strict (28 days).

LLUPA does not set out the standards for judicial review. Instead, it incorporates the judicial review provisions set out in the Idaho Administrative Procedure Act ("IAPA"), thereby bringing into play the familiar "substantial evidence" and "arbitrary and capricious" tests. In addition, a party may raise violations of law (ordinance, statute, or constitution) in LLUPA reviews.

Ordinarily (subject to some important exceptions discussed below), judicial review under LLUPA is not only available but is the exclusive means of review of such administrative actions. Judicial review under LLUPA is not available, however, for every type of action undertaken pursuant to LLUPA. Accordingly, a good deal of land use litigation occurs via declaratory actions and other mechanisms instead of or in addition to judicial reviews. For example, there are occasions when parties wish to challenge the constitutionality of an ordinance even before it is applied to them. Under proper circumstances, this is appropriate. There are other actions taken pursuant to LLUPA that are simply not covered by the judicial review provisions of LLUPA, for example challenges to a comprehensive plan or to an enforcement action.

From 1980 until 2008, the Idaho Supreme Court decided what was reviewable under LLUPA on the basis of whether the matter is quasi-judicial (and thus reviewable under LLUPA) or legislative (and thus reviewable only by some other

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Commentaries on the Laws of England 23. *See also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162-163 (1803).

means). This quasi-judicial / legislative distinction pre-dates LLUPA, is part of a much broader common law found in all jurisdictions, and also has important implications for certain constitutional claims. *E.g.*, due process and *ex parte* claims arise only in the context of quasi-judicial actions.

In 2008, however, the Court took an abrupt turn. The Court announced in a series of cases beginning with *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner I*"), 145 Idaho 630, 181 P.3d 1238 (2008) (Eismann, J.) and *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008) (Eismann, J.), that the availability of judicial review under LLUPA turns on the words of the statute itself, not on the court-created quasi-judicial/legislative distinction.

In *Giltner I*, the Court ruled unanimously that LLUPA authorizes appeals only of the issuance or denial of "permits" as that term was used in the act at that time,[256] therefore denying judicial review of an amendment to a comprehensive plan map (which is not a permit).[257] The Court went on to name five types of permits that are subject to judicial review under LLUPA. *Giltner I*, 145 Idaho at 633, 181 P.3d at 1241. The Court might have noted that section 67-6519(4) was inapplicable for another reason: It only authorizes appeals by applicants. Here the appeal was brought by a neighbor. The Court, however, did not mention this. Nor did the Court mention that adoption of a comprehensive plan map involves legislative (not quasi-judicial) action. In other words, there was no need to change the law in order to reach the result. But the Court did change the law, and dramatically so.

In these cases, the Court tossed aside a quarter century of jurisprudence on the legislative versus quasi-judicial distinction in favor of a simple, if not simplistic, evaluation of what constitutes a "permit" under LLUPA. Under *Giltner I* and its progeny, the Court applied this simple rule of thumb: LLUPA authorizes judicial review of five and only five types of permits (variances, conditional use permits, subdivisions, PUDs, and building permits[258]). (As discussed below, this list is no

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[256] At the time of *Giltner I*, LLUPA defined an affected person as "one having a bona fide interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development." Idaho Code § 67-6521(1)(a). At that time, LLUPA did not list which permits were appealable. However, as discussed below, the *Giltner I* Court itself identified which permits were appealable. Subsequent amendments to LLUPA, also discussed below, now identify a specific list of reviewable actions (and they do not exactly match those listed in the *Giltner I* decision).

[257] This conclusion was reiterated in *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008) (Eismann, J.). In *Highlands*, the dissent urged a broader reading of section 67-6519(4), noting that it authorized judicial review to an "applicant denied a permit or aggrieved by a decision." The majority, however, found no merit in this distinction, noting that the thrust of the provision is to allow review only of instances involving "the granting or denial of a permit authorizing the development." *Highlands,* 145 Idaho at , 188 P.3d at .

[258] Although building permits are identified in *Giltner I* and *Highlands* as among the five types of permits subject to judicial review under LLUPA, the dissent in *Highlands* cautions that the

longer accurate due to subsequent amendments to LLUPA.) If the local government's action is not one of these, then it must be challenged via some other form of action, typically a complaint for declaratory judgment.

Since deciding *Giltner I* in 2008, the Idaho Supreme Court consistently has followed this approach of parsing the words of LLUPA to determine jurisdiction. *E.g.*, *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008); *Johnson v. Blaine Cnty.*, 146 Idaho 916, 204 P.3d 1127 (2009); *Taylor v. Canyon Cnty. Bd. of Comm'rs* ("*Taylor II*"), 147 Idaho 424, 210 P.3d 532 (2009) (Burdick, J.); *Burns Holdings, LLC v. Madison Cnty. Bd. of Cnty. Comm'rs* ("*Burns Holdings I*"), 147 Idaho 660, 214 P.3d 646 (2009); *Noble v. Kootenai Cnty.*, 148 Idaho 937, 940, 231 P.3d 1034, 1037 (2010) (Burdick, J.); *Terrazas v. Blaine Cnty. ex rel. Bd. of Comm'rs*, 147 Idaho 193, 197, 207 P.3d 169, 173 (2009); *Stafford v. Kootenai Cnty.*, 150 Idaho 841, 848, 252 P.3d 1259, 1266 (2011).

Although *Giltner I* reflected a fundamental change in jurisprudence, the practical difference was not as great as one might expect. Indeed, the only major difference was that judicial review of rezones was no longer available. That was a significant matter, however, because rezones are so important in land use planning. The effect, however, was softened by court's decision in *Taylor v. Canyon Cnty. Bd. of Comm'rs* ("*Taylor II*"), 147 Idaho 424, 210 P.3d 532 (2009) (Burdick, J.), discussed below, which found that a conditional rezone coupled with a development agreement to be functionally identical to a conditional use permit, and therefore reviewable under LLUPA.

The 2010 the Legislature reacted to the *Giltner I* and *Taylor* cases with an amendment broadening judicial review somewhat. House Bill 605, 2010 Idaho Sess. Laws, ch. 175, effective March 31, 2010. This legislation did not attempt to restore the prior quasi-judicial versus legislative distinction.[259] Instead, it simply adopted its own set of reviewable actions. Thus, determining whether or not judicial review is available under LLUPA remains, even after 2010, a more-or-less mechanical

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majority's logic would allow judicial review only of a narrow class of building permits "for development on any lands designated upon the future acquisitions map." *Highlands*, 145 Idaho at 964-65, 188 P.3d at 906-07 (Justice Jim Jones dissenting). In a subsequent case, after the statute was amended in 2010, the Court ruled that building permits do not fall within the list of land use actions subject to judicial review under LLUPA. *Arnold v. City of Stanley* ("*Arnold II*"), 162 Idaho 115, 394 P.3d 1160 (2017) (w. Jones, J.).

[259] Curiously, some of the commentary in the legislative history suggests that the measure was intended to restore judicial review to quasi-judicial decisions. The legislation did so, however, not by making judicial review turn on whether the action was quasi-judicial or not. Instead, the legislation maintained the rigid, list-based approach to judicial review first embraced by the court in *Giltner*, but expanded the list to include a few quasi-judicial actions (and one legislative one, initial zones) that the drafters apparently thought were important.

evaluation of whether the action is on the list or not, rather than, as it was prior to *Giltner I*, a functional analysis of the nature of the governmental action.

First, the 2010 amendment restored judicial review of rezones. Then, it codified the rule in *Taylor* allowing judicial review of conditional rezones. Next, it allowed judicial review of initial zoning actions upon annexation. Idaho Code § 67-6521(1)(a). This went beyond even pre-*Giltner I* law, which viewed initial zones as non-reviewable legislative actions. Today, under the 2010 amendment, the list of what is reviewable consists of: (1) applications for subdivision permits, (2) applications for variances, (3) applications for conditional use permits (aka special use permits), (4) applications for similar permits under LLUPA presumably including planned unit developments, (5) initial zoning ordinances, (6) applications to rezone, and (7) applications for conditional rezones pursuant to section 67-6511A.

In *Arnold v. City of Stanley* ("*Arnold II*"), 162 Idaho 115, 394 P.3d 1160 (2017) (W. Jones, J.), the Court ruled that the catch-all "and such other similar applications require or authorized pursuant to this chapter" (Idaho Code § 67-6521(1)(a)) does not include building permits. The Court concluded that "LLUPA does not authorize or require building permits." *Arnold II*, 162 Idaho at 117, 394 P.3d at 1162. It noted that building permits are referenced only once in LLUPA and then only in the context of "future acquisition maps" that designate land proposed for acquisition by a public agency. *Arnold II*, 162 Idaho at 117, 394 P.3d at 1162.

The tables on the following pages summarize actions deemed reviewable and non-reviewable under the various regimes. Note that since *Giltner I*, the quasi-judicial versus legislative distinction is no longer determinative of whether judicial review is available. But whether an action is quasi-judicial or not remains relevant for determining whether due process considerations (such as *ex parte* communication and bias rules) attach. The distinction is also relevant to conflict of interest evaluations under Rule 1.7(b)(4). See the *Idaho Ethics Handbook*.

Note that LLUPA does not address judicial review of annexations. Under a separate statute, Category B and C annexations are subject to judicial review under the IAPA. See discussion in section 24.X at page 433.

Pre-*Giltner I* (1980-2008)	
Legislative	**Quasi-Judicial**
Initial zoning (including zoning upon annexation)[260] Comprehensive plan (adoption or amendments)[261] Comprehensive plan map[262] Moratorium (issuance or lifting) Annexations (annexations do not fall within LLUPA's judicial review provisions, but category B & C annexations are subject to IAPA review under a separate statute)[263]	Rezoning (both downzoning and upzoning)[264] Variance[265] Conditional use permits (aka special use permits)[266] Subdivision[267] Planned unit development[268] Building permit?[269]

[260] *Burt v. City of Idaho Falls*, 105 Idaho 65, 665 P.2d 1075 (1983).

[261] *Burt v. City of Idaho Falls*, 105 Idaho 65, 665 P.2d 1075 (1983).

[262] *Giltner I, LLC v. Jerome Cnty.*, 145 Idaho 630, 181 P.3d 1238 (2008).

[264] The following cases have recognized judicial review of rezones: *Brower v. Bingham Cnty. Comm'rs (In re The Application for Zone Change),* 140 Idaho 512, 96 P.3d 613 (2004); *Evans v. Teton Cnty.*, 139 Idaho 71, 73 P.3d 84 (2003) (Kidwell, J.); *Grubb & Associates v. Hailey*, 127 Idaho 576, 903 P.2d 741 (1995) (*"Sprenger Grubb I"*) (Silak, J.); *Taylor v. Bd. of Cnty. Comm'rs, Cnty. of Bonner*, 124 Idaho 392, 860 P.2d 8 (Ct. App. 1993); *Balser v. Kootenai Cnty. Bd. of Comm'rs,* 110 Idaho 37, 39, 714 P.2d 6, 8 (1986); *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 34, n.1, 655 P.2d 926, 928, n.1 (1982); *Cooper v. Ada Cnty. Comm'rs*, 101 Idaho 407, 614 P.2d 947 (1980); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984).

[265] "[T]he pertinent governing body enacts a land use ordinance in its legislative capacity, but it considers a variance in a quasi-judicial capacity." *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 846, 136 P.3d 310, 317 (2006) (J. Jones, J.). *Blaha v. Bd. of Ada Cnty. Comm'rs*, 134 Idaho 770, 773, 9 P.3d 1236, 1239 (2000) (Walters, J.) (reviewing subdivision and variance under LLUPA). *Highlands* and *Giltner I* list variance permits among the five types of permits subject to judicial review under LLUPA.

[266] *Taylor v. Canyon Cnty. Bd. of Comm'rs*, 147 Idaho 424, 435, 210 P.3d 532, 543 (2009); *Dry Creek Partners, LLC v. Ada Cnty. Comm'rs*, 148 Idaho 11, 17, 217 P.3d 1282, 1288 (2009), *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 961, 188 P.3d 900, 903 (2008) (Eismann, J.) and *Giltner I, LLC v. Jerome Cnty.*, 145 Idaho 630, 633, 181 P.3d 1238, 1241 (2008) (Eismann, J.) all list special use permits (aka conditional use permits) among the five types of permits subject to judicial review under LLUPA. Other examples of CUPs being challenged under LLUPA's judicial review provisions are *Ralph Naylor Farms v. Latah Cnty. ("Naylor Farms")*, 144 Idaho 806, 808, 172 P.3d 1081, 1083 (2007); *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1994); *Angstman v. City of Boise*, 128 Idaho 575, 578, 917 P.2d 409, 412 (Ct. App. 1996) (Walters, C.J.). In *Payette River Property Owners Ass'n v. Bd. of Comm'rs of Valley Cnty.,* 132 Idaho 551, 976 P.2d 477 (1999) (Trout, J.), the court held that a conditional use permit is a final

In the post-*Giltner I*, pre-2010 amendment era, judicial review turned on whether the decision involved a "permit." The following table summarizes actions were reviewable under *Giltner I*, prior to the 2010 amendment.

decision subject to judicial review even though no final plat had yet been issued (distinguishing *Bothwell v. City of Eagle*, 130 Idaho 174, 938 P.2d 1212 (1997), which held that issuance of a preliminary plat is not final and not subject to judicial review).

[266] *Taylor v. Canyon Cnty. Bd. of Comm'rs*, 147 Idaho 424, 435, 210 P.3d 532, 543 (2009); *Dry Creek Partners, LLC v. Ada Cnty. Comm'rs*, 148 Idaho 11, 17, 217 P.3d 1282, 1288 (2009), *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 961, 188 P.3d 900, 903 (2008) (Eismann, J.) and *Giltner I, LLC v. Jerome Cnty.*, 145 Idaho 630, 633, 181 P.3d 1238, 1241 (2008) (Eismann, J.) all list special use permits (aka conditional use permits) among the five types of permits subject to judicial review under LLUPA. Other examples of CUPs being challenged under LLUPA's judicial review provisions are *Ralph Naylor Farms v. Latah Cnty. ("Naylor Farms")*, 144 Idaho 806, 808, 172 P.3d 1081, 1083 (2007); *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1994); *Angstman v. City of Boise*, 128 Idaho 575, 578, 917 P.2d 409, 412 (Ct. App. 1996) (Walters, C.J.). In *Payette River Property Owners Ass'n v. Bd. of Comm'rs of Valley Cnty.,* 132 Idaho 551, 976 P.2d 477 (1999) (Trout, J.), the court held that a conditional use permit is a final decision subject to judicial review even though no final plat had yet been issued (distinguishing *Bothwell v. City of Eagle*, 130 Idaho 174, 938 P.2d 1212 (1997), which held that issuance of a preliminary plat is not final and not subject to judicial review).

[267] *Curtis v. City of Ketchum*, 111 Idaho 27, 32-33, 720 P.2d 210, 215-16 (1986); *Blaha v. Bd. of Ada Cnty. Comm'rs*, 134 Idaho 770, 773, 9 P.3d 1236, 1239 (2000) (Walters, J.) (reviewing subdivision and variance under LLUPA). *Highlands* and *Giltner I* list subdivision permits among the five types of permits subject to judicial review under LLUPA. If the preliminary plat approval allows the applicant to take immediate steps to permanently alter the land before final approval, the preliminary plat approval is subject to appeal under LLUPA. *Rural Idaho Organization, Inc. v. Bd. of Comm'rs, Kootenai Cnty.,* 133 Idaho 833, 837-39, 993 P.2d 596, 600-02 (2000).

[268] *Highlands* and *Giltner I* list planned unit development permits among the five types of permits subject to judicial review under LLUPA.

[269] Building permits are plainly quasi-judicial. However, the authors are not aware of any pre-*Giltner* appellate authority addressing whether they are reviewable under LLUPA. Although quasi-judicial in nature, they are largely non-discretionary and rarely result in the development of an administrative record.

Post-*Giltner I*, but pre-amendment (2008-2010)	
Not Subject to LLUPA Review	**Subject to LLUPA Review**
Rezoning (with an exception for conditional rezones)[270] Initial zoning (including zoning upon annexation)[271] Comprehensive plans (adoption or amendments) Comprehensive plan maps[272] Moratoriums (issuance or lifting) Enforcement actions[273] Annexations (annexations do not fall within LLUPA's judicial review provisions, but category B & C annexations are subject to IAPA review under a separate statute)[274]	Conditional rezones coupled with development agreements[275] Variance Conditional use permits (aka special use permits) Subdivision[276] Planned unit development Building permits[277]

[270] In *Burns Holdings, LLC v. Madison Cnty. Bd. of Cnty. Comm'rs* ("*Burns Holdings I*"), 147 Idaho 660, 214 P.3d 646 (2009), the court held that a rezone was not a permit and therefore was not reviewable under LLUPA.

[271] *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008) (Eismann, J.), dealt with annexation (under the prior Annexation Statute) and initial zoning, finding no LLUPA review available.

[272] *Giltner I, LLC v. Jerome Cnty.*, 145 Idaho 630, 181 P.3d 1238 (2008), dealt with a comprehensive plan map amendment, finding that no LLUPA review was available.

[273] Applying the pre-2010 version of LLUPA, the court held in *Stafford v. Kootenai Cnty.*, 150 Idaho 841, 848, 252 P.3d 1259, 1266 (2011), "The legislature has not granted the right of judicial review of administrative enforcement proceedings under local planning and zoning ordinances."

[275] In *Taylor v. Canyon Cnty. Bd. of Comm'rs*, 147 Idaho 424, 210 P.3d 532 (2009), the Court found that conditional rezones were in that nature of a conditional use permit and therefore reviewable under LLUPA.

[276] *Terrazas v. Blaine Cnty. ex rel. Bd. of Comm'rs*, 147 Idaho 193, 197, 207 P.3d 169, 173 (2009) ("The decision regarding a subdivision application is a decision granting a permit, I.C. § 67–6513, and is therefore subject to judicial review. *Johnson v. Blaine Cnty.*, 146 Idaho 916, 920–21, 204 P.3d 1127, 1131–32 (2009)"); *Noble v. Kootenai Cnty.*, 148 Idaho 937, 940, 231 P.3d 1034, 1037 (2010) (Burdick, J.) (citing *Terrazas*).

[277] Although building permits are identified in *Giltner I* and *Highlands* as among the five types of permits subject to judicial review under LLUPA, the dissent in *Highlands* notes that building permits are only mentioned in Idaho Code § 67-6517 dealing with the future acquisitions

The table below summarizes reviewable and non-reviewable actions under LLUPA today, following the 2010 amendment.

map. Justice Jim Jones then cautioned that the majority's logic arguably would allow judicial review only of a narrow class of building permits "for development on any lands designated upon the future acquisitions map." *Highlands*, 145 Idaho at 964-65, 188 P.3d at 906-07 (Justice Jim Jones dissenting). The Court's confusion is understandable because Section 67-6517 does not make sense in the context of building permits. These permits rarely if ever are addressed by "the zoning or planning and zoning commission or the governing board" in the words of Section 67-6517 to occasion a request to stop processing an application for lands on the future acquisitions map. Review of a building permit decision was allowed (but not allowed to be combined with a complaint) in *Euclid Ave. Trust v. City of Boise*, 146 Idaho 306, 193 P.3d 853 (2008) (J. Jones, J.). The list including building permits was set out again in *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008) (Eismann, J.).

[277] Although building permits are identified in *Giltner I* and *Highlands* as among the five types of permits subject to judicial review under LLUPA, the dissent in *Highlands* notes that building permits are only mentioned in Idaho Code § 67-6517 dealing with the future acquisitions map. Justice Jim Jones then cautioned that the majority's logic arguably would allow judicial review only of a narrow class of building permits "for development on any lands designated upon the future acquisitions map." *Highlands*, 145 Idaho at 964-65, 188 P.3d at 906-07 (Justice Jim Jones dissenting). The Court's confusion is understandable because Section 67-6517 does not make sense in the context of building permits. These permits rarely if ever are addressed by "the zoning or planning and zoning commission or the governing board" in the words of Section 67-6517 to occasion a request to stop processing an application for lands on the future acquisitions map. Review of a building permit decision was allowed (but not allowed to be combined with a complaint) in *Euclid Ave. Trust v. City of Boise*, 146 Idaho 306, 193 P.3d 853 (2008) (J. Jones, J.). The list including building permits was set out again in *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008) (Eismann, J.).

See footnote 281 on page 323 regarding post-2010 treatment of building permits.

Post-amendment (2010-present)	
Not Subject to LLUPA Review	**Subject to LLUPA Review**
Comprehensive plans (adoption or amendments) Comprehensive plan maps Moratoriums (issuance or lifting) Enforcement actions[278] Annexations (annexations do not fall within LLUPA's judicial review provisions, but category B & C annexations are subject to IAPA review under a separate statute)[279] Rezoning of large areas?[280] Building permits[281] Design review approval or denial[282]	Idaho Code § 67-6521(1)(a)(i): Subdivision[283] Variance Conditional use permit (aka special use permit) "Other similar applications required or authorized" under LLUPA. Planned unit developments[284] Idaho Code § 67-6521(1)(a)(ii): Initial zoning following annexation Rezoning of specific parcels or sites pursuant to section 67-6511 Idaho Code § 67-6521(1)(a)(ii): Conditional rezoning pursuant to section 67-6511A

[278] Applying the pre-2010 version of LLUPA, the court held in *Stafford v. Kootenai Cnty.*, 150 Idaho 841, 848, 252 P.3d 1259, 1266 (2011), "The legislature has not granted the right of judicial review of administrative enforcement proceedings under local planning and zoning ordinances." The 2010 amendment would not appear to change this outcome.

[283] The subdivision statute defines subdivision as a "tract of land divided into five (5) or more lots . . . ." Idaho Code § 50-1301(17). The statute also allows cities and counties to adopt their own definition. This presents the question: If a jurisdiction allows informal divisions of land (e.g., lot splits) that fall outside the definition of subdivision, are those actions subject to judicial review? Specifically, do such lot splits fall within the catch-all "such other similar applications." They are similar in that both involve divisions of land. But they are also different. Lot splits are often ministerial matters that produce little or no record for judicial review. Some may be approved by staff; some do not even require approval of or notice to the local governmental entity. Thus, one could argue that lot splits are more similar to building permits, which are not reviewable (see *Arnold v. City of Stanley* ("*Arnold II*"), 162 Idaho 115, 394 P.3d 1160 (2017) (W. Jones, J.)). On the other hand, if a landowner employed multiple lot splits to avoid meeting the definition of subdivision, that might cut the other way.

D. Interaction between LLUPA and IAPA

A common mistake of litigants is to confuse judicial review under LLUPA with judicial review under the Idaho Administrative Procedure Act ("IAPA"), Idaho Code §§ 67-5201 to 67-5292.[285] Both LLUPA and the IAPA provide a private right of action to challenge violations of the statute. (See discussion in section 13 at page 157.) However, the IAPA authorizes judicial review only of "agency" actions, which are defined in the IAPA as actions of state agencies—not, for example, cities, counties, or highway districts. (See definition of "Agency" at Idaho Code

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[280] Under the 2010 amendment, rezoning of "specific parcels or sites" is subject to judicial review. Does that mean that rezoning of a larger area including many parcels and sites is not subject to judicial review? The authors are not aware of any precedent or commentary addressing this.

[281] In *Arnold v. City of Stanley* ("*Arnold II*"), 162 Idaho 115, 394 P.3d 1160 (2017) (W. Jones, J.) (after LLUPA had been amended to specifically list which permits are appealable), the Court ruled that the catch-all "and such other similar applications require or authorized pursuant to this chapter" (Idaho Code § 67-6521(1)(a)) does not include building permits. The Court concluded that "LLUPA does not authorize or require building permits." *Arnold II*, 162 Idaho at 117, 394 P.3d at 1162. It noted that building permits are referenced only once in LLUPA and then only in the context of "future acquisition maps" that designate land proposed for acquisition by a public agency. *Arnold II*, 162 Idaho at 117, 394 P.3d at 1162. See discussion in footnote 277 on page 321 regarding pre-2010 decisions on building permits.

[282] Many cities have adopted ordinances requiring "design review approval" in connection with land use approvals. LLUPA may implicitly authorize such requirements, but the Act does not expressly "require or authorize" design review. We are aware of no decision addressing the issue. But it may be that, like the building permit in *Arnold II*, decisions on design review approval are not subject to judicial review.

[283] The subdivision statute defines subdivision as a "tract of land divided into five (5) or more lots . . . ." Idaho Code § 50-1301(17). The statute also allows cities and counties to adopt their own definition. This presents the question: If a jurisdiction allows informal divisions of land (e.g., lot splits) that fall outside the definition of subdivision, are those actions subject to judicial review? Specifically, do such lot splits fall within the catch-all "such other similar applications." They are similar in that both involve divisions of land. But they are also different. Lot splits are often ministerial matters that produce little or no record for judicial review. Some may be approved by staff; some do not even require approval of or notice to the local governmental entity. Thus, one could argue that lot splits are more similar to building permits, which are not reviewable (see *Arnold v. City of Stanley* ("*Arnold II*"), 162 Idaho 115, 394 P.3d 1160 (2017) (W. Jones, J.)). On the other hand, if a landowner employed multiple lot splits to avoid meeting the definition of subdivision, that might cut the other way.

[284] Arguably, a decision on a planned unit development falls within the "other similar applications" catch-all. Unlike building permits, planned unit developments are specifically authorized by LLUPA.

[285] The IAPA authorizes judicial review of final rules, orders, and other agency actions. Idaho Code §§ 67-5270, 67-5273. The third category (other "agency action") is broadly defined to include an "agency's performance of, or failure to perform, any duty placed on it by law." Idaho Code § 67-5201(3)(c). The time for filing a petition for judicial review of final rules, final orders, and other final agency actions is set out in Idaho Code § 67-5273.

§ 67-5201(2).[286]) Accordingly, the IAPA itself provides no basis for jurisdiction for judicial review of local land use decisions.

As discussed below, LLUPA authorizes judicial review of certain land use decisions. Rather than setting out its own judicial review procedures and standards, however, LLUPA simply incorporates by reference the judicial review provisions of the IAPA. LLUPA, Idaho Code §§ 67-6519(4) and 67-6521(1)(d).[287] Thus, a litigant under LLUPA does not rely on the IAPA directly as the basis for the action, but does rely on parts of the IAPA which are incorporated by reference by LLUPA.

The IAPA's standards for judicial review applicable to on-the-record review are found at Idaho Code § 67-5279(3). LLUPA does not identify particular sections of the IAPA that are made applicable to LLUPA review. Instead, LLUPA simply authorizes the injured party to "seek judicial review under the procedures provided by chapter 25, title 67, Idaho Code [the IAPA], Idaho Code § 67-6519(4), or to "seek judicial review as provided by chapter 25, title 67, Idaho Code [the IAPA], Idaho Code § 67-6519(4). [288] Presumably this reference includes the IAPA's judicial review provisions, Idaho Code §§ 67-5270 to 67-5277 and 67-5279.

However, LLUPA does not incorporate other provisions of the IAPA, such as the provision authorizing motions for reconsideration (Idaho Code §§ 67-5246(4) and (5)). *Arthur v. Shoshone Cnty.*, 133 Idaho 854, 860, 993 P.2d 617, 623 (Ct. App. 2000) (Lansing, J.) ("Nothing in § 67–6521(1)(d) suggests a legislative intent to incorporate into LLUPA portions of the APA authorizing state agency proceedings

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[286] "By the plain language of this statute only state government entities are agencies. A local government entity, such as a county board of commissioners, is not included. The Idaho Supreme Court so held in *Petersen v. Franklin Cnty.*, 130 Idaho 176, 938 P.2d 1214 (1997) . . . ." *Arthur v. Shoshone Cnty.*, 993 P.2d 617, 622 (Idaho Ct. App. 2000) (Lansing, J.). "Counties and city governments are considered local governing bodies rather than agencies for purposes of IAPA." *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner I*"), 181 P.3d 1238, 1240 (Idaho 2008) (Eismann, C.J.). This is one of many cases that have so held. *E.g.*, *Highlands Dev. Corp. v. City of Boise*, 188 P.3d 900 (Idaho 2008); *Petersen v. Franklin Cnty.*, 938 P.2d 1214, 1220 (Idaho 1997); *Allen v. Blaine Cnty.*, 953 P.2d at 578, 580 (Idaho 1998). However, other statutes, such as LLUPA, make the IAPA's judicial review provisions applicable to local governments. *Neighbors for a Healthy Gold Fork v. Valley Cnty.*, 145 Idaho 121, 126, 176 P.3d 126, 131 (2007).

[287] 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).

[288] When first enacted, LLUPA did refer to specific judicial review provisions of the IAPA, but this was changed in 1993 when the IAPA was amended. In any event, the judicial review provisions of the IAPA are now found in sections 67-5270 to 67-5277 and 67-5279. Section 67-5279 contains the provisions governing the standard of review. In addition to LLUPA and the IAPA, judicial review is governed by Idaho R. Civ. P. 84. However, Rule 84 does not set out any new substantive standard of review. *Roberts v. Bd. of Trustees, Pocatello, School Dist. No. 25*, 134 Idaho 890, 892-93, 11 P.3d 1108, 1110-11 (2000).

that occur prior to the initiation of judicial review."). Thus, the judicial review provisions of the IAPA (but not the rest of the IAPA) applies to those local planning and zoning decisions that are subject to review under LLUPA.

Note, by the way, that all other decisions of counties are also made reviewable under the IAPA by virtue of Idaho Code § 31-1506(1). 2011

E. LLUPA's judicial review provisions today

(1) As amended in 2010, LLUPA identifies specific actions that are subject to judicial review.

LLUPA contains two authorizations for judicial review: Idaho Code §§ 67-6519(4) and 67-6521(1). The operative terms are found in section 67-6521(1):

> (1)(a) As used herein, an affected person shall mean one having a bona fide interest in real property which may be adversely affected by:
>
> (i) The approval, denial or failure to act upon an application for a subdivision, variance, special use permit and such other similar applications required or authorized pursuant to this chapter;
>
> (ii) The approval of an ordinance first establishing a zoning district upon annexation or the approval or denial of an application to change the zoning district applicable to specific parcels or sites pursuant to section 67-6511, Idaho Code; or
>
> (iii) An approval or denial of an application for conditional rezoning pursuant to section 67-6511A, Idaho Code.
>
> . . .
>
> (d) . . . Any affected person aggrieved by a final decision concerning matters identified in section 67-6521(1)(a), Idaho Code, may within twenty-eight (28) days after all the remedies have been exhausted under local ordinances seek judicial review as provided by chapter 52, title 67, Idaho Code [the IAPA].

Idaho Code § 67-6521(1) (emphasis supplied).

This provision is cross-referenced by the seemingly redundant provision in Idaho Code § 67-6519(4), which authorizes judicial review for the applicant.[289] It

[289] An applicant, it would seem, is an affected person, so it is unclear why the legislature saw fit to provide two separate judicial review provisions. This distinction dates back to the enactment of

provides that judicial review is available when "[a]n applicant [is] denied an application or aggrieved by a final decision concerning matters in section 67-6521(1)(a), Idaho Code." Thus, the scope of section 67-6519(4) (which is applicable only to applicants for permits) is identical to section 67-6521(1).

In sum, under the current version of LLUPA, the only land use actions are subject to judicial review are the following:

- Initial zoning following annexation (Idaho Code § 67-6521(1)(a)(ii)).
- Rezoning of specific parcels or sites pursuant to section 67-6511 (Idaho Code § 67-6521(1)(a)(ii)).
- Conditional rezoning pursuant to section 67-6511A (Idaho Code § 67-6521(1)(a)(iii)).
- Applications for subdivision (Idaho Code § 67-6521(1)(a)(i)) (but see footnote 283 on page 323 re certain lot splits).
- Applications for variance (Idaho Code § 67-6521(1)(a)(i)).
- Applications for conditional use permit (aka special use permit) (Idaho Code § 67-6521(1)(a)(i)).
- "Other similar applications authorized or approved pursuant to this chapter" (Idaho Code § 67-6521(1)(a)(i)). Arguably, this includes planned unit developments, which are authorized by LLUPA (see footnote 284 on page 323). It does not include building permits (footnote 281 on page 323). Arguably it does not include design review decisions (see footnote 282 on page 323). Nor does it include comprehensive plans, comprehensive plan maps, moratoriums, enforcement actions, or annexations, none of which are "applications" and, hence, do not fall within the catch-all for similar applications.

Anything not on this list is not subject to judicial review under LLUPA. A challenge to those actions must occur by some collateral action, such as a civil suit. Note that while LLUPA does not provide for judicial review of annexations, a separate Annexation Statute provides that Category B and C annexations (but not Category A annexations) are subject to judicial review under the IAPA. See discussion in section 24.X at page 433.

LLUPA in 1975, 1975 Idaho Sess. Laws, ch. 188, and has been carried forward in various amendments for no apparent reason.

(2) Enforcement actions are not reviewable under LLUPA.

The non-availability of judicial review for enforcement actions was taken up in *Stafford v. Kootenai Cnty.*, 150 Idaho 841, 252 P.3d 1259 (2011). The *Stafford* dispute began when the county issued a notice of violation to the Staffords informing them that the landscaping at their home violated the county's ordinance requiring a 25-foot natural vegetation buffer adjacent to lakes and rivers. The Staffords appealed to the county commission, which rejected their arguments and ordered them to submit a remediation plan.[290] The Staffords then sought judicial review under LLUPA. Although the Court was clearly sympathetic with the Staffords, it threw out the judicial review on jurisdictional grounds that it raised *sua sponte*. The Court explained:

> The agency action in this case does not involve the denial or granting of a permit. In the order appealed from, the Board of Commissioners determined that the Staffords had violated the site disturbance ordinance by landscaping their property without first obtaining a permit. The Staffords have not appealed the denial of a permit or the conditions attached to a permit. Although the denial of the certificate of occupancy was involved in this case, that certificate neither is a permit under LLUPA nor was it addressed in the agency order appealed from. Therefore, the Staffords did not have the right to seek judicial review of that agency action under either former Idaho Code § 67–6519(4) or former Idaho Code § 67–6521(1)(d). <u>The legislature has not granted the right of judicial review of administrative enforcement proceedings under local planning and zoning ordinances.</u> Therefore, the district court did not have jurisdiction to rule on the merits of the petition for judicial review, and this Court does not have jurisdiction on the appeal.

Stafford, 150 Idaho at 848, 252 P.3d at 1266 (emphasis supplied).[291] This reasoning follows the Court's analysis in *Giltner I* and subsequent cases: Only the issuance or

[290] The Court also discussed the county's refusal to issue a certificate of occupancy for an addition to the Staffords' property. The Court addressed that issue, apparently in dictum, despite the fact that this action of the county was not part of the order from which judicial review was sought. In any event, the court made clear that the county had no authority to deny the certificate of occupancy. It also made clear that the county was misinterpreting its own ordinance, and that the ordinance did not apply to the Staffords to the extent that the land was previously disturbed.

[291] The *Stafford* case is discussed in 63 Planning & Envtl. L. 261 (2011) ("[T]he court lacked jurisdiction. The site disturbance ordinance was enacted under the Local Land Use Planning Act,

denial of permits are reviewable. Enforcement actions are not permits. So enforcement actions are not reviewable under LLUPA.

Although the *Stafford* case was decided after the 2010 amendment to LLUPA, the Court expressly applied the pre-2010 version of LLUPA. *Stafford*, 150 Idaho at 847, 252 P.3d at 1265. There appears to be nothing in the 2010 amendments, however, that would change the outcome. As discussed above, the 2010 amendment expanded the availability of judicial review under LLUPA to certain governmental actions (initial zoning actions, rezones, and conditional rezones). However, the language in effect today still limits judicial review to "approval, denial or failure to act upon an application" for certain identified actions as well as "similar applications." Idaho Code § 67-6521(1)(a)(i). Thus the distinction identified by the Court in *Stafford* between the issuance or denial of permits (which are reviewable) and enforcement actions involving permits (which are not reviewable) remains intact despite the amendment's expansion of the list of reviewable actions.

F. The law prior to the 2010 amendment

(1) Prior to *Giltner I* in 2008, reviewability turned on whether the action was legislative or quasi-judicial.

Prior to *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner I*"), 145 Idaho 630, 181 P.3d 1238 (2008), the Supreme Court all but ignored the language of LLUPA in determining whether judicial review was available.[292] Instead of asking, "What did the Legislature mean when it limited judicial review to permits?" the Court

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Idaho Code §§ 67-6501 to 67-6538, which provides for judicial review of actions on a 'permit.' . . . There is no statute permitting judicial review of administrative enforcement actions.")

[292] Over the years, prior to *Giltner*, the court said rather little about how judicial review relates to the statutory language of LLUPA. A footnote to *Cooper* mentioned that judicial review of quasi-judicial actions of zoning boards lies under the judicial review provisions of LLUPA (which, in turn, reference the IAPA). *Cooper v. Ada Cnty. Comm'rs*, 101 Idaho 407, 411 n.1, 614 P.2d 947, 951 n.1 (1980).[292] The Court repeated this conclusion (again without discussion) in *Walker-Schmidt Ranch v. Blaine Cnty.*, 101 Idaho 420, 422, 614 P.2d 960, 962 (1980). The Court said so once again in *Hill v. Bd. of Cnty. Comm'rs of Ada Cnty.,* 101 Idaho 850, 851, 623 P.2d 462, 463 (1981). In a special concurrence, Justice Bakes admitted to the court's lack of reflection on the subject:

> I concur with the action of the majority, which necessarily follows given the fact that the Court's dictal footnote in *Cooper* was elevated to law, with little discussion, in *Walker-Schmidt*. There is no language in the Local [Land Use] Planning Act of 1975 which expressly requires application of Idaho Code §§ 67-5215(b) through (g) and 67-5216 [references to former IAPA judicial review provisions before 1991 amendments] to rezone applications. Given that fact, it would have been better if sometime we had analyzed this issue before assuming that the appeal provisions of the Administrative Procedure Act applied to rezoning applications.

Hill, 101 Idaho at 852, 623 P.2d at 464 (citations omitted) (concurring opinion).

constructed its own common law paradigm—one which completely ignores the statutory authorizations for judicial review.

This discussion or pre-*Giltner I* and pre-2010 amendment law is retained in the handbook to assist the reader in understanding the development of the case law. Moreover, whether an action is quasi-judicial or not remains relevant for determining whether due process considerations (such as *ex parte* communication and bias rules) attach. The distinction is also relevant to conflict of interest evaluations under Rule 1.7(b)(4). See the *Idaho Ethics Handbook*.

Under the pre-*Giltner I* regime, the Court declared that the question of judicial review turns on whether the particular planning and zoning exercise was "quasi-judicial" or "legislative" in nature. (See cases discussed in section 24.F(4) at page 333.[293]) Direct judicial review under LLUPA is allowed as to quasi-judicial planning and zoning functions of cities and counties, but was unavailable with respect to their legislative planning and zoning functions. Instead, only collateral attacks (that is, legal actions outside of the judicial review process) were permitted with respect to actions deemed legislative.

The "legislative vs. quasi-judicial" distinction is sensible enough. The only thing curious about it is that it is not a distinction found in LLUPA. Nor was it modeled directly on the distinction drawn in the IAPA between legislative actions (rulemaking) and adjudicative actions (contested cases).[294] Instead, the distinction is traceable to early zoning decisions pre-dating either LLUPA or the IAPA. Indeed, the legislative/quasi-judicial distinction was drawn from the common law of other states (Washington, Oregon and Illinois). This is not to say that the standard does any violence to LLUPA. The Court might have looked at LLUPA and the IAPA and concluded that the legislative/quasi-judicial distinction is consistent with, or at least not offensive to, the language of the statute. However, the Court did not do so.

Thus, prior to *Giltner I*, the rule was simple: if the action is quasi-judicial (including rezoning, variances, conditional use permits, and subdivision), then it is subject to review under LLUPA. If instead the action is legislative (including

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[293] Note that the same distinction governs the rules of bias, *ex parte* communications, and views of the property.

[294] The IAPA's "legislative vs. adjudicative" distinction is closely analogous to the "legislative vs. quasi-judicial" distinction drawn by the court. Indeed, the IAPA could easily serve as the statutory basis for the distinction, complete with its detailed breakdown of the proper standards of review for each type of action, but for the failure of LLUPA to more fully integrate with the IAPA. Instead of making everything appealable under the IAPA, LLUPA's judicial review provisions are limited to review of permit actions. Thus, the IAPA's provisions for review of legislative functions are simply not applicable to planning and zoning matters. Recall that, but for LLUPA's limited incorporation by reference, the IAPA applies to state agencies, not to municipal bodies. *Arthur v. Shoshone Cnty.*, 133 Idaho 854, 859, 993 P.2d 617, 622 (Ct. App. 2000) (Lansing, J.) (ruling that the IAPA applies only to state agencies, not local governments).

comprehensive planning, annexation, and initial zoning), then is falls outside of LLUPA's judicial review.

(2) The basis for the legislative versus quasi-judicial distinction

The law draws a sharp distinction between how judges act and how legislators go about their jobs and how they interact with their communities. Judges are expected to be detached neutrals. Except in limited circumstances, their opinions on matters of public policy should play no role in their rulings. Judges reach their decisions simply by applying the law to the facts—even if they disagree with the policy underlying the law. Legislators, in contrast, are actively engaged in shaping public policy. They have opinions on these matters which they freely express and upon which they are freely judged by the electorate.

There are also differences when it comes to what may be considered in reaching the decision. Judges are expected to consider the matters before them solely on the basis of the record. Parties appearing before a judge have a right to hear and see everything that is considered by the court, and to respond to it. These are fundamental due process rights under the state and federal constitutions.

In contrast, the process of influencing legislation, by necessity, is much looser. People may meet one-on-one with their legislators, in private, to discuss pending legislation. It would be unthinkable for a plaintiff or defendant to approach the judge to have such a private communication, but this is done as a matter of course with legislators in our American democratic system, and, overall, it has worked well. Unlike judges, legislators are policy makers, and our democratic system depends on our legislators having broad and unfettered access to public opinion. Accordingly, the due process constraints prohibiting private communications with judges simply do not apply to private communications with legislators.

When dealing with judges and legislators, the rules are clear. A judge only wears one hat. Everything he or she does is judicial and is subject to strict due process rules. Likewise, everything a legislator does is legislative and subject to very limited restrictions (*e.g.*, for conflicts of interest).

Planning and zoning decisions arise in various contexts—sometimes legislative and sometimes judgelike (aka "quasi-judicial). It becomes necessary to know which "hat" the decision makers are wearing. Some decisions are similar to legislative actions, such as comprehensive planning and city-wide zoning. Other actions are more judge-like, such as a decision on an application for a planned unit development, conditional use permit, or building permit.

The courts have long recognized these distinctions, categorizing the former as "legislative" action and the latter as "quasi-judicial." These distinctions, in turn, guide the analysis of other issues including the rules governing bias, *ex parte*

contacts, "views" of the subject property, and—until *Giltner I*—the availability of judicial review.

(3) Until 1980, all zoning actions were viewed as legislative.

In the early years after the decision upholding zoning actions in *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926), courts struggled with challenges to both the merits and legitimacy of zoning decisions. Characterizing these zoning decisions as "legislative" gave the courts a way to limit their role while upholding the local zoning decisions. The first reference we have found in Idaho to the proposition that zoning actions are legislative in character is found in *City of Idaho Falls v. Grimmett*, 63 Idaho 90, 117 P.2d 461 (1941). In this decision, which affirmed the very authority of a city to engage in zoning, the Court declared:

> It must be conceded that, where a given situation admittedly presents a proper field for the exercise of the police power, the extent of its invocation and application is a matter which lies very largely in legislative discretion. Every presumption is to be indulged in favor of the exercise of that discretion, unless arbitrary action is clearly disclosed.

Grimmett, 63 Idaho at 92, 117 P.2d at 463 (emphasis supplied) (citations and quotation marks omitted). This case dealt with the availability of judicial review. *Grimmett* thus upheld the lawfulness of zoning and, on a more practical level, insulated it from probing judicial review.

Another pre-LLUPA case reinforced the idea of the legislative nature of zoning ordinances:

> It is fundamental that the enactment of a zoning ordinance constitutes the exercise of a legislative and governmental function. The reason upon which this principle is based is that zoning is essentially a political, rather than a judicial matter, over which the legislative authorities have, generally speaking, complete discretion. It is an exercise of legislative power residing in the state and delegated to a municipal corporation.

Harrell v. City of Lewiston, 95 Idaho 243, 247, 506 P.2d 470, 474 (1973) (quoting 8 McQuillin, *Law of Municipal Corporations*, § 25.54, pp. 134-135 (1965)).[295]

[295] In a similar vein see *Dawson Enterprises, Inc. v. Blaine Cnty.*, 98 Idaho 506, 511, 567 P.2d 1257, 1262 (1977) (Bistline, J.) ("Zoning is essentially a political, rather than a judicial matter, over which the legislative authorities have generally speaking, complete discretion."); *Ready-To-*

Dawson Enterprises, Inc. v. Blaine Cnty., 98 Idaho 506, 567 P.2d 1257 (1977) (Bistline, J.) (discussed below in section 24.M(5) at page 418), allowed a declaratory judgment action challenge to an initial zoning decision.

Indeed, until 1980, it was generally thought that every action undertaken by a planning and zoning board is legislative in nature and subject to only very limited judicial review. "The district court—following what had been a well-established line of Idaho decisions—held that all actions of zoning authorities were presumptively valid, and that the scope of judicial review was limited to looking for capriciousness, arbitrariness or discrimination." *Gay v. Cnty. Comm'rs of Bonneville Cnty.*, 103 Idaho 626, 627-28, 651 P.2d 560, 561-62 (Ct. App. 1982) (noting that this was the law until *Cooper* was decided in 1980).

(4) Idaho Supreme Court classifies actions into quasi-judicial and legislative categories

The first Idaho case to draw the distinction between legislative and quasi-judicial actions of zoning boards was decided in 1980.

> It is clear there is a pressing need in Idaho for established standards and procedures by which particularized land use regulation is to be administered. To allow the discretion of local zoning bodies to remain virtually unlimited in the determination of individual rights is to condone government by men rather than government by law. Accordingly, we adopt the rule which distinguishes between legislative and quasi-judicial actions of local zoning bodies and hold that the decision of the board in this case was quasi-judicial. Our prior cases, to the extent they are inconsistent with our holding today, are overruled.

Cooper v. Ada Cnty. Comm'rs, 101 Idaho 407, 411, 614 P.2d 947, 951 (1980). Note that while *Cooper* references recently adopted LLUPA, *Cooper*, 101 Idaho at 411 n.1, 614 P.2d at 951 n.1, the case was actually appealed under a prior statute, as explained in the concurrence, *Cooper*, 101 Idaho at 411, 614 P.2d at 954.

In *Cooper*, the Court held that the rezoning of a particular parcel of land (unlike the adoption of the initial zoning ordinance) is quasi-judicial in nature, therefore entitling the applicant to due process protections.

Pour, Inc. v. McCoy, 95 Idaho 510, 514, 511 P.2d 792, 796 (1973) (as legislative actions, zoning actions are presumed valid and upheld unless shown to be "confiscatory, arbitrary, unreasonable and capricious.")

> Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its propriety is subject to an altogether different test.
>
> Basically, this test involves the determination of whether action produces a general rule or policy which is applicable to an open class of individuals, interests, or situations, or whether it entails the application of a general rule or policy to specific individuals, interests, or situations. If the former determination is satisfied, there is legislative action; if the latter determination is satisfied, the action is judicial.

Cooper, 101 Idaho at 410, 614 P.2d at 950 (quoting and citing *Fasano v. Bd. of Cnty. Comm'rs*, 507 P.2d 23, 27 (1973)) (internal quotations and ellipses omitted).

The basic idea is that when municipalities take actions that affect a broad number of people, the action is like that of a legislative body. The remedy is political, not judicial. "Legislative action is shielded from direct judicial review by its high visibility and widely felt impact, on the theory that appropriate remedy can be had at the polls." *Burt v. City of Idaho Falls*, 105 Idaho 65, 68, 665 P.2d 1075, 1078 (1983) (Donaldson, C.J.). In contrast, decisions that are focused on particular individuals or parcels of land are more in the nature of judicial actions. These "quasi-judicial" actions, the Idaho Supreme Court says, are subject to direct judicial review under LLUPA and the IAPA.

Cooper was followed by *Walker-Schmidt Ranch v. Blaine Cnty.*, 101 Idaho 420, 614 P.2d 960 (1980); *Hill v. Bd. of Cnty. Comm'rs of Ada Cnty.*, 101 Idaho 850, 723 P.2d 462 (1981); *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 655 P.2d 926 (1982); *Gay v. Cnty. Comm'rs of Bonneville Cnty.*, 103 Idaho 626, 651 P.2d 560 (Ct. App. 1982); *Bone v. City of Lewiston*, 107 Idaho 844, 849, 693 P.2d 1046, 1051 (1984);[296] *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho

[296] In *Bone v. City of Lewiston*, 107 Idaho 844, 849, 693 P.2d 1046, 1051 (1984), the Court admonished the plaintiff for bringing a declaratory judgment action and trying to "bypass" the IAPA review standards. The Court declared that LLUPA "is the exclusive source of appeal for adverse zoning actions." *Bone*, 107 Idaho at 848, 693 P.2d at 1050. This case involved an application by a landowner for an upzone, which had been denied by the city. The Court did not discuss the case in the context of legislative versus quasi-judicial distinction, but simply cited LLUPA's judicial review provisions, saying, "We find no evidence that the legislature intended other avenues of appeal . . . ."

115, 118, 867 P.2d 989, 992 (1994); *Sprenger, Grubb & Associates v. Hailey* (*"Sprenger Grubb I"*), 127 Idaho 576, 903 P.2d 741 (1995) (Silak, J.); and *Sprenger, Grubb & Associates v. City of Hailey* (*"Sprenger Grubb II"*), 133 Idaho 320, 986 P.2d 343 (1999) (Walters, J.), each of which reaffirmed that rezoning actions are quasi-judicial. *Sprenger Grubb I and II* involved a downzoning, which, of course, is simply a form of rezoning.[297]

In *Curtis v. City of Ketchum*, 111 Idaho 27, 720 P.2d 210 (1986) (Bakes, J.), the Court ruled that the city's denial of a subdivision application is quasi-judicial and therefore exclusively subject to review under LLUPA and the IAPA. "Appellant's arguments are nothing more than a challenge of the city council's quasi-judicial action denying his subdivision application." Curtis, 111 Idaho at 32-33, 720 P.2d at 215-16.

In 1983, the Idaho Supreme Court decided *Burt v. City of Idaho Falls*, 105 Idaho 65, 665 P.2d 1075 (1983) (Donaldson, C.J.), a case involving the annexation of a 69-acre parcel of land which the county has zoned single family residential. The city amended it comprehensive plan, annexed the land, and zoned it commercial. Dissatisfied with the commercial zoning, neighbors of the annexed property filed a petition for judicial review under LLUPA. The Court found that the city's actions were legislative in nature and not subject to review under LLUPA. It declared: "Applying the test adopted in *Cooper*, we hold that in the annexation of land, the subsequent amendment of the comprehensive plan and the zoning of the annexed land, the City council acted in a legislative manner and that such actions are not subject to direct judicial review." *Burt*, 105 Idaho at 68, 665 P.2d at 1078. (Note that in 2002 the Legislature amended the Annexation Statute to make Category B and C annexations subject to judicial review under the IAPA.) Although the land had previously been zoned by the county, the Court declared that the new zoning applied by the city upon annexation was "initial zoning" not a rezone. *Burt*, 105 Idaho at 67, 665 P.2d at 1077. In a vigorous dissent, Justice Bakes contended that the majority elevated form over substance. The dissent pointed out that this was a site-specific decision, not a broad, legislative-style zoning action. The majority, however, stuck to its guns, noting that the "ownership of the annexed land was diverse and the papers filed by appellant Burt (representing more than 800 others) evidence that this was a general land use decision impacting a large number of people." *Burt*, 105 Idaho at

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Bone, 107 Idaho at 847, 693 P.2d at 1049. Nor did the Court recognize that there are other types of zoning actions (*e.g.*, initial zoning) that are not reviewable under LLUPA. This case is discussed further in the section dealing with alternative forms of judicial review. We include the case here because it is authority that LLUPA and the IAPA are the proper means of review for zone changes.

[297] In the *Sprenger Grubb* cases, the court did not discuss the quasi-judicial action issue, but simply declared that the matter was subject to review under the contested case provisions of the IAPA. The only way to get to the IAPA, however, would be by way of LLUPA, and the only way for LLUPA's judicial review provisions to apply was for this to be a quasi-judicial action.

68, 665 P.2d at 1078. Thus, there seems to be a black letter rule: Annexation, initial zoning, and comprehensive plan matters are legislative, while rezones are quasi-judicial.[298] On the other hand, the Court left the door open to future litigants to argue that initial zoning that does not involve multiple properties and wide-ranging impacts on neighbors might be quasi-judicial. To date, however, no Court has questioned the broad holding in *Burt*. Moreover, the decision in *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008) (Eismann, J.), appears to reinforce the outcome (but not the analysis) in *Burt*.

In *Crane Creek Country Club v. City of Boise*, 121 Idaho 485, 826 P.2d 446 (1992), the country club filed a petition for a writ of prohibition to restrain the city from annexing its property. The Court ruled, without analysis: "While it is true that city councils on occasion act in a quasi-judicial capacity, annexation is not such an occasion. Rather, annexation is a legislative act of city government accomplished by the amendment of an ordinance." *Crane Creek*, 121 Idaho at 487, 826 P.2d at 448 (citation and footnote omitted). Because the action was legislative, the Court said, it was not subject to a writ of prohibition, which only constrains quasi-judicial actions. As in *Burt*, the fact that *Crane Creek* dealt with a single parcel of land (the country club) was not controlling. What was controlling, apparently, was the nature of the action. The majority opinion offered no guidance as to how the plaintiff should have framed the case. However, it appears that the proper approach would have been a declaratory action such at that employed in an annexation challenge in *City of Lewiston v. Bergamo*, 119 Idaho 221, 224, 804 P.2d 1352, 1355 (Ct. App. 1990).[299] Also note that the statute governing judicial review of annexations was changed in 2002, providing for review of Category B and C annexations under the IAPA. See discussion in section 24.X at page 433.

Not surprisingly, conditional use permits (also known as special use permits), which apply to specific parcels, are deemed quasi-judicial. *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho 115, 867 P.2d 989 (1994) (conditional use permit for baseball field was a quasi-judicial action triggering due process); *Angstman v. City of Boise,* 128 Idaho 575, 578, 917 P.2d 409, 412 (Ct. App. 1996) (Walters, C.J.) ("Due process safeguards apply to quasi-judicial proceedings, such as those

[298] This formalistic approach to distinguishing legislative and quasi-judicial actions has been criticized by some commentators. Some have gone so far as to suggest that the entire distinction between legislative and quasi-adjudicative decision-making is bogus. D.S. Pensley (Note), *Real Cities, Ideal Cities: Proposing a Test of Intrinsic Fairness for Contested Development Exactions*, 91 Cornell L. Rev. 699, 704 (2006) ("in all practicality legislative and adjudicative land use decisions are indistinguishable").

[299] On the other hand, a concurrence by two justices says, "therefore the proceedings in the district court should have been a judicial review." *Crane Creek*, 121 Idaho at 487, 826 P.2d at 448. Yet this conclusion contradicts the court's holding in *Burt v. City of Idaho Falls*, 105 Idaho 65, 665 P.2d 1075 (1983), which held that annexations may not be reviewed under LLUPA.

conducted by zoning boards in considering whether to grant a conditional use permit.").

In *Castaneda v. Brighton Corp.*, 130 Idaho 923, 950 P.2d 1262 (1998), the Court approved without comment judicial review under LLUPA of the City of Eagle's approval of the developer's preliminary plat (subdivision), rezoning, and annexation relating to a proposed subdivision. The case contains no substantive discussion of jurisdiction, because these issues were not presented on appeal and the Court did not raise the issue *sua sponte*. In any event, allowing an annexation ordinance to be reviewed under LLUPA appears to be inconsistent with the Court's determination in *Crane Creek* and *Burt*.[300]

In 2000, the Supreme Court, without discussion, allowed review of variances and a subdivision under LLUPA, thus recognizing these actions to be quasi-judicial. *Blaha v. Bd. of Ada Cnty. Comm'rs*, 134 Idaho 770, 773, 9 P.3d 1236, 1239 (2000) (Walters, J.).

(5) In *Giltner I* and subsequent cases the Court ruled that only "permits" may be challenged under LLUPA.

In 2008, the Court handed down two decisions that displaced the legislative versus quasi-judicial distinction altogether. It is not the outcome of the cases that was surprising. In each case (until *Burns Holdings, LLC v. Madison Cnty. Bd. of Cnty. Comm'rs* ("*Burns Holdings I*"), 147 Idaho 660, 214 P.3d 646 (2009), discussed below), the outcome was entirely predictable based on well-established precedent. But the Court did not rely on precedent in reaching its decisions. It ignored the distinction between quasi-judicial and legislative functions that had controlled since 1980. Instead, it decided what is reviewable under LLUPA based on the definition of "permit" in the statute. There is nothing wrong in that. That would be fine, if the Court had explained that it was setting aside the prior cases and embarking on a new line of analysis. Oddly, however, the Court (despite prodding by dissents) did not address what appears to be a sea change in its thinking.

First, in *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner I*"), 145 Idaho 630, 181 P.3d 1238 (2008) (Eismann, J.), the Court found no judicial review under LLUPA of a change in the county's land use map associated with its comprehensive plan. Three months later, in *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008) (Eismann, J.), the Court found that LLUPA does not authorize juridical review of an initial zoning decision. Both outcomes were fully predictable and in line with the authorities discussed above because comprehensive plan development and initial zoning are traditionally viewed as legislative functions (*Burt v. City of Idaho Falls*, 105 Idaho 65, 665 P.2d 1075 (1983)). What is remarkable is the *Giltner I* court did not even mention the quasi-judicial versus legislative distinction in its

[300] However, IAPA review of Category B and C annexations was authorized in 2002.

analysis.[301] Instead, the Court decided the cases based on a formulaic evaluation of what constitutes a "permit" under LLUPA. We discuss each below.

In *Giltner I*, the Court ruled than an amendment to a comprehensive plan map is not subject to judicial review under LLUPA. When the county approved a change in the map sought by the developer, a neighboring dairy sought judicial review. The Idaho Supreme Court upheld the district court's determination that the lower court was without jurisdiction to hear the appeal. The Court first found that there was no jurisdiction under the IAPA, because it authorizes appeals only of agency actions, and counties are not agencies. *Giltner I*, 145 Idaho at 632, 181 P.3d at 1240. That was hardly news. The Court then turned to LLUPA's two judicial review provisions. The Court found no jurisdiction under Idaho Code § 67-6521, because that provision authorizes review of "permits authorizing the development" and the "ordinance amending the comprehensive plan map does not authorize any development." *Giltner I*, 145 Idaho at 632, 181 P.3d at 1240. Thus, the Court seemed to focus on the words "authorizing development" rather than the word "permit." It is unclear why the Court did not simply state that a map is not a permit, and end the discussion there. The Court then turned its attention to LLUPA's other judicial review provision, Idaho Code § 67-6519(4). It is unclear why *Giltner I* did not simply toss out review under section 67-6519(4) on the basis that the plaintiff was not an "applicant." Instead, it focused on the word "permit." It ruled that section 67-6519(4) applies only to review of permit decisions (*i.e.*, conditional use / special use permits, subdivision permits, planned unit development permits, variance permits, and building permits). In the decisions that followed *Giltner I*, this "permit only" interpretation became the main focus and guiding principle (and rule of thumb) for both section 67-6519(4) and section 67-6521(1).

In *Highlands*, a developer (Highlands) filed an "annexation/rezone application" with the city (which the Court noted was really an initial zoning).[302] Boise approved the annexation request, but zoned the property more restrictively than the developer wished. Highlands then sought judicial review of both the annexation and the initial zoning action under the IAPA. *Highlands*, 145 Idaho at 960, 188 P.3d

[301] The majority made no mention of the legislative versus quasi-judicial distinction. But the dissent did: "Not every zoning decision, however, is subject to judicial review. This Court has historically drawn a line between decisions that are legislative in nature and those that are quasi-judicial in nature, only allowing review of the latter category." *Highlands*, 145 Idaho at 965, 188 P.3d at 907 (Justice Jim Jones dissenting).

[302] As the court said, "The term 'initial zoning' means the City's act in zoning the properties in conjunction with the annexation. A city has no authority to zone property in the county, and vice versa. Although the properties had been zoned by Ada County prior to the annexation by the City, the county zoning ordinance ceased to apply once the land in question was removed from the county's jurisdiction by annexation." *Highlands*, 145 Idaho at 960, n.3, 188 P.3d at 902, n.3. This is consistent with an earlier statement to that effect in *Burt v. City of Idaho Falls*, 105 Idaho 65, 67, 665 P.2d 1075, 1077 (1983) (Donaldson, J).

at 902. Premising jurisdiction on the IAPA, of course, was a mistake—the same mistake made by the dairy in *Giltner I*. The Court made quick work of that contention, despite the fact that the city did not even raise an objection to jurisdiction.[303]

The Court dismissed the annexation appeal, noting that the pre-2002 Annexation Statute makes no provision for judicial review.[304] The Court then analyzed whether the LLUPA authorized judicial review of the initial zoning.

First, the Court applied its holding in *Giltner I* (handed down less than three months earlier) that section 67-6519(4) authorizes judicial review of only of five specified "permits" and that an initial zoning is not a permit. The majority rejected an argument pressed in the dissent that section 67-6519 allows review of both "permits" and "decisions." The Court found they were one and the same (that is, "decisions" refers to decisions as to permits not to all manner of decisions). The Court also rejected the dissent's suggestion that the term "permit" should be read broadly to include a broader range of zoning actions. Instead, the Court noted that there were five and only five types of permits mentioned in LLUPA: conditional use (aka special use) permits, subdivision permits, planned unit development permits, variance permits, and building permits. *Highland Development*, 145 Idaho at 961, 188 P.3d at 903.

The Court then turned to section 67-6521 (the judicial review portion of LLUPA), finding that it, too, is unavailable: "LLUPA also grants the right of judicial review to persons having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing development. This case does not involve the granting or denial of a permit authorizing development." *Highlands*, 145 Idaho at 961, 188 P.3d at 903 (citing Idaho Code § 67-6521). Here, apparently, the Court was keying in on the word "permit" rather than "affecting development"; unlike the map amendment in *Giltner I*, this action did authorize development. Thus, under *Highlands*, both section 67-6519 and 67-6521 boil down to the same test: Is it a permit?

The dissent in *Highlands* (written by Justice Jim Jones and joined in by Justice Burdick) warned that this simple rule would have the effect of barring judicial review of all rezone decisions. "I dissent from the Court's opinion because it will effectively

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[303] The district court raised the jurisdictional issue *sua sponte*. *Highlands*, 145 Idaho at 960, 188 P.3d at 902.

[304] Judicial review was not available under the Annexation Statute, Idaho Code § 50-222, because the judicial review provisions added to that statute in 2002 were not in effect at the time of the annexation in 2001. Even if the 2002 amendments had been in effect, however, they provide for judicial review only of Category B and C annexations, and this would have been a voluntary Category A annexation. Presumably, then, the only proper means of challenging the annexation would have been by declaratory action. See discussion in section 24.X at page 433.

foreclose review of quasi-judicial zoning decisions under the [IAPA]. The opinion will prevent property owners from obtaining judicial review of decisions downzoning their property and preclude unhappy neighbors from challenging decisions to upzone adjacent property." *Highlands*, 145 Idaho at 962, 188 P.3d at 904 (Justice Jim Jones, dissenting).

The *Highlands* majority responded to the dissent's concern that the decision will cut off judicial review: "It will not. As we recognized in *McCuskey v. Canyon Cnty. Comm'rs* [*"McCuskey II"*], 128 Idaho 213, 912 P.2d 100 (1996), such landowners can seek relief in an independent action." *Highlands*, 145 Idaho at 962, 188 P.3d at 904. Thus, the Court affirmed, once again, the principle that the absence of judicial review does not preclude other forms of judicial challenge.[305]

In *Johnson v. Blaine Cnty.*, 146 Idaho 916, 204 P.3d 1127 (2009), the Court upheld the right of an adjoining landowner to seek judicial review of the granting of a final plat for a planned unit development. In so ruling, the Court confirmed that judicial review under Idaho Code § 67-6521 is based on whether or not the application was for a "permit." The Court noted that the three matters before the Court (a planned unit development, subdivision, and conditional use permit) were all "permits." Thus, jurisdiction under both section 67-6519 and section 65-1921 turn on the same question—whether a permit is involved. Thus, we are left with a remarkably simple analysis: If the decision does not involve one of the five types of permit referenced above, LLUPA review is not available.

Any doubt about where the Court was headed was resolved in the case of *Burns Holdings, LLC v. Madison Cnty. Bd. of Cnty. Comm'rs* ("*Burns Holdings I*"),

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[305] The Court cited *McCuskey II*, which was a follow-on to *McCuskey I*. Both decisions support the Court's conclusion that, notwithstanding the unavailability of judicial review, "landowners can seek relief in an independent action." *Highlands,* 145 Idaho at 962, 188 P.3d at 904.

In *McCuskey I*, the landowner was successful in obtaining a declaratory judgment invalidating a downzone of his property that occurred years earlier without his knowledge. In so ruling, the *McCuskey I* Court repeated the oft-quoted language from *Burt* ("While we hold that a legislative zoning decision is not subject to direct judicial review, it nonetheless may be scrutinized by means of collateral actions such as declaratory actions.") *McCuskey I*, 123 Idaho at 660, 851 P.2d at 956 (quoting *Burt v. City of Idaho Falls*, 105 Idaho 65, 66 n.2, 665 P.2d 1075, 1076 n.2 (1983)).

After winning in *McCuskey I*, the landowner brought an inverse condemnation action (*McCuskey II*) seeking compensation for a temporary taking. (Takings are discussed in Volume II of this Handbook.) The Court recognized that such a claim could be brought. This one, however, was brought too late—past the four-year statute of limitations which began to run when the county issued a stop work order. *McCuskey II*, 128 Idaho at 216-17, 912 P.2d at 103-04. The Court also suggested in dictum that the inverse condemnation claim was barred by res judicata because it could have been presented in *McCuskey I*. *McCuskey II*, 128 Idaho at 216 n.1, 912 P.2d at 103 n.1. Finally, the Court suggested, in dictum, that the temporary taking claim would likely fail on the merits. "It appears in this case that, under our rule, the County's downzoning of the subject property to rural residential was, in all probability, not a taking." *McCuskey II*, 128 Idaho at 216 n.2, 912 P.2d at 103 n.2.

147 Idaho 660, 214 P.3d 646 (2009). Here, the landowner sought approvals to build a concrete batch plant in an agricultural and residential area near Rexburg. The company filed an application for a comprehensive plan text and map amendment and rezone. The county denied the comprehensive plan amendment and declined to act on the rezone, thus effectively denying it. The applicant sought judicial review under LLUPA. The Supreme Court, in a 3-2 decision, ruled that the applicant had no right to judicial review because neither the comprehensive plan or the rezone applications involved "permits." The Court followed its line of cases beginning with *Giltner I*, applying a rigid, text-based analysis of what is reviewable under LLUPA. The rejection of the appeal for the comprehensive plan was, of course, no surprise. *Burns Holdings I*, however, was the first post-*Giltner I* decision to confront directly the question of judicial review of a rezone application. The *Burns Holdings I* Court made quick work of that. If the applicant is not seeking a "permit," judicial review is not available under LLUPA, period—without any discussion of whether the action is legislative or quasi-judicial. The decision provoked a strong dissent by Justice Jim Jones and Justice Burdick who pointed out that the decision ignores 25 years of jurisprudence.

The majority in *Burns Holdings I*, noted that, while there is no judicial review of a rezone available, there is still the option of a declaratory judgment action. "While we hold that a legislative zoning decision is not subject to direct judicial review, it nonetheless may be scrutinized by means of collateral actions such as declaratory actions." *Burns Holdings I*, 147 Idaho at 664, 214 P.3d at 650 (quoting *Burt v. City of Idaho Falls*, 105 Idaho 65, 66 n.2, 665 P.2d 1075, 1076 n.2 (1983)). Note that *Burt* involved an annexation and an initial zoning (a legislative action), not a rezone (a quasi-judicial action). Be that as it may, the message was clear: If one wishes to challenge a rezone, it must be done through a declaratory action. (That clear message was followed by an amendment to LLUPA in 2010 allowing appeals of rezones).

The availability of declaratory actions where judicial review is unavailable was confirmed in *Ciszek v. Kootenai Cnty. Bd. of Comm'rs*, 151 Idaho 123, 254 P.3d 24 (2011) (J. Jones, J.) (allowing a rezone to be challenged by declaratory action). In a footnote, the Court noted that judicial review of rezones was unavailable per *Burns Holdings I*. *Ciszek*, 151 Idaho at 126, n.2, 254 P.3d at 27 n.2. The Court did not mention that LLUPA had been amended in 2010 to allow such judicial review. Presumably the Court felt it was apparent that the statutory change was not retroactive and did not apply to this case.

In any event, where a declaratory judgment action is the only available avenue for challenging a land use action, the question is presented: what the basis for such an action? It may be that there is some technical violation of law or procedure. Challenged to the decision itself are difficult to mount where the decision is

legislative in nature. See discussion of declaratory actions in section 24.M at page 402.

In *Taylor v. Canyon Cnty. Bd. of Comm'rs* ("*Taylor II*"), 147 Idaho 424, 210 P.3d 532 (2009) (Burdick, J.), the developer of an eight-acre parcel in Canyon County sought and received a rezone of his property with conditions imposed pursuant to a development agreement. He also sought and received an amendment to the comprehensive plan map in effect at the time of his application. When neighbors appealed under LLUPA, the Court rejected the portion of the appeal dealing with the map amendment, based on *Giltner I*. However, the Court found that—notwithstanding the holding in *Giltner I* that only "permits" may be appealed under LLUPA—a conditional re-zone coupled with a development agreement is the functional equivalent of a conditional use permit, and therefore was appealable. This decision was codified by the 2010 amendment to LLUPA.

The *Taylor* case partially re-opened the door to judicial review of rezones. However, it would appear to work only as to up-zones (where the developer is seeking the rezone, and thus can be packaged together with a development agreement and labeled a "conditional rezone.") Down-zones are imposed unilaterally against the wishes of the landowner, so it is highly unlikely that there would be a development agreement.

Packaging the upzone with a development agreement in order to facilitate judicial review cuts both ways for the developer. If the developer wins, as in *Taylor*, he subjects himself to challenges by neighbors. But if he loses, he at least preserved the opportunity to appeal himself. *Taylor* does not appear to offer any means of judicial review of a downzone, which, presumably, would not be characterized as conditional. Nor did the Court in *Taylor* offer any suggestions to litigants as to what means of judicial challenge might be appropriate where LLUPA review is unavailable.

All of this is now mooted, however, by the legislative change in 2010 allowing judicial review of all re-zones.

G. Burden of proof in challenging an ordinance

"The burden of proving that the ordinance is invalid rests upon the litigant who attacks the validity of the ordinance." *Dawson Enterprises, Inc. v. Blaine Cnty.*, 98 Idaho 506, 511-12, 567 P.2d 1257, 1262-63 (1977) (Bistline, J.).

> A presumption of validity is accorded to the decisions of a municipal zoning board. The burden of proof is placed upon the party attacking the zoning decision to show that the zoning ordinance, as applied to the property in question, was confiscatory, arbitrary, unreasonable and void. If the presumption is overcome,

> by evidence tending to show that the ordinance in question has been unreasonably applied to the property, the burden then shifts to the city to come forward with evidence to rebut and show that the ordinance was valid.

Sprenger, Grubb & Associates v. Hailey (*"Sprenger Grubb I"*), 127 Idaho 576, 586, 903 P.2d 741, 751 (1995) (Silak, J.) (citations omitted). In this case, the plaintiff's initial burden was met with evidence of other zoning actions that, on their face, appeared to be inconsistent with the challenged action. Ultimately, the city prevailed by showing each of its actions were consistent with the comprehensive plan.

H. Judicial review is limited to the record

Judicial review of planning and zoning decisions (as well as other administrative actions) is conducted on the record created by the administrative decision-maker.[306] This applies both to the decision by the local body and to judicial review. (See discussion in section 13.C at page 158 for a practical discussion about building the hearing record.)

This limitation to the record is not spelled out in LLUPA (except for the requirement of a transcribable record, Idaho Code § 67-6536). Instead, it is found in the IAPA judicial review provisions broadly referenced by LLUPA at Idaho Code §§ 67-6519(4) and 67-6521(1)(d).

Since 1991, the IAPA has expressly provided that review of orders in contested cases is limited to the record:

> Judicial review shall be conducted by the court without a jury.[307] Unless otherwise provided by statute, judicial review of disputed issues of fact must be confined to the agency record for judicial review as defined in this chapter, supplemented by additional evidence taken pursuant to section 67-5276.

IAPA, Idaho Code § 67-5277.[308]

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[306] In contrast to the rules applicable to contested cases, a "rulemaking record" is compiled when agencies promulgate rules. Idaho Code § 67-5225. However, the agency's rulemaking decision need not be based exclusively on this record. Idaho Code § 67-5225(3).

[307] There is no constitutional right to trial by jury in administrative review cases. *Brady v. Place*, 41 Idaho 747, 750-51, 242 P. 314, 315 (1925).

[308] This provision was added to the IAPA when it was overhauled in 1992. Prior to 1992, courts sometimes engaged in de novo review of agency actions. For instance, in *Cooper v. Ada Cnty. Comm'rs*, 101 Idaho 407, 409, 614 P.2d 947, 949 (1980), the district court undertook a de novo review of a decision by Ada County to deny a rezone request.

This principle is reiterated elsewhere in the IAPA:

> Except to the extent that this chapter or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in contested cases under this chapter or for judicial review thereof.

Idaho Code § 67-5249(3). See also Idaho R. Civ. P. 84(b)(2), 84(j), 84(k) and 84(l).

The case law strongly reinforces the conclusion that judicial review is limited to the record.[309]

Coincident with the concept of record review is the mandate that "[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." IAPA, Idaho Code § 67-5279(1).

There are limited exceptions for extra-record evidence spelled out in Idaho Code § 67-5276.[310]

Thus, with a few exceptions, the only evidence before the Court is the evidence that was before the planning and zoning commission and city council or county commission. The law on this subject was reinforced in 2007 by the Idaho Supreme Court's decision in *Crown Point Dev., Inc. v. City of Sun Valley*, 144 Idaho 72, 156 P.3d 573 (2007). This case involved Crown Point's applications for preliminary plat approval and design review on "Phase 5" of the Crown Ranch Subdivision development. In denying the applications, the city relied on "an analysis by several individuals of existing documents [the Phase 1-4 applications] in the City's possession, but not the existing documents themselves." *Crown Point*, 144 Idaho at 77, 156 P.3d at 578. The developer sought judicial review under LLUPA. Although, LLUPA provides for on the record review, the developer persuaded the district court that it should allow the record to be augmented with the Phase 1-4 applications, in order to demonstrate factual errors upon which the city's findings were premised. The Supreme Court reversed the district court, noting that none of LLUPA's exceptions allowing augmentation of the record applied here. "Instead, Crown Point merely argued that the City should not be allowed to rely on what it characterizes as unreliable facts in the place of documents to which it had access. This argument fails." *Crown Point*, 144 Idaho at 76, 156 P.3d at 577. The Court also

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[309] "The commissioners, in reaching their decision, must confine themselves to the record as established at the public hearing." *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1994) (citing *Cooper v. Ada Cnty. Comm'rs*, 101 Idaho 407, 411, 614 P.2d 947, 951 (1980)). "A quasi-judicial officer must confine his or her decision to the record produced at the public hearing." *Eacret v. Bonner Cnty.*, 139 Idaho 780, 786-87, 86 P.3d 494, 500-01 (2004).

[310] The IAPA allows the record on appeal to the district court to be augmented on a showing of either "good reasons" for not presenting it below or "alleged irregularities in procedure." Idaho Code § 67-5276(1).

noted that the fact that the documents are part of the "public" record does not make them part of this record. *Crown Point*, 144 Idaho at 76, 156 P.3d at 577. Finally, the Court noted that there was no showing of a procedural irregularity that would have justified augmentation of the record. *Crown Point*, 144 Idaho at 77, 156 P.3d at 578.

The message here is a simple one: LLUPA's concept of record-based review means what it says. Even if the extra-record evidence is in the "public record" and even if that additional evidence would show that the decision-making is flawed, it is too late to bring this up on appeal. The applicant must build the record at before the original decision maker, or live with the consequences.

The federal courts subscribe to the same principles of record-only review in the context of challenges brought under the federal Administrative Procedure Act ("APA"). *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996); *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988).[311]

Under certain circumstances, however, a reviewing court may expand its scope of review beyond the record. *Id.* Specifically, the Ninth Circuit recognizes four scenarios that allow for extra-record evidence:

> (1) if admission is necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) if the agency has relied on documents not in the record, (3) when supplementing the record is necessary to explain technical terms or complex subject matter, or (4) when plaintiffs make a showing of agency bad faith.

Lands Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005) (quoting *Sw. Ctr.*, 100 F.3d at 1450) (internal quotation marks omitted); *Nw. Envtl. Advocates v. Nat'l*

[311] This issue often arises in NEPA cases. As a general matter, judicial review of an agency's decision under NEPA is limited to the record before the agency at the time the decision was made. *See, e.g., Asarco, Inc. v. EPA*, 616 F.2d 1153, 1159 (9th Cir. 1980) ("A number of rules governing the scope of judicial review of agency action emerge from these cases. Predominant is the rule that agency action must be examined by scrutinizing the administrative record at the time the agency made its decision."); *Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1144 (9th Cir. 2006) ("We have held that review of agency action under NEPA is limited to the administrative record and may only be expanded beyond the record to explain agency decisions. Accordingly, administrative review disfavors consideration of extra-record evidence." (citations omitted)). In other words, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 141 (1973). "Consideration of the evidence to determine the correctness or wisdom of the agency's decision is not permitted, even if the court has also examined the administrative record." *Asarco*, 616 F.2d at 1160.

Marine Fisheries Serv., 460 F.3d 1125, 1145 (9th Cir. 2006) (quoting same language).

These exceptions are "narrowly construed and applied." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2004).[312] And they must be. The Ninth Circuit has explained that, if liberally applied, the exceptions would swallow the rule. "The scope of these exceptions permitted by our precedent is constrained, so that the exception does not undermine the general rule. Were the courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in effect, de novo rather than with the proper deference to agency processes, expertise, and decision-making." *Id*. at 1030.

In addition, federal courts will accept extra-record evidence to resolve disputes over its jurisdiction, such as in standing challenges. *See, Nw. Envtl. Defense Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997) (in which the court considered supplemental declarations "not in order to supplement the administrative record on the merits, but rather to determine whether petitioners can satisfy a prerequisite to this court's jurisdiction.")[313] See discussion in section 24.L(11) at page 395.

I. Standard of review under the IAPA

(1) "Preponderance of the evidence" standard applies at the administrative stage.

Before turning to the standard of review applicable on judicial review, we offer a word about the standard of proof required at the administrative level.

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[312] One district court in the Ninth Circuit has suggested that there is a common practice of allowing extra-record evidence in NEPA cases: "[T]he admission of extrinsic evidence on the issue of adequacy of an EIS appears to be the normal practice in the Ninth Circuit." *No Oilport! v. Carter*, 520 F. Supp. 334, 346 (W.D. Wash. 1981). But in the decades since *No Oilport!*, the Ninth Circuit has consistently affirmed the rule that extra-record evidence is generally not admissible. It has clarified the four established exceptions to this rule. And, it has directly contradicted the assertion that extra-record evidence should be "routinely or liberally" admitted. *Lands Council v. Powell*, 395 F.3d at 1030.

[313] In *Arizona Cattle Growers' Ass'n v. Cartwright*, 29 F. Supp. 2d 1100 (D. Az. 1998) (footnote omitted), the federal district court said: "As a general rule, when reviewing an agency decision the court's review is limited to the administrative record. *Northcoast Environmental Ctr. v. Glickman*, 136 F.3d 660, 665 (9th Cir. 1998); *citing Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988) (modified in 867 F.2d 1244). Only limited circumstances justify considering extraneous material. The Ninth Circuit characterized these circumstances in four categories: (1) material necessary to determine whether the agency considered all relevant factors and adequately explained its decision; (2) circumstances where the agency relied on extraneous documents; (3) when the extraneous material is necessary to explain technical terms or complicated subject matter; and (4) where Plaintiffs have shown bad faith by the agency. *Id*."

There is little (if any) case law in Idaho addressing the burdens and standards of proof applicable at the administrative stage in a land use permit proceeding. However, general principles of administrative law suggest the following. The applicant for a permit carries the burden of showing that he or she is entitled to the permit. Facts necessary to establish must be shown by a preponderance of the evidence.[314] "Absent an allegation of fraud or a statute or court rule requiring a higher standard, administrative hearings are governed by a preponderance of the evidence standard." *Northern Frontiers, Inc. v. State*, 129 Idaho 437, 439, 926 P.2d 213, 215 (Ct. App. 1996) (citing 2 Am. Jur. 2d, *Administrative Law* § 363 (1994)).

The preponderance of the evidence standard is a tougher one than the substantial evidence standard that will apply on judicial review.[315] But it is more lenient than the clear and convincing evidence standard. The clear and convincing evidence standard is a heightened evidentiary standard applicable in special cases such as abandonment,[316] forfeiture,[317] fraud,[318] and prescription[319]—cases where the outcome is disfavored in the law).

(2) The statutory framework – applicable standards of review

LLUPA adopts by reference the judicial review provisions of the IAPA, Idaho Code §§ 67-5201 through 67-5292.[320] The IAPA's standards for judicial review are found at Idaho Code § 67-5279. LLUPA's reference to the IAPA is found in Idaho Code §§ 67-6519(4) and 67-6521(1)(d). Both references are to the IAPA as a whole, not to any specific section.

This section of the IAPA contains two categories of judicial review, one for review of legislative matters such as rulemaking (not based exclusively on a record), Idaho Code § 67-5279(2), and one for review of contested cases (aka adjudicative

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[314] "A 'preponderance of the evidence' is evidence that, when weighed with that opposed to it, has more convincing force and from which results a greater probability of truth." *Harris v. Electrical Wholesale*, 141 Idaho 1, 3, 105 P.3d 267, 269 (2004) (quoting *Cook v. W. Field Seeds, Inc.*, 91 Idaho 675, 681, 429 P.2d 407, 413 (1967)).

[315] "Substantial and competent evidence is less than a preponderance of the evidence, but more than a mere scintilla." *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 456, 180 P.3d 487, 495 (2008) (J. Jones, J.).

[316] *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 388-89, 647 P.2d 1256, 1260-61 (1982).

[317] *McCray v. Rosenkrance*, 135 Idaho 509, 515, 20 P.3d 693, 699 (2001).

[318] *Sowards v. Rathbun*, 134 Idaho 702, 706, 8 P.3d 1245, 1249 (2000).

[319] *Baxter v. Craney*, 135 Idaho 166, 173, 16 P.3d 263, 270 (2000).

[320] These references to the IAPA were not changed by the 2010 amendments to these provisions, 2010 Idaho Sess. Laws, ch. 175, §§ 1, 3.

decision-making, which is based on a record), Idaho Code § 67-5279(3).[321] (The only difference between the two, by the way, is that contested cases are subject to a substantial evidence standard for fact finding, while legislative fact finding is subject to an arbitrary and capricious standard. This is discussed below in sections 24.I(6) and 24.I(7) beginning on page 351.)

Because judicial review of quasi-judicial actions of local land use entities is record-based, subsection (3) governs.[322] It provides that, in order to reverse the decision of the municipal planning and zoning body, the court must find that the underlying decision was:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) not supported by substantial evidence on the record as a whole; or
> (e) arbitrary, capricious, or an abuse of discretion.

Idaho Code § 67-5279(3). Each of these standards is discussed in turn below.

(3) Presumption of validity

(See also discussion under "Construction of Ordinances" in section 24.EE at page 455.)

From the outset, judicial review of agency action is tilted in favor of the agency. "A strong presumption of validity favors the actions of zoning authorities when applying and interpreting their own zoning ordinances." *Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 39, 981 P.2d 1146, 1149 (1999). "A strong presumption of validity favors an agency's actions." *Young Electric Sign Co., v. State*, 135 Idaho 804, 25 P.3d 117 (2001). "[J]udicial review under the IAPA begins with a presumption of regularity." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner,* 30 Idaho L. Rev. 273, 357 (1993).

The Idaho Supreme Court summed up this presumption on many occasions. Two follow.

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[321] Actually, the two are identical, except that subsection (3) (for record-based decisions) contains an additional standard (the substantial evidence test) not applicable to review of rules.

[322] One might guess that subsection (2) would govern the review of legislative-type actions, such as the adoption of zoning ordinances. This would make perfect sense. But it is not the case. The IAPA does not govern review of such actions. Instead, subsection (2) applies only to the review of "rules" adopted by state agencies.

> There is a strong presumption that the actions of the Board of Commissioners, where it has interpreted and applied its own zoning ordinances, are valid. The party appealing the Board of Commissioners' decision must first show the Board of Commissioners erred in a manner specified under I.C. § 67-5279(3), and second, that a substantial right has been prejudiced.

Evans v. Teton Cnty., 139 Idaho 71, 74-75, 73 P.3d 84, 87-88 (2003) (Kidwell, J.) (citations omitted).

> First, there is a strong presumption favoring the validity of the actions of zoning boards, and we have upheld the validity of their actions whenever they are free from capriciousness, arbitrariness or discrimination.

South Fork Coal. v. Bd. of Comm'rs of Bonneville Cnty. ("South Fork II"), 117 Idaho 857, 860, 792 P.2d 882, 885 (1990).

An excellent summary of the issues affecting the standard of review was set out by the Idaho Supreme Court in this 2000 decision:

> Where a district court acts in its appellate capacity pursuant to the Idaho Administrative Procedure Act (IAPA), this Court reviews the agency record independently of the district court's decision. The Court will defer to the agency's findings of fact unless those findings are clearly erroneous and unsupported by evidence in the record. This Court may not substitute its judgment for that of the agency as to the weight of the evidence on factual matters.
>
> A strong presumption of validity favors an agency's actions. The agency's actions may be set aside, however, if the agency's findings, conclusions, or decisions: (a) violate constitutional or statutory provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record as a whole; or (e) are arbitrary, capricious, or an abuse of discretion. In addition, this Court will affirm an agency action unless a substantial right of the appellant has been prejudiced.

Cooper v. Bd. of Prof'l Discipline, 134 Idaho 449, 454, 4 P.3d 561, 566 (2000) (citations omitted).

(4) Judicial review of legal determinations

The IAPA authorizes courts to overturn actions of planning and zoning entities where they are "in violation of constitutional or statutory provisions" or "in excess of the statutory authority of the agency." Idaho Code §§ 67-5279(3)(a) and (b). In other words, the courts may second-guess the legal pronouncements of planning and zoning entities.

Unlike review of fact-finding, the district court reviews these law-declaring functions *de novo*. Idaho Code §§ 67-5279(3)(a) and (b); Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner,* 30 Idaho L. Rev. 273, 359-60 (1993). (See discussion below regarding deference to the municipality's interpretation of its own ordinance.)

The distinction between law-making and the exercise of discretion (which is subject to the much more limited "arbitrary and capricious" standard discussed below) is subtle but important:

> It is important to distinguish these questions from another recurrent situation that arises from an agency's interpretation of a statute: to the extent that the statute accords the agency discretion, the issue increasingly becomes one of exercising the discretion granted to the agency by the legislature. Such discretionary decisions are reviewed under the "arbitrary, capricious, or abuse of discretion" standard.
>
> The traditional analysis of "questions of law" tends to conflate these two separate and sequential functions. Separating them can help to clarify the process of judicial review by shifting the focus: while the court's law-declaring function requires it first to determine de novo if the agency interpretation is "in violation of . . . statutory provisions [or] excess of . . . statutory authority" once it has determined that the agency's interpretation is not illegal, the applicable scope of review then becomes whether the agency's decision is "arbitrary, capricious, or an abuse of discretion."

Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner,* 30 Idaho L. Rev. 273, 360 (1993).

(5) Judicial review of procedural error

The action of a zoning and planning board may be set aside if it was "made upon unlawful procedure." Idaho Code § 67-5279(3)(c). This incorporates all of the procedural requirements found elsewhere in LLUPA or the governing ordinance. As

with other questions of law, the courts freely review whether procedural error has occurred. On the other hand, where the procedural violation is found in the ordinance, some deference may be accorded to the municipality's interpretation of its own ordinance. See discussion in section 24.EE at page 455.

Procedural errors probably provide the most fertile area for judicial review. Despite the fact that the courts have carved out a purportedly vigorous review of quasi-judicial actions, the reality is that even these are often given a "soft look" by the court with respect to the underlying factual findings. With very few exceptions, cities and counties have prevailed on the merits of land use disputes on appeal. However, Idaho courts have tended to be rather strict on procedure, overturning both legislative and quasi-judicial decisions upon a showing of any defect in process.

(6) Judicial review of fact-finding (the substantial evidence / clearly erroneous test)

When an agency finds facts in an adjudicative context, the proper standard of review is whether the decision was "supported by substantial evidence on the record as a whole." Idaho Code § 67-5279(3)(d).[323]

At the outset, it is important to note that this standard applies only in an adjudicative context. In the context of agency rulemaking (a legislative function), the "arbitrary and capricious / abuse of discretion" standard is used to review both discretion and fact-finding. Idaho Code § 67-5279(2)(e). In the context of adjudicative decision-making, however, the "arbitrary and capricious / abuse of discretion" standard applies only to the exercise of discretion, while fact-finding is reviewed under the substantial evidence test. Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner,* 30 Idaho L. Rev. 273, 363-65 (1993).

The reason for this distinction is that adjudicative decision-making is based on a fixed record; where there is a record, the court is obligated to probe that record to determine whether there is "substantial evidence" to support it. In legislative decision-making, there is no clearly-defined record, so the substantial evidence test does not make sense. In the end, however, the distinction is more semantic than real. Both tests ("substantial evidence" and "arbitrary and capricious") boil down to whether the decision was reasonable or not. Indeed, it is often hard to say whether particular decision is fact finding (subject to the substantial evidence test) or the exercise of discretion (subject to the arbitrary and capricious / abuse of discretion test). Courts seem to apply which ever test suits their fancy.

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[323] This contrasts with judicial review under the IAPA of facts in the rulemaking context, which is governed by the "arbitrary and capricious test." Idaho Code § 67-5279(2)(e); Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner,* 30 Idaho L. Rev. 273, 362-63 (1993).

The "substantial evidence" test is synonymous with the "clearly erroneous" test. "To hold that a finding is not clearly erroneous, there must be substantial evidence in the record to support the finding." *Pace v. Hymas*, 111 Idaho 581, 588, 726 P.2d 693 700 (1986). Indeed, the Supreme Court often refers to the "clearly erroneous" standard when describing review of fact-finding under the IAPA. *Evans v. Teton Cnty.*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003) (Kidwell, J.).

"The 'substantial evidence rule' is said to be a 'middle position' which precludes a *de novo* hearing but which nonetheless requires a serious review which goes beyond the mere ascertainment of procedural regularity." *Pace v. Hymas*, 111 Idaho 581, 588, 726 P.2d 693 700 (1986).

Thus, under the substantial evidence standard, the court may not substitute its judgment for that of the agency. This point is reiterated in the IAPA itself: "The court shall not substitute its judgment for that of the agency as to the evidence on questions of fact." Idaho Code § 67-5279(1). Rather, the reviewing court must uphold the agency's decision unless it finds there is no reasonable factual basis in the record taken as a whole to support the agency's decision.

On the other hand, the substantial evidence test is a less stringent one than the preponderance of the evidence standard that applies in civil litigation and at the administrative level.[324] "Substantial and competent evidence is less than a preponderance of the evidence, but more than a mere scintilla." *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 456, 180 P.3d 487, 495 (2008) (J. Jones, J.). Indeed, when a court reviews a matter *de novo*, it applies a preponderance of the evidence standard, meaning that the factual assertion must be shown to be more likely true than not. *Bd. of Education of the Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1982).

Gilmore and Goble explained the substantial evidence standard with an analogy to a motion for a directed verdict:

> The thousands of words that are written annually on the meaning of "substantial evidence" may actually do more to confuse than to clarify. The best that can be hoped for is some corralling of the idea: substantial evidence means more than a mere scintilla, more than simply some evidence supporting the agency's decision. It does not mean, however, that the court is to engage in *de novo* review or to substitute its judgment on the weight of the

[324] "A 'preponderance of the evidence' is evidence that, when weighed with that opposed to it, has more convincing force and from which results a greater probability of truth." *Harris v. Electrical Wholesale*, 141 Idaho 1, 3, 105 P.3d 267, 269 (2004) (quoting *Cook v. W. Field Seeds, Inc.*, 91 Idaho 675, 681, 429 P.2d 407, 413 (1967)).

> evidence for that of the agency. The standard has been likened to that applicable to motions for a directed verdict: if the evidence in the record would support a refusal to direct a verdict in a jury trial, the evidence is "substantial." Thus – to say the same thing yet again – the standard requires the reviewing court to consider all of the record and to determine on the basis of that record whether the agency's fact finding is reasonable.[325]

Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner,* 30 Idaho L. Rev. 273, 362-63 (1993). In other words, in order to overturn an agency, city, or county's decision, the challenging party must show that the evidence supporting the agency's decision was so weak that the agency would not have survived a motion for directed verdict, had this been a jury trial. The challenger need not show that there was zero evidence supporting it (that is, the challenger need not show that the evidence supporting the challenge is uncontradicted), but the challenger must show that the evidence supporting the decision was so weak that any reasonable person would have been unconvinced by it.[326]

As a practical matter, courts rarely overturn planning and zoning decisions on the basis of the substantial evidence test. Most successful challenges are based on

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[325] In ruling on a motion for directed verdict, the court "must determine whether, admitting the truth of the adverse evidence and drawing every legitimate inference most favorably to the opposing party, there exists substantial evidence to justify submitting the case to the jury. A directed verdict will only be granted in favor of the moving party if the evidence presented is so clear that "all reasonable minds would reach only one conclusion: that the moving party should prevail." *Melichar v. State Farm Fire and Casualty Co.*, 143 Idaho 716, 720, 152 P.3d 587, 591 (2007) (citation and internal quotes omitted).

[326] The Idaho Supreme Court explained the standard for directed verdicts and judgments notwithstanding the verdict (known as "judgment N.O.V.," based on the Latin phrase, non obstante veredicto) in a key 1974 case:

> By substantial, it is not meant that the evidence need be uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds could conclude that the verdict of the jury was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds must conclude, only that they could conclude. Therefore, if the evidence is so weak that reasonable minds could not reach the same conclusion the jury has, the motion for judgment n.o.v. is properly granted.

Mann v. Safeway Stores, Inc., 95 Idaho 732, 736, 518 P.2d 1194, 1198 (1974). This was an ordinary jury trial, not a judicial appeal. But the court explained that the standard for evaluating both motions (directed verdict and n.o.v.) is based on the presence or absence of "substantial evidence." This reinforces the idea that these trial motions are good analogies to help understand the substantial evidence test in the IAPA.

procedural defects. The difficulty of mounting a successful substantial evidence challenge is demonstrated in *Davisco Foods Int'l, Inc. v. Gooding Cnty.*, 141 Idaho 784, 118 P.3d 116 (2005) (Schroeder, C.J.), in which the Court declined to wade into a technically complex but utterly lopsided record that contained scant evidence to support the county's decision to deny a special use permit for a state-of-the-art wastewater treatment facility.[327] Absent a technical flaw, appellate courts in Idaho are disinclined to second-guess decisions of local planning entities—particularly when those decisions appear to be based on environmental protection grounds.

(7) Judicial review of discretion (the arbitrary and capricious / abuse of discretion test)

Much of what planning and zoning boards do involves the exercise of judgment and discretion. Such decisions may be challenged as "arbitrary, capricious, or an abuse of discretion." Idaho Code § 67-5279(3)(e).

Note also that the "arbitrary and capricious / abuse of discretion" test is a single standard, not two or three. In other words, the courts do not break down the analysis into what is arbitrary, what is capricious, and what is an abuse of discretion. It is just one test, with a lot of words that could have been boiled down to one: "unreasonable." As the Idaho Supreme Court said in 2007, "A city's actions are considered an abuse of discretion when the actions are arbitrary, capricious or unreasonable. . . . The City's interpretation of their code is unreasonable and therefore an abuse of discretion . . . ." *Lane Ranch Partnership v. City of Sun Valley* (*"Lane Ranch II"*), 145 Idaho 87, 91, 175 P.3d 776, 780 (2007) (citing *Enterprise, Inc. v. Nampa City*, 96 Idaho 734, 739, 536 P.2d 729, 734 (1975)).

Two distinguished commentators summed up the test this way:

> This standard is often phrased in the negative: an agency decision would be arbitrary, capricious, or an abuse of discretion if it were not based on those factors that the

[327] The dissent urged that the court at least should require the county to explain why it departed from the planning and zoning commission's approval of the project. "Despite the P & Z's extensive fact finding and comprehensive proposed permit, the Board offered no explanation for its reversal and summarily decided there was nothing Jerome Cheese could do to obtain a permit. Such conclusory decisions do not inspire confidence in the decision-making process." *Davisco, 141 Idaho at* 795, 118 P.3d at 127 (Justice Jim Jones, dissenting). The majority, however, was unmoved, proclaiming, "It is not the role of the reviewing court to weigh the evidence." *Davisco, 141 Idaho at* 790, 118 P.3d at 122. The *Davisco* Court held, in essence, that so long as the record establishes that odors are a matter of concern, the decision of the local government with respect to odors will not be disturbed, no matter how strongly the evidence establishes that odors will not be a problem. The Idaho Court's unwillingness to "weigh the evidence" departs from jurisprudence under the federal Administrative Procedure Act, which demands at least enough weighing of the evidence to determine whether, measured not in isolation but against the record as whole, it is sufficient to support a reasoned judgment. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

> legislature thought relevant, ignored an important aspect of the problem, provided an explanation that ran counter to the evidence before the agency, or involved a clear error of judgment. The focus of this inquiry is on the methods by which the agency arrived at its decision: for example, did the agency not only consider all the right questions, did it consider some wrong ones? Does the relationship between the facts found and the conclusion reached reveal gaps in the logic of the reasoning process? Again, the question of judicial review largely devolves into a question of whether the agency was reasonable.

Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 365 (1993). The factors Gilmore and Goble mention are set out in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."). Another seminal case on the subject is *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) ("To make this finding [arbitrary and capricious] the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.").

As discussed above, the standard of review for facts (substantial evidence) is different from the standard of review for exercises of discretion (arbitrary, capricious, and abuse of discretion). As a practical matter, however, the line between facts and discretion tends to blur.[328] In the end, it probably does not make much difference. At their core, both standards are aimed at determining whether the agency's decision was reasonable.[329]

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[328] To give a hypothetical example, suppose an ordinance established a design standard calling for developments in an overlay district to employ earth tones. Then suppose that the board rejected an application because the project was "too red." Would a challenge to that decision be one based on fact or discretion? This is hard to say.

[329] "[The substantial evidence] standard requires the reviewing court to consider all of the record and to determine on the basis of that record whether the agency's fact finding is reasonable." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 363 (1993) (emphasis supplied). "Again, the question of judicial review [of agency discretion] largely devolves into a question of whether the agency was reasonable." *Id*. at 365 (emphasis supplied).

(8) Harmless error / substantial rights

(a) "Substantial rights": Section 67-5279(4)

The Administrative Procedure Act provides what has been called a two-tiered requirement. First, the party appealing an administrative decision must demonstrate a violation based on one of the standards of review under section 67-5279(3) (unlawful procedure, not supported by substantial evidence, etc.). Second, the party must show that "substantial rights of the appellant have been prejudiced." Idaho Code § 67-5279(4).

A good example of harmless error is presented in *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 513, 148 P.3d 1247, 1259 (2006) (Burdick, J.). There, the Court found no prejudice when the county failed to provide proper public notice, yet the complaining party heard about and attended the hearing anyway.

Another example is offered by a 2002 case dealing with an improper "view" of the property by the county commissioners.[330] The Court concluded that this error did not prejudice the appellants for three reasons: there were no facts in dispute, the county was not acting in its appellate capacity, and there was substantial evidence demonstrating that the same decision would have been reached in any event. *Evans v. Bd. of Comm'rs of Cassia Cnty.*, 137 Idaho 428, 433, 50 P.3d 443, 448 (2002).

In *Noble v. Kootenai Cnty.*, 148 Idaho 937, 231 P.3d 1034 (2010) (Burdick, J.), the Idaho Supreme Court rejected a developer's appeal of the denial of a subdivision application on the basis that the developer failed to provide base flood elevation ("BFE") data required by the local ordinance. The Court also declared a site visit improper because the board failed to allow members of the public to get close enough to hear what was being said. However, the Court found that while the site visit was improper, it did not prejudice the substantial rights of the applicant in light of the fact that applicant failed to submit the required information and applicants "have no right to approval of a subdivision application that does not meet the requirements of the governing ordinances." *Nobel*, 148 Idaho at 943, 231 P.3d at 1040. Moreover, the application was not denied with prejudice and the applicant retained the opportunity to submit the required BFE information in the course of a subsequent subdivision application.

In another case, the Court of Appeals rejected a due process claim of a party appealing a conditional use permit because his claim amounted to a complaint that he had been given too much process. *Angstman v. City of Boise*, 128 Idaho 575, 578, 917 P.2d 409, 412 (Ct. App. 1996) (Walters, C.J.) ("Angstman's contention does not demonstrate that he was denied due process, but rather, that he was subjected to too

[330] Not every improper view is harmless error. See discussion in Volume II of this Handbook.

much process."). This decision is frequently cited in the boilerplate judicial review summary in land use cases. *E.g.*, *Price v. Payette Cnty. Bd. of Cnty. Comm'rs,* 131 Idaho 426, 429, 958 P.2d 583, 586 (1998) (Trout, C.J.).

In other cases, the courts have rejected arguments that a procedural or substantive error should be overlooked because no one was prejudiced. In a 2003 case, Bonner County urged that its failure to hold a hearing when it reviewed the P&Z's action impaired no substantial rights. The Court flatly rejected this contention:

> Bonner County also argues that Plaintiffs' substantial rights have not been prejudiced by the dismissal of their appeal. It contends that the district court could simply have heard the appeal based upon the record of the proceedings before the Planning and Zoning Commission. . . . Thus, the summary dismissal deprived the Plaintiffs of their right, under the ordinance, to a public hearing at which additional information could be presented, after which the County Commissioners must decide the matter as if it were originally presented to them. The summary dismissal of their appeal clearly prejudiced the Plaintiffs' substantial rights.

Cnty. Residents Against Pollution from Septage Sludge (CRAPSS) v. Bonner Cnty., 138 Idaho 585, 587, 67 P.3d 64, 66 (2003).

A similar result was reached in a 2002 case. In *Sanders Orchard v. Gem Cnty.*, 137 Idaho 695, 702, 52 P.3d 840, 847 (2002), the Idaho Supreme Court found that the county based its decision on a factual finding which was supported by no evidence in the record.[331] The Court found this finding (one of seven) was "material to the Board's decision" because it was referenced in one of the Board's conclusions of law. Accordingly, the Court determined that the erroneous finding prejudiced the substantial rights of the applicant. *Id*.

[331] Gem County denied a developer's subdivision application because it did not provide for a central water and sewer system. Although the Idaho Supreme Court found that the county had discretion to require such infrastructure, there was no factual basis for the county's conclusion that "it is projected that development of central sewer system and water lines will be extended to that area in the reasonably near future." *Sanders Orchard*, 137 Idaho at 702, 52 P.3d at 847. The Court reached this conclusion despite the fact that there was some opinion testimony in the record regarding when water and sewer service might be extended. The Court was rigorous in looking past these "opinions" and "feelings", emphasizing that there were no facts in the record to support the county's finding.

These cases and the language of the statute itself suggest that this statute is, in essence, a "harmless error" exception allowing the courts to overlook technical errors where no real harm was done.

In 2011, the Idaho Supreme Court decided *Hawkins v. Bonneville Cnty. Bd. of Comm'rs*, 151 Idaho 228, 254 P.3d 1224 (2011) (W. Jones, J.). This case took a somewhat different tack on the substantial rights issue. The plaintiff here was a neighbor (Senator Stan Hawkins) who challenged the decision of the county in approving variances allowing his neighbors to reconstruct two homes that were in disrepair. The plaintiff and variance applicants had been in a long-running battle over road access. (The plaintiff's neighbors used a road across plaintiff's property to access the homes.) It is safe to surmise that the dispute over the home reconstruction was motivated by the dispute over access. Reading between the lines, one is left with the impression that Court felt that the plaintiff was using LLUPA to advance issues that were not germane to variances. The holding, however, was not based on germaneness and is more complex.

First, the *Hawkins* Court disposed of the threshold issue of standing—not Article III standing, but standing under LLUPA.[332] The plaintiff had standing, the Court concluded, because he had identified potential harm resulting from the home reconstruction (increased road use resulting in escaping livestock and fire risk). There was nothing startling about the ruling on standing. It follows directly from cases like *Davisco Foods Int'l, Inc. v. Gooding Cnty.*, 141 Idaho 784, 786-87, 118 P.3d 116, 118-19 (2005) (Schroeder, C.J.), which the Court cited. In short, the Court has tended to give the benefit of the doubt to litigants on LLUPA standing, so long as they own real estate somewhere in the area.

Next, the Court tackled the "substantial rights" issue under Idaho Code § 67-5279. This was a trickier issue. At the outset, the Court rejected the plaintiff's argument that his substantial rights were impaired based on the county's allegedly incorrect application of legal standards in granting the variances. That would be a sufficient argument for the applicant to make, said the Court, but it was insufficient for a person opposing the issuance of a permit. "Since a party *opposing* a landowner's request for a development permit has no substantial right in seeing someone else's application adjudicated correctly, he or she must therefore show something more." *Hawkins*, 151 Idaho at 233, 254 P.3d at 1229 (emphasis original). At first, this seems unfair, but on reflection it makes sense. This is the proverbial "little old lady" issue. Someone who is not affected by governmental decision should

[332] The *Hawkins* case arose under Idaho Code § 67-6521(1)(a) apparently before it was amended in 2010. The amendment added the modifier "bona fide" to describe the type of interest one must have in real property to be an affected person (i.e., to have standing). It is unclear what effect, if any, this word change will have. Applicants for land use permits may also secure standing under Idaho Code § 67-6519(4). This was not applicable here because Hawkins was not the applicant for the variance.

not be allowed read something in the newspaper, conclude it was wrongly decided, and sue the government. Thus, the Court ruled, "The petitioner opposing a permit must be in jeopardy of suffering substantial harm if the project goes forward, such as a reduction in the opponent's land value or interference with his or her use or ownership of the land." This makes sense, but is sounds a lot like standing. It is different approach from the cases described above in which the Court focused on the causal link between the defect complained of (*e.g.*, bad notice or an improper viewing) and the decision that was reached.

The Court went on to address additional arguments offered by the plaintiff—which turned out to be the same ones he used to show he had standing (involving increased use of the road and possible fire risk because the road was not public). While these were sufficient to establish standing, they fell short of showing substantial prejudice, the Court ruled unanimously. "We acknowledge that it is possible for the Meyers to begin using the spur road more often now that they have variances allowing them to construct new houses. Hawkins, however, cannot show prejudice to a substantial right because no court has adjudicated the easement rights the Meyers might have in the spur road." *Hawkins*, 151 Idaho at 233-34, 254 P.3d at 1229-30. The Court does not explain how this conclusion fits with its earlier observation that "the petitioner must still show, not merely allege, real or potential prejudice to his or her substantial rights." *Hawkins*, 151 Idaho at 233, 254 P.3d at 1229 (emphasis supplied). It is apparent from the decision that the Court was deeply skeptical of the plaintiff's assertion that the road used by the applicants across the plaintiff's property was a private road with no easement rights. It seems odd, however, that the lack of proof on the road access issue amounts to failure to show potential prejudice. The take-away message here is that facts matter, sometimes more than law.

A concurrence by Justice Eismann noted that the issue was properly reached by the Idaho Supreme Court because it was raised at the district court level. The Chief Justice pointed out that if the "substantial rights" issue is not raised below, it may not be raised on a subsequent appeal. The concurrence cited *Kirk-Hughes Development, LLC v. Kootenai Cnty. Bd. of Cnty. Comm'rs*, 149 Idaho 555, 237 P.3d 652 (2010), dealing with failure to properly plead the substantial rights issue on the subsequent appeal. *Kirk-Hughes* is discussed further in section Volume II of this Handbook.

(b) "Actual harm or violation of fundamental rights": Section 67-6535(3)

In a similar vein, the Idaho Legislature added the following new section to LLUPA in 1999. Overall, the section seems to call for a less technical and more common-sense-based approach to review of land use decisions:

> (3) It is the intent of the legislature that decisions made pursuant to this chapter should be founded upon sound reason and practical application of recognized principles of law. In reviewing such decisions, the courts of the state are directed to consider the proceedings as a whole and to evaluate the adequacy of procedures and resultant decisions in light of practical considerations with an emphasis on fundamental fairness and the essentials of reasoned decision making. Only those whose challenge to a decision demonstrates actual harm or violation of fundamental rights, not the mere possibility thereof, shall be entitled to a remedy or reversal of a decision. Every final decision rendered concerning a site-specific land use request shall provide or be accompanied by notice to the applicant regarding the applicant's right to request a regulatory taking analysis pursuant to section 67-8003, Idaho Code. An applicant denied an application or aggrieved by a final decision concerning matters identified in section 67-6521(1)(a), Idaho Code, may, within twenty-eight (28) days after all remedies have been exhausted under local ordinance, seek judicial review under the procedures provided by chapter 52, title 67, Idaho Code. An appeal shall be from the final decision and not limited to issues raised in the request for reconsideration.

Idaho Code § 67-6535(3) (emphasis supplied) (formerly codified to Idaho Code § 67-6535(c)).[333]

In a 2000 decision, the Idaho Supreme Court seemingly brushed aside the language of section 67-6535: "These two standards [section 67-5279(3) and 67-6535] are not in conflict; but because we deem the later statute to be less specific, we apply the well-established APA standard to the review requested herein." *Blaha v. Bd. of Ada Cnty. Comm'rs*, 134 Idaho 770, 774, 9 P.3d 1236, 1240 (2000) (Walters, J).

Three years later, the Court declared that section 67-6535 does not limit (or apparently have anything to do with) the law of standing. "The language in I.C. § 67-6535(c) [now 67-6535(3)] . . . cannot be construed as a standing requirement. The existence of real or potential harm is sufficient to challenge a land use decision." *Evans v. Teton Cnty.*, 139 Idaho 71, 76, 73 P.3d 84, 89 (2003) (Kidwell, J.). The Court went on, however, to declare "I.C. § 67-6535(c) [now 67-6535(3)] requires a

[333] This section was amended in 2003, adding the last sentence regarding taking analysis.

demonstration of actual harm or violation of a fundamental right in order to be entitled to a remedy in cases disputing a LLUPA decision." *Evans*, 139 Idaho 71, 76, 73 P.3d 84, 89. This language is consistent with the view that statute authorizes the courts to decline to provide relief where the violation is purely technical—in other words, harmless error.

In *Terrazas v. Blaine Cnty.*, 147 Idaho 193, 207 P.3d 169 (2009), the Idaho Supreme Court relied on section 67-6535(c) (now 67-6535(3)) in determining that an improper site visit by one county commissioner did not merit overturning the county's decision.

J. Standard of review applicable to governing board review of a P&Z decision

Plainly, review of quasi-judicial planning and zoning decisions by the district court is appellate in nature. But what about review by a county or city of its own planning and zoning commission? Is that also appellate?

That is entirely up to the city or county. First, municipalities are not even required to have a planning and zoning commission. If a municipality chooses to create one, it must first decide whether to provide for any review of the P&Z's decisions.[334] Whether a city or county retains any review authority over P&Z decisions is entirely up to it. It may choose to give the P&Z the final say-so, with direct appeal to district court. Idaho Code § 67-6521(1)(d). Or it may elect to retain review authority over P&Z decisions. If so, that review may be broad (*de novo*) or narrow (appellate). Of course, a municipality may also create an in-between hybrid. Doing so, however, is probably ill advised because it is likely to lead to confusion and courts will not know how to interpret it.

In deciding which of these models to adopt, each Idaho municipal body must weigh countervailing goals. *De novo* review obviously gives the county a freer hand and more control. That comes at a price, however. The easier it is for a county to revisit and second-guess the determinations of the P&Z, the more likely it is that every controversial decision will have to be re-evaluated and re-decided by the county. This can undermine the very purpose of having a P&Z in the first place.[335]

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[334] The delegation authority is expressly stated. Idaho Code § 67-6504. The right to reserve review authority is implicit. Idaho Code § 67-6519 (referring to the decision of the P&Z as a "recommendation or decision").

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

Under LLUPA, municipal entities are allowed to weigh the benefits and burdens of various modes of review, and decide just how much appellate review is right for them. Once that decision is made, however, they are bound by their own ordinances.

If the municipality decides to provide limited, appellate-type review of the P&Z's decisions, what is the effect of this decision?

Plainly, it affects what the municipality may do at the time of the appeal. It means that the city or county may not take new evidence, but is limited to the record created by the P&Z. Moreover, the municipality may not freely substitute its judgment for that of the P&Z. Instead, it may overturn the P&Z's decision solely on the basis of ordinary appellate-type criteria: arbitrary & capricious or lack of substantial evidence.

One might also imagine that it affects the nature of the judicial review by the district court. It would seem that the focus of the district court's review would not be on the municipality's decision, but on the P&Z's decision. Thus, it would seem that the appeal to the municipality would simply be the first in a series of appeals, and that any subsequent reviewing courts would look not to the correctness of the first appellate decision (by the municipality), but to the correctness of the underlying decision (by the planning and zoning commission), just as the Supreme Court looks past the district court's decision back to the agency decision.[336] This argument was presented in *Davisco Foods Int'l, Inc. v. Gooding Cnty.*, 141 Idaho 784, 118 P.3d 116 (2005) (Schroeder, C.J.), but the issue was not reached because the Court found that the review by the county of the planning and zoning commission's decision was *de novo*, not appellate in nature. Thus, the question as to which decision the reviewing court looks where the ordinance provides for appellate review (to the planning and zoning commission's or the municipality's) remains an open one in Idaho. On the other hand, language in *Dawson Enterprises, Inc. v. Blaine Cnty.*, 98 Idaho 506, 512, 567 P.2d 1257, 1263 (1977) (Bistline, J.) may be read to suggest that the reviewing court looks only to the decision of the governing body, not the planning and zoning commission: "When the decision by the planning and zoning commission is reviewed by the board of zoning appeals, the determination made by the latter is

[336] "When the district court acts in an appellate capacity, on appeal this [Supreme] Court can review the record independently of the district court's decision." *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho 115, 116, 867 P.2d 989, 990 (1994). "In a case such as this, the Idaho Supreme Court reviews the record independently of the district court's appellate decision. Nonetheless, this Court's review is limited to a determination whether the zoning authority's findings and conclusions are supported by substantial, competent evidence." *Howard v. Canyon Cnty. Bd. of Comm'rs*, 128 Idaho 479, 480, 915 P.2d 709, 710 (1996). "In a subsequent appeal from the district court's decision where the district court was acting in its appellate capacity under IDAPA, the Supreme Court reviews the agency record independently of the district court's decision." *Evans v. Bd. of Comm'rs of Cassia Cnty.*, 137 Idaho 428, 430-31, 50 P.3d 443, 445-46 (2002).

presumed valid. The same presumption is accorded the subsequent decision of the county commissioners upon their review of the determination of the appeals board."

In any event, if a municipality adopts an appellate-type review process, and proceeds to take new evidence or patently substitute its judgment for that of the P&Z, the municipality's decision is subject to challenge.

The difficulty is that many local planning and zoning ordinances do not make clear whether *de novo* or appellate-type review is contemplated when matters are appealed to the city or county level. Moreover, ordinances often contain elements of each. In *Davisco Foods Int'l, Inc. v. Gooding Cnty.*, 141 Idaho 784, 118 P.3d 116 (2005) (Schroeder, C.J.), the Court was asked to consider an ordinance that provides for on the record review by the county of the planning and zoning commission, an appellate-type feature. The Court, however, found this was not dispositive. The Court deferred to and upheld the county's interpretation of its ordinance as providing for *de novo* review. The Court noted, in particular, that the ordinance allowed the county to "uphold, uphold with conditions, or overrule the Commission." *Davisco*, 141 Idaho at 788, 118 P.3d at 120. The Court's decision makes clear that municipal governments have considerable leeway in interpreting their own ordinances. In the long run, one hopes that governments will adopt ordinance provisions that say clearly what standard of review applies. Today, few do, creating confusion or parties and decision-makers alike.

K. Standard of review on appeal from district court to appellate court

(1) No deference to the district court.

As noted above, the district court operates in an appellate capacity when it reviews agency action. If that decision is appealed, the appellate court does not defer to the district court. Rather, it takes a fresh (or independent) look at the record, as if this were the first appeal:

> In a subsequent appeal from a district court's decision in which the district court was acting in its appellate capacity under the Administrative Procedure Act (APA), the Supreme Court reviews the agency record independently of the district court's decision.

Eacret v. Bonner Cnty., 139 Idaho 780, 784, 86 P.3d 494, 498 (2004) (Burdick, J.).

(2) Supreme Court applies the same deferential standard as the district court.

As to the facts, the Supreme Court (or Court of Appeals) reviews them in the same manner as did the district court, that is, with deference. "The standards

governing judicial review in a case involving the LLUPA provide that this Court does not substitute its judgment for that of the agency as to the weight of the evidence presented." *Fischer v. City of Ketchum*, 141 Idaho 349, 532,109 P.3d 1091, 1094 (2005) (quotations and citations omitted).

As to the facts, the Idaho Supreme Court applies a clearly erroneous standard: "Rather, this Court defers to the agency's findings of fact unless they are clearly erroneous." *Fischer*, 141 Idaho at 352, 109 P.3d at 1094.

(3) The denial of a motion for summary judgment is not appealable.

There is no standard of review applicable to review of a denial of a motion for summary judgment, because such an order is not appealable.

> "It is well settled in Idaho that '[a]n order denying a motion for summary judgment is an interlocutory order from which no direct appeal may be taken.'" *Garcia v. Windley*, 144 Idaho 539, 542, 164 P.3d 819, 822 (2007) (alteration in original) (quoting *Dominguez v. Evergreen Res., Inc.*, 142 Idaho 7, 13, 121 P.3d 938, 944 (2005)); see I.A.R. 11. "[A]n order denying a motion for summary judgment is not subject to review—even after the entry of an appealable final judgment." *Dominguez*, 142 Idaho at 13, 121 P.3d at 944; see also *Lewiston Indep. Sch. Dist. No. 1 v. City of Lewiston*, 151 Idaho 800, 808, 264 P.3d 907, 915 (2011) (explaining that this Court does not review denials of summary judgment after judgment is rendered on the merits); *Hunter v. State, Dep't of Corr.*, 138 Idaho 44, 46, 57 P.3d 755, 757 (2002) ("An order denying a motion for summary judgment is not an appealable order itself, nor is it reviewable on appeal from a final judgment.").

Am. Bank v. BRN Dev., Inc., 159 Idaho 201, 205–06, 358 P.3d 762, 766–67 (2015) (Horton, J.).

In *Garcia v. Windley*, 144 Idaho 539, 542, 164 P.3d 819, 822 (2007) (Burdick, J.), the Court declined to carve out an exception for circumstances in which the trial court ruled strictly on a point of law thus preventing the losing party from presenting evidence. The Court explained that such an exception would undermine the underlying purpose of the rule:

> [B]y entering an order denying summary judgment, the trial court merely indicates that the matter should proceed to trial on its merits. The final judgment

> in a case can be tested upon the record made at trial, not the record made at the time summary judgment was denied. Any legal rulings made by the trial court affecting that final judgment can be reviewed at that time in light of the full record. This will prevent a litigant who loses a case, after a full and fair trial, from having an appellate court go back to the time when the litigant had moved for summary judgment to view the relative strengths and weaknesses of the litigants at that earlier stage. Were we to hold otherwise, one who had sustained his position after a fair hearing of the whole case might nevertheless lose, because he had failed to prove his case fully on the interlocutory motion.

Garcia 144 Idaho at 542, 164 P.3d at 822 (alteration in original) (quoting *Miller v. Estate of Prater*, 141 Idaho 208, 211, 108 P.3d 355, 358 (2005) (J. Jones, J.)).

L. Timing of judicial review: ripeness, exhaustion, and primary jurisdiction

(1) Generally, timing issues are prudential, not jurisdictional

The doctrines of exhaustion of administrative remedies, finality, primary jurisdiction, and ripeness are prudential, not jurisdictional, limitations.[337] "The

[337] "However, we have not treated the [exhaustion] doctrine as one depriving a court of jurisdiction over the subject matter." *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 628, 586 P.2d 1068, 1072 (1978). "[W]e have not treated the [exhaustion] doctrine as one depriving a court of jurisdiction over the subject matter." *White v. Bannock Cnty. Comm'rs*, 139 Idaho 396, 400, 80 P.3d 332, 336 (2003) (citing *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 628, 586 P.2d 1068, 1072 (1978). "It [ripeness] is generally considered a prudential limitation on judicial action, although the Supreme Court has occasionally hinted that ripeness derives from the 'cases' and 'controversies' language of Article III." However, the Idaho Supreme Court has not been entirely consistent on this point. In *Park v. Banbury*, 143 Idaho 576, 582, 149 P.3d 851, 857 (2006), the Court found that plaintiffs' failure to exhaust deprived the district court of subject matter jurisdiction. "As a general rule, the Court has not treated the doctrine of exhaustion of administrative remedies as one depriving the court of jurisdiction over the subject matter." *Regan v. Kootenai Cnty.*, 140 Idaho 721, 726, 100 P.3d 615, 620 (2004). Despite this general rule, the *Regan* court concluded that in that case, "Regan's failure to exhaust their administrative remedies deprived the district court of subject matter jurisdiction over their claim for declaratory relief." *Regan*, 140 Idaho at 726, 100 P.3d at 620.

Marla E. Mansfield, *Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers*, 68 N.D. Law Rev. 1, 68 (1992). *But see*, Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. Chicago L. Rev. 153 (1987) (arguing that the federal courts have erred in "constitutionalizing" the law of ripeness).

timing doctrines are not jurisdictional because they are not concerned with whether the petitioner is ever entitled to judicial review, but only with when review is available." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 342 (1993) (emphasis original, citations omitted). Accordingly, the courts are free to fashion exceptions to these rule in the interest of justice.[338] Indeed, the discretionary nature of the exhaustion requirement is codified in the IAPA, which provides this exception to the exhaustion requirement: "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy." Idaho Code § 67-5271. The existence of statutory provisions for declaratory action further reduces the need for strict application of ripeness rules in Idaho.[339]

On the other hand, the Court said (somewhat circularly) that failure to exhaust is jurisdictional where none of the exceptions apply. *Regan v. Kootenai Cnty.,* 140 Idaho 721, 726, 100 P.3d 615, 620 (2004) (Schroeder, J.) ("The Regans' failure to exhaust their administrative remedies deprived the district court of subject matter jurisdiction over their claim for declaratory relief."); *Fairview Development Co. v. Bannock Cnty.,* 119 Idaho 121, 804 P.2d 294 (1990).

Unlike the federal Constitution, the grant of judicial power in the Idaho Constitution is a general grant and contains no "cases" and "controversies" limitation. "The constitutional prohibition on advisory opinions is based on the language of Article III, not on the due process clause. Consequently, the rule against advisory opinions applies only to the federal courts." Ronald D. Rotunda & John E. Nowak, 1 *Treatise on Constitutional Law—Substance and Procedure* § 2.13(a) (2008). Also see, Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner,* 30 Idaho L. Rev. 273, 336 (1993) (citing Idaho cases saying that Article III restraints do not apply in Idaho). Thus, the law of ripeness is necessarily prudential, not jurisdictional, in Idaho.

[338] The Legislature, too, has recognized rules to the exhaustion requirement. "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy." Idaho Code § 67-5271(2).

[339] "The potential applicability of the [ripeness] doctrine to judicial review of agency action in Idaho is substantially reduced by the provision of § 67-5278 authorizing the use of declaratory judgment actions to determine the 'validity or applicability of a rule.' . . . [T]he APA overrides much of the federal doctrine's traditional scope." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner,* 30 Idaho L. Rev. 273, 343-44 (1993), and in *Sierra Life Ins. Co. v. Granata,* 99 Idaho 624, 627, 586 P.2d 1068, 1071 (1978). The referenced APA judicial review provision is limited to challenges to agency rules, and is not applicable to land use matters. Nevertheless, it would seem that the commentators' basic point would be equally applicable to, for example, a declaratory judgment action challenging the validity of a land use ordinance.

(2) In contrast, the IAPA's 28-day deadline for judicial review is jurisdictional.

The deadline for appealing a final order in a contested case before a state agency subject to the Idaho Administrative Procedure Act ("IAPA") is 28 days.[340] Idaho Code § 67-5273(2). The IAPA's judicial review provision is applicable only to state agencies (and to Idaho counties[341]). LLUPA, however, sets its own 28-day deadline for judicial review of certain land use decisions of cities and counties. Idaho Code §§ 67-6519(4) and 67-6521(1)(d). (Both LLUPA provisions expressly state a 28-day deadline, but then refer to and incorporate by reference the procedures for judicial review set out in the IAPA.)

The Idaho Rules of Civil Procedure expressly provide that the deadlines for filing a petition for judicial review are jurisdictional:

> **(b) Filing Petition for Judicial Review.**
>
> (1) Unless a different time or procedure is prescribed by statute, a petition for judicial review from an agency to district court must be filed with the appropriate district court within twenty-eight (28) days after the agency action is ripe for judicial review under the statute authorizing judicial review, but the time for filing a petition for judicial review is extended as provided in the next sentence. When the decision to be reviewed is issued by an agency with authority to reconsider its decision, the running of the time for petition for judicial review is suspended by a timely motion for reconsideration, and the full time for petition for judicial review commences to run and is computed from the date of any decision on reconsideration, the date of any decision denying reconsideration, or the date that reconsideration is deemed to be denied by statute by inaction on a petition for reconsideration. Judicial review is commenced by filing a petition for judicial review with the district court, and the petitioner shall concurrently serve copies of the notice of petition for judicial review

[340] Idaho Code § 67-5273(2) was amended in 2010 to provide that the period for filing a petition for judicial review begins to run on the date of service of the final order or service of the decision on a motion for reconsideration. This overturns earlier cases interpreting the clock to begin running on the date of issuance.

[341] Idaho Code § 31-1506(1) makes "any final act, order or proceeding" of a board of county commissioners reviewable "within the same time and in the same manner as provided in chapter 25, title 67, Idaho Code, for judicial review of actions."

> upon the agency whose action will be reviewed and all other parties to the proceeding before the agency (if there were parties to the proceeding). Proof of service on the agency and all parties shall be filed with the court in the form required by Rule 5(f).
>
> . . .
>
> **(n) Effect of Failure to Comply With Time Limits**. The failure to physically file a petition for judicial review or cross-petition for judicial review with the district court within the time limits prescribed by statute and these rules shall be jurisdictional and shall cause automatic dismissal of the petition for judicial review upon motion of any party, or upon initiative of the district court. Failure of a party to timely take any other step in the process for judicial review shall not be deemed jurisdictional, but may be grounds only for such other action or sanction as the district court deems appropriate, which may include dismissal of the petition for review.

Idaho R. Civ. P. 84.

Note that the reference to "agency" in subsection 84(b)(1) is not limited to state agencies. Unlike the narrower definition of the term "agency" in the Idaho Administrative Procedure Act, Idaho Code § 67-5201(2), the definition of "agency" in the court rule is all encompassing. It omits the key limiting adjective "state" (found in the IAPA) and applies to "any non judicial board . . . or officer for which statute provides for the district court's judicial review of agency action." Idaho R. Civ. P. 84(a)(2)(B) (emphasis supplied). This is confirmed by the holding in *Arthur v. Shoshone Cnty.*, 133 Idaho 854, 860, 993 P.2d 617, 623 (Ct. App. 2000) (Lansing, J.) in which the Idaho Court of Appeals held that the rule "specifically governs judicial review of a local government action."

In *Arthur*, the Idaho Court of Appeals relied on Idaho R. Civ. P 84(b)(1) (which was then codified as rule 84(e)(1)) in holding that a petition for judicial review filed 30 days after the county denied an application for a conditional use permit was too late. In *Arthur*, the petitioner was tardy because he had filed a motion to reconsider and waited for that to be rejected before filing his petition for judicial review. That did not toll the deadline, said the Court, because, unlike the IAPA, LLUPA does not provide for motions for reconsideration. (Note, in contrast, that the Idaho road statutes do provide for reconsideration. Idaho Code§ 40-208.)

In *Horne v. Idaho State University*, 69 P.3d 120, 123 (Idaho 2003), the Court noted: "The filing of a petition for judicial review within the time permitted by statute is jurisdictional." This case dealt with a separate statute dealing with review

of personnel decisions, but it has been cited by the Idaho Supreme Court in the context of judicial review under the IAPA (*Erickson v. Idaho Bd. of Registration of Prof'l Engineers and Professional Land Surveyors*, 203 P.3d 1251, 1253 (Idaho 2009)).

In *Erickson v. Idaho Bd. of Registration of Prof'l Engineers and Professional Land Surveyors*, 203 P.3d 1251 (Idaho 2009), the Idaho Supreme Court found that the 28-day deadline in the IAPA (Idaho Code § 67-5273(2)) is jurisdictional and that the Court had no jurisdiction to hear an appeal filed two days late. In so ruling, the Court cited the jurisdictional statement in Idaho R. Civ. P. 84(n).

Relying on *Erickson*, the Idaho Supreme Court ruled in *City of Eagle v. Idaho Dep't of Water Resources*, 150 Idaho 449, 247 P.3d 1037 (2011) (Burdick, J.) that the district court properly dismissed the water right applicant's petition for judicial review as untimely. The Court ruled that the IAPA's 28-day deadline is jurisdictional and began to run from the date the Idaho Department of Water Resources issued its order on reconsideration—not from the date of service.[342] "The failure to file a timely petition for judicial review is jurisdictional and causes automatic dismissal of the petition. I.R.C.P. 84(n)." *City of Eagle*, 150 Idaho at 451, 247 P.3d at 1039.

The outcome was not changed by the fact that the agency initially failed to serve the order on the city and corrected the error 13 days later. When finally served, the order was accompanied by a letter from the agency stating that the deadline for judicial review was 28 days after service, naming the later date (13 days later) as the date of service. The Court ruled that the city was not entitled to rely on this incorrect advice.

> While that letter purported to extend the appeal period, this Court explained in *Quesnell Dairy* that while the Commissioners have the power to determine when a decision is final and appealable, they do not have the power to set the time frame for appeal in excess of twenty-eight days. . . . While IDWR made legally erroneous statements concerning the running of the appeal period, we find that IDWR clearly stated that the issuance for the Order on Reconsideration was July 3, 2008.

City of Eagle, 150 Idaho at 453-54, 247 P.3d at 1041-42 (citing *In re Quesnell Dairy*, 143 Idaho 691, 694, 152 P.3d 562, 565 (2007)). Nor did equitable or estoppel principles change the result. "Estoppel is not appropriate where jurisdiction is at

[342] The IAPA was amended in 2010 to provide that the period for filing a petition for judicial review begins to run on the date of service, but this amendment did not apply to this case.

issue. . . . The failure to file a timely petition for judicial review is jurisdictional and causes automatic dismissal of the petition." *City of Eagle*, 150 Idaho at 454, 247 P.3d at 1042.

Buckskin Properties, Inc. v. Valley Cnty., 154 Idaho 486, 300 P.3d 18 (2013) (J. Jones, J.) was the first Idaho case to apply LLUPA's 28-day jurisdictional deadline in the context of impact fees imposed on a conditional use permit.[343] In *Buckskin*, the Idaho Supreme Court ruled that failure to seek judicial review bars a collateral attack on a permit condition mandating payment of fees that are alleged to be unconstitutional taxes:

> As the County points out, Buckskin failed to seek judicial review of the requirement in its CUP that the CCA [Capital Contribution Agreement] received the County Board's approval. If Buckskin truly was aggrieved by this requirement, it had the ability to seek judicial review. By failing to do so, it cannot now complain. Buckskin states that the CCA and RDA [Road Development Agreement] are not "permits" and therefore were not reviewable under LLUPA. Indeed, the agreements are not permits but voluntary agreements entered into by the parties. However, the requirement that the CCA receive Board approval is a condition attached to the CUP and is a matter that could have been challenged on judicial review. It is obvious that Buckskin made no such challenge and therefore did not exhaust its administrative remedies.
>
> Buckskin's claim that judicial review would not have provided the relief it sought is also without merit. Had Buckskin truly objected to the CUP condition, and had it successfully challenged the condition and the validity of the CCA on judicial review, it might have been able to avoid paying the road impact charges for all six phases of The Meadows.

Buckskin, 154 Idaho at 493-94, 300 P.3d at 25-26.

[343] The argument also was presented as a defense by the City of McCall in *Hehr v. City of McCall*, 155 Idaho 92, 305 P.3d 536 (2013) and *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013), but the Idaho Supreme Court decided those cases in the city's favor on other grounds never reaching the issue of the defendants' failure to seek judicial review.

Buckskin's discussion of the 28-day rule was referenced by the Court again in *In the Matter of Certified Question of Law – White Cloud v. Valley Cnty.*, 156 Idaho 77, 320 P.3d 1236 (2014) (J. Jones, J.).

The Court reached the same conclusion in *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.), albeit in the context of ripeness requirements under *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (Blackmun, J.). The Court said:

> In response, McCall argues that state law provides Alpine with a means of challenging a taking through judicial review under the Local Land Use Planning Act (LLUPA) and that Alpine failed to use it. Additionally, McCall argues that any plaintiff that fails to timely file a state takings claim can never satisfy this prong of *Williamson County*.
>
> The Local Land Use Planning Act (LLUPA) provides an avenue to evaluate certain proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property:
>
> > Upon the written request of an owner of real property that is the subject of such action, such request being filed with the clerk or the agency or entity undertaking the regulatory or administrative action not more than twenty-eight (28) days after the final decision concerning the matter at issue, a state agency or local governmental entity shall prepare a written taking analysis concerning the action.
>
> I.C. § 67–8003; *see also Buckskin Properties, Inc. v. Valley County*, 154 Idaho 486, 496, 300 P.3d 18, 28 (2013). Alpine did not seek judicial review under this statute. Alpine correctly notes an exception in I.C. § 67–6521(2)(b) which allows a legal action under Article I, Section 14 of the Idaho Constitution. But this exception requires "a final action restricting private property development" and as discussed above there was no final action in this matter. Therefore, we hold that the second prong of the *Williamson County* ripeness test has not been satisfied and that Alpine's federal claims are not ripe.

Alpine Village, 154 Idaho at 939, 303 P.3d at 626 (emphasis supplied).

(3) The federal view of jurisdictional deadlines is somewhat more liberal than Idaho's.

The United States Supreme Court has taken a modestly more liberal view of the subject of jurisdictional deadlines. In *Sebelius v. Auburn Regional Medical Center*, 133 S. Ct. 817 (2013) the Court expressed caution toward the recognition of jurisdictional deadlines:

> With these untoward consequences in mind, "we have tried in recent cases to bring some discipline to the use" of the term "jurisdiction." *Hendersen*[*v. Shinseki*], 562 U.S. at ____, 131 S. Ct. 1197, 1202 [(2011)]; see also *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90, 118 S. Ct. 1003, 140 L.Ed.2d 210 (1998) (jurisdiction has been a "word of many, too many, meanings" (internal quotation marks omitted)).
>
> To ward off profligate use of the term "jurisdiction," we have adopted a "readily administrable bright line" for determining whether to classify a statutory limitation as jurisdictional. [Citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006).] We inquire whether Congress has "clearly state[d]" that the rule is jurisdictional; absent such a clear statement, we have cautioned, "courts should treat the restriction as nonjurisdictional in character."

Sebelius, 133 S. Ct. at 824.

In *Sebelius*, a hospital challenged an agency's determination regarding payments for Medicare coverage. The applicable statute set the deadline for such appeals at 180 days. A longstanding regulation implementing the statute liberalized this, providing that, for good cause, a tardy appeal could be entertained, but not one more than three years after the administrative decision. The hospital filed its appeal more than a decade late, contending that its tardiness was excused by equitable tolling of the statute. The Supreme Court held that, as a matter of statutory construction, the 180 day deadline was not jurisdictional. "The language Congress used hardly reveals a design to preclude any regulatory extension. . . . This provision does not speak in jurisdictional terms." *Sebelius*, 133 S. Ct. at 824 (internal quotation marks omitted). Thus, the regulation extending the deadline up to three years was a permissible interpretation. But the Court did not buy the hospital's equitable tolling argument. The Court noted that "procedural rules requiring timely filings are indispensable devices for keeping the machinery of the reimbursement appeals process running smoothly." *Sebelius*, 133 S. Ct. at 826. The regulation, it said, was entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). In rejecting the hospital's argument

for equitable tolling notwithstanding the three-year limit in the regulation, the Court placed emphasis on Congress' acquiescence in the rule:

> Congress amended [the appeal statute] six times since 1974, each time leaving untouched the 180-day administrative appeal provision and the Secretary's rulemaking authority. At no time did Congress express disapproval of the three-year outer time limit set by the Secretary for an extension upon a showing of good cause. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846, 106 S. Ct. 3245, 92 L.Ed.2d 675 (1986) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." (internal quotation marks omitted)).

Sebelius, 133 S. Ct. at 827-28.

Sebelius, of course, dealt with federal deadlines and does not control the interpretation by Idaho courts of the jurisdictional status of Idaho appeal provisions. But, if the reasoning of *Sebelius* were applied, it would not seem to change the outcome with respect to the jurisdictional nature of the 28-day deadline for judicial review. This is because Idaho's interpretation of the jurisdictional status is longstanding and "codified" in Idaho R. Civ. P. 84(n). The Idaho Legislature has repeatedly amended the IAPA and LLUPA's judicial review provisions, but has never liberalized the well-established jurisdictional rule.

Sebelieus has been followed by the Ninth Circuit. *Kwau Fun Wong v. Beebe*, 732 F.3d 1030 (9th Cir. 2013) (overruling *Marley v. United States*, 567 F.3d 1030 (9th Cir. 2008)).

(4) Exhaustion of administrative remedies

(a) In general

Exhaustion principles require litigants to utilize available administrative remedies before seeking judicial review. This is codified in the IAPA[344] as well as LLUPA[345] (whose provisions are quoted below). Exhaustion typically applies where the plaintiff cuts short an ongoing administrative proceeding by initiating a lawsuit before exhausting available administrative appeals (or after missing the deadline for

[344] Idaho Code § 67-5271(1).

[345] Idaho Code §§ 67-6521(1)(d) and 67-6519(5) (previously codified to section 67-6519(4)).

such appeals). Thus, the question presented is whether seeking judicial relief in such cases constitutes an improper end run around the administrative process.

Note that the term "exhaustion" is sometimes employed (somewhat confusingly) to describe the obligation of a party to pursue designated judicial review remedies (such as a judicial review under LLUPA) rather than pursuing a declaratory judgment action or a § 1983 claim. Indeed, courts often float back and forth between a discussion of the law of exhaustion and the law barring collateral attacks when available judicial review remedies are not utilized. *E.g.*, *Regan v. Kootenai Cnty.*, 140 Idaho 721, 724-25, 100 P.3d 615, 618-19 (2004) (Schroeder, J.).

It is typically necessary to appeal from the P&Z commission to the city or county commission before a judicial appeal may be filed. The aggrieved party needs to pay close attention to the deadlines for such appeals because the appeals often have very short triggers for filing (often just 10 or 15 days). Failure to exhaust in such situations is not just a matter of timing or sequencing; it may result in foreclosing judicial review altogether.

The exhaustion requirement is grounded in principles of good government and judicial economy. In an oft-quoted statement, the Idaho Supreme Court explained why exhaustion matters: "As we have previously recognized, important policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative processes established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body." *White v. Bannock Cnty. Comm'rs*, 139 Idaho 396, 401-02, 80 P.3d 332, 337-38 (2003).

The starting point is a black letter rule: The requirement that a party must exhaust administrative remedies before pursuing a judicial review of a quasi-judicial land use action is reflected in numerous court decisions and is codified in the IAPA:

> (1) A person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter.
> (2) A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy.

Idaho Code § 67-5271 (emphasis added).

The exhaustion rule is also stated in LLUPA: "An affected person aggrieved by a decision may within twenty-eight (28) days after all remedies have been exhausted under local ordinances seek judicial review as provided by chapter 52, title 67, Idaho Code [the IAPA]." Idaho Code § 67-6521(1)(d). A virtually identical

provision is found in another section of LLUPA. Idaho Code §§ 67-6519(5) (previously codified to section 67-6519(4)).

As discussed further in section 24.L(2) on page 367, failure to exhaust is jurisdictional. Idaho R. Civ. P. 84(n).

Watch out, however, for so-called black letter rules. Three times the Idaho Supreme Court has repeated these words of caution from Professor Davis' treatise:

> The statement the courts so often repeat in their opinions—that judicial relief must be denied until administrative remedies have been exhausted—is seriously at variance with the holdings . . . .
>
> The law embodied in the holdings clearly is that sometimes exhaustion is required and sometimes not. No court requires exhaustion when exhaustion will involve irreparable injury and when the agency is palpably without jurisdiction; probably every court requires exhaustion when the question presented is one within the agency's specialization and when the administrative remedy is as likely as the judicial remedy to provide the wanted relief. In between these extremes is a vast array of problems on which judicial action is variable and difficult or impossible to predict.

Sierra Life Ins. Co. v. Granata, 99 Idaho 624, 627, 586 P.2d 1068, 1071 (1978) (quoting 3 Kenneth Davis, *Administrative Law Treatise* § 20.01 (1958)) (*quoted again in Fairway Development Co. v. Bannock Cnty.*, 119 Idaho 121, 125, 804 P.2d 294, 298 (1990); *Regan v. Kootenai Cnty.*, 140 Idaho 721, 726, 100 P.3d 615, 620 (2004) (Schroeder, J.); *Park v. Banbury*, 143 Idaho 576, 581, 149 P.3d 851, 856 (2006)).

(b) Under LLUPA

A classic example of the exhaustion requirement is found in *South Fork Coalition v. Bd. of Comm'rs of Bonneville Cnty.* ("*South Fork I*"), 112 Idaho 89, 730 P.2d 1009 (1986). In this case, Bonneville County provided preliminary approval of a planned unit development application for a residential and golf course development project near the South Fork of the Snake River, the first step toward final approval under the applicable ordinance. Without waiting for final approval, the South Fork Coalition sued the county. The Idaho Supreme Court ruled that the district court had no jurisdiction to hear the appeal because there was no "final decision on the

application, and all administrative remedies have not been exhausted." *South Fork I*, 112 Idaho at 90, 730 P.2d at 1010.[346]

The case of *Palmer v. Bd. of Cnty. Comm'rs of Blaine Cnty.*, 117 Idaho 562, 790 P.2d 343 (1990), is another classic exhaustion case. Palmer received a stop work order from the county when it learned that he was constructing a home 500 feet from an airport runway in violation of a zoning ordinance. Palmer brought a tort claim against the city seeking damages. The Court ruled that Palmer should have first sought a special use permit under local ordinances. In other words, Palmer not only failed to exhaust his administrative remedies, he did not even initiate them. Notably, the Court did not limit Palmer to judicial review of the special use permit, if it was denied, but noted that Palmer would then be free to file a complaint for damages as well. *Palmer*, 117 Idaho at 565, 790 P.2d at 346. It simply said he needed to seek the special use permit first. Moreover, the Court observed, "Here, there is no challenge to the validity of [the applicable ordinance]," *Palmer*, 117 Idaho at 564, 790 P.2d at 345, thus recognizing that rules of exhaustion do not apply to facial challenges. These exceptions are discussed in the following section.

In *Rollins v. Blaine Cnty.*, 147 Idaho 729, 215 P.3d 449 (2009), the Idaho Supreme Court cited *Palmer* in rejecting an appeal on exhaustion grounds. Rollins purchased a parcel of land intending to build a home. He received a written determination from the P&Z Administrator that the property was not within the Mountain Overlay District ("MOD") and that no site alteration permit was required. Rollins proceeded with site preparation. He later obtained two permits (presumably from the P&Z Commission), one to build a retaining wall and another to construct the home. A neighbor appealed these permits to the Board, and the Board determined that the site was within the MOD and that a site alteration permit was required. Rollins filed a judicial appeal. The Idaho Supreme Court ruled, *sua sponte*, that the appeal was premature because Rollins had not exhausted his administrative remedies by seeking a site alteration permit.

(c) Under IAPA

For challenges to agency action outside of LLUPA, the exhaustion provisions of the IAPA apply.

As noted above, the issue is jurisdictional. Idaho R. Civ. P. 84(n).

In *A&B Irrigation Dist. v. IDWR*, Case No. CV-42-2015-2452 (Idaho 5th Jud. Dist. Dec. 14, 2015) (Wildman, J), the court ruled that a party to an IDWR water right proceeding is not required to file "exceptions" to a preliminary order (which

[346] In so ruling, the court cited to the requirement for a "final decision in" IAPA's review provision, then codified at Idaho Code § 67-5215(a), now codified at Idaho Code § 67-5270(2) (referring to "final agency action"). For some reason, the court did not cite the exhaustion requirements in LLUPA.

became a final order by operation of law) in order to exhaust administrative remedies.[347] Judge Wildman noted that Idaho Code § 67-5273(2) provides for judicial review of "a preliminary order that has become final when it was not reviewed by the agency head." Accordingly, he ruled that filing exceptions to the agency head is not necessary for an order to become final and, hence, reviewable.

Judge Wildman's decision did not address whether filing a petition for reconsideration is required in order to exhaust administrative remedies. Indeed, the decision does not say whether reconsideration was sought.

However, the language of the IAPA strongly suggests that filing a petition for reconsideration is optional and not necessary in order to exhaust administrative remedies. The exhaustion provision of the IAPA provides: "A person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter." Idaho Code § 67-5271(1) (emphasis added). This raises the question: What administrative remedies are required under the IAPA? The IAPA expressly authorizes petitions for reconsideration. Idaho Code §§ 67-5243(3), 67-5245(3), 67-4246(4) &(5), 67-5248(1)(b), 67-5249(g), and 67-5273(2). However, none of these state or even imply that a petition for reconsideration is "required."

The optional nature of a petition for reconsideration is also evident in the IAPA's provision setting the deadline for judicial review:

> A petition for judicial review of a final order or a preliminary order that has become final when it was not reviewed by the agency head . . . must be filed within twenty-eight (28) days of the service date of the final order [or] the date when the preliminary order became final . . . , or, if reconsideration is sought, within twenty-eight (28) days after the service date of the decision thereon. . . .

Idaho Code § 67-5373(2) (emphasis added). The fact that the deadline depends on whether or not a petition for reconsideration has been filed must mean that a petition for judicial review is optional. Otherwise, the only deadline would be the one for after disposal of the petition for reconsideration.

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[347] The term "exceptions" refers to a petition asking the agency head to review a preliminary or recommended order issued by a hearing officer. IDAPA 37.01.01.720 and 37.01.01.730. Judge Wildman's decision did not use the term "exceptions." Instead, he spoke in terms of whether it was necessary "to motion the Director to review the hearing officer's Preliminary Order." *A&B* at page 5. IDWR's new procedural rules (expected to be promulgated in 2022) are expected to add a definition for the term "exceptions."

(5) Exceptions to the exhaustion requirement

The Idaho Supreme Court has recognized two exceptions to the general rule requiring exhaustion.

> As a general rule, a party must exhaust administrative remedies before resorting to the courts to challenge the validity of administrative acts. We have recognized exceptions to that rule in two instances: (a) when the interests of justice so require, and (b) when the agency acted outside its authority.

KMST, LLC v. Cnty. of Ada, 138 Idaho 577, 583, 67 P.3d 56, 62 (2003) (Eismann, J.) (citation omitted). The Court has repeated these exceptions frequently. *E.g.*, *Regan v. Kootenai Cnty.*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004) (Schroeder, J.); *Arnzen v. State*, 123 Idaho 899, 906, 854 P.2d 242, 249 (1993).

In *Park v. Banbury*, 143 Idaho 576, 149 P.3d 851 (2006) (Schroeder, J.), the Court described the exceptions this way: "Styled differently, courts will not require exhaustion 'when exhaustion will involve irreparable injury and when the agency is palpably without jurisdiction.'" *Park*, 143 Idaho at 581, 149 P.3d at 856 (quoting *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 627, 586 P.2d 1068, 1071 (1978)).

The rule and its principal exceptions may be traced as far back as 1958 in Idaho:

> While as a general rule administrative remedies should be exhausted before resort is had to the courts to challenge the validity of administrative acts, such rule is not absolute and will be departed from where the interests of justice so require, and the rule does not apply unless the administrative agency acts within its power."

Bohemian Breweries v. Koehler, 80 Idaho 438, 332 P.2d 875 (1958).

In 1990, the Idaho Court of Appeals offered this formulation of the exceptions:

> Illustrative of the circumstances which require an exception to the exhaustion doctrine include: (1) where resort to administrative procedures would be futile; (2) where the aggrieved party is challenging the constitutionality of the agency's actions or of the agency itself; or (3) where the aggrieved party has no notice of the initial administrative decision or no opportunity to exercise the administrative review procedures.

Peterson v. City of Pocatello, 117 Idaho 234, 236, 786 P.2d 1136, 1138 (Ct. App. 1990) (citations omitted); *discussed in* Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 347 (1993). This appears to be an earlier formulation of the modern two-exception test. The first and third exceptions in *Peterson* would seem to fall under the rubric of "interests of justice," while the second *Peterson* exception seems to fall under the rubric of action outside of an agency's jurisdiction.

Another statutory exception to the exhaustion requirement is the "no adequate remedy" provision codified in the IAPA: "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy." Idaho Code § 67-5271(2). This, too, seems to fall within the "interests of justice" exception. Indeed, these interests of justice tests are often blurred together. "The standard may also be satisfied by showing that the agency lacks power to grant the requested relief, i.e., that exhaustion would be futile." *Park v. Banbury*, 143 Idaho 576, 581, 149 P.3d 851, 856 (2006)).

Note that the IAPA also contains what sounds like an exception to exhaustion requirements for declaratory actions challenging agency rules. Idaho Code § 67-5278. However, the Court ruled that "the 'threatened application' language in I.C. § 67-5278 is there to permit standing to challenge a rule, but does not eliminate the need for completion of administrative proceedings for an as applied challenge." *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 871-72, 154 P.3d 433, 442-43 (2007).

(a) The interests of justice (irreparable injury, futility, and bias)

In *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 106 P.3d 455 (2005), the Idaho Supreme Court noted an exception where the decision maker is biased. "One such exception to the exhaustion requirement applies where bias or prejudgment by the decision maker can be demonstrated. This is because '[t]he due process clause entitles a person to an impartial and disinterested tribunal.' Actual bias on the part of a decision maker is 'constitutionally unacceptable.' The constitutional requirement that an adjudicator be free from bias applies equally to the courts and to state administrative agencies. To require a litigant to exhaust his administrative remedies before a biased decisionmaker would also be futile." *Owsley*, 141 Idaho at 135-36, 106 P.3d at 461-62 (citations omitted).

The *Owsley* Court relied on *Peterson v. City of Pocatello*, 117 Idaho 234, 786 P.2d 1136 (1990). In *Peterson*, the Court of Appeals held that exhaustion is not required "where resort to administrative procedures would be futile." *Peterson*, 117 Idaho at 236, 786 P.2d at 1138.

In *Park v. Banbury*, 143 Idaho 576, 149 P.3d 851 (2006), the Court found that neither exception applied to a challenge to taxing decisions by the county board of equalization. Addressing the first of these exceptions, the *Park* court said:

> The Property Owners claim that the interests of justice required immediate judicial intervention. Typically this situation occurs where irreparable harm results from the administrative process itself. See *Sierra Life*, 99 Idaho at 629, 586 P.2d at 1073 (excusing failure to exhaust where the subject matter of the action involved alleged proposed unlawful action by the agency that would cause irreparable harm to the plaintiff); *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 135, 106 P.3d 455, 461 (2005) (recognizing an exception to the exhaustion requirement "where bias or prejudgment by the decisionmaker can be demonstrated" because due process entitles a person to an impartial tribunal and requiring exhaustion before a biased decision maker would be futile). The standard may also be satisfied by showing that the agency lacks power to grant the requested relief, i.e., that exhaustion would be futile.

Park, 143 Idaho at 581, 149 P.3d at 856. In this case, however, the Court found that the agency did have the power to correct the alleged error, so pursuit of administrative remedies was not futile and the interests of justice exception did not apply.

Another example of the interests of justice exception is found in *McVicker v. City of Lewiston*, 134 Idaho 34, 995 P.2d 804 (2000). In *McVicker*, the Court ruled that a city employee's failure to forward a protest letter excused the plaintiffs' failure to timely exhaust their administrative remedies. (The Court did not recite the exceptions, but this circumstance would appear to fall within the interests of justice exception.)

(b) Where the agency acts outside of its jurisdiction (including facial constitutional challenges to an ordinance)

The second exception to the rule requiring exhaustion of administrative arises where the agency acted outside its authority, that is, "when the agency is palpably without jurisdiction.'" *Park*, 143 Idaho at 581, 149 P.3d at 856 (quoting *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 627, 586 P.2d 1068, 1071 (1978)). For example, if a planning and zoning entity were to declare an applicant's water rights invalid, such action would plainly be beyond its jurisdiction and could be challenged without exhaustion of administrative remedies.

Exhaustion also is not required where the authorizing statute (as opposed to an implementing ordinance) is being challenged as unconstitutional. "An administrative agency cannot pass on the constitutionality of the legislation under which it acts so that a party seeking review of the constitutionality of an agency's enabling legislation need not exhaust its administrative remedies. Exhaustion of administrative remedies also may not be required where an agency ordinance or rule is attacked as unconstitutional on its face." 2 Am. Jur. 2d *Administrative Law* § 479 at 406 (2004).

In *McCuskey v. Canyon Cnty.* ("*McCuskey I*"), 123 Idaho 657, 660, 851 P.2d 953, 956 (1993) (Bistline, J.), the Idaho Supreme Court ruled that a party challenging an ordinance itself (rather than contesting an administrative decision) is not required to exhaust administrative or judicial review remedies. Other cases have made clear that this exception is limited to facial challenges. (See further discussion of this case in section 24.M beginning on page 402.)

Indeed, the Idaho Supreme Court has made clear that facial challenges to the validity of an ordinance do not require exhaustion of administrative remedies, but challenges to the application of an ordinance (even where the constitutional claims are raised) do require exhaustion. This is consistent with commentary by Michael Gilmore and Professor Goble in their seminal article on the subject. "As the *Robinson* case demonstrates, exhaustion is not required when the issue is a facial constitutional challenge to the agency." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 347 (1993) (referencing *Idaho Mutual Benefit Ass'n v. Robinson*, 65 Idaho 793, 154 P.2d 156 (1944), a challenge to the constitutionality of the statute relied on by the agency).

In *Park v. Banbury*, 143 Idaho 576, 149 P.3d 851 (2006) (Schroeder, J.), landowners in Valley County challenged sharp increases in property assessments as violative of the Article VII, Section 5 of the Idaho Constitution (requiring that "taxes shall be uniform upon the same class of subjects"). The homeowners appealed the assessments to the Board of County Commissioners, which denied the appeal. Rather than appealing that decision to the Board of Tax Appeals, they filed a complaint in district court. The key question in the case was whether plaintiffs' failure to exhaust their administrative remedies should preclude this action. The Court noted two exceptions to the exhaustion requirement (interests of justice and agency action outside of its authority). *Park*, 143 Idaho at 580, 149 P.3d at 855. The latter, said the Court, could be described as "when the agency is palpably without jurisdiction." *Park*, 143 Idaho at 581, 149 P.3d at 856. The property owners contended that this exception applied because they had raised a constitutional challenge. The Idaho Supreme Court rejected this argument:

> The Property Owners' cross appeal alleges that various methods used by the Assessor violate the constitutional

> rule requiring that tax assessments be uniform. Even if these claims are interpreted as a constitutional challenge to the validity of a statute or rule, it does not follow that exhaustion is waived. Although facial challenges to the validity of a statute or ordinance need not proceed through administrative channels, as-applied challenges may be required to do so. In *McCuskey*, the Court recognized an exception where the property owner was challenging the validity of the zoning ordinance itself rather than a decision of the zoning authority. 123 Idaho at 660, 851 P.2d at 956; cf. *Regan*, 140 Idaho at 725, 100 P.3d at 619 (finding an adequate administrative remedy where the party was challenging the interpretation rather than the constitutionality of the statute at issue). In *White* the Court suggested that even a due process claim should be addressed first at the administrative level to avoid courts interfering with the subject matter jurisdiction of another tribunal. 139 Idaho at 400, 80 P.3d at 336 ("Whether or not Monroc's request for a conditional use permit met the requirements of the statute or satisfied due process is an issue which should have been pursued before the county zoning authorities under the procedures of the [zoning] ordinance and [the governing statute], and not by the district court through a collateral attack."). Where the possibility exists that an alleged constitutional violation might be remedied on other than constitutional grounds, requiring exhaustion of administrative remedies is not futile.

Park, 143 Idaho at 581-82, 149 P.3d at 856-57 (emphasis supplied, brackets original). Thus, while facial challenges to a local ordinance are excused from exhaustion, as-applied challenges generally are not.

The Court reached the same conclusion in *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 870-72, 154 P.3d 433, 441-43 (2007) (Trout, J).

> Historically, this Court has not permitted a party to seek declaratory relief until administrative remedies have been exhausted, unless the party is challenging a rule's facial constitutionality. . . . A district court should not rule that a statute is unconstitutional "as applied" to a particular case until administrative proceedings have concluded and a complete record has been developed.

American Falls, 143 Idaho at 871, 154 P.3d at 442.[348]

Later in the opinion the Court noted that there are exceptions to the exhaustion requirement, even for as-applied challenges. "There are two exceptions to the rule that an as applied analysis is appropriate only if all administrative remedies have been exhausted: when the interests of justice so require and when an agency has acted outside of its authority." *American Falls*, 143 Idaho at 872, 154 P.3d at 443. The Court explained, however, that the second exception (action outside of agency authority) is not triggered simply by alleging a constitutional violation. That would provide an easy way out for any litigant.

> Although a district court has jurisdiction to decide constitutional issues, administrative remedies generally must be exhausted before constitutional claims are raised. *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 134, 106 P.3d 455, 460 (2005). Other jurisdictions have also refused to excuse a party from exhausting administrative remedies merely because the party raises a constitutional issue that no official in the proceeding is authorized to decide, reasoning that "to hold otherwise would mean that a party whose grievance presents issues of fact or misapplication of rules or policies could nonetheless bypass his administrative remedies and go straight to the courthouse by the simple expedient of raising a constitutional issue." *Foremost Ins. Co. v. Public Serv. Comm'n*, 985 S.W.2d 793, 795 (Mo. Ct. App. 1998). Thus, raising a constitutional challenge does not alleviate the necessity of establishing a complete administrative record.

American Falls, 143 Idaho at 871, 154 P.3d at 442.

The Court explained that trying to figure out whether an agency acted outside its authority is essentially a circular argument (except in those rare cases where the agency had no authority over the subject matter at all). Thus, a plaintiff may not avoid the exception merely by alleging that the agency's action is unlawful and therefore beyond the scope of its authority. That would be "a circuitous analysis," and exhaustion would never be required when challenging agency action. *American Falls*, 143 Idaho at 872, 154 P.3d at 443.

Accordingly, it concluded that it makes sense to apply this simple rule of thumb: "Thus, the exception for when an agency exceeds its authority does not apply

[348] See *American Falls, 143 Idaho at 870-72, 154 P.3d at 441-43,* for a good discussion of the difference between facial and as-applied challenges under Idaho law.

unless the CM [Conjunctive Management] Rules are facially unconstitutional." *American Falls*, 143 Idaho at 872, 154 P.3d at 443.

In sum, if an agency acts in a manner entirely outside its regulatory authority (for instance, if a city or county sought to rule on the validity of a person's water rights), then the municipal action could be challenged without exhaustion—even in the context of an "as applied" challenge. But where the governmental entity has regulatory authority to act on the subject matter and the only question is whether it has exercised that authority properly in a particular "as applied" action, then exhaustion is required.

The conclusion that exhaustion is required (and the exceptions do not apply) in "as applied" constitutional challenges finds strong support in *White v. Bannock Cnty. Comm'rs*, 139 Idaho 396, 80 P.3d 332 (2003) (Burdick, J). In *White*, the Court rejected an end run around LLUPA by a neighbor challenging the issuance of a conditional use permit for an asphalt plant. Rather than pursuing an administrative appeal to Bannock County, Mr. White filed suit raising various as applied due process challenges to the zoning approval. The county sought dismissal for failure to exhaust. The Court recognized that there are exceptions to the exhaustion requirement, but said they did not apply.

> Whether or not Monroc's request for a conditional use permit met the requirements of the statute or satisfied due process is an issue which should have been pursued before the county zoning authorities under the procedures of the ordinance and LLUPA, I.C. § 67-6501 et seq., and not by the district court through a collateral attack.

White, 139 Idaho at 400, 80 P.3d at 336. The Court continued:

> We also conclude that the recognized exceptions to the exhaustion doctrine do not apply to the present case where the question of a conditional use permit "is one within the zoning authority's specialization and when the administrative remedy is as likely as the judicial remedy to provide the wanted relief."

White, 139 Idaho at 402, 80 P.3d at 338 (citing *Fairway Development Co. v. Bannock Cnty.*, 119 Idaho 121, 124, 804 P.2d 294, 297 (1990)).

The *White* court did not discuss the exceptions or explain why they did not apply. Given that was an as-applied constitutional challenge (as opposed to a challenge to the ordinance itself), the implication is that the exceptions to exhaustion simply did not apply. Or, put differently, the exception for an agency acting outside its authority is not satisfied by an as-applied constitutional challenge. This conclusion is confirmed by the Court's citation and quotation of the *White* decision in

Park, 143 Idaho at 582, 149 P.3d at 857, which drew a sharp distinction between facial and as-applied constitutional challenges.

The following cases have excused failure to exhaust. Each involved a facial challenge.

In *Service Employees Int'l Union, Local 6 v. Idaho Dep't of Health & Welfare*, 106 Idaho 756, 683 P.2d 404 (1984), an employee challenged his dismissal as a violation of equal protection. The Court threw out this "as applied" challenge on exhaustion grounds. "Our disposition of this case makes it unnecessary for us to address appellant's constitutional claims. Exhaustion of administrative remedies is generally required before constitutional claims are raised." *Service Employees*, 106 Idaho at 762, 683 P.2d at 410. Although the Court did not explain its reasoning, the decision lends implicit support for the conclusion that the exceptions to exhaustion do not apply to as applied challenges.[349]

Likewise, the Court noted in *Palmer v. Bd. of Cnty. Comm'rs of Blaine Cnty.*, 117 Idaho 562, 564, 790 P.2d 343, 345 (1990): "This Court has frequently announced that except in unusual circumstances parties must exhaust their administrative remedies before seeking judicial recourse." No exception applied because "[h]ere, there is no challenge to the validity of Ordinance 77-5." *Id.* This, too, suggests that the exception applies only to facial challenges.

(c) Section 67-6521(2)(b) (exhaustion exception for "public use" challenges)

In 1996, the Legislature amended the judicial review provision of LLUPA to add a new exception to the exhaustion requirement. As further amended in 2010,[350] the provision reads:

> (2)(a) Authority to exercise the regulatory power of zoning in land use planning shall not simultaneously displace coexisting eminent domain authority granted

[349] Another case holding that exhaustion is required in constitutional challenges is *Cnty. of Ada v. Henry*, 105 Idaho 263, 266-67, 668 P.2d 994, 997-98 (1983). In this case, the Supreme Court rejected a § 1983 counterclaim (in an enforcement action initiated by the county) alleging that Ada County's zoning and subdivision ordinances violated due process and equal protection and constituted a taking of property. The Court declared that the plaintiffs failed to appeal an earlier County decision, concluding that "[s]uch exhaustion is required in a zoning matter." *Henry*, 105 Idaho at 267, 668 P.2d at 998. Despite this statement, the court proceeded to address the merits of the constitutional challenges, rejecting each of them. Thus, the court seems to have contradicted its own statement about requiring exhaustion—not to mention overlooking the fact that exhaustion rules do not apply to § 1983 actions.

[350] The provision was added in 1996, 1996 Idaho Sess. Laws, ch. 199, and amended slightly in 2010, 2010 Idaho Sess. Laws, ch. 175. The 2010 amendment was not substantive. It simply conformed the language to changes made elsewhere in LLUPA dealing with judicial review.

> under section 14, article I, of the constitution of the state of Idaho and chapter 7, title 7, Idaho Code.
>
> (b) An affected person claiming "just compensation" for a perceived "taking," the basis of the claim being that a final action restricting private property development is actually a regulatory action by local government deemed "necessary to complete the development of the material resources of the state," or necessary for other public uses, may seek a judicial determination of whether the claim comes within defined provisions of section 14, article I, of the constitution of the state of Idaho relating to eminent domain. Under these circumstances, the affected person is exempt from the provisions of subsection (1) of this section and may seek judicial review through an inverse condemnation action specifying neglect by local government to provide "just compensation" under the provisions of section 14, article I, of the constitution of the state of Idaho and chapter 7, title 7, Idaho Code [dealing with eminent domain].

Idaho Code § 67-6521(2).

The effect of the statute is to exempt from the judicial review provisions in section 67-6521(1) (including, presumably, the 28-day deadline) a party who alleges a taking and seeks a "determination of whether the claim comes within the defined provisions of section 14, article I, of the constitution of the state of Idaho relating to eminent domain." The referenced constitutional provision authorizes governmental entities and even private parties to condemn the property of others for any "use necessary to the complete development of the material resources of the state," which uses are "declared to be a public use." This sweeping power—which may be exercised by one private person against the property of another—has been recognized since 1906. *Potlatch Lumber Co. v. Peterson*, 12 Idaho 769, 88 P. 426 (1906); *Blackwell Lumber Co. v. Empire Mill Co.*, 28 Idaho 556, 155 P. 680 (1916), appeal dismissed, 244 U.S. 651. Constitutional provisions like this, allowing private property to be taken for other seemingly private uses (such as private development touted as urban renewal), have become increasingly controversial across the nation in the last few decades, culminating in the celebrated case of *Kelo v. City of New London*, 545 U.S. 469 (2005) (Stevens, J.). The Idaho statute, which pre-dates *Kelo*, was enacted at a time of growing public alarm over what is perceived by many as use of eminent domain to promote private, rather than public, goals.

The language of the statute is convoluted and difficult to parse, and its purpose and effect are not intuitively apparent. Accordingly, resort to legislative history would appear to be appropriate.

Thankfully, the legislative history is much clearer than the statute itself in showing that the measure is aimed at and limited to challenges based on the allegation that a governmental taking is not for a valid public purpose. The sponsor of the measure, Rep. Jim D. Kempton, provided testimony on the measure to the House State Affairs Committee on January 30, 1996. His testimony on House Bill 628 was summarized in the record as follows, "This proposed legislation amends local government land use planning statutes to the extent that administrative remedies need not be exhausted prior to judicial review if a taking claim involves court determination of public use under provisions of eminent domain." Virtually identical statements were made by Rep. Kempton before the same committee on February 13, 1996, and on March 1, 1996 to the Senate Local Government and Taxation Committee. This language also corresponds, word for word, to the official statement of purpose for the bill (H.B. 628). At the March 1, 1996 hearing, Rep. Kempton also handed out a packet of information including a copy of Idaho Const. art. I, § 14, with the relevant language underlined, as well as an exchange of correspondence with the Office of the Idaho Attorney General discussing this constitutional language. That is the extent of the legislative history. Thus the legislative history is consistent with the language of the statute itself which limits the new exhaustion exception to those rare situations in which a landowner contends that a regulatory action is not for a legitimate "public use." This conclusion is further reinforced by the agenda heading for the hearing on March 1, 1996, which said that the bill "[p]rovides remedy for zoning action was in essence an eminent domain action."

Plainly, then, the scope of the legislation is quite narrow. It applies to an "affected person" who asserts that his or her property is being taken for something other than a public purpose. This would include, for example, the property owner who is the target of an eminent domain proceeding facilitating a private development. Presumably, it would also include a neighboring property owner affected by a new development facilitated through eminent domain. But that is all it does. It does not provide a blanket exemption from the exclusive judicial review provisions of LLUPA for anyone alleging a regulatory taking in the context of their own development.

The fact that a similar exemption was not included in LLUPA's other judicial review provision, Idaho Code § 67-6519(4)—which applies to the permit applicant—reinforces the idea that this measure is intended to protect those on the receiving end of eminent domain proceedings—people like Susette Kelo whose home was demolished to make way for Pfizer—not to protect the developers themselves by providing an end-run around LLUPA. Indeed, the absence of a corresponding exemption from section 67-6519(4) presents at least an argument that "applicants"

for permits under section 67-6519(4) are not covered, and that the exemption applies only to other "affected persons" under section 67-6521(2).

The Idaho Supreme Court touched briefly on this provision in *KMST, LLC v. Cnty. of Ada*, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003) (Eismann, J.). In *KMST*, the plaintiff (an applicant for a development permit) argued that this provision exempted it from exhaustion requirements. The Court quoted the statute in full and then concluded: "By its terms, that statute has no application to the impact fees imposed in this case. It only applies if the basis of the inverse condemnation claim is that a specific zoning action or permitting action restricting private property development is actually a regulatory action by local government deemed necessary to complete the development of the material resources of the state, or necessary for other public uses." *KMST*, 138 Idaho at 583, 67 P.3d at 62 (internal quotations omitted).

The Court also mentioned the provision in *Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 494, 300 P.3d 18, 26 (2013) (J. Jones, J.), noting that the plaintiff had not raised the issue.

(d) Section 1983 claims

Note that exhaustion is not required in § 1983 claims,[351] which are sometimes employed to challenge to land use decisions. While exhaustion is not required, a special form of ripeness (that seems much like exhaustion) is required. See discussion in section 24.CC at page 442.

(6) Waiver of constitutional rights: When must due process issues be raised below?

See also discussion in section 24.KK(1) at page 472.

A critical part of building the record is ensuring that objections that one intends to raise on appeal are presented to the decision maker below. "It is well established in Idaho that review on appeal is limited to those issues raised before the lower tribunal and that an appellate court will not decide issues presented for the first time on appeal." *Neighbors for a Healthy Gold Fork v. Valley Cnty.*, 145 Idaho 121, 131, 176 P.3d 126, 136 (2007) (rejecting a neighbor's complaint about violations of bulk and placement restrictions that had not been presented in the hearing below). This point was reiterated in *Johnson v. Blaine Cnty.*, 146 Idaho 916, 204 P.3d 1127 (2009).

The requirement that issues must be presented first to decision-making body makes sense where those issues relate to the substance of what is being decided. It is not so clear whether participants in public hearings must raise due process objections

[351] Section 1983 refers to the Civil Rights Act of 1871, 17 Stat. 13, now codified at 42 U.S.C. § 1983.

at the time of the hearing. Two cases suggest that such objections must be presented first to the city or county. In *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 148 P.3d 1247 (2006) (Burdick, J.), a developer received plat approvals from the county for a subdivision near Island Park Reservoir. A neighbor, Cowan, brought a judicial review appeal under LLUPA alleging, among other things, that the county violated his due process rights. Before addressing the merits, the Court noted that Cowan had presented his due process claims to the county, so that they were not waived. *Cowan*, 143 Idaho at 510-11, 148 P.3d at 1256-57. Note that in *Cowan*, it was not the applicant, but a neighbor, who complained of due process violations.

Cowan cited *Butters v. Hauser ("Butters I")*, 125 Idaho 79, 82, 867 P.2d 953, 956 (1993), for the proposition that "constitutional issues not raised before a board of commissioners will not be considered on appeal." *Cowan*, 143 Idaho at 511, 148 P.3d at 1257. This sweeping statement overlooks the fact that *Butters I* did not deal with due process violations, but rather with constitutional issues (such as the Supremacy Clause and the validity of controlling law) that went to the merits of the county commissioners'' decision and, obviously, should have been presented to them first. The second case that contains sweeping language suggesting that due process claims must be presented first to the county is *Floyd v. Bd. of Comm'rs of Bonneville Cnty.*, 137 Idaho 718, 52 P.3d 863 (2002). Here, too, the Court found that the complaining party in fact had presented the issue of bias to the board, and was therefore properly presented on appeal. *Floyd*, 137 Idaho at 725, 52 P.3d at 870.

Cowan and *Floyd* do not address the practical consideration that it may not be realistic to demand that parties raise challenges based on bias and the like to the very decision-makers who will be acting on the matter. Unlike judicial proceedings, there is no ready mechanism to deal with disqualification, nor any means to replace disqualified decision-makers. They also appear to be inconsistent with the discussion of exceptions to the exhaustion requirement discussed in section 24.L(5) at page 378.

Nor can *Cowan* and *Floyd* be reconciled with other cases in which due process claims have been decided on appeal without any mention of a requirement that they be raised first before the city or county. For example, *Eacret v. Bonner Cnty.*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004) (Burdick, J.) contains an extensive analysis of due process claims, concluding that due process was violated, without any apparent requirement that the issues be first presented at the administrative level. Likewise, in *Neighbors for a Healthy Gold Fork v. Valley Cnty.*, 145 Idaho 121, 131, 176 P.3d 126, 136 (2007), the Court analyzed and rejected various due process claims without any suggestion that they must first be presented to the county.

Failure to exhaust by failing to present a due process claim to the city or county decision maker may be thought of as a waiver. There is a powerful history of case law cautioning against waiver of constitutional rights. This jurisprudence may be traced to the U.S. Supreme Court's pronouncement, in *Smith v. United States*, 337

U.S. 137, 150 (1949), that "[w]aiver of constitutional rights, however, is not lightly to be inferred." That statement in *Smith* was quoted again by the Court in *Emspak v. United States*, 349 U.S. 190, 197 (1955). Our Supreme Court, too, has noted that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Abercrombie v. State*, 91 Idaho 586, 593, 428 P.2d 505, 512 (1967).

Much of the law of waiver arises in the context of criminal prosecutions. But it applies as well in the context of land use matters. Our Court of Appeals cited *Emspak* as support for this statement: "As a general rule, constitutional rights—including the right to due process—may be waived. However, the waiver of any fundamental constitutional right is never presumed. Rather the waiver must be affirmatively demonstrated." *Glengary-Gamlin Protective Ass'n v. Bird*, 106 Idaho 84, 90, 675 P.2d 344, 350 (Ct. App. 1983) (Burnett, J.) (citations omitted). In *Glengary*, the Court emphasized that Bonner County could not assume, based on the developer's application for a conditional use permit for an expanded use of the prior non-conforming use, that it intended to waive its right to continue a prior non-conforming use.

(7) Preliminary plat is an appealable "final" decision

In *Johnson v. Blaine Cnty.*, 146 Idaho 916, 204 P.3d 1127 (2009), the Court dismissed an appeal by a neighboring landowner of a final plat approving a conditional use permit and planned unit development. The landowner failed to appeal the decision at the preliminary plat stage when the conditional use permit and planned unit development were first approved, subject to conditions. The Court found that the earlier decision was a final appealable decision under LLUPA. "[W]here preliminary plat approval and the issuance of permits places a developer in a position to take immediate steps to permanently alter the land before final approval, the decision is final for purposes of challenging the authorized action that permits the material alteration and can be reviewed on appeal." *Johnson v. Blaine Cnty.*, 146 Idaho at 924-25, 204 P.3d at 1135-36 (quoting *Stevenson v. Blaine Cnty.*, 134 Idaho 756, 760, 9 P.3d 1222, 1226 (2000)). Since the preliminary plat approval authorized the developer to construct three model homes, the decision was appealable. Having failed to appeal at that stage, the neighboring landowner could not appeal the final plat approval and the court has "no jurisdiction to review determinations made" in the unappealed decision. *Johnson v. Blaine Cnty.*, 146 Idaho at 926, 204 P.3d at 1137.

(8) Ripeness

Ripeness and standing both have to do with the extent that courts will entertain lawsuits dealing with "hypothetical" issues. It is easy enough to understand the difference between ripeness and standing. "'Standing' deals with the 'who' of a lawsuit; 'ripeness' deals with the 'when.'" Marla E. Mansfield, *Standing and*

Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers, 68 N.D. Law Rev. 1, 68 (1992).

Telling the difference between ripeness and exhaustion, however, is trickier.[352] Sometimes courts seem to use the terms interchangeably.[353] In other instances, courts draw fine distinctions between the two. *E.g.*, *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (Blackmun, J.), in which the Court recognized that exhaustion does not apply to § 1983 actions but ripeness does. See discussion in Volume II of this Handbook.

As our Supreme Court has cautioned, the law of ripeness is "not subject to a mechanical standard." *Noh v. Cenarrusa*, 137 Idaho 798, 800, 53 P.3d 1217, 1219 (2002) (quoting *Harris v. Cassia Cnty.*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984)).

The U.S. Supreme Court outlined the law of ripeness in a 2003 decision:

> Ripeness is a justiciability doctrine designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149, 87 S. Ct. 1507, 18 L.Ed.2d 681 (1967); accord, *Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726, 732-733, 118 S. Ct. 1665, 140 L.Ed.2d 921 (1998). The ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction," *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57, n. 18, 113 S. Ct.

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[352] "Both the requirement of ripeness and the requirement of exhaustion of administrative remedies are concerned with the timing of judicial review of administrative actions, but the two requirements are by no means the same. The ripeness focus is upon the nature of the judicial process—upon the types of functions that courts should perform. The exhaustion focus is upon the relatively narrow question of whether a party should be required to pursue an administrative remedy before going to court." Kenneth Culp Davis, *Ripeness of Governmental Action for Judicial Review*, 68 Harvard L. Rev. 1122, 1122 (1955).

[353] For example, in *Canal/Norcrest/Columbia Action Committee v. City of Boise* (*"Canal I"*), 136 Idaho 666, 671-72, 39 P.3d 606, 610-11 (2001) (emphasis supplied), the court said: "The issue before the Court is whether the approval of the conditional use permit of the planned unit development is final action by the City, and thus ripe for review. The district court held that until the design review was completed, the approval could not be deemed final because of a failure by CNC to exhaust all administrative remedies."

> 2485, 125 L.Ed.2d 38 (1993) (citations omitted), but, even in a case raising only prudential concerns, the question of ripeness may be considered on a court's own motion. *Ibid*. (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138, 95 S. Ct. 335, 42 L.Ed.2d 320 (1974)).
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> Determining whether administrative action is ripe for judicial review requires us to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. *Abbott Laboratories, supra*, at 149, 87 S. Ct. 1507. "Absent [a statutory provision providing for immediate judicial review], a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the [Administrative Procedure Act (APA)] until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately ... .)" *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891, 110 S. Ct. 3177, 111 L.Ed.2d 695 (1990).

National Park Hospitality Ass'n v. DOI, 538 U.S. 803, 807-08 (2003).

The two-part test described above (fitness and hardship) is broken down further by the Supreme Court in *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998):

> In deciding whether an agency's decision is, or is not, ripe for judicial review, the Court has examined both the "fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." [*Abbott Laboratories v. Gardner*, 387 U.S.] at 149, 87 S. Ct., at 1515. To do so in this case, we must consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.

This three-part test is routinely followed by the federal courts. *E.g., San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1046 (10th Cir. 2011).

Frankly, the courts have been somewhat erratic in their application of the ripeness doctrine.[354] Any effort to sort out the precedent into neat and consistent principles will fail.

At its core, however, ripeness is a comprehensible and practical doctrine. "The basic principle of ripeness is easy to state: Judicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or remote." Kenneth Culp Davis, *Ripeness of Governmental Action for Judicial Review*, 68 Harvard L. Rev. 1122, 1122 (1955). As Idaho's Supreme Court has summarized it, "Ripeness asks whether there is any need for court action at the present time." *Boundary Backpackers v. Boundary Cnty.*, 128 Idaho 371, 376, 913 P.2d 1141, 1146 (1996) (Johnson, J.).

"[T]he Idaho case law suggests a two-part test: whether the issues are suitable for judicial resolution without the additional facts that would become available if adjudication were delayed and whether delay will itself be beneficial or detrimental." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 350 (1993).

The Idaho Supreme Court ruled that issuance of a conditional use permit is final agency action and ripe for review, despite the fact that the permit set out conditions requiring the holder to obtain other governmental approvals. *Canal/Norcrest/Columbia Action Committee v. City of Boise* (*"Canal I"*), 136 Idaho 666, 671-72, 39 P.3d 606, 610-11 (2001).

(9) Primary jurisdiction

The common law doctrine of primary jurisdiction applies where a plaintiff is entitled either to bring a lawsuit or to pursue administrative remedies, and chooses to pursue the lawsuit. Courts sometimes exercise their discretion not to hear such a case

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[354] "[T]he Supreme Court has fluctuated over an exceedingly wide range. In many cases the Court had decided issues which seem clearly abstract or hypothetical or remote, and in even more cases the Court has refused to decide issues which are real and present." Kenneth Culp Davis, *Ripeness of Governmental Action for Judicial Review*, 68 Harvard L. Rev. 1122, 1122 (1955). "While the general ripeness principle is not disputed, its application by the Supreme Court has resulted in a line of cases with seemingly inconsistent rulings. At least the grounds distinguishing them are too subtle for the commentators to appreciate." Ronald D. Rotunda & John E. Nowak, 1 *Treatise on Constitutional Law—Substance and Procedure*, § 2.13(d)(i) (2008). "Unfortunately, the doctrine of ripeness as interpreted by the courts has evolved into a confused morass of conflicting dogma that often leaves the landowner and government agencies with uncertainty about whether a case for damages is ripe." James S. Burling, *When Is a Claim Against the Government Ripe? Takings, Equal Protection, Due Process, and First Amendment Challenges*, ALI-ABA Course of Study at 37 (Apr. 22-24, 2004).

on the basis that where jurisdiction overlaps, the agency should have "primary jurisdiction." This doctrine is typically applied where the court determines that the agency has expertise on the question presented. By deferring to the agency, the courts encourage uniformity of administrative decisions based on agency expertise.

This doctrine is explored more fully in Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner,* 30 Idaho L. Rev. 273, 343-44 (1993), and in *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 627, 586 P.2d 1068, 1071 (1978).

The doctrine of primary jurisdiction is related to, but technically different that the requirement of exhaustion. The distinction, however, is subtle.[355] Indeed, courts sometimes speak of the two in the same breath.[356] The doctrine doctrine's role appears to be waning, having been largely supplanted by the rule of exhaustion. Yet it continues to pop up from time to time. *E.g.*, *Grever v. Idaho Telephone Co.*, 94 Idaho 900, 499 P.2d 1256 (1972); *White v. Bannock Cnty. Comm'rs*, 139 Idaho 396, 400, 80 P.3d 332, 336 (2003).

(10) Mootness

The Ninth Circuit rejected an argument that a utility group's challenge to federal curtailment amendment was moot because at least one of the curtailment amendments had been fully performed. "Nonetheless, Bell's challenge is live because it is capable of repetition, yet evading review." *Bell v. BPA*, 340 F.3d 945, 948 (9th Cir. 2003) (citing *Energy Resources Conservation and Development Comm'n v. BPA*, 754 F.2d 1470, 1473 (9th Cir. 1985)).

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[355] As noted above, the issue of primary jurisdiction arises where both the court and the agency has jurisdiction, but the plaintiff chooses to proceed with a lawsuit. The doctrine of exhaustion of administrative remedies, in contrast, arises where the plaintiff initially appeared before an administrative agency or local government, and now seeks judicial review of the entity's action. The doctrine of exhaustion (and its statutory codification in Idaho Code § 67-5271) poses the question of whether the plaintiff should have spent more time exhausting administrative remedies before seeking judicial review. "Primary jurisdiction thus is concerned with *initial* jurisdiction, while exhaustion focuses on when *review* of an agency action may be had." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner,* 30 Idaho L. Rev. 273, 345 (1993) (emphasis original).

"The Court distinguished the doctrine of exhaustion, which governs the timing of judicial review of administrative action, from the doctrine of primary jurisdiction, which determines whether the court or agency should make the initial determination." *White v. Bannock Cnty. Comm'rs*, 139 Idaho 396, 401, 80 P.3d 332, 337 (2003).

[356] For example, in *Pounds v. Denison*, 115 Idaho 381, 383, 766 P.2d 1262, 1264 (1988), the court described the primary jurisdiction doctrine as a "corollary" to the exhaustion doctrine.

(11) Motions to dismiss (Rule 12(b)) and motions for summary judgment (Rule 56)

This section explores how parties may raise and respond to threshold jurisdictional defenses such as standing, ripeness, exhaustion, and mootness. This discussion is based on the Federal Rules Civil Procedures and federal case law. However, Idaho's rules of civil procedure are essentially identical. This discussion is not applicable to a judicial review in Idaho state court. It is applicable to judicial review in federal court and to non-judicial review litigation in both state and federal court.

The defendant must plead all legal and factual defenses and objections in the first responsive pleading (typically, the answer).[357] At the responding party's option, however, seven defenses enumerated in Rule 12(b) may be raised earlier by motion before the first responsive pleading. If the party elects to file such a motion, it must be filed prior to the answer or other responsive pleading and the party must include all enumerated defenses and objections (except subject matter jurisdiction, which is never waived, or failure to state a claim, which may be raised at trial). Rule 12(g)(2) and (h). In addition, jurisdictional defenses may be addressed later in the proceeding through a Rule 12(c) motion for judgment on the pleadings or, except for defenses going to the court's subject matter jurisdiction, through a Rule 56 motion for summary judgment.

Rule 12(h) mandates that the defenses identified in Rule 12(b)(2) through (5) must be raised either in a 12(b)(1) motion or in the answer or other responsive pleading. Lack of subject-matter jurisdiction, however, is non-waivable and may be raised at any time and failure to state a claim may be raised at trial.[358] As for how a tardy but permissible defense of lack of subject matter jurisdiction may be presented, Wright and Miller offer this:

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[357] Rule 8(b)(1)(A) requires that a party must state each of its defenses in its answer to a complaint. Rule 8(c) expressly identifies 19 affirmative defenses, requiring that these and any other "avoidance or affirmative defense" be plead in responding to any pleading.

[358] The Supreme Court contrasted the handling of tardy 12(b)(1) and 12(b)(6) motions: "The objection that a federal court lacks subject-matter jurisdiction, see Fed. Rule Civ. Proc. 12(b)(1), may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment. Rule 12(h)(3) instructs: 'Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.' See *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S. Ct. 906, 157 L.Ed.2d 867 (2004). By contrast, the objection that a complaint 'fail[s] to state a claim upon which relief can be granted,' Rule 12(b)(6), may not be asserted post-trial. Under Rule 12(h)(2), that objection endures up to, but not beyond, trial on the merits: 'A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading . . . or by motion for judgment on the pleadings, or at the trial on the merits.' *Cf. Kontrick*, 540 U.S., at 459, 124 S. Ct. 906." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506-07 (2006).

> A motion to dismiss an action for lack of subject matter jurisdiction under Rule 12(b)(1) is but one of the many ways the defense may be presented. For example, in a significant number of cases, federal courts have permitted a defending party to raise a lack of subject matter jurisdiction on a Rule 12(c) motion for judgment on the pleadings or on a Rule 12(f) motion to strike. And, in keeping with the policy set forth in Rule 12(h)(3) of preserving the defense throughout the action, it has long been well-established that the court's lack of subject matter jurisdiction may be asserted at any time by any interested party, either in the answer or in the form of a suggestion to the court prior to final judgment. After judgment a lack of subject matter jurisdiction may be interposed as a motion for relief from the judgment under Rule 60(b)(4).
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> However, some procedures occasionally employed to raise the Rule 12(b)(1) defense have been held to be improper. Federal courts have concluded that both a Rule 12(e) motion for more definite statement and, in most circumstances, a Rule 56 motion for summary judgment are inappropriate methods for challenging the district court's subject matter jurisdiction. Inasmuch as the first of these motions is designed to go to the comprehensibility of the challenged pleading and the second tests the merits of the plaintiff's actions and the Rule 12(b)(1) motion involves a matter in abatement, these decisions are technically correct, although perhaps somewhat restrictive. A more fruitful approach would be to treat the motion for summary judgment as a "suggestion" of lack of subject matter jurisdiction, a path that has been followed by several courts.

5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §1350 at 114-119, 134-37 (3rd ed. 2004) (footnotes omitted).[359]

[359] "The government's motion was framed as a Fed. R. Civ. P. 12(b)(1) motion to dismiss. Because that motion was made after the government's responsive pleading, it was technically untimely. The matter of subject matter jurisdiction, however, may be raised by the parties at any time pursuant to Fed. R. Civ. P. 12(h)(3), and the government's motion was thus properly before the court as a Rule 12(h)(3) suggestion of lack of subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3); *Csibi v. Fustos*, 670 F.2d 134, 136 n. 3 (9th Cir. 1982); Wright & Miller § 1350, at 544-45, 548." *Augustine v. United States*, 704 F.2d 1074, 1075 n.3 (9th Cir. 1983). "The government's motion was

We discuss two of the seven Rule 12(b) motions here: Rule 12(b)(1) provides for a motion to dismiss based on lack of subject matter jurisdiction. Rule 12(b)(6) authorizes a motion to dismiss based on failure to state a claim upon which relief can be granted. For most defenses, it is fairly clear which of these two would apply. Moreover, in many instances, picking the correct motion is not of any particular consequence.[360] On the other hand, as discussed below, there are differences in the way that factual assumptions are treated. Accordingly, labeling of the motion may make a difference in some circumstances.

Rule 12(b)(6) is reserved for defenses, other than those going to the court's jurisdiction, that appear on the face of the complaint. (Indeed, Rule 12(d) provides that if matters outside the pleadings are presented, the motion must be treated a Rule 56 motion for summary judgment.) Thus, a 12(b)(6) motion is appropriate where, even though the court has jurisdiction, it is evident on the face of the complaint that even if the plaintiff's allegations are true, they afford the plaintiff no relief under any legal theory. This conclusion might be based on an affirmative defense, such as the statute of limitations, but only if the facts giving rise to the defense are evident in the complaint.

In a Rule 12(b)(6) motion, "(1) the complaint is construed in the light most favorable to plaintiff, (2) its allegations are taken as true, and (3) all reasonable inferences that can be drawn from the pleading are drawn in favor of the pleader." 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §1357 at 417 (3rd ed. 2004) (footnote omitted). However, only "material allegations" and "well-pleaded facts" must be taken as true. The Court is not bound to accept the plaintiff's "legal conclusions" or "unwarranted inferences." Wright & Miller, § 1357 at 463-531.

Rule 12(b)(1) is the proper vehicle for noting the court's lack of subject matter jurisdiction. All Article III challenges fall plainly within this category, including

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framed as a Fed. R. Civ. P. 12(b) (1) motion to dismiss. Because that motion was made after the government's responsive pleading, it was technically untimely. The matter of subject matter jurisdiction, however, may be raised by the parties at any time pursuant to Fed. R. Civ. P. 12(h)(3), and the government's motion was thus properly before the court as a Rule 12(h)(3) suggestion of lack of subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3); *Csibi v. Fustos*, 670 F.2d 134, 136 n. 3 (9th Cir. 1982); Wright & Miller § 1350, at 544–45, 548." *Kern Cnty. Farm Bureau v. Badgley*, 2002 WL 34236869, *18 n.3 (E.D. Cal. 2002). Note that Rule 12(h)(3) was amended in 2007 and no longer contains a reference to a "suggestion" by a party. The rule change, however, was without substantive effect. 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §1341 at 4 (3rd ed. 2011 pocket part)

[360] "Provided no prejudice is caused, courts often excuse a mislabeling of a Rule 12(b)(1) motion as a Rule 12(b)(6) failure to state a claim motion, and vice versa. In such an instance, the court will merely apply the appropriate legal standard and rule accordingly." Baicker-McKee, Janssen & Corr, *Federal Civil Rules Handbook*, at 417 (2007).

Article III standing, mootness,[361] ripeness,[362] and sovereign immunity.[363] In contrast, it appears that failure to exhaust administrative remedies should be raised by a 12(b)(6) motion, at least if the failure is evident on the face of the complaint.[364] *See Jones v. Bock*, 549 U.S. 199, 216 (2007).

The harder question is whether a challenge based on prudential standing (such as the zone of interests test) is properly raised under Rule 12(b)(1) or 12(b)(6). As noted by the Ninth Circuit in footnote 361, Rule 12(b)(1) pertains to subject matter jurisdiction under Article III. By negative implication, a prudential standing challenge, which is not based on Article III jurisdiction, should be brought under Rule 12(b)(6), not Rule 12(b)(1).

A 2004 decision reached a similar conclusion in a case where Congress had not granted standing:

> If a plaintiff has suffered sufficient injury to satisfy the jurisdictional requirement of Article III but Congress has not granted statutory standing, that plaintiff cannot state a claim upon which relief can be granted. See *Steel Co.*,

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[361] "Because standing and mootness pertain to a federal court's subject-matter jurisdiction under Article III, they are properly raised in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), not Rule 12(b)(6)." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

[362] Typically, ripeness challenges arise under Article III and are properly addressed by Rule 12(b)(1). "Whether a claim is ripe for adjudication goes to a court's subject matter jurisdiction under the case or controversy clause of article III of the federal Constitution. Like other challenges to a court's subject matter jurisdiction, motions raising the ripeness issue are treated as brought under Rule 12(b)(1) even if improperly identified by the moving party as brought under Rule 12(b)(6). Unlike a Rule 12(b)(6) motion, a Rule 12(b)(1) motion can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency, and in so doing rely on affidavits or any other evidence properly before the court. It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction. The district court obviously does not abuse its discretion by looking to this extra-pleading material in deciding the issue, even if it becomes necessary to resolve factual disputes." *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989) (citations omitted).

Note, however, that in addition to Article III ripeness requirements, the courts have created certain prudential ripeness requirements, such as those set out in *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), for federal taking claims. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 n.7 (1997). "The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction, but, even in a case raising only prudential concerns, the question of ripeness may be considered on a court's own motion." *National Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 808 (2003) (citation and internal quotations marks omitted).

[363] Likewise, sovereign immunity is a jurisdictional issue properly addressed by Rule 12(b)(1). Wright and Miller, Federal Practice and Procedure, § 1350 at 195-96.

[364] See discussion of whether exhaustion is jurisdictional in footnote 337 at page 365.

> 523 U.S. [83] at 97, 118 S. Ct. 1003 (statutory standing is not a jurisdictional question of whether there is case or controversy under Article III); *Guerrero v. Gates*, 357 F.3d 911, 920-21 (9th Cir. 2003) (where plaintiffs lacked standing under RICO, affirming district court's dismissal under Federal Rule of Civil Procedure 12(b)(6)). In that event, the suit should be dismissed under Rule 12(b)(6). *Guerrero*, 357 F.3d at 920-21.

The Cetacean Community v. Bush, 386 F.3d 1169, 1175 (9th Cir. 2004) (Note that the *Guerrero* opinion was replaced by *Guerrero v. Gates*, 442 F.3d 697 (9th Cir. 2006)). The Second Circuit seems to be of the opposite view, however. *Thompson v. Cnty. of Franklin*, 15 F.3d 245 (2d Cir. 1994).

As noted above, in a Rule 12(b)(6) motion, the complaint's allegations are taken as true and the court may not consider evidence outside the complaint. (If evidence outside the pleadings is offered, the effect is to convert the motion to a Rule 56 motion.) In contrast, evidence outside the pleadings may sometimes be considered in conjunction with a Rule 12(b)(1) motion. Indeed, offering such evidence cannot convert the motion to a Rule 56 motion because "[i]f the court has no subject matter jurisdiction, it has no power to grant summary judgment or any other motion going to the merits of the action." *Federal Civil Procedure Before Trial* (Rutter Group), § 1423 at 14-8 (2011).

This is not always the case with a Rule 12(b)(1) motion. In the case of a 12(b)(1) motion, the answer depends on whether the jurisdictional attack is "facial" or "factual." Facial attacks under Rule 12(b)(1) mirror challenges under Rule 12(b)(6); they are limited to the pleadings which are taken as factually true. In contrast, in factual jurisdictional challenges under Rule 12(b)(1), the court may gather additional evidence and weigh it.[365] "The case law permits the defendants to

[365] "Rule 12(b)(1) jurisdictional attacks can be either facial or factual. . . . With a factual Rule 12(b)(1) attack, however, a court may look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment. It also need not presume the truthfulness of the plaintiffs' allegations." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (citing 2 *Moore's Federal Practice*, ¶ 12.30[4], at 12-38 (1999); other citations omitted) (finding nonetheless that the plaintiffs had standing to challenge HUD's actions involving public housing). Conversely, in the case of "factual (or substantive) subject matter jurisdiction attacks, the court will *not* presume that plaintiff's factual allegations are true, and will not accept conclusory allegations as true but may instead weight the evidence before it and find the facts, so long as this fact finding does not involve the merits of the dispute. In so doing, the court enjoys broad discretion. The court may receive and consider extrinsic evidence. The court must permit the pleader to respond with supporting evidence and, where necessary, may convene an evidentiary hearing or plenary trial to find the facts." Baicker-McKee, Janssen & Corr, *Federal Civil Rules Handbook*, at 415-16 (2007). *Accord*, *Thornhill Publ'g Co., Inc. v. General Telephone & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) (in a factual, aka "speaking motion," Rule 12(b)(1) challenge, no presumption of truthfulness

challenge the truth and sufficiency of the jurisdictional allegations in a 12(b)(1) motion on a standard similar to that used for summary judgment." *Public Lands for the People, Inc. v. U.S.D.A.*, 2010 WL 3069934 at *24 (E.D. Cal. 2010).

> In *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004), we explained the difference between facial and factual attacks as follows: "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id*. at 1039. If the moving party converts "the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Id*. (quoting *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003), *cert. denied*, 541 U.S. 1009, 124 S. Ct. 2067, 158 L. Ed. 2d 618 (2004)).
>
> In this case, the defendants argue that the allegations in Wolfe's complaint are insufficient on their face to establish subject matter jurisdiction. Whether subject matter jurisdiction exists therefore does not depend on resolution of a factual dispute, but rather on the allegations in Wolfe's complaint. We assume Wolfe's allegations to be true and draw all reasonable inferences in his favor.

Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004).

These standards for facial versus factual challenges to jurisdiction under Rule 12(b)(1) are summarized in a 2010 district court decision out of the Ninth Circuit:

> The party seeking to invoke the jurisdiction of the federal court has the burden of establishing that jurisdiction exists. *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278, 57 S. Ct. 197, 81 L. Ed. 183 (1936); *Assoc. of Medical Colleges v. United States*, 217 F.3d 770, 778-79 (9th Cir. 2000). On a motion to dismiss pursuant to Fed.

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attaches to the plaintiff's allegations, the court may investigate the merits of disputed facts going to jurisdiction, and the plaintiff has the burden of proving that jurisdiction exists).

R. Civ. P. 12(b)(1), the standards that must be applied vary according to the nature of the jurisdictional challenge.

If the challenge to jurisdiction is a facial attack, *i.e.*, the defendant contends that the allegations of jurisdiction contained in the complaint are insufficient on their face to demonstrate the existence of jurisdiction, the plaintiff is entitled to safeguards similar to those applicable when a Rule 12(b)(6) motion is made. See Sea *Vessel Inc. v. Reyes*, 23 F.3d 345, 347 (11th Cir. 1994), *Osborn v. United States*, 918 F.2d 724, 729 n. 6 (8th Cir. 1990); see also 2-12 Moore's Federal Practice-Civil § 12.30 (2009). If the challenge to jurisdiction is made as a "speaking motion" attacking the truth of the jurisdictional facts alleged by the plaintiff, a different set of standards must be applied. *Thornhill Pub. Co., Inc. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Where the jurisdictional issue is separable from the merits of the case, the district court is free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983); *Thornhill*, 594 F.2d at 733. "In such circumstances '[n]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.' " *Augustine*, 704 F.2d at 1077 (quoting *Thornhill*, 594 F.2d at 733).

> However, where the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial.

Id. (citing *Thornhill*, 594 F.2d at 733-35 and 5 C. Wright & A. Miller, Federal Practice & Procedure § 1350, at 558 (1969 & Supp. 1987)). On a motion going to the merits, the court must employ the standard applicable to a motion for summary judgment. *Farr v. United States*, 990 F.2d 451, 454 n. 1 (9th Cir. 1993), *cert. denied*, 510 U.S. 1023, 114 S. Ct. 634, 126 L.Ed.2d 592 (1993).

Public Lands for the People, Inc. v. U.S.D.A., 2010 WL 3069934 at *4-5 (E.D. Cal. 2010).

An example may help in understanding the difference between a facial and a factual challenge. Suppose a plaintiff alleged Article III standing on the basis that her property taxes are likely to rise as a result of defendant's action. If the defendant challenged plaintiff's standing on the basis that this is a mere generalized injury insufficient to confer standing, that would be a facial challenge. The Court would presume that defendant's actions would result in increased property taxes and proceed to determine whether this afforded standing. In contrast, if defendant challenged plaintiff's standing on the basis that she did not actually own the property in question, the court, in its discretion, might allow additional evidence, and even discovery, to determine whether plaintiff's ownership allegation was true.

Note also that where the factual issue both establishes jurisdiction and determines the merits of the case, a special rule applies. In that circumstance, the case should not be dismissed on Rule 12(b)(1) grounds. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039-40 (9th Cir. 2004) (whether grass burning constituted illegal disposal of solid waste went to both the court's jurisdiction and the merits of the RCRA claim).

Thus, in defending a standing challenge, under Rule 12(b)(1), a plaintiff would seek, if possible, to characterize the challenge as facial, in order to limit extrinsic evidence and require the court to accept the plaintiff's factual allegations as true. If the defendant's challenge were based solely on prudential standing, the plaintiff might contend that the motion should be treated as a Rule 12(b)(6) motion, in which case the factual allegations also would be accepted as true. While a court may convert a Rule 12(b)(6) motion to a Rule 56 motion (pursuant to Rule 12(d)), this ordinarily happens only when matters outside the pleadings are presented (typically in the form of affidavits attached to the motion to dismiss). See discussion in section 18.E(1)(a)(x) at page 218 regarding the differing treatment of factual matters in standing challenges brought under Rule 12(b) versus Rule 56.

M. Declaratory actions and the rule of "exclusive" review under LLUPA.

Note: The reader should also see the discussion of exceptions to the exhaustion requirement in section 24.L(4) beginning on page 373.[366]

[366] The authors, by the way, find it confusing to discuss the permissibility of collateral attack under the rubric of exhaustion. Both federal and Idaho courts, however, employ the term "exhaustion" in discussing not only the obligation to exhaust administrative remedies, but also judicial remedies. Thus, they sometimes will speak of failure to exhaust when a

(1) The general rule is that collateral attacks are not allowed where judicial review is available under LLUPA.

A separate statute (not part of LLUPA or IAPA) authorizes actions for declaratory judgment.[367] Uniform Declaratory Judgment Act, Idaho Code §§ 10-1201 to 10-1217. See also Idaho R. Civ. P. 57 (declaratory judgments). (Note that this act does not confer standing. See discussion in 18.I at page 234.)

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collateral attack (*e.g.*, via declaratory judgment action) is initiated in lieu of a judicial review of a completed administrative action.

For instance, in *McCuskey v. Canyon Cnty.* ("*McCuskey I*"), 123 Idaho 657, 661, 851 P.2d 953, 957 (1993), Justice Bistline described the failure "to appeal certain adverse zoning decisions" under LLUPA in the context of the law of exhaustion. The Court did so again in *Park v. Banbury*, 143 Idaho 576, 149 P.3d 851 (2006). That case involved parties who, having missed the deadline for a judicial review, launched a collateral attack on a decision of the county commission sitting as a board of equalization. Apparently, the court considers the petition for judicial review itself one of the administrative remedies that must (in some cases) be exhausted. Indeed, the court said as much in *Blanton v. Canyon Cnty.*, 144, 148 Idaho 718, 170 P.3d 383, 387 (2007) ("We held [in *Park*] that their action must be dismissed for failure to exhaust their administrative remedy of direct appeal to the district court."). Likewise, *Monroe v. Pape*, 365 U.S. 167 (1961), and its progeny dealing with the non-applicability of the exhaustion requirement to § 1983 actions uses the term "exhaustion" to describe state judicial remedies, not just administrative remedies.

[367] The IAPA also contains two authorizations for administrative "declaratory rulings" by the agency. Idaho Code § 67-5232 (with respect to the applicability of statutes and rules); Idaho Code § 67-5255 (with respect to the applicability of orders).

Declaratory rulings are final agency action subject to judicial review. Idaho Code §§ 67-5232(3) and 67-5255(3). Accordingly, the rulings are *res judicata* as to the issues addressed and are binding on the parties to the proceeding. However, as to non-parties, they are precedential only (similar to the effect of other contested cases). Declaratory rulings "do not have the force and effect of law on the general public." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner,* 30 Idaho L. Rev. 273, 285 n.52 (1993).

In addition to its provisions for declaratory rulings (by agencies), the IAPA contains its own authorization for judicial declaratory relief actions seeking a determination as to the "validity or applicability of a rule." Idaho Code § 67-5278. Of course, planning and zoning decisions are not "rules" and are not issued by "agencies." It is not necessary to explore whether the ambiguous judicial review provisions of LLUPA (Idaho Code §§ 67-6517(4) and 67-6521(1)(d)) incorporate the declaratory action authority in the IAPA and make it applicable municipal land use decisions. The availability of the stand-alone authority for declaratory actions (Idaho Code §§ 10-1201 to 10-1217) moots the question. A terse *per curium* decision in *Shobe v. Bd. Of Comm'rs of Ada Cnty., Idaho,* 126 Idaho 654, 655, 889 P.2d 88, 89 (1995) states: "Moreover, we find no procedural mechanism in either the indigency statutes or the Administrative Procedures Act which permits the Commissioners to issue a declaratory ruling on a legal issue." As noted, there are provisions in the IAPA authorizing declaratory rulings. It would have been helpful if the Court had noted this and then explained that the IAPA does not apply to counties.

Idaho's statutory provisions on declaratory rulings have counterparts in the federal APA, 5 U.S.C. § 554(e), as well as in most states. For example, Utah's statute (which uses the terminology "declaratory orders") is considerably more comprehensive. Utah Code § 63G-4-503.

Despite the existence of the Uniform Declaratory Judgment Act, the judicial review provisions of LLUPA and IAPA are viewed as the exclusive means of review of quasi-judicial land use decisions (in the absence of special circumstances). Thus, declaratory actions and special writs[368] are not ordinarily available to parties disappointed by land use decisions.

One might ask, by the way, why anyone would want to do an end run around LLUPA. Those who bring independent actions typically do so for one of the following reasons: (1) they missed the 28-day deadline for filing a LLUPA action, (2) broader discovery is available outside of LLUPA, or (3) they seek damages (which are not available under LLUPA) or other specialized claims such as takings or § 1983.

In *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984) (Bistline, J.), Mr. Bone filed an application to re-zone his property to allow commercial use, noting that the land use map designated the area as commercial. The city denied the application, finding that commercial use would be incompatible with surrounding uses and that Lewiston already had an over-abundance of commercial properties. Rather than appeal the denial under LLUPA, Mr. Bone filed a civil action seeking declaratory relief and a writ of mandamus. (The decision does not indicate that Mr. Bone missed the deadline for judicial review. Indeed, it suggests that he did not, because ultimately the matter was remanded for further proceedings thus allowing the plaintiff to pursue the matter via judicial review.)

The Court admonished the plaintiff for trying to "bypass" the IAPA review standards, declaring that LLUPA "is the exclusive source of appeal for adverse zoning actions." *Bone*, 107 Idaho at 848, 693 P.2d at 1050. The Court explained:

> We find § 67-5215(b-g) [the former judicial review provisions of IAPA incorporated by LLUPA] to be a complete, detailed, and exhaustive remedy upon which an aggrieved party can appeal an adverse zoning decision. We also find that the legislature's intent in outlining the scope of review and the bases upon which a court may reverse a governing body's zoning decision to be clear. We find no evidence that the legislature intended other

[368] Noted commentators Michael Gilmore and Prof. Dale Goble have stated: "The APA explicitly authorizes two forms of review: a petition for review and a declaratory judgment. The Act is not intended to preclude other forms of review such as common law prerogative writs of certiorari, mandamus, and prohibition." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 351 (1993) (footnotes omitted). That may be true for review of other agency actions. However, as noted below, this is not the case for challenges to quasi-judicial actions authorized under LLUPA. Generally speaking, if judicial review is authorized under LLUPA, that is the exclusive remedy. Other forms of review are available only to fill in the gap when LLUPA does not provide judicial review.

> avenues of appeal to be available or that bases for reversal or the scope of review should be broader than that found in § 67-5215(b-g). Thus, we hold that § 67-5215(b-g) is the exclusive source of appeal for adverse zoning decisions. To hold otherwise would render the mandate of § 67-5215(b-g) meaningless, for it would allow an applicant to bypass § 67-5215(b-g) by seeking different avenues of appeal with different levels of judicial scrutiny.

Bone, 107 Idaho at 847-48, 693 P.2d at 1049-50.

Bone did not directly address the exceptions allowing collateral attack of a zoning decision. This is probably because the Court analyzed the matter mechanically under the prior IAPA, rather than as a common law exhaustion case. Nevertheless, the Court recognized implicitly the exception for a challenge to the validity of a statute. Mr. Bone had argued that he was not appealing the adverse rezone, but was bringing an independent declaratory judgment action seeking an interpretation of the statute. The Court disagreed, declaring: "Such an argument exalts form over substance. The fact is that Mr. Bone applied for a rezoning." *Bone*, 107 Idaho at 849, 693 P.2d at 1051. The Court concluded that the essence of his case is "appealing the City's decision." *Id.* Despite this ruling, the Court went on to reach the merits of the case, offering guidance on the nature and role of comprehensive plans in zoning decisions and remanding the matter for further proceedings.

The Court reached same result in *Curtis v. City of Ketchum*, 111 Idaho 27, 720 P.2d 210 (1986) (Bakes, J.). There a subdivision applicant missed the deadline for filing a LLUPA appeal and instead brought an inverse condemnation action against the city.[369] Citing *Bone*, the Court declared:

> Appellant's arguments are nothing more than a challenge of the City's quasi-judicial action denying his subdivision. As such, the express provisions of I.C. §§

[369] The case is procedurally complicated. The lawsuit was filed within the deadline (60 days at the time) for a LLUPA appeal, challenging denial of a subdivision application issued on November 6, 1978. The case was filed by way of complaint seeking damages and writ of mandate, rather than petition for judicial review, but that seems not to have been an issue for either the trial court or the appellate court, both of which treated it as a judicial review. See, *e.g.*, *Curtis*, 111 Idaho at 32 n.10, 720 P.2d at 215 n.10. The "heart of appellant's case," however, dealt with a subsequent subdivision application that was denied in 1982, which was not challenged within 60 days. *Id.* It was this subsequent challenge which the court rejected based on failure to seek timely judicial review under LLUPA. That application was denied on the basis of a new zoning ordinance (adopted while the litigation was pending, but before the 1982 subdivision application) prohibiting construction on slopes exceeding 25 percent. The plaintiff alleged this constituted an inverse condemnation of his property.

> 67–6519, -6521(d), limit appellant's remedy to seeking judicial review of the city council's action pursuant to I.C. § 67–5215(b)-(g). Both I.C. §§ 67–6519 and 67–6521(d) require that such review be sought within 60 days [now 28 days] of the city council's action. In *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984), we held that I.C. § 67–5215(b)-(g) provided parties aggrieved by a zoning commission or city council's decision relative to zoning issues with a "complete, detailed, and exhaustive remedy . . . ." *Bone v. City of Lewiston*, 107 Idaho at 847, 693 P.2d at 1049.

Curtis, 111 Idaho at 32-33, 720 P.2d at 215-216 (ellipses original). As in *Bone*, the *Curtis* Court approached the matter as one of statutory construction, finding that the Legislature intended that LLUPA review would be the exclusive means of challenging the merits of a quasi-judicial action. The *Curtis* court noted that constitutional questions (such as inverse condemnation) could be raised in a LLUPA appeal, and therefore must be:

> Indeed, one of the express bases upon which review may be had pursuant to I.C. § 67–5215 is that the governing body's actions (e.g., the city council's decision) are "in violation of constitutional . . . provisions." I.C. § 67–5215(g)(1). Again, as stated in Bone: "We find no evidence that the legislature intended other avenues of appeal to be available . . . . [Therefore,] we hold that § 67–5215(b)-(g) is the exclusive source of appeal for adverse zoning decisions." *Bone v. City of Lewiston*, 107 Idaho at 847, 848, 693 P.2d at 1049, 1050.

Curtis, 111 Idaho at 33, 720 P.2d at 216.

The Court's unwillingness to allow end-runs around LLUPA review is reinforced by the decision in *Regan v. Kootenai Cnty.*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004) (Schroeder, J.). This case dealt primarily with exhaustion of administrative remedies, but also touched on failure to utilize judicial review under LLUPA.

In *Regan*, the plaintiffs constructed a private airstrip on their property, in violation of the zoning ordinance. Shortly thereafter, the Kootenai County Planning and Zoning Department sent them a letter informing them that the airstrip was not a permitted use. The letter set out three options, one of which was an administrative appeal of the Planning Director's conclusion, pursuant to the County's zoning ordinance. That, in turn, would have been reviewable under LLUPA (under then-existing law) as a quasi-judicial action. Instead, the Regans immediately filed suit

seeking declaratory relief. The trial court ruled on the merits in favor of the county and issued an order prohibiting the Regans from using the airstrip.

On appeal, the Idaho Supreme Court raised the issue of exhaustion of administrative remedies *sua sponte*. *Regan*, 140 Idaho at 723, 100 P.3d 617. It then ruled that it lacked jurisdiction to hear the matter.

Though the opinion focused on exhaustion of administrative remedies and the exceptions thereto (which it found not to be applicable), it also drew on and reinforced the teaching of *Bone*.

> In *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984), this Court concluded that Bone had improperly bypassed the exclusive source of appeal for adverse zoning decisions by seeking a declaratory judgment and writ of mandamus. Similarly, the Regans have attempted to bypass the administrative process for reviewing the Planning Director's interpretation of the Kootenai County zoning ordinance. While the Regans' complaint for declaratory relief sought an interpretation of the zoning ordinance rather than judicial review of the Planning Director's interpretation, such a distinction "exalts form over substance." See *Bone*, 107 Idaho at 849, 693 P.2d at 1051.

Regan, 140 Idaho at 725, 100 P.3d at 619. Thus, the Court appears to be saying that the Regans should not only have exhausted their administrative remedies but their judicial remedies under LLUPA.

The exclusivity of judicial review is not unique to LLUPA. In *Cobbley v. City of Challis* ("*Cobbley II*"), 143 Idaho 130, 133-34, 139 P.3d 732, 735-36 (2006) (J. Jones, J.), the Court held that a petition for judicial review pursuant to Idaho Code § 40-208 (the public road statute) is the exclusive means to challenge a county's decision concerning the validation of a road. Citing *Bone*, the Court concluded that a properly filed petition for judicial review is the sole means of challenging a road validation decision.[370]

[370] In *Cobbley II*, the Court was called upon to untangle a procedural mess created by *pro se* plaintiffs in a road case. The Cobbleys had sued the City of Challis contending that the City owned and was required to maintain a road outside of the City in front of their home. Meanwhile, the County undertook validation proceedings on the road, in which the Cobbleys participated. In the validation proceeding, the County concluded that the County, not the City, owned the road. The Cobbleys failed to properly appeal the validation decision. Instead, they mistakenly filed a pleading in their ongoing lawsuit with the City challenging the County's decision. It was in this context that

In *Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 300 P.3d 18 (2013) (J. Jones, J.), the Idaho Supreme Court ruled that failure to seek judicial review bars a collateral attack on a permit condition mandating payment of fees that are alleged to be unconstitutional taxes.

> As the County points out, Buckskin failed to seek judicial review of the requirement in its CUP that the CCA [Capital Contribution Agreement] received the County Board's approval. If Buckskin truly was aggrieved by this requirement, it had the ability to seek judicial review. By failing to do so, it cannot now complain. Buckskin states that the CCA and RDA [Road Development Agreement] are not "permits" and therefore were not reviewable under LLUPA. Indeed, the agreements are not permits but voluntary agreements entered into by the parties. However, the requirement that the CCA receive Board approval is a condition attached to the CUP and is a matter that could have been challenged on judicial review. It is obvious that Buckskin made no such challenge and therefore did not exhaust its administrative remedies.

Buckskin, 154 Idaho at 493, 300 P.3d at 25.

Buckskin was the first Idaho case to apply this jurisdictional deadline in the context of impact fees imposed on a conditional use permit, but courts in other jurisdictions have done so before.[371] In *Sold, Inc. v. Town of Gorham*, 868 A.2d 172 (Maine 2005), the Supreme Judicial Court of Maine considered a declaratory judgment action brought by a group of developers who had paid impact fees under an allegedly illegal ordinance (alleging an unconstitutional taking among other things). The Court held that the action was barred by the plaintiffs' failure to challenge the city's approval of their subdivisions, which included the payment of the impact fees as a condition, within 30 days as provided under state law. "When the time to file an appeal expired, the conditional approvals, including the impact fee requirements, became final, and were not subject to challenge." *Sold Inc.* at 176 (citation omitted).

Similarly, in *James v. Cnty. of Kitsap*, 115 P.3d 286 (Wash. 2005), the Washington Supreme Court, addressed claims from developers who sought refunds

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Court ruled that a properly filed petition for judicial review is "the exclusive means by which a validation decision can be challenged." *Cobbley II*, 143 Idaho at 133, 139 P.3d at 735.

[371] The argument also was presented as a defense by the City of McCall in *Hehr v. City of McCall*, 155 Idaho 92, 305 P.3d 536 (2013) and *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013), but the Idaho Supreme Court decided those cases in the city's favor on other grounds never reaching the issue of the defendants' failure to seek judicial review.

of impact fees paid during the time that the county's ordinances were not in compliance with state law. (Unlike *Sold*, this case did not include a takings claim.) In *James*, the county appealed from a summary judgment that awarded the developers more than three million dollars in refunds arguing, inter alia, that the developers' claims were barred by their failure to challenge the fees within 21 days of when the permits were issued, as required under Washington's Land Use Petition Act ("LUPA"). The *James* Court agreed with the county. "[W]e find that the imposition of impact fees as a condition on the issuance of a building permit is a land use decision and is not reviewable unless a party timely challenges that decision within 21 days of its issuance." *James* at 292. The Court rejected the developers' argument that the superior court had original jurisdiction to hear their claims:

> The Developers here were provided, by statute, with several avenues to challenge the legality of the impact fees imposed by the County and comply with the procedural requirements under chapter 82.02 RCW and LUPA. . . . However, rather than complying with either of these procedures provided by statute, the Developers waited almost three years before challenging the legality of the impact fees imposed by the County. The Developers have not complied with the procedures provided under LUPA and RCW 82.02.070(4) and are barred under LUPA from challenging the legality of the fees imposed.

James at 293-94. The *James* court went on to describe the public policy considerations that supported limiting challenges to land use decisions to the procedures available under the statute.

> As we stated in [*Chelan Cnty. v.*] *Nykreim*, this court has long recognized the strong public policy evidenced in LUPA, supporting administrative finality in land use decisions. 146 Wash.2d at 931–32, 52 P.3d 1. The purpose and policy of the law in establishing definite time limits is to allow property owners to proceed with assurance in developing their property. Additionally, and particularly with respect to impact fees, the purpose and policy of chapter 82.02 RCW in correlation with the procedural requirements of LUPA ensure that local jurisdictions have timely notice of potential impact fee challenges. Without notice of these challenges, local jurisdictions would be less able to plan and fund construction of necessary public facilities. Absent enforcement of the requirements under chapter 82.02

> RCW and LUPA, local jurisdictions would alternatively be faced with delaying necessary capacity improvements until the three-year statute of limitations for challenging impact fees had run.

James at 294.

(2) Exception: Challenges to the validity of the ordinance

Declaratory judgment actions may also be employed to challenge the validity of the underlying zoning ordinance, even in a quasi-judicial setting. Early cases, dating at least to 1953, established this principle in the context of challenges to property tax assessments.[372] More recently, the Court has addressed the exception to the exhaustion requirement in the context of land use decisions.

In *Jerome Cnty. v. Holloway*, 118 Idaho 681, 799 P.2d 969 (1990) (McDevitt J.), a dairy operator applied for a special use permit to operate a dairy. The permit was issued by the planning and zoning commission (following an earlier appeal by the neighbor and remand) with a restriction prohibiting placement of the dairy within 1,000 feet of other property owners based on an ordinance amended two years earlier. This time the dairy operator appealed to the County, contending that the ordinance imposing the 1,000 foot rule was void because it was adopted without proper notice. Rather than act on the appeal, the county filed a civil action seeking a declaratory order respecting the validity of the ordinance amendment. The district court invalidated the amended ordinance and went on to rule that the prior ordinance (which was applicable to the dairy operator) does not require the 1,000 foot setback and should be issued.

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[372] In *Security Abstract & Title Co. v. Leonardson*, 74 Idaho 528, 264 P.2d 1027 (1953), the court allowed a collateral attack against the assessment of property taxes by the Ada County tax assessor. Ada County insisted that the case should be dismissed because the taxpayer had not exhausted administrative remedies, but the court responded: "If the respondent assessor had no authority under the conditions presented and complained of, to make an ad valorem assessment against appellant's property, then the tax is void and can be challenged in the manner here done." *Security Abstract* at 531, 264 P.2d at 1028-29.

In *V-1 Oil Co. v. Cnty. of Bannock*, 97 Idaho 807, 810, 554 P.2d 1304, 1307 (1976), a taxpayer sought a declaratory judgment that the county's tax assessment was excessive. The Court dismissed the suit, explaining: "Actions for declaratory judgment are not intended as a substitute for a statutory procedure and such administrative remedies must be exhausted." That is the general rule. But the court also took pains to explain why the general rule applied and the exception did not: "Those allegations simply allege excessive payments on appellant's personal property. There is no contention that the assessor lacked authority to assess the property in some amount and we have repeatedly held such questions must be pursued in the statutory administrative process designed for that purpose prior to seeking relief in the district court by way of a declaratory judgment or refund." *V-1 Oil* 97 Idaho at 809, 554 P.2d at 1306 (emphasis supplied).

The Idaho Supreme Court upheld the challenge to the ordinance, but held that it was beyond the Court's jurisdiction to rule on the permit itself (which was still pending). "While the district court had jurisdiction to issue its declaratory judgment regarding the validity of the 1985 amendment to the zoning ordinance, '[i]t is the county through its planning and zoning commission and the county commission that should make the decision whether a special use permit should be issued. Only after the exhaustion of remedies provided under [LLUPA] and under local ordinances may an unsuccessful applicant or an affected person seek judicial review.'" *Holloway*, 118 Idaho at 685, 799 P.2d at 973 (quoting *Palmer v. Bd. of Cnty. Comm'rs*, 117 Idaho 562, 565, 790 P.2d 343, 346 (1990).

The holding in *Holloway* was reiterated in *Foster v. City of St. Anthony*, 122 Idaho 883, 887-88, 841 P.2d 413, 417-18 (1992). The *Foster* case involved consolidated challenges to actions by the city in leasing a city-owned hospital to the State of Idaho for use as a correctional facility. Some of the parties, referred to collectively as Zundel, brought a declaratory judgment action and request for injunctive relief challenging the city's comprehensive plan and zoning ordinance. Zundel had not been a party to an earlier special use permit proceeding and had not appealed from it. The city contended that Zundel therefore had failed to exhaust his administrative remedies. The Idaho Supreme Court disagreed, explaining that "the district court has jurisdiction to entertain a declaratory judgment action challenging the validity of the enactment of amendments to zoning ordinances, even though the party challenging the validity has not exhausted administrative remedies." *Foster*, 122 Idaho at 887-88, 841 P.2d at 417-18.

In *McCuskey v. Canyon Cnty.* ("*McCuskey I*"), 123 Idaho 657, 660, 851 P.2d 953, 956 (1993) (Bistline, J.), the Idaho Supreme Court drew heavily on the *Holloway* case in a decision that reinforced the principle that a challenge to the validity of the zoning ordinance may be pursued by a separate civil action.

McCuskey dealt with a downzone of property. When the landowner discovered that the county had rezoned land including his property some years earlier without providing notice to him, he filed a "petition for clarification of zoning status." The county shortly thereafter issued a stop work order, saying that its earlier issued building permit for a Circle K had been issued in error. In response, the landowner withdrew his petition to clarify and filed a civil action seeking declaratory judgment and writ of mandate, based on the fact that the downzone ordinance (which was adopted in 1979) was void because McCuskey had received no notice (as required by LLUPA, Idaho Code § 67-6511(b)). The Court of Appeals, citing *Bone v. City of Lewiston,* 107 Idaho 844, 847, 693 P.2d 1046, 1049 (1984), ruled that LLUPA was the exclusive means of review available to McCuskey.[373] The Idaho

[373] The Court of Appeals raised this issue *sua sponte*.

Supreme Court reversed, distinguishing *Bone*, saying that the case was more like *Holloway*:

> In this case, McCuskey is challenging the *enactment* of the 1975 comprehensive plan and the 1979 zoning ordinance. Thus, he is not arguing that the authorities made the wrong zoning decision, but rather he challenges the validity of the zoning ordinance.

McCuskey I, 123 Idaho at 660, 851 P.2d at 956 (emphasis original).

In so ruling, the Court relied on *Holloway* for the proposition that challenges to the validity of an ordinance are appropriate in a civil action, but "appeals involving the issuance of a particular permit should be reviewed under the procedures established by the Local Planning Act." *McCuskey I*, 123 Idaho at 660, 851 P.2d at 956 (citing *Holloway*, 118 Idaho at 685, 799 P.2d at 973).

The *McCuskey I* Court went on to quote from *Burt*:

> While we hold that a legislative zoning decision is not subject to direct judicial review, it nonetheless may be scrutinized by means of collateral actions such as declaratory actions.

McCuskey I, 123 Idaho at 660, 851 P.2d at 956 (quoting *Burt v. City of Idaho Falls*, 105 Idaho 65, 66 n.2, 665 P.2d 1075, 1076 n.2 (1983)).

This quotation suggests that the rule is not so much an exception to the principle of exclusive review under LLUPA, but that collateral actions are limited to those situations where review is not available under LLUPA. Recall that, at the time, the availability of review under LLUPA turned on whether the challenged decision was legislative or quasi-judicial. The *McCuskey I* Court did not explore this further. In any event, that principle would not seem to apply in *McCuskey I* because that case involved a quasi-judicial challenge (a building permit and a re-zone). Thus, notwithstanding the quotation from *Burt*, the *McCuskey I* case appears to set out an exception to the requirement for exclusive review under LLUPA where the nature of the challenge is to the ordinance itself. [374]

[374] *McCuskey I* was followed by *McCuskey v. Canyon Cnty. Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 218, 912 P.2d 100, 105 (1996) (Trout, J.). In *McCuskey II* the Idaho Supreme Court threw out a temporary taking claim based on the invalidation of the ordinance in *McCuskey I*. That case was disposed of under the four-year statute of limitations. The issue of exclusive review under LLUPA did not arise, because the court had ruled in *McCuskey I* that the exception applied. Instead, the court noted that the inverse condemnation claim could have been raised in *McCuskey I*, and, in any event, must have been raised within four years of the stop work order.

As these cases make clear, if the action is properly framed as one for declaratory relief challenging the validity of ordinance, then it is not necessary to exhaust administrative remedies or to pursue judicial review. As the Court said in *McCuskey I*, 123 Idaho at 661, 851 P.2d at 957, "Accordingly, there are no administrative procedures to exhaust." *Accord*, *Foster v. City of St. Anthony*, 122 Idaho 883, 887-88, 841 P.2d 413, 417-18 (1992) ("the district court has jurisdiction to entertain a declaratory judgment action challenging the validity of the enactment of amendments to zoning ordinances, even though the party challenging the validity has not exhausted administrative remedies."); *Jerome Cnty. v. Holloway*, 118 Idaho 681, 685, 799 P.2d 969, 973 (1990) (McDevitt J.). The subject of exhaustion is treated further in section 24.L(4) at page 373.[375]

In *Park v. Banbury*, 143 Idaho 576, 149 P.3d 851 (2006), landowners in Valley County challenged sharp increases in property assessments as violative of the Article VII, Section 5 of the Idaho Constitution (requiring that "taxes shall be uniform upon the same class of subjects"). The homeowners appealed the assessments to the Board of County Commissioners, which denied the appeal. Rather than appealing that decisions to the Board of Tax Appeals, they filed a complaint in district court. The key question in the case was whether plaintiffs' failure to exhaust their administrative remedies should preclude this action. The Court noted two exceptions to the exhaustion requirement (interests of justice and agency action outside of its authority). *Park*, 143 Idaho at 580, 149 P.3d at 855. The latter, said the Court, could be described as "when the agency is palpably without jurisdiction." *Park*, 143 Idaho at 581, 149 P.3d at 856. The property owners contended that this exception applied because they had raised a constitutional challenge. The Idaho Supreme Court rejected this argument:

> The Property Owners' cross appeal alleges that various methods used by the Assessor violate the constitutional rule requiring that tax assessments be uniform. Even if these claims are interpreted as a constitutional challenge to the validity of a statute or rule, it does not follow that exhaustion is waived. Although facial challenges to the validity of a statute or ordinance need not proceed through administrative channels, as-applied challenges may be required to do so. In *McCuskey*, the Court recognized an exception where the property owner was challenging the validity of the zoning ordinance itself

[375] The conclusion that exhaustion rules do not apply, by the way, tracks the provision in IDAPA stating that declaratory judgment actions challenging agency rules are not subject to exhaustion requirements. Idaho Code § 67-5278(3). The Court noted in *Bone*, 107 Idaho at 848, 693 P.2d at 1050, that this provision (referred to there at its former codification, Idaho Code § 67-5215(a)), is unavailable in a quasi-judicial review setting.

> rather than a decision of the zoning authority. 123 Idaho at 660, 851 P.2d at 956; cf. *Regan*, 140 Idaho at 725, 100 P.3d at 619 (finding an adequate administrative remedy where the party was challenging the interpretation rather than the constitutionality of the statute at issue). In *White* the Court suggested that even a due process claim should be addressed first at the administrative level to avoid courts interfering with the subject matter jurisdiction of another tribunal. 139 Idaho at 400, 80 P.3d at 336 ("Whether or not Monroc's request for a conditional use permit met the requirements of the statute or satisfied due process is an issue which should have been pursued before the county zoning authorities under the procedures of the [zoning] ordinance and [the governing statute], and not by the district court through a collateral attack."). Where the possibility exists that an alleged constitutional violation might be remedied on other than constitutional grounds, requiring exhaustion of administrative remedies is not futile.

Park, 143 Idaho at 581-82, 149 P.3d at 856-57 (emphasis supplied, brackets original).

This limitation on *McCuskey* to situations involving challenges to the ordinance itself is reinforced by cases addressing the question in the context of exhaustion of administrative remedies. These are discussed in section 24.L(5) beginning on page 378.

(3) Challenges involving questions of law applicable to quasi-judicial decisions

Declaratory judgment actions may also be brought to resolve questions of law other than the validity of an ordinance. For example, in *Lane Ranch Partnership v. City of Sun Valley* (*"Lane Ranch I"*), 144 Idaho 584, 166 P.3d 374 (2007), the developer of Lane Ranch brought a lawsuit with multiple counts.[376] One count was for a declaratory judgment repudiating the city's conclusion that a development agreement precluded Lane Ranch from seeking a zoning change. Another count was for judicial review under LLUPA challenging the city's denial of its requested zoning change and subdivision applications. The city did not object to the declaratory judgment action on exhaustion or any other grounds (other than the merits), so the

[376] The Idaho Supreme Court's decision suggests that these were separate lawsuits that were later consolidated. In fact, there was one lawsuit with multiple counts.

question of its appropriateness was not put into question. The Court, however, had no trouble with the two actions, ruling in Lane Ranch's favor on both.

(4) Actions not subject to judicial review may be challenged by way of declaratory judgment or other civil action.

The principle that judicial review must be employed if available does not apply, obviously, if judicial review is not available. Thus, land use decisions that are not reviewable under LLUPA may be challenged in an action for declaratory judgment. Likewise, judicial review is unavailable in the context of a forward-looking relief. (Judicial review addresses past actions of cities and agencies; it does not afford an opportunity to prohibit unlawful actions in the future.) In either situation (judicial review is not authorized or does not fit the circumstances) a declaratory action serves as a sort of gap-filler.

The first post-*Giltner Dairy* case to address annexation was *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 960, 188 P.3d 900, 902 (2008) (Eismann, J.), which applied to a pre-2002 annexation. It found judicial review of annexations is unavailable under the IAPA (because cities are not state agencies).

However, Highlands expressly noted that the absence of judicial review does not bar other forms of relief:

> The dissent also argues that this opinion "will prevent property owners from obtaining judicial review of decisions downzoning their property." It will not. As we recognized in *McCuskey v. Canyon County Commissioners*, 128 Idaho 213, 912 P.2d 100 (1996), such landowners can seek relief in an independent action.

Highlands, 145 Idaho at 962, 188 P.3d at 904. (The dissent also noted that other civil actions challenging annexations have long been allowed. *Highlands*, 145 Idaho at 969, 188 P.3d at 911.)

In *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner II*"), 249 P.3d 358 (Idaho 2011) (Horton, J.) the dairy farmer sought judicial review of the rezone of a neighboring property allowing residential development next to the dairy. The ill-starred farmer had failed before in (in *Giltner I*) in an attempted judicial review based on LLUPA. Rather than bring a declaratory action (as he should have), he pinned his next lawsuit on an obscure judicial review statute, Idaho Code § 31-1506(1), found in the part of the code dealing with county finances. This Court rejected that, too, essentially saying the obscure provision in Title 31 was preempted by the more specific judicial review provision in LLUPA.

More importantly, Justice Jones explained in his concurrence:

> It appears that Giltner jumped on the wrong horse—I.C. § 31-1506—to obtain judicial review under the Administrative Procedure Act and doggedly continued to ride it even after the Legislature amended I.C. § 67-6521 in its 2010 session to reinstate judicial review of zoning decisions. It is unfortunate for Giltner that its appeal arose during the time that judicial review was made unavailable for zoning decisions but, rather than trying to obtain judicial review under a statutory provision that did not really fit, Giltner could have sought relief in a declaratory judgment action.

Giltner II at 361-62 (emphasis added) (citing *Burns Holdings*). In other words, the absence of judicial review (under either LLUPA or section 31-1506(1)) did not prevent Giltner from pursuing a declaratory action.

In *Burns Holdings, LLC v. Madison Cnty. Bd. of Cnty. Comm'rs* ("*Burns Holdings I*"), 147 Idaho 660, 214 P.3d 646 (2009), the majority noted that, when there is no judicial review available, there is still the option of declaratory action. "While we hold that a legislative zoning decision is not subject to direct judicial review, it nonetheless may be scrutinized by means of collateral actions such as declaratory actions." *Burns Holdings I*, 147 Idaho at 664, 214 P.3d at 650 (quoting *Burt v. City of Idaho Falls*, 105 Idaho 65, 66 n.2, 665 P.2d 1075, 1076 n.2 (1983)). This conclusion was reiterated in *Ciszek v. Kootenai Cnty. Bd. of Comm'rs*, 151 Idaho 123, 254 P.3d 24 (2011) (J. Jones, J.) (allowing a rezone to be challenged by declaratory action).[377] By the time *Ciszek* was decided, LLUPA had been amended to allow judicial review of rezones, however this had not occurred at the time the action was filed, so the declaratory action was appropriate at that time.

The Idaho Supreme Court has frequently recognized the availability of collateral attack to challenge legislative actions:

> While we hold that a legislative zoning decision is not subject to direct judicial review, it nonetheless may be scrutinized by means of collateral actions such as declaratory actions.

Burt v. City of Idaho Falls, 105 Idaho 65, 66 n.2, 665 P.2d 1075, 1076 n.2 (1983) (Donaldson, C.J.) (citations omitted); *cf.*, *Bone v. City of Lewiston*, 107 Idaho 844,

[377] In *Ciszek*, the operator of an open pit mine sought and received zoning approval allowing mining on an adjacent parcel. Neighboring property owners challenged the approval contending, among other things, that packaging two zoning requests in a single application violated LLUPA. The Court rejected the neighbors' form over substance argument along with due process and other arguments.

848, 693 P.2d 1046, 1050 (1984) (holding that a decision on a quasi-judicial rezone application may not be challenged by declaratory action), a decision that was implicitly overruled by *Burns Holdings I*, which nevertheless quoted *Burt* and said this rule applies to rezones.

In *Student Loan Fund of Idaho, Inc. v. Payette Cnty.*, 125 Idaho 824, 875 P.2d 236 (Ct. App. 1994), the Court of Appeals recognized that landowners could bring a declaratory judgment action to challenge an unlawful area of city impact designation ("ACI"). "The Fund's action is for declaratory relief. Idaho's courts are authorized to determine by declaratory judgment the validity of contracts and municipal ordinances and the rights and status of persons thereunder. I.C. §§ 10–1201 and 10–1202." *Student Loan Fund*, 125 Idaho at 825, 875 P.2d at 237. However, in this case, the plaintiff failed to plead sufficient facts to establish injury, and was thrown out on standing grounds. (See discussion in section 18 (Standing) beginning on page 196.)

In 2006, the Idaho Supreme Court again reiterated the availability of declaratory relief: "While legislative actions by counties are subject to collateral actions such as declaratory judgments, they cannot be attacked by a petition for judicial review." *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 509, 148 P.3d 1247, 1255 (2006) (Burdick, J.) (finding that the Court had no jurisdiction to consider a challenge to an appeals fee ordinance in the context of a LLUPA judicial review).

In *Scott v. Gooding Cnty.*, 137 Idaho 206, 208, 46 P.3d 23, 25 (2002), the Court rejected a petition for review filed under the IAPA on the grounds that the challenged action (lifting a moratorium and issuing a special use permit for a confined animal feeding operation) was legislative in nature. (This was a pre-*Giltner Dairy* decision.) The entire basis for the Court's decision is that the lawsuit was framed as a petition for judicial review and not as a declaratory action. Thus, by necessary implication, it would have been judicially cognizable had it been filed as a civil action.

Actions for declaratory judgment may be brought to challenge all manner of legislative actions, including initial zoning upon annexation, the adoption and amendment of comprehensive plans, Category A annexations,[378] and moratorium decisions. Parties may also employ declaratory judgment actions to engage in a facial challenge to the validity of the underlying ordinance, at least where the challenges goes to the heart of the agency's authority to act.

Comprehensive plans are rarely challenged in stand-alone lawsuits. More typically, the comprehensive plan is attacked in the context of a judicial appeal of the

[378] Note the special judicial review provision for annexation discussed in section 24.X at page 433.

grant or denial of an application for a zoning, subdivision, or other site-specific application. For example, in *Sprenger, Grubb & Associates v. Hailey* ("*Sprenger Grubb II*"), 133 Idaho 320, 322, 986 P.2d 343, 345 (1999) (Walters, J.), the Court invalidated Hailey's comprehensive plan because it did not contain a land use map. That action, however, was a standard LLUPA appeal of the city's downzoning of the landowner's property.

McCuskey v. Canyon Cnty. ("*McCuskey I*"), 123 Idaho 657, 660, 851 P.2d 953, 956 (1993) (Bistline, J.) dealt with a downzone of property. When the landowner discovered that the county had rezoned land including his property some years earlier without providing notice to him, he filed a "petition for clarification of zoning status." The county shortly thereafter issued a stop work order, saying that its earlier issued building permit for a Circle K had been issued in error. In response, the landowner withdrew his petition to clarify and filed a civil action seeking declaratory judgment and writ of mandate, based on the fact that the downzone ordinance (which was adopted in 1979) was void because McCuskey had received no notice (as required by LLUPA, Idaho Code § 67-6511(b)). The Court of Appeals, citing *Bone v. City of Lewiston,* 107 Idaho 844, 847, 693 P.2d 1046, 1049 (1984), ruled that LLUPA was the exclusive means of review available to McCuskey.[379] The Idaho Supreme Court reversed. In so ruling, the Court went on to quote from another case: "While we hold that a legislative zoning decision is not subject to direct judicial review, it nonetheless may be scrutinized by means of collateral actions such as declaratory actions." *McCuskey I*, 123 Idaho at 660, 851 P.2d at 956 (quoting *Burt v. City of Idaho Falls*, 105 Idaho 65, 66 n.2, 665 P.2d 1075, 1076 n.2 (1983)). This quotation suggests that the rule is not so much an exception to the principle of exclusive review under LLUPA, but that collateral actions are limited to those situations where review is not available under LLUPA. Recall that, at the time, the availability of review under LLUPA turned on whether the challenged decision was legislative or quasi-judicial. The *McCuskey I* Court did not explore this further. In any event, that principle would not seem to apply in *McCuskey I* because that case involved a quasi-judicial challenge (a building permit and a re-zone). Thus, notwithstanding the quotation from *Burt*, the *McCuskey I* case appears to set out an exception to the requirement for exclusive review under LLUPA where the nature of the challenge is to the ordinance itself.

(5) What standard of review applies to an action challenged by declaratory action?

Since the 2010 amendment to LLUPA, initial zoning actions are subject to LLUPA review. Previously, there were not, but could be challenged by way of declaratory action.

[379] The Court of Appeals raised this issue *sua sponte*.

In 1977 the Court dealt with a challenge to the reasonableness of an initial zoning action. The Court recognized that this was a legislative matter (unlike a rezone), and adopted a deferential standard of review:

> This Court has frequently stated, and it is now beyond dispute, that a local legislative body has the right to enact zoning ordinances. However, since the power to zone derives from the police power of the state, Idaho Constitution, art. 12, § 2, the zoning ordinance must bear a reasonable relation to goals the state may properly pursue under its police power. This limitation was made clear in *Cole-Collister* where the Court quoted the following language approvingly: "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."
>
> In making the determination [whether the zoning ordinance can be upheld], however, we note that our review of decisions of zoning authorities is limited. Zoning is essentially a political, rather than a judicial matter, over which the legislative authorities have, generally speaking, complete discretion. Since the local governmental bodies are most familiar with the problems of their particular jurisdictions, their legislative determinations come before us with a strong presumption of validity. Such presumption can only be overcome by a clear showing that the ordinance as applied is confiscatory, arbitrary, unreasonable and capricious. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control and the court may not substitute its judgment for that of the zoning authority. It is not the function of this Court or of the trial courts to sit as super zoning commissions. The burden of proving that the ordinance is invalid rests upon the litigant who attacks the validity of the ordinance.

Dawson Enterprises, Inc. v. Blaine Cnty., 98 Idaho 506, 511-12, 567 P.2d 1257, 1262-63 (1977) (Bistline, J.) (citations omitted) (emphasis supplied).[380]

Although the Court has employed the words "arbitrary, unreasonable and "capricious," it is presumably not referring to the same arbitrary and capricious standard applied in appeals under LLUPA. Indeed, these words date back to cases pre-dating LLUPA review. For example, in *Ready-to-Pour, Inc. v. McCoy*, 95 Idaho 510, 511 P.2d 792 (1973), the Court used this same string of adjectives, but focused on the confiscatory nature of the ordinance—essentially ruling that it was an unauthorized taking of property.

Thus, it is an open question whether the party challenging a zoning ordinance via an action for declaratory judgment will be required to demonstrate that the ordinance bears no "substantial relation to the public health, safety, morals, or general welfare" – a nearly impossible standard. After *Burns Holdings I* and *Arnold II*, we can expect to see more litigation by means of actions for declaratory action. Perhaps the courts will allow the development of a more robust standard of review – focusing on the words "arbitrary, unreasonable and capricious" also employed by *Dawson* – that comes closer to the sort of review available under the IAPA.

Dawson, by the way, was an initial zoning case – that is, a legislative action. Would the same standard apply to a rezone challenge – which is a quasi-judicial action? *Burns Holdings I* implies that the answer is yes. In *Burns Holdings I*, the Court quoted from *Burt* (an initial zone challenge) in explaining that a litigant challenging a rezone should follow the same path. "While we hold that a legislative zoning decision is not subject to direct judicial review, it nonetheless may be scrutinized by means of collateral actions such as declaratory actions." *Burns Holdings I*, 147 Idaho at 664, 214 P.3d at 650 (quoting *Burt v. City of Idaho Falls*, 105 Idaho 65, 66 n.2, 665 P.2d 1075, 1076 n.2 (1983)).

N. Stays and the effective date of action

LLUPA does not address the question of when the action of a planning and zoning entity becomes final. However, as discussed above, LLUPA incorporates the judicial review provisions of the IAPA for review of quasi-judicial matters such as actions on special use permits. Presumably, this includes Idaho Code § 67-5274.[381]

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[380] In *Burt v. City of Idaho Falls*, 105 Idaho 65, 66 n.2, 665 P.2d 1075, 1076 n.2 (1983) (Donaldson, J), the court cited *Dawson* with approval, noting: "In such instances the decision will not be disturbed absent a clear showing that it is confiscatory, arbitrary, unreasonable or capricious."

[381] LLUPA references and incorporates all of the judicial review provisions of the IAPA. Idaho Code §§ 67-6519(4) and 67-6521(1)(d). LLUPA does not identify particular sections of the IAPA, but refers generally to the judicial review provisions under the IAPA, those being Idaho Code §§ 67-5270 to 67-5279. However, LLUPA does not incorporate other provisions of the IAPA, such

The IAPA provides that final actions are effective at once, unless provided otherwise by local ordinance, order of the governing body, or a reviewing court. "The filing of the petition for review does not itself stay the effectiveness or enforcement of the agency action. The agency may grant, or the reviewing court may order, a stay upon appropriate terms." Idaho Code § 67-5274. This is reiterated in the nearly identical Idaho R. Civ. P. 84(m), providing that stays are not automatic in the judicial review actions.

Land use actions not reviewable under LLUPA (and incorporated provisions of the IAPA) are governed instead by general principles of municipal law. In most instances, such actions would be effective at once (unless otherwise provided by local ordinance or order).

Although the IAPA and Idaho R. Civ. P. 84(m) expressly authorize issuance of a stay, neither articulates any governing standards. No Idaho appellate authority is directly on point.[382] However, it is a settled rule of administrative law that a court should apply the same factors to the analysis of a stay as it would to the consideration of a request for a preliminary injunction. To wit:

> Factors to be considered by the court on motion for stay.
>
> Four criteria are relevant in considering whether to issue a stay of an order of a district court or of an administrative agency pending appeal:
>
> - the likelihood of success on the merits
> - irreparable injury if a stay is denied
> - substantial injury to the party opposing a stay if one is issued
> - the public interest
>
> These four considerations are factors to be balanced, not prerequisites to be met, and in order for the reviewing court to adequately balance these factors, the party seeking a stay must address each of the factors regardless of its strength and provide the court with facts and affidavits supporting these assertions. In determining whether a stay on agency action is warranted, no one factor is determinative, and the court should balance a movant's showings regarding the four factors on a sliding scale. Irreparable harm to warrant a stay of agency action is a high standard wherein the alleged injury must be certain and great, and mere injuries, however substantial,

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as the provision authorizing motions for reconsideration (Idaho Code §§ 67-5246(4) and (5). *Arthur v. Shoshone Cnty.*, 133 Idaho 854, 858-59, 993 P.2d 617, 621-22 (Ct. App. 2000) (Lansing, J.).

[382] Case law under Idaho Appellate Rule 13 (stay of proceedings upon appeal) may provide a useful general analogy. However, in contrast to the IAPA, the appellate rule provides an automatic stay of 14 days upon filing of an appeal.

> in terms of money, time, and energy necessarily expended in the absence of a stay are not enough.

2 Am. Jur. 2d *Administrative Law* § 530 (2018) (footnotes omitted). See also, 5 Am. Jur. 2d *Appellate Review* § 470 (1995).

O. Other technical issues regarding the 28-day rule

As noted elsewhere, LLUPA contains two (seemingly redundant) authorizations for judicial review. Idaho Code §§ 67-6519(4) and 67-6521(1)(d).[383] Both require the petition for review to be filed within 28 days "after all remedies have been exhausted under local ordinances."[384] (The deadline was 60 days until LLUPA was amended in 1993 as part of a major revamping of the IDAPA. 1993 Idaho Sess. Laws, ch. 216 §§ 111, 113.)

In *White v. Bannock Cnty. Comm'rs,* 139 Idaho 396, 399-400, 80 P.3d 332, 335-36 (2003), the Court held that a decision (in this case, the decision of the lower planning and zoning entity) becomes final for purposes of review when the agency adopts findings and conclusions, not on the day it reached the decision. Until the written findings and conclusions are issued, the time for filing an appeal is tolled. *Id*. This is an important clarification that makes the time for filing appeals more certain. It may be described as dictum, however, because the case dealt with an improperly filed complaint that was dismissed for failure to exhaust administrative remedies.

The dictum, however, was confirmed in 2005. "It has been previously held that the date on which the decision is made corresponds to the date of the written findings, conclusions and order, which starts the clock for filing an appeal." *Fischer v. City of Ketchum*, 141 Idaho 349, 355, 109 P.3d 1091, 1097 (2005) (citing *White v. Bannock Cnty.*). Like *White*, *Fischer* dealt with the timing of the appeal from the planning and zoning commission to the decision-making body. Presumably, however, the same principle would apply to the timing of the decision by the city or county.

In *In re Quesnell Dairy*, 143 Idaho 691, 694, 152 P.3d 562, 565 (2007), the Idaho Supreme Court held while a city or county has no authority to extend the 28-day appeal period, it does have "the authority to determine when a decision is final and appealable." In this case, the county's statement in its findings and conclusions that the appeal period ran to July 29, 2002 was dispositive, despite the fact that this was 30 days beyond the date appearing on the face of the findings and conclusions.

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

[384] In Idaho Code § 67-6519(4) the word "ordinance" is singular; in Idaho Code § 67-67-6521(1)(d) it is plural.

There was some ambiguity as to whether the date on the findings and conclusions was correct, and the public was entitled to conclude that they did not become final and effective until the following Monday. Although the Court does not say so in so many words, it is apparent that the starting date is the date that the findings and conclusions become final, not the date of the hearing at which the decision was made.

The time for filing a judicial appeal is stayed "during the pendency of the petitioner's timely attempts to exhaust administrative remedies, if the attempts are clearly not frivolous or repetitious." Idaho Code § 67-5273(3). Of course, it is important not to let the 28-day judicial appeal period run while pursuing administrative appeals that might be considered untimely, frivolous, or repetitious. The statute does not offer black-letter tests as to any of these criteria.

Note that the regulatory taking analysis statute contains its own tolling provision. "During the preparation of the taking analysis, any time limitation relevant to the regulatory or administrative actions shall be tolled. Such tolling shall cease when the taking analysis has been provided to the property owner." Idaho Code § 67-8003(4). Presumably this has the effect of tolling the judicial review clock.

One should make certain that the petition for judicial review is properly filed in the proper court. In *Cobbley v. City of Challis* ("*Cobbley II*"), 143 Idaho 130, 139 P.3d 732 (2006), litigants seeking to judicial review of a road validation had their case thrown out when they filed their "petition" in the course of a remand of another tort case against the city, rather than as a new lawsuit.

In *Erickson v. Idaho Bd. of Registration of Prof'l Engineers and Professional Land Surveyors*, 146 Idaho 852, 203 P.3d 1251 (2009), the Idaho Supreme Court found that the 28-day deadline in the Idaho Administrative Procedure Act is jurisdictional and that it had no jurisdiction to hear an appeal filed two days late. Since the judicial review was filed under the IAPA, rather than LLUPA, the appeal clock was tolled by a motion for reconsideration. The issue in the case was whether the new 28-day period begins on the day the order resolving the motion for reconsideration is signed or served. The Court ruled that the clock begins when it is signed (and the same is true for the clock that begins running when the earlier final order is issued). Presumably, the same rule (applicable to the original final order – that is, the "findings and conclusions") would apply in the LLUPA context.

P. Tolling of the appeal period during reconsideration

Due to the interaction between reconsideration and the reasoned statement requirement, this discussion has been moved from the judicial review chapter to the chapter on the public hearing process (section 13.F at page 168).

Q. Cities and counties except from appeal bonding

An appeal of a judgment does not automatically stay execution of the judgment below.[385] Thus, the appealing party must file a motion with the district court seeking to stay execution until the appeal is resolved. Idaho Code § 12-202. Ordinarily, the party seeking the stay may be required to post a supersedeas bond (aka appeal bond), thus providing assurance that the respondent will be fully compensated in the event the appeal fails. Idaho R. Civ. P. 62; Idaho R. App. P. 13(b)(8), (14) & (15); Fed. R. Civ. P. 62(d), Fed. R. App. P. 8(b).

An important exception to the bonding requirement is found in Idaho Code § 12-615, which provides that cities, counties, and the state are except from bonding requirements. This exception is reflected in Idaho R. Civ. P. 62(e).

A similar rule exempts the United States from appeal bonding requirements in federal court. Fed. R. Civ. P. 62(e).

R. Relief from error: vacation or reversal, followed by remand

In a judicial review under LLUPA, if the party contesting the city or county's decision prevails, the relief is ordinarily to remand to the agency for further proceedings:

> In a given situation involving a conditional use permit, if there were a procedural error, or error of law, the commissioners' decision would need to be reversed; thereafter, the case would also need to be remanded to the commissioners to grant or deny the permit <u>because the reviewing court does not grant or deny conditional use permits</u>. Although this is not a case where a reversal was necessary, the district court's decision indicates it properly vacated the commission's decision and remanded the case for further proceedings.

Chambers v. Kootenai Cnty. Bd. of Comm'rs, 125 Idaho 115, 119, 867 P.2d 989, 993 (1994). Thus, while the reviewing court does not have authority to issue a permit itself,[386] it may vacate or even reverse the decision of the city or county and remand with instructions to act in accordance with that action. Depending on the nature of the case, the city or county may then have broad discretion to reconsider the matter,

[385] Idaho R. Civ. P. 62(d) sets out what appears to be a broad, automatic grant of stay. However, it says that the stay is "as provided by the Idaho Appellate Rules." Those rules provide only an automatic 14-day stay. Idaho R. App. P. 13(a).

[386] The authors are not aware of any authority addressing this question, but it might be that under extraordinary circumstances (such as bad faith by the city or county) the court might direct the governmental entity to take a particular action, such as to issue or deny a permit.

or its discretion may be tightly constrained (or even eliminated) by the court's decision.

This is in accord with the prior decision of the Idaho Court of Appeals in *Lowery v. Bd. of Cnty. Comm'rs for Ada Cnty.* (*"Lowery I"*), 115 Idaho 64, 67, 764 P.2d 431, 434 (Ct. App. 1988).[387] In *Lowery I*, the district court reversed a decision of the Ada County Board of County Commissioners to issue a conditional use permit and zoning certificate. The county did not contest the decision on the merits, but insisted that the district court erred in outright denying the permit and certificate rather than remanding to the county for further proceedings consistent with the district court's legal rulings. The Court of Appeals agreed:

> Our review of the full text of the court's decision reveals nothing in support of the Board's speculation that if there were a change in circumstances, or in the ordinance, the county would be precluded from relying upon any part of its record or decision that has not been set aside in this case. Nevertheless, the county is right insofar as it contends that the district court's role was to determine the propriety of the county's motion, but not to displace the county by "denying" the certificate and permit directly. See generally 2 AM.JUR.2d Administrative Law § 765. Therefore, we uphold the court's decision on the merits but we modify the decision to provide that the case is remanded to the county for action consistent with the court's ruling on the question of law presented in the appeal.

Lowery I, 115 Idaho at 67, 764 P.2d at 434.

S. Vesting (aka grandfathering): ordinances and plans in effect at time of application govern.

Changes in ordinances while an application is pending may not be applied to the pending application. "Although a majority of courts from other jurisdictions have adopted that line of reasoning and held that a change in the law following an application for a building permit will be applied to the application, Idaho law is well

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[387] *Lowery v. Bd. of Cnty. Comm'rs for Ada Cnty.* (*"Lowery II"*), 117 Idaho 1079, 793 P.2d 1251 (1990) was a separate but related appeal. The trial court awarded attorney fees against both the county and another respondent, the private party who obtained the CUP. Both appealed separately. Those appeals ended up at the Idaho Court of Appeals and, for some reason, were never consolidated. The appeal by the county resulted in *Lowery I* issued by the Court of Appeals. The appeal by the CUP holder resulted in *Lowery II* issued by the Idaho Supreme Court. *Lowery II* dealt only with attorney fees, essentially overturning the ruling in *Lowery I*. See discussion of Idaho Code § 12-121 in Volume II of this Handbook.

established that an applicant's rights are determined by the ordinance in existence at the time of filing an application for the permit." *South Fork Coal. v. Bd. of Comm'rs of Bonneville Cnty. ("South Fork II")*, 117 Idaho 857, 865-86, 792 P.2d 882, 885-86 (1990) (footnote omitted).

"It is well established that an applicant's rights are determined by the ordinance in existence at the time of filing an application for the permit." *Chisholm v. Twin Falls County*, 139 Idaho 131, 134-35, 75 P.3d 185, 1988-89 (2003). "Idaho law is well established that an applicant's rights are determined by the ordinance in existence at the time of filing an application." *Urrutia v. Blaine Cnty.*, 134 Idaho 353, 359, 2 P.3d 738, 744 (2000) (citing *Payette River Property Owners Ass'n v. Bd. of Comm'rs of Valley Co.*, 132 Idaho 551, 555, 976 P.2d 477, 481 (1999)).

The same applies to the comprehensive plan. *Urrutia*, 134 Idaho at 359-60, 2 P.3d at 744-45. This principal is often referred to as "vesting."

The principle was upheld again in *Taylor v. Canyon Cnty. Bd. of Comm'rs* ("*Taylor II*"), 147 Idaho 424, 436, 210 P.3d 532, 544 (2009) (Burdick, J.). Indeed, this case went a step further, holding that even though a comprehensive plan and map were repealed and replaced during the pendency of a rezone application, the county could amend the repealed plan and map, at the request of the applicant, in order to approve the application.

T. Retroactive legislation

(1) Overview

From time to time, legislation modifying (or preserving) property rights has been challenged as unconstitutional retroactive legislation. *E.g., Lummi Indian Nation v. State*, 241 P.3d 1220 (Wash. 2010); *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179 (Ariz. 1999).

The Idaho Constitution contains a provision prohibiting certain types of retroactive legislation. Idaho Const. art. XI, § 12. Idaho courts have read this legislation quite narrowly, however. See *Idaho Attorney General Opinion No. 91-2*, at 7 (Feb. 14, 1991) ("There are a number of cases construing this clause and they suggest that retroactive legislation for the benefit of the public does not violate this section.").

The Idaho law governing retroactive legislation is summarized in a 2016 decision:

> Idaho Code section 73–101 provides, "[n]o part of these compiled laws is retroactive, unless expressly so declared." I.C. § 73–101. In *Guzman v. Piercy*, this

> Court addressed statutory interpretation related to retroactivity as follows:
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> > In general, legislation acts prospectively. *Ben Lomond, Inc. v. City of Idaho Falls*, 92 Idaho 595, 601, 448 P.2d 209, 215 (1968). "Retrospective or retroactive legislation is not favored." *Winans v. Swisher*, 68 Idaho 364, 367, 195 P.2d 357, 359 (1948). As such, "a well-settled and fundamental rule of statutory construction" is to construe statutes to have a prospective rather than retroactive effect. *Id.* "Consonant with this view, I.C. § 73–101 states that '[n]o part of these compiled laws is retroactive, unless expressly so declared.'" *Univ. of Utah Hosp. ex. rel. Harris v. Pence*, 104 Idaho 172, 174, 657 P.2d 469, 471 (1982) (alteration in original) (quoting I.C. § 73–101). "Thus, in Idaho, a statute is not applied retroactively unless there is 'clear legislative intent to that effect.'" *Gailey v. Jerome Cnty.*, 113 Idaho 430, 432, 745 P.2d 1051, 1053 (1987) (quoting *City of Garden City v. City of Boise*, 104 Idaho 512, 515, 660 P.2d 1355, 1358 (1983)).
>
> 155 Idaho 928, 937–38, 318 P.3d 918, 927–28 (2014). Accordingly, statutory amendments are not deemed to be retroactive unless there is an express legislative statement to the contrary. *Id.* (citing *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 614, 747 P.2d 18, 23 (1987)).

State v. Leary, 160 Idaho 349, 353, 372 P.3d 404, 408 (2016) (W. Jones, J.).

A particularly instructive and detailed discussion of the law of retroactivity is found on *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) (Stewart, J.). This seminal decision has been cited over ten thousand times. The Court notes that there is an inherent tension between competing canons, but the tension is resolved in favor of retroactivity if the legislature makes its intent clear:

> It is not uncommon to find "apparent tension" between different canons of statutory construction. . . . [The] federal courts have labored to reconcile two seemingly contradictory statements found in our decisions concerning the effect of intervening changes in the law.

> Each statement is framed as a generally applicable rule for interpreting statutes that do not specify their temporal reach. The first is the rule that "a court is to apply the law in effect at the time it renders its decision," Bradley, 416 U.S., at 711, 94 S.Ct., at 2016. The second is the axiom that "[r]etroactivity is not favored in the law," and its interpretive corollary that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Bowen, 488 U.S., at 208, 109 S.Ct., at 471. . . . We found it unnecessary in Kaiser to resolve that seeming conflict "because under either view, where the congressional intent is clear, it governs," and the prejudgment interest statute at issue in that case evinced "clear congressional intent" that it was "not applicable to judgments entered before its effective date." 494 U.S., at 837–838, 110 S.Ct., at 1577.

Landgraf at 263-64.

"A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf* at 269-70 (citation omitted).

(2) Procedural or remedial legislation is not deemed retroactive.

In *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner II*"), 150 Idaho 559, 249 P.3d 358 (2011) (Horton, J.), the Court rejected a judicial review of a rezone that was improperly premised on Idaho Code § 31-1506 (appeals by counties) and an earlier version of Idaho Code § 67-6521 (LLUPA appeals). *Giltner II* arose when rezones were not subject to judicial review. LLUPA was amended during the course of the litigation making rezones subject to judicial review, but Giltner Dairy failed to argue that the 2010 amendments applied. The concurrence by Justice Jim Jones chastised counsel for its narrow approach to the litigation. The dairy could have obtained judicial relief either by framing the matter as a declaratory action or, after the 2010 amendments, requesting that they be applied retroactively:

> Had Giltner embraced the amended version of I.C. § 67–6521, I believe it would have been appropriate to apply the same to Giltner's appeal, permitting judicial review of the County's decision. Although the Legislature did not include language in the 2010 amendment to make it retroactive (see 2010 Idaho Sess. Laws, ch. 175, § 5), the

> amendment was procedural or remedial in nature and thus could have been applied retroactively. *Bryant v. City of Blackfoot*, 137 Idaho 307, 313, 48 P.3d 636, 642 (2002). "[A] statute is remedial if it does not create, enlarge, diminish or destroy any substantive rights, but merely alters the remedy available for enforcing pre-existing rights." *State ex rel. Wasden v. Daicel Chem. Indus., Ltd.*, 141 Idaho 102, 105, 106 P.3d 428, 431 (2005). This Court noted in Floyd v. Bd. of Comm'rs of Bonneville County:
>
> > Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.
>
> 131 Idaho 234, 238, 953 P.2d 984, 988 (1998) (quoting *State v. Currington*, 108 Idaho 539, 541, 700 P.2d 942, 944 (1985)). This principle applies to amendments as well as the underlying statute. *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 614, 747 P.2d 18, 23 (1987). In this case, the amendment merely reinstated the right of judicial review for zoning decisions, relieving aggrieved parties of the necessity of challenging the decision in a declaratory judgment action. Since the reinstated review mechanism was procedural or remedial in nature, the amended statute could have been applied here, had the Court properly been asked to do so. Failing that request, the Court has correctly disposed of this matter.

Giltner II, 150 Idaho at 563, 249 P.3d at 362.

In *Floyd v. Bd. of Comm'rs of Bonneville Cnty.* ("*Floyd I*") (Silak, J.), 131 Idaho 234, 953 P.2d 984 (1998), which held that procedural rules governing validation proceedings may be applied retroactively. That case involved changing the standard of review in judicial review of road validations from *de novo* to a more deferential standard.

In a footnote to a 2015 decision, the Idaho Supreme Court reached the opposite conclusion. In *Flying "A" Ranch, Inc. v. Cnty. Comm'rs of Fremont Cnty.* ("*Flying A*"), 157 Idaho 937, 940 N.2, 342 P.3d 649, 652 n.2 (2015) (Horton, J.)), the Court held, without explanation, 2013 amendments to standard of review in the very

same section 40-208 do not apply retroactively. It appears that the Court spoke on this issue without benefit of briefing. The only appellate brief in that case that is available on Westlaw does not even mention the 2013 legislation, much less discuss its retroactivity. See further discussion of this case in the *Idaho Road Law Handbook.*

"We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf* at 274.

(3) Retroactive legislation and vested rights

In *Cooper v. Ada Cnty. Comm'rs*, 101 Idaho 407, 412, 614 P.2d 947, 952 (1980) (Donaldson, C.J.), the Idaho Supreme Court held that land use applications (an application for a zone change in this case) must be evaluated on the basis of the law, ordinances, and comprehensive plan in effect at the time of application.

In *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981) (Donaldson, J.), the Court distinguished *Cooper*, finding that a newly enacted "local public interest" statute (enacted during the course of the IDWR administrative proceeding) could be applied to an applicant for a water right permit because an applicant for a permit has not yet acquired a vested property right in the use of water.

Our Supreme Court has explained that only substantive law changes that affect "vested or already existing rights" are deemed retroactive.

> Generally a statute will not be applied retroactively in the absence of clear legislative intent to that effect. I.C. § 73–101. *Johnson v. Stoddard*, 96 Idaho 230, 526 P.2d 835 (1974). However, it also is the rule in Idaho that retroactive legislation is only that which affects vested or already existing rights. *Hidden Springs Trout Ranch, Inc., v. Allred*, 102 Idaho 623, 624, 636 P.2d 745, 746 (1981); *Buckalew v. City of Grangeville*, 100 Idaho 460, 600 P.2d 136 (1979).
>
> Remedial or procedural statutes which do not create, enlarge, diminish or destroy contractual or vested rights are generally held to operate retrospectively. *Ohlinger v. U.S.*, 135 F. Supp. 40 (D.C. Idaho 1955).

City of Garden City v. City of Boise, 104 Idaho 512, 660 P.2d 1355 (1983) (Huntley, J.).

Our Supreme Court has said that it will apply a statute retroactively (if doing so does not raise constitutional problems) where the Legislature "refers to the past as well as to the future":

> "[A] statute should be applied retroactively only if the legislature has clearly expressed that intent or such intent is clearly implied by the language of the statute." *Kent v. Idaho Pub. Utils. Comm'n*, 93 Idaho 618, 621, 469 P.2d 745, 748 (1970). The Legislature does not need to "use the words, 'this statute is to be deemed retroactive,' " however. *Peavy v. McCombs*, 26 Idaho 143, 151, 140 P. 965, 968 (1914).
>
> > [I]t is sufficient if the enacting words are such that the intention to make the law retroactive is clear. In other words, if the language clearly refers to the past as well as to the future, then the intent to make the law retroactive is expressly declared within the meaning of [I.C. § 73–101].
>
> *Id*.

Guzman v. Piercy, 155 Idaho 928, 938, 318 P.3d 918, 928 (2014) (Schroeder, pro tem.) (brackets original, emphasis supplied).

U. Summary judgment not available in an IAPA/LLUPA appeal

In Idaho, summary judgment is not available in a proceeding initiated by a petition for judicial review.[388] The reasons are two-fold. First, the nature of review is appellate. Second, review is limited to the record, and summary judgment motions are typically accompanied by affidavits.

> Generally, summary judgment is not the appropriate procedure for resolving a petition for judicial review. The district court is not permitted to receive evidence on appeal except in two limited circumstances, neither of which applies in this case. Plaintiffs' petition for judicial review should have been heard simply as an appellate proceeding, with oral argument, as provided in Rule 84 of the Idaho Rules of Civil Procedure.

Cnty. Residents Against Pollution from Septage Sludge (CRAPSS) v. Bonner Cnty., 138 Idaho 585, 587, 67 P.3d 64, 66 (2003) (footnote omitted). In that case, however, the Court ruled that the district court's consideration of a motion for summary judgment did not prejudice the other party. In other cases, the Idaho Supreme Court

[388] In contrast, motions for summary judgment are employed in federal Administrative Procedure Act cases.

has allowed summary judgment in IAPA cases. *E.g.*, *Allen v. Blaine Cnty.*, 131 Idaho 138, 140, 953 P.2d at 578, 580 (1998).

In contrast, federal courts routinely allow motions for summary judgment in cases under the federal Administrative Procedures Act.

V. Selection and identification of proper parties

Most civil lawsuits are initiated by the filing of a complaint by the plaintiff against a defendant. In contrast, a challenge to a special use permit (or other quasi-judicial zoning action) brought under LLUPA and the IAPA is denominated a "petition for judicial review."[389] The party filing the petition is the "petitioner" or "appellant." The municipal entity whose decision is challenged is the "respondent."

Often, there is at least one other interested party—either an opponent of the application or the applicant (if the petition was filed by a project opponent). The law is fuzzy as to whether such "third persons" must be named.

Plainly, they may intervene of their own accord if they are not named. In such a case, they would be denominated an "intervenor-petitioner" or "intervenor-respondent," depending on which side they took.

In some cases where the "third person" has not been named, the respondent has been successful in persuading the district court that the third person was a necessary party who should be joined. In order to avoid such procedural side-shows, it is probably the better practice for the petitioner either to join known interested parties at the outset, or, at a minimum, to document that they were advised of the litigation and made aware of their right to intervene.

W. Disqualification of the judge

Litigants in civil actions and judicial reviews[390] are allowed to disqualify one district court judge "without cause" (meaning that the litigant does not need to identify a basis for the disqualification. Idaho R. Civ. P. 40(d)(1).

In addition, a judge may be disqualified for cause (such as bias or conflict of interest), but that is extraordinarily rare.

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[389] In *Scott v. Gooding Cnty.*, 139 Idaho 206, 208, 46 P.3d 23, 25 (2002), the review was initiated by filing a "Notice of Appeal – Petition for Review" with the filing party denominated "Appellant."

[390] Previously, disqualification without cause was limited to civil actions. *Arthur v. Shoshone Cnty.*, 133 Idaho 854, 857, 993 P.2d 617, 620 (Ct. App. 2000) (Lansing, J.). The rule was amended in approximately 2012 to apply equally in the context of judicial reviews.

X. Judicial review of municipal annexation

Annexation is governed by Idaho Code § 50-222. (See discussion in section 9 at page 98.) Historically, annexations were not subject to judicial review under the IAPA, but instead could be challenged by way of declaratory actions. See discussion in section 24.M(4) (Actions not subject to judicial review may be challenged by way of declaratory judgment or other civil action.) on page 415. In 2002 the Legislature made Category B and C annexations subject to judicial review under the IAPA. Idaho Code § 50-222(6). S.B. 1391, 2002 Idaho Sess. Laws, ch. 333 (codified at Idaho Code § 50-222(6)). Declaratory actions remain available to challenge a Category A annexation.

(1) Review prior to 2002

Historically, annexations were not subject to judicial review under. In earlier decades, the availability of judicial review for land use decisions turned on whether the governmental action was deemed "legislative" or "quasi-judicial." *Cooper v. Ada Cnty. Comm'rs*, 101 Idaho 407, 411, 614 P.2d 947, 951 (1980) (Donaldson, C.J.). Annexation decisions were deemed "legislative," and, hence, not subject to judicial review. "Legislative action is shielded from direct judicial review by 'its high visibility and widely felt impact, on the theory that appropriate remedy can be had at the polls.'" *Burt v. City of Idaho Falls*, 105 Idaho 65, 68, 665 P.2d 1075, 1078 (1983) (Donaldson, C.J.) (quoting *Cooper v. Ada Cnty. Comm'rs*, 101 Idaho 407, 410, 614 P.2d 947, 950 (1980)).

Basing jurisdiction on the legislative/quasi-judicial distinction ended with *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner I*"), 145 Idaho 630, 632, 181 P.3d 1238, 2140 (2008), after which the availability of judicial review turned on the express words of statutes authorizing such review. After *Giltner I*, however, judicial review remained unavailable because the IAPA authorizes judicial review of actions by state "agencies," not cities and counties. *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 960, 188 P.3d 900, 902 (2008) (Eismann, J.).[391]

Thus, the rule today is simple: without a statute specifically authorizing judicial review, none is available. LLUPA, for example, authorizes judicial review of certain planning and zoning action. But, until 2002, Idaho's Annexation Statute contained no such provision.

But that did not mean that annexation decisions were immune from legal challenge. Although judicial review was not available, unlawful annexation actions could be challenged by bringing a civil action (typically for declaratory judgment)

[391] Although *Highlands* was decided in 2008, it dealt with an annexation occurring prior to the 2002 amendment to the Annexation Statute allowing judicial review of Category B and C annexations. *Highlands*, 145 Idaho at 961, 188 P.3d at 903.

against the city, seeking to have an annexation ordinance declared void or invalid. *E.g.*, *Hendricks v. City of Nampa*, 93 Idaho 95, 96, 456 P.2d 262, 263 (1969) (Donaldson, J.) (allowing "an action against the [City] to have declared void [the City's annexation ordinance]").[392] See discussion in section 24.M(4) (Actions not subject to judicial review may be challenged by way of declaratory judgment or other civil action.) on page 415.[393]

(2) The test of reasonableness

The annexation decision itself has long been viewed as "legislative" in nature. Hence, the Idaho Supreme Court has allowed second-guessing by the court only in rather extreme circumstances. This is reflected in the "test of reasonableness" standard.

An annexation must not only satisfy the procedural and substantive requirements of Section 50-222, but must also pass judicially-imposed the "test of reasonableness." *Hendricks v. City of Nampa*, 93 Idaho 95, 98, 456 P.2d 262, 265 (1969). (Presumably this pre-2002 case law is still applicable, despite the changes in judicial review provisions. However, the Supreme Court has not yet spoken to this.)

In *Batchelder v. City of Coeur d'Alene,* 85 Idaho 90, 95, 375 P.2d 1001, 1004 (1962), *Batchelder*, the Idaho Supreme Court excluded a drive-in movie theater from an otherwise proper annexation because the annexation boundary bisected several buildings on the property. This resulted in, among other things, the snack bar and generator being inside the city while the rest rooms and other equipment remained outside the city.

> Such manner of division of the physical plant of Lee's business would create problems and result in confusion in the matter of assessment and levy of taxes for county and municipal purposes, as well as in management problems by the municipality of the properties, if allowed to be so

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[392] The *Hendricks* case cited many more examples of annexations properly challenged by civil actions. *Finucane v. Village of Hayden*, 86 Idaho 199, 384 P.2d 236 (1963); *Batchelder v. City of Coeur D'Alene*, 85 Idaho 90, 375 P.2d 1001, (1962); *Oregon Short Line Railroad Co. v. Village of Chubbuck*, 83 Idaho 62, 357 P.2d 1101 (1960); *Potvin v. Village of Chubbuck*, 76 Idaho 453, 284 P.2d 414 (1955); *Hillman v. City of Pocatello*, 74 Idaho 69, 256 P.2d 1072 (1953); *Boise City v. Baxter*, 41 Idaho 368, 238 P. 1029 (1925); *Boise City v. Boise City Dev. Co.*, 41 Idaho 294, 238 P. 1006 (1925); *cf. State v. Frederic*, 28 Idaho 709, 155 P. 977 (1916).

[393] The *Highlands* case left the door open for attacking an unlawful annexation through other means, such as declaratory action. "The dissent also argues that this opinion "will prevent property owners from obtaining judicial review of decisions downzoning their property." It will not. As we recognized in *McCuskey v. Canyon County Commissioners* [*"McCuskey II"*], 128 Idaho 213, 912 P.2d 100 (1996), such landowners can seek relief in an independent action." *Highlands*, 145 Idaho at 962, 188 P.3d at 904.

> divided. We therefore hold that the division of appellants Lee's property on the basis shown is unreasonable; and until and unless such property is divided in a reasonable manner so as not to bisect the buildings and assets of the business there conducted, that such tract must be excluded.

Batchelder, 85 Idaho at 96, 375 P.2d at 1004. The test of reasonableness also requires that a court view the annexation as a whole in determining whether it was reasonable:

> the total portion annexed is to be considered as an entirety, and even though some parts might have been left out or other areas might have been included, nevertheless, if the entire portion sought to be annexed comes reasonably within the purposes for which annexation may be made it will not be considered that the city has abused its discretion.

Hendricks, 93 Idaho at 98, 456 P.2d at 265.

The legislative intent expressed in Section 50-222 indicates that "the purposes for which an annexation may be made" are those "reasonably necessary to assure the orderly development of Idaho's cities," to allow "efficient and economically viable provision of tax-supported and fee-supported municipal services," enable "the orderly development of private lands which benefit from the cost-effective availability of municipal services in urbanizing areas," and to "equitably allocate the costs of public services in management of development on the urban fringe." Idaho Code § 50-222(1). *Batchelder*, *Hendricks*, and *Boise City Development Company* thus suggest that the statutorily authorized annexation of a particular tract will be found reasonable if the annexation that included the tract was, as a whole, "reasonably necessary" for the orderly and economical development of the city, unless the annexation results in patently unreasonable results on the tract in question, such as in *Batchelder*.

Idaho courts have not defined the parameters of what makes an annexation "reasonably necessary" for the orderly and economical development of a city. The Idaho Supreme Court indicated in *Boise City Development* that courts generally should defer to the city's judgment in this regard:

> Many reasons might be advanced from the standpoint of the city why certain property immediately contiguous should nevertheless not be a part of the city and, while the city under the statute under consideration may annex all of the adjacent and contiguous tracts, it is not

> unreasonable and illogical to hold that the city council may exercise their best judgment as to what should be annexed.

Boise City Development Co., 41 Idaho 294, 309, 238 P. 1006, 1011 (1925).

This is consistent with the fact that annexation is a legislative act, not a judicial one. *Crane Creek Country Club v. City of Boise*, 121 Idaho 485, 487, 826 P.2d 446, 448 (1992). Furthermore, challenges to the validity of an annexation generally are viewed from the perspective of the city's needs, not from that of the individual landowner. *See Oregon Shortline Railroad Co. v.* City *of Chubbuck*, 93 Idaho 815, 817, 474 P.2d 244, 246 (1970) ("The record is replete with evidence that the railroads do not need the municipality . . . . There is, however, no proof and indeed no discussion as to whether the city needs to annex the railroad land in pursuit of an orderly development of the city. Respondent railroads have thus failed to carry their burden of proof and the presumption of the validity of the duly enacted municipal ordinance continues to prevail."); *see also Boise City Development Co.*, 42 Idaho at 309, 238 P. at 1011 (stating that the question was not whether the tract in question, considered separately, should have been annexed, but whether the annexation should be sustained in view of the conditions confronting the municipal authorities at the time).

Idaho courts thus probably will not disturb a city's determination that the annexation of certain lands is reasonably necessary to ensure the orderly and economical development of the city and the surrounding urbanizing areas, absent a *Batchelder*-like scenario or unless an annexation is in some other regard plainly unreasonable or unnecessary on its face. As previously discussed, the test of reasonableness therefore might, in theory, limit a statutorily authorized but geographically over-reaching annexation. It appears that no reported Idaho case addresses this question, however, and such an annexation probably would have to be very over-reaching indeed to be invalidated on reasonableness grounds.

An argument could be made that statutorily sound but geographically over-reaching annexation does not reasonably come within the purposes for which an annexation may be made, and amounts to an abuse of discretion. As will be discussed, however, such an annexation likely would have to be extremely large to constitute an abuse of discretion.

(3) Review after 2002

When the Legislature re-wrote the Annexation Statute in 2002, it expressly authorized judicial review of Category B and Category C annexations under the

IAPA (including the standards set forth in Section 67-5279). S.B. 1391, 2002 Idaho Sess. Laws, ch. 333 (codified at Idaho Code § 50-222(6)).[394]

In *Black Labrador Investing, LLC v. Kuna City Council*, 147 Idaho 92, 205 P.3d 1228 (2009), the Court held that the act authorizes judicial review only of Category B and C annexations. However, the Court also appears to hold that, even as to Category B and C annexations, judicial review is authorized only to challenge an affirmative decision by the city to annex the property. In other words, there is no judicial review if the city determines to deny the annexation request. *Black Labrador*, 147 Idaho at 97, 205 P.3d at 1233.

Section 50-222 does not expressly prohibit direct actions by way of complaint against a city in regard to a Category B or Category C annexation ordinance, but it seems unlikely a court would allow such an action in light of the new judicial review provision. In contrast, the statute does not subject Category A annexations to IAPA judicial review, and presumably direct actions against a city may still be brought in regard to that category of annexations.

The broad reference to the IAPA judicial review provisions (Idaho Code § 67-5279) is ambiguous. Did the Legislature mean for review to be governed by the contested case provisions (section 67-5279(3)) or the provisions for review of rulemakings and other informal matters that that are not based on a record (section 67-5279(2))? Presumably, the Legislature intended the former. This would make the findings and conclusions required to be made under Category B and C annexations subject to the same level of scrutiny that courts apply to factual findings in quasi-judicial proceeding.

As noted, annexations have been viewed as legislative, not quasi-judicial. Whether the 2002 statute converts Category B and C annexations into quasi-judicial actions for purposes of due process has not been addressed by an appellate court. However, an Idaho district court found that Category B annexations remain legislative and therefore not subject to *ex parte* communication rules. *City of Boise v. Bastian* (unpublished district court) (2006). See discussion of legislative versus quasi-judicial actions in section 13.F at page 136.

Meanwhile, Category A annexations presumably remain subject to only limited judicial challenge via declaratory action. In *Steele v. City of Shelley (In re Annexation to the City of Shelley)*, 151 Idaho 289, 255 P.3d 1175 (2011), the Court followed *Black Labrador* and confirmed that there is no judicial review of Category A annexations. The Court did not discuss whether the parties could have instead

[394] Any such petition for judicial review must be filed in the district court within twenty-eight days of the publication of the annexation ordinance. Idaho Code § 50-222(6). The court is to hear any such petition "at the earliest practicable time" if a question as to the validity of the annexation ordinance may arise. Idaho Code § 50-222(6).

obtained relief via a declaratory action. See discussion of *Steele* in section 9.E(6) at page 106.

In addition to whatever other standards of review may be applicable, keep in mind that annexations are subject to challenge on the basis of the "test of reasonableness" (see discussion in section 24.X(2) at page 434).

Y. The *Euclid Avenue* case: Supreme Court prohibits the combination of judicial review and civil actions.

In *Euclid Avenue Trust v. City of Boise*, 146 Idaho 306, 193 P.3d 853 (2008) (J. Jones, J.), the Idaho Supreme Court declared that it is improper for a litigant to combine a judicial review with a civil action for declaratory and/or monetary relief in a single complaint. Although this case arose in the context of a land use decision, the Court made clear that the same result would apply in other contexts. Indeed, it quoted from a prior case dealing with road validation. *Euclid Avenue*, 146 Idaho at 308, 193 P.3d at 855 (quoting from *Cobbley v. City of Challis*, 143 Idaho 130, 133, 139 P.3d 732, 735 (2006) (J. Jones, J.)).

The more complete discussion is *Cobbley* explains that judicial review is a different kind of animal that a civil action:

> The district court's ruling is correct: a petition for judicial review of a road-validation decision of a local governing board is a distinct form of proceeding and cannot be brought as a pleading or motion within an underlying civil lawsuit. A board of county commissioners' authority over highways derives from the Legislature's delegation of its authority over roads and highways. See I.C. § 40–201. The Legislature has provided the method by which certain persons, or the board having jurisdiction over the particular highway system, may initiate proceedings to validate a road. I.C. § 40–203A. "Judicial review" is defined by our Rules of Civil Procedure as "the district court's review pursuant to statute of actions of agencies...." Idaho R. Civ. P. 84(a)(2)(C). Judicial review of an administrative decision is wholly statutory; there is no right of judicial review absent the statutory grant.

Cobbley, 143 Idaho at 133, P.3d at 735.

The *Euclid Avenue* Court noted, however, that Rule 84(a)(1) of the Idaho Rules of Civil Procedure does allow petitions for judicial review to be combined with petitions for writs of mandate, prohibition, quo warranto, certiorari, or other common law or equitable writs. *Euclid Avenue*, 146 Idaho at 309, 193 P.3d 856.

In the face of improperly combined claims, the Court did not simply throw out the entire case. Instead it allowed the case civil action alone to proceed on the basis of the "fee category" stated on the face of the complaint.[395]

Z. Injunctive relief

In addition to seeking declaratory relief, plaintiffs may also seek injunctive relief prohibiting enforcement of an unlawful zoning ordinance. *Cole-Collister Fire Protection Dist. v. City of Boise*, 93 Idaho 558, 562, 468 P.2d 290, 294) (1970).

Likewise, a city or county may enforce its zoning ordinances by way of injunction. *Wyckoff v. Bd. of Cnty. Comm'rs of Ada Cnty.*, 101 Idaho 12, 15, 607 P.2d 1066, 1069 (1980).

AA. Writs

Idaho statutes authorize three extraordinary writs:

A writ review (formerly writ of certiorari) may be issued to an inferior tribunal, board, or officer exercising judicial functions in a manner that exceeds its authority. Idaho Code §§ 1-201 to 1-208.

A writ of mandate (formerly writ of mandamus) may be issued to an inferior tribunal, corporation, board, or person to compel the performance of an act that the entity has a duty to perform. Idaho Code §§ 1-301 to 1-314.

The writ of prohibition is the negative counterpart of the writ of prohibition. It may be issued to a tribunal, corporation, board, or person engaged in proceedings without or in excess of its jurisdiction. Idaho Code §§ 1-401 to 1-404.

Writs of mandate and prohibition come in either of two forms. An "alternative writ" is one issued to the party with an instruction to perform some act or, in the alternative, show cause why the act has not been done. A "peremptory writ" contains no show cause alternative, and would be issued after a hearing.

Under rare circumstances these extraordinary writs may be available to review certain forms of planning and zoning actions.

The courts will not allow parties to end-run LLUPA by seeking a writ of mandate. In *Brady v. City of Homedale*, 130 Idaho 569, 944 P.2d 704 (1997), which involved a challenge to a building permit, the Court cited *Bone v. City of Lewiston*, 107 Idaho 844, 850, 693 P.2d 1046, 1052 (1984), for the proposition that LLUPA

[395] "Euclid's initial filing in district court indicated a fee category of A1 and, thus, the Court will take Euclid at its word and consider the appeal as an appeal of a civil action. Had the filing category been designated as R2, we would again take Euclid at its word and determine the matter as an administrative appeal. It is likely the district court viewed the case as a civil action because it determined the claims under the summary judgment standard. We will do likewise." *Euclid Avenue*, 146 Idaho at 309, 193 P.3d at 856.

and the IAPA ordinarily establish the exclusive means of judicial review, but that in this case the plaintiff was entitled to pursue a writ of mandate because she was unable to exhaust administrative remedies under LLUPA after she was denied a hearing. Thus, this case seems to hold that absent such extraordinary circumstances, a writ of mandate would not be available to challenge actions reviewable under LLUPA.

The Court reached the same result in *McVicker v. City of Lewiston*, 134 Idaho 34, 995 P.2d 804 (2000), where the Court ruled that a city employee's failure to forward a protest letter excused the plaintiffs' failure to timely exhaust their administrative remedies. In *McVicker*, however, Court declared that "the McVickers are entitled to a hearing before the Lewiston planning and zoning commission, as they were denied that opportunity and prevented from exhausting administrative remedies. *McVickers,* 134 Idaho at 38, 995 P.2d at 808. Apparently the Court contemplated a remand for further administrative proceedings and declined to reach the plaintiffs' request for a writ of mandate and declaratory judgment.

The Idaho Supreme Court has declared that actions reviewable under LLUPA are not subject to review under the writ of prohibition. In *Crane Creek Country Club v. City of Boise,* 121 Idaho 485, 826 P.2d 446 (1992), the Court ruled that a writ of prohibition lies for review of a city's quasi-judicial actions, not its legislative functions, and annexation is legislative in nature. The Court did not say what the litigant should have done in this case, merely observing: "Unfortunately, because Crane Creek erred in its choice of tools, we are unable to reach the merits of the case." *Crane Creek*, 121 Idaho at 486, 826 P.2d at 447. Presumably, a declaratory judgment action would have been the proper vehicle. On the other hand, a concurrence by two justices says, "[T]herefore the proceedings in the district court should have been a judicial review." *Crane Creek*, 121 Idaho at 487, 826 P.2d at 448. The concurrence says: "As the majority opinion correctly states, '[p]rohibition is primarily concerned with jurisdiction and is not available to review errors committed in the exercise of jurisdiction.'" *Crane Creek,* 121 Idaho at 487, 826 P.2d at 448. The fact that the concurrence then suggests that the proper vehicle for review should have been judicial review suggests that maybe a discrete, single-parcel annexation is quasi-judicial after all. The bottom line is that the Court has never pinned this down, and it is now largely mooted by the 2002 amendments to the annexation law allowing judicial review of Category B and C annexations.

In *McCuskey v. Canyon Cnty.* ("*McCuskey I*"), 123 Idaho 657, 663-64, 851 P.2d 953, 959-60 (1993) (Bistline, J.), the Court issued a declaratory order striking down a zoning ordinance as void on procedural grounds. Nevertheless, the Court determined that the plaintiff was not entitled to a writ of mandate directing the commissioners to issue a permit under the prior ordinance:

> It is well established that a writ of mandate will not issue to compel the performance of a discretionary act. As I.C. § 67-6519 [LLUPA] gives counties the discretion to grant or deny an application for a permit authorized by the Local Planning Act of 1975, a writ of mandate is not available to compel the issuance of such a permit.

McCuskey I, 123 Idaho at 663, 851 P.2d at 959.

Where proceedings under a writ of mandate are allowed, the standard is a difficult one. "A writ of Mandate will lie to require administrative action in zoning matters only when the party seeking the writ has a clear legal right to have the act performed . . . and . . . the act be ministerial and not require the exercise of discretion." *Wyckoff v. Bd. of Cnty. Comm'rs of Ada Cnty.*, 101 Idaho 12, 14, 607 P.2d 1066, 1068 (1980) (internal quotation marks omitted); *accord*, *Tranmer v. Helmer*, 126 Idaho 88, 878 P.2d 787 (1994) (denying petition for writ of mandate to compel approval of plat, where ordinance did not absolutely mandate approval of plat).

In *Butters v. Hauser ("Butters II")*, 131 Idaho 498, 501, 960 P.2d 181, 184 (1998), the Court allowed a party to pursue an action for declaratory judgment challenging a zoning ordinance, but declined to issue a writ of mandamus to abate the issuance of a conditional use permit issued pursuant to the challenged ordinance. The Court noted that the same party was simultaneously pursuing a judicial review of the permit and thus had other adequate remedies.

Where the proper form of proceeding is unclear, the better approach may plead each of them in the alternative (but mindful of the requirement in *Euclid Avenue* not to mix judicial review and civil actions). *M.K. Transp., Inc. v. Grover*, 101 Idaho 345, 350, 612 P.2d 1192, 1197 (1980), cited with approval in *McCuskey v. Canyon Cnty. Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 218, 912 P.2d 100, 105 (1996) (Trout, J.) (modern pleading rules allow parties to seek alternative types of relief regardless of inconsistency).

BB. Damages under state law

LLUPA and the IAPA provide limited relief—overturning the governmental action. If the party wishes to obtain damages against the governmental entity that wrongfully denied an entitlement, it is necessary to bring an appropriate civil action. This would include claims for taking, inverse condemnation (a form of taking), unlawful conversion, unjust enrichment, or other state law remedy. In addition, a federal cause of action under § 1983 may be available. This is discussed below.

Some claims, however, are subject to the Idaho Tort Claims Act. For counties, this is limited to claims sounding in tort. In the case of cities, all state law

damage claims are subject to the procedural requirements of the Idaho Tort Claims Act. See discussion under that heading.

CC. Section 1983 actions

(1) Scope of § 1983 actions

If a party to a land use decision has been denied rights under the laws or Constitution of the United States by an entity acting under color of state law, he or she may bring an action under the Civil Rights Act of 1871, generally known as a "§ 1983 action."[396] This includes allegations of violations of the Fifth Amendment's protection against uncompensated takings[397] and the Fourteenth Amendment's promises of due process[398] and equal protection.[399]

"That statute does not confer any substantive rights.[400] It is a vehicle for vindicating rights secured by the United States Constitution or federal law."[401]

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[396] Section 1983 refers to the Civil Rights Act of 1871 also known as the Ku Klux Klan Act, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983). It provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." A separate provision enacted in 1976, 42 U.S.C. § 1988(b), authorizes the award of attorney fees to successful litigants under § 1983.

[397] "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Fifth Amendment is applicable to the states via the due process clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1. *Cnty. of Ada v. Henry*, 105 Idaho 263, 265, 668 P.2d 994, 996 (1983).

[398] "[N]or shall any state deprive a person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

[399] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

[400] "[Section 1983] only fashions a remedy, and is not a jurisdictional statute, and persons asserting claims thereunder must look to other authority to obtain jurisdiction in federal courts. 28 U.S.C.A. § 1343(a)(3) confers jurisdiction of 42 U.S.C.A. § 1983 actions on federal courts." 15 Am. Jur. 2d *Civil Rights* at § 136 (2000). 28 U.S.C. § 1343(a)(3) is a statute dealing specifically with § 1983 claims.

[401] Not all violations of federal law may be vindicated by § 1983. "However, § 1983 may not be used to enforce a right secured by a particular federal act if the remedial devices provided in that act are sufficiently comprehensive to demonstrate that congress intended to preclude the remedy of suits under § 1983." *Bryant v. City of Blackfoot*, 137 Idaho 307, 314, 48 P.3d 636, 643 (2002) (citing *Middlesex Cnty. Sewerage Authority v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1(1981).

Bryant v. City of Blackfoot, 137 Idaho 307, 314, 48 P.3d 636, 643 (2002). "Thus, § 1983 provides a uniquely federal remedy against incursions upon rights secured by the Constitution and laws of the Nation, and is to be accorded a sweep as broad as its language." *Felder v. Casey*, 487 U.S. 131, 140 (1988) (Brennan, J.) (citations, internal quotation marks, and ellipses omitted).

Damages, as well as equitable and declaratory relief are available. 15 Am. Jur. 2d *Civil Rights* §§ 164, 169 (2000). Trial by jury is available if the "essential character" of the action is one for damages.[402]

A § 1983 claim may be brought as a stand-alone action in state[403] or federal court.[404] Until *Euclid Avenue Trust v. City of Boise*, 146 Idaho 306, 193 P.3d 853 (2008), they were often brought as a separate count in a single lawsuit including a judicial review.

Section 1983 only applies to actions taken under color of <u>state</u> law, not federal law.[405]

The U.S. Supreme Court and the Idaho Supreme Court each have recognized that § 1983 actions lie against municipal governments. *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Gibson v. Ada Cnty.*, 142 Idaho 746, 752, 133 P.3d 1211, 1217 (2006), ,

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[402] "[A]n action under § 1983 for legal relief is an action at law to which the Seventh Amendment guarantee of the right to jury trial applies. However, the fact that a plaintiff in an action under § 1983 has sued for damages as part of the relief sought does not automatically entitle him to a jury trial of the action; the essential character of the action as legal or equitable, as shown by the allegations of the petition, determine whether a particular action is one at law to be tried to a jury or in equity to be tied to a court." 15 Am. Jur. 2d *Civil Rights* at § 160 (2000) (footnotes omitted).

[403] "[S]tate courts . . . possess concurrent jurisdiction over [§ 1983] actions." *Felder v. Casey*, 487 U.S. 131, 140 (1988). "Accordingly, we have held that a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy . . . ." *Felder* at 140.

[404] The U.S. Supreme Court recognized early on that "the federal courts are the chief—though not always the exclusive—tribunals for enforcement of federal rights." *McNeese v. Bd. of Education for Community Unit School Dist. 187, Cahokia, Illinois*, 373 U.S. 668, 672 (1963). This extension of federal jurisdiction by the Civil Rights Act was particularly significant in 1871, because federal courts did not gain broad "arising under" jurisdiction until 1975. *McNeese* at 672 n.2. In *Patsy v. Bd. of Regents of the State of Florida*, 457 U.S. 496, 506 (1982), the Court said that the purpose of § 1983 was "to provide dual or concurrent forums I the state and federal systems, enabling the plaintiff to choose the forum in which to seek relief."

[405] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 399 n.1 (1971) (explained in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 409 F.2d 718, 720 n.1 (2nd Cir. 1969)); 15 Am. Jur. 2d *Civil Rights* § 75 (2000) ("One acting under color of federal law cannot be held liable under 42 U.S.C.A. § 1983 for his or her acts.").

cert. denied, 549 U.S. 994 (2006), *rehearing denied*, 549 U.S. 1159 (2007); *Bryant v. City of Blackfoot*, 137 Idaho 307, 314, 48 P.3d 636, 643 (2002).

In contrast, States are immune from suit under the Eleventh Amendment and are not "persons" subject to suit under § 1983. *Arnzen v. State*, 123 Idaho 899, 903-04, 854 P.2d 242, 246-47 (1993), *cert. denied*, 510 U.S. 1071(1994).

> The immunity of the states from suit in the federal courts, as guaranteed by the Eleventh Amendment, is not overridden by 42 U.S.C.A. § 1983. . . . State agencies or governmental entities which have been found to partake of the state's Eleventh Amendment immunity from § 1983 actions include state courts, state public defender systems, departments of education, departments of correction, departments of environmental management, and state universities. . . . Counties and county officials, school districts, school boards, and municipalities have been held not covered by the Eleventh Amendment immunity against § 1983 actions. . . .
> An action in federal court under 42 U.S.C.A. § 1983 brought against a state official in his individual capacity, rather than his official capacity, is not barred by the Eleventh Amendment. This is so even though the state may ultimately reimburse the official with respect to any judgment paid by him.

15 Am. Jur. 2d *Civil Rights* §§ 99, 100 (2000) (footnotes omitted).

Section 1983 actions are subject to state statutes of limitations (see discussion in section 22 at page 291). However, state notice-of-claim restrictions are preempted, even when the § 1983 action is raised in state court. *Felder v. Casey*, 487 U.S. 131, 140-41 (1988) (Brennan, J.).[406]

See discussion of attorney fee recoveries in § 1983 actions in Volume II of this Handbook.

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[406] *Felder* contains some very broad language. "Finally, the notice provision operates, in part, as an exhaustion requirement, in that it forces claimants to seek satisfaction in the first instance from the governmental defendant. We think it plain that Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries." *Felder*, 487 U.S. at 143. This pro-plaintiff decision seems difficult to reconcile with the far harsher approach taken with respect to takings plaintiffs in *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (Blackmun, J.). No one, by the way, has ever suggested that the 28-day judicial review deadlines in the IAPA and LLUPA are preempted by § 1983.

(2) No exhaustion required under § 1983.

As discussed in section 24.L(4) at page 373, litigants must exhaust their administrative remedies before pursuing a judicial review of a land use decision. Exhaustion, however, is not required for § 1983 actions.

The U.S. Supreme Court first articulated the rule that exhaustion principles do not apply to § 1983 actions in *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled on other grounds by Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658 (1978). There the Court said, "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe* at 183.

This conclusion was reiterated in *McNeese v. Bd. of Education for Community Unit School Dist. 187, Cahokia, Illinois*, 373 U.S. 668 (1963). "We have previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy." *McNeese* at 671.

The U.S. Supreme Court said it a third time in *Patsy v. Bd. of Regents of the State of Florida*, 457 U.S. 496 (1982). There the Court concluded that exhaustion was inconsistent with the original purpose of the statute and with more recent legislative indications of intent.[407] The dissent characterized this as "a flat rule without exception." *Patsy* at 534 (J. Powell, dissenting, characterizing the majority's holding). This characterization was quoted the following year by the Ninth Circuit, which said that Justice Powell's "flat rule" summary accurately described the state of the law. *Heath v. Cleary*, 708 F.2d 1376 (9th Cir. 1983) (eliminating various exceptions previously recognized by the federal courts).

The Idaho Supreme Court, too, has recognized that exhaustion is not required in § 1983 cases. "The U.S. Supreme Court and several federal circuits have held that it is not a prerequisite to filing a § 1983 claim that a party must exhaust all state administrative claims." *Gibson v. Ada Cnty.*, 142 Idaho 746, 753, 133 P.3d 1211, 1218 (2006), *cert. denied*, 549 U.S. 994 (2006), *rehearing denied*, 549 U.S. 1159 (2007). The Court recognized that while the exhaustion requirement did not apply,

[407] The Court found three themes that strongly suggested that exhaustion of state administrative remedies would be inconsistent with the purpose of the statute: (1) the assignment to the federal courts of the paramount role in protecting constitutional rights, (2) the belief that state authorities had been unable or unwilling to protect the constitutional rights of individuals or punish the violators, and (3) the recognized dual or concurrent forums that allowed a plaintiff to choose whether to file in state or federal court. *Patsy*, 457 U.S. at 503-07. The Court further observed that Congress had explicitly included an exhaustion requirement under § 1983 for federal prisoners in subsequent legislation (the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 et. seq.), thus demonstrating Congress' "approach of carving out specific exceptions to the general rule that federal courts cannot require exhaustion under § 1983." *Patsy* at 512.

the ripeness requirement did.[408] The ripeness issue, by the way, arose obliquely in the context of a possible defense to the statute of limitations.[409] The take home point from this somewhat confusing opinion is that our Court has recognized that exhaustion does not apply to § 1983 actions.

An earlier Idaho case, *Cnty. of Ada v. Henry*, 105 Idaho 263, 668 P.2d 994 (1983), contains language that might be misunderstood as establishing a procedural exhaustion requirement (in contradiction of the U.S. Supreme Court's very clear holdings on this issue). A careful reading of the decision, however, shows that this was not the Court's holding. In this case the plaintiffs built a home on illegally subdivided property "despite repeated warnings and restraining orders." *Henry*, 105 Idaho at 264, 668 P.2d at 995. The county moved for an order to show cause, and the Henrys counterclaimed under § 1983 claim alleging that Ada County denied them due process and equal protection and constituted a taking. The Court rejected the due process claim, observing that they could hardly complain of a lack of due process when they had not bothered to appear at their own hearings:[410] "The Henrys had ample opportunity to argue their claim that they were entitled to a building permit, but did not participate in several hearings . . . ." *Henry*, 105 Idaho at 266, 668 P.2d at 997. Given that the Henrys "chose not to appear, and they further chose not to exhaust their remedies," they should not now be allowed to "collaterally attack the ordinances." *Henry*, 105 Idaho at 266-67, 668 P.2d at 997-98. This reference to exhaustion should be read in context; it is not as a contradiction of the well-established rule that exhaustion

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[408] "[T]here must be at least some definitive administrative or institutional determination before an action may arise." *Gibson*, 142 Idaho at 753, 133 P.3d at 1218 (emphasis, internal quotation marks, and brackets omitted). *Gibson's* conclusion that ripeness, not exhaustion, is required is consistent with federal case law. See discussion of the ripeness requirement in § 1983 actions articulated in *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), in Volume II of this Handbook. For unknown reasons, the *Gibson* Court did not cite *Williamson County*, but instead cited earlier lower federal court decisions for the same proposition.

[409] This case involved an action by a Sheriff's Department clerk who was fired for accepting duplicate pay vouchers. She filed a § 1983 action (among other claims). Meanwhile, she pursued a separate administrative appeal. The Idaho Supreme Court ruled that she missed the deadline for filing the § 1983 action under the applicable two-year statute of limitations, and that the time for filing was not tolled by virtue of the separate ongoing administrative action. The Court found that the § 1983 action was ripe at the time it was filed despite the ongoing administrative proceeding, and therefore time barred.

[410] Apparently the Henrys' attorney advised them "that any effort to protest the injunction [at the hearings] would be useless" so they did not bother to appear. *Henry*, 105 Idaho at 264, 668 P.2d at 995.

is not required in 1983 actions. The Court's decision was a rejection on the merits of the due process claim.[411] The case does not establish a procedural or jurisdictional requirement of exhaustion as a prerequisite to hearing a § 1983 action. The Henrys' due process claim was heard and rejected.

The nonapplicability of the exhaustion rule is also evident in *Puckett v. City of Emmett*, 113 Idaho 639, 747 P.2d 48 (1988). In that case, the Court recognized that a plaintiff could elect to proceed, first, with a federal court § 1983 action and then (when that failed) with a state law claim in a separate action. (The issue in the Idaho case was whether res judicata precluded the second action. It did not.) The Idaho Court noted that the federal court could have heard both claims—thus recognizing that there is no requirement that the § 1983 claim await the resolution of the state law remedy. *Puckett*, 113 Idaho at 642, 747 P.2d at 51.

(3) Ripeness is required for § 1983 claims based on takings

Although exhaustion does not apply to § 1983 claims, ripeness may be required. *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). The applicability of the ripeness requirement to § 1983 claims based on takings is discussed in Volume II of this Handbook.

(4) Section 1983 is the exclusive means of raising federal takings claims (exception for *Bivens* actions not applicable)

Section 1983 provides a means of challenging constitutional violations. The question arises: Where § 1983 is available, is it the exclusive means of pursuing a federal constitutional violation? The quick answer is "yes."

In limited circumstances, courts have recognized the right of plaintiffs to seek relief for constitutional violations in the absence of any statutory authority. In essence, a cause of action may be derived from the Constitution itself. In *Bivens v.*

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[411] "We hold there to be an absence of merit in any of those claims." *Henry*, 105 Idaho at 266, 668 P.2d at 997 (emphasis supplied). Essentially, the court found that the Henrys were not denied due process, because they declined to take advantage of the process afforded them. "We reject the Henrys' assertion that they had been denied due process." *Henry*, 105 Idaho at 267, 668 P.2d at 998. In addition to rejecting the § 1983 due process claim on the merits, the court also rejected the Henrys' § 1983 equal protection claim. "[T]here is a lack of any indication that the Henrys' property is the only property affected by the ordinance or that there was herein any type of discrimination." *Henry*, 105 Idaho at 267, 668 P.2d at 998. In addition, the court rejected the takings claim on the merits, citing federal precedent. *Henry*, 105 Idaho at 266, 668 P.2d at 997.

Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971), the U.S. Supreme Court found that the Constitution itself "gives rise to a cause of action for damages consequent upon [the] unconstitutional conduct [of federal agents]." Thus, the absence of a statutory cause of action is no bar to a damage action for an unlawful search and seizure by federal agents.[412]

Subsequent authority has limited *Bivens* to situations in which no other statutory cause of action is available:

> Since *Bivens*, the Court has applied a two-prong test to determine whether an implied cause of action is necessary. According to this test, a *Bivens* action is permissible unless either (1) special factors counsel hesitation or (2) Congress has provided an alternative remedy intended to be an equally effective substitute for the Bivens claim.

David C. Nutter, *Two Approaches To Determine Whether an Implied Cause of Action Under the Constitution Is Necessary: The Changing Scope of the Bivens Action*, 19 Georgia L. Rev. 683, 683-84 (1985).

The § 1983 remedy was unavailable in *Bivens* because that case involved a constitutional violation by federal agents. Section 1983 provides a remedy where the unlawful actor is an official acting under color of state law. The Ninth Circuit has consistently ruled that § 1983 supplants any *Bivens*-style implied cause of action and is the exclusive basis for a federal court challenge to actions by local planning and zoning officials that are alleged to violate the U.S. Constitution. "Plaintiff has no cause of action directly under the United States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983." *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992), *cert. denied*, 506 U.S. 1081 (1993). "For these reasons, we have held that a plaintiff may not sue a state defendant directly under the Constitution where section 1983 provides a remedy, even if that remedy is not available to the plaintiff."

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[412] *Bivens* was followed by *Davis v. Passman*, 442 U.S. 228 (1979), which held that a congressional staffer could sue her employer, a U.S. Congressman, for an alleged violation of the Fifth Amendment (gender discrimination). Here, too, § 1983 was unavailable because no state actor was involved, as the court noted in a footnote. *Davis*, 442 U.S. at 239 n.16. Thus, *Davis* and *Bivens* are consistent in recognizing a direct cause of action for constitutional deprivation under facts where no other cause of action is available. Neither is inconsistent with *Azul-Pacifico* and other authorities holding that § 1983 displaces direct constitutional challenges when § 1983 is available. See also, *United States v. Clarke*, 445 U.S. 253, 257 (1980) (Rehnquist, J.) (describing "the self-executing character of the constitutional provision with respect to compensation."). This was an action against the federal government, so, as in *Bivens*, § 1983 was not available.

Martinez v. City of Los Angeles, 141 F.3d 1373, 1382 (9th Cir 1998).[413] "Taking claims must be brought under § 1983." *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003), *cert. denied*, 543 U.S. 1041 (2004 and 2005) (two petitions for certiorari denied).

Some confusion on this point has been introduced by *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 314-15 (1987). The case contains some remarkably broad language regarding taking claims: "We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation.'" *First English*, 482 at 315 (internal quotation marks omitted). However, this sweeping statement was offered as a background premise explaining the substantive issue in the case (temporary takings)—which the Court never reached—and not as a repudiation of the limitations on *Bivens* recognized by the Ninth Circuit and other courts. Indeed, *First English* does not address the question of whether taking claims may be brought directly under Constitution independent of § 1983.[414]

Given that § 1983 was not discussed, it is fair to say that *First English* is not on point. Nevertheless, a few courts have assumed that *First English* offers a way for inverse condemnation cases to proceed around § 1983. *E.g., Bieneman v. City of Chicago*, 864 F.2d 463, 468 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989); *287 Corporate Center Associates v. Township of Bridgewater*, 101 F.3d 320 (3d Cir. 1996). These cases, however, dispose of the claims on other grounds (statute of limitations) and do not engage on the issue of independent causes of action against state actors under the Fifth or Fourteenth Amendments. The only case we have encountered that expressly addresses and rejects *Azul-Pacifico*, albeit in dictum, is *Lawyer v. Hilton Head Public Service Dist. No. 1*, 220 F.3d 298 (4th Cir. 2000):

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[413] An attempt to evade this result by asserting that *Azul-Pacifico* applies only to damage-based taking claims and not claims seeking injunctive relief was rejected by the Ninth Circuit in *Golden Gate Hotel Ass'n v. City and Cnty. of San Francisco*, 76 F.3d 386 (list of unpublished decisions), 1996 WL 26944 at *1 (9th Cir. 1996).

[414] The opinion does not even mention § 1983, and the dissent mentions it only in another context. Nor do the parties' briefs. Nor does the case on remand, *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 210 Cal.App.3d 1353, 258 Cal. Rptr. 893 (1989). This may be explained by the peculiar posture of the case. It was brought in state court pursuant to a complaint that alleged only violations of the state constitution. Somehow, in an apparent afterthought, the federal takings claim was introduced at the state appellate level. The U.S. Supreme Court said that was good enough to allow the case to be brought under 28 U.S.C. § 1257. *First English*, 482 U.S. at 313 n.8. Nor does the case cited by the Court for this proposition, *United States v. Clarke*, 445 U.S. 253, 257 (1980) (Rehnquist, J.) have anything to do with the *Bivens* exception issue; *Clarke* involved a federal actor. Owing to the peculiar posture of the case, it appears that no one thought to ask whether a statutory cause of action was available. In any event, the Court did not address the question.

"Other courts, however, have held, in apparent conflict with *First English*, that a violation of the Takings Clause can only be redressed through a claim under § 1983." *Lawyer* at 303 n.4.

The Idaho Supreme Court has not yet grappled with the question. In a footnote in *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 176 n.2, 108 P.3d 315, 323 n.2 (2004) (Eismann, J.), the Court noted in passing that the plaintiffs in that case brought their action directly under the federal Constitution and that doing so was permissible under *First English* (which it called *First Lutheran*).[415] However, the fact that the plaintiff failed to plead § 1983 was not raised as an issue by the parties or the Court, and, in any event, the Court made no mention of Ninth Circuit and other authority to the contrary. The reason it was mentioned at all had to do only with the non-applicability of the tort claims act to federal causes of action. The Court noted that prior Idaho precedent on this point arose in the context of § 1983, but said that made no difference. In other words, no tort claim notice is required for federal claims regardless whether they are pled under § 1983 or otherwise. That is certainly true, and that is the only holding that can be found in *BHA II* on the subject of § 1983. The rest is dictum that is in direct conflict with Ninth Circuit precedent.

Commentators have recognized that *First English* is not definitive. "In the wake of *Monell* and the provision of a remedy under § 1983 there is a split in authority as to whether a right of action based on the Fourteenth Amendment provides a claim for relief sufficient to invoke the federal question jurisdiction of the federal courts." Kenneth B. Bley, *Use of the Civil Rights Acts to Recover Damages in Land Use Cases*, ALI-ABA, § III(B) (2001) (available on Westlaw at SF64 ALI-ABA 435) (citing *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978)).

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[415] The Idaho Supreme Court said in a footnote:

> The Takings Clause is self-executing, and a takings claim may be based solely upon it, *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107 S. Ct. 2378, 96 L.Ed.2d 250 (1987), or it may be brought as an action under 42 U.S.C. § 1983, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L.Ed.2d 882 (1999). The *Felder* case was based upon a state notice-of-claim law that "place[d] conditions on the vindication of a federal right," 487 U.S. at 147, 108 S. Ct. at 2311, 101 L.Ed.2d at 143 not upon a state law that conflicted with the procedure provided by § 1983. One advantage to bringing a federal takings claim under § 1983 is the availability of an award of attorney fees under 42 U.S.C. § 1988.

BHA II, 141 Idaho at 176 n.2, 108 P.3d at 323 n.2.

The cases and commentary overwhelmingly support the rule established in the Ninth Circuit by *Azul-Pacifico* and other cases.[416] For example:

> Although § 1983 provides express authorization for the assertion of federal constitutional claims against state actors, the Supreme Court has endorsed the view, expressed in several circuit court decisions, that limitations which exist under § 1983 may not be avoided by assertions of *Bivens*-type claims against state and local defendants. [Footnote citing *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 735 (1989).] Thus, the availability of the § 1983 remedy precludes reliance upon the *Bivens* doctrine.
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> . . .
>
> Whether § 1983 preempts an alternative constitutional or statutory claim depends upon congressional intent.
>
> . . . As discussed below, it is settled that § 1983 operates to preempt alternative *Bivens*-type claims asserted directly under the federal Constitution.
>
> . . .
>
> The federal courts have consistently adhered to the principle that § 1983 preempts *Bivens*-type remedies against those who acted under color of state law. [Footnote citing *Azul-Pacifico* among others.]

[416] Cases from other jurisdictions reaching the same conclusion as *Azul-Pacifico* include the following: *Smith v. Dep't of Public Health*, 410 N.W.2d 749, 787 (Mich. 1987) ("Thus, both *Chappell* and *Bush* signal a retrenchment from the broad remedial scope evident in the Court's earlier *Bivens*, *Davis*, and *Carlson* opinions. Both *Chappell* and *Bush* suggest greater caution and increased willingness on the part of the court to defer to Congress on the question whether to create damages remedies for violations of the federal constitution."); *Kelley Property Development, Inc. v. Town of Lebanon*, 627 A.2d 909, 921 (Conn. 1993) ("In its current configuration, the *Bivens* line of United States Supreme Court cases thus appears to require a would be *Bivens* plaintiff to establish that he or she would lack any remedy for alleged constitutional injuries if a damages remedy were not created. It is no longer sufficient under federal law to allege that the available statutory or administrative mechanisms do not afford as complete a remedy as a *Bivens* action would provide."); *Wax 'n Works v. City of St. Paul*, 213 F.3d 1016, 1019 (8th Cir. 2000) (Plaintiff asserted claim directly under Fourteenth Amendment; court treated it as under § 1983 and denied relief on exhaustion/ripeness grounds); *Thomas v. Shipka*, 818 F.2d 496, 499 (6th Cir. 1987), *vacated on other grounds & remanded*, 488 U.S. 1036 (1989) (when § 1983 action is precluded by statute of limitations, plaintiff may not bring separate action directly under the Constitution).

Martin A. Schwartz, *Section 1983 Litigation Claims and Defenses*, § 1.05 (2010) (available on Westlaw as SNETLCD s 1.05). There is substantial secondary authority on this point.[417] All of these authorities are post-*First English*.

Indeed, *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 735 (1989), it would seem, should put to rest the suggestion that *First English* provides a basis for an end run around § 1983. It held:

> We hold that the express "action at law" provided by § 1983 for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor.

Jett, 491 U.S. at 735. *Jett* dealt with the question of whether plaintiffs can evade limitations on respondeat superior under § 1983 by bringing direct, *Bivens*-type claims. The Court said they may not. "Since our decision in *Monell*, the Courts of Appeals have unanimously rejected the contention, analogous to petitioner's argument here, that the doctrine of respondeat superior is available against a municipal entity under a *Bivens*-type action implied directly from the Fourteenth Amendment." *Jett*, 491 U.S. at 735.

Escaping § 1983 may matter for purposes of respondeat superior, but apparently it does not matter for the statute of limitations. See discussion in section 22 at page 291.

In the end, getting around *Azul-Pacifico* and escaping § 1983 may not matter. Even if there is a direct cause of action that gets the plaintiff into court, the federal claims would still be subject to the two-year statute of limitations applicable to

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[417] Another hornbook on § 1983 notes a variety of federal cases reaching the same conclusion, concluding, "The Ninth Circuit asserted that Fourteenth Amendment actions for damages against state defendants are precluded by the availability of § 1983." Sheldon Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983*, § 6:59 (2010) (available on Westlaw at CIVLIBLIT § 6:59). Another law professor concludes:

> Under *Bivens*, the courts are to refrain from a *Bivens*-type action for damages only when Congress has created an alternative remedy. Originally, the Court withheld a *Bivens* damages remedy, because unnecessary, only when the remedy provided by Congress was equally effective. Since *Bivens*, however, the Court has retreated from that principle and now refuses a damages action whenever Congress has made available some relief even if not equal to the damages remedy.

Alan R. Madry, Private Accountability and the Fourteenth Amendment; State Action, Federalism and the Courts, 59 Missouri L. Rev. 499, 551 (1994) (footnote cites David C. Nutter, Note, Two Approaches to Determine Whether an Implied Cause of Action under the Constitution is Necessary: The Changing Scope of the Bivens Action, 19 Ga. L. Rev. 683 (1985)).

§ 1983 claims (see discussion in section 22 at page 291) as well as the *Williamson County* defenses (discussed in section Volume II of this Handbook).

Nor may a plaintiff may not escape the restrictions of § 1983 by arguing that the federal Declaratory Judgment Act accords an independent cause of action. "The Declaratory Judgment Act (28 USC §2201, above) creates a federal *remedy*. It is *not* an independent basis for federal jurisdiction. Before declaratory relief can be granted, federal subject matter jurisdiction requirements must be satisfied. . . . [D]eclaratory relief is a remedy, not a cause of action." *Federal Civil Procedure Before Trial* (Rutter Group – 9th Circuit Edition), § 10:14 at 10-5 (2010).

In *White Cloud v. Valley County*, 2011 WL 4583846 (D. Idaho Sept. 30, 2011) (Lodge, J.); *White Cloud v. Valley County*, 2012 WL 13018504 (D. Idaho Aug. 8, 2012) (Lodge, J.), the federal district court confirmed in an Idaho case that where § 1983 is available it is exclusive. Accordingly, the court dismissed the plaintiffs' federal taking claim for failure to present it under § 1983.

DD. Separate judicial review provision for counties: Section 31-1506(1)

In addition to LLUPA, another statute provides an independent basis for judicial review of county decisions. It is contained within a chapter of the Idaho Code and appears under the heading "County Finances and Claims Against Counties." It links to the judicial review provisions in the IAPA. It provides:

> (1) Unless otherwise provided by law, judicial review of any final act, order or proceeding of the board as provided in chapter 52, title 67, Idaho Code, shall be initiated by any person aggrieved thereby within the same time and in the same manner as provided in chapter 52, title 67, Idaho Code, for judicial review of actions.
> (2) Venue for judicial review of final board actions shall be in the district court of the county governed by the board.

Idaho Code § 31-1506.[418]

[418] This statute may be traced back at least to 1887. Rev. Stat. of Idaho Terr. § 1776 (1887). It was amended many times over the years, the first in 1895. 1895 Idaho Sess. Laws, S.B. 39 at 50-52. From then until 1993, the statute provided a 20-day deadline for judicial review (initially referred to as an appeal). In 1993 the Legislature repealed the statute and replaced it with an entirely new one similar to the current law (referencing the 28-day period for judicial review in the IAPA). 1993 Idaho Sess. Laws, ch. 103, § 2. At that time and for many years prior, the statute was codified at Idaho Code § 31-1509. It was amended in 1994, substituting the word "shall" for "may." 1994 Idaho Sess. Laws, ch. 241, § 1. In 1995, it was recodified (without amendment) to Idaho Code

In *Giltner Dairy, LLC v. Jerome Cnty.* ("*Giltner II*"), 150 Idaho 559, 249 P.3d 358 (2011) (Horton, J.), the Idaho Supreme Court found that section 31-1506(1) does not provide an independent right to judicial review of matters governed by LLUPA. In essence, the Court determined that LLUPA's judicial review provisions are more specific and override the broader authorization contained in section 31-1506(1).

> This Court has given an expansive reading to I.C. § 31-1506, notwithstanding the fact that the provision is included in a chapter that addresses county finances. *See, e.g., In re Bennion*, 97 Idaho 764, 554 P.2d 942 (1976) (decision approving property development); *Rural High Sch. Dist. No. 1 v. Sch. Dist. No. 37*, 32 Idaho 325, 182 P. 859 (1919) (order changing school district boundaries); *Village of Ilo v. Ramey*, 18 Idaho 642, 112 P. 126 (1910) (order incorporating a village); *Latah County v. Hasfurther*, 12 Idaho 797, 88 P. 433 (1907) (order opening a private road). However, the prior holdings by this Court do not address the question whether, by providing specific judicial review provisions in LLUPA, the legislature has "otherwise provided" that those provisions are the sole avenues for judicial review.

Giltner II, 150 Idaho at 561, 249 P.3d at 360.

> We conclude that LLUPA's judicial review provisions comprise a comprehensive scheme for judicial review and indicate that the legislature has "otherwise provided" a system for review for decisions made under LLUPA.

Giltner II, 150 Idaho at 562, 249 P.3d at 361.

Thus, if the action being challenged is a planning and zoning matter governed or addressed by LLUPA, judicial review is available if and only if LLUPA provides judicial review, and section 31-1506 may not be used to fill in gaps in judicial review intentionally built into LLUPA by the Legislature.

In *Giltner II*, the dairy sought judicial review of a rezone of a neighboring property. (Presumably, the dairy was concerned that if a housing development was constructed adjacent to the dairy, there would be odor complaints about the dairy.) Recall that in *Giltner I*, the dairy failed in its effort to obtain judicial review of a change to the comprehensive plan map. This time the dairy premised jurisdiction in part on Idaho Code § 31-1506(1). The Idaho Supreme Court affirmed the district

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§ 31-1506. 1995 Idaho Sess. Laws, ch. 61, § 11. It was amended again in 2013. 2013 Idaho Sess. Laws, ch. 282 § 1.

court's decision that LLUPA's judicial review provisions are an instance in which the Legislature has "otherwise provided by law" thus making section 31-1506(1) inapplicable to planning and zoning matters. The Court said that it is not necessary for the Legislature to expressly state in LLUPA that section 31-1506 is unavailable. Instead, by analogy to the law of preemption, the Court will look to the overall legislative scheme and will find that the LLUPA judicial review provisions reflect legislative action "in such a pervasive manner that it must be assumed that it intended to occupy the entire subject." *Giltner II*, 150 Idaho at 561, 249 P.3d at 360 (*quoting from Envirosafe Services of Idaho, Inc. v. Cnty. of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987) (internal quotation marks omitted).

The *Giltner II* case arose during the "donut hole" between *Burns Holdings, LLC v. Madison Cnty. Bd. of Cnty. Comm'rs* ("*Burns Holdings I*"), 147 Idaho 660, 214 P.3d 646 (2009) and the 2010 LLUPA amendments when rezones were not subject to judicial review. The concurrence by Justice Jim Jones chastised counsel for its narrow approach to the litigation. The dairy could have obtained judicial relief either by framing the matter as a declaratory action or, after the 2010 amendments, requesting that they be applied retroactively.

In an earlier case, the Idaho Supreme Court recognized the district court's jurisdiction over a judicial review involving "an application to the County for approval to build a rental home on their leased property." *Allen v. Blaine Cnty.*, 131 Idaho 138, 139, 953 P.2d at 578, 579 (1998). The county denied the application because it was inconsistent with the final plat, which listed the lot as non-buildable. It is not clear from the opinion what the nature of the application was. Apparently, it was something that fell outside the ambit of LLUPA. In any event, the case did not discuss the availability or non-availability of LLUPA review, nor the interaction between LLUPA review and review under section 31-1506.

EE. Estoppel

In *Terrazas v. Blaine Cnty.*, 147 Idaho 193, 207 P.3d 169 (2009), the Idaho Supreme Court rejected an estoppel argument based on representations by the P&Z Administrator that a proposed subdivision did not lie within the mountain overlay district. The Court emphasized that estoppel is available only under "exigent circumstances" that were not present here, despite the fact that the applicants spent over $50,000 in planning for a project that was ultimately rejected by the county as being within the mountain overlay district. The Court explained, "If this Court were to apply the doctrine of estoppel in the instant case, then all future boards of commissioners in similar circumstances would be estopped from disagreeing with the opinions of staff members simply because a landowner expended money in reliance on those opinions."

FF. Void for vagueness

Occasionally zoning and subdivision ordinances have been challenged as being void for vagueness. The basic premise is that "[a] statute is void for vagueness if persons of ordinary intelligence must guess at its meaning." *Terrazas v. Blaine Cnty.*, 147 Idaho 193, 207 P.3d 169 (2009). This is a difficult standard to meet.

In *Terrazas*, the Idaho Supreme Court rejected an argument that Blaine County's mountain overlay district ("MOD") ordinance was void for vagueness (and a separate argument that it was inconsistently applied in violation of equal protection). The MOD ordinance employed a textual definition of the MOD, as opposed to a map. (It has subsequently been changed to a map, to avoid the sort of confusion that led to this litigation.) The text defined the boundaries of the MOD in terms of the steepness of the slope. There was a dispute as to whether the MOD included flat bench areas above lower, high-slope areas. County staff told the applicant that these bench areas were excluded, based on a definition of "bench" in the ordinance. The county commissioners disagreed, concluding that while the term "bench" was a defined term, the MOD definition contained no exception for benches. The applicant's argument was, essentially, that if the staff and the county commissioners can't even agree on what the statute means, it must be unconstitutionally vague. The court (Judge Elgee) said that was not the test. Nor was the Court moved by comments made by county commissioners that the ordinance was difficult to understand. Rather, the Court looked at the language of the ordinance itself, and found it to be clear and correctly interpreted by the county commissioners. Hence it was not void for vagueness.

The Idaho Supreme Court affirmed the district court's decision. The district court decision contains a good summarizes the law on the subject, clarifying how the rule operates in criminal and civil contexts:

> Due process prohibits "a statute which either forbids or requires the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application" *Haw v. Idaho State Board of Medicine*, 140 Idaho 152, 90 P.3d 902 (2004). Although the void-for-vagueness doctrine is most often applied to criminal statutes, its application to civil statutes or ordinances is well founded. *Cowan v. Board of Commissioners of Fremont County*, 143 Idaho 501, 148 P.3d 1247 (2006). However, when applied to civil ordinances, "a greater tolerance is permitted." *Id*. Furthermore, "in evaluating a constitutional challenge to a statute on the basis of void for vagueness, the Court must consider both the essential fairness of the law and

> the impracticality of drafting legislation with greater specificity." *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 715, 791 P.2d 1285, 1294 (1990).

Terrazas v. Blaine Cnty., Case No. CV-05-760 (Idaho, Fifth Judicial Dist., Mar. 21, 2007) (Decision at 17), aff'd, *Terrazas v. Blaine Cnty.*, 147 Idaho 193, 207 P.3d 169 (2009).

GG. Construction of ordinances

(See also discussion under "Presumption of Validity" in section 24.I(3) at page 348.)

The issue of interpretation of ordinances comes up frequently in judicial review litigation. Here is the recurring fact pattern: The city (or county) says its ordinance means X, and that the court should defer to its construction. Both parties then employ various canons of construction to argue that the ordinance does or does not mean X.

At the outset, it should be noted that the interpretation of an ordinance is an issue of law. Therefore, both the district court and the appellate court exercise free review in interpreting the ordinance. *Ada Cnty. v. Gibson*, 126 Idaho 854, 855, 893 P.2d 801, 802 (Ct. App. 1995). *See also, Cnty. Residents Against Pollution from Septage Sludge (CRAPSS) v. Bonner Cnty. ("County Residents")*, 138 Idaho 585, 588, 67 P.3d 64, 67 (2003) (overturning county interpretation of appeal ordinance).

"We apply the same principles in construing municipal ordinances as we do in the construction of statutes." *Neighbors for a Healthy Gold Fork v. Valley Cnty.*, 145 Idaho 121, 131, 176 P.3d 126, 136 (2007). The interpretation of an ordinance "begins with the literal language of the enactment." *Payette River Property Owners Ass'n v. Bd. of Comm'rs of Valley Cnty.*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999); *Fischer v. City of Ketchum*, 141 Idaho 349, 109 P.3d 1091 (2005). Where the language of the ordinance is unambiguous, "the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction." *Payette River*, 132 Idaho at 557, 976 P.2d at 483. That is, the court must first determine whether the ordinance is ambiguous. If it is not, the plain language of the ordinance governs and it is improper to even consider other "interpretations." No "presumption of validity" changes this basic rule. *See also, The J & M Realty Company v. Bd. of Zoning Appeals of the City of Norwalk*, 286 A.2d 317, 319 (Conn. 1971) (a governing board may not interpret its zoning regulations beyond the "fair import" of the language of the regulations). Although the language may be slightly different, the substance is the same: the county may not interpret its ordinance in a way inconsistent with reason and the words of the ordinance.

Moreover, "ambiguity is not established merely because the parties present differing interpretations to the court." *Payette River*, 132 Idaho at 557, 976 P.2d at 483. Only where "reasonable minds might differ or be uncertain as to [the ordinance's] meaning," should a court consider rules of construction. *Payette River*, 132 Idaho at 557, 976 P.2d at 483; *Gibson*, 142 Idaho at 856, 893 P.2d at 803.

Nevertheless, courts will "defer[] to the [County Commission's] application and interpretation of its Zoning Ordinance unless such application or interpretation is capricious, arbitrary or discriminatory." *Sanders Orchard v. Gem Cnty.*, 137 Idaho 695, 700-01, 52 P.3d 840, 845-46 (2002) (upholding interpretation of central sewer requirement in ordinance). *See also, Rural Kootenai Organization, Inc. v. Bd. of Comm'rs, Kootenai Cnty.*, 133 Idaho 833, 842-43, 993 P.2d 596, 605-06 (2000) (overturning interpretation of ownership and open space requirements in zoning ordinance); *County Residents*, 138 Idaho at 588, 67 P.3d at 67 (overturning county's interpretation of ordinance, but without discussion of rules of construction). "Because there is a strong presumption favoring the validity of the actions of zoning boards, which includes the application and interpretation of their own zoning ordinances, this Court defers to County's interpretation." *Chisholm v. Twin Falls Cnty.*, 139 Idaho 131, 136, 75 P.3d 185, 190 (2003).

Even where the Court has found that ambiguity allows for the consideration of alternative constructions, it has said that "[c]onstructions that would lead to absurd or unreasonably harsh results are disfavored." *Payette River*, 132 Idaho at 557, 976 P.2d at 483.

In *County Residents*, the Idaho Supreme Court showed there are some limits on a governing board's authority to interpret their ordinances. In that case, the Bonner County Planning and Zoning Commission issued a permit to the applicant to apply septic tank sludge on his property. Several neighbors appealed to the county commission pursuant to the terms of the zoning ordinance. The county commission met and summarily dismissed the appeal pursuant to an ordinance provision allowing a summary dismissal where the appellant "does not state lawful grounds" for appeal. The district court reversed the decision and the Idaho Supreme Court upheld the reversal. The county had argued the "no lawful grounds" language in the ordinance permitted the county commission to dismiss the appeal simply if it did not want to hear it, and the applicant's sole remedy was to obtain judicial review in district court based on the planning and zoning commission's record. Notwithstanding the "presumption of validity" favoring the county, the Court rejected the county's interpretation, finding that the appeal included both sufficient facts and legal grounds to require the county commission to hear the appeal under the terms of the ordinance. *County Residents*, 138 Idaho at 588, 67 P.3d at 67. The Court even ordered the county to pay the appellant's attorney's fees, both at the district court level and on appeal, for adopting a position without a reasonable basis in fact or law. *County Residents*, 138 Idaho at 589, 67 P.3d at 68.

The Court also applies to ordinances this well-known canon of construction: "All sections of applicable statutes must be construed together so as to determine the legislature's intent." *Friends of Farm to Market v. Valley Cnty.*, 137 Idaho 192, 197, 46 P.3d 9, 14 (2002).

HH. Deference to an agency's construction of its governing statute

The preceding section discussed the rules governing a local government's interpretation of its own ordinances. We turn now to the rules of statutory construction, that is, the rules governing its interpretation of the controlling statutes.

Ordinarily statutory construction is considered a question of law that is entirely within the province of the courts. Under some circumstances, however, deference is owed to the agency's own interpretation of its governing statute. The seminal modern federal case on this issue is *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In *Chevron*, the Supreme Court set out a two-step analysis. First, the reviewing court determines whether the Congress or state legislative body has spoken directly and unambiguously. If so, that is the end of the matter. If, however, the court concludes that the statute is silent or ambiguous, then the court moves to the second step. In the second step the court determines whether the agency's interpretation of the statute is based on a permissible construction, *i.e.*, whether it is reasonable. If so, the agency's interpretation is entitled to deference.

Agencies have been tripped up under this two-step process. Where the agency declared that the statute is unambiguous, and the court determines that it is ambiguous, the court will not then deferentially evaluate whether the agency's interpretation is reasonable. "Because the Secretary did not recognize the ambiguities inherent in the statutory terms, we do not defer to her plain meaning interpretation but instead remand for her to treat the statutory language as ambiguous." *Peter Pan Bus Lines, Inc. v. Federal Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006). "As the Final Rule is based on FWS' erroneous conclusion that the ESA is unambiguous on this point, the court may neither defer to the agency's construction nor endorse [its] construction." *The Humane Society of the U.S. v. Kempthorne*, 579 F. Supp. 2d 7, 15 (2008). The take-home message to agencies and local governments: support your interpretation by arguments in the alternative (both plain meaning and reasonable construction of an ambiguous statute).

The Idaho Supreme Court embraced at least parts of *Chevron* in *J.R. Simplot Company, Inc. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991), declaring that "the rule of deference to agency statutory constructions retains continuing validity." In its ruling, however, the Idaho Supreme Court articulated a

four-step analysis that incorporates some of the basic teaching of *Chevron* while departing in other ways.

> After reviewing our extensive case history, as well as the holdings of the U.S. Supreme Court and various other state courts, we hold that the rule of deference to agency statutory constructions retains continuing validity. We hold that a standard of "free review" is not applicable to agency determinations. Accordingly, we hereby clarify and limit *Idaho Fair Share* [*v. Public Utility Comm'n, 113 Idaho 959, 751 P.2d 107 (1988)*] to the extent that case implied that the standard of free review was appropriate for reviewing an agency's statutory interpretations.
>
> In determining the appropriate level of deference to be given to an agency construction of a statute, we are of the opinion that a court must follow a four-prong test. The court must first determine if the agency has been entrusted with the responsibility to administer the statute at issue. Only if the agency has received this authority will it be "impliedly clothed with power to construe" the law. *Kopp v. State*, 100 Idaho 160, 163, 595 P.2d 309, 312 (1979).
>
> The second prong of the test is that the agency's statutory construction must be reasonable. This requirement was recognized at the beginning of our case law when in *State v. Omaechevviaria*, 27 Idaho 797, 152 P. 280 (1915), we indicated that deference would not be appropriate when an agency interpretation "is so obscure and doubtful that it is entitled to no weight or consideration." 27 Idaho at 803, 152 P. at 281; *see also Breckenridge v. Johnston*, 62 Idaho 121, 108 P.2d 833 (1940).
>
> The third prong for allowing agency deference is that a court must determine that the statutory language at issue does not expressly treat the precise question at issue. An agency construction will not be followed if it contradicts the clear expressions of the legislature because "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43, 104 S. Ct. at 2781 (footnotes omitted).
>
> If an agency, with authority to administer a statutory area of the law, has made a reasonable construction of a

> statute on a question without a precise statutory answer then, under the fourth prong of the test, a court must ask whether any of the rationales underlying the rule of deference are present. If the underlying rationales are absent then their absence may present "cogent reasons" justifying the court in adopting a statutory construction which differs from that of the agency.

J.R. Simplot Company, Inc. v. Idaho State Tax Comm'n, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991) (emphasis supplied).

As noted, the first prong of that test is to "determine if the agency has been entrusted with the responsibility to administer the statute at issue." *J.R. Simplot*, 120 Idaho at 862, 820 P.2d at 1219. In the land use context, the question would be whether the city or county is an agency entrusted to administer LLUPA. Presumably the answer would be yes, but, to our knowledge, that point has not been litigated.

II. Statutes and canons of construction

(1) Only ambiguous statutes are subject to statutory construction.

Statutory construction is appropriate only where the statute is ambiguous. *Bonner Cnty. v. Kootenai Hospital Dist.*, 145 Idaho 677, 145 Idaho 677 (2008) ("Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999).").

"The purpose of an unambiguous statute is not the concern of the courts when attempting to interpret a statute. The asserted purpose for enacting the legislation cannot modify its plain meaning. The scope of the legislation can be broader than the primary purpose for enacting it. This Court has stated that when the language of a statute is definite, courts must give effect to that meaning whether or not the legislature anticipated the statute's result. We do not construe a statute unless its wording is ambiguous." *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 233 P.3d 118, 122-23 (Idaho 2010) (Eismann, C.J.) (citations and internal quotation notations omitted).

In 2011, the Court rejected earlier suggestions that it might invalidate a statute whose unambiguous meaning would lead to an absurd result:

> We have recited the language from the *Willys Jeep* case or similar language numerous times, usually without even addressing whether we considered the unambiguous statute absurd as written. [String citation omitted.]

> In several cases, we have responded to arguments that the wording of an unambiguous statute would produce an absurd result, but we have never agreed with such arguments. [String citation omitted.]
>
> Thus, we have never revised or voided an unambiguous statute on the ground that it is patently absurd or would produce absurd results when construed as written, and we do not have the authority to do so. "The public policy of legislative enactments cannot be questioned by the courts and avoided simply because the courts might not agree with the public policy so announced." *State v. Village of Garden City*, 74 Idaho 513, 525, 265 P.2d 328, 334 (1953). Indeed, the contention that we could revise an unambiguous statute because we believed it was absurd or would produce absurd results is itself illogical. "A statute is ambiguous where the language is capable of more than one reasonable construction." *Porter v. Board of Trustees, Preston School Dist. No. 201*, 141 Idaho 11, 14, 105 P.3d 671, 674 (2004). An unambiguous statute would have only one reasonable interpretation. An alternative interpretation that is unreasonable would not make it ambiguous. *In re Application for Permit No. 36–7200*, 121 Idaho 819, 823–24, 828 P.2d 848, 852–53 (1992). If the only reasonable interpretation were determined to have an absurd result, what other interpretation would be adopted? It would have to be an unreasonable one. We therefore disavow the wording in the *Willys Jeep* case and similar wording in other cases and decline to address Plaintiffs' argument that Idaho Code section 39–1392b is patently absurd when construed as written.

Verska v. St. Alphonsus Regional Medical Center, 151 Idaho 889, 895-86, 265 P.3d 502, 508-09 (2011) (Eismann, J.) (citing *State, Dep't of Law Enforcement v. One 1955 Willys Jeep*, 100 Idaho 150, 595 P.2d 299 (1979)). This holding has been repeatedly confirmed. *E.g.*, *State v. Owens*, 158 Idaho 1, 5, 343 P.3d 30, 34 (2014) (Trout, J); *State v. Montgomery*, 163 Idaho 40, 44, 408 P.3d 38, 42 (2017) (Brody, J.)[419]; *State v. Osborn*, 165 Idaho 627, 631, 449 P.3d 419, 423 (2019) (Brody).

[419] The *Montgomery* case drew a sharp distinction between the interpretation of statutes and court rules. *Montgomery* recognized the prohibition in *Verska* against interpreting an unambiguous statute other than according to its plain meaning, but said that restriction does not apply to the

In 2000 (prior to *Verska*), the Court said that statutes should be interpreted to avoid "hardship" or "an oppressive result." *Mulder v. Liberty Northwest Ins. Co*., 135 Idaho 52, 57, 14 P.3d 372, 377 (2000) (Silak, J.). However, that statement was made in the context of "choosing between alternative constructions of a statute." *Id*. Thus, the statement is not inconsistent with *Verska*, because it arose in the context of an ambiguous statute.

In 2016, the Court stated, without discussing *Verska* or any other authority, that it "will not read a statute to create an absurd result." *David & Marvel Benton Trust v. McCarty*, 161 Idaho 145, 151, 384 P.3d 392, 398 (2016) (W. Jones, J). In *Moser v. Rosauers Supermarkets, Inc*., 165 Idaho 133, 443 P.3d 147 (2019) (Bevan, J.), the Court found that the statute at issue was unambiguous, which precluded an investigation of legislative intent.[420] Yet, in applying the unambiguous statute, the Court employed the absurd result language in *Benton Trust*. "It would be unreasonable to allow a claimant to file a claim for disability and prohibit an employer any opportunity to assess the merit of those allegations before they have to compensate the claimant. 'This Court will not read a statute to create an absurd result.'" *Moser*, 165 Idaho at 137, 443 P.3d at 151 (quoting *Benton Trust*).

This statement in *Moser* might seem like a retreat from *Verska*, but it was not. This made clear in *State v. Osborn*, 165 Idaho 627, 631, 449 P.3d 419, 423 (2019) (Brody). In *Osborn*, the majority simply stuck to *Verska* and applied what the dissent quite accurately called a textualist analysis of a statute dealing with sentencing. The dissent argued that the statute was ambiguous and should have been interpreted in a way in line with its clear legislative purpose. Citing *Benton Trust* and *Moser*, the dissent said those cases stand for the "cardinal principle of statutory construction to avoid reading ambiguous statutes in a manner that leads to an irrational result." *Osborn*, 165 Idaho at 636, 449 P.3d at 428 (Moeller, J., dissenting) (emphasis added). Thus, both sides of the Court are of the view there has been no departure from the rule in *Verska* that only ambiguous statutes are subject to examination of legislative intent.

A Justice of the U.S. Supreme Court, whose textualist legal philosophy aligns with that reflected in *Verska*, wrote in 2021 summed all this up with the observation

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interpretation of court rules. "We are not constrained by the constitutional separation of powers when interpreting rules promulgated by the Court. Today we make it clear that while the interpretation of a court rule must always begin with the plain, ordinary meaning of the rule's language it may be tempered by the rule's purpose. We will not interpret a rule in a way that would produce an absurd result." *Montgomery*, 163 Idaho at 44, 408 P.3d at 42. See *State v. Heath*, 168 Idaho 678, 485 P.3d 1121 (2021) (Brody, J.) (interpreting a court rule to avoid an absurd result).

[420] "We do not find Idaho Code section 72-433 to be ambiguous. We will therefore apply the statute as written." *Moser*, 165 Idaho at 136, 443 P.3d at 150.

that "no amount of policy-talk can overcome a plain statutory command." *Niz-Chavez v. Garland*, 141 S.Ct. 1474 (2021) (Gorsuch, J.).

(2) More specific controls

Where two statutes address the same subject matter and lead to different conclusions, the more specific and/or more recent statute controls.

"Further, '[w]here two statutes apply to the same subject matter they are to be construed consistent with one another where possible, otherwise the more specific statute will govern.'" *Hood v. Poorman*, 519 P.3d 769, 790 (Idaho 2022) (Zahn, J.) (citing *Huyett v. Idaho State Univ.*, 104 P.3d 946, 951 (Idaho 2004)).

Regan v. Owen, 2017 WL 3927024 at *7 (Idaho, Sept. 8, 2017) (Horton, J.) ("when a conflict between statutes arises, the more specific will control"); *Christensen v. West*, 92 Idaho 87, 90, 437 P.2d 359, 362 (Idaho 1968) (McQuade, J.) ("we reaffirm the principle that a particular pertinent statute will prevail over a general pertinent statute").

(3) More recent controls

Mickelsen v. City of Rexburg, 101 Idaho 305, 307, 612 P.2d 542, 544 (1980) (McFadden, J.) ("when two governmental promulgations are in irreconcilable conflict, the one enacted later in time governs").

(4) Various canons

As *Verska* and its progeny (discussed above) make clear, courts may not engage in statutory construction where the statute is ambiguous. But where a statute is subject to differing interpretations, courts are expected to employ the canons of construction to search for the legislative intent. Indeed, the core purpose of statutory construction is to divine legislative intent. *Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52, 57, 14 P.3d 372, 377 (2000) (Silak, J.) ("Our objective in interpreting a statute is to derive the intent of the legislature.").

There are many well-known canons of statutory construction. These are simply rules of thumb applied by courts and other decision-makers to the interpretation of written laws of all sorts (constitutions, legislation, and ordinances).

Writing in *The Advocate*, an Idaho lawyer published a comprehensive list of canons of statutory construction. At the end, he summed them up saying, "In conclusion, the general rule appears to be that the most reasonable interpretation of a statute is the one that will likely be adopted by the Court, as it is the likeliest intent of the legislature. These canons are in place simply to help determine what is reasonable under the circumstances." *Listing the Canons of Statutory Construction*, The Advocate (May 2016).

An excellent summary of the canons is found in this Court of Appeals decision:

> The interpretation of a statute is an issue of law over which we exercise free review. *Aguilar v. Coonrod*, 151 Idaho 642, 649-50, 262 P.3d 671, 678-79 (2011). Such interpretation must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011). It is well established that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature. *Id*. Only where a statute is capable of more than one conflicting construction is it said to be ambiguous and invoke the rules of statutory construction. *L & W Supply Corp. v. Chartrand Family Trust*, 136 Idaho 738, 743, 40 P.3d 96, 101 (2002). If it is necessary for this Court to interpret a statute because an ambiguity exists, then this Court will attempt to ascertain legislative intent and, in construing the statute, may examine the language used, the reasonableness of the proposed interpretations, and the policy behind the statute. *Kelso & Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 134, 997 P.2d 591, 595 (2000). Where the language of a statute is ambiguous, constructions that lead to absurd or unreasonably harsh results are disfavored. *See Jasso v. Camas Cnty*., 151 Idaho 790, 798, 264 P.3d 897, 905 (2011).

State v. Kincaid, 165 Idaho 273, 278-79, 443 P.3d 287, 292-93 (Ct. App. 2019) (Huskey, J.).

Several basic premises of statutory construction are captured in this quotation:

> The interpretation of a statute is a question of law over which we exercise free review. *Zener v. Velde*, 135 Idaho 352, 355, 17 P.3d 296, 299 (Ct. App. 2000). We will construe a statute as a whole, and the plain meaning of a statute will prevail unless clearly expressed legislative intent is contrary or unless the plain meaning leads to absurd results. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-

> 88 (1990); *Zener*, 135 Idaho at 355, 17 P.3d at 299. Statutes that are *in pari materia, i.e.*, relating to the same subject, must be construed together to give effect to legislative intent. *Paolini v. Albertson's Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006); *Union Pacific R.R. Co. v. Bd. of Tax Appeals*, 103 Idaho 808, 811, 654 P.2d 901, 904 (1982). In construing a statute, this Court examines the language used, the reasonableness of the proposed interpretations, and the policy behind the statutes. *Webb v. Webb*, 143 Idaho 521, 525, 148 P.3d 1267, 1271 (2006). This Court will avoid an interpretation that would lead to an absurd result or render a statute a nullity. *State v. Schmitt*, 144 Idaho 768, 770, 171 P.3d 259, 261 (Ct. App. 2007); *State v. Harvey*, 142 Idaho 727, 730, 132 P.3d 1255, 1258 (Ct. App. 2006).

Johnson v. McPhee, 147 Idaho 455, 561, 210 P.3d 563, 569 (Ct. App. 2009). But see *Verska v. St. Alphonsus Regional Medical Center*, 151 Idaho 889, 895-86, 265 P.3d 502, 508-09 (2011) (Eismann, J.) holding that the Court will not deviate from the plain meaning of a statute even if it leads to an absurd result.

Writing for a unanimous Court, Chief Justice Bevan (then Associate Justice) wrote:

> This Court exercises free review when interpreting a statute. [Citing *Lopez v. State*, 136 Idaho 136, 178, 30 P.3d 952, 956 (quoting *State ex rel. Industrial Commission v. Quick Transp., Inc.*, 134 Idaho 240, 999 P.2d 895 (2000)).] If the statutory language is unambiguous, we merely apply the statute as written. *Id*. If the statute is ambiguous, then we seek to determine the legislative intent. *Id*. When doing so, we may examine the language used, the reasonableness of proposed interpretations, and the policy behind the statute. *Id*. Interpretation begins with the literal language of a statute. *Wernecke v. St. Maries Joint Sch. Dist. No. 401*, 147 Idaho 277, 282, 207 P.3d 1008, 1013 (2009). "The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings." *Id.* That said, the Court must also "give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant." *Id*.

Moser v. Rosauers Supermarkets, Inc., 165 Idaho 133, 136, 443 P.3d 147, 150 (2019) (Bevan, J.).

Another summary of the law is found in this 2021 Idaho Court of Appeals decision:

> This Court exercises free review over the application and construction of statutes. *State v. Reyes*, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003). Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000). The language of the statute is to be given its plain, obvious, and rational meaning. *Burnight*, 132 Idaho at 659, 978 P.2d at 219. If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *Escobar*, 134 Idaho at 389, 3 P.3d at 67. When this Court must engage in statutory construction because an ambiguity exists, it has the duty to ascertain the legislative intent and give effect to that intent. *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct. App. 2001). To ascertain such intent, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute and its legislative history. *Id*. It is incumbent upon a court to give an ambiguous statute an interpretation which will not render it a nullity. *Id*.

State v. Damiani, 2021 WL 3520973, *2 (Idaho Ct. App.) (Aug. 11, 2021).

Likewise, there is the rule that a statute should be construed so as to avoid constitutional questions. *United States v. Grace*, 461 U.S. 171, 175-76 (1983) ("Our normal course is first to ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.") (internal quotes and brackets omitted); *State v. Holden*, 126 Idaho 755, 761 n.4, 890 P.2d 341, 347 n.4 (Ct. Ap. 1995) ("We are mindful that whenever possible, a statute should be construed so as to avoid a conflict with the state or federal constitution."); *Cowles Publ'g Co. v. Magistrate Court of the First Judicial Dist. of the State of Idaho*, 118 Idaho 753, 759, 800 P.2d 640, 646 (1990) ("Where a statute is capable of two interpretations, one of which would make it constitutional and the other

unconstitutional, it is well established that a court should adopt that construction which upholds the validity of the act.").

Writing for the U.S. Supreme Court in 2007, Justice Roberts quoted Justice Frankfurter speaking sixty years earlier:

> "Whatever temptations the statesmanship of policy-making might wisely suggest," the judge's job is to construe the statute—not to make it better. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533 (1947). The judge "must not read in by way of creation," but instead abide by the "duty of restraint, th[e] humility of function as merely the translator of another's command." *Id*., at 533-534. See United States v. Goldenberg, 168 U.S. 95, 103, 18 S. Ct. 3, 42 L. Ed. 394 (1897) ("No mere omission . . . which it may seem wise to have specifically provided for, justif[ies] any judicial addition to the language of the statute").

Jones v. Bock, 549 U.S. 199, 216-17 (2007).

> This Court has consistently adhered to the primary canon of statutory construction that where the language of the statute is unambiguous, the clear expressed intent of the legislature must be given effect and there is no occasion for construction. *Ottesen v. Board of Comm'rs. of Madison County*, 107 Idaho 1099, 1100, 695 P.2d 1238, 1239 (1985). Moreover, unless a contrary purpose is clearly indicated, ordinary words will be given their ordinary meaning when construing a statute. *Bunt v. City of Garden City*, 118 Idaho 427, 430, 797 P.2d 135, 138 (1990). In construing a statute, this Court will not deal in any subtle refinements of the legislation, but will ascertain and give effect to the purpose and intent of the legislature, based on the whole act and every word therein, lending substance and meaning to the provisions. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-88 (1990).

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Ada Cnty., 123 Idaho 410, 415, 849 P.2d 83, 88 (1993).

> "Language of a particular section need not be viewed in a vacuum. And all sections of applicable statutes must be

> construed together so as to determine the legislature's intent." *Lockhart v. Dept. of Fish and Game*, 121 Idaho 894, 897, 828 P.2d 1299, 1302 (1992) (quoting *Umphrey* [*v. Sprinkel*], 106 Idaho [700,] 706, 682 P.2d [1247,] 1253 [(1983)]; *see* also *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 853–54, 820 P.2d 1206, 1210–11 (1991)). Statutes and ordinances should be construed so that effect is given to their provisions, and no part is rendered superfluous or insignificant. *See Brown v. Caldwell Sch. Dist. No. 132*, 127 Idaho 112, 117, 898 P.2d 43, 48 (1995). There is a strong presumption of validity favoring the actions of a zoning authority when applying and interpreting its own zoning ordinances. *South Fork Coalition v. Bd. of Comm'rs*, 117 Idaho 857, 860, 792 P.2d 882, 885 (1990).

Friends of Farm to Market v. Valley Cnty., 137 Idaho 192, 197, 46 P.3d 9, 14 (2002).

> This Court exercises free review over the application and construction of statutes. *State v. Schumacher*, 131 Idaho 484, 485, 959 P.2d 465, 466 (Ct. App. 1998). Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999); *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000). The language of the statute is to be given its plain, obvious, and rational meaning. *Burnight*, 132 Idaho at 659, 978 P.2d at 219. If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *Escobar*, 134 Idaho at 389, 3 P.3d at 67. When this Court must engage in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent. *Rhode*, 133 Idaho at 462, 988 P.2d at 688. To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history. *Id.* It is "incumbent upon a court to give a statute an interpretation which will not render it a nullity." *State v. Nelson*, 119 Idaho 444, 447, 807 P.2d 1282, 1285 (Ct. App. 1991).

State v. Reyes, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003).

> If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history, or rules of statutory interpretation. *Escobar*, 134 Idaho at 389, 3 P.3d at 67.

State v. Abbott, 2014 WL 1266318 (Idaho Ct. App. Mar. 27, 2014) (Gutierrez, J.).

"Statutes and rules that can be read together without conflicts must be read in that way." *State v. Garner*, 161 Idaho 708, 711, 390 P.3d 434, 437 (2017) (Brody, J.).

"Constructions of an ambiguous statute that would lead to an absurd result are disfavored." *State v. Doe*, 140 Idaho 271, 275, 92 P.3d 521, 525 (2004) (Schroeder, J).

"'It is a universally recognized rule of the construction that, where a constitution or statute specifies certain things, the designation of such things excludes all others,' a maxim commonly known as *expressio unius est exclusio alterius." KGF Development, LLC v. City of Ketchum*, 149 Idaho 524, 528, 236 P.3d 1284, 1288 (2010) (J. Jones, J) (italics original).

(5) Codified vs. uncodified legislation

Most legislation of general applicability (federal, state, and municipal) is codified. Occasionally, for one reason or another, a legislature or municipal entity will determine not to codify a provision (or even to un-codify it). This is generally done to avoid unnecessary clutter in the codification. Codification is essentially a convenience for the reader. Whether a statute is codified or not has no bearing on the effectiveness of the statute.

For example, the following pieces of legislation are uncodified, notwithstanding their general applicability:

- A water right permit will specify a period of time during which beneficial use must be made. Idaho Code § 42-204. In 2013, the statute was amended allowing a ten-year extension of the deadline for proof. 2013 Idaho Sess. Laws, ch. 82. An uncodified portion of the 2013 legislation provided that the legislation is retroactive: "Permits pending before the department are entitled to the maximum qualifying extension available pursuant to the provisions of section 42-204, Idaho Code, regardless of whether the permittee received a prior extension under section 42-204(6), Idaho Code." 2013 Idaho Sess. Laws, ch. 82 § 2.

- Legislation authorizing a petition for commencement of the Snake River Basin Adjudication was enacted in 1985. 1985 Idaho Sess. Laws, ch. 18, § 1 (formerly codified at Idaho Code § 42-1406A), as amended by 1985 Idaho Sess. Laws, ch. 118, § 1. It was then amended and uncodified by 1994 Idaho Sess. Laws, ch. 454, § 11).

JJ. Proper use of legislative history and statutory construction

Resort to legislative history is impermissible if the statute is unambiguous.

> The interpretation of a statute "must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written." *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003) (citations omitted). "We have consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." *City of Sun Valley v. Sun Valley Co.*, 123 Idaho 665, 667, 851 P.2d 961, 963 (1993). Furthermore, this Court has held that "[t]he asserted purpose for enacting the legislation cannot modify its plain meaning. The scope of the legislation can be broader than the primary purpose for enacting it." *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 892–93, 265 P.3d 502, 505–06 (2011) (quoting *Viking Constr., Inc. v. Hayden Lake Irr. Dist.*, 149 Idaho 187, 191–92, 233 P.3d 118, 122–23 (2010)). "If the statute as written is socially or otherwise unsound, the power to correct it is legislative, not judicial." Id. (quoting *In re Estate of Miller*, 143 Idaho 565, 567, 149 P.3d 840, 842 (2006)).

Wright v. Ada Cnty., 160 Idaho 491, 497, 376 P.3d 58, 64 (2016) (Burdick, J.).

"However, where a statute is unambiguous, its plain language controls and this Court will not engage in statutory construction." *Ravenscroft v. Boise Cnty.*, 154 Idaho 613, 615-16, 301 P.3d 271, 273-74 (2013) (Burdick, C.J.).

"This Court does not have the authority to revise a statute that is unambiguous as written 'on the ground that it is patently absurd or would produce absurd results when construed as written.'" *Ravenscroft v. Boise Cnty.*, 154 Idaho 613, 616, 301

P.3d 271, 274 (2013) (Burdick, C.J.) (quoting *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 896, 265 P.3d 502, 509 (2011) (Eismann, J.).

KK. Procedural requirements on appeal

(1) Waiver of issues not raised below.

See also discussion in section 24.L(6) at page 388.

"[I]ssues not raised below but raised for the first time on appeal will not be considered or reviewed." *Whitted v. Canyon Cnty. Bd. of Comm'rs*, 137 Idaho 118, 122, 44 P.3d 1173, 1177 (2002).

In *Elias-Cruz v. Idaho Dep't of Transp.*, 2012 WL 2481632 (Idaho 2012), the Idaho Supreme Court noted:

> "Review on appeal is limited to those issues raised before the administrative tribunal," *Johnson v. Blaine County*, 146 Idaho 916, 920, 204 P.3d 1127, 1131 (2009), with the exception of "an issue the administrative tribunal lacked the authority to decide," *id.* at n.2. We will not consider on appeal issues that the administrative tribunal had the authority to decide but were not raised before it. *Id*. at 927, 204 P.3d at 1138.

In *Total Success Investments, LLC v. Ada Cnty. Highway Dist.*, ("*Total Success II*"), 148 Idaho 688, 696, 227 P.3d 942, 950 (Ct. App. 2010) (Perry, J. pro tem.), the Court noted: "However, an appellate court may affirm the district court's decision if an alternative legal basis supports it. *Hanf v. Syringa Realty, Inc.*, 120 Idaho 364, 370, 816 P.2d 320, 326 (1991)."

In *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J.), the city prevailed at trial in defending its sewer cap fee. On appeal, the city raised two additional statutory arguments that had not been presented below, contending that the rule against raising new issues on appeal applies only to the party seeking reversal. The Idaho Supreme Court agreed:

> That statute was not raised below, but the City contends that we could affirm the district court based upon this ground. *See Johnson v. Blaine County*, 146 Idaho 916, 921, 204 P.3d 1127, 1132 (2009) ("[T]he district court arrived at the correct result, but its decision was based upon the wrong theory. We will affirm the decision on the correct theory .").

NIBCA I, 158 Idaho at 85-86, 343 P.3d at 1092-93. The Court went on to consider, but reject, the alternative grounds.

Note the distinction, however, between raising new claims and raising new arguments in support of a previously raised claim:

> We must also reject respondent's contention that the regulatory taking argument is not properly before us because it was not made below. . . .
> . . . Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate claims. They are, rather, separate arguments in support of a single claim—that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here. . . .
> A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below.

Yee v. City of Escondido, 503 U.S. 519, 534-35 (1992) (O'Connor, J.) (citations omitted).

(2) Waiver of issues not supported by authority.

"[I]ssues on appeal that are not supported by propositions of law or authority are deemed waived and will not be considered." *Halvorson v. N. Latah Cnty. Highway Dist.*, 151 Idaho 196, 202, 254 P.3d 497, 503 (2011) (quoting *Michalk v. Michalk*, 148 Idaho 224, 230, 220 P.3d 580, 586 (2009) and citing *Wheeler v. Idaho Dep't of Health & Welfare*, 147 Idaho 257, 266, 207 P.3d 988, 997 (2009)).

"A general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue. This Court will not search the record on appeal for error." *Halvorson v. N. Latah Cnty. Highway Dist.*, 151 Idaho 196, 202, 254 P.3d 497, 503 (2011) (quoting *Dawson v. Cheyovich Family Trust*, 149 Idaho 375, 383, 234 P.3d 699, 707 (2010) and citing *Michael v. Zehm*, 74 Idaho 442, 445, 263 P.2d 990, 991 (1953); *Suits v. Idaho Bd. of Prof'l Discipline*, 138 Idaho 397, 400, 64 P.3d 323, 326 (2003)).

LL. Other judicial review provisions under LLUPA

LLUPA contains two other specific judicial review provisions. A P&Z commission is authorized to "seek judicial process" as necessary in the course of developing land use plans. Idaho Code § 67-6507. The rule prohibiting rezoning within four years may be judicially enforced. Idaho Code § 67-6511(d).

MM. Tort and damage claim procedures

Plaintiffs seeking financial recoveries against cities and counties should be careful to comply with advance notice requirements under Idaho Code §§ 6-907 (tort claims) and 50-219 (all damage claims by cities). See discussion in section 19 at page 268.

NN. Prejudgment interest

If damages are awarded on the basis of an uncompensated taking of property, the property owner may also be entitled to an award of prejudgment interest. Indeed, prejudgment interest is not viewed as an add-on to the damage award or as a cost of litigation. Rather, under both state and federal law, it is considered part and parcel of what was taken.

An Idaho statute establishes a default legal rate of interest (set at 12 percent) where a contract fails to specify an interest rate.[421] Idaho Code § 28-22-104(1)(1). Another sub-section of the same statute applies that 12 percent interest rate to "Money after the same becomes due." Idaho Code § 28-22-104(1)(2). This has been construed broadly to authorize prejudgment interest in damage awards (with various exceptions). *Roesch v. Klemann*, 155 Idaho 175, 179 n.1, 307 P.3d 192, 196 n.1 (2013) (Horton, J.).

In *Coeur d'Alene Garbage Service v. City of Coeur d'Alene* ("*Garbage Service*"), 759 P.2d 879 (Idaho 1988) (Johnson, J.), the Idaho Supreme Court held that a property owner who suffers an uncompensated taking under the Idaho Constitution is entitled to prejudgment interest.

This decision, however, was expressly limited to takings under the Idaho Constitution. *Garage Service* at 881. That decision did not address Idaho Code § 28-22-104(1)(2) or what interest rate should apply. Presumably, however, Idaho

[421] Another section of the statute sets the interest rate for postjudgment interest. Idaho Code § 28-22-104(2). This rate is set as 5 percent "plus the base rate in effect at the time of entry of the judgment." A protocol is set out for the determination of the base rate on July 1 of each year by the Idaho State Treasurer.

Code § 28-22-104(1)(2) would set the rate for prejudgment interest on taking claims brought pursuant to the Idaho Constitution.

In *Schneider v. Cnty. of San Diego*, 285 F.3d 784 (9th Cir. 2002), the Ninth Circuit, relying on U.S. Supreme Court precedent, held that the owner of property bringing a successful § 1983 action is entitled to prejudgment interest as part of the compensation due under the Fifth Amendment.

> The "just compensation" remedy for an unconstitutional taking is required by the Constitution. Accordingly, we look to the underlying constitutional provision at issue, and cases interpreting it, to define the appropriate measure of prejudgment interest in Section 1983 cases based on an unconstitutional taking. We conclude that the district court must examine what "a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal," *50.50 Acres of Land*, 931 F.2d at 1354, would receive in determining the amount of prejudgment interest due in Section 1983 actions predicated on an unconstitutional taking.

Schneider at 792.

The court then laid out the standard that should be applied. "The district court should apply an interest rate based on evidence of the rate that would be generated by investment in a diverse group of securities, including treasury bills." *Schneider* at 793.

The court ruled that this overrides a federal statute setting a 6 percent rate (which would set a floor, not a ceiling) applicable in federal condemnation actions under the Declaration of Taking Act.

> The Supreme Court has recognized that, unlike most constitutional provisions, the Fifth Amendment provides both the cause of action and the remedy for an unconstitutional taking, "frequently stat[ing] the view that, in the event of a taking, the compensation remedy is required by the Constitution." *First English*, 482 U.S. at 315–16, 107 S. Ct. 2378.

Schneider at 793 (brackets original).

Under *Schneider* and *50.50 Acres*, it app ears that Congress has the power to set a floor for compensation that might exceed what is constitutionally mandated by the Fifth Amendment. A question arises as to whether Idaho's prejudgment interest

statute may also set a floor on federal taking claims. Arguably it does not. The federal claim is based on federal law, not state law.

A handful of cases have addressed the choice of law question involving prejudgment interest. Most circuits conclude that federal law applies.

In *Golden State Transit Corp. v. City of Los Angeles*, 773 F. Supp. 204 (C.D. Cal. 1991), the court noted that "neither 42 U.S.C. § 1983 nor 42 U.S.C. § 1988 mention the award of prejudgment interest, and there is no general federal statute governing the award of prejudgment interest." The court went on to conclude, however, that federal law controls because "there is sufficient federal case law which governs the award of prejudgment interest" and "several courts in other circuits have held that federal law applies to the issue of prejudgment interest." *Golden State* at 209.

In *Murphy v. City of Elko*, 976 F. Supp. 1359 (D. Nev. 1997), another district court in the Ninth Circuit rejected contrary views in the Fifth and Eighth Circuits, holding that it follows from *Golden Gate* that federal law applies:

> We reject this principle [that state law applies to prejudgment interest]. There are, of course, legal questions arising in Section 1983 cases which are determined by state law, such as statutes of limitations, but the question of relief in general is determined entirely by federal law—damages, injunctions, costs, attorney's fees, and postjudgment interest are all determined by federal statutory and decisional law. We see no principled reason not to similarly compute prejudgment interest in accordance with federal law, and we think the Ninth Circuit would so conclude as well.

Murphy at 1363.

In 2015, the last sentence in that paragraph was quoted with approval by another district court in the Ninth Circuit. *Humann v. City of Edmonds*, 2015 WL 3539569 at *1 (W.D. Wash. 2015) ("We see no principled reason not to similarly compute prejudgment interest in accordance with federal law, and we think the Ninth Circuit would so conclude as well.").

In addition, several federal cases have noted that that where state claims are presented in federal court under its supplemental jurisdiction,[422] the state claims are

[422] The same principle applies in diversity cases. *Emmenegger v. Bull Moose Tube Co.*, 324 F.3d 616, 624 n.9 (8th Cir. 2003).

subject to state law governing prejudgment interest.[423] Indeed, one of them expressly noted that prejudgment interest is substantive, not procedural, law. The implication is that where federal claims are presented in state court, federal law, not Idaho's prejudgment interest standard, should apply.

OO. Class actions

There is little guidance in Idaho law whether a court might certify a class for recovery of unlawfully paid fees. Rule 23(a) and (b) of the Idaho Rules of Civil Procedure outline the requirements for the certification of a class action. Examples of intended class actions in the context of challenged fees and taxes include both *Miles* and *Alpert*. In both of those cases, however, once the Court determined there was standing, no further case history was made available (a likely indication that some sort of settlement was reached) and the issue of class certification was never addressed.

A class will not be certified for a class action unless it is sufficiently numerous that joinder of all parties is impractical. Idaho R. Civ. P. 23(a); *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 171-72, 108 P.3d 315, 318-19 (2004) (Eismann, J.) (class of 17 too small to certify).

PP. Res judicata

Idaho has long recognized that res judicata attaches to final judicial decisions. The seminal case is *Joyce v. Murphy land & Irrigation Co*., 35 Idaho 549, 553, 208 P. 241, 242-43 (1922) (Budge, J.).

> We think the correct rule to be that in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim, but also as to every matter which might and should have been litigated in the first suit.

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[423] *West Linn Corporate Park, LLC v. City of West Linn*, 2011 WL 47008774 at *4 (D. Or. 2011) (unpublished) ("In regard to interest, state law governs the award of prejudgment interest"); *Emmenegger v. Bull Moose Tube Co*., 324 F.3d 616, 624 n.9 (8th Cir. 2003) ("In a diversity case [involving state law claims], the question of prejudgment interest is a substantive one, controlled by state law."); *Olcott v. Delaware Flood Co*., 327 F.3d 1115,1126 (10th Cir. 2003) ("Where state law claims are before a federal court on supplemental jurisdiction, state law governs the court's award of prejudgment interest.). *Mills v. River Terminal Railway Co.*, 276 F.3d 222, 228 (6th Cir. 2002) ("Where state law claims come before a federal court on supplemental jurisdiction, the award of prejudgment interest rests on state law."); *Lewis v. Haskell Co., Inc.*, 304 F. Supp. 2d 1347, 1351 (M.D. Ala. 2004) ("in actions premised on supplemental jurisdiction, state law applies to the extent the party prevailed on state law").

Joyce, 35 Idaho at 553, 208 P. at 242-43.

This res judicata principle announced in *Joyce* has come to be known as "claim preclusion." It is one of two encompassed by the rule of res judicata, the other being "issue preclusion" (aka "collateral estoppel"). The distinction was explained by Judge Burnett (later Dean Burnett) in *Aldape v. Akins*, 105 Idaho 254, 258, 668 P.2d 130, 134 (Ct. App. 1983) (Burnett, J.),

> Functionally, the doctrine has two components—claim preclusion and issue preclusion.
>
> > "[C]laim preclusion," or true res judicata ... treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action." * * * When the plaintiff obtains a judgment in his favor, his claim "merges" in the judgment; he may seek no further relief on that claim in a separate action. Conversely, when a judgment is rendered for a defendant, the plaintiff's claim is extinguished; the judgment then acts as a "bar." * * * Under these rules of claim preclusion, the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial.
>
> > * * * * * *
>
> > [C]ollateral estoppel or "issue preclusion" ... bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties.... [T]he contested issue *257 **133 must have been litigated and necessary to the judgment earlier rendered.

Aldape, 105 Idaho at 256-57, 668 P.2d at 132-33 (quoting *Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc.*, 575 F.2d 530, 535–36 (5th Cir. 1978)).

(1) Res judicata attaches to administrative proceedings.

"The doctrine of res judicata applies to administrative proceedings. *Hansen v. Estate of Harvey*, 119 Idaho 333, 806 P.2d 426 (1991); *J & J Contractors/O.T. Davis Constr. v. State by Idaho Transp. Bd.*, 118 Idaho 535, 797 P.2d 1383 (1990)." *Sagewillow, Inc. v. IDWR* ("*Sagewillow II*"), 138 Idaho 831, 844, 70 P.3d 669, 682 (2003) (Eismann, J.). However, issue preclusion attaches only to issues actually

raised. Thus, a transfer approval in which the issue of forfeiture did not actually arise is not res judicata as to that issue.

QQ. Federal court – abstention and res judicata

In some cases, the federal court has abstained from considering the federal court challenge while state court proceedings challenging land use decisions are underway.[424] *Rollins v. Blaine Cnty.*, No. CV 07-275-S-ELJ-CWD (U.S. Dist. Ct., Dist. of Idaho June 12, 2008) (applying rules of the *Pullman* abstention doctrine under *Railroad Comm'n of Texas v. Pullman Co*., 312 U.S. 496 (1941)).

In *Rollins*, the federal court noted that, if the Idaho Supreme Court ruled against the plaintiffs, that would bring an end to their federal due process appeals, and that res judicata would attach to the state court decision. This conclusion appears to be in accord with other decisions dealing with res judicata.

RR. Federal court – preliminary injunctions

In order to obtain a preliminary injunction to maintain the status quo pending the outcome of the litigation, plaintiffs must meet four tests. The plaintiffs must show (1) that she will suffer irreparable injury if the injunction does not issue, (2) likelihood of success on the merits, (3) that the balance of equities tips in her favor, and (4) that issuance of the injunction is in the public interest. Courts have long held that there is a sliding scale applicable to these tests allowing a strong showing on one to compensate for a weak showing on another.

In 2008, the U.S. Supreme Court rejected that sliding scale, at least as the showing of irreparable injury. In *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), the Court held that a mere "possibility" of irreparable injury was insufficient even if the other factors weighed strongly in the plaintiffs' favor.

The *Winters* opinion could be read to eliminate the sliding scale altogether—as to each of the tests. The Ninth Circuit, however, has concluded that the sliding scale survives *Winter* at least with respect to likelihood of success on the merits test. In *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011), the court found that the "significant questions" standard still prevails in the Ninth Circuit. (In so ruling, the Ninth Circuit followed the Second and Seventh Circuits. Only the Fourth Circuit has taken the contrary position.) This means that there is still a partial sliding scale making it easier for plaintiffs to obtain injunctive relief. If the plaintiffs

[424] In other cases have simultaneously proceeded on two tracks without the issue of abstention being raised. *E.g.*, *Crown Point Dev., Inc. v. City of Sun Valley*, 144 Idaho 72, 156 P.3d 573 (2007), and *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 852-53 (2007) (where the defendant did not seek abstention).

can show that the equities "tip sharply" in their favor, they need to meet only the more modest showing that they have raised "significant questions" going to the merits. And they do not have to meet the more challenging standard of showing a likelihood of success on the merits.

SS. Authority of courts to raise issues *sua sponte.*

Our courts have long recognized that public policy is a central concern in the application of equitable principles. Here, the public policy elephant in the room is the Land Board's violation of a sacred constitutional duty.

In a case that has been cited 79 times, our Supreme Court observed that contracts against public policy are void, and "[p]ublic policy may be found and set forth in the constitution or in the statutes." *Stearns v. Williams*, 72 Idaho 276, 287, 240 P.2d 833, 840 (1952) (Thomas, J.).

> A party to a contract, void as against public policy, cannot waive its illegality by failure to specially plead the defense or otherwise, but whenever the same is made to appear at any stage of the case, it becomes the duty of a court to refuse to enforce it; again, a court of equity will not knowingly aid in the furtherance of an illegal transaction; in harmony with this principle, it does not concern itself as to the manner in which the illegality of a matter before it is brought to its attention. Furthermore, the court itself will raise the question of the invalidity of a contract which offends public policy and, as stated before, the parties cannot waive it.

Stearns, 72 Idaho at 290, 240 P.2d at 842 (citations omitted) (emphasis supplied).

The holding was reiterated in 1969. "This court undoubtedly has the power to raise the questions of illegality and public policy *sua sponte*." *Nab v. Hills*, 92 Idaho 877, 822, 452 P.2d 981, 986 (1969) (Donaldson, J.) (quoted in *Braddock v. Family Finance Corp.*, 95 Idaho 256, 506 P.2d 824 (1973) (Bakes, J., dissenting); *Crane Creek Country Club v. City of Boise*, 121 Idaho 485, 826 P.2d 446 (1992) (Bistline, J., concurring)).

It was addressed again in 1997.

> Whether a contract is against public policy is a question of law for the court to determine from all the facts and circumstances of each case. Public policy may be found and set forth in the statutes, judicial decisions or the constitution. An illegal contract is one that rests on illegal consideration consisting of any act or forbearance

> which is contrary to law or public policy. A contract prohibited by law is illegal and hence unenforceable.
>
> . . . [I]n Idaho a court may not only raise the issue of whether a contract is illegal *sua sponte*, but it has a duty to raise the issue of illegality, whether pled or otherwise, at any stage in the litigation. *Stearns*.

Quiring v. Quiring, 130 Idaho 560, 566-67, 944, P.2d 695, 701-02 (1997) (Schroeder, J.) (citations omitted) (emphasis supplied).

This was drilled home in the Court's recent decision in the case challenging the illegal contract awarded for the Idaho Education Network:

> The district court correctly concluded that *Quiring* imposed on it a duty to invalidate the SBPOs if they were unlawful. If the SBPOs were void for violating state procurement laws, as the district court ultimately concluded, then it was proper for the district court to find that it had an independent duty to invalidate them. We affirm the district court's holding that it had a duty to raise the issue of illegality of the SBPOs, regardless of whether Syringa could raise that issue on remand.

Syringa Networks, LLC v. Idaho Dep't of Admin. ("*Syringa II*"), 159 Idaho 813, 822-23, 367 P.3d 208, 217-18 (2016) (J. Jones, J.) (2016) (J. Jones, J.) (emphasis supplied).[425]

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[425] The *Syringa* litigation involved a challenge by Syringa Networks, LLC, a subcontractor to a successful bidder in the construction of the Idaho Education Network ("IEN"). The IEN was a publicly funded undertaking to bring a network of high-bandwidth telecommunications to public schools, libraries, and agencies across the State. Competitive bidding for the project was overseen by the Idaho Department of Administration ("DOA").

DOA issued a Request for Proposals ("RFP") in 2008. It explained that each bidder must provide "a total end-to-end service support solution" (*i.e.*, system-wide proposals only) *Syringa I*, 155 Idaho at 59, 305 P.3d at 503. Accordingly, Syringa entered into a "teaming agreement" with ENA Services in order to provide a comprehensive joint proposal. The joint proposal was submitted by ENA, with ENA providing "E-rate" management and Syringa (serving as a subcontractor to ENA) constructing the "network backbone." Competing proposals were filed by two other bidders.

DOA awarded two contracts (known as Statewide Blanket Purchase Orders ("SBPOs"), to ENA and to Qwest. These were for identical services, but would be split geographically. Thus, ENA (with Syringa as its "backbone" subcontractor) would construct a substantial portion of the project, while Qwest constructed the rest, based on some yet-to-be-determined geographic division.

One month later, DOA modified the awards. Under the amendment, Qwest would build the backbone on a statewide basis, and ENA would provide E-rate services statewide. The effect was to eliminate any role for Syringa, while expanding the roles for Qwest and ENA. "[I]t didn't take long for ENA to forsake its team partner and cozy up to Qwest." *Syringa I*, 155 Idaho at 68, 305 P.3d at 512 (J. Jones, J, concurring). "Gwartney [the Director of DOA] appears to have been the architect of

the State's effort to bend the contracting rules to Qwest's advantage. . . . Syringa alleges that Gwartney made threatening statements against Syringa on a couple of occasions, indicating he would 'make sure Syringa would never get any of the IEN business.'" *Syringa I*, 155 Idaho at 68-69, 305 P.3d at 512-13 (J. Jones, J, concurring).

Syringa sued DOA (and individual officials), Qwest, and ENA, seeking a declaratory judgment that the DOA violated statutory bidding procedures. (Idaho Code § 67-5725 provides a basis for relief in such cases. It states that contracts made in violation of procedures are void and that money advanced thereunder shall be repaid.)

Everyone agreed that the DOA could issue multiple contracts only for the same or similar property. DOA contended, however, that it was not restricted from subsequently modifying the contracts to differentiate their scopes. "They believed they could do in two steps what they could not do in one." *Syringa I*, 155 Idaho at 61, 305 P.3d at 505. This amounted to "changing the RFP after the bids were opened." *Id*. "[M]ere schemes to evade law, once their true character is established, are impotent for the purpose intended. Courts sweep them aside as so much rubbish." *Syringa II*, 159 Idaho at 829, 367 P.3d at 224 (quoting *Syringa Networks v. Idaho Dep't of Admin.* ("*Syringa I*"), 155 Idaho 55, 62, 305 P.3d 499, 506 (2013) (Eismann, J.) (quoting, in turn, *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 325, 303 P.2d 672, 678 (1956) (Porter, J.)) (brackets original).

Syringa I dealt with challenges to Syringa's standing, as well as other defenses and side-issues. The Court found that Syringa had standing. The Court held that Syringa was not a party to the contracts issued to Qwest and ENA, and therefore "does not have standing to challenge them. . . . However, when the amendments to the contracts are viewed in the context of the entire bidding process, Syringa does have standing." *Syringa I*, 155 Idaho at 61, 305 P.3d at 505. The case was remanded to evaluate the merits of the alleged violations of state procurement law.

On the second appeal, the Court reached those merits and voided the contracts. The Court first dealt with a critical procedural issue. On remand, Syringa sought a ruling that the contracts (SBPOs) were illegal and void, but Syringa was estopped from doing so due to an earlier admission that only the amendments were illegal. The Idaho Supreme Court upheld the district court's ruling that, even if Syringa could not raise the issue, the Court had an independent duty to invalidate them:

> The district court correctly concluded that *Quiring* imposed on it a duty to invalidate the SBPOs if they were unlawful. If the SBPOs were void for violating state procurement laws, as the district court ultimately concluded, then it was proper for the district court to find that it had an independent duty to invalidate them. We affirm the district court's holding that it had a duty to raise the issue of illegality of the SBPOs, regardless of whether Syringa could raise that issue on remand.

Syringa II, 159 Idaho at 822-23, 367 P.3d at 217-18 (emphasis supplied). "The district court had the authority to declare the SBPOs void regardless of whether Syringa had properly challenged them." *Syringa II*, 159 Idaho at 827, 367 P.3d at 222

The Court then tackled another critical procedural issue: mootness. The defendants sought to moot the case by rescinding the amended contracts in 2014. The Court found this was ineffective because void contracts cannot be rescinded. "We now hold that void contracts may not be rescinded because they are deemed never to have existed." *Syringa II*, 159 Idaho at 826, 367 P.3d at 221.

The *Syringa II* Court then reached the merits, extensively quoting and approving statements that it made in *Syringa I* in the context of standing.

> The amendments to the purchase orders issued to ENA and Qwest were, in effect, changing the RFP after the bids were opened. The RFP solicited proposals from bidders who were able to perform the entire contract which, under the wording of the RFP, would be a "total end-to-end service support solution." . . . The RFP did not

"[M]ere schemes to evade law, once their true character is established, are impotent for the purpose intended. Courts sweep them aside as so much rubbish." *Syringa II*, 159 Idaho at 829, 367 P.3d at 224 (quoting *Syringa Networks v. Idaho Dep't of Admin.* ("*Syringa I*"), 155 Idaho 55, 62, 305 P.3d 499, 506 (2013) (Eismann, J.) (quoting, in turn, *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 325, 303 P.2d 672, 678 (1956) (Porter, J.)) (brackets original).

In sum, no failing of the parties relieves a court of its power and duty to recognize the invalidity of a transaction against public policy.

TT. Necessary and indispensable parties

Both the Idaho and federal rules of civil procedure contain a Rule 19 addressing necessary and indispensable parties. The state and federal versions are similar, but not precisely identical. This section addresses the Idaho rule, Idaho R. Civ. P. 19.

Under Rule 19, "necessary parties" are whose that must be joined if possible (Rule 19(a)), and "indispensable parties" are those whose failure to join (because they are beyond the reach of the court) results in dismissal of the action (Rule 19(b)).

> seek bids for one contract to provide the backbone and a separate contract to be the E-rate service provider. . . .
>
> By amending the contracts so that Qwest and ENA were no longer furnishing the same or similar property, the State has, in effect, changed the RFP after the bids had been opened in violation of I.C. § 67–5718(2) and IDAPA 38.05.01.052. The separate contracts as amended no longer conform to the RFP's description of the property to be acquired. The description of property to be provided by Qwest under its amended contract is not a minor deviation from the property to be provided by the successful bidder under the RFP, nor is the property to be provided by ENA under its amended contract. "[M]ere schemes to evade law, once their true character is established, are impotent for the purpose intended. Courts sweep them aside as so much rubbish." *O'Bryant* [*v. City of Idaho Falls*], 78 Idaho [313] at 325, 303 P.2d [672] at 678 [(1956)].

Syringa II, 159 Idaho at 828-29, 367 P.3d at 223-24 (ellipses and brackets original). The Court went on to decide that even if the original contracts were lawful, they could be rendered unlawful and void by the subsequent illegal amendments. *Syringa II*, 159 Idaho at 829, 367 P.3d at 224.

The Court then addressed the elephant in the room: The fact that millions of dollars had already been expended by the State in constructing the system under void contracts. It noted that the statute governing procurement obligates the State to seek repayment of money advanced under the void SBPOs. "But it imposes no obligation on the district court to preemptively order that DOA comply with this obligation. If the appropriate State officer fails to perform this statutory obligation, the State's chief legal officer can step forward to make the State whole for these unfortunate violations of State law." *Syringa II*, 159 Idaho at 830, 367 P.3d at 225.

The terms "necessary" and "indispensable" are the traditional words of art use by lawyers to describe parties under subsections (a) and (b) of the rule. The rule itself does not employ these terms. Indeed, it refers to what we call necessary parties as "required parties."

Necessary parties are those whose absence "as a practical matter [would] impair or impede the person's ability to protect the interest." Rule 19(a)(1)(B)(i). Neither Rule 19 nor the cases interpreting it suggest that a mere "interest in the outcome" is sufficient to make them necessary to the litigation.

Rule 19 sets forth a two-step process for determining whether an action should be dismissed for failure to join an indispensable party. *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999). First, the court must determine whether an absent party is necessary under Rule 19(a). If an absent necessary cannot be joined, the court must determine whether the absent party is indispensable under Rule 19(b). If so, the case must be dismissed.

"The party advocating for joinder has the burden of proving that the absent person should be joined." Baicker-McKee, *et al.*, *Federal Civil Rules Handbook 2019* ("*Handbook*") at 613.

"As a general rule, courts construing contracts require that parties to the contract be joined." *Handbook* at 611.

Rule 19 does not call for a rigid analysis of property interests. "More than most Rules, the application of Rule 19 is highly fact specific. Thus, when the court addresses questions of impairment of interest, the court will examine both legal and actual, real-world, impairment." *Handbook* at 609. One of those considerations is whether the absent parties are sufficiently represented by others. "By contrast, when the interests of an absent group are adequately represented by existing parties, the absent group need not be joined." *Handbook*, page 611.

"Rule 19 contains no express time limit within which a party seeking joinder must file a motion. However, undue delay in filing can be grounds for denying a motion." *Handbook* at 613.

However, a motion under Rule 12(b)(7) to dismiss for failure to join a party under Rule 19 must be filed prior to the first responsive pleading.