Volume 2

Land Use Handbook

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

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25. COSTS AND ATTORNEY FEE AWARDS

Unless a specific statute, rule, or contract dictates another outcome, Idaho courts follow the "American rule" regarding the award of attorney fees.[1] Under this approach, each party to litigation bears the burden of his or her own attorney fees, except in those rare cases where the court finds one party's actions to be frivolous. Under the American Rule, persons may engage in non-frivolous litigation without fear that they will be saddled with the other side's attorney fees if they lose. On the other hand, the American Rule means that successful litigants are often unable to recover their own legal fees even when they prevail. This contrasts with the practice in England of automatically awarding attorney fees to the prevailing party.

Idaho statutes, rules and common law provide some relief from American Rule, enabling courts to award attorney fees in certain circumstances. These are discussed below. Only one (Section 12-117) is typically applicable in an appeal of a land use decision. A brief discussion of other key attorney fee recovery rules is included. These could be applicable to other litigation arising out of a land use matter.

A. Costs

Idaho R. Civ. P. 54(d) (and the corresponding statute, Idaho Code § 12-101) authorizes the award of costs (including expert witness fees) to the prevailing party "as a matter of right." It does not authorize the award of attorney fees. Rule 54(d)(2) authorizes the award of costs to each of the prevailing parties, where multiple parties are involved.

Idaho Appellate Rule 40 (and the corresponding statute Idaho Code § 12-107) authorizes costs on appeal. Where a judgment is modified or a new trial ordered, costs are discretionary with the appellate court. In all other cases (*e.g.*, where the decision is affirmed), the prevailing party is entitled to costs as a matter of right. Rule 40 and Idaho Code § 12-114 both set out procedures for taxing costs on appeal to the Idaho Supreme Court.

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[1] "We continue to adhere to the so-called 'American Rule' to the effect that attorney fees are to be awarded only where they are authorized by statute or contract." *Hellar v. Cenarrusa*, 106 Idaho 571, 578, 682 P.2d 524, 532 (1984). "The Idaho Legislature has authorized the award of attorney fees in only a few clearly defined circumstances. . . . From the foregoing statutes, it is clear that the Idaho legislature has provided for the award of attorney fees specifically when it so intends, and only when it so intends." *Idaho Power Co. v. Idaho Public Utilities Comm'n*, 102 Idaho 744, 751, 639 P.2d 442, 449 (1981). "This assertion of a general inherent authority to award fees was incorrect. Idaho law does not recognize such an equitable power to grant attorney fees. Rather, our law adheres to the 'American Rule' which generally permits an attorney fee award only when authorized by contract or statute." *Keevan v. Estate of Keevan*, 126 Idaho 290, 298, 882 P.2d 457, 465 (Ct. App. 1994).

B. Idaho Code §§ 12-117(1) to 12-117(3): Actions involving a state agency or political subdivision and a private party.

(1) Idaho Code § 12-117(1): General principles

Prevailing parties in actions involving a state agency or local government and a private entity as adverse parties may recover their costs and attorney fees where they can show that the non-prevailing party acted "without a reasonable basis in fact or law."

Section 12-117(1) authorizes awards of attorney fees to the "prevailing party" when "the nonprevailing party acted without a reasonable basis in fact or law." Both determinations are committed to the discretion of the trial court and are reviewed under an abuse of discretion standard. *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005) (J. Jones, J.); *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012) (J. Jones, J.).

As amended in 2012, the first section of the statute provides:

> (1) Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

Idaho Code § 12-117(1) (emphasis supplied).

When first enacted in 1984, it was applicable only to recovery of attorney fees in litigation against state agencies. It was amended in 1994 to include litigation with cities, counties, and other taxing districts. 1994 Idaho Sess. Laws, ch. 36, § 1.[2]

It was amended in 2000 to provide for an award to either prevailing party, turning the statute into a two-edged sword. 2000 Idaho Sess. Laws, ch. 241, § 1.

The statute was amended again in 2010, 2010 Idaho Sess. Laws, ch. 29, to change the result obtained in *Rammell v. ISDA*, 147 Idaho 415, 210 P.3d 523 (2009), which is discussed further in the next footnote. The amendment restored the prior

[2] Apparently the Idaho Supreme Court was not aware of this amendment when it handed down its decision in *Gibson v. Ada Cnty.*, 142 Idaho 746, 756, 133 P.3d 1211, 1221(2006), *cert. denied*, 549 U.S. 994 (2006), *rehearing denied*, 549 U.S. 1159 (2007) (Schroeder, C.J.), declining to award attorney fees against Ada County under section 12-117 because it is not a state agency.

law, which is that attorney fees may be awarded in administrative proceedings, not just court proceedings.

Unfortunately, while the amendment fixed one problem (restoring the availability of attorney fee awards in administrative actions), it created another (inadvertently eliminating attorney fee awards in judicial reviews).[3]

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[3] It took two legislative corrections to restore what had been the law for 20 years prior to 2009. The Idaho Supreme Court had long held that Idaho Code § 12-117 allowed administrative tribunals to award attorney fees at the conclusion of the administrative stage. *E.g., Stewart v. Dep't of Health & Welfare*, 115 Idaho 820, 771 P.2d 41 (1989); *Rural Kootenai Organization, Inc. v. Bd. of Comm'rs, Kootenai Cnty.,* 133 Idaho 833, 845-46, 993 P.2d 596, 608-09 (2000). In *Stewart*, the Court acknowledged that the statute authorized "the court" to award attorney fees in certain "administrative or civil judicial proceeding[s]." The *Stewart* Court found that it would be anomalous to allow fee awards only in administrative proceedings that are appealed to court. Accordingly, the Court determined that the statute authorized administrative tribunals to make such awards, too.

In 2009, the Idaho Supreme Court overruled the *Stewart* line of cases. *Rammell v. ISDA*, 147 Idaho 415, 210 P.3d 523 (2009). (This reversal was foreshadowed by a concurrence by Justice Eismann in *Sanchez v. State of Idaho, Department of Correction*, 143 Idaho 239, 245, 141 P.3d 1108, 1114 (2006) (referring to "the clear abuse of power by the majority in *Stewart*").) The *Rammell* Court ruled that the statute meant what it said and that only courts may award attorney fees. The Court ruled, "A court may only make such an award of fees incurred in the appeal of an administrative determination." (In a strongly worded concurrence, Justice Eismann said, "There is simply no basis in law for holding that the legislature intended the word 'court' in Idaho Code § 12-117 to include administrative agencies. The *Stewart* majority simply rewrote the statute to provide what it wanted, rather than what the legislature enacted. Therefore, *Stewart* must be overruled." *Rammell*, 147 Idaho at 424, 210 P.3d at 532.) Thus, under *Rammell*, administrative agencies could no longer award attorney fees in administrative matters. But courts could award attorney fees associated with the judicial review of an administrative matter.

The Idaho Legislature responded swiftly in 2010, but partially missed the mark. The legislature changed the statute as follows: "(1) Unless otherwise provided by statute, in any administrative proceeding or civil judicial proceeding involving as adverse parties a state agency~~, a city, a county or other taxing district~~ or political subdivision and a person, the state agency or political subdivision or the court, as the case may be, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if ~~the court~~ it finds that the nonprevailing party ~~against whom the judgment is rendered~~ acted without a reasonable basis in fact or law." 2010 Idaho Sess. Laws, ch. 29. As the legislative history makes clear, the intent was to expand coverage (restoring pre-*Rammell* coverage to administrative matters). The legislative history shows that this result was unintended. "In 1989, the Supreme Court construed Idaho Code Section 12-117 to permit awards of costs and attorney fees to prevailing parties not only in court cases, but also in administrative cases." Statement of floor manager Representative Grant Burgoyne on House Bill 421, House Judiciary, Rules & Administration Committee (Feb. 3, 2010). "This bill will restore the law as it existed since 1989." Statement of floor manager Representative Grant Burgoyne on House Bill 421, Senate Judiciary & Rules Committee (Feb. 15, 2010).

Alas, the effect was to fix one problem and create another. The 2010 amendment made it clear that attorney fees may be awarded at the administrative level by the administrative tribunal. However, by inserting the word "proceeding," the legislation made it no longer possible for the court to read the phrase "administrative or civil judicial proceeding" to include a judicial review of an administrative matter. Thus, the legislation eliminated attorney fee recoveries under section 12-117

In March of 2012, in response to *Smith v. Washington Cnty.*, 150 Idaho 388, 247 P.3d 615 (2010), the Idaho Legislature amended Idaho Code § 12-117 yet again to restore the availability of attorney fee awards in judicial reviews. 2012 Idaho Sess. Laws, ch. 149, § 1. Following these judicial and legislative gyrations between 2009 and 2012, it is now settled, once again, that Idaho Code § 12-117 authorizes attorney fees in administrative proceedings as well as judicial review proceedings and civil actions.

None of these legislative and judicial gyrations, however, changed the substance of the attorney fee statute. Accordingly, prior precedent remains valid.

In 2004, the Idaho Supreme Court described the dual purposes of the attorney fee statute:

> We believe the purpose of that statute is two-fold: (1) to serve as a deterrent to groundless or arbitrary agency action; and (2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies never should have made."

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in judicial reviews of administrative actions. That is how the Idaho Supreme Court interpreted the amendment in *Smith v. Washington Cnty.*, 150 Idaho 388, 392, 247 P.3d 615, 619 (2010) (replacing earlier opinion): "The Legislature therefore must also have intended to abrogate the part of *Rammell* that interpreted § 12-117 to allow courts to award fees in petitions for judicial review. Again, *Rammell* read the prior version of § 12-117 to allow fees in "administrative judicial proceedings," which included petitions for review of administrative decisions. By separating "administrative proceedings" from "civil judicial proceedings," the Legislature signaled that the courts should no longer be able to award fees in administrative judicial proceedings such as this one." *Smith*, 150 Idaho at 392, 247 P.3d at 619.

The 2010 legislative history shows that this result was unintended. "In 1989, the Supreme Court construed Idaho Code Section 12-117 to permit awards of costs and attorney fees to prevailing parties not only in court cases, but also in administrative cases." Statement of floor manager Representative Grant Burgoyne on House Bill 421, House Judiciary, Rules & Administration Committee (Feb. 3, 2010). "This bill will restore the law as it existed since 1989." Statement of floor manager Representative Grant Burgoyne on House Bill 421, Senate Judiciary & Rules Committee (Feb. 15, 2010). This legislative history was brought to the attention of the Idaho Supreme Court in *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 264 P.3d 916 (2011). However, the Court declined to reverse course, holding that the matter is now *stare decisis*. "The County acknowledges that *Smith* controls here, but asserts that this Court should overrule *Smith* because the Legislature intended to expand the availability of attorney's fees, not bar fee awards in administrative appeals. . . . Stare decisis requires this Court to follow controlling precedent unless it is manifestly wrong, proven to be unjust or unwise, or overruling it is necessary in light of obvious principles of law and justice. . . . This Court's interpretation of section 12–117 was not manifestly wrong." *Sopatyk*, 151 Idaho at 818-19, 264 P.3d at 925-26. In March of 2012, the Idaho Legislature amended Idaho Code § 12-117 to restore the availability of attorney fee awards in judicial review. 2012 Idaho Sess. Laws, ch. 149, § 1.

Bogner v. State Dep't of Revenue and Taxation, 107 Idaho 854, 859, 693 P.2d 1056, 1061 (1984). This language has been quoted by appellate courts at least 20 times.[4]

(2) The "without a reasonable basis" requirement.

Bringing a lawsuit in plain violation of an applicable statute of limitations gives rise to an attorney fee award. *State of Idaho v. Estate of Joe Kaminsky*, 141 Idaho 436, 439-40, 111 P.3d 121, 124-25 (2005). In that case, the Court quoted the dual purposes of the statute stated in *Bogner* and declared that both were violated. "The action was groundless because the Department clearly waited too long to present its claim. . . . It is appropriate to discourage such action. Further, the Department's action placed an unjustified financial burden on the Estate." *Id*.

To be eligible for fees under the statute, the party must prevail and show that the other party "acted without a reasonable basis in fact or law." *Reardon*, 140 Idaho at 118, 90 P.3d at 343.

Although the courts have applied the statute on countless occasions, the discussion of the standard tends to be conclusory, providing little guidance for future litigants. "[U]nfortunately, very little discussion of the standard exists." Mark D. Perison, *A Guide to Attorney Fee Awards in Idaho*, 32 Idaho L. Rev. 29, 69 (1995).

In *Stevens v. Fleming*, 116 Idaho 523, 527, 777 P.2d 1196, 1200 (1989), the Idaho Supreme Court held that notice "is prerequisite to maintaining a claim" and failure to file a timely notice means that "the claim against the Grimes failed for lack of jurisdiction."

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[4] *Fuchs v. Idaho State Police, Alcohol Beverage Control*, 153 Idaho 114, 117, 279 P.3d 100, 103 (2012); *In re Daniel W.*, 145 Idaho 677, 682, 183 P.3d 765, 770 (2008); *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 458-59, 180 P.3d 487, 497-98 (2008) (J. Jones, J.); *Neighbors for a Healthy Gold Fork v. Valley Cnty.*, 145 Idaho 121, 138, 176 P.3d 126, 143 (2007); *Ralph Naylor Farms v. Latah Cnty.*, 144 Idaho 806, 809, 172 P.3d 1081, 1084 (2007); *Ater v. Idaho Bureau of Occupational Licenses*, 144 Idaho 281, 286, 160 P.3d 438, 443 (2007); *In re Estate of Kaminsky*, 141 Idaho 436, 439-40, 111 P.3d 121, 124-25 (2005); *In re Estate of Elliot*, 141 Idaho 177, 184, 108 P.3d 324, 331 (2005); *Reardon v. City of Burley*, 140 Idaho 115, 118, 90 P.3d 340, 343 (2004); *Canal/Norcrest/Columbia Action Committee v. City of Boise* (*"Canal I"*), 136 Idaho 666, 671, 39 P.3d 606, 611 (2001); *State of Idaho, Dep't of Finance v. Resource Service Co., Inc.*, 134 Idaho 282, 284, 1 P.3d 783, 785 (2000); *Payette River Property Owners Ass'n v. Bd. of Comm'rs of Valley Cnty.*, 132 Idaho 551, 558, 976 P.2d 477, 484 (1999); *Rincover v. State, Dep't of Finance*, 132 Idaho 547, 549, 976 P.2d 473, 475 (1999); *McCoy v. State, Dep't of Health and Welfare*, 127 Idaho 792, 797, 907 P.2d 110, 115 (1995); *Idaho Dep't of Law Enforcement v. Kluss*, 125 Idaho 682, 685, 873 P.2d 1336, 1339 (1994); *Hood v. Idaho Dep't of Health and Welfare*, 125 Idaho 151, 154, 868 P.2d 479, 482 (1993); *Lockhart v. Dep't of Fish and Game*, 121 Idaho 894, 898, 828 P.2d 1299, 1303 (1992); *Cox v. Dep't of Insurance, State of Idaho,* 121 Idaho 143, 148, 823 P.2d 177, 182 (1991); *Fox v. Bd. of Cnty. Comm'rs, Boundary Cnty.,* 121 Idaho 686, 692-93, 827 P.2d 699, 705-06 (Ct. App. 1991); *Stewart v. Dep't of Health and Welfare*, 115 Idaho 820, 822, 771 P.2d 41, 43 (1989).

In *Allied Bail Bonds, Inc. v. Cnty. of Kootenai*, 151 Idaho 405, 415, 258 P.3d 340, 350 (2011), the Court awarded attorney fees against the plaintiff pursuant to Idaho Code § 12-117 noting: "Allied misrepresented controlling precedent in its briefing, and also presented multiple arguments in its briefing that it abandoned at oral argument. Further, Allied unreasonably pursued this appeal even though it failed to comply with the notice requirement of the ITCA and the bond requirement of I.C. § 6–610."

The Court of Appeals has described the standard under section 12-117 ("without a reasonable basis in fact or law") as "similar" to the standard under section 12-121 ("frivolously, unreasonably or without foundation"). *Total Success Investments, LLC v. Ada Cnty. Highway Dist.* ("*Total Success II*"), 148 Idaho 688, 695, 227 P.3d 942, 949 (Ct. App. 2010) (Perry, J. Pro Tem.).

Note, however, that section 12-121 is available only in civil actions. Thus, it is not available in a judicial review of governmental action. In those cases, attorney fees may be sought only under section 12-117.

If an agency's actions are based upon a "reasonable, but erroneous interpretation of an ambiguous statute," then attorney fees should not be awarded. *Idaho Potato Comm'n v. Russet Valley Produce, Inc.*, 127 Idaho 654, 661, 904 P.2d 566, 573 (1995) *citing Cox v. Dep't. of Ins., State of Idaho*, 121 Idaho 143, 148, 823 P.2d 177, 182 (Ct. App. 1991)).

"Attorney's fees are also inappropriate if the City presented a legitimate question for this Court to address." *Lane Ranch Partnership v. City of Sun Valley* (*"Lane Ranch II"*), 145 Idaho 87, 91, 175 P.3d 776, 780 (2007). This statement has been quoted in a number of more recent opinions. *E.g.*, *Kepler-Fleenor v. Freemont Cnty.*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012); *City of Osburn v. Randel*, 152 Idaho 906, 910, 277 P.3d 353, 357 (2012).

Even some inconsistency in treatment of applicants before a government entity may be overlooked where there is no express appellate decision establishing a precedent. *Lake CDA Investments, LLC v. Idaho Dep't of Lands*, 149 Idaho 274, 284-85, 233 P.3d 721, 731-32 (2010). Indeed, the Court frequently has held that a losing party cannot be said to have acted without reasonable basis when litigating a case of first impression. *Arambarri v. Armstrong*, 152 Idaho 734, 740-41, 274 P.3d 1249, 1255-56 (2012) (W. Jones, J.); *St. Luke's Magic Valley Regional Medical Center, Ltd. v. Bd. of Cnty. Comm'rs of Gooding Cnty.*, 149 Idaho 584, 591, 237 P.3d 1210, 1217 (2010); *KGF Development, LLC v. City of Ketchum*, 149 Idaho 524, 532, 236 P.3d 1284, 1291 (2010) (J. Jones, J); *State of Idaho, Dep't of Finance v. Resource Service Co., Inc.*, 134 Idaho 282, 284-85, 1 P.3d 783, 785-86 (2000); *Treasure Valley Concrete, Inc. v. State*, 132 Idaho 673, 678, 978 P.2d 233, 238 (1999); *Rincover v. State of Idaho, Dep't of Finance*, 132 Idaho 547, 550, 976 P.2d 473, 476 (1999).

In contrast, a party that ignores settled precedent will be subject to an award of fees under section 12-117. *Excell Construction, Inc. v. Idaho Dep't of Commerce and Labor*, 145 Idaho 783, 793, 186 P.3d 639, 649 (2008) (attorney fees awarded against an agency that failed to apply a case whose relevant facts were "virtually indistinguishable"); *Gallagher v. State*, 141 Idaho 665, 669, 115 P.3d 756, 760 (2005) (attorney fees may be awarded when "the law is well-settled").

The Court has laid down essentially a "per se" rule when an agency acts outside of its authority. "Where an agency has no authority to take a particular action, it acts without a reasonable basis in fact or law." *Fischer v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005); *Reardon*, 140 Idaho at 120, 90 P.3d at 345; *Moosman v. Idaho Horse Racing Comm'n*, 117 Idaho 949, 954, 793 P.2d 181, 186 (1990).

Where an agency ignores the procedural requirements of its own ordinance, attorney fees will be awarded. *Fischer v. City of Ketchum*, 141 Idaho 349, 355-56, 109 P.3d 1091, 1097-98 (2005). Likewise, presenting an erroneous interpretation of an unambiguous statute may give rise to an attorney fee award. *State of Idaho, Dep't of Health and Welfare v. Estate of Dolores Arlene Elliott*, 141 Idaho 177, 184, 108 P.3d 324, 331 (2005).

Failure to address controlling appellate decisions and failure to address factual or legal findings of the district court equates to pursuing an appeal without a reasonable basis in law or fact. *Waller v. State of Idaho, Dep't of Health and Welfare*, 146 Idaho 234, 240, 192 P.3d 1058, 1064 (2008).

In some instances, pursuit of litigation may be reasonable at the outset. But once the party is presented with clear contrary authority (for example, in the district court's decision), pursuit of an appeal may give rise to an award of attorney fees.

> Although the Castrignos may have had a good faith basis to bring the original suit based on their interpretation of Idaho law, the Castrignos were very clearly aware of the statutory procedures, failed to appeal separate appraisals when they had a right to appeal, and were clearly advised on the applicable law in an articulate and well reasoned written decision from the district court. Nevertheless, the Castrignos chose to further appeal that decision to this Court, even though they failed to add any new analysis or authority to the issues raised below. Accordingly, it was frivolous and unreasonable to make a continued argument, and Ada County is awarded its reasonable attorney fees.

Castringo v. McQuade, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005) (Trout, J.).

Another factor to be considered is whether the losing party took taken actions that unreasonably increased the costs of litigation borne by the prevailing party. *Canal/Norcrest/Columbia Action Committee v. City of Boise* (*"Canal I"*), 136 Idaho 666, 671, 39 P.3d 606, 611 (2001).

The Idaho Supreme Court has noted that where the requirements of the statute are met, an award of attorney fees is mandatory, not discretionary. "This Court has further noted that Idaho Code § 12-117 is not a discretionary statute; but it provides that the court *shall* award attorney fees where the state agency did not act with a reasonable basis in fact or law in a proceeding involving a person who prevails in the action." *Rincover v. State of Idaho, Dep't of Finance*, 132 Idaho 547, 549, 976 P.2d 473, 475 (1999) (emphasis original). "The statute is not discretionary but provides that the court must award attorney fees where a state agency did not act with a reasonable basis in fact or in law in a proceeding involving a person who prevails in the action." *Fischer v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005) (awarding attorney fees to a private litigant where the City of Ketchum "ignored the plain language" of its own zoning ordinance). "Under a two-part test, attorney fees pursuant to I.C. § 12–117 must be awarded if the party is a prevailing party and if the state agency did not act with a reasonable basis in fact or law." *Fuchs v. Idaho State Police, Alcohol Beverage Control*, 153 Idaho 114, 117, 279 P.3d 100, 103 (2012) (Burdick, C.J.) (citing *Reardon*).

However, in *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012) (J. Jones, J.), the Court explained that the award is mandatory only upon a determination that the non-prevailing party acted without reasonable basis in fact or law. Those threshold determinations do involve an exercise of discretion.

In *Rincover*, the Court denied an award of attorney fees to a prevailing party on the basis that state agency's action was not without reasonable basis. "At the time, the specific provisions in I.C. 30-1413 which were relied upon by the Department had not been construed by the courts. . . . The Department did not act without or contrary to statutory authority, or ignore or refuse to comply with duties imposed by statute." *Rincover*, 132 Idaho at 550, 976 P.2d at 476. Thus, it appears, where the agency is legitimately grappling with an unsettled area of law, it may be immune from an attorney fee award, even when the court rules against it. This makes all the more sense where, as here, the state agency was not affirmatively acting outside its authority, but was required to take on a judge-like role in a contested case.

In the same vein are the following three cases: *Lane Ranch Partnership v. City of Sun Valley* (*"Lane Ranch II"*), 145 Idaho 87, 91, 175 P.3d 776, 780 (2007) ("A party is not entitled to attorney's fees if the issue is one of first impression in Idaho. . . . Attorney's fees are also inappropriate if the City presented a legitimate question for this Court to address."); *Kootenai Medical Ctr. v. Bonner Cnty.*, 141

Idaho 7, 10, 105 P.3d 667, 670 (2004) ("In this case, the Appellant is raising issues of first impression to this Court and therefore we do not believe Bonner County acted without a reasonable basis in fact or law."); *SE/Z Construction, LLC v. Idaho State Univ.*, 140 Idaho 8, 14, 89 P.3d 848, 854 (2004) ("The facts, however, gave rise to questions of first impression regarding application of Idaho's competitive bidding law. Therefore, the challenge SE/Z brought was reasonably founded in fact and law . . . ."); *IHC Hospitals, Inc. v. Teton Cnty.*, 139 Idaho 188, 191-92, 73 P.3d 1198, 1201-02 (2003) ("Here, a legitimate question was presented as to what constitutes an application or delayed application; therefore, we deny an award of fees to the County.").

Unlike other attorney fee provisions, section 12-117 also applies to attorney fees incurred during the pre-judicial administrative phase. Indeed, where one of the parties to the administrative proceeding is a governmental entity, the administrative decision-maker has authority to award attorney fees at the administrative level. *Stewart v. Dep't of Health and Welfare*, 115 Idaho 820, 822, 771 P.2d 41, 43 (1989) (awarding attorney fees against the Idaho State School and Hospital in an administrative proceeding before the Idaho Personnel Commission involving the firing of employees)[5]; *Cox v. Dep't of Insurance, State of Idaho*, 121 Idaho 143, 823 P.2d 177 (Ct. App. 1991); *Ockerman v. Ada Cnty. Bd. of Comm'rs*, 130 Idaho 265, 939 P.2d 584 (Ct. App. 1997) (holding that a hearing officer in a county personnel proceeding has authority to award attorney fees against the county); Mark D. Perison, *A Guide to Attorney Fee Awards in Idaho*, 32 Idaho L. Rev. 29, 69 (1995). Of course, this posture (private party versus governmental entity appearing as parties in an administrative matter) is not likely to present itself in the land use context. In the land use context, the governmental entity is typically the decision-maker, not a party.[6] In some instances, however, a city or county may take on an adversarial role even in a land use context, for example by directing an order to show cause against a permit holder.

In *Eacret v. Bonner Cnty.*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004) (Burdick, J.), the Court noted that section 12-117 does not apply to a County sitting in its appellate capacity reviewing a P&Z decision, but only comes into play when the county becomes an "adverse party" when sued in district court. At that point, arguably, the prevailing party would be entitled to an award of attorney fees reaching back to capture the attorney costs incurred at the administrative stage. See *Bogner*

[5] The *Stewart* Court noted that section 12-117 does authorize administrative decision-makers to award attorney fees, in contrast to section 12-121, which authorizes courts to award attorney fees in the context of civil proceedings following administrative actions. See discussion of *Bogner*, and its unusual judicial review posture, in footnote 17 at page 46.

[6] This posture does arise from time to time in water right cases, in which cities or other governmental entities protest the water rights of private parties. See discussion in the *Idaho Water Law Handbook*.

and *Stewart* discussed above. The counter-argument would be that the governmental entity was not an adverse party at the administrative stage.

In an interesting split, the Court once upheld an award of attorney fees to a permit applicant at district court level, but denied attorney fees to the same party on appeal. *Sanders Orchard v. Gem Cnty.*, 137 Idaho 695, 702, 52 P.3d 840, 847 (2002).

Ralph Naylor Farms v. Latah Cnty. ("Naylor Farms"), 144 Idaho 806, 172 P.3d 1081 (2007), involved an ordinance adopted by Latah County creating the "Moscow Sub-basin Groundwater Management Overlay Zone." The ordinance prohibited certain specified land uses that were found to consume large quantities of water (mineral extraction and processing, large CAFOs, and golf courses). The ordinance was enacted as a direct response to the county's failed protest of Naylor Farms' application to IDWR for a ground water right for clay processing. When the Director of the Planning and Building Department refused to accept Naylor Farms' application for a conditional use permit on the basis of the use was prohibited under the overlay zone, Naylor Farms challenged the validity of the overlay ordinance. The challenge was brought as a collateral attack by way of complaint (not under LLUPA). The district court invalidated the ordinance on the basis that it was preempted by the authority granted to IDWR to regulate water resources.[7] The county did not appeal. Instead, the prevailing applicant appealed the district court's denial of its attorney fee request. The Supreme Court upheld the district court's finding that "the conflict between the Ordinance and the state law 'was by no means obvious.'" *Naylor Farms*, 144 Idaho at 810, 172 P.3d at 1085. In upholding the denial of attorney fees, the Idaho Supreme Court concluded: "Even though the district court ruled against the County and set aside the Ordinance, it did so on the basis that the County's actions were preempted by State law and not because the County acted wrongfully or without any authority. Because there a legitimate question about the validity of the County's actions in adopting the Ordinance, the County did not act without a reasonable basis in fact or law . . . ." *Naylor Farms*, 144 Idaho at 811, 172 P.3d at 1086.

[7] While the appeal dealt with attorney fees, the court found it necessary to discuss the merits of the preemption issue, essentially upholding the district court's preemption analysis. Neither the parties nor the court discussed Idaho Code § 42-201(4), which was enacted in 2006, the year after the county adopted the ordinance in question. The 2006 statute delegates to IDWR "exclusive authority over the appropriation of the public surface water and ground waters of the state" and prohibits any other agency from taking any "action to prohibit, restrict or regulate the appropriation" of water. Instead, the district court and the Idaho Supreme Court applied a common law implied preemption analysis under *Envirosafe Services of Idaho, Inc. v. Cnty. of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987). (See the *Idaho Water Law Hand*book for a discussion of section 42-201(4).) In any event, the case appears to reinforce the effect of the 2006 statute.

Note that a city or county that unsuccessfully defends its own decision may be subject to an award of attorney fees. *Lowery v. Bd. of Cnty. Comm'rs for Ada Cnty.* (*"Lowery I"*), 115 Idaho 64, 70-71, 764 P.2d 431, 437-38 (Idaho App. 1988).[8] In *Lowery I*, the Court of Appeals assessed attorney fees solely against the applicant for the permit, who had filed a separate appeal, finding that the county's role in the appeal was limited and passive. The Court of Appeals said:

> When acting upon a quasi-judicial zoning matter the governing board is neither a proponent nor an opponent of the proposal at issue, but sits instead in the seat of a judge. . . .
>
> In the instant case, the Ada County board now acknowledges having committed an error of law. Neither the Board nor its counsel actively advocated the position found to be frivolous by the district court. Instead the Board apparently tried to maintain a passive, nonpartisan and removed posture on appeal, while at the same time explaining its decision below.

Lowery I, 115 Idaho at 71, 764 P.2d at 438.

Nevertheless, the Court of Appeals emphasized that under different circumstances (presumably where the county played a more active role in the appeal), the county might have had to pay: "We do *not* hold that circumstances could never exist where an administrative or governmental tribunal could be subjected to an award of attorney fees to an appellant for frivolously defending its decision below." *Lowery I*, 115 Idaho at 71, 764 P.2d at 438 (emphasis original).

In *Galli v. Idaho Cnty.*, 146 Idaho 155, 191 P.3d 233 (2008) and again in *Neighbors for Responsible Growth v. Kootenai Cnty.*, 147 Idaho 173, 207 P.3d 149 (2009),[9] the Court determined that section 12-117 is not applicable where the county was a named party but was not actively involved on the merits of the appeal. In an

[8] This case involved a claim for attorney fees under section 12-121, not section 12-117 (which, at that time, was limited to claims against the state). In *Lowery II*, the Idaho Supreme Court held that section 12-121 is not available in judicial review actions. Nevertheless, the Court of Appeals' reasoning in *Lowery I* would appear to apply today to attorney fees claimed against cities and counties under section 12-117.

[9] In *Neighbors*, the appellants had not timely sought attorney fees at the administrative or district court level. The only issue was attorney fees on appeal to the Idaho Supreme Court. Citing *Galli*, the *Neighbors* Court explained: "Similarly, the county in this case is not adverse to either party. The county's only involvement in this appeal was to waive any objection to Neighbors' motion to dismiss and to waive any claim to attorney fees. Furthermore, Appellants are intervenors on the side of the county—perhaps the most obvious indicator that the two are not adverse. Thus, because Appellants are not adverse to the county, they are not entitled to an award of attorney fees under I.C. § 12-117." *Neighbors*, 147 Idaho at 177, 207 P.3d at 153.

earlier decision, the Court also noted that a fee award did not make sense when the governmental body is acting as a decision-maker. "Idaho Code, Section 12-117 states that attorney fees, witness fees and expenses may be awarded against a county only when it is an 'adverse party.' We note that the Board of Commissioners was sitting in its appellate capacity reviewing the administrative proceeding of the Planning and Zoning Commission and was not an 'adverse party' until the case was taken to the district court." *Eacret v. Bonner Cnty.*, 139 Idaho 780, 788 n.2, 784, 86 P.3d 494, 498, 502 n.2 (2004) (Burdick, J.).

In *Rammell v. State*, 154 Idaho 669, 678, 302 P.3d 9, 18 (2012), the Idaho Supreme Court affirmed an award of attorney fees below and awarded attorney fees on appeal to the State, noting that the plaintiff "both mischaracterized and misapplied the law to the extent that no reasonable basis in law existed."

Where a party wins, but not on the issue argued by the party, that party is not entitled to fees under section 12-117. "Although the Respondents have prevailed from an overall standpoint, it cannot be said that Paddison acted without a reasonable basis in fact or law. Indeed, neither side argued the issue upon which the appeal was decided. Thus, we decline to find that the requirements for a fee award under I.C. § 12–117 have been met." *Paddison Scenic Properties, Family Trust, L.C. v. Idaho Cnty.*, 153 Idaho 1, 278 P.3d 403 (2012).

A party may be subject to attorney fees either for abandoning or pursuing losing arguments. "Allied misrepresented controlling precedent in its briefing, and also presented multiple arguments in its briefing that it abandoned at oral argument. Further, Allied unreasonably pursued this appeal even though it failed to comply with the notice requirement of the ITCA and the bond requirement of I.C. § 6–610." *Allied Bail Bonds, Inc. v. Cnty. of Kootenai*, 151 Idaho 405, 415, 258 P.3d 340, 350 (2011).

"The District was clearly the prevailing party, as Zingiber's claims were dismissed with prejudice in a motion for summary judgment." *Zingiber Investment, LLC v. Hagerman Highway Dist.*, 150 Idaho 675, 686, 249 P.3d 868, 879 (2010).

(3) The "prevailing party" requirement under Idaho Code §§ 12-117(1) and other statutes.

(a) Idaho R. Civ. P. 54(d)(1)(B) guides the court's inquiry on the prevailing party question.

A fundamental prerequisite to the award of attorney fees is that the person seeking them be the "prevailing party." Although this section deals primarily with section 12-117, it is equally applicable to sections 12-120, 12-121 and, presumably, any other prevailing party award statute.

Regardless of the statute, Idaho R. Civ. P. 54(d)(1)(B) guides the court's inquiry on the prevailing party question. *Shore v. Peterson*, 146 Idaho 903, 914, 204 P.3d 1114, 1125 (2009) (J. Jones, J.) (arising under section 12-120).

That rule provides:

> (B) Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

Idaho R. Civ. P. 54(d)(1)(B).

(b) Determination of prevailing party involves an exercise of discretion.

"A determination on prevailing parties is committed to the discretion of the trial court and we review the determination on an abuse of discretion standard." *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005) (J. Jones, J.). "The determination of prevailing party status is committed to the sound discretion of the district court and will not be disturbed absent an abuse of that discretion." *Credit Suisse AG v. Teufel Nursery, Inc.*, 2014 WL 1053324 (Idaho Mar. 19, 2014) (quoting *Jorgensen v. Coppedge*, 148 Idaho 536, 538, 224 P.3d 1125, 1127 (2010)) (this statement was made in the context of a different attorney fee recovery statute).

The role of discretion is also expressly stated in the applicable rule of civil procedure, Idaho R. Civ. P. 54(d)(1)(B) (quoted above).

(c) Determination of prevailing party is based on the overall result.

The prevailing party standard was discussed at length by the Idaho Supreme Court in a 2012 decision. *Hobson Fabricating Corp. v. SE/Z Const*., LLC, 154 Idaho 45, 294 P.3d 171 (2012) (Burdick, C.J.). In this case, the parties settled all claims except costs and attorney fees at the district court. The district court determined that both sides prevailed in part, and awarded no attorney fees to either. Two of the parties appealed, contended that they were the overall prevailing party and should have been awarded fees. The Idaho Supreme Court affirmed, holding (1) the trial

court did not abuse its discretion in finding that both parties prevailed in part and (2) the request for partial prevailing party fees was not properly presented and would not be considered. In so ruling, the Court provided this explanation of the prevailing party issue:

> Rule 54(d)(1)(B) directs the court to consider, among other things, the extent to which each party prevailed relative to the "final judgment or result." This Court has previously noted that it may be "appropriate for the trial court, in the right case, to consider the 'result' obtained by way of a settlement reached by the parties." *Bolger v. Lance*, 137 Idaho 792, 797, 53 P.3d 1211, 1216 (2002). Additionally, where there are claims and counterclaims between opposing parties, "the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis." *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005). Accordingly, this Court has held that the trial court has the discretion to decline an award of attorney fees when it determines that both parties have prevailed in part. *Oakes v. Boise Heart Clinic Physicians*, 152 Idaho 540, 545, 272 P.3d 512, 517 (2012) (citing *Jorgensen*, 148 Idaho at 538, 224 P.3d at 1127). Therefore, the issue in this case is not who succeeded on more individual claims, but rather who succeeded on the main issue of the action based on the outcome of both the litigation and the settlement.

Hobson, 154 Idaho at 49, 294 P.3d at 175.

The need for an overall perspective was reiterated in 2013:

> "In determining which party prevailed in an action where there are claims and counterclaims between opposing parties, the court determines who prevailed 'in the action.' That is, the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis."

Advanced Medical Diagnostics, LLC v. Imaging Center of Idaho, LLC, 154 Idaho 812, 814, 303 P.3d 171, 173 (2013) (Eismann, J.) (quoting *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005) (J. Jones, J.)).

The same analysis applies where the case is settled by stipulation:

> For purposes of analysis in this case, stipulations to dismiss are a form of settlement. Idaho has treated cases ending in settlement no differently than cases tried to conclusion. In either case, the court must still look to I.R.C.P 54(d)(1)(B). As this Court stated in *Bolger v. Lance*:
>
> > Rule 54(d)(1)(B) directs the court to consider, among other things, the extent to which each party prevailed relative to the "final judgment or result." [I]t may be appropriate for the trial court, in the right case, to consider the "result" obtained by way of a settlement reached by the parties. However, the "[d]etermination of who is a prevailing party is committed to the sound discretion of the trial court and will not be disturbed absent abuse of discretion."
>
> 137 Idaho 792, 797, 53 P.3d 1211, 1216 (2002) (citations omitted). Additionally, *Bolger* stands for the proposition that the trial court may take into consideration the result obtained by way of settlement, but that result alone is not controlling.

Hobson, 154 Idaho at 51, 294 P.3d at 177 (brackets and parentheticals original).

Where there is a true split decision—with each side scoring a major victory—neither side is a prevailing party for purposes of section 12-117. *Trilogy Network Systems, Inc. v. Johnson*, 144 Idaho 844, 172 P.3d 1119 (2007); *Fuchs v. Idaho State Police, Alcohol Beverage Control*, 153 Idaho 114, 117, 279 P.3d 100, 103 (2012) (Burdick, C.J.).

> In *Trilogy*, following a court trial, the district court found that the plaintiff had proved that the defendant breached a contract. The district court further found that the plaintiff had failed to prove its damages with reasonable certainty. Under these circumstances, the district court found that there was no prevailing party, because the plaintiff had prevailed on the issue of liability and the defendant had prevailed on the issue of damages.

Fuchs, 153 Idaho at 118, 279 P.3d at 104 (citations omitted). Note that *Trilogy* arose under Idaho Code § 12-120. However, it was cited as applicable authority in *Fuchs*, a section 12-117 case.

Where a party presents claims or affirmative defenses in the alternative, either of which would be sufficient to achieve the desired result, and prevails on only one of them, that party is the overall prevailing party. *Shore v. Peterson*, 146 Idaho 903, 915, 204 P.3d 1114, 1126 (2009) (J. Jones, J.) (arising under section 12-120).

Where a defendant succeeds in fending off a lawsuit, he or she is the prevailing party:

> In *Daisy Manufacturing Co. v. Paintball Sports, Inc.*, 134 Idaho 259, 999 P.2d 914 (Ct. App. 2000), the Court of Appeals observed: "The 'result obtained' in this case was a dismissal of [plaintiff's] action with prejudice, the most favorable outcome that could possibly be achieved by [a defendant].

Shore, 146 Idaho at 915, 204 P.3d at 1126 (brackets original).

Idaho Military Historical Society, Inc. v. Maslen, 2014 WL 2735320 (Idaho June 17, 2014) (Schroeder, J. pro tem.) involved a dispute over a PT23 Fairchild airplane donated to an aviation museum by former Micron President Steve Appelton. When the museum ran low on funds to pay for storing the plane, it accepted an offer from defendants Maslen and another aviation museum to house the plane. Sometime later, the original museum decided to give the plane to a third aviation museum (the plaintiff). Upon learning of this, the defendants filed a $12,025 lien on the plane and refused to surrender possession to the plaintiff museum. The district court ordered the defendants to surrender possession of the plane to the plaintiff but denied the plaintiff's $796,218 damage claims as well as $14,630 in counterclaims by the defendants. Although the plaintiff did not prevail on its $796,218 damage claims, the district court found that it was nonetheless the prevailing party, because securing title and possession of the plane was the key goal of the litigation. This Court affirmed.

In so ruling, the Court disavowed language in *Nampa & Meridian Irrigation Dist. v. Washington Fed. Savings*, 135 Idaho 518, 522, 20 P.3d 702, 706 (2001) (Walters, J.) suggesting that a party could escape an attorney fee award in an otherwise frivolously litigated case if it managed to present a single triable issue. *Idaho Military Historical Society* at *7.

Although *Idaho Military Historical Society* arose in the context of Idaho Code § 12-121, the case was decided on the basis of Idaho R. Civ. P. 54(d)(1)(B), which applies equally to Idaho Code § 12-117 (and every other prevailing party statute). *Idaho Military Historical Society* at *4.

In sum, *Idaho Military Historical Society* makes clear that attorney fees may be awarded to the overall prevailing party, which is determined based on a broad view of the action that identifies the principal issues and goals in the case. In some instances, that award may be reduced where less important issues are pursued by the

other party in a non-frivolous fashion. This is consistent with the express language of Idaho R. Civ. P. 54(d)(1)(B) as well as the provisions in both 12-117(1) and (2).

(4) Partially prevailing parties: Idaho Code § 12-117(2)

Subsection 12-117(2) provides that even a partially prevailing party may obtain an award of attorney fees as to those issues on which it prevailed and the other party acted without a reasonable basis. Subsection (2) states:

> (2) If a party to a proceeding prevails on a portion of the case, and the state agency or political subdivision or the court hearing the proceeding, including on appeal, finds that the nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the case, it shall award the partially prevailing party reasonable attorney's fees, witness fees and other reasonable expenses with respect to that portion of the case on which it prevailed.

Idaho Code § 12-117(2).

Curiously, this provision has received scant attention in the appellate cases. The first case to address the subsection (2) of the statute is *Roe v. Harris*, 128 Idaho 569, 917 P.2d 403 (1996) (Johnson, J.). Consistent with the plain language of the statute, the *Roe* Court ruled that a litigant may lose a part of the case and still be a prevailing party in the grand scheme of things and thus be entitled to an attorney fee award as to those issues on which he or she prevailed.

In *Roe*, pro-abortion plaintiffs challenged the constitutionality of an anti-abortion statute and an anti-abortion rule. The district court upheld the statute (but based on an interpretation favorable to the plaintiffs) and struck down the rule. The plaintiffs sought attorney fees on for the portion of the case they won pursuant to Idaho Code § 12-117(2). (They also sought attorney fees for the entire case under the private attorney general doctrine, but that claim was rejected by the trial court and the Idaho Supreme Court on the basis that section 12-117 is exclusive).

The district court ruled that the plaintiffs were the prevailing party, but were not entitled to fees because the case "was not defended frivolously or without reasonable basis." *Roe*, 128 Idaho at 573, 917 P.2d at 407. The Idaho Supreme Court agreed with the first conclusion but not the second; thus the plaintiffs were entitled to a fee award.

As to the prevailing party determination, the Court said determining who is a prevailing party under Idaho R. Civ. P. 54(d)(1)(B) should not be made on a claim by claim basis, but upon an overall evaluation of the litigation. "Rather than focusing on tallying the issues or the counts in the complaint however, the trial court should

evaluate the result in relation to the relief sought." *Roe*, 128 Idaho at 571, 917 P.2d at 405 (internal quotations marks omitted). The Court concluded that even though statute's constitutionality was upheld, the decision narrowed its reading, and, in the grand scheme of things, it was within the district court's discretion to conclude that the plaintiffs were overall prevailing parties. Thus, the plaintiffs in *Roe* were entitled to attorney fees at least on the one count on which they formally prevailed. (It appears that the plaintiffs sought fees only on as to that count.)

The *Roe* Court concluded that this holding was not in conflict with another case, *Magic Valley Radiology Associates, P.A. v. Professional Business Services*, 119 Idaho 558, 563, 808 P.2d 1303, 1308 (1991), which held that the case should be considered as a whole in determining which was the overall prevailing party. The *Roe* Court then said, simply: Idaho Code § 12-117(2) (Supp. 1995) provides a different rule." *Roe*, 128 Idaho at 574, 917 P.2d at 408.

It would be nice if the explanation provided by the Court in *Roe* were a little more thorough, but the bottom line is unmistakable. A partially prevailing party who achieves the major objective of the litigation is entitled, at a minimum, to a partial fee award.

The Court briefly referenced the statute in *Nelson v. Big Lost River Irrigation Dist.*, 133 Idaho 139, 143, 983 P.2d 212, 216 (1999) (Kidwell, J.). In that case, the Court upheld the district court's award of partial attorney fees to each party under Idaho Code § 12-117(2). In so holding, the *Nelson* Court referenced its decision in *Prouse v. Ransom*, 117 Idaho 734, 791 P.2d 1313 (Ct. App. 1989) (Burnett, J.) (upholding a spilt award on the basis of Idaho R. Civ. P. 54(d)(1)).

In *Hobson Fabricating Corp. v. SE/Z Const*., LLC, 154 Idaho 45, 49-51, 294 P.3d 171, 175-77 (2012) (Burdick, C.J.), the Court upheld the district court's finding that the parties seeking attorney fees were not the "overall prevailing party" and thus not entitled to attorney fees under Idaho Code § 12-117(1). On appeal, those parties argued, in the alternative, that if they were not overall prevailing parties they were at least entitled to partial recovery of attorney fees under Idaho Code § 12-117(2). The Court said, in essence, "good point, but you should have raised it below."

> In this case, the Contractors failed to adequately describe that the basis of the award they were pursuing was centered on I.C. § 12–117(2), and they did not cite to any case where an award of attorney fees was made pursuant to I.C. § 12–117(2). . . . Because the Contractors did not properly present a request pursuant to I.C. § 12–117(2) below, they are not allowed to pursue that request on appeal.

Hobson, 154 Idaho at 52-53, 294 P.3d 171, 178-79. While the *Hobson* court did not reach the merits on section 12-117(2), its ruling did nothing to disturb or question the holding in *Roe* that partially prevailing parties may be entitled, at least, to partial awards.

(5) Appellate review of attorney fee awards under section 12-117(1).

In *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012) (J. Jones, J.), the Court overturned a line of cases[10] that applied various standards of review (including "clearly erroneous" and *de novo* review) and settled instead on an abuse of discretion standard for review a decision to grant or deny attorney fees under Idaho Code § 12-117. "Our prior holdings to the contrary in *Rincover* [*v. State of Idaho, Dep't of Finance*, 132 Idaho 547, 550, 976 P.2d 473, 476 (1999)] and its progeny are hereby overruled in this respect." *City of Osburn*, 152 Idaho at 908, 277 P.3d at 355. This holding was confirmed in *Martin v. Smith*, 154 Idaho 161, 163, 296 P.3d 367, 369 (2013).

This abuse of discretion standard applies not only to the "without a basis in fact or law" standard, but also to the determination of who is the prevailing party. "A determination on prevailing parties is committed to the discretion of the trial court and we review the determination on an abuse of discretion standard." *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005) (J. Jones, J.).

At first, it may seem odd to employ an abuse of discretion standard to a statute that makes an award of attorney fees mandatory.[11] However, in *City of Osburn*, the Court explained that the award is mandatory only upon a determination that the non-prevailing party acted without reasonable basis in fact or law. That determination, which is focused on reasonableness, "is properly left to the district court's reasoned judgment." *City of Osburn*, 152 Idaho at 908, 277 P.3d at 355. In other words, the determination of whether the non-prevailing party acted reasonably involves an exercise of discretion and is reviewed on an abuse of discretion standard.

The same standard applies when a district court evaluates an attorney fee award or denial by an administrative agency. "This Court reviews a determination of

[10] Prior to *City of Osburn*, the rule was that, on appeal, the reviewing court freely reviews a district court's award of attorney fees under section 12-117. This was in contrast to awards under other statutes, such as section 12-121, which are reviewed for an abuse of discretion. *Total Success Investments, LLC v. Ada Cnty. Highway Dist.* ("*Total Success II*"), 148 Idaho 688, 695, 227 P.3d 942, 949 (Ct. App. 2010) (Perry, J. Pro Tem.).

[11] "Furthermore, this Court interpreted I.C. § 12–117 to require a fee award where a government entity acts without a reasonable factual or legal basis." *City of Osburn*, 152 Idaho at 909, 277 P.3d at 356 (citing *Rincover v. State of Idaho, Dep't of Finance*, 132 Idaho 547, 549, 976 P.2d 473, 475 (1999).

whether to award attorney fees pursuant to I.C. § 12-117 under an abuse of discretion standard." *Fuchs v. Idaho State Police, Alcohol Beverage Control*, 153 Idaho 114, 116, 279 P.3d 100, 102 (2012) (involving judicial review of an administrative decision denying attorney fees to the prevailing party) (citing *Halvorson v. N. Latah Cnty. Highway Dist.*, 151 Idaho 196, 208, 254 P.3d 497, 509 (2011).

"Where the district court acts within the bounds of its discretion and reaches its decision through an exercise of reason an abuse of discretion will not be found." *Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 498, 300 P.3d 18, 30 (2013) (internal quotation marks and brackets omitted).

(6) Attorney fees awards on appeal under Idaho Code § 12-117.

In 2012, section 12-117(1) was amended to codify prior decisions[12] holding that it authorized attorney fee awards on appeal as well as below. 2012 Idaho Sess. L. ch. 149.

"The Court employs a two-part test for I.C. § 12–117 on appeal: the party seeking fees must be the prevailing party and the losing party must have acted without a reasonable basis in fact or law." *City of Osburn v. Randel*, 152 Idaho 906, 910, 277 P.3d 353, 357 (2012) (J. Jones, J.).

"On appeal, all of the issues raised by Alpine have been resolved in favor of McCall, therefore they are the prevailing party. Additionally, Alpine pursued these issues without a reasonable basis in fact or law. This Court awards attorney fees to McCall pursuant to I.C. § 12–117." *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.).

(7) Prevailing party status in cases involving appeal and cross appeal.

The decisions involving awards of attorney fees on appeal contain only cursory discussions of the prevailing party issue.

There is a line of authority holding that if a party prevails on the appeal but loses the cross appeal for attorney fees (or any other aspect of the appeal), he or she is not a prevailing party. *Hoskins v. Circle A Const., Inc.*, 138 Idaho 336, 63 P.3d 462 (2003) (Schroeder, J.); *Keller v. Inland Metals All Weather Conditioning, Inc.*, 139 Idaho 233, 241, 76 P.3d 977, 985 (2003) (Eismann, J.); *KEB Enterprises, L.P. v. Smedley*, 101 P.3d 690, 699, 140 Idaho 746, 755 (2004) (Eismann, J.); *Total Success Investments, LLC v. Ada Cnty. Highway Dist.* ("*Total Success II*"), 148 Idaho 688, 696, 227 P.3d 942, 950 (Ct. App. 2010) (Perry, J. Pro Tem.); *Tapadeera, LLC v.*

[12] "The statute authorizes the awarding of attorney fees on appeal . . . ." *Daw ex rel. Daw v. School Dist. 91 Bd. of Trustees*, 136 Idaho 806, 41 P.3d 234 (2001) (Eismann, J.)

Knowlton, 153 Idaho 182, 189, 280 P.3d 685, 692 (2012) (Eismann, J.); *Hurtado v. Land O'Lakes, Inc.*, 153 Idaho 13, 23, 278 P.3d 415, 415 (2012) (Horton, J.) [13]; *Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 498, 300 P.3d 18, 30 (2013) (J. Jones, J.); *Hehr v. City of McCall*, 155 Idaho 92, 97, 305 P.3d 536, 543 (2013) (Burdick, C.J.); *Sanders v. Bd. of Trustees of Mtn. Home School Dist. No. 193*, 2013 WL 1349418 (Idaho Apr. 7, 2014) (Burdick, C.J.).

Hoskins involved dueling substantive appeals and cross-appeals, both of which raised significant issues. Because Hoskins won one and lost the other, he was not the prevailing party. "However, Hoskins has only prevailed in part in this appeal. He cross-appealed, and Circle A has prevailed on the cross-appeal. Both parties prevailed in part. Under these circumstances, Hoskins is not entitled to attorney fees." *Hoskins*, 138 Idaho at 343, 63 P.3d at 469.

Keller was a contract damages case involving a defective dehumidifier installed in an athletic club. The trial court awarded the athletic club damages of $13,452 and attorney fees (under Idaho Code § 12-120(3)) of $74,400. The contractor appealed. The Idaho Supreme Court substantially reduced the damage award—to $2,793—but affirmed all other aspects of the judgment. The Court then concluded: "Because both parties have prevailed in part on appeal, we will not award attorney fees on appeal." *Keller*, 139 Idaho at 241, 76 P.3d at 985.

In *Tapadeera*, the plaintiff succeeded below in obtaining a judgment against the defendants for $23,421, but lost its request for attorney fees in the amount of $22,666. *Tapadeera*, 153 Idaho at 185-86, 280 P.3d at 688-89. Both sides appealed, and the Idaho Supreme Court affirmed on both scores. The Court concluded, simply: "[The plaintiff] prevailed on the Knowltons' appeal but lost its cross-appeal. Therefore, Tapadeera is not the prevailing party on appeal and is not entitled to an award of attorney fees under Idaho Code section 12–121. *Tapadeera*, 153 Idaho at 189, 280 P.3d at 692. Having prevailed on one appeal for $23,421 while losing its cross-appeal for $22,666, it is obvious that these appeals resulted in a wash with no overall prevailing party.

Hoskins, *Keller*, and *Tapadeera* are classic split decisions in which each party won a substantial part and lost a substantial part on appeal. In other words, there was no obvious winner, and it is easy to see why attorney fees were not awarded on appeal.

In the other cases mentioned above, however, the Court simply recited a rule-of-thumb suggesting that if the party loses any aspect of the appeal, he or she can never be a prevailing party. For example, in *Hurtado* the Court said, "Where both

[13] *Keller* and *Hurtado* involved only Idaho Code § 12-120(3). However, *Hurtado* (which cited *Keller*) was cited in *Sanders* involving section 12-117 and 12-120(3).

parties prevail in part on appeal, this Court does not award attorney fees to either party." *Hurtado*, 153 Idaho at 23, 278 P.3d at 425.

Such a rule-of-thumb stands in sharp contrast to how the prevailing party is evaluated at the district court or administrative agency level. In those arenas, the Court has said, "the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis." *E.g.*, *Advanced Medical Diagnostics, LLC v. Imaging Center of Idaho*, LLC, 154 Idaho 812, 814, 303 P.3d 171, 173 (2013) (Eismann, J.) (quoting *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005) (J. Jones, J.)).

Indeed, the relative significance of attorney fees versus the merits was noted by the Court in another context (construing a stipulation): "Furthermore, we have said costs and attorney fees are collateral issues which do not go to the merits of an action . . . ." *Straub v. Smith*, 145 Idaho 65, 69, 175 P.3d 754, 758 (2007) (Burdick, J.).

Because the same statute, section 12-117, applies to attorney fee awards at below and on appeal, one would think that Idaho R. Civ. P. 54(d)(1)(B) (which describes the prevailing party standard) would apply. In another context, however, the Court has said that the rule "has no application on appeal." *Tapadeera, LLC v. Knowlton*, 153 Idaho 182, 189, 280 P.3d 685, 692 (2012) (Eismann, J.).

In any event, this line of cases presents a dilemma to a prevailing party on appeal who lost an award of attorney fees below. By including a challenge to the denial of attorney fees below (which is difficult to win, given the discretion involved), that party may forfeit attorney fees on the appeal despite winning every other point in the case.

(8) Idaho Code § 12-117(1) is not exclusive.

In *Syringa Networks, LLC v. Idaho Dep't of Admin*. ("*Syringa I*"), 155 Idaho 55, 305 P.3d 499 (2013) (Eismann, J.), the Idaho Supreme Court overturned over a dozen cases dealing with the exclusivity of Idaho Code § 12-117. "Therefore, we hold that section 12–117(1) is not the exclusive basis upon which to seek an award of attorney fees against a state agency or political subdivision, but attorney fees may be awarded under any other statute that expressly applies to a state agency or political subdivision, such as sections 12-120(3) and 12-121." *Syringa I*, 155 Idaho at 67, 305 P.3d at 511.

Thus, there is no doubt that attorney fee requests may be made, in the alternative, under Idaho Code § 12-120(3) (dealing with contracts) and Idaho Code § 12-121 (civil actions), both of which expressly define "party" to include the State and its political subdivisions. It appears, however, that, Idaho Code § 12-117, if available, remains exclusive where the alternative attorney fee statute is not one "that expressly applies to a state agency or political subdivision."

The ruling that section 12-117 was exclusive derives from the Court's 1997 decision that section 12-117 supplants the private attorney general doctrine and provides "the exclusive basis upon which to seek an award of attorney fees against a state agency." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 718, 722-23, 947 P.2d 391, 395-96 (1997) (which relied on *Roe v. Harris*, 128 Idaho 569, 917 P.2d 403 (1996)).

This point was reiterated in many other cases. *Lake CDA Investments, LLC v. Idaho Dep't of Lands*, 149 Idaho 274, 285, 233 P.3d 721, 732 (2010); *Kootenai Medical Center v. Bonner Cnty. Comm'rs*, 141 Idaho 7, 105 P.3d 667 (2004) (applying to counties as well as state agencies); *Westway Construction, Inc. v. ITD*, 139 Idaho 107, 116, 73 P.3d 721, 730 (2003). However, the private attorney general doctrine (discussed in section 25.K at page 53) remains available in actions against the state itself (as opposed to a state agency). *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 718, 722-23, 947 P.2d 391, 395-96 (1997).

Although this line of reasoning arose in the context of denying claims under the private attorney general doctrine and was thus limited to precluding attorney fee claims against the government, more recent decisions have made clear that Idaho Code § 12-117 is exclusive in all situations.[14] "I.C. § 12–117 is the exclusive means for awarding attorney fees for the entities to which it applies." *Potlatch Educ. Ass'n v. Potlatch School Dist. No. 285*, 148 Idaho 630, 635, 226 P.3d 1277, 1282 (2010). *See also*, *Smith v. Washington Cnty.*, 150 Idaho 388, 392, 247 P.3d 615, 619 (2010); *Brown v. City of Pocatello*, 148 Idaho 802, 811, 229 P.3d 1164, 1173 (2010); *Sopatyk v. Lemhi Cnty.*, 151 Idaho 818, 264 P.3d 916, 925 (2011); *Kepler-Fleenor v. Freemont Cnty.*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012); *City of Osburn v. Randel*, 152 Idaho 906, 910, 277 P.3d 353, 357 (2012); *State of Idaho, Dep't of Transportation v. JH Grathol*, 153 Idaho 87, 93, 278 P.3d 957, 963 (2012); *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, 329, 297 P.3d 1134, 1146 (2013) (holding that an irrigation district is a political subdivision within the meaning

[14] On other occasions, the Court has applied both section 12-117 and 12-121. *E.g.*, *Ada Cnty. Highway Dist. v. Total Success Investments, LLC ("Total Success I")*, 145 Idaho 360, 372, 179 P.3d 323, 335 (2008); *Total Success Investments, LLC v. Ada Cnty. Highway Dist.* ("*Total Success II*"), 148 Idaho 688, 694-96, 227 P.3d 942, 948-50 (Ct. App. 2010) (Perry, J. Pro Tem.). The authors are not aware that these cases have been expressly overruled, but the most recent decisions of the Court have stuck with the position that Idaho Code § 12-117 is exclusive where it is available.

On the other hand, a 2008 decision held that specific attorney fee provisions in specialized statutes may apply and even override section 12-117. *Beehler v. Fremont Cnty.*, 145 Idaho 656, 661, 182 P.3d 713, 718 (Ct. App. 2008). Perhaps this remains good law, in this specialized situation. Thus, it may be that the principle that section 12-117 is exclusive is applicable only in the context of dueling generic attorney fee authorities.

of section 12-117; awarding fees sua sponte under Idaho Appellate Rule 11.2 despite the fact that defendant failed to request fees under section 12-117).[15]

While it is now clear that both statutes are available, whether this makes a difference depends on the statutes involved. In the case of Idaho Code §§ 12-117 and 12-121, the substantive standards have been equated by the Idaho Supreme Court. There appears to be some difference in how the two statutes address the "prevailing party" requirement, and section 12-121 appears to apply a tougher standard. Thus, it is difficult to conceive that if an award is not justified under the first statute (section 12-117), it would be justified under the second.

C. Idaho Code § 12-117(4): Litigation between two adverse governmental entities

Idaho Code § 12-117 was amended in 2012 to add a new provision dealing with litigation between governmental entities. Idaho Sess. Laws, ch. 149. This subsection mandates an award of attorney fees to the "prevailing party" in "any civil judicial proceeding" between adverse governmental entities. Idaho Code § 12-117(4). In other words, there is no requirement that the non-prevailing governmental entity act without a reasonable basis in fact or law.

Unlike section 12-117(1), subsection (4) does not apply in administrative litigation. It is unclear whether "civil judicial proceeding" includes judicial review or is limited to a civil action.

Section 12-117(4) does not address what happens when one of the governmental entities only partially prevails. It may be that section 12-117(2) (dealing with partially prevailing parties) applies to awards under section 12-117(4). However, section 12-117(2) requires a finding that the non-prevailing party acted without a reasonable basis in fact or law; so it does not mesh well with the mandatory award concept in section 12-117(4).

On the other hand, the 2012 amendment that added section 12-117(4) also tinkered with section 12-117(2)—suggesting that the legislature was aware of section 12-117(2) and intended it to apply in the context of 12-117(4). If so, that would mean that where two governmental agencies litigate against each other and neither fully prevails, a partial award will only be made where the other governmental agency acted frivolously. In other words, the mandatory award of fees occurs only where one of the governmental entities prevails on every issue.

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[15] Despite the Court's repeated statements (until *Syringa I*) that section 12-117 is exclusive, it continued to entertain and occasionally grant attorney fees under Idaho Code § 12-121 in cases involving governmental entities. *E.g.*, *Athay v. Rich Cnty.*, 153 Idaho 815, 291 P.3d 1014 (2012) (granting attorney fees under section 12-121 without discussing section 12-117); *Ravenscroft v. Boise Cnty.*, 154 Idaho 613, 617, 301 P.3d 271, 275 (2013) (denying attorney fees on the merits of the claim); *Hoagland v. Ada Cnty.*, 2013 WL 2096575 (May 16, 2013) (denying attorney fees on the merits of the claim). This inconsistency is mooted by *Syringa I*.

D. Idaho Code § 12-120(1): Civil cases under $35,000

Section 12-120(1) provides that the prevailing party is entitled to recover his or her attorney fees in civil actions where the amount pleaded is $35,000 or less (formerly $25,000). To be eligible for this award, a prevailing plaintiff must have made written demand for payment of the claim on the defendant at least ten days prior to commencing suit. No attorney fee award will be made if the defendant tendered to plaintiff at least 95 percent of the amount demanded.

The notice requirement keys into the filing of the complaint, not an amended complaint. "The request for attorney fees under Idaho Code section 12–120(1) is also denied because Tapadeera did not make written demand for the payment of the claim 'not less than ten (10) days before the commencement of the action.' I.C. § 12–120(1). 'A civil action is commenced by the filing of a complaint with the court,' I.R.C.P. 3(a)(1), not by filing a second amended complaint." *Tapadeera, LLC v. Knowlton*, 153 Idaho 182, 189, 280 P.3d 685, 692 (2012) (Eismann, J.).

The Idaho Supreme Court has ruled that cases seeking injunctive or declaratory relief, rather than a monetary award, do not satisfy the "under $25,000" rule. *Boise Cent. Trades & Labor Council, Inc. v. Bd. of Ada Cnty. Comm'rs*, 122 Idaho 67, 831 P.2d 535 (1992).

This statute does not apply to personal injury actions; those are covered instead by section 12-120(4) discussed below.

E. Idaho Code § 12-120(4): Personal injury claims under $25,000

Section 12-120(4), applies to civil actions under $25,000 involving claims for personal injury. The only differences between this and section 12-120(1) deal with the requirement for pre-litigation demand. In personal injury cases, the demand must be made both on the party and on her insurer at least 60 days prior to commencing the action. Also, the defendant is protected against an award of attorney fees if she tendered 90 percent of the amount demanded.

F. Idaho Code § 12-120(3): Commercial transactions

Section 12-120(3) allows recovery of attorney fees by the prevailing parties in cases involving commercial transactions.[16] Typically to fall within the definition of "commercial transaction" the suit will be for enforcement of a business contract .

[16] More specifically, the statute applies to civil actions "to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services in any commercial transaction." Idaho Code § 12-120(3). "The term 'commercial transaction' is defined to mean all transactions except transactions for personal or household purposes." Idaho Code § 12-120(3).

See, *e.g.*, *Brower v. E.I. DuPont De Nemours & Co.*, 117 Idaho 780, 792 P.2d 345 (1990).

Note that fees under this section are not available in judicial review cases. "Like section 12-121, section 12-120(3) allows for attorney's fees in "civil action[s]." Civil actions are commenced by the filing of a complaint. Because Travelers initiated these proceedings by filing a petition for judicial review with the district court, attorney's fees cannot be awarded under Idaho Code section 12-120(3)." *In re Idaho Workers Compensation Bd.*, 167 Idaho 13, 25, 467 P.3d 377, 389 (Burdick, C.J.).

In *Westway Construction, Inc. v. Idaho Transportation Dep't*, 139 Idaho 107, 73 P.3d 721 (2003), a private litigant sought attorney fees against a state agency under section 12-120(3). It would seem that the Supreme Court could have dismissed the request because the case arose under the IAPA and did not involve a "commercial transaction." Instead the Court stated, "That statute [section 12-120(3)] is not applicable. 'I.C. § 12-117 provides the exclusive basis upon which to seek an award of attorney fees against a state agency.'" *Westway*, 139 Idaho at 116, 73 P.3d at 730 (quoting *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 718, 723, 947 P.2d 391, 396 (1997)).

Note that in *Syringa Networks, LLC v. Idaho Dep't of Admin*. ("*Syringa I*"), 155 Idaho 55, 305 P.3d 499 (2013) (Eismann, J.), the Idaho Supreme Court overturned over a dozen cases holding that, where Idaho Code § 12-117 is available, it is the exclusive means of seeking attorney fees. "Therefore, we hold that section 12–117(1) is not the exclusive basis upon which to seek an award of attorney fees against a state agency or political subdivision, but attorney fees may be awarded under any other statute that expressly applies to a state agency or political subdivision, such as sections 12-120(3) and 12-121." *Syringa I*, 155 Idaho at 67, 305 P.3d at 511. Thus, requests for attorney fees may be made under Idaho Code § 12-120(3) in the alternative to Idaho Code § 12-117.

Section 12-120(3) also allows attorney fees to be awarded on appeal:

> Both parties request an award of attorney fees on appeal pursuant to Idaho Code section 12–120(3). That statute provides that in any civil action to recover in a commercial transaction, the prevailing party shall be allowed a reasonable attorney fee. This was an action to recover in a commercial transaction, and the statute applies even if the only issue on appeal involves the award of attorney fees below. *BECO Constr. Co., Inc. v. J–U–B Engineers Inc.*, 149 Idaho 294, 298, 233 P.3d 1216, 1220 (2010).

Advanced Medical Diagnostics, LLC v. Imaging Center of Idaho, LLC, 154 Idaho 812, 816, 303 P.3d 171, 175 (2013) (Eismann, J.).

G. Section 12-121 (Non-prevailing party was frivolous – civil actions only)

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Editor's Note: On September 28, 2016, the Idaho Supreme Court handed down *Hoffner v. Shappard*, 160 Idaho 870, 380 P.3d 681 (2016) (Horton, J.). This decision overturned decades of precedent. The Court held that Idaho R. Civ. P. 54(e)(1) (which established the "frivolously, unreasonably or without foundation" standard) is in conflict with Idaho Code § 12-121. *Hoffner* was promptly "reversed" by the Idaho Legislature with the enactment of House Bill 97 in March of 2017. The legislation amended Idaho Code 12-121 to read:

> 12-121. ATTORNEY'S FEES. In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties~~, provided that this~~ when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation. This section shall not alter, repeal or amend any statute ~~which~~ that otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

Idaho Code § 12-121 (as amended by House Bill 97 in 2017).

In short, the Legislature eliminated the conflict with the rule by grafting the language of Idaho R. Civ. P. 54(e)(1) directly into the statute. The Legislature underscored its intent with the following statement of legislative intent (enacted as section 1 of the bill):

> It is the intent of the Legislature, by enactment of this legislation, to reinstate and make no change to Idaho law on attorney's fees as it existed before the Idaho Supreme Court's decision in *Hoffer v. Shappard*, 2016 Opinion No. 105, September 28, 2016. To accomplish that goal, it is the Legislature's intent that this legislation be construed in harmony with Idaho Supreme Court decisions on attorney's fees that were issued before *Hoffer v. Shappard*.

Accordingly, the discussion of authorities below remains relevant.

In 1976, the Legislature adopted a broad attorney fee recovery provision authorizing the award of attorney fees to prevailing parties in all civil actions:

> In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

Idaho Code § 12-121.

Section 12-121, however, is limited to civil actions initiated by complaint; it does not apply in cases such as judicial review of administrative action and land use decisions initiated by petition.[17] *Lowery v. Bd. of Cnty. Comm'rs for Ada Cnty.* (*"Lowery II"*), 117 Idaho 1079, 1081-82, 793 P.2d 1251, 1253-54 (1990)[18]; *Sanchez v. State of Idaho, Department of Correction*, 143 Idaho 239, 245, 141 P.3d 1108, 1114 (2006); *Johnson v. Blaine Cnty.*, 146 Idaho 916, 929, 204 P.3d 1127 (2009)

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[17] "Attorney's fees are not available under Idaho Code section 12-121 on petitions for judicial review because they are not commenced by the filing of a complaint." *In re Idaho Workers Compensation Bd.*, 167 Idaho 13, 24, 467 P.3d 377, 388 (Burdick, C.J.) (the Court said that the same goes for fees under Idaho Code § 12-120(3)). The case of *Bogner v. Idaho Dep't of Revenue and Taxation*, 107 Idaho 854, 693 P.2d 1056 (1984), presents a unique application of this statute in the context of the Tax Commission. In *Bogner*, section 12-121 was found applicable to a judicial review of an adverse Tax Commission decision. "An appeal to district court is for certain a civil action, and hence within the purview of I.C. § 12-121." *Bogner* at 858, 693 P.2d at 1060. Indeed, the *Bogner* court allowed an award of attorneys fees by the district court to reach back and cover attorney fees incurred at the administrative level. How can a judicial review be a civil action? The answer is found in the unique judicial review statute for tax cases, which authorizes challenges to the Tax Commission not by petition but by complaint. See discussion in *Bogner* at 858, 693 P.2d at 1060, n.4.

[18] In *Lowery II*, the court ruled that Idaho Code § 12-121 did not apply to a judicial review of a conditional use permit. "Idaho Rule of Civil Procedure 3(a) clearly declares that 'a civil action is commenced by filing a complaint with the court.' . . . The award of attorney fees in the instant case was therefore error as this proceeding was not a "*civil action.*'" *Lowery II*, 117 Idaho at 1081-82, 793 P.2d at 1253-54 (emphasis original). Without expressly saying so, *Lowery II* essentially overturned *Lowery v. Bd. of Cnty. Comm'rs for Ada Cnty.* (*"Lowery I"*), 115 Idaho 64, 67, 764 P.2d 431, 434 (Ct. App. 1988), in which the Idaho Court of Appeals applied Idaho Code § 12-121 in the context of a judicial review of a LLUPA permit.

(confirming *Lowery*); *Knight v. Dep't of Insurance*, 119 Idaho 591, 593, 808 P.2d 1336, 1338 (Ct. App. 1991).[19] As a consequence, this statutory provision is not ordinarily available in land use appeals.[20]

When enacted, the statute sent conflicting messages. Its reference to "prevailing parties" suggests the English Rule. But this result was softened by the use of the permissive "may." The resulting ambiguity resulted in widely differing practices among district judges. Jesse R. Walters, Jr., *A Primer for Awarding Attorney Fees in Idaho*, 38 Idaho L. Rev. 1, 18 (2001).

In response, the Idaho Supreme Court appointed a blue ribbon committee to review the problem. The result was the adoption of a new rule of civil procedure, Idaho R. Civ. P. 54(e)(1), which significantly constrained the statute:

> In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B) [defining "prevailing party"], when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation; but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment.[21]

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[19] In the case of *Angstman v. City of Boise*, 128 Idaho 575, 917 P.2d 409 (Ct. App. 1996) (Walters, C.J.), the Court of Appeals considered an award of attorney fees to the city of Boise under section 12-121 in a land use appeal under LLUPA, but denied it on the merits of the request. The Court apparently overlooked the inapplicability of section 12-121. This case arose before section 12-117 was amended to allow prevailing municipalities to obtain attorney fees under that statute.

[20] But see, *Chisholm v. Twin Falls Cnty.*, 139 Idaho 131, 136, 75 P.3d 185, 190 (2003), in which the Idaho Supreme Court declined to award attorney fees in an appeal of a "livestock confinement operation" permit decision by the P&Z administrator. The disappointed party filed an action seeking both review under LLUPA and declaratory action. The Court declined to award attorney fees under Idaho Code § 12-121, but apparently believed that the statute was applicable. Although the court did not discuss the issue, it may have concluded that the statute was applicable because the complaint was also premised on a non-LLUPA claim (declaratory action).

In *Neighbors for Responsible Growth v. Kootenai Cnty.*, 147 Idaho 173, 177 n.1, 207 P.3d 149, 153 n.1 (2009), the court noted that attorney fees in *Giltner I, LLC v. Jerome Cnty.*, 145 Idaho 630, 634, 181 P.3d 1238, 1242 (2008), were "improvidently granted." The Court explained that fees should not have been awarded under Idaho Code § 12-121 because *Giltner* was a judicial review case.

[21] The referenced Rule 54(d)(1)(B) defines "prevailing party" in a flexible manner, allowing the court to take into account multiple claims, etc.

Idaho R. Civ. P. 54(e)(1). The effect of the rule was to convert what reads like a prevailing party rule in Idaho Code § 12-121 to an American Rule approach of awarding attorney fees only in cases of frivolous conduct.

Note that Rule 54(e)(1) is not an independent basis for the award of attorney fees; it merely sets the conditions for an attorney fee award where such an award is authorized by statute or contract. *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 2010 WL 5186735 (Idaho 2010).

As a result of the clarification provided by Rule 54(e)(1), it is clear today that awards under Idaho Code § 12-121 are discretionary:

> Although Respondents are the prevailing parties, the statutory power is discretionary, and attorney fees are not awarded as a matter of right. Ordinarily, attorney fees will not be awarded where the losing party brought the appeal in good faith and where a genuine issue of law was presented.

Chisholm v. Twin Falls Cnty., 139 Idaho 131, 136, 75 P.3d 185, 190 (2003).

In *McCuskey v. Canyon Cnty.* ("*McCuskey I*"), 123 Idaho 657, 851 P.2d 953 (1993) (Bistline, J.), the plaintiff succeeded in invalidating an ordinance that downzoned his property. Upon prevailing in *McCuskey I*, the plaintiff promptly sued the county again in *McCuskey v. Canyon Cnty. Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 912 P.2d 100 (1996) (Trout, J.). The second suit sought damages for inverse condemnation for the temporary taking alleged to have occurred between the original stop work order and the decision in *McCuskey I*. The Court denied the claim as time barred, concluding, based on *Tibbs v. City of Sandpoint*, 100 Idaho 667, 603 P.2d 1001 (1979), that the statute of limitations clock began to run at the time of the stop work order not the subsequent decision vindicating the plaintiff. Accordingly, the Court awarded attorney fees to Canyon County.[22] "This Court clearly established the time when a cause of action accrues in an inverse condemnation claim *Tibbs*. . . . McCuskey has provided no 'substantial' showing that the district court misapplied the rule elucidated in these cases with his particular claim and has given no compelling reason to deviate from the rule we have established." *McCuskey II*, 128 Idaho at 218, 912 P.2d at 105. (In dictum, the Court also cast doubt on the viability of the takings claim. *McCuskey II*, 128 Idaho at 216 n.2, 912 P.2d at 103 n.2.)

In *Covington v. Jefferson Cnty.*, 137 Idaho 777, 782, 53 P.3d 828, 833 (2002), the Court distinguished *McCuskey II* in denying attorney fees to the county. With

[22] The fee award in *McCuskey II* was made under Idaho Code § 12-121, not 12-117, which, at the time was a one-way street and did not allow counties to obtain fee awards against private parties.

little analysis, the Court declared, "However, we find the Covingtons have made some valid arguments relating to their claim for inverse condemnation, which demonstrates that the appeal is not frivolous or unreasonable." The Court did not say which arguments were valid. Presumably the Court was referring to the debate over whether a regulatory action authorizing a hot mix plant (which in turn emits odors that travel to plaintiffs property) is a physical or regulatory taking).

Similarly, in *Gibson v. Ada Cnty.*, 142 Idaho 746, 756, 133 P.3d 1211, 1221 (2006), *cert. denied*, 549 U.S. 994 (2006), *rehearing denied*, 549 U.S. 1159 (2007), the Court denied attorney fees despite the plaintiff missing the statute of limitations because it found, "She made a good faith argument based on relevant authority that the statute of limitations was tolled."

"Attorney fees are awardable if an appeal does no more than simply invite an appellate court to second-guess the trial court on conflicting evidence, or if the law is well settled and appellant has made no substantial showing that the district court misapplied the law." *Johnson v. Edward*, 113 Idaho 660, 662, 747 P.2d 69, 71 (1987).

The prevailing party must show that the other party's conduct of the litigation was without foundation as to the overall case, not just that a particular claim or defense was frivolous. "When deciding whether the case was brought, pursued, or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account. Thus, if there is a legitimate, triable issue of fact, attorney fees may not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation." *McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003) (citation omitted). The *McGrew* case presented mixed results where "both parties prevailed in part"; hence, it was appropriate to deny attorney fees. *Id*. In *Michalk v. Michalk*, 148 Idaho 224, 235, 220 P.3d 580, 591 (2009), the Court cited *McGrew* (paraphrasing its holding in broad terms favorable to the non-prevailing party), but nevertheless awarded attorney fees because owing to the non-prevailing party's failure to amend an earlier appeal from the magistrate. This failure, said the Court, meant that the trial court had no choice but to rule against her.

The Court has broad authority to apportion fees under section 12-121 where some of the claims were those of first impression (or "debatable") and others were without any reasonable basis. *Nampa Charter School, Inc. v. DeLaPaz*, 140 Idaho 23, 29, 89 P.3d 863, 869 (2004).

The Idaho Supreme Court has said that the non-prevailing party is subject to attorney fees under section 12-121 only if its position was frivolous in every respect:

> An award of attorney fees under Idaho Code § 12–121 is not a matter of right to the prevailing party, but is

> appropriate only when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation. *McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003). When deciding whether attorney fees should be awarded under I.C. § 12–121, the entire course of the litigation must be taken into account and if there is at least one legitimate issue presented, attorney fees may not be awarded even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation. *Id.*

Michalk v. Michalk, 148 Idaho 224, 235, 220 P.3d 580, 591 (2009).

Note that in *Syringa Networks, LLC v. Idaho Dep't of Admin*. ("*Syringa I*"), 155 Idaho 55, 305 P.3d 499 (2013) (Eismann, J.), the Idaho Supreme Court overturned over a dozen cases holding that, where Idaho Code § 12-117 is available, it is the exclusive means of seeking attorney fees. "Therefore, we hold that section 12–117(1) is not the exclusive basis upon which to seek an award of attorney fees against a state agency or political subdivision, but attorney fees may be awarded under any other statute that expressly applies to a state agency or political subdivision, such as sections 12–120(3) and 12–121." *Syringa I*, 155 Idaho at 67, 305 P.3d at 511. Thus, requests for attorney fees may be made under Idaho Code § 12-121 in the alternative to Idaho Code § 12-117.

H. Section 12-123 (frivolous conduct in a civil case)

Section 12-123 was adopted in 1987. It authorizes the award of sanctions (including attorney fees) for frivolous conduct in a civil case. Judge Walters summed up the statute this way:

> Apparently this statute was part of the 'Tort Reform' law to provide for sanctions against over-zealous plaintiff attorneys. Its use has been very limited, or almost non-existent. . . . This statute seems to be a cross between section 121 and Idaho R. Civ. P. 11. It seems to allow the award of attorney fees against an attorney personally, as does Idaho R. Civ. P. 11, and it seems to prohibit frivolous actions like section 121. The criteria for awarding attorney fees under section 123 is more restrictive than section 121, but not quite the same as Idaho R. Civ. P. 11. The courts appear to treat sections 121 and 123 similarly if not identically.

Jesse R. Walters, Jr., *A Primer for Awarding Attorney Fees in Idaho*, 38 Idaho L. Rev. 1, 37-38 (2001).

The statute says that the award must be made within 21 days after entry of judgment in a civil action, and sets up procedures for a hearing on a motion for sanctions.

The statute applies only to district court proceedings. "The request for fees under Idaho Code section 12-123 is denied because that statute does not apply on appeal." *Tapadeera, LLC v. Knowlton*, 153 Idaho 182, 189, 280 P.3d 685, 692 (2012) (Eismann, J.) (citing *Spencer v. Jameson*, 147 Idaho 497, 507, 211 P.3d 106, 116 (2009)).

I. Rule 11 (frivolous litigation)

Idaho R. Civ. P. 11(a)(1) requires that pleadings, motions, and other papers signed by an attorney, or a party not represented by an attorney, meet certain criteria. The signature certifies that "to the best of his knowledge, information, and belief, after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument." This rule affords courts broad authority to issue sanctions for frivolous litigation. Sanctions may be imposed against the attorney, the party, or both. The rule specifically identifies payment of the opposing side's attorney fees as a possible sanction.

In *Durrant v. Christensen*, 785 P.2d 634 (Idaho 1990), the Court held that bad faith is no longer required for a court to award Rule 11 sanctions; rather the Court must merely apply an objective reasonableness under the circumstances standard.

A parallel rule operates with respect to discovery. Idaho R. Civ. P. 26(f).

Idaho's appellate rules contain a parallel provision, Idaho App. R. 11.2 (which, until 2009 was Idaho App. R. 11.1.)

In *Read v. Harvey*, 147 Idaho 364, 209 P.3d 661 (2009), The Court also upheld the district court's award of attorney fees below under Idaho R. Civ. P. 37(c) (dealing with discovery abuses). Read, 147 Idaho at 369-70, 209 P.3d at 666-67. The prevailing party also asked for attorney fees on appeal but failed to identify a basis for an award as required by Idaho App. R. 35(a)(5). See discussion in section 25.R at page 56. The Court nonetheless acted *sua sponte* in awarding attorney fees on appeal under Idaho App. R. Rule 11.1 (now 11.2), noting that Harvey had misrepresented the record and pursued the appeal without foundation in fact or law. *Read*, 147 Idaho at 370-71, 209 P.3d at 667-68 (2009). In an unusually forceful message to counsel, the Court ordered that the fees be paid not by the party or even by the party's law firm, but by a specifically named member of the law firm representing the party.

In *Lattin v. Adams Cnty.*, 149 Idaho 497, 504, 236 P.3d 1257, 1264 (2010), the Idaho Supreme Court employed Rule 11.2 to award attorney fees against Idaho County for frivolously appealing its defense of a quiet title action involving a road. By the way, this was not a *sua sponte* award. The party sought an award under Rule 11.2.

In *Gibson v. Ada Cnty. Sheriff's Office*, 147 Idaho 491, 211 P.3d 100 (2009), the Court awarded attorney fees under Rule 11.1 to the Sheriff's office citing a litany of erroneous claims which the Court found unnecessary to address in the opinion on the merits, even in dicta, but which were taken into account nonetheless for purposes of Rule 11.1. It is unclear why the Sheriff's office did not include a claim under Idaho Code § 12-117.

In *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, 329, 297 P.3d 1134, 1146 (2013), the Court denied attorney fees as requested under section 12-121 holding that an irrigation district is a political subdivision within the meaning of section 12-117 and that the latter is the exclusive attorney fee statute available. Nevertheless, the Court awarded fees *sua sponte* under Idaho Appellate Rule 11.2. "In this case, we have determined that Bettwieser's appeal was brought for an improper purpose. That determination is based upon the level of hostility, both in his briefing and at oral argument, directed toward the district court, the directors of the New York Irrigation District, and its counsel. This animosity, coupled with the complete absence of merit to Bettwieser's claims, leads us to the conclusion that Bettwieser has pursued this appeal for the purpose of harassment and annoyance. Bettwieser has filed lengthy briefs that contain little in the way of legal argumentation or authority and raises several issues on appeal that were not before the district court at trial . . . ." *Id.*

The comparable federal rule, Fed. R. Civ. P. 11, is conceptually the same but procedurally quite different. The federal rule contains a "safe harbor" provision requiring that a party moving for sanctions must first serve the motion on the other party and then wait for at least 21 days. The purpose is to allow the other party an opportunity to withdraw or otherwise correct the offending pleading or paper. If that occurs, the complaining party may not file the motion. Fed. R. Civ. P. 11(c)(2). The court, however, has power to impose sanctions on its own motion and is not subject to this safe harbor provision. Fed. R. Civ. P. 11(c)(3). The rule is directed primarily to counsel. In some circumstances sanctions may be awarded against the party. Fed. R. Civ. P. 11(5).

J. Rule 65(c) – injunctions (attorney fees)

Idaho R. Civ. P. 65(c) governs the requirement that a party seeking an injunction must post a bond "for the payment of costs and damages including reasonable attorney's fees." In *Devine v. Cluff*, 110 Idaho 1, 713 P.2d 437 (Ct. App. 1985), the Court of Appeals interpreted this to authorize an award of attorney fees to

a person who was wrongfully enjoined, despite the fact that the person did not contest the injunction prior to the trial.

In *Brady v. City of Homedale*, 130 Idaho 569, 944 P.2d 704 (1997), the Supreme Court held that Idaho R. Civ. P. 65(c) does not provide a basis for an award of attorney fees to a party who successfully defends against the issuance of an injunction. In other words, an injunction must issue wrongfully (and be reversed on appeal) before attorney fees can be granted. This decision is based solely on a reading of the rule; the Court did not discuss the policy basis (or lack thereof) for such a distinction. In *Nelson v. Big Lost River Irrigation Dist.*, 133 Idaho 139, 983 P.2d 212 (1999) (Kidwell, J.), the Court applied and confirmed *Brady*.

K. Discovery (attorney fees)

A rule comparable to Rule 11 operates with respect to discovery. Idaho R. Civ. P. 26(f).

In *Read v. Harvey*, 147 Idaho 364, 209 P.3d 661 (2009), the Court affirmed an award of attorney fees for a discovery violation based on Idaho R. Evid. 37(c)—failure to admit.

L. Private attorney general doctrine

Under rare circumstances, courts will award attorney fees to a prevailing party in an action against the state under the "private attorney general doctrine." In *Hellar v. Cenarrusa*, 106 Idaho 571, 577-78, 682 P.2d 524, 530-31 (1984), the Idaho Supreme Court awarded attorney fees under this theory to a private party who challenged a legislative reapportionment statute. In this case, the Attorney General was obligated to defend the legislature, and it fell upon this private citizen, acting as a sort of "private attorney general" to defend the Constitution of the State of Idaho against this improper legislation.

The Court established a three-part test for that the prevailing party must meet: (1) the strength or societal importance of the public policy indicated by the litigation; (2) the necessity for private enforcement and the magnitude of the resultant burden on the Plaintiff; and (3) The number of people standing to benefit from the decision. *Hellar*, 106 Idaho 571, 577-78, 682 P.2d 524, 530-31 (1984).

In *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 718, 722-23, 947 P.2d 391, 395-96 (1997), the Idaho Supreme Court explained that the private attorney general doctrine is not (as its name implies) a creation of the common law. Rather, the doctrine is simply a judicial interpretation of Section 12-121, which authorizes the courts to award attorney fees to the prevailing party. Consequently, the tests of that statute must also be met. What the doctrine accomplishes is to eliminate the limitation found in Idaho R. Civ. P. 54(e)(1) to cases that are defended frivolously, unreasonably, or without foundation.

The applicability of this theory, however, is severely limited by the decision in *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 718, 722-23, 947 P.2d 391, 395-96 (1997). In this case, the Court declared that the private attorney general doctrine is preempted by Idaho Code section 12-117 where the action involves a suit against a state agency. "[A] court may not award attorney fees against a state agency under the private attorney general doctrine . . . . I.C. § 12-117 provides the exclusive basis upon which to seek an award of attorney fees against a state agency." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 718, 722-23, 947 P.2d 391, 395-96 (1997). Thus, the doctrine appears to be available only in rare instances where the plaintiff seeks relief from a state official or the State itself (rather than a state agency).

The conclusion reached in *Hagerman* (that a court may not award attorney fees against a state agency under the private attorney general doctrine) was reaffirmed in *Kootenai Medical Ctr. v. Bonner Cnty.*, 141 Idaho 7, 10, 105 P.3d 667, 667 (2004), and extended to counties and other entities.

M. Attorney fees awards following stipulated dismissals

Attorney fees may be awarded following a stipulated dismissal where the stipulation is silent as to attorney fees. *Straub v. Smith*, 145 Idaho 65, 175 P.3d 754 (2007). As noted in Justice Eismann's concurrence: "Every attorney worth his or her salt knows that if you want to dismiss your complaint just before trial and do not want your client to be liable for the defendant's court costs and attorney fees, you had better seek a stipulation stating that each party will bear their own costs and attorney fees." *Straub*, 145 Idaho at 73, 175 P.3d at 762.

The *Straub* Court explained: "In litigation, avoiding liability is as good for a defendant as winning a money judgment is for a plaintiff." *Straub*, 145 Idaho at 72, 175 P.3d at 761 (Eismann, J., concurring) (quoting *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005)).

In a 2012 case, the Court explained:

> For purposes of analysis in this case, stipulations to dismiss are a form of settlement. Idaho has treated cases ending in settlement no differently than cases tried to conclusion. In either case, the court must still look to I.R.C.P 54(d)(1)(B). As this Court stated in *Bolger v. Lance*:
>
> > Rule 54(d)(1)(B) directs the court to consider, among other things, the extent to which each party prevailed relative to the "final judgment or result." [I]t may be appropriate for the trial court, in the right

> case, to consider the "result" obtained by way of a settlement reached by the parties. However, the "[d]etermination of who is a prevailing party is committed to the sound discretion of the trial court and will not be disturbed absent abuse of discretion."
>
> 137 Idaho 792, 797, 53 P.3d 1211, 1216 (2002) (citations omitted). Additionally, *Bolger* stands for the proposition that the trial court may take into consideration the result obtained by way of settlement, but that result alone is not controlling.

Hobson Fabricating Corp. v. SE/Z Const., LLC, 154 Idaho 45, 49-51, 294 P.3d 171, 175-77 (2012) (Burdick, C.J.) (brackets original).

The federal courts also have recognized that a litigant may be a prevailing party based on a favorable settlement that changed the legal relationship of the parties. "A litigant qualifies as a prevailing party if it has obtained a "court-ordered 'chang[e] [in] the legal relationship between [the plaintiff] and the defendant.'" *St. John's Organic Farm v. Gem Cnty. Mosquito*, 574 F.3d 1054, 1059 (9th Cir. 2009) (brackets and internal quotations original).

N. Attorney fees need not be plead at the district court stage

It is not required that a party plead a request for attorney fees in the district court pleadings. *Straub v. Smith*, 145 Idaho 65, 175 P.3d 754 (2007).

O. EAJA

Although beyond the scope of this handbook, the reader should be aware of the existence of the Equal Access to Justice Act, which authorizes the award of attorney fees in actions against federal agencies. The act is codified primarily to 5 U.S.C. § 504 (dealing with administrative actions) and 28 U.S.C. § 2412 (dealing with judicial actions).

In the judicial context, EAJA authorizes an award of attorney fees to a "prevailing party" against the United States "unless the court finds that the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A). If a party prevails against the United States, that is prima facie evidence that the position of the United States was not substantially justified, and the burden shifts to the federal government to show the court that its position was substantially justified.

If the case involved a finding that the government was "arbitrary and capricious," that obviously weights against the government, but it is not definitive. These are different standards, and it is possible that the government may have been

arbitrary and capricious and yet still be (ironically) substantially justified in its position.

On the other hand, a finding that the government was arbitrary and capricious is not a prerequisite to an EAJA award. A party may earn an EAJA award in a case not involving that standard at all. For instance, the party might prevail by showing that the government violated some statutory rule or the Constitution. Here, too, simply prevailing is not enough. The government might lose on the law, but successfully defend the EAJA claim on the basis that its position was consistent with prior precedent or otherwise not unreasonable.

P. Attorney fee awards under § 1983.

The Civil Rights Act of 1871[23] contained no provision for award of attorney fees. The Civil Rights Attorney's Fee Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, amended 42 U.S.C. § 1988(b), to authorize awards of attorney fees to successful litigants under § 1983. Under section 1988, fees are available to "the prevailing party, other than the United States."

The United States Supreme Court and the Idaho Supreme Court have both held that an award of fees under section 1988 should be given to a prevailing party, unless special circumstances exist that would make an award unfair. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); *Shields v. Martin*, 109 Idaho 132, 141, 706 P.2d 21, 30 (1985). There is an extensive body of federal law on the subject of attorney fees under this section. In any event, the standard appears to be more generous (to the prevailing party) than is available under other Idaho attorney fee provisions, such as Idaho Code § 12-117 which requires the prevailing party to establish that the non-prevailing party acted "without a reasonable basis in fact or law."

Q. Attorney fees under the Idaho Tort Claims Act

The Idaho Tort Claims Act contains its own, exclusive attorney fee provision. Idaho Code § 6-918A. It is far more restrictive than most others, requiring a showing of bad faith and capping the amount of the award.

R. Attorney fees on appeal

(1) Procedural requirements (Idaho App. R. 35 and 41)

Idaho Appellate Rule 41 sets out procedural requirements for seeking an attorney fee award on appeal. "This rule alone does not provide a basis for awarding attorney fees on appeal, but simply allows the appellate court to award fees if those fees are permitted by some other contractual or statutory authority." Jesse R.

[23] See Volume 1 of this Handbook for a discussion of § 1983 actions.

Walters, Jr., *A Primer for Awarding Attorney Fees in Idaho*, 38 Idaho L. Rev. 1, 37-38 (2001) (citing *Swanson v. Kraft*, 116 Idaho 315, 775 P.2d 629 (1989)). Instead, it simply constitutes a "codification" of the court's authority to award fees on appeal. Idaho App. R. 35 also establishes procedural requirements, but provides no authority for an award. *Capps v. FIA Card Services, N.A.*, 149 Idaho 737, 744, 240 P.3d 583, 590 (2010).

Idaho App. R. 35(a)(5) requires the appellant, if claiming attorney fees on appeal, to "so indicate in the division of issues on appeal . . . and state the basis for the claim." The Idaho Supreme Court has interpreted Idaho App. R. 35(a)(6)[24] as requiring the appellant to present argument and authority on the attorney fee request in the opening brief. *Cowles Publ'g Co. v. Kootenai Cnty. Bd. of Cnty. Comm'rs*, 144 Idaho 259, 266, 159 P.3d 896, 903 (2007); *Frazier v. J.R. Simplot Co.*, 136 Idaho 100, 29 P.3d 936 (2001); *McVicker v. City of Lewiston*, 134 Idaho 34, 995 P.3d 804 (2000); *Sprenger, Grubb & Associates v. Hailey* ("*Sprenger Grubb II*"), 133 Idaho 320, 322, 986 P.2d 343, 345 (1999) (Walters, J.). This rule is vigorously applied. *Carroll v. MBNA America Bank*, 148 Idaho 261, 270, 220 P.3d 1080, 1089 (2009) ("A citation to statutes and rules authorizing fees, without more, is insufficient. Although MBNA cited to the above statutory fees provisions, it submitted no argument in its brief as to why fees should be awarded under either I.C. § 12–120(3) or I.C. § 12–121. Thus, we decline to award attorney's fees to MBNA on appeal.") (citation omitted); *Capps v. FIA Card Services, N.A.*, 149 Idaho 737, 744, 240 P.3d 583, 590 (2010) (quoting from *Carroll*).

Idaho App. R. 35(b)(5) and (6) apply in similar fashion to the appellee. The Court has justified this seemingly harsh rule on the basis of due process. *Walters* at 80; *see Bingham v. Montana Resource Associates*, 133 Idaho 420, 424, 997 P.2d 1035, 1039 (1999)).

The case law is equally rigorous when it comes to challenges on appeal to the award of attorney fees by the district court. In *Gallagher v. State*, 141 Idaho 665, 115 P.3d 756 (2005), the appellant included the following argument in the opening brief: "This action was presented as a public service in good faith – the imposition of sanctions should be reversed." The Court declared that this fell short of the requirement to support each position by citing to "propositions of law, authority, or argument." The Court stated, "When an opening brief contains no authority on an issue presented, it is immaterial that the party provides authority either in a reply brief or in supplemental briefing because the issue had already been waived." *Gallagher*, 141 Idaho at 669, 115 P.3d at 760. This requirement is not stated expressly in Idaho App. R. 35 (although that rule has been cited by the court as its

[24] Idaho App. R. 35(a)(6) provides: "Argument. The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to authorities, statutes and parts of the transcript and record relied upon."

basis); rather it is premised on case law, *e.g.*, *Estes v. Barry*, 132 Idaho 82, 87, 967 P.2d 284, 289 (1998).

In *Kirk-Hughes Development, LLC v. Kootenai Cnty. Bd. of Cnty. Comm'rs*, 149 Idaho 555, 237 P.3d 652 (2010), the district court rejected a developer's LLUPA appeal of a zoning decision, concluding that the denial did not prejudice Kirk-Hughes's substantial rights under Idaho Code § 67-5279(4). The developer appealed, raising four issues including an arbitrary and capricious claim. The Idaho Supreme Court rejected the appeal because Kirk-Hughes failed to challenge the prejudice issue. Kirk-Hughes did mention it in passing in its brief, but the Idaho Supreme Court said that the mere declaration that its substantial rights had been prejudiced "is conclusory and without more, is insufficient." *Kirk-Hughes* at *3. The Court, citing prior precedent, noted that the party must also provide "propositions of law, authority or argument." *Id*.

The appellate rules ordinarily do not come into play until there is an appeal from district court. However, they also apply at the district court level when an appeal is made pursuant to the IAPA. They are adopted by reference under Idaho R. Civ. P. 84(r) and therefore apply also to the initial judicial appeal from land use decisions to district court. Presumably, the rules governing the identification of, and argument and support for, attorney fee awards are equally applicable there.

The Court rarely cuts any slack to parties whose lawyers do not follow the procedural requirements of Idaho App. R. 35(a)(5). In *Read v. Harvey*, 147 Idaho 364, 209 P.3d 661 (2009), the Court awarded attorney fees despite the prevailing party's failure to identify a basis for an award of attorney fees. The Court nonetheless acted *sua sponte* in awarding attorney fees to the prevailing party under Rule 11 (which specifically allows a court to act on its own initiative), noting that Harvey had misrepresented the record and pursued the appeal without foundation in fact or law. In an unusually forceful message to counsel, the Court ordered that the fees be paid not by the party or even by the party's law firm, but by a specifically named member of the law firm representing the party.

A request for attorney fees on appeal is different from requesting the appellate court to overturn the district court's denial of attorney fees below. In order to comply with the rules requiring that attorney fee requests be accompanied by legal argument (Idaho App. R. 35 and 41), it is important to distinguish between the two. *See Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 498, 300 P.3d 18, 30 (2013).

(2) Substantive standards for attorney fees on appeal

"Section 12–117 authorizes fees to the prevailing party on appeal. The Court employs a two-part test for I.C. § 12–117 on appeal: the party seeking fees must be the prevailing party and the losing party must have acted without a reasonable basis

in fact or law." *City of Osburn v. Randel*, 152 Idaho 906, 910, 277 P.3d 353, 357 (2012) (citation omitted) (quoted in *Hobson Fabricating Corp. v. SE/Z Const*., LLC, 154 Idaho 45, 53, 294 P.3d 171, 179 (2012).

In *Rueth v. State* ("*Rueth II*"), 103 Idaho 74, 644 P.2d 1333 (1982) (McFadden, J.), the Court awarded attorney fees on appeal noting that an appellant will be subject to an attorney fee award if he or she appeals without a reasonable expectation of obtaining reversal:

> In the instant case a dispassionate view of the record discloses there was no valid reason to anticipate reversal of the judgment below on the factual grounds urged. The record contains abundant evidence supporting the determination of the judge and jury. Similarly, the arguments and authorities advanced in support of the two legal issues presented on appeal failed to establish how the discretionary decisions of the district court not to bifurcate the issues involved in the trial or to act upon the motion for a view arose to the level of error.

Rueth II, 103 Idaho at 81, 644 P.2d at 1340.

S. Sua sponte awards of attorney fees.

Generally speaking, courts may not make sua sponte awards of attorney fees.

> The district judge's underlying assumption that he had the power to award fees on a basis not asserted by Montane is erroneous. In order to be awarded attorney fees, a party must actually assert the specific statute or common law rule on which the award is based; the district judge cannot sua sponte make the award or grant fees pursuant to a party's general request.

Bingham v. Montane Resource Associates, 133 Idaho 420, 423-24, 987 P.2d 1035, 1038-39 (1999) (cited for this point in *Hobson Fabricating Corp. v. SE/Z Const*., LLC, 154 Idaho 45, 52, 294 P.3d 171, 178 (2012)).

An exception is Idaho R. Civ. P. 11(a)(1) and its parallel provision in the appellate rules, Idaho App. R. 11.2. These expressly provide for sua sponte awards of attorney fees. *See, e.g., Read v. Harvey*, 147 Idaho 364, 370-71, 209 P.3d 661, 667-68 (2009); *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, 329, 297 P.3d 1134, 1146 (2013).

T. Attorney fee awards in federal court diversity actions

"Idaho law governs the award of attorney fees in this matter because federal courts follow state law as to attorney fee awards in diversity actions. *See Interform Co. v. Mitchell*, 575 F.2d 1270, 1280 (9th Cir. 1978) (applying Idaho law). *LaPeter v. Canada Life Ins. of America*, 2007 WL 4287489, *1 (D. Idaho 2007) (not reported in F. Supp. 2d).

U. Attorney fees in administrative proceedings

Awards of attorney fees in administrative proceedings (prior to judicial review thereof) are quite limited. See discussion of this topic in the *Idaho Water Law Handbook.*

26. DUE PROCESS RIGHTS APPLICABLE TO LAND USE DECISIONS

A. Procedural due process rights generally

Due process rights derive from the Fifth Amendment of the U.S. Constitution, applicable to the states via the Fourteenth Amendment. U.S. Const. amend. V and XIV, § 1. Idaho's Constitution also guarantees due process. Idaho Const. art. I, § 13.

As its name implies, procedural due process deals with the procedural rights of litigants.[25] "Procedural due process requires that some process be provided to ensure that the individual is not arbitrarily deprived of his or her rights in violation of the state or federal constitutions." *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 454, 180 P.3d 487, 493 (2008) (J. Jones, J.).

Procedural due process requirements under the Idaho and federal constitutions are applicable to quasi-judicial land use and zoning actions. "Since decisions by zoning boards apply general rules to specific individual, interests or situations, and are quasi-judicial in nature they are subject to due process constraints." *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 510, 148 P.3d 1247, 1256 (2006) (Burdick, J.) (internal quotation marks omitted).[26] These constitutional protections undergird the rights discussed throughout this chapter.

The Idaho Supreme Court has described the flexible nature of the due process analysis this way:

> Due process is not a concept to be rigidly applied, but is a flexible concept calling for such procedural protections as are warranted by the particular situation. The U.S. Supreme Court has stated that identification of the specific dictates of due process generally requires

[25] Due process ordinarily refers to "procedural due process," which should not be confused with "substantive due process." Substantive due process is an oxymoron. It has nothing to do with process. Instead, it deals with the rationality of the legislation itself—that is, the substance. "In this context substantive due process requires that legislation which deprives a person of life, liberty, or property must have a rational basis. That is, the statute must bear a reasonable relationship to a permissible legislative objective. The reason for the deprivation must not be so inadequate that it may be characterized as an arbitrary exercise of state police powers." *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 455, 180 P.3d 487, 494 (2008) (J. Jones, J.) (citing *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 90, 982 P.2d 917, 926 (1999)).

[26] Other cases recognizing that due process rights attach to quasi-judicial land use decisions include *Neighbors for a Healthy Gold Fork v. Valley Cnty.*, 145 Idaho 121, 127, 176 P.3d 126, 132 (2007); *Cowan v. Bd. of Comm'rs of Fremont Cnty.,* 143 Idaho 501, 510, 148 P.3d 1247, 1256 (2006) (Burdick, J.); *Gay v. Cnty. Comm'rs of Bonneville Cnty.,* 103 Idaho 626, 628, 651 P.2d 560, 562 (Ct. App. 1982); *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1994).

> consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, third, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirements would entail.

Neighbors for a Healthy Gold Fork v. Valley Cnty., 145 Idaho 121, 127, 176 P.3d 126, 132 (2007) (citations omitted).

Due process issues pertinent to land use matters include: bias of the decision-maker, *ex parte* communications, site visits (aka "views"), executive sessions, mediation, and the rights of participants at hearings. The first three are discussed in the following subsections. Executive sessions are discussed in section 36.B at page 381. Mediation and the hearing process are discussed in Volume 1 of this Handbook. Conflicts of interest are discussed in section 37 at page 383.

As discussed more fully below, procedural due process rights are applicable in quasi-judicial settings, not legislative settings. Accordingly, it is always important to ask "what hat" the decision-makers are wearing. Other procedural requirements, for example open meeting requirements and conflict of interest rules, arise out of statutes or rules (as opposed to the constitutional provisions on due process). Unlike due-process-based procedural requirements, the latter are not limited to quasi-judicial settings.

B. Bias

(1) Overview

When decisions are made in the legislative context, bias is sometimes part of the process. For instance, a city official may run on a platform supporting or opposing foothills development. If elected, that person would be expected and entitled to act in accordance with that bias when he or she considers a new zoning plan or comprehensive plan dealing with the foothills.

The expectations are quite different, however, when it comes to actions on individual matters. Where parties are appearing in quasi-judicial settings, such as CUP applications, rezones, or variance proceedings, they are entitled to unbiased decision makers. "The Due Process Clause entitles a person to an impartial and disinterested tribunal." *Eacret v. Bonner Cnty.*, 139 Idaho 780, 784, 86 P.3d 494,

498 (2004) (Burdick, J.).[27] The discussion below is limited to such quasi-judicial proceedings. (See discussion dealing with legislative versus quasi-judicial actions in Volume 1 of this Handbook.)

The right to be protected from biased decision makers is rooted squarely in the state and federal constitutions, and applies to local agencies. "The Due Process Clause entitles a person to an impartial and disinterested tribunal. This requirement applies not only to courts, but also to state administrative agencies . . . ." *Davisco Foods Int'l, Inc. v. Gooding Cnty.*, 141 Idaho 784, 794, 118 P.3d 116, 123 (2005) (Schroeder, C.J.) (citing *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) and *Eacret v. Bonner Cnty.*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004) (Burdick, J.).

However, this prohibition against bias only applies to judges, not legislators. After all legislators may campaign on their biases and are often elected precisely because the voters like their biases. In contrast, judges are expected to approach each case without bias—or recuse themselves if they cannot. Consequently, the no-bias rule operates only when planning and zoning commissions are acting in a judge-like capacity. "[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." *Eacret v. Bonner Cnty.*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004) (Burdick, J.) (citing *Schweiker v. McClure*, 456 U.S. 188, 195 (1982)).

Thus, applicants and other affected persons in permit application proceedings are entitled to have the application heard by unbiased decision-makers. "[A] decision by a zoning board applying general rules or specific policies to specific individuals, interests or situations, are quasi-judicial in nature and subject to due process constraints." *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1994). The same is true of an appeal of such a decision to a board of county commissioners. *See Comer v. Cnty. of Twin Falls*, 130 Idaho 433, 438-39, 942 P.2d 557, 562-63 (1997) (analyzing whether the county board violated due process in the appeal of a P&Z decision).

Indeed, some courts view the no-bias rule as applying even more vigorously to quasi-judicial proceedings than to true judicial proceedings. "The rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the customary safeguards affiliated with court proceedings have, in the interests of expedition and a supposed administrative efficiency, been relaxed." *Reid v. New Mexico Bd. of Examiners in Optometry*, 589 P.2d 198, 200 (N.M. 1979); *Marris v. City of Cedarburg*, 498 N.W.2d 842, 845, 847 (Wis. 1993) ("zoning decisions are especially vulnerable to problems of bias"). Idaho courts have not addressed this point.

[27] The call for a "disinterested" decision maker is not for one who is bored or otherwise uninterested in the proceedings. It is a call for someone with no conflict of interest.

In any event, the impartial adjudicator requirement is "imperative" in quasi-judicial zoning decisions in Idaho. "With appellate review so limited, it is imperative that biased or potentially biased commissioners be barred from participating in the zoning procedure." *Manookian v. Blaine Cnty.*, 112 Idaho 697, 701, 735 P.2d 1008, 1012 (1987). Thus, Idaho law flatly forbids biased decision-makers from participating in zoning applications where they have or display a bias. *Bowler v. Board Of Trustees of Sch. Dist. No. 392*, 101 Idaho 537, 543, 617 P.2d 841, 846 (1980) ("It is well established that 'actual bias of a decisionmaker is constitutionally unacceptable.'"); *Floyd v. Bd. of Comm'rs of Bonneville Cnty.*, 137 Idaho 718, 725, 52 P.3d 863, 870 (2002) (A county commissioner's pre-hearing public statements indicating "predetermination" on an issue demonstrate "actual bias," rendering his or her participation in the hearing "constitutionally unacceptable.").

Other states have reached the same conclusion. *Prin v. Council of the Municipality of Monroeville*, 645 A.2d 450, 451-52 (Pa. 1994) (holding, under a due process analysis, that a councilman's public statements and letters to constituents "expressing strong opposition" to a shopping center proposal "clearly demonstrated his bias"); *Marris v. City of Cedarburg*, 498 N.W.2d 842, 845, 848-49 (Wis. 1993) (holding that a zoning board of appeals chairperson's pre-hearing statements that an applicant's legal position was a "loophole" in need of "closing" and that the board should try to "get her on the Leona Helmsley rule" had "created a situation in which the risk of bias was impermissibly high" under "common law concepts of due process and fair play"); *Acierno v. Folsom*, 337 A.2d 309, 314-17 (Del. 1975) (holding that a planning board chairman "deprived the appellant of due process" by failing to disqualify himself from hearing an appeal of a subdivision proposal when he had previously "conducted himself like an actual adversary" of the proposal).

A decision maker's express or implied assertion of non-bias and refusal to recuse herself for bias will not prevent a court from overturning the decision for bias. *See, e.g., Prin v. Council of Municipality of Monroeville*, 645 A.2d 450, 451-52 (1993) (holding that council member was biased despite his refusal to recuse himself); *Acierno v. Folsom*, 337 A.2d 309, 316 (Del. 1975) (The Chairman refused to disqualify himself. The Court said: "A public officer acting in a quasi-judicial capacity is disqualified to sit in a proceeding in which there is a controverted issue as to which he has publicly expressed a pre-conceived view, bias, or prejudice.").[28]

[28] *See, e.g., Cinderella Career & Finishing Sch., Inc. v. Fed. Trade Comm'n*, 425 F.2d 583, 590-91 (D.C. Cir. 1970) ("It requires no superior olfactory powers to recognize that the danger of unfairness through prejudgment is not diminished by a cloak of self-righteousness"); *Staton v. Mayes*, 552 F.2d 908, 913-15 (10th Cir. 1977) (holding that "firm public statements before the hearing" by school board members on issues to be decided at hearing demonstrated bias despite the board members' trial court testimony that they based their votes "on the evidence" and "had not committed" to a position before the hearing); *Marris v. City of Cedarburg*, 498 N.W.2d 842, 848-49 (Wis. 1993) (holding that a zoning board member's biased pre-hearing statements violated due process despite the board's protestations that it had "engaged in objective fact-finding" and that the

It is one thing to express a general policy viewpoint in an election campaign or other context. It is another matter to make a statement tied to a particular development. This principle is illustrated by a Tenth Circuit decision in which a school board candidate made biased statements about a particular matter "in his campaign for election." *Staton v. Mayes*, 552 F.2d 908, 913 (10th Cir. 1977) (not a land use case, but a matter involving a school board election). The Court set aside the school board's decision as impermissibly lacking the appearance of fairness, stating, "[w]e do not say that such statements in an election campaign or between members were unlawful or improper. However, a due process principle is bent too far when such persons are then called on to sit as fact finders and to make a decision affecting [other's] property interests." *Staton* at 915.

Similarly, in *Nat'l Bank of Chester Cnty. & Trust Co*., 27 Pa. D. & C. 384, 390, 393-94 (Pa. Ct. Quarter Sessions, Chester County 1962), an individual who had publicly opposed a zoning application subsequently was elected to the board that ultimately denied the application. *Nat'l Bank of Chester Cnty. & Trust Co*., 27 Pa. D. & C. 384, 390, 393-94 (Pa. Ct. Quarter Sessions, Chester County 1962). He argued that disqualifying him from voting on the application would be tantamount to holding that "no candidate for public office would be eligible to vote, after election, on any question which had been an issue during the campaign." *Nat'l Bank of Chester Cnty. & Trust Co*., 27 Pa. D. & C. 384, 390, 393-94 (Pa. Ct. Quarter Sessions, Chester County 1962). The Court rejected the argument, observing that such a candidate would be ineligible only in regard to quasi-judicial proceedings regarding which he or she had shown bias: the candidate would remain eligible to vote in all other instances. *See Nat'l Bank of Chester Cnty. & Trust Co*., 27 Pa. D. & C. 384, 390, 393-94 (Pa. Ct. Quarter Sessions, Chester County 1962) (distinguishing between legislative and quasi-judicial proceedings and holding that an official was disqualified from voting on a zoning adjustment application he had opposed as a candidate).

(2) Injunctive relief available

Idaho law presumes "honesty and integrity in those serving as adjudicators." *Shoebe v. Ada Cnty.*, 130 Idaho 580, 586, 944 P.2d 715, 721 (1997) (internal quotation marks and citation omitted). However, "upon a showing that there is a probability that a decision-maker in a due process hearing will decide unfairly any issue presented in the hearing, a trial court may grant an injunction to prevent the decision-maker from participating in the proceeding." *Johnson v. Bonner Cnty. Sch. Dist. No. 82*, 126 Idaho 490, 494, 887 P.2d 35, 39 (1994). Moreover, a county

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statements were years old and taken out of context); *Siegfried v. City of Charlottesville*, 142 S.E.2d 556, 559-61 (Va. 1965) (holding that the trial court erred in failing to dismiss commissioners deciding condemnation compensation when the commissioners had read a biased newspaper article regarding the property in question, even though the commissioners all testified they would decide the case objectively).

commissioner's pre-hearing public statements indicating "predetermination" on an issue demonstrate "actual bias," rendering his or her participation in the hearing "constitutionally unacceptable." *Floyd v. Bd. of Comm'rs of Bonneville Cnty.*, 137 Idaho 718, 725, 52 P.3d 863, 870 (2002). *See also Acierno v. Folsom*, 337 A.2d 309, 316 (Del. 1975) ("A public officer acting in a quasi-judicial capacity is disqualified to sit in a proceeding in which there is a controverted issue as to which he has publicly expressed a pre-conceived view, bias or prejudice.")

(3) The appearance of fairness is not the legal standard; actual bias must be shown.

Earlier cases suggested that the mere appearance of impropriety could be a basis for disqualifying a decision maker.[29] Indeed, the importance of protecting against even the appearance of impropriety is well established in other jurisdictions.[30]

Without mentioning or expressly overruling is prior decisions speaking about the importance of an "appearance" of fairness, the Idaho Supreme Court seems now

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[29] *Floyd v. Bd. of Comm'rs of Bonneville Cnty.,* 137 Idaho 718, 726, 52 P.3d 863, 871 (2002) (Court must determine the effect of biased vote in order to "avoid the appearance of impropriety.") The "appearance of impropriety" was mentioned as a contributing factor in reversing a zoning decision in *Eacret v. Bonner Cnty.*, 139 Idaho 780, 787, 86 P.3d 494, 501 (2004) (Burdick, J.). The statement at issue in *Eacret* addressed a matter of general public policy (that boat docks should be more freely permitted). "Here, Commissioner Mueller publicly expressed his position regarding building of Bottle Bay boathouses in general." *Eacret*, 139 Idaho at 786, 86 P.3d at 500 (emphasis supplied). The Bonner County Commissioner's statement did not address any particular boat dock or any particular application. Nevertheless, this Court found even this statement, when considered in the context of other statements and actions, crossed the line and created an unacceptable "appearance of unfairness."

[30] *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995) (stating, in regard to state administrative adjudications, the adjudicator's personal interest in the outcome of the proceedings may create an appearance of partiality that violates [federal] due process, even without any showing of actual bias) (emphasis in original) (citing *Gibson v. Berryhill*, 411 U.S. 564, 578 (1973)); *Staton v. Mayes*, 552 F.2d 908, 914-15 (10th Cir. 1977) (holding that public statements by school board members endorsing removal of a superintendent prior to the termination hearing violated the fourteenth amendment because the statements "left no room for a determination that there was a decision by a fair tribunal, with the appearance of fairness"); *Acierno*, 337 A.2d at 316 ("It is fundamental that a quasi-judicial tribunal, like a court, must not only be fair, it must appear to be fair") (Court of Chancery of Delaware); *Bunko v. City of Puyallup Civil Service Comm'n*, 975 P.2d 1055, 1060 (Wash. Ct. App. 1999) ("The appearance of fairness doctrine protects public confidence in quasi-judicial proceedings"); *Marris,* 498 N.W.2d at 848-49 (concluding that a board member's pre-hearing statements violated common-law due process when the statements did not show "actual bias" but nonetheless "created a situation in which the risk of bias was impermissibly high") (Wisconsin Supreme Court); 16B Am. Jur. 2d *Constitutional Law* § 968 (1998) ("The Due Process Clause is concerned not only with the actual bias of judges and jurors, but also with the need for the appearance of justice.").

to have embraced a more rigorous requirement that a litigant seeking to overturn a decision of a local government on due process grounds must prove "actual" bias.

> This Court has never adopted the appearance of fairness doctrine of our westerly neighbor [the state of Washington]. Rather, we recognize that due process "entitles a person to an impartial and disinterested tribunal[,]" but we require a showing of actual bias before disqualifying a decision maker even when a litigant maintains a decision maker has deprived the proceedings of the appearance of fairness.

Cowan v. Bd. of Comm'rs of Fremont Cnty., 143 Idaho 501, 515, 148 P.3d 1247, 1261 (2006) (Burdick, J.) (emphasis supplied) (citing *Davisco Foods Int'l, Inc. v. Gooding Cnty.*, 141 Idaho 784, 791, 118 P.3d 116, 123 (2005) (Schroeder, C.J.)).

The holding in *Cowan* is in conflict with (and implicitly overrides) the suggestion in *Eacret* that an "appearance of impropriety" or "appearance of unfairness" may give rise to a due process violation. *Eacret v. Bonner Cnty.,* 139 Idaho 780, 784, 786, 86 P.3d 494, 498, 500 (2004) (Burdick, J.).

(4) General policy statements do not necessarily reflect bias

Plainly, where a decision maker announces that he or she has made up his or her mind prior to the hearing, that is actual bias, and that decision maker must be disqualified from participating. *Floyd v. Bd. of Comm'rs of Bonneville Cnty.,* 137 Idaho 718, 725, 52 P.3d 863, 870 (2002) (A county commissioner's pre-hearing public statements indicating "predetermination" on an issue demonstrate "actual bias," rendering his or her participation in the hearing "constitutionally unacceptable.").

On the other hand, not every comment on a policy issue constitutes evidence of bias:

> A decision maker is not disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that the decision maker is "not capable of judging a particular controversy fairly on the basis of its own circumstances." Prehearing statements by a decision maker are not fatal to the validity of the zoning determination as long as the statement does not preclude the finding that the decision maker maintained an open mind and continued to listen to all the evidence presented before making the final decision. By way of explanation

> then, prehearing statements by a decision maker are fatal to the validity of the zoning determination if the statements show that the decision maker: (a) has made up his or her mind regarding the facts and will not listen to the evidence with an open mind, or (b) will not apply the existing law, or (c) has already made up his or her mind regarding the outcome of the hearing.

Eacret v. Bonner Cnty., 139 Idaho 780, 785, 86 P.3d 494, 499 (2004) (Burdick, J.) (quoting *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Education Ass'n*, 426 U.S. 482, 493 (1941)).

As the Idaho Supreme Court previously noted:

> Mere familiarity with the facts of a case . . . does not, however, disqualify a decisionmaker . . . . [n]or is a decisionmaker disqualified simply because [the decisionmaker] has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that [the decisionmaker] is not "capable of judging a particular controversy fairly on the basis of its own circumstances."

Johnson v. Bonner Cnty. Sch. Dist. No. 82, 126 Idaho 490, 493, 887 P.2d 35, 38 (1994) (quoting *Hortonville*, 426 U.S. at 493) (citations omitted) (ellipses, brackets, and emphasis by Idaho Supreme Court).

Such pre-hearing policy pronouncements are not fatal "as long as the statement does not preclude the finding that the decision maker maintained an open mind and continued to listen to all the evidence presented before making the final decision." *Johnson*, 126 Idaho 490, 493, 887 P.2d 35, 38 (1994).

In *Eacret*, the Court then summed up the law:

> By way of explanation then, prehearing statements by a decision maker are fatal to the validity of the zoning determination if the statements show that the decision maker: (a) has made up his or her mind regarding the facts and will not listen to the evidence with an open mind, or (b) will not apply the existing law, or (c) has already made up his or her mind regarding the outcome of the hearing.

Eacret, 139 Idaho at 785-86, 86 P.3d at 499-500.

In *Davisco Foods Int'l, Inc. v. Gooding Cnty.*, 141 Idaho 784, 118 P.3d 116 (2005) (Schroeder, C.J.) (Schroeder, C.J.), the Court noted its statement in *Eacret* that a "decision maker is not disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute." In *Davisco*, one of the county commissioners was quoted in the newspaper that he was "absolutely against Jerome Cheese's proposal to pipe waste from its Jerome plant." The *Davisco* Court viewed this statement as an acceptable general policy statement, because the statement was published nearly three years prior to the vote, the project had undergone some modification since that time, and the commissioner later asserted (after his statements were discovered on appeal) that he had an open mind all the time. This case suggests that courts will overlook a great deal in deference to a statement (even a post-hoc statement) from the decision-maker that he or she has an open mind.

C. *Ex parte* contacts

(1) Summary

Ex parte contacts refers to communications regarding a substantive issue in a pending matter between an interested party and a decision maker out of the presence of other interested parties. The law governing *ex parte* communications varies depending on the context. *Ex parte* communications are strictly prohibited in a contested case before an agency. In contrast, *ex parte* contacts in a quasi-judicial local government proceedings are not strictly prohibited, so long as they are fully and timely disclosed at the time of the hearing in order to allow other parties a meaningful opportunity to rebut any information provided to the decision maker.

Note that while *ex parte* contacts may be "cured" through full disclosure in a quasi-judicial land use proceeding, they do not appear to be curable in the context of a contested case before an administrative agency. In the latter context, *ex parte* contacts are governed not just by the law of due process, but by statutes and agency rules that appear to be less flexible than the constitutional principle. (See discussion in section 26.C(4) at page 77.) Note also that rules of professional conduct are an additional overlay applicable to lawyers. However, those rules seem to incorporate the general law of *ex parte* communications. (See discussion in section 26.C(3) at page 75.)

(2) *Ex parte* communications in quasi-judicial settings

(a) *Ex parte* contacts are commonplace in land use matters

It is natural for the applicant or opponent of a land use matter to desire to "lobby" the decision makers. Waiting for the public hearing to make one's case is neither realistic nor wise for either the applicant or the public. The fact is that public hearings are often ill-suited forums for serious and thoughtful discussion of a project.

Moreover, it is often too late. An applicant does not want to learn for the first time at the hearing what is really bothering the commissioners about a proposal. Likewise, opponents of the application need access to decision-makers to make sure they are fully prepped for the hearing and know to ask the right questions. Thus, *ex parte* contacts are an essential part of the educational process leading to sound decision making.

On the flip side, *ex parte* communications provide an opportunity to improperly influence the decision making process. Parties may present incomplete, misleading or downright false information to the decision-makers in contexts where it remains completely untested by the adversarial system.

In order to balance these competing considerations, some very clear and strict rules apply to these exchanges. Alas, as a practical matter, these rules are routinely violated. Despite this, parties are well advised to pay scrupulous attention to them. If a violation can be shown, it provides a free ticket to the other side for overturning the decision.

(b) Distinction drawn between legislative and quasi-judicial actions of commissions

As with bias, the rules governing *ex parte* contacts depend upon the type of proceeding. (See discussion in in Volume 1 of this Handbook.) *Ex parte* contacts are strictly forbidden in a judicial setting or a contested case proceeding, except for very specific exceptions.[31] At the other extreme, *ex parte* rules do not apply at all in the legislative branch. *Bi-Metallic Investment Co. v. Bd. of Equalization*, 239 U.S. 441 (1915). Indeed, elected representatives are expected and encouraged to communicate directly with their constituents and all others who may have relevant information about pending legislation. Thus, it is entirely permissible for a lawyer or a lobbyist to discuss a client's interest in pending legislation in private conversations with legislators.

The same goes for legislative acts at the local level. This includes, for instance, the adoption of ordinances by county or municipal authorities. In the zoning context, the Idaho Supreme Court has also determined that the adoption of comprehensive plans and general zoning regulations constitutes "legislative" action. *Cooper v. Bd. of Cnty. Comm'rs of Ada Cnty.*, 101 Idaho 407, 409-10, 614 P.2d 947, 949-50 (1980); *see also Gay v. Cnty. Comm'rs of Bonneville Cnty.*, 103 Idaho 626, 628, 651 P.2d 560, 562 (Ct. App. 1982); Daniel R. Mandelker, *Quasi-Judicial vs. Legislative: What Does It Mean?*, SB06 ALI-ABA 749 (1996).

[31] "A lawyer shall not . . . communicate *ex parte* with such a person [a judge, juror, prospective juror or other official] except as permitted by law . . . ." Idaho Rules of Professional Conduct 3.5(b).

In contrast, decisions on CUPs, variances and other particularized actions are deemed "quasi-judicial" actions, and are subject to *ex parte* contact rules. *Idaho Historic Preservation Council, Inc. v. City Council of Boise* ("*Historic Preservation*"), 134 Idaho 651, 8 P.3d 646 (2000) (Silak, J.). In such cases, the commissioners sit in a judge-like capacity on individual claims. Yet, they are not exactly like judges, hence the term "quasi-judicial."

The concept behind the quasi-judicial label is nicely explained in an Oregon case:

> [C]ommissioners need not conduct themselves in all respects as judges or the proceedings in all respects as trials. The Supreme Court characterized particular land-use proceedings as "quasi-judicial," which means they have many, but not all, of the attributes of actual judicial proceedings . . . . Another gap in the analogy arises from the nature of the office. A judge is expected to be detached, independent and nonpolitical. A county commissioner, on the other hand, is expected to be intensely involved in the affairs of the community. He is elected because of his political predisposition, not despite it, and is expected to act with awareness of the needs of all elements of the county . . . .

Eastgate Theatre v. Bd. of City Comm'rs, 588 P.2d 640, 643-44 (Ore. App. 1978).

(c) *Ex parte* contacts in a quasi-judicial setting are not prohibited, but must be fully disclosed

The rules governing *ex parte* contacts in quasi-judicial settings are rooted in due process considerations. Over the years, the Idaho Supreme Court has laid out a series of decisions laying the constitutional foundation for the right to due process in administrative proceedings, such as land use permit applications. *Cooper v. Bd. of Cnty. Comm'rs of Ada Cnty.*, 101 Idaho 407, 614 P.2d 947 (1980); *Van Orden v. State*, 102 Idaho 663, 665, 637 P.2d 1159, 1161 (1981); *Gay v. Cnty. Comm'rs of Bonneville Cnty.*, 103 Idaho 626, 651 P.2d 560 (Ct. App. 1982); *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1994); *Comer v. Cnty. of Twin Falls*, 130 Idaho 433, 942 P.2d 557 (1997); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 928, 950 P.2d 1262, 1267 (1998). They established that due process requires that the parties be afforded a fair opportunity to build the record that will form the basis of the decision. Thus, the preparation of a fair record is at the center of the *ex parte* analysis.

While the Idaho Supreme Court has dealt broadly with the subject of due process for decades, the first case to deal squarely with *ex parte* contacts in a land use

permit case was not decided until 2000. *Idaho Historic Preservation Council, Inc. v. City Council of Boise* ("*Historic Preservation*"), 134 Idaho 651, 8 P.3d 646 (2000) (Silak, J.).[32] The *Historic Preservation* case involved a challenge to a decision by the City of Boise authorizing the demolition of the Foster Warehouse Building.[33] At the outset of the hearing by the city council, certain council members disclosed that they had received phone calls from concerned citizens who expressed views on the issue. While disclosing the existence of the calls, the council members failed to disclose who the calls were from or what arguments or facts were asserted.

The Supreme Court held that mere disclosure of the existence of such calls fell short of due process requirements.

The Court's reasoning was a bit unclear.[34] But the rule it stated is quite clear: *Ex parte* contacts are not prohibited *per se*, so long as meaningful disclosure is made:

> This decision does not hold the City Council to a standard of judicial disinterestedness. As explained above, members of the City Council are free to take phone calls from concerned citizens and listen to their opinions and arguments prior to a quasi-judicial proceeding. In order to satisfy due process, however, the identity of the callers

[32] Another Idaho case addressing the *ex parte* contact issue in the land use context is *Castaneda v. Brighton Corp.*, 130 Idaho 923, 950 P.2d 1262 (1998). In brief, Castaneda contended that Brighton engaged in an improper *ex parte* contact by obtaining a preliminary plat approval from the City of Boise at a hearing that Castaneda did not attend. The notice given for this hearing did not comply with the notice requirements of LLUPA. The Court held that due process requirements were satisfied (with the possible implication that subdivision plat applications are not subject to LLUPA notice requirements). The Court also held the hearing did not constitute an improper *ex parte* contact, since the hearing was publicly noticed and open to the public and the press. Of course, this case did not address the issue of meeting with a decision-maker outside of the public hearing.

[33] *Historic Preservation* neither a LLUPA case nor an IAPA case. A separate statute (the Idaho Preservation of Historic Sites Act, Idaho Code §§ 67-4601 to 67-4619) requires a landowner to obtain a "certificate of appropriateness" before modifying a building within an historic district. The owner of Foster's Warehouse sought a certificate allowing it to demolish the historic structure. The Boise City Historic Preservation Council denied the certificate, but, on appeal, the City of Boise granted the permit. The state historic preservation council sought judicial review of the City's decision under a provision of the preservation act authorizing such review. The Idaho Supreme Court invalidated the certificate of appropriateness, and Fosters Warehouse stands today in Boise's BODO district.

[34] The Court discussed at some length Oregon cases that applied a more relaxed standard with respect to *ex parte* contacts. But rather an endorsing or rejecting them, the Court then found it unnecessary to do so: "Even if this Court were persuaded that *Tierney* and *Neuberger* express the better rule, the requirements of procedural due process … were not met." *IHPC* at 655, 8 P.3d at 650.

> must be disclosed, as well as a general description of what each caller said.

Historic Preservation, 134 Idaho at 656, 8 P.3d at 651.

The bottom line is that *ex parte* contacts which are properly put in the record (with identity and subject matter reasonably described) do not constitute a violation of due process in the context of a quasi-judicial proceeding.

The Court dealt with *ex parte* contacts again in *Eacret v. Bonner Cnty.*, 139 Idaho 780, 86 P.3d 494 (2003) (Burdick, J.), which reiterated and expounded upon the ruling in *Historic Preservation*:

> A quasi-judicial officer must confine his or her decision to the record produced at the public hearing. Any *ex parte* communication must be disclosed at the public hearing, including a general description of the communication. The purpose of the disclosure requirement is to afford opposing parties with an opportunity to rebut the substance of any *ex parte* communications.

Eacret, 139 Idaho at 786, 86 P.3d at 500 (citations and internal quotations omitted).

(d) Documentation of *ex parte* communications

The case law provides no guidance on what documentation, if any, should be kept of *ex parte* communications. It merely requires that they be fully disclosed, overturning decisions where a commissioner "did not reveal the substance of the conversations or when exactly they had taken place." *Eacret*, 139 Idaho at 787, 86 P.3d at 501.

Given this, commissioners ought to keep detailed records of every *ex parte* communication. The fact is, however, they rarely do. Consequently, it is wise for the applicant or other interested party to keep track of every communication that person has with any decision-maker outside the hearing. The authors recommend the maintenance of journal-type entries of all such contacts, which can then be made a formal part of the record by the party. This way, the party does not need to rely on the commissioner to make a full and complete disclosure.

(e) Do *ex parte* rules apply before the application is filed?

Plainly, once an application has been filed for a permit or variance, *ex parte* rules are in effect and a record of such contacts must be maintained and disclosed. As for pre-application consultations, the statutes and case law provide no guidance.

Drawing an analogy to the contested case (a more purely judicial procedure[35]), one might conclude that *ex parte* rules do not apply prior to application. Under the IAPA, *ex parte* constraints apply only during the pendency of a "contested case." Idaho Code § 67-5253. (See discussion in section 26.C(4) at page 77.) Thus, applicants before administrative agencies routinely make substantive inquiries of agency staff (including agency decision-makers) during the pre-contested-case phase.[36]

Whether the same is true in the context of a quasi-judicial land use application is an open question. The more prudent approach is to make certain that records of all contacts are maintained to permit full disclosure on the record from the outset.

Interestingly, the Idaho Supreme Court quoted this very statutory provision in *Eacret*, 139 Idaho at 786, 86 P.3d at 500. The Court failed to explain why it quoted the statute, which applies to contested cases before administrative agencies, not land use matters. Perhaps, however, the Court meant to draw the same parallel as we draw here.

(f) Procedural inquiries are permissible

Ex parte communications are generally understood to apply to substantive communications and do not include, for instance, purely procedural inquiries. However, the conversation must not stray into any issue which has a bearing on the merits of the case.

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[35] Administrative decision-makers involved in a contested case are not acting in a quasi-judicial capacity. Their actions are purely judicial (or close to it). Thus, the IAPA simply prohibits *ex parte* communications (with some exceptions), rather than calling for disclosure of *ex parte* communications. On the other hand, the Attorney General has issued rules calling for disclosure of *ex parte* communications, with the implication that such disclosure eliminates any *ex parte* problem. IDAPA 04.11.01.417. See Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner,* 30 Idaho L. Rev. 273, 324 (1993) for a general discussion of *ex parte* communications in contested case proceedings.

[36] In 2003, the Idaho Department of Water Resource rejected a challenge to this practice: "The Irrigation Protestants seemingly suggest that there should be zero contact between a member of the public seeking to file an application and IDWR. An administrative agency must not only rule on applications that come before it, the agency also has the obligation to provide support to the public that it serves. It is both expected and proper that the administrative agency provide the public with general guidance, especially since it is the administrative agency that has expertise in the area and implements the regulations relating to the applications coming before it." *Order Denying Motion for Order Authorizing Preliminary Discovery Regarding Due Process*, In the Matter of Application for Transfer of Water Rights in the Name of United Water Idaho, Inc., Integrated Municipal Application Package) (June 11, 2003).

(g) Contacts with staff

The limitations on *ex parte* contacts are directed to decision-makers. Consequently, communications with agency staff are not ordinarily considered improper. We are not aware of any case law on this subject, however. In some agency settings, there is not a bright line between who is a decision-maker and who is not. Some agencies have designated which employees are part of the "decision-making circle" and are therefore subject to *ex parte* communications restrictions.

(h) *Ex parte* contacts in land use mediations, executive sessions, and negotiation.

Ex parte rules apply in the context of mediation. See discussion in Volume 1 of this Handbook.

Ex parte communications in executive sessions and negotiations are discussed in section 36 at page 379.

(3) Idaho rules of professional conduct

The Idaho Rules of Professional Conduct (applicable to lawyers) do not directly address the issue of *ex parte* contacts with decision-makers in an administrative or municipal setting. However, the rules do provide the following guidance that lawyers should be familiar with.

> A lawyer shall not:
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order.

Idaho Rules of Professional Conduct 3.5 (as amended, effective July 1, 2004).[37]

The first question is, to which communications does this rule apply? The terms judge, juror and prospective juror are clear enough. But what is included by the reference to "other official"? To what extent does this rule apply to regulatory agencies and local governmental bodies? Although the rule itself offers no guidance and does not employ the term "tribunal" in its body, the rule is entitled "Impartiality

[37] Another ethics rule that bears tangentially on *ex parte* communications forbids a lawyer to: "(d) engage in conduct that is prejudicial to the administration of justice; (e) state or imply an ability to influence improperly a government agency or official; or (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law." Idaho Rules of Professional Conduct 8.4 (as amended, effective July 1, 2004)

and Decorum of the Tribunal." Presumably, then, it is intended to apply to "tribunals," and that is a defined term.

> "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

Idaho Rule of Professional Conduct 1.0(m) (emphasis supplied).

The reference in the definition to "acting in an adjudicative capacity" means that it applies to "contested cases" before regulatory agencies (as that term is used in the Idaho Administrative Procedures Act). It is less clear whether it applies to informal quasi-judicial proceedings undertaken by local governments, such as an application for a CUP before a planning and zoning commission in which a town hall style hearing is to be held. Although the definition seems aimed at formal hearing officer situations, the safer course is to assume that the prohibition applies to all quasi-judicial proceedings. On the other hand, being limited to adjudicative matters, it apparently does not apply to lobbying and advocacy before bodies sitting in a legislative capacity (*e.g.*, annexation and initial zoning).

The reference in Rule 3.5(b) to *ex parte* communications "during the proceeding" presumably means that informal interactions with agency staff (or even agency decision-makers) prior to the initiation of a contested case are not prohibited. Thus, for example, it is permissible for an attorney and her client to meet with agency officials to inquire about agency policy and how best to shape an application to satisfy agency expectations. There may even be back-and-forth discussion and advocacy as to what that policy should be.

Where those interactions are substantive and, in particular, with agency decision makers, it is a good practice to memorialize those discussions with written communications on the agency record. Doing so will reduce the likelihood of other parties successfully challenging the agency's action (or the lawyer's conduct) as violations of *ex parte* commination rules (including due process considerations discussed below).

The prohibition in Rules 3.5(a) against attempting influence "by means prohibited by law" and the permission granted by Rule 3.5(b) to *ex parte* communications where "authorized to do so by law" both suggest that not all *ex parte* communications are prohibited. Rather, the rule appears to incorporate the broader

body of case law and other applicable rules governing *ex parte* communications with agency and local government officials.

Rule 3.5 appears to integrate with Idaho case law addressing *ex parte* communications discussed above. Thus, to the extent that *ex parte* communications are allowed if fully disclosed, they do not violate Rule. 3.5.

(4) *Ex parte* communications in contested cases

The discussion above addresses *ex parte* communications in quasi-judicial governmental decision making (notably, land use matters). The rules against *ex parte* communications are stricter in the context of a formal contested case before a state agency (where a hearing officer, aka presiding officer, has been appointed).

In a contested case, the presiding officer is acting not in a quasi-judicial capacity, but in something approaching a fully judicial capacity. Accordingly, the IAPA sets out an absolute bar against such communications:

> Unless required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in a contested case shall not communicate, directly or indirectly, regarding any substantive issue in the proceeding, with any party, except upon notice and opportunity for all parties to participate in the communication.

Idaho Code § 67-5253.[38]

The Attorney General has promulgated a rule implementing this provision. While recognizing the bar on substantive *ex parte* communications, the rule provides a cure for written communications through disclosure:

> Unless required for the disposition of a matter specifically authorized by statute to be done ex parte, a presiding officer serving in a contested case shall not communicate, directly or indirectly, regarding any substantive issue in the contested case with any party, except upon notice and opportunity for all parties to participate in the communication. The presiding officer may communicate ex parte with a party concerning procedural matters (e.g., scheduling). Ex parte communications from members of the general public not

[38] A general discussion of *ex parte* communications in contested cases is found in Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 323-25 (1993).

> associated with any party are not required to be reported by this rule. However, when a presiding officer becomes aware of a written ex parte communication regarding any substantive issue from a party or representative of a party during a contested case, the presiding officer shall place a copy of the communication in the file for the case and distribute a copy of it to all parties of record or order the party providing the written communication to serve a copy of the written communication upon all parties of record. Written communications from a party showing service upon all other parties are not ex parte communications.

IDAPA 04.11.01.417 (rules of the Attorney General).

Idaho Department of Water Resource's Rule of Procedure 417, IDAPA 37.01.01.417, authorizes a hearing officer to engage in *ex parte* communications with parties that are limited to procedural issues. In contrast, the prohibition of *ex parte* communications in Idaho Rule of Professional Conduct 3.5(b) contains no exception for procedural issues. The authors suggest that such procedural communications with IDWR hearing offers are nonetheless permitted under Idaho Rule of Professional Responsibility 3.5 because they are "authorized . . . by law."

D. Unauthorized "view" of the site

A recurring problem occurs when decision-makers take it upon themselves to visit and view the site of a proposed project or other action. It is a natural tendency, it seems, for people to want to go out and see things for themselves. However, this is simply not allowed.

In *Comer v. Cnty. of Twin Falls*, 130 Idaho 433, 942 P.2d 557 (1997), the Court said that a viewing of the project site by either the P&Z or the county board of commissioners "is analogous to a viewing in a trial. We have held that a judge or jury may not view premises without notice to the parties." *Comer*, 130 Idaho at 439, 942 P.2d at 563 (citing *Highbarger v. Thornock*, 94 829, 831, 498 P.2d 1302, 1304 (1972).

As with *ex parte* communications, the rule against unauthorized views has its basis in the statutory and constitutional requirement that the decision be made "on the record":

> A quasi-judicial officer must confine his or her decision to the record produced at the public hearing. . . . A view of the subject property without notice to the interested parties by a board considering an appeal from the commission has been held a violation of due process.

Eacret v. Bonner Cnty., 139 Idaho 780, 786-87, 86 P.3d 494, 500-01 (2004) (Burdick, J.).

It is now a black letter rule that *ex parte* views by the decision-maker are improper:

> *Comer* demands that any view of a parcel of property in question must be preceded by notice and the opportunity to be present to the parties in order to satisfy procedural due process concerns. If Commissioner Mueller had previously viewed the property for reasons unrelated to the pending matter (*i.e.* located in his neighborhood or on his daily commute to work) he should have disclosed the fact of the view prior to the hearing, in order to allow the parties to object or move for a viewing by all of the commissioners. The commissioners could then have dealt with those motions within their discretion.

Eacret, 139 Idaho at 787, 86 P.3d at 501 (quoting *Comer*, 130 Idaho at 439, 942 P.2d at 563)).

In several cases, however, improper views have been held to be deemed harmless error.[39] The first was *Evans v. Bd. of Comm'rs of Cassia Cnty.*, 137 Idaho 428, 433, 50 P.3d 443, 448 (2002). The *Evans* Court distinguished *Comer*, noting that in this case the county was not acting in an appellate capacity:

> The Board was not acting upon a cold appellate record to make its decision, as was the case in *Comer*, rather, it was the original deciding body. There was substantial evidence presented at the hearing upon which the Board could have based its decision, wholly independently from the visit to the property. . . . We find that whatever knowledge the Board may have gained from visiting the property was not necessary to form the basis of its decision, as the hearing yielded substantially the same evidence as could have been garnered during the visit. Also, interested persons were provided a fair opportunity to present and rebut evidence at the hearing. Consequently, the appellants cannot show that a substantial right of theirs has been prejudiced by the Board's visit to the site.

[39] See discussion of harmless error in Volume 1 of this Handbook.

Evans v. Bd. of Comm'rs of Cassia Cnty., 137 Idaho 428, 433, 50 P.3d 443, 448 (2002). The Court's suggestion in *Evans* that *ex parte* site visits are more of a problem in appellate proceedings that when the county acts as the original decision-maker is difficult to understand. Due process rights plainly attach to quasi-judicial actions at the original decision-making stage.[40] *Evans* is also difficult to reconcile with the Court's subsequent decision in *Eacret* (which did not mention *Evans*). *Eacret* involved a county's *de novo* review of a decision by the planning and zoning commission. The fact that the county was acting as the original decision maker (on *de novo* review) did not relieve it of its obligation to avoid improper site visits.

In *Terrazas v. Blaine Cnty.*, 147 Idaho 193, 207 P.3d 169 (2009), the Idaho Supreme Court relied on section 67-6535(c) (now 67-6535(3)) in determining that an improper site visit by one county commissioner did not merit overturning the county's decision.

In *Noble v. Kootenai Cnty.*, 148 Idaho 937, 231 P.3d 1034 (2010) (Burdick, J.), the Idaho Supreme Court rejected a developer's appeal of the denial of a subdivision application, finding that the developer failed to submit base flood elevation ("BFE") data required by the local ordinance. The Court also declared a site visit improper because the board failed to allow members of the public to get close enough to hear what was being said. It seems that the board members consciously avoided getting near a group of interested persons because they feared that they would attempt to engage the board in a discussion. The Court agreed that the board was under no obligation to take public comment. Nevertheless, the board was obligated to provide fair notice of the site visit and to allow those attending to get "close enough to hear what is being said." *Noble*, 148 Idaho at 943, 231 P.3d at 1040. The *Noble* Court cited *Comer v. Cnty. of Twin Falls*, 130 Idaho 433, 440, 942 P.2d 557, 564 (1997), and noted that *Comer* was decided on due process grounds.

The *Noble* Court then pivoted from the constitutional analysis to the Open Meeting Act, Idaho Code §§ 67-2340 to 67-2347, ruling that the way the site visit was conducted did not "comply with the spirit of the open meeting laws." *Noble*, 148 Idaho at 943, 231 P.3d at 1040. Despite this violation, the Court found that the substantial rights of the applicant had not been violated in light of the fact that applicant failed to submit BFE information required by the statute and applicants "have no right to approval of a subdivision application that does not meet the requirements of the governing ordinances." *Id.* at *6. Moreover, the application was

[40] "In *Cooper v. Bd. of Cnty. Comm'rs of Ada Cnty.,* 101 Idaho 407, 411, 614 P.2d 947, 951 (1980), we held that a decision by a zoning board applying general rules or specific policies to specific individuals, interests or situations, are quasi-judicial in nature and subject to due process constraints." *Chambers v. Kootenai Cnty. Bd. of Comm'rs*, 125 Idaho 115,118, 867 P.2d 989, 992 (1994).

not denied with prejudice and the applicant retained the opportunity to submit the required BFE information in the course of a subsequent subdivision application.

E. Combinations of bias, *ex parte* contacts, and improper views

Where there is evidence of both bias and *ex parte* contacts, the court will consider the combined effect of the two. Thus, either alone might be insufficient to cross the constitutional threshold, but consideration of the "totality of factors" may be sufficient to render the decision invalid. *Eacret*, 139 Idaho at 787, 86 P.3d at 501. "When ex parte contacts are present in the context of quasi-judicial zoning decisions, such as variances and CUPs, courts will be more receptive to challenges to decisions on grounds of zoning bias." *Eacret*, 139 Idaho at 786, 86 P.3d at 500 (quoting *McPherson Landfill, Inc. v. Bd. of Comm'rs of Shawnee Cnty.*, 49 P.3d 522, 533 (Kan. 2002) (quoting in turn, 32 *Proof of Facts* 531, § 16)).

F. When multiple decision makers are involved

Where multiple decision makers vote on an application, the disqualification of a single decision maker (due to bias, *ex parte* contacts, improper view, or a combination of them) does not automatically invalidate the vote of the entire board. If the disqualified individual did not cast a "swing vote," the court may uphold the vote of the remaining commissioners. *Eacret v. Bonner Cnty.*, 139 Idaho 780, 786-87, 86 P.3d 494, 500-01 (2004) (Burdick, J.) (biased commissioner was swing vote, so decision was invalid); *Floyd v. Bd. of Comm'rs of Bonneville Cnty.*, 137 Idaho 718, 727, 52 P.3d 863, 871 (2002) (biased commissioner was not swing vote, so his vote was simply disregarded).

What happens when so many decision makers are disqualified that the decision-making body is denied a quorum? That is a good question. As the Idaho Supreme Court said in 1994: "In the event a board is deprived of a quorum, our trial courts will find it necessary to devise solutions to the dilemma presented by this circumstance." *Johnson v. Bonner Cnty. Sch. Dist. No. 82*, 126 Idaho 490, 494, 887 P.2d 35, 39 (1994).

G. Failure to provide mandatory information in the application

Failure to supply a concept plan and narrative with an application constitutes a violation of due process rights of other affected property owners, resulting in voiding approval of the application. The deficiency is not cured by providing the required information at the hearing. *Johnson v. City of Homedale*, 118 Idaho 285, 796 P.2d 162 (App. 1990). *But see Taylor v. Bd. of Cnty. Comm'rs, Cnty. of Bonner* ("*Taylor I*"), 124 Idaho 392, 860 P.2d 8 (Ct. App. 1993) (Swanstrom, J.) (finding that substantial rights of applicant were not prejudiced by failure to provide information in application). *Evans v. Bd. of Comm'rs of Cassia Cnty.*, 137 Idaho 428, 50 P.3d 443 (2002) (holding general information in application to be sufficient).

H. Transcribable record

LLUPA requires city, county, and planning and zoning commissions to make a transcribable verbatim record of "all public hearings at which testimony or evidence is received or at which an applicant or affected person addresses the commission or governing board regarding a pending application or during which the commission or governing board deliberates toward a decision after compilation of the record." Idaho Code § 67-6536. Failure to compile a transcribable verbatim record is grounds for vacating a land use agency's decision. *Gay v. Cnty. Comm'rs of Bonneville Cnty.*, 103 Idaho 626, 629, 651 P.2d 560, 563 (1982); *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 36, 655 P.2d 926 (1982). The commission is also required to compile and permanently preserve a set of minutes. On the other hand, even a very poor recording of the hearing may suffice. *Rural Kootenai Organization, Inc. v. Bd. of Comm'rs, Kootenai Cnty.*, 133 Idaho 833, 843-44, 993 P.2d 596, 606-07 (2000).

27. EQUAL PROTECTION

Equal protection claims arise from time to time in land use appeals, although they rarely gain any traction.

The Fourteenth Amendment of the Constitution bars states from enacting legislation that denies any person equal protection under the law. U.S. Const., Amend XIV, § 1. Similar protection is embodied in Idaho's Constitution. Idaho Const. art. I, § 2. These equal protection provisions apply to corporations as well as to natural persons. In re Case, 20 Idaho 128, 132-33, 116 P. 1037, 1038 (1911). In essence, the equal protection provisions prohibit the government from singling out certain individuals or classes of persons for special treatment. While some classification is inherent in all legislation, the Equal Protection Clause prohibits laws that are in reality "a subterfuge to shield one class or unduly burden another." 16B Am. Jur. 2d., Constitutional Law § 808 (1998). Thus, where legislation classifies persons without any rational basis, treating some better than others, it is unconstitutional.

Not all legislative classifications are inappropriate. The Equal Protection Clause "does not preclude the states from enacting legislation that draws distinctions between different categories of people, but it does prohibit them from according different treatment to persons who have been placed by statute into different classes on the basis of criteria wholly unrelated to the purpose of the legislation." 16B Am. Jur. 2d., Constitutional Law § 793 (1998).

By way of example, it is reasonable and proper to implement different maximum fee schedules for ophthalmologists and optometrists. *Posner v. Rockefeller*, 31 A.D.2d 352 (N.Y. 1969). In that case the purpose of the legislation (to implement Medicare requirements) was rationally related to the distinction drawn between doctors and non-doctors. The situation would be entirely different if instead the Legislature declared that ophthalmologists are subject to a moratorium on new water rights, while optometrists are not. Plainly, such a classification would improperly single out a particular class of citizens, thus violating the Equal Protection Clause.

Our Supreme Court has summed up the law concisely: "The discrimination must rest upon some reasonable ground of difference between the persons or things included and those excluded, having regard to the purpose of the legislation, and, within the sphere of its operation, the statute must affect all persons similarly situated." *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 403-04, 263 P. 45, 53 (1927). In *Big Wood*, the Court upheld a statute providing special treatment of irrigation systems covering over 25,000 acres, noting that the classification was legitimate because it did not bear on the nature of the corporation, but instead "its classification relates solely to size." Big Wood, 45 Idaho at 403, 263 P. at 53.

A good example of an unconstitutional differentiation is found in *Corm v. Farm*, 33 Idaho 314, 193 P. 1013. In that case, the Idaho Supreme Court struck down a law that singled out Carey Act irrigation companies, allowing them to modify their boards more easily than other Idaho corporations. The Court declared that such special treatment of one type of water user "is not founded on a difference either natural, or intrinsic, or reasonable." *Crom*, 33 Idaho at 319, 123 P. at 1014.

Equal protection claims can also be founded on allegations of unequal and discriminatory enforcement of land use ordinances. A good overview of the law in this context can be found in *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 853-54, 136 P.3d 310, 324-25 (2006) (J. Jones, J.) (remanding with instructions on how to evaluate equal protection claims).

In 2012, the U.S. Supreme Court rejected an equal protection challenge in *Armour v. City of Indianapolis*, 132 S. Ct. 2073 (2012). For decades, Indianapolis funded sewer projects using Indiana's "Barrett Law," which authorized cities to assess fees to property owners served by individual sewer projects and improvements. They could pay the fee in a lump sum or over a period of up to 30 years. In 2005, the city changed its funding mechanism to rely more on bonds (repaid by property owners city-wide), thereby lowering individual sewer connection charges and encouraging transition away from septic tanks. To facilitate the change, the city simply forgave all outstanding unpaid charges under the former Barrett Law system. This benefited those who were paying overtime and, not surprisingly, upset those who had already paid the entire hook-up fee. The latter group sued, alleging that the city's transition to the new system violated equal protection. In a six-three decision, the Court rejected the charge.

The Court began by noting that the city's classification system does not involve a fundamental right or suspect classification.

> As long as the City's distinction has a rational basis, that distinction does not violate the Equal Protection Clause. This Court has long held that "a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 319–320, 113 S. Ct. 2637, 125 L.Ed.2d 257 (1993); *cf. Gulf, C. & S.F.R. Co. v. Ellis*, 165 U.S. 150, 155, 165–166, 17 S. Ct. 255, 41 L. Ed. 666 (1897).

Armour, 132 S. Ct. at 2079-80. The Court noted that that this might have been different had the new payment system targeted newcomers or out-of-state commerce. *Armour*, 132 S. Ct. at 2080. The Court then concluded that Indianapolis'

classification system has a rational basis because, "[o]rdinarily administrative considerations can justify a tax-related distinction." *Armour*, 132 S. Ct. at 2081. The Court explained:

> After that change, to continue Barrett Law unpaid-debt collection could have proved complex and expensive. It would have meant maintaining an administrative system that for years to come would have had to collect debts arising out of 20-plus different construction projects built over the course of a decade, involving monthly payments as low as $25 per household, with the possible need to maintain credibility by tracking down defaulting debtors and bringing legal action.
>
> . . .
>
> The rationality of the City's distinction draws further support from the nature of the line-drawing choices that confronted it. To have added refunds to forgiveness would have meant adding yet further administrative costs, namely the cost of processing refunds.

Armour, 132 S. Ct. at 2081.

28. DEVELOPMENT AGREEMENTS

A. Section 67-6511A (development agreements for rezones).

Development agreements are contracts between a land developer and a local government in which the developer makes various commitments affecting a proposed development conditioned upon receiving the necessary land use approvals. These commitments might encompass restrictions on use, design of the development, conservation requirements (such as water reuse), and provision for roads and other infrastructure, open space, workforce housing, and other benefits. These conditional commitments enable the governing body to consider the land use application in the light of these favorable features. The local government, in turn, has a mechanism to ensure that promises made are kept.

Development agreements are routinely employed in a variety of land use contexts. As discussed below, they have been recognized by the Idaho Supreme Court as valid independent of specific statutory authorization. *E.g.*, *Sprenger, Grubb & Associates v. Hailey* (*"Sprenger Grubb I"*), 127 Idaho 576, 903 P.2d 741 (1995) (Silak, J.) (upholding a development agreement that predated the authorization now contained in Idaho Code § 67-6511A).

In 1991, the Legislature ratified and codified the longstanding practice of entering into development agreements in the context of rezoning. Idaho Code § 67-6511A.[41] Specifically, the statute authorized local governments to "require or permit as a condition of rezoning that an owner or developer makes a written commitment concerning the use or development of the subject parcel."[42] The legislation was developed and promoted by the Association of Idaho Cities, which explained that it would facilitate "contract zoning"—allowing local governments to require commitments from developers before approving a rezone.[43] The legislative

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[41] Section 67-6511A was enacted by 1991 Idaho Sess. Laws, ch. 146. It has never been amended.

[42] The statute refers to "commitments." The section heading refers to "development agreements." Neither term is defined. The bill's statement of purpose uses the terms "commitment" and "development agreement" interchangeably: "The purpose of this legislation is to create a new section of Idaho Code relating to the Local Planning Act. This new section, 67-6511A, Idaho Code, would give a city or county the option to require a written commitment—a development agreement—regarding the use or development of a parcel which is rezoned. The city or county using this authority will be required to adopt rules relating to the creation, form, recording, modification, enforcement and termination of the development agreements." Statement of Purpose for RS00039 (1991).

[43] "The AIC will promote legislation to allow for "contract zoning." This is a zoning technique which would allow a city to control—through the use of a contract—the type of development for which a zoning variance might be granted. The contract would protect the city from a situation in which a proposed development falls through and a less desirable replacement development is established on the newly zoned property." *Recommended Top Ten Priorities*,

history further explains that the legislation employed contracts to ensure that commitments made by one developer would carry over to subsequent owners of the property.[44]

In many cases, development agreements are initiated by the developer hoping to secure approval of the necessary entitlements. However, section 67-6511A also authorizes a local government to impose conditions on a rezone sought by a developer. The statute includes no substantive guidance or limitations on the types of conditions a jurisdiction may impose on a development. Therefore, the developer can be placed in a difficult position if the jurisdiction seeks to impose exactions as conditions of rezoning or initial zoning that are unfair or beyond development standards that the jurisdiction has adopted for the community at large. The *Nollan* and *Dolan* cases[45] may prevent exactions that are out of proportion to the development's impact on the community (see Section 29.E at page 126). However, these protections are not written into the annexation, zoning, or development agreement statutes.

The authority granted by the statute is not self-executing. Rather, it authorizes a city or county governing board to adopt an implementing ordinance addressing the "creation, form, recording, modification, enforcement and termination of conditional commitments." Idaho Code § 67-6511A.

The act requires the development agreement to be recorded. Nevertheless, it is binding on the owner and others with notice even if it is not recorded. Idaho Code § 67-6511A.

Statement of Association of Idaho Cities in support of H.B. 194 (1991). "Chairman Stone called on Mike Wetherell to introduce the legislation to the committee. He stated this new section, 67-6511[A] gives the city or county the option of requiring a written development agreement regarding the use or development of a parcel that is rezoned. Frequently a developer comes to the city with a well-designed project, receives rezoning and then the project falls through. Years later the deal falls through and the developer sells to a third party who wants to build something on the land that does not fit into the original rezoning intentions of the planning and zoning authority." Hearing before the House Local Government Committee, at 1 (Feb. 12, 1991). "Mr. Wetherell told the committee this legislation would give a city or county the option of requiring a development agreement regarding the use or development of a parcel which is rezoned. He told the committee that developers are supportive of the legislation because it is often difficult to get a parcel rezoned." Hearing before the House Local Government Committee, at 1 (Feb. 26, 1991).

[44] "Bill Jaroki made the presentation of House Bill 194. This bill holds agreements in place that are made between a city and a developer to those new developers that may buy property. A written contract would hold such agreements in place." Hearing before Senate Local Government and Taxation Committee, at 2 (Mar. 11, 1991).

[45] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (Scalia, J.); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (Rehnquist, J.).

A development agreement becomes effective upon adoption of the zoning ordinance and is binding on the owner of the parcel, each subsequent owner, and each person acquiring an interest in the parcel, unless modified or terminated by the governing board after a public hearing. Idaho Code § 67-6511A.

The statute expressly provides that development agreements are enforceable against the developer. Perhaps that includes specific performance. However, the only remedy specifically mentioned in the statute is the provision allowing the governing board to terminate the agreement and rezone the parcel back to its prior zoning if the developer does not live up to its commitments in the agreement. Idaho Code § 67-6511A. Oddly, the statute does not address the question of whether the development agreement is enforceable against the governing body. However, it would seem that two-way enforceability is implicit in the statute's use of the term "agreement."

In *Price v. Payette Cnty. Bd. of Cnty. Comm'rs,* 131 Idaho 426, 431, 958 P.2d 583, 588 (1998) (Trout, C.J.), the Court ruled that the authority to enter into a development agreement under section 67-6511A is purely discretionary. Even after enacting an implementing ordinance, the county was not required to enter into a development agreement.

B. Development agreements may be employed in the context of annexation and initial zoning, as well as re-zones.

By its terms, section 67-6511A applies only to rezoning.[46] Neither the legislation nor the legislative history addresses whether that includes the initial zoning that accompanies annexation. Given the broad purposes of the Act, as illustrated by its legislative history,[47] it is difficult to imagine that the Legislature would have intended to cover rezones but not initial zones. The twin goals of encouraging developers to make commitments and ensuring that those commitments carry over to future owners would seem equally applicable in both situations. The failure to address the question is not surprising. The distinction between initial zoning and rezoning is a subtle one not well understood even by many practitioners.[48]

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[46] A rezone occurs when property has been previously zoned and that zoning is now being changed by the same entity that zoned it previously. Technically speaking, this does not apply to the "initial" zoning that occurs when a property is annexed. Even if the land was previously zoned by the county, the city's first zoning ordinance applicable to the annexed land is considered an initial zone. *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 960 n.3, 188 P.3d 900, 902 n.3 (2008). As explained in footnote 49 at page 89, this legal principle dates to 1968, but the terminology is a recent development.

[47] All of the relevant legislative history is set out in footnotes 42, 43, and 44. That legislative history uses the term rezone, but, like the statute itself, does not explain whether it was intended to include or exclude initial zoning.

[48] In *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008), a developer filed an application entitled "annexation/rezone application." *Id*., 145 Idaho at 961, 188 P.3d 903.

Moreover, the terminology drawing a distinction between "rezone" and "initial zone" did not come into common usage until after 1991.[49]

The conclusion that section 67-6511A encompasses initial zoning as well as rezoning is implicitly confirmed in *Wylie v. State*, 151 Idaho 26, 253 P.3d 700 (2011) (J. Jones, J.). In that case, the Idaho Supreme Court enforced a development agreement entered into in conjunction with the annexation, initial zoning, and approval of a preliminary plat of a subdivision along Chinden Boulevard in Meridian.[50] No one, it appears, challenged the validity of the development agreement

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The Court explained that this was not the correct terminology and that the correct term is "initial zoning." *Id*., 145 Idaho at 960 n.3, 188 P.3d 902 n.3.

[49] The seminal case dealing with zoning upon annexation, *Ben Lomond, Inc. v. City of Idaho Falls*, 92 Idaho 595, 448 P.2d 209 (1968), established the legal principle that newly annexed land is unzoned, but that case did not employ the "initial zoning" terminology for annexed land. At the time, the term "initial zoning" was used to describe the first time any jurisdiction zoned the land. *Dawson Enterprises, Inc. v. Blaine Cnty.*, 98 Idaho 506, 512, 567 P.2d 1257, 1263 (1977) (Bistline, J.); *Taylor v. Bd. of Cnty. Comm'rs, Cnty. of Bonner,* 124 Idaho 392, 396-97, 860 P.2d 8, 12-13 (Ct. App. 1993). The only pre-1991 case to use the term initial zoning in the context of annexed land, and then only in passing, was *Burt v. City of Idaho Falls*, 105 Idaho 65, 67, 665 P.2d 1075, 1077 (1983) ("The annexed land was not rezoned by the city but initially zoned."). The first case to define the term "initial zoning" in the context of newly annexed land was *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 960 n.3, 188 P.3d 900, 902 n.3 (2008) (Eismann, J.). In *Wylie v. State*, 253 P.3d 700, 703 (Idaho 2011), however, the court used the terms "initial zoning" and "rezoning" interchangeably. *Wylie* at 703 (noting that the applicant "applied for the annexation and rezone" while, in the very next sentence, saying that the city "approved the initial zoning of the Property"). Thus, there is no reason to think that the Legislature in 1991 would have used the term "rezoning" to exclude initial zoning upon annexation.

[50] The *Wylie* decision is a bit challenging to sort out. In the development agreement, Wylie's predecessor agreed to limit access to Chinden Boulevard from his proposed development in Meridian. After acquiring the property, Wylie sought a variance allowing direct access to Chinden Boulevard. The City denied the variance request, after which Wylie promptly sought a declaratory judgment declaring that ITD had exclusive jurisdiction to control access and that the City's ordinance dealing with access was void. As the Idaho Supreme Court pointed out, it is unclear why Wylie did not seek an amendment of the development agreement (despite earlier having obtained a modification on a different aspect of the agreement). The Court first ruled that the development agreement's unambiguous requirement limiting access mooted any claims that Wylie might have under the development agreement. (This is confusing, because the opinion does not suggest that Wylie had any claims under the agreement.) The Court then turned to the ordinance, holding the agreement did not render the challenge to the ordinance non-justiciable. (The Court did not explain why this is so. It would seem that if the applicant agreed to do something, that would moot its argument that the city could not have compelled the applicant to do it. This seems to have been the holding the district court.) The Court first opined that the ordinance was not preempted by state law or otherwise *ultra vires*. Despite this ruling on the merits, the Court then concluded that the ordinance challenge was nonjusticiable because "Wylie has been unable to articulate how a judgment declaring the Ordinance invalid would provide him any relief." *Wylie*, 151 Idaho at 34, 253 P.3d at 708. This statement, however, does not seem to be based on Wylie's commitments in the development agreement but on the fact that the ITD had independently denied Wylie relief. Although the Court's reasoning is tricky to sort, the bottom line message appears to be that

itself. Nor did the parties or the Court draw a distinction between initial zoning and rezoning.[51]

The Court expressly ruled, "The terms of the Agreement are binding on Wylie . . . ." *Wylie*, 151 Idaho at 32, 253 P.3d at 706. In so ruling, the Court noted that it was entered into pursuant to Idaho Code § 67-6511A. *Wylie*, 151 Idaho at 33 n.7, 253 P.3d at 707 n.7. Thus, there appears to be no doubt that section 67-6511A authorizes development agreements for annexation/initial zoning as well as for rezones.

C. Development agreements are also valid outside the context of section 67-6511A.

The Idaho Supreme Court has recognized the efficacy of development agreements arising prior to the enactment of section 67-6511A. *Sprenger, Grubb & Associates v. Hailey* (*"Sprenger Grubb I"*), 127 Idaho 576, 903 P.2d 741 (1995) (Silak, J.) involved a development agreement entered in 1973 governing the annexation and initial zoning of 654 acres of land.[52] Under the agreement, the developer committed to make cash contributions, to construct a recreation center and a sewage treatment facility, and to dedicate open space totaling over 30 percent of the property. The city, in turn agreed to the annexation and initial zoning and to "take all action as may be required by [the developer] to develop the annexed real property in accordance with the terms and provisions of the [developer's] Master Plan . . . ." *Sprenger Grubb I*, 127 Idaho at 580, 903 P.2d at 745.[53]

In this case, most of the development was residential, but the master plan also contemplated a small commercial area within the development. Many years later, after much but not all of the development had been built, the City of Hailey downzoned the commercial area from "business" to "limited business." This was done, apparently, to prevent construction of a big box discount store outside of the

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challenging governmental action as unauthorized is fraught with difficulty if the challenger has first agreed to the action.

[51] Indeed, the Court used the terms interchangeably. It noted that the applicant "applied for the annexation and rezone" and, in the very next sentence, said that the city "approved the initial zoning of the Property"). *Wylie* at 703.

[52] *Sprenger Grubb I* did not mention LLUPA's provision on development agreements, Idaho Code § 67-6511A, enacted in 1991, presumably because the development agreement at issue pre-dated that provision (by nearly two decades).

[53] Development agreements entered into before the government approval are typically made conditional upon approval of the relevant entitlements. In such cases, the government is not bound to approve the development despite signing the agreement. Presumably that was the case here, but the opinion does not specifically say so.

city business core.[54] The developer sued alleging, among other things, that the downzone violated the development agreement.

The Idaho Supreme Court took it for granted that cities and developers have authority to enter into such development agreements. Instead, the Court focused on whether the downzone violated the terms of the development agreement. The Court found that the agreement contemplated small convenience stores to serve the homeowners, not a large, regional store. Accordingly, it found this particular downzone did not violate the agreement. For this reason, the Court found it unnecessary to consider the harder question of "whether such a provision [barring any future downzoning] could even be enforced against a City Council exercising its police powers many years later." *Sprenger Grubb I*, 127 Idaho at 581, 903 P.2d at 746 (citing *Idaho Falls v Grimmett*, 63 Idaho 90, 97, 117 P.2d 461, 464 (1941)). Thus, while a question remains about whether a city or county may "barter away its police power,"[55] there is no doubt that under *Sprenger Grubb I* development agreements are valid and enforceable against the developer (and, at least to some extent, against the government).

Another case dealing with a pre-1991 development agreement (that is, before section 67-6511A) is *Lane Ranch Partnership v. City of Sun Valley* (*"Lane Ranch I"*), 144 Idaho 584, 166 P.3d 374 (2007) (Trout, J.). This case dealt with a 1986 agreement setting out terms for annexation and initial zoning of a property by Sun Valley. The developer's successor later sought a rezone that was inconsistent with the development agreement, and the city turned it down on the basis that the development agreement must first be amended.[56] The Court found that since the rezone was sought by the landowner, the city could grant it without amending the

[54] The opinion makes reference to "a major retain shopping center, such as a 'K-Mart' or 'Shopko.'" *Sprenger Grubb I*, 127 Idaho at 581, 903 P.2d at 746.

[55] The *Sprenger Grubb I* Court cited *Idaho Falls v. Grimmett*, 63 Idaho 90, 97, 117 P.2d 461, 464 (1941) (Ailshie, J.) (police power of a municipality cannot be bartered away even by express contract). *Sprenger Grubb I*, 127 Idaho at 581, 903 P.2d at 746.

[56] This case involved a challenge to an annexation agreement entered into in 1986 between the city and the predecessor of Lane Ranch Partnership. The agreement provided that the city would annex the property, and provided that the portion south of Elkhorn Road would be zoned residential and the property north of the road would be zoned open space. In 2001, Lane Ranch filed subdivision and rezone applications (and a request for amendment of the comprehensive plan) to allow some development on the northern property. The city denied the applications noting that granting them would require amendment of the development agreement. The city said, in effect, "We might both agree that this rezone makes sense, but, alas, we're bound by the annexation agreement. Before we can even consider the rezone, we must renegotiate the development agreement."

development agreement.[57] By clear implication, however, the development agreement was otherwise assumed to be valid.

An example of a case involving a development agreement outside the context of rezoning is *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 148 P.3d 1247 (2006) (Burdick, J.). In 2001, the county approved the development and issued a final plat subject to a requirement to enter a development agreement. A neighbor sued, complaining that, under the local ordinance, the county should have insisted on a development agreement being in place prior to final plat. The Court found that under the local ordinance development agreements were mandatory, but the county could decide when to enter into the agreement. "Thus, we hold P & Z did not err by conditioning its approval on the acceptance of a development agreement." *Cowan*, 143 Idaho at 516, 148 P.3d at 1262. The Court further noted that "a development agreement is a contract between the County and the developer and gives the developer vested rights in the plat." *Cowan*, 143 Idaho at 516, 148 P.3d at 1262. Although the subject agreement was entered into after 1991, the Court did not mention section 67-6511A, presumably because the development agreement was not required in the context of a rezone.

None of these cases relied on (or even mentioned) section 67-6511A. Plainly, then, there is sound common law authority recognized the proper role of development agreements. Although the appellate courts have not articulated a basis for this authority, it is presumably part of the inherent police power and/or based on the general statutory authority (Idaho Code §§ 50-301, 31-601, 37-604) described in footnote 58 at page 93. In any event, these cases demonstrate that the effect of section 67-6511A was not to create new authority, nor to limit the authority to rezones. Section 67-6511A simply codified the practice (and set particular requirements, such as an implementing ordinance) in the context of rezones.

[57] The Court applied traditional rules of construction to construe the annexation agreement, finding that it was unambiguous. It ruled that the agreement contemplated development only on the southern property. Despite this, the Court ruled that the agreement did not prohibit the developer from seeking zoning inconsistent with the agreement, nor justify the city in automatically denying the applications on the basis of the agreement. (This ruling was made in the context of the second prong of the litigation—the judicial review of the city's factual findings.) Instead, the Court ruled that "the City may certainly consider the Agreement as well as the Agreement's history and purpose, in deciding whether to grant or deny the Partnership's applications. The Agreement may be a factor in the city's determination, but the Agreement does not absolutely bind the City to deny the rezone as the City's findings suggest." *Lane Ranch I*, 144 Idaho at 591, 166 P.3d at 381. In other words, the existence of the agreement is not dispositive; the city must decide whether or not to follow it. The Court offered no guidance to the city as to how it should factor into its decision an agreement reached two decades ago. Apparently, however, it has enough discretion to change its mind.

D. Other statutory authority for development agreements.

In addition to section 67-6511A and the common law recognition of development agreements discussed above, cities and counties have broad and express statutory authority to enter into contracts of all types and to engage in other actions in fulfillment of their police powers.[58] The authors are not aware of any judicial decisions construing this authority in the context of development agreements. (This authority is also discussed in the section of this Handbook dealing with lawful fees versus illegal taxes.)

E. Development agreements and IDIFA.

Note that the Idaho Development Impact Fee Act ("IDIFA") also authorizes certain development agreements for site-specific project improvements. Idaho Code § 67-8214(2).

By its express terms, the various restrictions and requirements relating to impact fees imposed by the Idaho Development Impact Fee Act ("IDIFA") do not apply to applicants for voluntary annexation. Voluntary annexations are typically governed by agreements that addresses the annexation and the initial zoning. IDIFA provides:

> Nothing in this chapter [IDIFA] shall restrict or diminish the power of a governmental entity to annex property into its territorial boundaries or exclude property from its territorial boundaries upon request of a developer or owner, or to impose reasonable conditions thereon, including the recovery of project or system improvement costs required as a result of such voluntary annexation.

[58] Idaho Code § 50-301 applies to cities: "Cities governed by this act shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; accept grants-in-aid and gifts of property, both real and personal, in the name of the city; acquire, hold, lease, and convey property, real and personal; have a common seal, which they may change and alter at pleasure; may erect buildings or structures of any kind, needful for the uses or purposes of the city; and exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho." Idaho Code § 50-301 (emphasis supplied). Similar statutory authority exists for counties: "Every county is a body politic and corporate, and as such has the powers specified in this title or in other statutes, and such powers as are necessarily implied from those expressed." Idaho Code § 31-601. "It has power: 1. To sue and be sued. 2. To purchase and hold lands. 3. To make such contracts, and purchase and hold such personal property, as may be necessary to the exercise of its powers. 4. To make such orders for the disposition or use of its property as the interests of its inhabitants require. 5. To levy and collect such taxes for purposes under its exclusive jurisdiction as are authorized by law. 6. Such other and further authority as may be necessary to effectively carry out the duties imposed on it by the provisions of the Idaho Code and constitution." Idaho Code § 37-604 (emphasis supplied).

Idaho Code § 67-8214(7).

The only restrictions section 67-8214(7) places on conditions to a voluntary annexation are that the conditions must be "reasonable." This includes, but is not limited to, conditions for the recovery of project or system improvement costs. By negative implication, cities have the authority to impose conditions within that broad sweep.

29. TAKINGS

A. The constitutional basis

One often hears references to "unconstitutional takings." It is important to understand what is meant by that term. After all, there is nothing unconstitutional about the government taking private property for a public purpose. The only requirement is that compensation be paid. Specifically, the Fifth Amendment[59] requires the government to compensate individuals for the taking of property.[60]

The term "unconstitutional takings" can mean either of two things. It may refer to a taking that is not for a public purpose. But those are extremely rare. Compensated takings are undertaken all the time by means of condemnation. The only limit on the power of condemnation is the issue explored in *Kelo v. City of New London*, 545 U.S. 469 (2005) (Stevens, J.)—that is, whether the purpose of the condemnation is truly a public purpose. That topic is explored in another chapter. The issue also arises in the context of the Idaho Regulatory Takings Act discussed in section 29.I at page 169.

This chapter addresses an entirely different question—the extent to which the government may burden private property without paying compensation. In other words, what is a taking? If a governmental action amounts to a taking, the thing that makes it unconstitutional is not the taking itself but the government's refusal to pay for it. Indeed, we might be clearer if we would refer to these as "uncompensated takings" rather than "unconstitutional takings."

We begin by noting that not every uncompensated burden placed by the government on private property is a taking. As citizens, we accept the fact that governmental actions often limit the use of our property. For instance, when the

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[59] "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Fifth Amendment is applicable to the states via the due process clause of the Fourteenth Amendment, U.S. Const. amend. XIV § 1. *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 536 (2005).

[60] The term "taking" derives from the Constitution's language about the taking of property in the Just Compensation Clause of the Fifth Amendment: "[N]or shall private property be taken for public use without just compensation." U.S. Const. amend. V. The Fifth Amendment is applicable to the states via the due process clause of the 14th Amendment. *Chicago Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226 (1897); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). The constitutional protection extends to all kinds of property, real, personal, and intangible. *See, e.g.*, *City of Cincinnati v. Louisville & Nashville R.R. Co.*, 223 U.S. 390, 400 (1912) ("[L]and and movables [are] within the sweep of [eminent domain]."); *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1003-04 (1984) (holding that property right in trade secrets is protected by Takings Clause.

Idaho also has its own constitutional protection. "Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor." Idaho Const. art. I, § 14.

government tells us that we must stop at a red light, our right to use our car is impaired. We accept this, however, because the burden is shared widely and makes all of our lives better. On the other hand, we would not accept a regulation that allowed the Mayor to take our car when it was needed for government business. Doing so would place too much of the burden of government on an individual.

"The Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public has a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The law of takings addresses the question of when governmental action crosses this line and entitles the property owner to compensation for the burden imposed.

When the government recognizes its obligation to pay for property it takes, its acts by way of condemnation (eminent domain), a subject treated elsewhere. Takings cases arise where the government contends it has no obligation to compensate property owners for the impact of governmental action. Because the property owner is the plaintiff in a takings case (in contrast to being the defendant in a condemnation case), takings cases are often referred to as "inverse condemnation" cases.[61]

The body of law addressing takings in Idaho is not so extensive as in the federal cases. However, in recent years[62] the Idaho Supreme Court has embraced the taking analysis of U.S. Supreme Court when analyzing takings issues under the Idaho State Constitution. *E.g., BHA Investments, Inc. v. State of Idaho, Alcohol Beverage Control Bd.* ("*BHA v. State*"), 138 Idaho 348, 354, 63 P.3d 474, 480 (2003) (Schroeder J.); *KMST, LLC v. Cnty. of Ada*, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003); *Covington v. Jefferson Cnty.*, 137 Idaho 777, 781-82, 53 P.3d 828, 832-33 (2002); *McCuskey v. Canyon Cnty. Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 216-17, 912 P.2d 100, 103-04 (1996) (Trout, J.). The Court has noted that the Idaho Constitution differs somewhat from other state constitutional takings provisions.[63]

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[61] "An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemnor. An inverse condemnation action cannot be maintained unless an actual taking of private property is established." *Covington v. Jefferson Cnty.,* 137 Idaho 777, 780, 53 P.3d 828, 831 (2002). "Such a suit is 'inverse' because it is brought by the affected owner, not by the condemnor." *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 n. 6 (1984).

[62] In earlier years, the Idaho Supreme Court suggested that it might follow a different path. "We note, however, that . . . the decision in *Agins v. City of Tiburon, supra*, would be binding upon us only insofar as it interprets the United States Constitution. *Agins* is not necessarily binding as to our interpretation of the Idaho Constitution . . . ." *Cnty. of Ada v. Henry*, 105 Idaho 263, 266, 668 P.2d 994, 997 (1983).

[63] "Article I, section 14 of the Idaho Constitution, unlike the constitution of many other states, omitted the words 'damaged' following the word 'taken.' . . . [I]n other words, it has not authorized the collection of damages where there is no actual physical taking of the property."

Apparently the Court nonetheless views the Idaho Constitution as being in line with the federal constitution.

"Under the United States Constitution, the United States Supreme Court has articulated the longstanding distinction between physical and regulatory takings." *Covington v. Jefferson Cnty.*, 137 Idaho 777, 781, 53 P.3d 828, 832 (2002). In addition, the Supreme Court recently has articulated other "categorical" takings, such as a taking based a permanent deprivation of all economically beneficial uses (section 29.C(4) at page 111). Likewise, there are sub-categories of takings cases involving particular facts, such as the exaction cases (section 29.E at page 126). Some might classify these as different species of takings. The authors prefer to classify them under the broader rubric of regulatory takings. Each of these is discussed below.

B. Direct appropriation of property and other physical takings

(1) Distinguishing physical and regulatory takings

There are two types of takings cases: physical and regulatory. In the early days of the nation, the takings provision of the Constitution was viewed narrowly and thought to apply only to physical takings. "Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922), it was generally thought that the Takings Clause reached only a 'direct appropriation' of property or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1014 (1992) (Scalia, J.) (citations omitted, brackets original).

> The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property. See, *e.g.*, *United States v. Pewee Coal Co.*, 341 U.S. 114, 71 S. Ct. 670, 95 L. Ed. 809 (1951) (Government's seizure and operation of a coal mine to prevent a national strike of coal miners effected a taking); *United States v. General Motors Corp.*, 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311 (1945) (Government's occupation of private warehouse effected a taking).

Lingle v. Chevron USA, Inc., 544 U.S. 528, 537 (2005) (O'Connor, J.).

> The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the

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Covington v. Jefferson Cnty., 137 Idaho 777, 780-81, 53 P.3d 828, 831-32 (2002) (internal quotation and ellipses omitted). The absence of the word "damaged" however simply brings Idaho's taking provision into line with the federal takings clause. In this case, the Court found that a diminution in value of one fourth of the assessed value was insufficient to render the government's action a taking.

> economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests.

Lingle, 544 U.S. at 539.

"A physical taking occurs when the government's action amounts to a physical occupation or invasion of the property, including the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Tulare Lake Basin Storage Dist. v. United States*, 49 Fed. Cl. 313, 318 (2001) (quoting *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878).

The authors of a 2010 law review article explained the distinction this way: "This article includes as potential 'physical takings' regulations that require owners of private property to submit to occupations by the government or by third parties. See generally *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (presenting the issue of whether a cable company's physical occupation of a person's property as authorized by New York Law amounted to a taking, and finding that such actions were a taking). In contrast, this article characterizes regulations that restrict uses of property as potential 'regulatory takings.'" Daniel L. Siegel and Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 Vt. J. Envtl. L. 479, 480 n.2 (2010).

A good summary of the distinction between physical and regulatory takings is found in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *overruled on other grounds by Yee v. City of Escondido*, 503 U.S. 519 (1992) (O'Connor, J.).

> Supreme Court cases addressing this question can be divided into two lines of authority: the so-called regulatory taking cases and the physical occupation cases. Regulatory taking cases are those where the value or usefulness of private property is diminished by regulatory action not involving a physical occupation of the property. A typical case of this sort is *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), where New York City prohibited Penn Central from building a 55-story office tower over its Grand Central Terminal. Despite the drastic diminution in the value and usefulness of Penn Central's property, the Court held that the city's action did not amount to a taking.
>
> Physical occupation cases are those where the government physically intrudes upon private property either directly or by authorizing others to do so. A typical case is *Loretto v. Teleprompter Manhattan CATV*

> *Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), where New York City authorized Teleprompter to string 36 feet of one-half inch coaxial cable and place two switchboxes, all amounting to about one and one half cubic feet, on a private building. Despite the minimal burden placed on the property owner, the Court in *Loretto* held that a taking had occurred.

Hall, 833 F.2d at 1275 (footnotes omitted). The *Hall* case involved a challenge to a municipal rent control ordinance. The court classified the ordinance as a physical occupation rather than regulatory taking.[64] *Hall* held that rent control ordinances constitute physical takings, not because they involve money, but because they allow lessees to physically occupy the landowner's property.

The conclusion that rent control results in a physical taking was expressly overruled in *Yee v. City of Escondido*, 503 U.S. 519 (1992) (O'Connor, J.), another rent control case.

> The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. . . .
> But the Escondido rent control ordinance, even when considered in conjunction with the California Mobilehome Residency Law, authorizes no such thing. Petitioners voluntarily rented their land to mobile home owners. At least on the face of the regulatory scheme, neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with 6 or 12 months' notice. Cal. Civ. Code Ann. § 798.56(g). Put

[64] The *Hall* court explained:

> Reduced to its essentials, appellants' claim is that the Santa Barbara ordinance has transferred a possessory interest in their land to each of their 71 tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent; and that this interest is transferable, has an established market and a market value. If proven, appellants' claims would amount to the type of interference with the property owner's rights the Court described so eloquently in *Loretto*.

Hall, 833 F.2d at 1276. The court's primary focus was on how uncompensated physical occupations constitute *per se* takings. It also concluded in a footnote that because a physical taking was involved, prong one of *Williamson County* is automatically satisfied. *Hall*, 833 F.2d at 1281 n.28.

> bluntly, no government has required any physical invasion of petitioners' property.

Yee, 503 U.S. at 527 (italics original, underlining added). Thus, the U.S. Supreme Court said the rent control statute must be analyzed as a regulatory taking, not a physical taking, which entails a balancing analysis and is not a *per se* taking. "Such forms of regulation are analyzed by engaging in the "essentially ad hoc, factual inquiries" necessary to determine whether a regulatory taking has occurred." *Yee*, 503 U.S. at 529.

The distinction between physical and regulatory takings has been recognized by the Idaho Supreme Court as well. "Under the United States Constitution, the United States Supreme Court has articulated the longstanding distinction between physical and regulatory takings. Recently, the Court has re-emphasized it is inappropriate to treat precedent from on as controlling on the other." *Covington v. Jefferson Cnty.*, 137 Idaho 777, 781, 53 P.3d 828, 832 (2002) (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002)).[65]

"When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes the entire parcel or merely a part thereof." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) (Stevens, J.) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)). *Tahoe-Sierra* was a temporary takings case involving a moratorium on new development. Thus, it was a regulatory taking, not a physical taking case. However, the Court spoke at length about the difference between the two, because the plaintiffs urged a *per se* taking rule similar to the one that applies to physical takings. The Court, however, declined to go there.

In a physical taking, the owner is entitled to compensation "no matter how minute the intrusion, and no matter how weighty the public purpose behind it." *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1015 (1992) (Scalia, J.). This absolute obligation to pay for physical takings stands in sharp contrast to

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[65] In the *Covington* case, the county planning and zoning authorities allowed a landowner to construct a hot mix plant and landfill across the street from the Covingtons. Rather than sue the neighbor for nuisance, the Covingtons sued the county. The Idaho Supreme Court determined that this was not a physical taking (despite the alleged invasion of their property by dust, flies, and noise), because there was no actual physical invasion of the property. Instead they analyzed it as a regulatory taking, finding that the mere diminution in value fell short of the *per se* taking requirement in *Lucas*. This raises an interesting question, which the Court did not address. Bear in mind that the county's regulatory zoning action was not directed at the Covingtons. In other words, the county did not restrict in any way what the Covingtons may do with their property. The Court's decision assumes that every governmental regulation of one property that has an effect on another property must be analyzed as a regulatory taking. One might suggest that this is a false assumption.

regulatory takings, discussed below, which usually are evaluated on the basis of a balancing test in which mere diminution in value does not give rise to a taking.

(2) Exactions are regulatory takings

Note that when the government physically takes property through an exaction, that is analyzed as a regulatory taking, not a physical taking. This is evident from *Yee*, which emphasized that in order to constitute a physical occupation, the property owner must have no choice in the matter. *Yee*, 503 U.S. at 527 ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land.") (emphasis original). Where the property owner may continue to make use of her property, but seeks regulatory authorization to do something else with the property, the exaction is analyzed as a regulatory matter, not a physical occupation.

In *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005), the Court drew a clear distinction between physical takings and exaction-based regulatory takings, even when the end result is that the government ends up with physical possession of the plaintiff's money or property:

> In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking. The question was whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny. . . . *Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings.
>
> . . .
>
> In so doing, we reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above-by alleging a "physical" taking, a *Lucas*-type "total regulatory taking," a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*.

Lingle, 544 U.S. at 546-48 (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-32 (1987) (Scalia, J.), *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (Rehnquist, J.), *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1960) (Brennan, J.), and *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1014 (1992) (Scalia, J.)). In other words, obtaining an easement in the property by

direct appropriation would have been a physical taking. Obtaining the same thing via an exaction may still be a taking, but it is analyzed as an exaction (a special category of regulatory taking).

Despite this clear statement by the Supreme Court, the Ninth Circuit for some reason has struggled with whether the acquisition of an easement by way of an exaction should be characterized as a physical or a regulatory taking. "[The] claims arising out of the exaction of the offers to dedicate can plausibly be characterized as either regulatory or physical takings. . . . We think it most plausible to characterize [the] claims as alleged regulatory rather than physical takings." *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 380 (9th Cir. 2002).[66]

(3) Federal law: *Causby*, *Kaiser Aetna*, *Loretto*, and *Tulare Lake*

The only tricky part of physical takings cases is deciding if it is physical. Where the government appropriates a person's property for a road or reservoir, the physical invasion is so obvious that, as a practical matter, these cases are never litigated as takings cases. Instead, the government proceeds by way of condemnation, and the issue is not whether compensation is owed, but how much.

The few physical takings that are litigated occur on the edges, where it is not so obvious that the taking is physical. The lead case on this question is *United States v. Causby*, 328 U.S. 256 (1946), in which the Court ruled that frequent over flights immediately above a landowner's property (which interfered with his raising of chickens) constituted a taking, even though the government never set foot on the property. Justice Douglas wrote that the plaintiff's loss "would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it." *Causby* at 261.

In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (Rehnquist, J.), the Supreme Court held that a requirement by the Corps of Engineers that the developers of a private marina allow public access constituted a physical invasion and, therefore, a categorical taking. "In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests of interests that the Government cannot take without compensation." *Kaiser Aetna*, 444 U.S. at 179-180.

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[66] Elsewhere the court waivered saying, "It is also plausible to characterize Johnson's and the Bucklews' claims as alleged physical takings." *Daniel* at 382. But that was because the exaction involved the physical occupation of the plaintiffs' property. "Although the exactions of the [options for dedication of easements] resulted from the Coastal Commission's regulatory process, the ultimate result of the process was the exaction of options for a public access easement across private property." *Id*. There is nothing in *Daniels* to suggest that an exaction of money constitutes a physical taking.

The next physical taking case occurred in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This case involved a municipal regulation requiring landlords to install cable television connections in their apartments. In *Loretto*, the Supreme Court held that any permanent physical occupation of private property by a government entity is a *per se* taking without regard to whether the regulation achieves an important public benefit or has only minimal economic or other impact on the owner.[67]

In 2004, the Idaho Supreme Court ruled against a takings claim brought in response to a statute immunizing seed farmers from harm caused by their burning of grass. *Moon v. North Idaho Farmers Ass'n*, 140 Idaho 536, 96 P.3d 637 (2004). "The taking asserted by plaintiffs is not a physical taking because the plaintiffs' land is not appropriated and because the smoke complained of does not result in a loss of access or of any complete use of the property." *Moon*, 140 Idaho at 542, 96 P.3d at 643.[68]

Litigation in the Federal Claims Court has involved water rights impacted by the Endangered Species Act. In *Tulare Lake Basin Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001), California water users prevailed in a taking claim against the federal government in response to water use restrictions imposed by the U.S. Bureau of Reclamation ("BOR") to aid the endangered Chinook salmon and delta smelt. Responding to biological opinions issued by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, BOR restricted diversions of water out of the Sacramento and Feather Rivers to the Central Valley Project and the State Water Project, in order to increase flows into San Francisco Bay. The federal defendant urged the Court to evaluate the claim as a regulatory taking, subject to the balancing test set out in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (Brennan, J.), discussed below. However, the district court determined that the interference with the water right constituted a physical taking, thus entitling plaintiffs to compensation even though the entire property right had not been taken.

> While water rights present an admittedly unusual situation, we think the *Causby* example is an instructive

[67] *Loretto* involved a New York City statute that required landlords to install cable television equipment on the roof of their buildings. The city required the landlords to provide a location for a six-foot section of cable one-half inch in diameter, as well as two four-cubic-inch metal boxes. This permanent physical occupation by the city was recognized as a taking, despite its minimal size, consequences, and burden.

[68] The court went on to hold that there was no regulatory taking, either. The court might have reached this conclusion simply by applying the *Penn Central* balancing test. Instead, for reasons that are unclear, the Court ignored *Penn Central* and focused on whether the statute immunizing the seed farmers created an easement to maintain a nuisance. In rejecting the easement theory, the Court found it necessary to expressly reject the view reflected in the *Restatement of Property* § 451.

> one. In the context of water rights, a mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right itself since plaintiffs' sole entitlement is to the use of the water. Unlike other species of property where use restrictions may limit some, but not all of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of all value. . . . To the extent, then, that the federal government, by preventing plaintiffs from using the water to which they would otherwise have been entitled, have rendered the usufructuary right to that water valueless, they have thus effected a physical taking.

Tulare Lake, 49 Fed. Cl. at 319 (citation omitted). The court noted that the taking of property did not have to be complete to be a physical taking and it did not matter that the government did not physically enter the property to effect the taking.

> Defendant attempts to distinguish these cases on the ground that each involved actual diversions of water by the government for its own consumptive use, whereas here, it is claimed, the government has merely regulated the plaintiffs' method of diverting water. Additionally, defendant argues that the government could not by law have physically appropriated plaintiffs' property right since California does not recognize a right to appropriate water for in-stream uses. But as defendant readily admits, the ultimate result of those rate and timing restrictions on pumping is an aggregate decrease in the water available to the water projects. Under those circumstances, whether the government decreased the water to which plaintiffs had access by means of a dam or by means of pumping restrictions amounts to a distinction without a difference.

Tulare Lake, 49 Fed. Cl. at 319-20 (citation omitted).[69]

[69] The *Tulare Lake* case was criticized by the same court in *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (2005), but not on the basis of the physical taking analysis. In *Klamath*, the court concluded that the water user's contract rights for water delivery with BOR were not property rights protected under the Fifth Amendment.

(4) Idaho Law: *BHA II* (*per se* takings based on unauthorized fees)

A special category of takings has been recognized by the Idaho Supreme Court which arises where a municipality charges an illegal fee.

In *BHA Investments, Inc. v. City of Boise* ("*BHA I*"), 138 Idaho 356, 63 P.3d 482 (2003) (Schroeder, J.), the Court invalidated a fee imposed by the City of Boise on the transfer of liquor licenses.[70] The Court noted that Idaho's Constitution grants the State sole authority to regulate liquor. Consequently, cities may charge fees in connection with the sale of liquor only if legislatively authorized. The Court found that the applicable legislation authorized cities to charge a fee for the initial liquor license, but does not authorize cities to charge fees for the transfer of liquor licenses.

In an appeal following remand,[71] *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 108 P.3d 315 (2004) (Eismann, J.),[72] the Court ruled the collection of a fee by a city without authority is a *per se* taking and a violation of the Idaho and United States Constitutions. "Since the City had no authority to charge the liquor license transfer fee, its exaction of the fee constituted a taking of property under the United States and Idaho Constitutions." *BHA II*, 141 Idaho at 172, 108 P.3d at 319. The *BHA II* Court did not use the phrase "*per se*." That is a short-hand description the authors of this Handbook have employed to capture the essence of the holding: that charging an illegal fee automatically equates to a taking.

The effect of this is to convert a challenge to an unauthorized development impact fee (a claim under the municipal taxation provision of the Idaho Constitution, Idaho Const. art. VII, § 6) into a takings claim under both the Idaho Constitution,

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[70] In a decision issued the same day as *BHA I*, the Idaho Supreme Court threw out BHA's claim against the State Alcoholic Beverage Control Board. *BHA Investments, Inc. v. State of Idaho, Alcohol Beverage Control Bd.* ("*BHA v. State*"), 138 Idaho 348, 354, 63 P.3d 474, 480 (2003) (Schroeder, J.; Horton, D.J.). The state, which was authorized to impose transfer fees, was not limited to charging an amount related to the cost of the service provided. The liquor transfer fee was allowed to be disproportionately large because the fee was intended to discourage market entry. Thus, the requirement that a regulatory fee bear a rough relation to the cost of the regulation (per *Chapman*, *Brewster*, and *Loomis*) is applicable "only to licensing of those professions considered desirable." *BHA v. State*, 138 Idaho at 353, 63 P.3d at 479.

[71] On remand from *BHA I*, the district court granted BHA summary judgment and awarded it judgment against the city on the illegal fee issue. However, BHA also sought certification as a class action, which the district court denied. BHA appealed only the class action issue, and the Idaho Supreme Court affirmed. However, the case was consolidated with another case involving other similarly situated parties (Bravo Entertainment and Splitting Kings). This portion of the case became the foundation for most of the discussion in *BHA II*.

[72] A third case, *BHA Investments, Inc. v. State*, 138 Idaho 348, 63 P.3d 474 (2003), involved a challenge to the fees imposed by the state (as opposed to the city). The Court found those fees were proper.

Idaho Const. art. I, § 14, and the U.S. Constitution, U.S. Const. amend. XIV, § 1. This has the effect of giving rise to a federal claim for relief under 42 U.S.C. § 1983, and an entitlement to recovery of attorney fees under 42 U.S.C. § 1988.

C. Regulatory takings

The more difficult and interesting area of inverse condemnation law involves government regulatory actions[73] that rise to the level of a taking. These so called "regulatory takings" are a fairly recent phenomenon. Although traceable to *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)., the explosion of regulatory takings cases began with *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (Brennan, J.).

In the land use context, regulatory takings usually involve (1) restrictions placed on property or (2) exactions (payments) demanded in exchange for regulatory approvals. Of course, the government usually would not institute eminent domain proceedings in a regulatory action, believing, rightly or wrongly, that its actions fall within the police power. If the landowner believes a government regulatory action rises to the level of a taking, it may be appropriate to bring an inverse condemnation or regulatory taking action.

The U.S. Supreme Court recently summarized the difference between physical and regulatory takings this way:

> Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by essentially ad hoc, factual inquiries designed to allow careful examination and weighing of all the relevant circumstances.

[73] While *Tahoe-Sierra* seems to put the physical takings cases in a distinct category from regulatory takings, *Lucas* classified physical takings (where there is no express expropriation of the property) as a class of regulatory takings. *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1015 (1992) (Scalia, J.). The distinction is purely semantic. Either way, physical takings are categorical takings, while other regulatory takings are decided on a case-by-case basis applying *Penn Central*'s balancing test. This chapter, depending on whether you prefer the *Lucas* or the *Tahoe-Sierra* terminology, could be entitled simply "regulatory takings" or the more cumbersome "non-physical invasion regulatory takings."

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 322 (2002) (quotation marks and citations omitted).[74] The Court zeroed in on one key difference. In a physical taking, taking any part of the property, even a very small part, requires compensation. In a regulatory taking, in contrast, the amount of the property taken must be quite substantial:

> It is worth noting that *Lucas* underscores the difference between physical and regulatory takings. For under our physical takings cases it would be irrelevant whether the property owner maintained 5% of the value of her property so long as there was a physical appropriation of any of the parcel.

Tahoe-Sierra at 330 n.25.

The essential sideboards of regulatory takings law can be stated in two points: First, the mere diminution in value, standing alone, does not establish a taking. *Covington v. Jefferson Cnty.*, 137 Idaho 777, 782, 53 P.3d 828, 833 (2002). However, if government regulation of private property goes too far, it may amount to a compensable taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). This section explores the development of these principles and how they are applied.

(1) Harbinger of regulatory takings: *Pennsylvania Coal*

Takings law is popularly viewed as providing protection of the little guy against actions of big government. This is particularly so in the context of the furor raised over the Supreme Court's decision on eminent domain in *Kelo v. City of New London*, 545 U.S. 469 (2005) (Stevens, J.).

However, the constitutional takings principle applies equally to protect well-heeled developers and large corporations. Indeed, in the seminal takings case, the principle was employed to protect a large mining company against governmental action taken on behalf of the little guy.

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Supreme Court expressly held for the first time that a regulation may constitute a taking within the meaning of the Takings Clause. In that watershed decision, the Court considered whether a Pennsylvania statute that prohibited coal mining prone to cause subsidence in pre-existing buildings was an unconstitutional taking of the private property of coal mine owners. The Pennsylvania statute was adopted to benefit homeowners who had the misfortune or poor judgment to build homes on land that they did not own in fee simple. The homeowners had acquired merely the surface rights, while

[74] A good discussion of the distinction between physical and regulatory takings is also found in a recent Idaho Supreme Court decision, *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 846-47, 136 P.3d 310, 317-18 (2006) (J. Jones, J.).

the coal company, by agreement, expressly retained the right to mine the land in such a way as to cause subsidence. The Pennsylvania legislature sought to undo this perceived injustice by prohibiting mining in such a way as to destroy the residences (even though their contract said they could). The Supreme Court sided with the coal company, finding that it was owed compensation for the taking of its property:

> But the question at bottom is upon whom the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

Pennsylvania Coal at 415. In short, the Court found that the Pennsylvania Legislature was not justified in altering, without compensation, the allocation of a risk that private parties had allocated among themselves.

Justice Holmes spoke these now famous words, thereby laying the foundation for a new era in takings law: "Government hardly could go on if, to some extent values incident to property could not be diminished without paying for every such change in the general law. . . . The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal* at 413, 415.

(2) Three-part balancing test: *Penn Central*

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (Brennan, J.), is considered the granddaddy of all modern regulatory takings cases because it set forth the three-part takings test that is still applied in the overwhelming majority of inverse condemnation cases. Ironically, recent public statements by the judicial clerk for Justice Brennan who wrote the first draft of the *Penn Central* opinion indicate that the U.S. Supreme Court did not intend at the time for this decision to be of any real importance, let alone contribute the test by which most subsequent taking claims would be judged.

In *Penn Central*, a New York City historic preservation ordinance acted to prevent the owners of Grand Central Station from building a 55-story office tower on top of the station. In deciding that such a restriction was not a regulatory taking (in part because of the availability of transferable development rights), the Court set forth three factors of "particular significance:" (1) the economic impact on the property owner; (2) the extent to which the regulation interferes with distinct investment-backed expectations; and (3) the "character" of the government action.

Given the subjective nature of *Penn Central*'s test, each one of the three factors could be the topic of its own handbook. Remember, there is no magic tipping point as to any of these factors. However, each factor, if sufficiently persuasive, can

conclusively establish a taking on its own without reference to the other two factors. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1005 (1984) (investment-backed expectations were "so overwhelming" so as to dispose of the takings question in favor of the government).

More often than not however, the factors are weighed together to decide if the balance of them favors the government or the landowner. What might be considered a large enough economic impact to constitute a taking in one case may not be large enough in another case where the landowner did not have the same level of investment-backed expectations. With these things in mind, recognize that this handbook only highlights a few issues to keep in mind with each factor.

(a) Economic impact

The first component of the balancing test is the extent of the economic impact of the regulation on the landowner. *Penn Central*, however, makes clear that "mere" diminution in value is insufficient, in itself, to constitute a taking. A severe economic loss, however, is a factor to be considered. The questions, then, is "how severe"? In *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992) (Scalia, J.), the Court hinted that perhaps a 95 percent diminution in value would likely constitute a taking. The Federal Circuit has similarly hinted that a 62.5 percent loss could be a taking. Courts outside the Federal Circuit most often say that there must be a deprivation of all or substantially all economic use for a taking.

Penn Central's central theme—that mere diminution in value is insufficient—is good law in Idaho. "While they contend the value of their property has decreased by $29,000, the diminution in property value, standing alone, is insufficient to establish a taking. *Covington v. Jefferson Cnty.*, 137 Idaho 777, 782, 53 P.3d 828, 833 (2002) (citing *Penn Central*).

Note that if the economic depreciation is 100 percent, the balancing test does not apply. Instead, this would be a *per se* taking under *Lucas*. See discussion in section 29.C(4) at page 111.

(b) Investment-backed expectations

The second factor is "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. Issues under this factor may include: (1) the role of a landowner's initially limited economic intentions for the property versus his later intentions for development; (2) whether reasonable expectations can exist when the landowner voluntarily entered a highly regulated field like banking; (3) whether government interference with a property's primary use (*i.e.*, longstanding and existing at time of regulation) plays a role in determining the property owner's investment-backed expectations; and (4) does this factor undermine a takings claim by an owner who acquired the property as a gift of some sort?

The fact that the plaintiff acquired the property after the offending regulation was in place, however, is not part of the calculus. See discussion in section 29.C(7) at page 123.

(c) Character of government action

The third factor mentioned by the *Penn Central* court (the "character" of the government's action) is the most amorphous. Although the term "character" may mean many things, some examples come to mind:

(1) *emergency response versus routine regulation*. If the government action is for war, fire-fighting, or other emergency purposes, courts are more likely to find no taking.

(2) *benefits versus prevention of harm*. A taking is more likely to be found where the purpose of the regulation is to create a public benefit (which, presumably the public as a whole should pay for) as opposed to the prevention of a public harm caused by individual's use of property. However, this distinction was rejected as a defense for categorical takings in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025-26 (1992) (Scalia, J.).

(3) *physical invasion versus limitation on use*. "[Another factor] is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, see, *e. g., United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124. However, this is not really a balancing factor to be weighed in a regulatory taking. If a physical invasion is involved, it is not a regulatory taking at all, and there will be no balancing.

(3) Substantially advance legitimate state interests: *Agins* overruled by *Lingle*

For twenty-five years, the courts followed a decision in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (Powell, J.).[75] In *Agins*, the U.S. Supreme Court upheld the downzoning of property on land overlooking San Francisco Bay, finding that it did not constitute a taking. The Court announced: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." *Agins* at 260 (citations omitted).

[75] The Idaho Supreme Court acknowledged the decision in Agins, but described it as "murky and unresponsive to many of the broad issues." *Cnty. of Ada v. Henry*, 105 Idaho 263, 266, 668 P.2d 994, 997 (1983).

This pronouncement caused a stir among legal theorists who believed this test to be more of a substantive due process inquiry as opposed to a taking analysis. Critics pointed out that this test improperly allowed a landowner to second-guess the reasonableness of a government land use decision.

In the end, the critics won out. In *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 545 (2005) (O'Connor, J.), the United States Supreme Court ruled, "we conclude that the 'substantially advances' formula announced in *Agins* is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation." Agreeing with what commentators and legal theorists had been saying for years, the Court said: "We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and . . . it has no proper place in our takings jurisprudence." *Lingle* at 540.[76]

The Idaho Supreme Court has recognized *Lingle*'s overruling of *Agins*. *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 847, n.5, 136 P.3d 310, 318, n.5 (2006) (J. Jones, J.).

(4) Categorical taking based on no economically viable use: *Lucas, Palazzolo,* and *Tahoe-Sierra*

(a) A new type of categorical taking.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (Scalia, J.), the Supreme Court carved out a new type of "categorical" taking. The Court ruled:

> [W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Lucas, 505 U.S. at 1019 (emphasis original).

In *Lucas*, the developer paid nearly a million dollars for two beachfront lots on the Isle of Palms near Charleston, South Carolina. At the time of purchase, they were zoned for residential development. Two years later, the state legislature enacted a strict coastal protection law that prevented Lucas from erecting any habitable structures on the lots. The trial court found that the regulation rendered the property "valueless," and that factual finding was not challenged on appeal.[77] The state supreme court ruled against Lucas, holding that no compensation is required when a regulation is legitimately aimed at preventing serious public harm. The U.S.

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[76] Another effect of *Lingle* was to undermine *Armendariz v. Penman*, 75 P.3d 1311 (9th Cir. 1996), which held that the Fifth Amendment's Takings Claim subsumes or preempts substantive due process claims challenging land use regulations. See discussion in section 29.H(2) at page 168.

[77] The validity of the finding, nonetheless, was questioned by the dissent.

Supreme Court reversed. It found that the state had a legitimate interest in protecting its coastline and that the Act substantially advanced that interest. Nonetheless, the Supreme Court determined that the Act effected a taking because it deprived the owner of all economically viable use of his land—thus creating a new class of categorical (that is automatic or *per se*) takings.

By recognizing this as a categorical taking, the landowner no longer has to demonstrate that his or her harm outweighs other considerations. As one commentator said: "Balancing tests are, however, maddeningly complicated. They require extensive factual analysis; precedents are difficult to analogize and distinguish; and outcomes are unpredictable. Dissatisfied with the complexities and uncertainties of the *Penn Central* balancing test, the current Court has taken an interest in defining categories of 'per se' takings, or government actions that are takings regardless of the public interest involved. In effect, per se takings are pre-balanced. They are categories of governmental action so extreme and intrusive that they always out-weigh the public interest." Angela Schmitz, Note, *Taking Shape: Temporary Takings and the Lucas Per Se Rule in Tahoe-Sierra Preservation Council, Inv. v. Tahoe Regional Planning Authority*, 82 Or. L. Rev. 189, 190 (2003).

(b) Requires <u>no</u> viable economic use.

While the categorical taking test is simple to apply (the landowner wins) once it is determined that a categorical taking has occurred, the *Lucas* Court acknowledged that it is not so easy to determine whether there is a categorical taking in the first instance:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Lucas, 505 U.S. at 1016 n.7.

The *Lucas* Court went on, in another footnote, to observe that a 95% loss in value would take the analysis out of the categorical taking box and put it into the *Penn Central* balancing test box. *Lucas*, 505 U.S. at 1019 n.8.

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330 (2002), the Court seized on this footnote, emphasizing

that "[a]nything less than a 'complete elimination of value,' or a 'total loss,'" requires analysis under the *Penn Central* test.

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Court had occasion to address a 94% reduction in value resulting from a regulation barring development on marshland and wetlands. Mr. Palazzolo acknowledged that, with regulation in force, the property still was worth $200,000 (down from $3,150,000 had the development of the marshlands been allowed) because a single home could have been constructed on the upland portion of the 18-acre property. But he complained that the state should not be able to avoid a *Lucas* taking "by the simple expedient of leaving a few crumbs on the table." *Palazzolo*, 533 U.S. at 631. The Court said it agreed with that principle, but found $200,000 to be more than a few crumbs:

> Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. This is not the situation of the landowner in this case, however. A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property economically idle.

Palazzolo, 533 U.S. at 631.

Mr. Palazzolo might have argued that the wetland regulation constituted a 100% taking of the wetland portion of his property. Indeed he did, but only in his appellate brief. Having failed to preserve the argument, the Court declined to consider it. However, the Court did offer, in dictum, a critical swipe at the prior law on the subject of "the proper denominator." *Palazzolo*, 533 U.S. at 631.

While the Court's holding denied Mr. Palazzolo a categorical taking, the possibility of a *Penn Central* taking was left open on remand. *Palazzolo*, 533 U.S. at 632.

(c) The "background principles of state law" exception.

Lucas contains an important exception to its rule for categorical takings. If the regulation is based on nuisance prevention or abatement or is based on other "background principles of state property law" (such as the public trust doctrine[78]),

[78] *E.g., Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002) (no taking occurred when property restrictions were undertaken pursuant to Washington's public trust doctrine). Note, however, that in 1996 the Legislature abolished the public trust doctrine in Idaho except as to land below navigable waters. 1996 Idaho Sess. Laws, ch. 342 (codified at Idaho Code §§ 58-1201 to 58-1203). Note: The public trust doctrine is discussed in the *Idaho Water Law Handbook*.

then the developer did not have the right to develop in the first place—and nothing is "taken."

As the Court put it:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.
>
> . . .
>
> Any limitation so severe [as to deny all economic use] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.

Lucas, 505 U.S. at 1027, 1029.

What exactly constitutes a "background principle of property law" is a complicated topic that has given rise to considerable comment and litigation.[79] One should examine the history, purpose, and application of the regulation to determine whether it is a *bona fide* nuisance regulation or merely a downzone cloaked in public interest rhetoric. The existence of exceptions to the regulation may give a clue. Exceptions that genuinely probe the existence, extent, or mitigation of the nuisance would support the conclusion that the regulation is legitimately concerned with nuisance. But exceptions that have nothing to do with (1) the existence, extent, or mitigation of nuisance or (2) legally mandated grandfathering, cut in the other direction.

One thing we do know is that a zoning restriction does not become a "background principle of the State's law" simply because the property is transferred to a new owner. See discussion of *Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001) in section 29.C(7) at page 123.

(d) Moratoriums are not categorical takings

The Supreme Court ruled in 2002 that moratoriums do not constitute "categorical" or "*per se*" takings. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (Stevens, J.). (See discussion of temporary takings in section 29.C(6) at page 119.) Rather, each moratorium will be

[79] See, e.g., Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 Harv. Envtl. L. Rev. 321 (2005).

evaluated individually to determine whether affected landowners are entitled to compensation.

(e) Idaho's recognition of *Lucas*.

The Idaho Supreme Court has cited *Lucas* approvingly on four occasions (as of 2009). *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 136 P.3d 310 (2006) (J. Jones, J.) (citing *Lucas* eight times before remanding for a determination of whether a *Lucas*-type or *Penn Central*-type taking occurred); *Moon v. North Idaho Farmers Ass'n*, 140 Idaho 536, 542, 96 P.3d 637, 643 (2004) (no *Lucas*-type taking because "the plaintiffs have not claimed a permanent deprivation of all economically beneficial uses of their land"); *Covington v. Jefferson Cnty.*, 137 Idaho 777, 781-82, 53 P.3d 828, 832-33 (2002) (no *Lucas*-type taking because plaintiff failed to show that he was deprived of "any economic use"); and *McCuskey v. Canyon Cnty. Comm'rs ("McCuskey II")*, 128 Idaho 213, 912 P.2d 100 (1996) (Trout, J.) (inverse condemnation action barred by statute of limitations, citing *Lucas* for general proposition only).

(5) The "denominator" or "relevant parcel" problem

In determining whether a governmental action results in a *Lucas*-type categorical taking, it is necessary to determine what is the "relevant parcel" to evaluate. *Apollo Fuels, Inc. v. United States*, 54 Fed. Cl. 717, 723 (2002) (the "threshold matter" in a regulatory takings case is the determination of the "relevant parcel").

By way of example, if a property owner owns a single 160-acre parcel of land, 40 acres of which are wetlands subject to government regulation prohibiting development, has the property's value been reduced by only 25 percent (40 of 160) or has the property owner lost 100 percent of the value as to the regulated 40 acres? If the property owner only owned the 40 acres of wetlands, he undoubtedly would be entitled to compensation under *Lucas*, so should he be punished for owning the other 120 acres? What if the wetlands and uplands are not contiguous but are across the street from each other? Or separated by one parcel in between? As you will see, this issue has arisen in some form in most of the cases cited above.

Keep in mind that the issue of relevant parcel can focus on many different aspects of property beyond the scope of this handbook. The relevant parcel analysis may include consideration of such things as subsurface rights vs. surface rights, air rights above the property, contiguous land holdings operated as one operation, non-contiguous land holdings operated as one operation, parcels purchased at different points, transferable development rights, and property interests over time. "The relevant parcel of real property can extend not only below the surface and to the very heavens above, but also across time itself." Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. Haw. L. Rev. 353, 363 (2003).

Penn Central gave rise to the " parcel as a whole" rule, wherein the Supreme Court wrote:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular government action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."

Penn Central at 130-31. The *Penn Central* Court refused to allow the owners of Grand Central Station to separate the air rights over the station from the remainder of the property—an effort by the property owners to say that 100 percent of their property had been taken.

As you will see, the "parcel as a whole" rule is still the rule of law, but it is coming under increasing scrutiny.

The "relevant parcel" issue arose again nine years later in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987), wherein the Court wrote:

> Because our test for regulatory takings requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'

Keystone involved a government regulation that required coal-mining companies to avoid mining any coal they owned which could lead to subsidence of residential areas. This had the effect of prohibiting the coal companies from mining approximately 27 million tons of coal. The coal companies filed an inverse condemnation action arguing that this government regulation effected a taking.

Rather succinctly, the *Keystone* Court held: "The 27 million tons of coal do not constitute a separate segment of property for takings law purposes." Rather, the Court focused on all of the coal owned by the coal companies and determined that only about two percent of their coal was unavailable to mine because of the regulation, therefore, there was no taking.

In that same year, the U.S. Supreme Court recognized that a taking could be "temporal." In *First English Evangelical Lutheran Church of Glendale v. Los*

Angeles Cnty., 482 U.S. 304 (1987), the Court held that the government must compensate a property owner denied all use of his property for the period of time a regulation was in place, even though the regulation was later invalidated by the courts. This case shows that the "relevant parcel" issue can involve issues of time.

In *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994), the court of appeals rejected the government's argument that the court should look to the entire 250-acre parcel owned by a developer in New Jersey. The court determined that the proper denominator was the 12.5-acre parcel for which a Clean Water Act permit was denied.

A few years later in *Lucas*, the U.S. Supreme Court recognized a categorical taking in situations where regulation denies all economically beneficial or productive use of land. In addition, in a famous footnote, the Court recognized the difficulties of the "relevant parcel" issue:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured … Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court.

Lucas at 1016-17 n.7.

More recently, in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the U.S. Supreme Court rejected a property owner's attempt to allege a 100 percent taking of all the wetlands he owned. The Court rejected the attempt to parcel out the wetlands portions of the contiguous property, but did so only because this argument had not been made by the landowner in the trial court below. However, the Court hinted that it was less than satisfied with the "parcel as a whole" rule:

> This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators.

Palazzolo at 631 (2001)

In a recent decision that seems to contradict (or at least narrowly apply) *First English*, the U.S. Supreme Court relied upon the "parcel as a whole" rule to reject a

claim for a temporal taking. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (holding that segmentation based on time violates the "parcel as a whole" rule). In *Tahoe-Sierra*, the government placed a 32-month moratorium on development near Lake Tahoe, so that environmental studies could be conducted. The landowners owning property near Lake Tahoe brought an inverse condemnation claim based on *Lucas* and *First English*.

First, the *Tahoe-Sierra* Court addressed *First English* and stated that in that case it had "assumed" that a taking occurred, therefore *First English* only addressed whether compensation was due for an established temporary taking. The *Tahoe-Sierra* Court specifically rejected the idea that *First English* stood for the proposition that compensation is due whenever the government temporarily restricts the use of property. *Tahoe-Sierra* at 328.

Second, the *Tahoe-Sierra* Court narrowly interpreted its *Lucas* decision to apply only in those cases where an "unconditional and permanent" taking has occurred, thus requiring a "permanent obliteration of the value" of the property before *Lucas* could apply. Because the moratorium at issue was temporary, *Lucas* did not apply.

Lastly, as to the relevant parcel issue, the *Tahoe-Sierra* Court refused to "sever a 32-month segment from the remainder of each landowner's fee simple estate" and determine whether that separate temporal segment had been taken.

In summation, the *Tahoe-Sierra* Court wrote: "The starting point for the [trial] court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework." However, in a separate dissent, Justice Thomas questioned the majority's reliance upon the "parcel as a whole" rule, noting that the Court in *Palazzolo* had recently called the concept into question.

Like the *Penn Central* three-part test that applies in most regulatory takings cases, the relevant parcel issue is an ad hoc factual issue, which means it continues to be a somewhat confusing area of takings jurisprudence. Several courts, but not those in Idaho, have tried to devise some formulation or set of factors for its determination. Some examples are listed below.

Walcek v. United States, 49 Fed. Cl. 248, 260 (2001), finding an entire 14.5-acre parcel to be the "relevant parcel" because "the Property is contiguous and unsubdivided; was purchased over a matter of a month or two, with uniform ownership; has been maintained for many years as a single parcel; has the same zoning status; and, in all the plans the partners advanced, has always been intended to be developed as a whole."

Cane Tennessee, Inc. v. United States, 57 Fed. Cl. 115 (2003):

> In determining the "parcel as a whole," the focus is on the economic expectations of the claimant with regard to the property. Accordingly, where a "developer treats legally separate parcels as a single economic unit, together they may constitute the relevant parcel." This is a factual inquiry, and the relevant consideration have been said to include the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the [regulated] lands enhance the value of remaining lands, and no doubt many others….

(citing *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (1991)) (citations omitted).

Machipongo Land & Coal Co. v. Commonwealth, 799 A.2d 751 (Pa. 2002): adopting a "flexible approach, designed to account for factual nuances;" listing a non-inclusive list of factors to consider when determining the relevant parcel:

> unity and contiguity of ownership, the dates of acquisition, the extent to which the proposed parcel has been treated as a single unit, the extent to which the regulated holding benefits the unregulated holdings; the timing of transfers, if any, in light of the developing regulatory environment; the owner's investment-backed expectations; and the landowner's plans for development.

For further discussion and an in-depth analysis of the "relevant parcel" issue, refer to an article appearing recently in the University of Hawaii Law Review. Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. Haw. L. Rev. 353 (2003).

(6) Temporary takings

(a) Federal cases

In *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304 (1987), a church owned a 21-acre parcel that it used as a summer camp for handicapped children. When the property flooded, the county and flood district enacted a ban that prevented rebuilding the destroyed camp. The church brought an action for inverse condemnation (as well as a tort action, alleging the cloud seeding and other actions led to the flooding). The state appeals court[80] ruled that landowners may not bring inverse condemnation actions for regulatory takings. Rather than seeking damages, they must seek only declaratory relief that the regulation constitutes a taking. At that point, the government could elect to rescind the regulation (without paying compensation) or to pay compensation. The U.S.

[80] This was the highest state court ruling. The California Supreme Court did not denied review.

Supreme Court reversed, finding that inverse condemnation is an appropriate remedy for what it described as a "temporary taking." Thus, if the government rescinds the offending regulation, it must nonetheless pay compensation for the time the regulation was in place.

Thus, the *First English* case was decided in the abstract. It did not decide that there was a temporary taking (or any taking at all).[81] It merely found that a temporary taking is theoretically possible and that the plaintiff should be allowed to pursue the inverse condemnation claim. If the ordinance ultimately were found to be a taking, the church would be entitled to compensation for the period during which its use of the property was denied.

The Court emphasized repeatedly that the potential entitlement to compensation for a temporary taking was premised on the fact that the plaintiff alleged a total deprivation of all use of the property: "We also point out that the allegation of the complaint which we treat as true for purposes of our decision was that the ordinance in question denied appellant all use of its property. We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *First English*, 482 U.S. at 322.

For a while, it looked like *Lucas* and *First English* might team up to create a categorical temporary taking in the event of a moratorium on new construction or approvals. But it was not to be. The limited nature of the *First English* ruling on temporary takings was made clear in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). (This case is discussed further in section 29.C(5) at page 115.) In *Tahoe-Sierra*, the Court explained that not every temporary regulation gives rise to a compensable taking. The Court applied the "parcel as a whole" rule to find that a moratorium on all construction was not a temporarily taking. It would seem, however, that applying the "parcel as a whole" analysis to a temporary taking would mean essentially destroy the whole idea of temporary takings.

The case of *Arkansas Game and Fish Comm'n v. United States*, 133 S. Ct. 511 (2012) (Ginsburg, J.) follows logically from the cases discussed above. The Supreme Court reaffirmed two basic principles: First, temporary takings are possible. Second, they are not automatic and must be evaluated on a case-by-case basis. This does not appear to carve out any new territory. In this unanimous decision, the Court found it necessary to overturn a federal appellate court decision which held, incorrectly, that

[81] "We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations." *First English*, 482 U.S. at 313.

in flooding cases, a taking occurs only in the case of "a permanent or inevitably recurring condition, rather than an inherently temporary situation." *Arkansas Game*, 133 S. Ct. at 515. The Supreme Court explained that the quoted statement (which was based on *Sanguinetti v. United States*, 264 U.S. 146 (1924) was dictum that predated the law of temporary takings that emerged during World War II. In so ruling, the Court emphasized the limited nature of its holding, which did nothing to disturb the cases like *Tahoe-Sierra* discussed above:

> We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection. When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking. See *Loretto*, 458 U.S., at 435, n. 12, 102 S. Ct. 3164 (temporary physical invasions should be assessed by case-specific factual inquiry); *Tahoe–Sierra*, 535 U.S., at 342, 122 S. Ct. 1465 (duration of regulatory restriction is a factor for court to consider); *National Bd. of YMCA v. United States*, 395 U.S. 85, 93, 89 S. Ct. 1511, 23 L.Ed.2d 117 (1969) ("temporary, unplanned occupation" of building by troops under exigent circumstances is not a taking).
>
> Also relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action. See *supra*, at 517; *John Horstmann Co. v. United States*, 257 U.S. 138, 146, 42 S. Ct. 58, 66 L. Ed. 171 (1921) (no takings liability when damage caused by government action could not have been foreseen). See also *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355–1356 (C.A. Fed. 2003); *In re Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 799 F.2d 317, 325–326 (C.A. 7 1986). So, too, are the character of the land at issue and the owner's "reasonable investment-backed expectations" regarding the land's use. *Palazzolo v. Rhode Island*, 533 U.S. 606, 618, 121 S. Ct. 2448, 150 L.Ed.2d 592 (2001). . . . Severity of the interference figures in the calculus as well. See *Penn Central*, 438 U.S., at 130–131, 98 S. Ct. 2646; *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329–330, 43 S. Ct. 135, 67 L. Ed. 287 (1922) ("[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [a

> taking]. Every successive trespass adds to the force of the evidence.").

Arkansas Game, 113 S. Ct. at 522-23.

In sum, "if government action would qualify as a taking when permanently continued, temporary actions of the same character may also qualify as a taking." *Arkansas Game*, 113 S. Ct. at 515 (emphasis supplied). Thus, temporary regulatory takings are limited to situations in which a regulatory action was intended to be permanent but was later rescinded or overturned, where the regulatory action would have caused (1) a *Lucas*-style total deprivation of all use of the property, (2) an overreaching exaction in violation of *Nollan* or *Dolan*, or (3) a regulatory taking of the *Penn Central* variety. Even then, the effect, circumstances, and duration of the impairment will considered under the principles of the "parcel as a whole" rule (made applicable by *Tahoe-Sierra* and confirmed in *Arkansas Game*). See, Daniel L. Siegel and Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 Vt. J. Envtl. L. 479 (2010).

(b) Idaho cases

The Idaho Supreme Court touched on the issue of temporary takings in *Moon v. North Idaho Farmers Ass'n*, 140 Idaho 536, 542, 96 P.3d 637, 643 (2004) (Burdick, J.). In *Moon*, plaintiffs challenged a statute immunizing grass seed growers from certain nuisance and trespass actions. They contended that this immunity constituted a taking of their property, which was invaded by smoke from the annual burning of post-harvest straw and stubble. The district court found this constituted a taking. The Idaho Supreme Court reversed.

The *Moon* decision includes the following statement: "[T]he mere interruption of the use of one's property, as it is less than a permanent (complete) deprivation, does not mandate compensation." *Moon*, 140 Idaho at 542, 96 P.3d at 643. However, the case does not seem to turn on this point. For instance, the Court recognized that a physical invasion (flooding from a government dam) could result in a taking, even though the flooding was only temporary. "[W]here a structure causes permanent liability to intermittent but inevitably recurring overflows it is [a] taking." *Moon*, 140 Idaho at 542, 96 P.3d at 643 (emphasis and internal quotation marks omitted). Note also that the quoted statement about interruption of the use of one's property was not made in the context of a temporary taking arising from the effect of an ordinance prior to its being overturned. Rather, it was made in reference to the intermittent nature of the smoke invasion. Ultimately, the Court determined that the invasion of smoke at most a nuisance. Unlike other states, the right to maintain a nuisance is not an easement (which might give rise to an argument for a physical taking). And the Legislature is free to modify the common law right to abate a nuisance.

The *Moon* case did not discuss an earlier Idaho precedent, *McCuskey v. Canyon Cnty. Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 216, 912 P.2d 100, 103 (1996) (Trout, J.), which recognized temporary takings in concept. In *McCuskey II*, the plaintiff claimed a temporary taking from the time Canyon County issued a stop work order to the time the Idaho Supreme Court voided the controlling ordinance in *McCuskey v. Canyon Cnty.* ("*McCuskey I*"), 123 Idaho 657, 851 P.2d 953 (1993) (Bistline, J.). The Court stated: "If a regulation of private property that amounts to a taking is later invalidated, this action converts the taking to a 'temporary' one for which the government must pay the landowner for the value of the use of the land during that period." *McCuskey II*, 128 Idaho at 216, 912 P.2d at 103 (citing *First English*). While this temporary taking was the premise of the plaintiff's case, the Court did not explore the law of temporary takings. Instead, it dismissed the case on basis of the statute of limitations.

(7) Post-regulation transfer of the property: *Palazzolo*

Most taking claims arise when a restrictive regulation is applied to a piece of property already owned by the plaintiff. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) involved a claim by a person who acquired the property after the allegedly confiscatory regulation was adopted. For years, the plaintiff (and his predecessor corporation) sought permission to fill marshland in order to develop a waterfront property in Westerly, Rhode Island. Finally he sued, alleging both a categorical taking under *Lucas* and a traditional regulatory taking under *Penn Central*.

The state contended that the taking claim was defeated by the fact that Mr. Palazzolo had acquired the property after wetlands ordinance was adopted.[82] The state argued this timing factor defeated the *Lucas* taking because the wetland regulation had become part of the "background principles of state property law" by the time he owned the property. It contended that the timing also defeated the *Penn Central* taking because Mr. Palazzolo had no "reasonable, investment-backed expectation" of development at the time he acquired the property. The U.S. Supreme Court rejected both arguments noting that the "State may not put so potent a Hobbesian stick into the Lockean bundle." *Palazzolo*, 533 U.S. at 627. The *Palazzolo* Court noted with approval that in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 860 (1987) (Scalia, J.) the Court had recognized that "[s]o long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Palazzolo*, 533 U.S. at 629. The *Palazzolo* Court also rejected the idea that *Lucas* introduced a new stumbling block for the new owner under the "background principles" exception. "It suffices to say that a regulation that would be unconstitutional absent compensation is not transformed

[82] Technically this was true. However, Anthony Palazzolo has owned the property through a corporation of which he was the sole stockholder for some time prior to the wetlands regulation.

into a background principle of the State's law by mere virtue of the passage of title." *Palazzolo*, 533 U.S. at 629-30.

In short, *Palazzolo* made clear that the fact that the property owner did not own the property at the time of the regulatory taking is immaterial in a regulatory taking under either *Lucas* or *Penn Central*.

Physical takings are a different matter. The Court noted that in the case of direct condemnation or a physical invasion (where the fact and extent of the taking are known at the outset and need not be ripened), "any award goes to the owner at the time of the taking, and that right to compensation is not passed to a subsequent purchaser." *Palazzolo*, 533 U.S. at 628.

One Idaho case held that a person acquiring a property with notice that it was subject to restrictive zoning could not claim that the prior downzoning constituted a taking of his property. *Cnty. of Ada v. Henry*, 105 Idaho 263, 266, 668 P.2d 994, 997 (1983). More recently, however, the Idaho Supreme Court has moved away from this and embraced *Palazzolo*: "However, since 2001, the fact that an owner acquires property after a regulation has been enacted does not necessarily bar a claim that the regulation has effected a taking." *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 848, 136 P.3d 310, 319 (2006) (J. Jones, J.) (citing *Palazzolo*). See also the discussion of standing in inverse condemnation cases at section 29.C(7) at page 123, dealing with the related issue of whether the purchaser can sue to vindicate a taking imposed on the predecessor-in-interest.

(8) Downzoning and takings

From time to time downzoning (that is, rezoning a property to a more restrictive zone) is challenged as an unconstitutional taking. The analysis is straightforward, and the result is usually to uphold the downzone.

Downzones are not physical takings, because they involve no physical invasion of the property by the government. Instead (unless the downzone is so complete as to constitute a categorical taking under *Lucas*), they are analyzed as regulatory takings, applying the same three-part balancing test first established in *Penn Central*. Under *Penn Central* it is clear that mere diminution in value resulting from planning and zoning land use restrictions, standing alone, does not establish a taking.

The Idaho Supreme Court is in accord with federal case law that the mere diminution in value associated with a typical downzone does not give rise to a taking claim:

> However, once again, we hold that a property owner has no vested interest in the highest and best use of

> his land, in the solely monetary sense of that term. This Court has repeatedly declared that a zoning ordinance which downgrades the economic value of property does not constitute a taking of property in violation of the United States Constitution, where some residual value remains in the property.

Sprenger, Grubb & Associates v. Hailey (*"Sprenger Grubb I"*), 127 Idaho 576, 581-82, 903 P.2d 741, 746-47 (1995) (Silak, J.) (citations and internal quotation marks omitted). "[A] zoning ordinance that downgrades the economic value of private property does not necessarily constitute a taking by the government, especially if some residual value remains after the enactment of the ordinance." *Covington v. Jefferson Cnty.*, 137 Idaho 777, 781, 53 P.3d 828, 832 (2002) (quoting *McCuskey v. Canyon Cnty. Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 216, 912 P.2d 100, 103 (1996) (Trout, J.)). Thus, whether it is or is not a taking must be analyzed on an *ad hoc* basis under the *Penn Central* test. "A zoning ordinance which downgrades the economic value of property does not constitute a taking of property without compensation at least where some residual value remains in the property." *Intermountain West, Inc. v. Boise City*, 111 Idaho 878, 880, 728 P.2d 767, 769 (1986) (Donaldson, C.J.) (citing *Cnty. of Ada v. Henry*, 105 Idaho 263, 266, 668 P.2d 994 (1993).[83]

On the other hand, if the downzoning was so severe that, in practical effect, it denied the landowner all economic use of the property, it would constitute a categorical taking under *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992) (Scalia, J.).

D. Exhausting administrative remedies under IDIFA

In Idaho, a developer may not challenge the impact fee imposed under IDIFA unless the developer has exhausted his or her administrative remedies under the local ordinance implementing IDIFA. In *KMST, LLC v. Cnty. of Ada*, 138 Idaho 577, 578, 67 P.3d 56, 57 (2003) (Eismann, J.), a partnership that wanted to construct a shopping center sought ACHD's approval of a land use application. Prior to submitting this application, the partnership met with the supervisor of ACHD's Development Services Division regarding the proposed development. The supervisor told them that he would recommend they be required to construct a street along the east side of the property and dedicate it to the public. *KMST*, 138 Idaho at 579, 67

[83] The Court also based its decision on violation of the statute of limitations. In doing so, it evaluated two different accrual dates for two distinct claims. One was a tort claim based on the city's failure to recognize that the developer was entitled to rely on a prior zoning certificate obtained from Ada County before the land was annexed. The second was a claim based on the subsequent downzoning by the city after the annexation alleging that the downzone was so severe as to constitute a regulatory taking.

P.3d at 58. In its application to ACHD, the plaintiff agreed to construct the street. The ACHD commissioners and the county commissioners subsequently approved the application and final development plan. *KMST*, 138 Idaho at 579, 67 P.3d at 58. One month after the final development plan was approved, the plaintiff conveyed the street to ACHD by warranty deed and also paid impact fees to ACHD in the amount of $99,127. *KMST*, 138 Idaho at 579, 67 P.3d at 58.

Approximately one year later, the plaintiffs filed an action claiming, among other things, that ACHD's impact fee assessment was excessive and constituted a taking of plaintiffs' property without due process of law. *KMST*, 138 Idaho at 580, 67 P.3d at 59. Specifically, plaintiffs contended that the fee constituted an unconstitutional taking because (1) ACHD used outdated fee tables; (2) it failed to give the plaintiffs any credit for the expense they incurred in designing and constructing the public street; and (3) it failed "to consider the extent to which the street benefited the ACHD's highway system." *KMST*, 138 Idaho at 583, 67 P.3d at 62. The Idaho Supreme Court rejected these arguments stating,

> In this case, the ACHD staff calculated the impact fees for [plaintiffs'] development based upon the fee schedules in the Ordinance. [Plaintiff] did not request an individual assessment of the amount of its impact fees; it did not appeal the calculation of the fees; and it did not pay the fees assessed under protest. It simply paid the impact fees in the amount initially calculated. Having done so, it cannot now claim that the amount of the impact fees constituted an unconstitutional taking of its property.

KMST, 138 Idaho at 583, 67 P.3d at 62.

Therefore, pursuant to the holding in *KMST*, a developer must exhaust all administrative remedies with ACHD *prior* to bringing an action alleging that the impact fee assessment was excessive and constituted an unconstitutional taking.

This holding is consistent with other cases holding that plaintiffs are not required to exhaust administrative remedies when challenging the authority of the governmental entity to act at all. Here, ACHD had authority to impose impact fees. The question was whether the fee imposed was correct. In such cases, exhaustion is clearly required.

E. The exaction cases: *Nollan* and *Dolan*

Often, as a condition to granting a development permit, a government agency will require that the applicant developer perform certain other actions in order to counteract the effects of the proposed development. For example, a landowner might be required to dedicate a portion of her property for use as a road or greenbelt. These

are called "exactions." Such exactions, which are analyzed as regulatory takings, may or may not constitute a taking. "In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking. The question was whether the government could, without paying compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny." *Lingle* at 546-47 (citations omitted). The answer depends on the circumstances.

The most famous exaction cases are *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (Scalia, J.) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (Rehnquist, J.). These cases established the dual principles that an exaction is a unconstitutional taking only if (1) there is no "nexus" between the exaction and a public need created by the development and (2) the exaction is not roughly proportional to impact of the proposed development.

(1) Substantial nexus: *Nollan*

In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (Scalia, J.), the owners of beachfront land situated between two public beaches wanted to rebuild the existing bungalow on the parcel into a three-bedroom house, which would be in conformance with the rest of the neighborhood.

A California statute required the owners to obtain a coastal development permit from the California Coastal Commission before beginning any construction on their parcel. The Coastal Commission granted the owners a construction permit, subject to a requirement that the owners grant the public a lateral easement across the back of the parcel between the high tide line and a seawall. The Coastal Commission justified this requirement by arguing that while the proposed house would not actually restrict the public's beach access, it would serve as a "psychological barrier" to the public because it limited the view of the beach. The owners challenged the permit requirement as a regulatory taking.

The Supreme Court began with the premise that if the government had simply imposed a unilateral requirement on the landowner to convey an easement to the government, that, obviously, would constitute a taking. The Court then inquired whether the fact that the easement requirement was a condition on a permit sought by the landowner changed things. The Court said that would indeed change things (making it not a taking), but only if the government's condition had an "essential nexus" to some public need created by the development. In other words, if the thing that is permitted imposes an unacceptable burden on the community, the government may constitutionally prohibit the action altogether or, in the alternative, it may impose a condition to ease that burden.

In this case, however, the Court found no "essential nexus" between the Coastal Commission's requirement that the Nollans dedicate an easement to the public and any legitimate governmental purpose actually related to the construction of the bungalow. In short, the Court found no plausible connection between the visual impact of the home's expansion and the need for an easement on the other side of the seawall. Accordingly, the Court struck down the permit requirement.

By way of explanation, the Court offered this example of a condition that would have met the nexus requirement:

> Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end.

Nollan at 836.

The point of the Court's somewhat improbable hypothetical seems to be that it is permissible for the government to impose even a rather intrusive condition (dedication of an ocean viewing area) so long as the condition has an essential nexus to the problem caused by the thing that is being permitted. Here, however, there was no nexus, because the condition (providing ocean access) was not aimed at solving the problem caused by the permitted construction (blocked view of the ocean).

(2) Rough proportionality: *Dolan*

Seven years later, the Court decided the case of *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (Rehnquist, J.). In *Dolan*, an Oregon property owner wished to expand her store and pave her parking lot. The City Planning Commission said she could do so only if she dedicated part of her land for a public "greenway." The Commission justified this requirement as a means of minimizing the flooding that would be exacerbated by the increase in water-impervious surfaces associated with the property's development and decreasing downtown traffic congestion by providing for a pedestrian/bicycle pathway.

The property owner challenged the Commission's requirement. The Court found that minimizing the potential for flooding and decreasing traffic were legitimate state interests. The Court also found that the requirement for a greenway would substantially advance these interests. However, despite these findings, the Court held that dedication of a greenway would be a compensable regulatory taking unless the Commission could show on remand that there was a "rough proportionality" between the required dedication and the impact of the proposed development.

Subsequent Supreme Court decisions have made clear that the nexus and rough proportionality requirements articulated in *Nollan* and *Dolan* are limited to exaction cases.[84] The Idaho Supreme Court reached the same conclusion.[85]

Both *Nollan* and *Dolan* rely on *Agins* for the basic principle land use restrictions are not takings is they meet basic tests. "We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" *Nollan*, 483 U.S. at 834 (brackets original) (quoting *Agins*, 447 U.S. at 260). *Agins* was overturned by *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 545 (2005) (O'Connor, J.), but *Nollan* and *Dolan* remain good law.[86] Indeed, the *Lingle* Court specifically said so. "In short, *Nollan* and *Dolan* cannot be characterized as applying

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[84] "Both Nollan and Dolan involved Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Lingle*, 544 U.S. at 546. "[W]e have not extended the rough-proportionality test of Dolan beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) (Kennedy, J.).

[85] "*Dolan* is distinguishable. It involved the reasonableness of conditions exacted on a property owner before the community would grant a building permit." *Sprenger, Grubb & Associates v. Hailey* (*"Sprenger Grubb I"*), 127 Idaho 576, 582, 903 P.2d 741, 747 (1995) (Silak, J.).

[86] The Idaho Supreme Court has recognized *Lingle*'s overruling of *Agins*. *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 847, n.5, 136 P.3d 310, 318, n.5 (2006) (J. Jones, J.).

the 'substantially advances' test we address today, and our decision should not be read to disturb these precedents." *Lingle* at 548.

(3) *Koontz*: The Supreme Court responds to attempts to limit *Nollan-Dolan*

(a) Grant versus denial of permit

In *Koontz v. St John River Water Management District*, the U.S. Supreme Court confirmed and expanded the applicability of its prior holdings in *Nollan* and *Dolan*.

First, the Court tackled the question of whether it made a difference that the permit in *Koontz* was not granted subject to the objectionable condition. Instead, it was denied, because the developer declined to agree to the condition. The majority held that this was no more than a semantic difference and the *Nollan-Dolan* analysis applies the just same.

(b) Dedicatory versus monetary exactions

Another distinction, drawn by some, is that "*Nollan-Dolan* should be limited to dedicatory exactions—that is, exactions that require dedication of land, rather than payment of money—because monetary exactions are somehow more 'benign' than dedicatory exactions." Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513, 1519 (2006). The Supreme Court has not yet spoken on the issue of applying *Nollan* and *Dolan* to monetary exactions, which are also commonly employed by government. Lower courts are split on this issue. The suggest that such a distinction exists has been sharply criticized. Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513 (2006).

This contention was put to rest by the Court in *Koontz*, which said it made no difference whether money or real property was involved. Because the demand for money was tied to a parcel of property (the one for which the land use entitlement is sought) it triggers the Fifth Amendment's protection against takings.

This is hardly a startling proposition. Indeed, it appears that the Idaho Supreme Court has always operated on the same premise—otherwise it would be difficult to explain the outcome in cases like *BHA Investments, Inc. v. City of Boise* ("*BHA I*"), 138 Idaho 356, 63 P.3d 482 (2003) (Schroeder, J.), which found a fee charged for transfer of a liquor license to be a *per se* taking.

(c) User fees and taxes

In addition to its main holdings, the *Koontz* decision contains reinforces a point that may bear on disputes in which user fees have been challenged as unconstitutional takings. This issue was not presented directly by the facts of the

Koontz case. Nevertheless, both the Court addressed the subject in the context of explaining what the decision does and does not do. The majority was very clear: "It is beyond dispute that '[t]axes are . . . not takings." *Koontz,* slip op at 18 (internal quotation and ellipses original). The Court continued, "This case therefore does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners." *Id*. (emphasis supplied).

(d) Administrative versus legislative exactions

There is language in *Dolan*[87] suggesting (to some at least) that the *Nollan-Dolan* analysis is applicable only in the context of so-called administrative (aka quasi-judicial) decision making by local governmental bodies, and that the principles do not apply to legislative actions such as the enactment of impact fee ordinances.

This conclusion was hotly contested in courts and in the law reviews. *E.g.*, Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513 (2006); Christopher T. Goodin (Note), *Dolan v. City of Tigard and the Distinction Between Administrative and Legislative Exactions: "A Distinction Without a Difference*," 28 U. Haw. L. Rev. 139 (2005). The dissent in *Koontz* picked up on this again, but the majority chose to ignore it.

This debate was put to rest in 2024. In *Sheetz v. Cnty. of El Dorado, California*, 601 U.S. 267 (2024), the Supreme Court determined conclusively and unanimously that the *Nollan-Dolan* analysis does apply to legislative exactions. The plaintiff in *Sheetz* owned property that at the time of filing had no improvements. He applied for a building permit to allow the construction of a small, prefabricated (manufactured) home. The county approved the permit but assessed a traffic impact fee of $23,420 pursuant to the county's "General Plan," a legislative enactment by the county's Board of Supervisors that factored in the type of development and the location in the county. Sheetz paid the fee under protest and then sued, arguing that the legislative action instituting the fee was an unconstitutional exaction and that the county must determine the fee based on an individualized determination that the fee amount was necessary to offset the impact of his development. The trial court and

[87] "The sort of land use regulations discussed in the cases just cited . . . differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions f the property to the city." *Dolan*, 512 U.S. at 385. "[I]n evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city." *Dolan*, 512 U.S. at 321 n.8.

the California Court of Appeal rejected his argument, holding that the *Nollan-Dolan* test applied only to permit conditions imposed "on an individual and discretionary basis," not to fees imposed on "a broad class of property owners through legislative action." The California Supreme Court did not grant an appeal.

Resolving a state law split, the U.S. Supreme Court held that "[t]he Constitution's text does not limit the Takings Clause to a particular branch of government,"[88] and that such a distinction was both ahistorical[89] as well as contrary to Supreme Court precedent.[90] The Court remanded to the state courts for ultimate resolution of whether the fee was reasonable under the *Nollan-Dolan* test.

(e) Remedies

We turn now to a procedural point. The *Koontz* Court held that because the permit was denied, no taking occurred under *Nollan-Dolan* for which just compensation is owed. That does not mean that such an applicant is not entitled to appropriate relief for the impairment of its constitutional rights. But whether the applicant is entitled to monetary relief (as opposed to relief aimed at issuance of the permit) is a function of other causes of action. In this case, the applicant framed his case under Florida law. Accordingly, the U.S. Supreme Court remanded for a determination of "what remedies might be available." *Koontz*, slip p. at 11.

F. A regulation may favor one private interest over another

In *Miller v. Schoene*, 276 U.S. 272 (1928), the Supreme Court considered a Virginia statute which required the destruction of all red cedar trees within a prescribed distance of an apple orchard and provided no compensation for this destruction. Virginia had passed the law because many red cedar trees in the state were infected with cedar rust, a disease that is highly destructive to apple orchards. The Court upheld the uncompensated destruction of red cedar trees, holding that the

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[88] *Sheetz v. Cnty. of El Dorado, California*, 601 U.S. 267, 276 (2024) (Barrett, J.).

[89] "…special deference for legislative takings would have made little sense historically, because legislation was the conventional way that governments exercised their eminent domain power. Before the founding, colonial governments passed statutes to secure land for courthouses, prisons, and other public buildings. See, e.g., 4 Statutes at Large of South Carolina 319 (T. Cooper ed. 1838) (Act of 1770) (Cooper); 6 Statutes at Large, Laws of Virginia 283 (W. Hening ed. 1819) (Act of 1752) (Hening). These statutes "invariably required the award of compensation to the owners when land was taken." J. Ely, "That Due Satisfaction May Be Made:" the Fifth Amendment and the Origins of the Compensation Principle, 36 Am. J. Legal Hist. 1, 5 (1992). Colonial practice thus echoed English law, which vested Parliament alone with the eminent domain power and required that property owners receive "full indemnification ... for a reasonable price." 1 W. Blackstone, Commentaries on the Laws of England 139 (1768).

During and after the Revolution, governments continued to exercise their eminent domain power through legislation." *Sheetz* at 277.

[90] *Id.* at 278-79.

state had a right to determine that apple orchards were more important to the state economy than cedars. This was true even though it had the effect of favoring the interests of apple orchard owners over red cedar tree owners.

G. Initiating a takings action (inverse condemnation)

(1) Nature of inverse condemnation

An inverse condemnation case is simply a condemnation case in which the parties are reversed, with the landowner suing the government for compensation (or other relief) resulting from a taking.[91]

As the Court explained in *Rueth v. State* ("*Rueth I*"), 100 Idaho 203, 596 P.2d 75 (1982) (Bistline, J.), *appeal following remand*, *Rueth v. State* ("*Rueth II*"), 103 Idaho 74, 644 P.2d 1333 (1982) (McFadden, J.), an inverse condemnation action finds its basis in the self-executing constitutional provision on takings:

> In *Renninger v. State*, 70 Idaho 170, 213 P.2d 911 (1950) the Court stated tersely but accurately that that action, which sought damages for the permanent although intermittent flooding of the property owners' lands, was in essence "a condemnation suit in reverse." *Id*. at 177, 213 P.2d 911. The final paragraph of that opinion said this: "Because this is, in effect, a condemnation suit and the condemnor must bear all costs, costs are awarded (to) appellants." *Id*. at 179, 213 P.2d at 917. It is clear that the Court there considered that <u>what is now popularly called an action in inverse condemnation</u> is nevertheless a proceeding in eminent domain and the only difference is the reversed alignment of the parties. The Court there noted that "Article 1, Section 14 of the Constitution of Idaho, is mandatory that private property may not be taken until a just compensation, to be ascertained in the manner prescribed by law, is paid." *Id*. at 177, 213 P.2d at 915. The Court there reiterated what an earlier Court

[91] "An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemnor." *Covington v. Jefferson Cnty.*, 137 Idaho 777, 780, 53 P.3d 828, 831 (2002) (Trout, J.). "Inverse condemnation is a taking of private property for a public use without the commencement of condemnation proceedings." *Wadsworth v. Idaho Dep't of Transportation*, 128 Idaho 439, 441, 915 P.2d 1, 3 (1996) (Schroeder, J.). "Inverse condemnation is 'a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.'" *Agins v. City of Tiburon*, 447 U.S. 255, 258 (1980) (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)) (Rehnquist, J.). "Such a suit is 'inverse' because it is brought by the affected owner, not by the condemnor." *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 n. 6 (1984) (Marshall, J.).

> had said in *Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 722 (1931), that this constitutional provision is self-executing, that is, " 'No action of the Legislature further than providing the procedural machinery by which the right may be applied is necessary.'" *Id.*, 70 Idaho at 177, 213 P.2d at 915. The import of that holding is clear. Both the right to condemn and the right of the condemnee to just compensation are granted, not by the legislature, but by the Constitution. The Court in *Renninger*, supra, repeated the holding from *Bassett*, supra, that " 'whether or not a right claimed under this provision of the Constitution is within the grant Is held to be a judicial question to be determined by the courts.'" *Id*. at 177, 213 P.2d at 915. In the ordinary situation the constitutional right to condemn is exercised by the party seeking to take private property. In the "reverse" situation the constitutional right to be paid just compensation is exercised by the property owner who brings the action, alleging that his property rights have been taken without payment.

Rueth I, 100 Idaho at 217-18, 596 P.2d at 89-90 (emphasis supplied).

The U.S. Supreme Court offered this commentary on the nature of inverse condemnation and the origin of the term, which is entirely consistent with what the Idaho Supreme Court has said:

> Although a landowner's action to recover just compensation for a taking by physical intrusion has come to be referred to as "inverse" or "reverse" condemnation, the simple terms "condemn" and "condemnation" are not commonly used to describe such an action. Rather, a "condemnation" proceeding is commonly understood to be an action brought by a condemning authority such as the Government in the exercise of its power of eminent domain . . . .
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> . . . The phrase "inverse condemnation" appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted. As defined by one land use planning expert, "[i]nverse condemnation is '*a cause of action against a governmental defendant* to recover the value of property which has been taken in fact

> by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'" D. Hagman, *Urban Planning and Land Development Control Law* 328 (1971) (emphasis added). A landowner is entitled to bring such an action as a result of "the self-executing character of the constitutional provision with respect to compensation. . . ." *See* 6 P. Nichols, *Eminent Domain* § 25.41 (3d rev. ed. 1972). A condemnation proceeding, by contrast, typically involves an action by the condemnor to effect a taking and acquire title. The phrase "inverse condemnation," as a common understanding of that phrase would suggest, simply describes an action that is the "inverse" or "reverse" of a condemnation proceeding.

United States v. Clarke, 445 U.S. 253, 255-57 (1980) (Rehnquist, J.) (emphasis original).

Idaho first recognized a cause of action for inverse condemnation in *Boise Valley Const. Co. v. Kroeger*, 17 Idaho 384, 105 P. 1070 (1909) (Ailshie, J.). It continues to recognize the action. "A property owner who believes that his or her property, or some interest therein, has been invaded or appropriated to the extent of a taking, but without due process of law and the payment of compensation, may bring an action for inverse condemnation." *KMST, LLC v. Cnty. of Ada*, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003) (Eismann, J.).

To support a claim for inverse condemnation, "the action must be: (1) instituted by a property owner who (2) asserts that his property, or some interest therein, has been invaded or appropriated (3) to the extent of a taking, (4) but without due process of law, and (5) without payment of just compensation." *Covington v. Jefferson Cnty.*, 137 Idaho 777, 780, 53 P.3d 828, 831 (2002) (Trout, J.).

An inverse condemnation action begins like all other civil matters with a complaint and summons. "[T]he determination of whether or not there was a taking is a matter of law to be resolved by the trial court." *Covington*, 137 Idaho 777, 880, 53 P.3d 828, 831 (2002) (Trout, J.) (quoting *Tibbs v. City of Sandpoint*, 100 Idaho 667, 670, 603 P.2d 1001, 1004 (1979) (Thomas, J. pro tem.)).

"[A]ll issues regarding inverse condemnation are to be resolved by the trial court, except the issue of what is just compensation. Once the trial court has made the finding that there is a taking of the property, the extent of the damages and the measure thereof are questions for the jury." *Covington*, 137 Idaho at 880, 53 P.3d at 831 (citing *Rueth v. State* ("*Rueth II*"), 103 Idaho 74, 79, 644 P.2d 1333, 1338 (1982) (McFadden, J.)).

(2) Standing

See discussion of standing in inverse condemnation cases in Volume 1 of this Handbook.

(3) Remedies in takings cases

The most common remedy sought in inverse condemnation cases is damages, but there may be other remedies available depending on the facts of an individual case. For instance, the property owner may seek an injunction to prevent a recurring government action (*e.g.*, flooding of property) from taking place in the future. In still other cases, a property owner may be able to recover possession of his land in ejectment proceedings (i.e., where the government occupies or takes private property without a proper public purpose).

However, efforts to re-characterize takings as damage claims for equitable or declaratory relief in order to avoid *Williamson County* had not been well received. The plaintiffs in *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 383 (9th Cir. 2002), *cert. denied*, 537 U.S. 973, argued they were not subject to *Williamson County* because they were seeking injunctive and declaratory relief, not damages. The *Daniel* court recognized an exception to the requirement to employ state inverse condemnation proceedings (where the plaintiff is making a facial challenge to a municipal ordinance), but found it not applicable there. Where a regulatory exaction is alleged to be a taking, the remedy is not to stop the exaction, but to make the government pay for it. Thus declaratory and injunctive relief is inappropriate. *Daniel*, 288 F.3d at 385.

(4) Role of judge and jury

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (Kennedy, J.), the U.S. Supreme Court upheld a jury's award of $1.45 million in damages in a § 1983 action[92] to a property owner who claimed it had been denied all economically viable use of its property. The award was based on a "temporary taking."[93] The case focused on issue of the right to jury trial, holding 1983 actions for damages are common law actions within the meaning of the Seventh Amendment. The Court upheld the jury's finding that the repeated roadblocks thrown up by the city made it clear, as a practical matter, that the plaintiff would never be allowed to develop the property. The case was couched, in part, in *Agins'* language (jury instruction on whether the project substantially advanced a legitimate project purpose). That part of the case is no longer good law, in light of *Lingle*.

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[92] Civil Rights Act, 42 U.S.C. § 1983.

[93] The Court had little to say about why this was a temporary, rather than a permanent, taking. We presume it was because, during the course of the litigation, the State of California purchased the property from the landowners. *Del Monte Dunes* at 700.

However, the case's basic message remains viable: abusive treatment of land use applicants may subject municipalities to liability, and that a jury may get to make the call under a § 1983 challenge.

In contrast, the Idaho Supreme Court declared that "all issues regarding inverse condemnation are to be resolved by the trial court, except the issue of what is just compensation." *Covington v. Jefferson Cnty.*, 137 Idaho 777, 780, 53 P.3d 828, 831 (2002). "[T]he question whether a regulatory taking has occurred is committed to the trial court; just compensation is a matter for the jury." *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 854, 136 P.3d 310, 325 (2006) (J. Jones, J.).

(5) Exhaustion

See discussion of exhaustion in Volume 1 of this Handbook.

H. Procedural limitations on federal inverse condemnation actions

NOTE: *Williamson County* was overturned in a five to four decision by *Knick v. Township of Scott, Pennsylvania*, 2019 WL 2552486 (S. Ct. June 21, 2019) (Roberts, C.J.).

(1) *Williamson County* ripeness ("final decision" and "state remedies")

In 1985, the U.S. Supreme Court decided *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (Blackmun, J.), a pivotal case setting up new roadblocks for plaintiffs pursuing federal taking claims. The decision laid down two significant procedural requirements for regulatory taking claims under federal law, requiring that they be ripe in the sense that (1) the agency "has arrived at a final, definitive position regarding how it will apply the regulations at issue"[94] and (2) the plaintiff has first utilized all available state procedures for recovery of compensation. It bears emphasis that, while the Court employed the term "ripeness" in describing these two tests, it did not mean ripeness in the ordinary sense. This is a special variant of ripeness applicable only to federal taking claims.

Williamson County was not an exactions case. Rather, it was a regulatory takings case of the *Lucas* variety involving a downzoning that allegedly deprived the plaintiff of all economically viable use of the property. *Williamson County*, 473 U.S. at 182-83, 191. The plaintiff was the successor to the developer of a residential subdivision in Tennessee. In 1973, the developer obtained approval of a preliminary plat authorizing construction of 736 homes in Temple Hills Country Club Estates. In 1977, before the final plat was submitted, the local planning and zoning entity

[94] *Williamson County*, 473 U.S. at 191.

amended and toughened the zoning ordinance, resulting in a substantial reduction in the number of lots allowed. Applying the revised ordinance, the planning commission then disapproved a revised preliminary plat.

The developer's successor brought a § 1983[95] action in federal court alleging, among other things, a taking of the property.[96] The focus of the argument at trial and on appeal was whether temporary takings are compensable. The U.S. Supreme Court, however, changed course and threw the case out on procedural grounds.[97]

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[95] Section 1983 refers to the Civil Rights Act of 1871, 17 Stat. 13, now codified at 42 U.S.C. § 1983.

[96] The *Williamson County* plaintiff also alleged violations of equal protection and substantive and procedural due process. Those theories were not pursued on appeal. *Williamson County*, 473 U.S. at 182 n.4. The great majority of subsequent courts have held that taking claims may not be re-packaged as due process or equal protection claims; they remain subject to *Williamson County* no matter the label. *E.g., Acierno v. Mitchell*, 6 F.3d 970 (3d Cir. 1993); *Taylor Inv., Ltd. v. Upper Darby Tp.*, 983 F.2d 1285 (3d Cir. 1993); *Unity Ventures v. Lake Cnty.*, 841 F.2d 770 (7th Cir. 1988); *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173 (D. Kan. 1999); *Shelter Creek Development Corp. v. City of Oxnard*, 838 F.2d 375 (9th Cir. 1988); *Herrington v. Sonoma Cnty.*, 834 F.2d 1488, (9th Cir. 1987), *opinion amended on denial of reh'g*, 857 F.2d 567 (9th Cir. 1988); *Celentano v. City of West Haven*, 815 F. Supp. 561 (D. Conn. 1993); *Seguin v. City of Sterling Heights*, 968 F.2d 584 (6th Cir. 1992); *Forseth v. Village of Sussex*, 20 F. Supp. 2d 1267 (E.D. Wis. 1998), *aff'd in part, rev'd in part on other grounds*, 199 F.3d 363 (7th Cir. 2000); *Forseth v. Village of Sussex*, 199 F.3d 363 (7th Cir. 2000); *Sameric Corp. of Delaware, Inc. v. City of Philadelphia*, 142 F.3d 582 (3d Cir. 1998); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994); *Gamble v. Eau Claire Cnty.*, 5 F.3d 285 (7th Cir. 1993); *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84, 95 (2d Cir. 1992); *Front Royal and Warren Cnty. Indus. Park Corp. v. Town of Front Royal, Va.*, 922 F. Supp. 1131, 1150 n.26 (W.D. Va. 1996), *rev'd*, 135 F.3d 275 (4th Cir. 1998); *Glendon Energy Co. v. Borough of Glendon*, 836 F. Supp. 1109 (E.D. Pa. 1993); *Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988); *John Corp. v. City of Houston*, 214 F.3d 573 (5th Cir. 2000); *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173 (D. Kan. 1999); See Note, *Determining Ripeness of Substantive Due Process Claims Brought by Landowners Against Local Governments*, 95 Mich. L. Rev. 492 (1996); Note, *The Applicability of Just Compensation to Substantive Due Process Claims*, 100 Yale L.J. 2667 (1991); *Seeking of variance as prerequisite for ripeness of challenge to zoning ordinance under due process clause of Federal Constitution's Fifth and Fourteenth Amendments—post-Williamson cases*, 111 A.L.R. Fed. 483. On the other hand, some courts have found exceptions to *Williamson County* for truly different claims, such as actions based on race or retaliation. *E.g., Flying J Inc. v. City of New Haven*, 549 F.3d 538, 543-44 (7th Cir. 2008) ("conduct that evidences a spiteful effort to 'get' him for reasons unrelated to any legitimate state objective" creates a *bona fide* equal protection exception to the *Williamson County*, ripeness requirement); see *Federal Land Use Law & Litigation* § 12:25 (2015).

[97] The trial court issued an injunction ordering the planning commission to apply the 1973 ordinance but rejected the jury's award of $350,000 for a temporary taking. The planning commission did not appeal the ruling that it must apply the 1973 ordinance. Instead, the plaintiff appealed the judgment notwithstanding the verdict as to the temporary taking. On appeal, the Sixth Circuit reinstated the award for a temporary taking. On certiorari to the U.S. Supreme Court, the planning commission contended that even if it should have applied the 1973 ordinance, its failure to do so constituted, at most, a temporary regulatory interference that, even if it is a taking, it does not

(a) Applicable to all takings

Williamson County is often thought of (and spoken of) as applying to takings arising out of local land use actions. Indeed, *Williamson County* arose in such a context, and the huge majority of cases applying it involve such regulatory takings. However, nothing in the decision limits its applicability to any particular class of takings. As discussed below, the prong one (the first of two ripeness tests) applies only to regulatory takings (as opposed to physical takings). But prong two—requiring the plaintiff to employ available means to obtain compensation—is premised on the Court's textual reading of the Fifth Amendment, and it applies to all takings.

While the great majority of *Williamson County* cases involve challenges to state or local government actions alleged to be takings, *Williamson County* applies as well to federal governmental actions. In that context, however, the prong two requirement that available state remedies for just compensation be employed is transmuted into a requirement that the plaintiff first seek relief in the Claims Court under the Tucker Act, unless another statute withdraws Tucker Act jurisdiction. *Horne v. Department of Agriculture*, 133 S. Ct. 2053, 2062-63 (2013).

(b) Prong one: Final decision

First, the Court held that in order to be ripe for judicial consideration, the challenged decision must be a "final decision":

> As this Court has made clear in several recent decisions, a claim that the application of governmental regulations effects a taking of property is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding application of the regulations to the property at issue.

Williamson County, 473 U.S. at 186.[98]

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give rise to a claim for money damages. The Supreme Court did not reach the planning commission's argument, instead finding that the plaintiff's claim was not ripe.

[98] Although not mentioned by the Court, the decision in *Williamson County* was foreshadowed by its earlier decision in the famous *Penn Central* case, which spoke of the plaintiff's failure to explore other options for a less intrusive building:

> Appellants, moreover, exaggerate the effect of the law on their ability to make use of the air rights above the Terminal in two respects. First, it simply cannot be maintained, on this record, that appellants have been prohibited from occupying any portion of the airspace above the Terminal. While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a

Although the local planning commission had squarely rejected the revised preliminary plat and, apparently, no further administrative appeal was available,[99] that was not final enough, said the Court, because the developer had failed to seek a variance. Instead of seeking a variance under the new ordinance the developer filed suit, insisting that the planning commission should have applied an earlier zoning ordinance. The Court explained why requiring the plaintiff to probe the decision maker in this way is a fundamental prerequisite to a takings claim:

> Thus, in the face of respondent's refusal to follow the procedures for requesting a variance, and its refusal to provide specific information about the variances it would require, respondent hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision that no variances would be granted.
>
> As in *Hodel*, *Agins*, and *Penn Central*, then, respondent has not yet obtained a final decision regarding how it will be allowed to develop its property. Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. . . . Those factors [which determine whether there has been a taking] simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

> certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit any construction above the Terminal. The Commission's report emphasized that whether any construction would be allowed depended upon whether the proposed addition "would harmonize in scale, material and character with [the Terminal]." Record 2251. Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal.

Penn Central Transp. Co. v. New York City, 438 U.S. 104, 136-37 (1978) (Brennan, J.) (footnote omitted) (brackets original). The *Penn Central* connection to *Williamson County* was discussed by the Idaho Supreme Court in *Hehr v. City of McCall*, 155 Idaho 92, 97-98, 305 P.3d 536, 543-44 (2013) (Burdick, C.J.) (finding that the developer failed both prongs of the ripeness test).

[99] Tennessee has a quirky planning and zoning system with authority split between counties and regional and municipal planning commissions. The developer had previously appealed from the regional planning commission to the county board of zoning appeals, but the regional planning commission later determined that the county had no jurisdiction to entertain the appeal. *Williamson County*, 473 U.S. at 180-82.

Williamson County, 473 U.S. at 190-91 (emphasis supplied) (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) (Marshall, J.); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (Powell, J.); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (Brennan, J.)). Note that this principle is based on the Constitution itself and not on something in § 1983.

These are not, by the way, traditional Article III or prudential ripeness tests. Rather, they are special ripeness tests for federal taking claims. Frankly, they sound more like exhaustion, but the Supreme Court has made clear that they are not. Indeed, the Court took pains to explain that it was requiring ripeness (aka "finality"), not exhaustion.

> While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Williamson County, 473 U.S. at 193 (emphasis supplied).

This mattered, because, under *Patsy v. Bd. of Regents of the State of Florida*, 457 U.S. 496 (1982), § 1983 litigants are not required to exhaust administrative remedies.[100] Thus, for instance, a landowner would not be required to bring a declaratory judgment action challenging the validity of the zoning ordinance or to bring an appeal to the Board of Zoning Appeals, "because those procedures are clearly remedial" and have nothing to do with the finality of the decision rendered. *Williamson County*, 473 U.S. at 193.[101] The Court explained:

> Resort to those procedures [seeking declaratory judgment] would result in a judgment whether the Commission's actions violated any of respondent's rights. In contrast, resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent

[100] The Court made clear that the ripeness tests apply because of the nature of the taking claims. *Williamson County*, 473 U.S. at 190-91. In other words, they do not apply because of § 1983. Rather, they apply in spite of § 1983.

[101] See *Montgomery v. Carter Cnty.*, 226 F.3d 758 (6th Cir. 2000), for further explanation of the difference between exhaustion and ripeness in this context.

> proposed. The Commission's refusal to approve the preliminary plat does not determine that issue; it prevents respondent from developing its subdivision without obtaining the necessary variances, but leaves open the possibility that respondent may develop the subdivision according to its plat after obtaining the variances.

Williamson County, 473 U.S. at 193-94 (emphasis supplied).

Notwithstanding the Supreme Court's characterization of these as ripeness tests, other courts from time to time have referred to them as exhaustion requirements.[102] At the end of the day it makes no difference what they are called. Their effect is to block the litigation.

In *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997) (Souter, J.), the Court recognized that there are limits to the requirement of finality. (*Suitum* dealt only with the first prong of *Williamson County*. *Suitum*, 520 U.S. at 734.) The plaintiff owned an undeveloped lot near Lake Tahoe. The planning agency determined that the lot was not eligible for any development, but the landowner would be entitled to receive and to sell certain TDRs (transferable development rights). Rather than seeking to use the TDRs, which she described as an "idle and futile act," Ms. Suitum sued claiming a taking. *Suitum* at 732. The Supreme Court reversed the lower courts, finding that the landowner's claim satisfied the finality requirement of *Williamson County* even she did not receive a final agency decision as to the transfer of her TDRs. (It did not reach the merits, but remanded for further proceedings.)

In *Suitum*, prong one was satisfied because a decision on the sale of TDRs is not "the type of 'final decision' required by our *Williamson County* precedents," *Suitum* at 739, and there was "no question here about how the regulations at issue [apply] to the particular land in question," *Suitum* at 739 (quoting *Williamson County*, brackets original). "Because the agency has no discretion to exercise over Suitum's right to use her land, no occasion exists for applying *Williamson County*'s requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel." *Suitum*, 520 U.S. at 739.[103]

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[102] *E.g.*, *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 93-94 (1st Cir. 2003), *cert. denied*, 540 U.S. 1090 (2003); *Harbours Pointe of Nashotah, LLC v. Village of Nashotah*, 278 F.3d 701, 706 (7th Cir. 2002); *Hehr v. City of McCall*, 155 Idaho 92, 98, 305 P.3d 536, 542 (2013) (Burdick, C.J.); *Kurtz v. Verizon New York, Inc*., 758 F.3d 506, 513-14 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1156, 190 L. Ed. 2d 912 (2015).

[103] In passing, the *Suitum* Court described the *Williamson County* ripeness tests as "prudential" in nature. *Suitum* at 733. But it did not explain how that affected the decision, and it does not appear that it did. Indeed, the Court did not rely on the prudential nature of the tests to

While *Williamson County* dealt with the failure to seek a variance, the holding is equally applicable in other contexts. For example, it would presumably apply to the failure to appeal a planning and zoning decision to the city council or county commission.[104] The Idaho Supreme Court has had occasion to apply prong one of *Williamson County* in a handful of land use cases.

In KMST, LLC v. Cnty. of Ada, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003) (Eismann, J.), the Idaho Supreme Court rejected a challenge to the Ada County Highway District ("ACHD") under the first prong of *Williamson County* It held that the inverse condemnation action against ACHD not ripe because the objectionable requirement was merely recommended by ACHD, which lacked final authority to impose the requirement. The plaintiff should have challenged Ada County's adoption of ACHD's recommendation for the dedication of a street as a condition of approval.

In *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 845-46, 136 P.3d 310, 316-17 (2006) (J. Jones, J.), the Idaho Supreme Court applied the *Williamson County* ripeness requirement, despite the fact that neither side had raised it. It found *Palazzolo* futility exception was applicable to the first prong; plaintiffs were not required to seek a variance where none would have been granted.

In *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.), the City of McCall required a developer to provide affordable housing as a condition of development approval. When the affordable housing ordinance was overturned in separate litigation (*Mountain Central Bd. of Realtors, Inc. v. City of McCall*, Case No. CV 2006-490-C (Idaho, Fourth Judicial Dist., Feb. 19, 2008) (Thomas F. Neville, J.)), the city released the developer from its obligations. By that time, however, the housing market had crashed and the developer was left holding an apartment building (the Timbers) that it had acquired to meet the requirement. The Court ruled that the developer failed the final decision

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avoid applying them. To the contrary, it applied prong one (the only one at issue) and found that it was satisfied.

[104] In discussing the difference between ripeness and exhaustion, the Court noted: "Similarly, respondent would not be required to appeal the Commission's rejection of the preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decisionmaking." *Williamson County*, 473 U.S. at 193. This example, however, is limited to Tennessee's peculiar appeal mechanism in which the Board sits in the nature of an appellate body. In Idaho, where cities and counties have the authority to not only reverse the planning and zoning commission but to modify that decision, such an appeal presumably would be necessary in order to satisfy *Williamson County*'s "final decision" requirement. This nuance, however, appears to have been overlooked by the Ninth Circuit in *Hacienda*. "In *Williamson County* the Supreme Court made it clear that resort beyond the 'initial decision-maker' is not necessary to fulfill the final decision prong of the ripeness analysis." *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 657 (9th Cir. 2003).

prong of the *Williamson County* test by failing to explore other options for meeting the requirement.

> There is nothing in the record to indicate any action by McCall that would constitute a final decision regarding the application of Ordinance 819 to Alpine's development. Although Alpine initially proposed an alternative to satisfy the ordinance, there is no evidence that Alpine challenged the purchase of the Timbers to the county or the city. For this reason, it is unclear how McCall would have responded. Like in *Penn Central*, the absence of such a challenge means this Court does not have the benefit of a final decision, and the federal claims are unripe under the first prong of the *Williamson County* ripeness test.

Alpine Village, 154 Idaho at 938, 303 P.3d at 625. (The Court went on to award attorney fees to the city.)

The take home message is that if the planning entity imposes requirements that are thought to be unlawful, the applicant should speak up and explore whether an accommodation can be achieved.

(c) Prong two: Failure to timely pursue state remedies

(i) Federal action premature until state remedy pursued and denied

The second holding in *Williamson County*, also framed in terms of ripeness, is even more restrictive. Prong two requires that, before pursuing a federal taking claim, the plaintiff must first (or, in some cases, simultaneously) pursue any available state law remedy and be denied relief by the state.

Note that in cases involving federal governmental actions, this requirement is transmuted into a requirement to seek relief under the Tucker Act (see discussion in section 29.H(1)(a) at page 139).

As a practical matter, it bars litigation involving federal regulatory taking claims aimed at state or local governments in jurisdictions like Idaho where state remedies for takings are available. The *Williamson County* Court held that when a federal regulatory taking is alleged against a state or local government agency, the property owner must first "seek compensation through the procedures the State has provided for doing so" before pursuing the federal taking claim. *Williamson County*, 473 U.S. at 194.

> Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491. [Citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-20 (1984).] Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Williamson County, 473 U.S. at 195. The Court further explained:

> Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not "complete" until the State fails to provide adequate compensation for the taking.

Williamson County, 473 U.S. at 195.

In other words, where state courts will entertain actions under state law to address the alleged taking, the landowner must avail itself of that remedy (and be denied) before pursuing the federal taking claim[105]—unless doing so would be futile.[106] This is necessary, the Court explained, because the Just Compensation Clause does not prohibit takings. It simply prohibits takings without just compensation. Thus, it is necessary to turn first to the state to see if compensation will be granted. *Williamson County*, 473 U.S. at 194-95.

Although this case was brought under § 1983, the holding is not premised on that statute. Rather, the ripeness requirements arise out of the Constitution itself: "The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." *Williamson County*, 473 U.S. at 195. Thus, it would seem that the *Williamson County* ripeness

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[105] As discussed elsewhere, if the litigation is pursued in state court, the state and federal claims may be presented in the same complaint, thus allowing the state court to take up the state claim first and then to consider the federal claim if the state claim fails. However, the state claim must be timely presented. The federal claim cannot be ripened by including an untimely state claim.

[106] *Williamson County* requires use of state procedures only where "the [state] government has provided an adequate process for obtaining compensation." *Williamson County*, 473 U.S. at 194. The Ninth Circuit has read into this a futility test. The futility test, however, is a difficult one. *E.g.*, *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 658-61 (9th Cir. 2003) (rejecting plaintiff's argument that resort to California courts would have been futile in a regulatory taking case).

requirements would be applicable even if the Court held that federal takings claims could be made directly under the Constitution.

The prong two principle was reiterated in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999) (Kennedy, J.): "A federal court, moreover, cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy."

(ii) Forfeiture of federal claim

Prong two is more than a sequencing requirement (requiring that the state law claim be brought first or simultaneously with the federal claim in state court). Where a plaintiff fails to pursue an available state remedy that is now time-barred under state law, federal claim not ripe and can never become ripe. Consequently, it is forfeited altogether.

"[W]hile the *Williamson County* requirements typically reveal a claim to be premature, they may also reveal that a claim is barred from the federal forum." *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 95 (1st Cir. 2003), *cert. denied*, 540 U.S. 1090 (2003).[107] In other words, *Pascoag* recognized that where it is too late to go back to ripen a federal claim in state court, the federal claim is forfeited altogether.

In *Pascoag*, the State of Rhode Island sued in state court to quiet title to land and lake access on a privately owned reservoir based on adverse possession. When the State prevailed in the state quiet title action, the reservoir owner brought a new suit in federal court alleging that the adverse possession amounted to an uncompensated taking under the federal Constitution (among other claims). The First Circuit found it unnecessary to resolve the question of whether adverse possession can give rise to a right of compensation, because the case was not ripe under prong two of *Williamson County*. *Pascoag* at 90.[108] It was not ripe, because Pascoag failed to bring a state law inverse condemnation action within the state's statute of limitation.

> As the Rhode Island Supreme Court noted, there is a fatal flaw in Pascoag's claim: it is too late for any state law cause of action. *Williamson County* requires the pursuit of state remedies before a taking case is heard in federal

[107] *Pascoag* was emphatically affirmed in *Downing/Salt Pond Partners, L.P. v. Rhode Island and Providence Plantations*, 643 F.3d 16 (1st Cir. 2011).

[108] As for the merits of Pascoag's claim, the author of this section of the Handbook would opine that such a claim is ludicrous and contrary to the whole idea of adverse possession, which is that the adverse user obtains the property for free. For a contrary view, see Martin J. Foncello [Comment], *Adverse Possession and Takings Seldom Compensation for Chance Happenings*, 35 Seaton Hall L. Rev. 667 (2005).

> court. Adequate state remedies were available to Pascoag; it simply ignored those remedies until it was too late. By failing to bring a timely state cause of action, Pascoag forfeited its federal claim.

Pascoag, 337 F.3d at 94.

Noting that the case involved a physical taking, the First Circuit did not apply the first prong of *Williamson County*. However, it applied the second prong. *Pascoag* at 91-92 (citing *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1281 n.28 (9th Cir. 2002); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989), *overruled on other grounds by Armendariz v. Penman*, 75 F.3d 1311, 1326 (9th Cir. 1996) (en banc)). It ruled that by bringing suit in federal rather than state court, Pascoag failed to ripen its claim under prong two.

Pascoag contended that it should be excused (under the *Palazzolo* futility exception) from the requirement to first pursue a state remedy, because its state law remedy had lapsed under the statute of limitations. The court rejected that argument.

> If the futility rule were read this broadly it would swallow the general rule of state remedy exhaustion. Like the other exceptions, the futility exception must consider the landowner's available state remedies at the time of the taking. . . . There is no evidence that the state would not have been receptive to Pascoag's claim had it been brought at the time the property was taken . . . .

Pascoag, 337 F.3d at 93-94.

As a result, the federal claim could never be ripened:

> Adequate state remedies were available to Pascoag; it simply ignored those remedies until it was too late. By failing to bring a timely state cause of action, Pascoag forfeited its federal claim.

Pascoag, 337 F.3d at 94.

> [W]hile the *Williamson County* requirements typically reveal a claim to be premature, they may also reveal that a claim is barred from the federal forum. The *Williamson County* 'ripeness' requirements will never be met in this case, because the state statute of limitations has run on Pascoag's inverse condemnation claim. By failing to bring its state claim within the statute of limitations period, Pascoag *forfeited* its federal claim.

Pascoag, 337 F.3d at 95 (citations omitted, emphasis original).

Similarly, in *Harbours Pointe of Nashotah, LLC v. Village of Nashotah*, 278 F.3d 701 (7th Cir. 2002), the court threw out a federal taking claim for failure to satisfy prong two of *Williamson County*. In 1980, the village began imposing "reserve capacity assessments" to pay for construction of a local sanitary sewer system. It appears that the assessments were initially imposed on "every parcel of land in Village." *Harbours Point* at 702. However, after the Village collected sufficient funds to retire the debt, it continued to collect the fees "from developers in the Village." *Harbours Point* at 703. In 1996, the plaintiff acquired property which had never paid the assessments. In connection with development of the property, the plaintiff entered into a Developer's Agreement with the village agreeing to pay the sewer assessment. Over a year later, the developer later sued the village in a § 1983 action in state court, complaining that the village failed to adopt an "impact ordinance" and that the assessment was therefore an unlawful taking. The village removed the case to federal court. *Harbours Pointe* at 703. The Seventh Circuit affirmed the district court's ruling that the plaintiff failed to employ an adequate state remedy—a statute authorizing challenges to assessments within 90 days of entering into the Developer's Agreement. As a result, it failed to ripen that thereby forfeited its federal taking claim.

> A property owner cannot "let the time for seeking a state remedy pass without doing anything to obtain it and then proceed in federal court on the basis that no state remedies are open." *Gamble*, 5 F.3d at 286. An unexcused failure to exhaust adequate statutory remedies forfeits a claimant's rights. *Id.* Because Harbours Pointe waited nineteen months after receiving notice of the assessment and then filed a complaint on July 16, 1998, it is now barred from recovering any refund from the Village. Harbours Pointe failed to pursue its state remedies in a timely fashion and has forfeited its right to assert a claim for just compensation under either Wisconsin or federal law. *Id.*

Harbours Pointe at 706 (citing *Gamble v. Eau Claire Cnty.*, 5 F.3d 285 (7th Cir. 1993)).

Both *Pascoag* and *Harbours Pointe* relied on *Gamble v. Eau Claire Cnty.*, 5 F.3d 285 (7th Cir. 1993). That case, like *Pascoag*, involved a blown statute of limitations on the state inverse condemnation claim (as well as failure to seek judicial review of a land use decision), resulting in forfeiture of the federal takings claim. "By booting her state compensation remedies she forfeited any claim based on the takings clause to just compensation." *Gamble* at 286.

A Ninth Circuit decision reached the same conclusion in 2002. *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 381 & 382 (9th Cir. 2002), *cert. denied*, 537 U.S. 973. The court noted:

> Assuming that adequate state procedures were available to seek such compensation, the failure of Johnson and the Bucklews to seek just compensation meant that they never created ripe federal takings claims. The failure of Johnson and the Bucklews to use such state procedures cannot now be cured because the applicable state limitation periods have long since expired.

Daniel at 381 (emphasis supplied).

In Idaho, an inverse condemnation based on a denial or restrictive approval of a land use application is pursued by seeking judicial review of the decision within 28 days of the adverse decision. If the governmental action complained of is not appealable under LLUPA, inverse condemnation may be pursued by filing a complaint against the local government.[109] In addition, the litigant could seek a "regulatory taking analysis" under Idaho Code § 67-8003(2).

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[109] Idaho first recognized a cause of action for inverse condemnation in *Boise Valley Const. Co. v. Kroeger*, 17 Idaho 384, 105 P. 1070 (1909). As our Supreme Court explained in 1950:

> In essence, this is a condemnation suit in reverse. The State took appellants' land without paying for it and now contends, because of interposed immunity of the State, appellants may not recover herein.
>
> Article 1, Section 14 of the Constitution of Idaho, is mandatory that private property may not be taken until a just compensation, to be ascertained in the manner prescribed by law, is paid. This Section is self-executing:
>
> "This provision of our Constitution to the extent of establishing the nature of the use required has been held to be self-executing and constitutes a grant of the power of eminent domain in behalf of the uses therein expressed. No action of the Legislature further than providing the procedural machinery by which the right may be applied is necessary. his is provided by the special proceedings in eminent domain enacted by the Legislature, and whether or not a right claimed under this provision of the Constitution is within the grant is held to be a judicial question to be determined by the courts." *Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 722, 725 [(1931)].

Renninger v. State, 70 Idaho 170, 177, 213 P.2d 911, 915 (1950) (Givens, J.).

The Court continues to recognize the action. "A property owner who believes that his or her property, or some interest therein, has been invaded or appropriated to the extent of a taking, but without due process of law and the payment of compensation, may bring an action for inverse condemnation." *KMST, LLC v. Cnty. of Ada*, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003) (Eismann, J.). To support a claim for inverse condemnation, "the action must be: (1) instituted by a property

Under *Williamson County*, this becomes a prerequisite to a federal court action alleging a taking. However, both state and federal taking claims may be pursued simultaneously in a timely state action. Subsequent cases, notably *San Remo Hotel, L.P. v. City and Cnty. of San Francisco*, 545 U.S. 323 (2005) (Stevens, J.), have made clear that the plaintiff can (and, under *Williamson County*, must) bring the federal claims in state court. In other words, *Williamson County* does not require the plaintiff to pursue state substantive remedies (*e.g.*, its state constitutional claims) first. The federal remedy may be pursued from the outset, so long as it is pursued in state court.

In *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.), the Idaho Supreme Court applied the forfeiture principles of *Pascog* even though it did not cite those cases. The *Alpine Village* Court rejected a lawsuit under prong two of *Williamson County* because the plaintiff failed to seek relief under either the Idaho Regulatory Takings Act or LLUPA within 28 days. The Court said:

> In response, McCall argues that state law provides Alpine with a means of challenging a taking through judicial review under the Local Land Use Planning Act (LLUPA) and that Alpine failed to use it. Additionally, McCall argues that any plaintiff that fails to timely file a state takings claim can never satisfy this prong of *Williamson County*.
>
> The Local Land Use Planning Act (LLUPA) provides an avenue to evaluate certain proposed regulatory or 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.

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owner who (2) asserts that his property, or some interest therein, has been invaded or appropriated (3) to the extent of a taking, (4) but without due process of law, and (5) without payment of just compensation." *Covington v. Jefferson Cnty.*, 137 Idaho 777, 780, 53 P.3d 828, 831 (2002). For further discussion of inverse condemnation, see section 29.G at page 133.

> I.C. § 67–8003; *see also Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 496, 300 P.3d 18, 28 (2013). Alpine did not seek judicial review under this statute. Alpine correctly notes an exception in I.C. § 67–6521(2)(b) which allows a legal action under Article I, Section 14 of the Idaho Constitution. But this exception requires "a final action restricting private property development" and as discussed above there was no final action in this matter. Therefore, we hold that the second prong of the *Williamson County* ripeness test has not been satisfied and that Alpine's federal claims are not ripe.

Alpine Village, 154 Idaho at 939, 303 P.3d at 626 (emphasis supplied). In sum, where there is an opportunity to present a state law takings claim through judicial review and the plaintiff fails to make timely use of it and that avenue is no longer available, the plaintiff forfeits the federal claim.

In *Hehr v. City of McCall*, 155 Idaho 92, 305 P.3d 536 (2013) (Burdick, C.J.), the Court found that a developer's taking claim against the City of McCall failed both prongs of the *Williamson County* test, this time citing both *Pascoag* and *Harbours Point*. The problem under prong two was the developer's failure to seek a regulatory taking analysis:

> Greystone filed permit applications with McCall for a subdivision and a planned unit development. Under the Local Land Use Planning Act (LLUPA) provisions dealing with subdivision permits and planned unit development permits, *see* I.C. §§ 67–6513, 67–6515, Greystone could have requested a regulatory taking analysis pursuant to I.C. § 67–8003. S.L. 2003, ch. 142, §§ 24. Idaho Code section 67–6513 specifically states, "Denial of a subdivision permit or approval of a subdivision permit with conditions unacceptable to the landowner may be subject to the regulatory taking analysis provided for by section 67–8003, Idaho Code, consistent with the requirements established thereby." "[B]ecause the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied." *Williamson County*, 473 U.S. at 194 n. 13, 105 S. Ct. 3108. If Greystone had found the conveyance of the nine lots unacceptable, it could have sought a regulatory taking analysis under I.C. § 67–8003. *See Buckskin Props., Inc. v. Valley County*, 154 Idaho 486, 492, 300

> P.3d 18, 24 (2013). Greystone failed to seek just compensation under I.C. § 67–8003 and it has not shown that this statute's procedures were inadequate. Having failed to timely bring a state claim for just compensation, Greystone has forfeited its federal claim. *See Harbours Pointe of Nashotah, LLC v. Vill. of Nashotah*, 278 F.3d 701, 706 (7th Cir. 2002) ("An unexcused failure to exhaust adequate statutory remedies forfeits a claimant's rights."); *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 94 (1st Cir. 2003). Greystone's claim fails to meet both of the ripeness requirements set forth in *Williamson County*. Because Greystone has waived its federal takings claim, we affirm the district court's dismissal of this claim.

Hehr, 155 Idaho at 98, 305 P.3d at 542.

Thus, in *Alpine Village* and again in *Hehr*, the Idaho Supreme Court embraced the "forfeiture of claim" analysis developed by the Seventh Circuit (*Harbours Point*) and the First Circuit (*Pascoag*). In both cases, the Idaho Court found that the developer's failure to take advantage of an optional procedure (seeking a regulatory taking analysis) constituted failure to failure to employ an adequate procedure for seeking just compensation, resulting in forfeiture of the federal claim.

(d) Exceptions to prong one (finality requirement).

(i) Physical takings

Various lower courts have recognized an exception to the first *Williamson County* requirement. The requirement that there be a final government decision is automatically satisfied by a physical taking because the taking occurs at the moment there has been a physical invasion. *Vacation Village, Inc. v. Clark Cnty., Nev*ada, 497 F.3d 902, 912 (9th Cir. 2007); *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002). This is a fairly narrow exception, however, and it does not apply in the context of regulatory takings, including exaction cases. (See discussion of physical takings in section 29.B(1) at page 97.)

In any event, the exception does not eliminate the second prong of the *Williamson County* test requiring utilization of state inverse condemnation proceedings.[110] Relying on Ninth Circuit precedent, the court in *Pascog* explained:

[110] "Even in physical taking cases, compensation must first be sought from the state if adequate procedures are available." *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989), overruled on other grounds by *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). "The second *Williamson County* requirement remains the same. In a physical takings

> The present case concerns a potential physical taking, based on the intrusion onto Pascoag's property or the acquisition of rights in that property. In a physical taking case, the final decision requirement is relieved or assumed because "[w]here there has been a physical invasion, the taking occurs at once, and nothing the [governmental actor] can do or say after that point will change that fact." *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1281 n.28 (9th Cir. 1987); cf. Arnett v. Myers, 281 F.3d 552, 563 (6th Cir. 2002) (finding final decision requirement satisfied because decision maker "arrived at a definitive position inflicting an actual, concrete injury when its agents removed and destroyed" plaintiff's alleged property); *Forseth v. Village of Sussex*, 199 F.3d 363, 372 n. 12 (7th Cir. 2000) (finding physical taking claim subject only to Williamson County's state action requirement). However, the state action requirement remains in physical taking cases: "[C]ompensation must first be sought from the state if adequate procedures are available." *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989), *overruled on other grounds by Armendariz v. Penman*, 75 F.3d 1311, 1326 (9th Cir. 1996) (en banc).

Pascog at 91-92 (footnote omitted).

(ii) Independent legal theories

The *Williamson County* ripeness hurdles may not be applicable if the plaintiff has identified significant, independent legal theories in addition to the takings claim.

> Land-use regulation may be challenged on theories different from a taking claim. The [*Williamson County*] ripeness tests applied to a taking claim are likely to be applied to other theories as well when it is difficult to find any clear conceptual distinction between the alternative theory and a taking claim. Courts frequently refer to the

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case, as in a regulatory takings case, the property owner must have sought compensation for the alleged taking through available state procedures." *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002). *Vacation Village, Inc. v. Clark Cnty., Nev*ada, 497 F.3d 902, 912-13 (9th Cir. 2007) (first prong was inapplicable in the context of a physical taking, but second prong applied). This is consistent with holdings in other circuits, *e.g.*, *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1977); *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 380 (2nd Cir. 1995); *Peters v. Village of Clifton*, 498 F.3d 727, 732 (7th Cir. 2007).

> other theories as "ancillary" to the taking claim. As distinctions emerge, however, general ripeness theories may displace the specific finality and exhaustion requirements applied to taking claims.

Wright, Miller *et al.*, 13B *Federal Practice and Procedure* § 3532.1.1.

However, merely reframing the taking issue as a due process violation does not negate the applicability of the *Williamson County* ripeness requirements. In *Williamson County*, the planning commission urged that the developer's takings claim should be analyzed instead as a due process claim. (The developers alleged procedural and substantive due process claims. *Williamson County*, 473 U.S. at 182 n.4. The planning commission argued that the case should be viewed through that lens: a regulation that "goes too far" is a violation of due process. It hoped that by reframing it as a due process question, it the claim would not give rise to damages for the temporary taking.) The Court said that it does matter what you call it, ripeness is a requirement in any event.[111]

See also *Herrington v. Cnty. of Sonoma*, 857 F.2d 567, 569 (9th Cir. 1988) (holding that the *Williamson County* ripeness tests apply to equal protection and substantive due process claims, and stating that "we see no reason, under the circumstances of this case, to apply a different standard to [plaintiff's] procedural due process claim."); *Harris v. Cnty. of Riverside*, 904 F.2d 497, 500 (9th Cir 1990) ("Procedural due process claims arising from an alleged taking may be subject to the same ripeness requirements as the taking claim itself depending on the circumstances of the case."); *Weinberg v. Whatcom Cnty.*, 241 F.3d 746 (9th Cir. 2001) (procedural due process claim was unrelated to the takings claim and therefore not subject to the ripeness analysis).

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[111] The Court explained:

> We need not pass upon the merits of petitioners' [due process] arguments, for even if viewed as a question of due process, respondent's claim is premature. Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of property through eminent domain or physical possession.
>
> . . .
>
> In sum, respondent [developer]'s claim is premature, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment."

Williamson County, 473 U.S. at 200.

> Accordingly, the Ninth Circuit requires a final decision for a due process claim if it relates to, or arises from, a taking claim. *See Norco Construction, Inc v. King County*, 801 F.2d 1143 (9th Cir. 1986). Otherwise procedural due process claims are not subject to heightened ripeness constraints. *Carpinteria Valley Farms, Ltd v. County of Santa Barbara*, 344 F.3d 822, 831 (9th Cir. 2003) ("Thus * * * claims under 42 USC § 1983 concerning land use may proceed even when related Fifth Amendment 'as applied' taking claims are not yet ripe for adjudication."). *See also Harris v. County of Riverside*, 904 F.2d 497, 500-01 (1990). Here, plaintiffs' due process claims do not relate to or arise from a taking claim; hence, the standard ripeness test [as opposed to *Williamson County*] is appropriate.

Mi Pueblo San Jose, Inc. v. City of Oakland, 2006 WL 2850016 (N.D. Cal. 2006) (unreported).

(iii) Futility

In *Palazzolo v. Rhode Island*, 533 U.S. 606, 618-26 (2001), the U.S. Supreme Court grafted on a futility exception to *Williamson County*[112] For over 40 years, Mr. Palazzolo owned about eighteen acres of valuable wetlands containing a few spots of uplands. In the span of twenty-three years, Mr. Palazzolo applied four times for a permit to fill in the wetlands; each time he was denied. Mr. Palazzolo brought an inverse condemnation action in state court and lost. The Rhode Island Supreme Court affirmed the trial court decision, finding that Mr. Palazzolo's claim was not ripe because he had failed to apply for "less ambitious development plans", *i.e.*, a plan that only sought to develop the small upland portions of the property.

The U.S. Supreme Court reversed, holding that Mr. Palazzolo established ripeness because the "unequivocal nature of the wetland regulations" and the government's decisions "make plain that the agency interpreted its regulations to bar petitioner from engaging in any filling or development activity on the wetlands . . . ." *Palazzolo, 533 U.S.* at 619, 621. In other words, it was sufficiently clear from the record that no development would be permitted the property, so there was no point in

[112] The *Palazzolo* Court also spoke on the issue of preclusion, holding that the fact that a property owner acquires the property after the regulations go into effect does not *ipso facto* preclude a takings claim.

filing further applications. *Palazzolo* at 623. Basically, the Court recognized a "futility" exception to the requirements of *Williamson County*[113]

As noted above, the Idaho Supreme Court recognized and applied the *Palazzolo* exception in *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 845-46, 136 P.3d 310, 316-17 (2006) (J. Jones, J.).

In *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87 (1st Cir. 2003), *cert. denied*, 540 U.S. 1090 (2003), the court rejected the plaintiff's argument that ripening the federal claim by first bringing a state takings claim would have been futile because the claim was barred by the statute of limitations. A plaintiff may not show futility through self-inflicted wounds. See more detailed discussion of *Pascoag* in Volume 1 of this Handbook.

(iv) Facial challenges

In *Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992) (O'Connor, J.), the Supreme Court noted that the first prong of the *Williamson County* ripeness test does not apply to facial challenges to ordinances.

> As a preliminary matter, we must address respondent's assertion that a regulatory taking claim is unripe because petitioners have not sought rent increases. While respondent is correct that a claim that the ordinance effects a regulatory taking *as applied* to petitioners' property would be unripe for this reason, petitioners mount a *facial* challenge to the ordinance. They allege in this Court that the ordinance does not "substantially advance" a "legitimate state interest" no matter how it is applied. As this allegation does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated, petitioners' facial challenge is ripe.

Yee at 533-34 (emphasis original) (citations and internal quotes omitted).

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[113] "Ripeness doctrine does not require a landowner to submit applications for their own sake." *Palazzolo*, 533 U.S. at 622. "Where the state agency charged with enforcing a challenged land-use regulation entertains an application from an owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing court has cited noncompliance with reasonable state-law exhaustion or pre-permit processes, federal ripeness rules do not require the submission of further and futile applications with other agencies." *Palazzolo*, 533 U.S. at 625-26.

The Court reiterated this in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 730 (1997) (Souter, J.). "Such 'facial' challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed, but face an 'uphill battle,' since it is difficult to demonstrate that 'mere enactment' of a piece of legislation deprived the owner of economically viable use of his property.'" *Suitum*, 520 U.S. at 737 n.10 (citation omitted; internal quotation marks and brackets omitted).[114]

The Ninth Circuit has followed suit: "Facial challenges are exempt from the first prong of the *Williamson* ripeness analysis because a facial challenge by its nature does not involve a decision applying the statute or regulation." *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1117 (9th Cir. 2010) (quoting *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003), *cert. denied*, 543 U.S. 1041 (2004 and 2005) (two petitions for certiorari denied)).[115]

"The state remedies prong [prong two], however, does apply to facial challenges." *Hacienda*, 353 F.3d at 655. "This requirement [prong two] applies to both facial challenges as well as 'as applied' challenges." *8679 Trout, LLC v. North Tahoe Public Utilities Dist.*, 2010 WL 3521952 at *4 (E.D. Cal. 2010) (publication pending). "As-applied challenges must meet both prongs of the *Williamson County* ripeness analysis." *Hacienda*, 353 F.3d at 657. This breakdown is summarized in the chart below:

	Facial challenge	As-applied
Prong one (final decision)	Not applicable	Applicable
Prong two (state remedies)	Applicable	Applicable

The fact that facial challenges are exempt from prong one, but not prong two, makes sense. Prong one is premised on the need to know the extent of the taking. If the existence of the taking can be established simply by reading the ordinance, there is no need for a final administrative decision applying it. In contrast, prong two is

[114] *Yee* and *Suitum* involved only prong one. The *Yee* litigation was initiated in state court, thus satisfying prong two. Moreover, the Court makes clear in the quotation above that an "as applied" challenge would not have been ripe. In *Suitum*, the Court stated: "Because only the "final decision" prong of Williamson was addressed below and briefed before this Court, we confine our discussion here to that issue." *Suitum* at 734. In a footnote, the *Suitum* Court noted that counsel agreed that no state remedies were available to the plaintiff. The Court suggested that the Court of Appeals might want to examine that more closely on remand. *Suitum* at 734, n.10. This observation confirms that prong two is a live issue, applicable in a facial challenge.

[115] Do not be confused, by the way, by the distinction drawn in *San Remo Hotel, L.P. v. City and Cnty. of San Francisco*, 545 U.S. 323 (2005) between the facial and as-applied claims. The *San Remo* case involved only the second prong of *Williamson County* (the state remedies requirement), so the facial challenge exception to the first prong was not relevant or discussed. The *San Remo* case dealt with a distinction over the nature of the takings claim which has now been mooted by *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 545 (2005). See *San Remo*, 545 U.S. at 346 n.25.

based on the text of the Fifth Amendment and the fact that a taking does not occur unless the property owner has actually been denied compensation by the state. That requirement is just as true for a facial challenge.

(e) Exceptions to prong two (state remedies): None

We are not aware of any judicially recognized exceptions to prong two of *Williamson County*

(f) *San Remo*: The federal taking claim may be brought simultaneously in state court

Note: See discussion of when the cause of action accrues in Volume 1 of this Handbook.

As noted above, the second prong of the *Williamson County* ripeness test requires a plaintiff to pursue state law remedies in state court (and fail) before bringing the federal taking claim. This would appear to mandate a two-step process in which the plaintiff first litigates any state-law based inverse condemnation claim and, when that fails, may bring the federal takings claim. In *San Remo Hotel, L.P. v. City and Cnty. of San Francisco*, 545 U.S. 323 (2005) (Stevens, J.), however, the U.S. Supreme Court said this is not the case. This case expressly provided that a federal takings claim that is not ripe in federal court due to *Williamson County* may nonetheless be brought in state court simultaneously with any state claims.

San Remo dealt with the "reservation" of federal claims under *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) (Stevens, J.). So, first, a word about *England* reservations. In *England* a group of newly graduated chiropractors brought suit in federal court challenging licensing requirements in Louisiana. They brought both state statutory claims and a federal Fourteenth Amendment claim. The federal court of appeals invoked the *Pullman* abstention doctrine,[116] noting that the issue might be resolved by a narrow construction of the state statute. The plaintiffs then litigated both the federal and state claims in state court. Losing there, plaintiffs returned to federal court. On appeal, the U.S. Supreme Court established the principle that where the federal court sends the plaintiff to state court to litigate a state issue, the plaintiff may affirmatively reserve the federal issue in the state court litigation thus preserving it for subsequent federal court litigation.[117] Thus, *England* reservations occur only when the plaintiff begins in federal court and is directed back to state court.

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[116] The *Pullman* extension doctrine is based on *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

[117] Interestingly, these plaintiffs failed to make such a reservation, but were forgiven for their mistake. The Court made clear that henceforth an affirmative reservation is required.

In *San Remo*, the owner of the San Remo Hotel in Fisherman's Wharf challenged a $567,000 fee imposed by the City of San Francisco for converting "residential units" to "tourist units." The plaintiff brought a petition for mandamus in state court challenging the decision to classify the hotel as residential hotel (contending that it was really a tourist hotel all along). The state court action, however, was stayed while the plaintiff pursued another action in federal court. There it alleged both facial and as-applied federal taking claims (in addition to other claims).

The federal district court ruled for the city, dismissing all the claims as either unripe, barred by the statute of limitations, or precluded by prior adverse judgment. On appeal to the Ninth Circuit, the hotel owners took the unusual step (for a plaintiff) of asking the appeals court to abstain under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The idea was that by allowing the dormant state court action to proceed first, the whole issue might be resolved by finding that the hotel was a tourist hotel all along and not subject to the fee. The Ninth Circuit agreed to the *Pullman* abstention as to the facial claim (because it was ripe and the Court had jurisdiction[118]). As for the as-applied claim, the Ninth Circuit found that it was not ripe under prong two of *Williamson County* Accordingly, *Pullman* abstention was not appropriate as to the as-applied challenge. Instead, the Ninth Circuit dismissed it—apparently without prejudice so that it could be litigated in state court. The Ninth Circuit noted in a footnote that while the plaintiffs pursued their mandamus action in state court they were free to simultaneously litigate their facial taking claim in state court, or it could reserve it under *England*.[119]

Back in state court, the plaintiffs revived their dormant action while purporting to reserve their federal claims under *England.* Despite the reservation, however, they actively litigated both the facial and as applied taking claims through the California Supreme Court—losing them both on the merits. The plaintiffs did not seek certiorari. Instead, they returned to federal court seeking to litigate the taking

[118] The facial takings claim was based on two theories: deprivation of economically viable use under *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992) (Scalia, J.) and failure of the ordinance to substantially advance state interests under *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (which was subsequently been overruled). The Ninth Circuit found that the first was barred under prong two of *Williamson County. San Remo v. City and Cnty. of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998). Prior to overruling of *Agins*, however, the Ninth Circuit had taken the positions that claims based on this now defunct legal theory were not subject to either prong of *Williamson County. Sinclair Oil Corp. v. Cnty. of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996). Accordingly, the Ninth Circuit ruled that the facial takings challenge was ripe based on the *Agins* theory.

[119] The Ninth Circuit referred to taking claim in the singular, apparently in reference to the facial claim on which it abstained. However, it is apparent from the Supreme Court's decision that both the facial and as-applied claims were pursued subsequently in state court. *San Remo*, 545 U.S. at 344.

claims based on their *England* reservation. This did not work. The Supreme Court ruled that the facial claim (which was ripe in federal court under *Williamson County* but subject to a *Pullman* abstention) could have been reserved, but was not effectively reserved because the plaintiff voluntarily litigated it in state court. As for the as-applied claim, it was never the proper subject of an *England* reservation because it was unripe under *Williamson County* and therefore not properly before the federal court. Thus, the plaintiff was free to litigate the as-applied claim in state court but could have no expectation that it would be immune from res judicata. "*England* does not support their erroneous expectation that their reservation would fully negate the preclusive effect of the state-court judgment . . . ." *San Remo*, 545 U.S. at 338. In other words, if the plaintiffs wanted to ripen the claim in state court, they would be bound by the state court's decision. (As noted, they could have sought certiorari from the state supreme court to the U.S. Supreme Court, but chose not to do so. *San Remo*, 545 U.S. at 334.)

The bottom line is that when *Williamson County* is combined with *San Remo*, the message is that federal taking claims that are unripe under prong two of *Williamson County* may nevertheless be litigated in state court simultaneously with any state claims.[120] The Court said:

> With respect to those federal claims that did require ripening [that is, those claims barred from federal court under *Williamson County*], we reject petitioners' contention that *Williamson County* prohibits plaintiffs from advancing their federal claims in state courts. The requirement that aggrieved property owners must seek "compensation through the procedures the State has provided for doing so," 473 U.S., at 194, 105 S. Ct. 3108, does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution. Reading

[120] Prior to *San Remo*, the courts struggled with how to implement the ripening process mandated by *Williamson County*. In *Palomar Mobilehome Park Association v. City of San Marcos*, 989 F.2d 362, 365-66 (9th Cir. 1993), the Ninth Circuit held that the doctrine of claim preclusion acted to preclude the federal courts from hearing plaintiff's federal takings claim because the federal claim could have been presented in state court at the time that the plaintiff was pursuing his state claims pursuant to *Williamson County* and, in any event, was taken up by the state court. Two years later, the Ninth Circuit held read *Williamson County* as requiring a plaintiff only to present its state inverse condemnation claims in state court. *Dodd v. Hood River Cnty.*, 59 F.3d 852 (9th Cir. 1995). See also *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118 (2nd Cir. 2003) (holding that parties may make an *England* reservation in the mandated state court proceedings and thereby preserve their federal taking claims for federal court litigation).

> *Williamson County* to preclude plaintiffs from raising such claims in the alternative would erroneously interpret our cases as requiring property owners to "resort to piecemeal litigation or otherwise unfair procedures."

San Remo, 545 U.S. at 346 (citing *MacDonald, Sommer & Frates v. Yolo Cnty.*, 47 U.S. 340, 350 n.7 (1986).

Accordingly, *England* reservations for unripe federal taking claims have been rendered useless. Some hope for the litigant seeking access to federal courts, is found in the strongly worded concurrence to *San Remo*. *San Remo* at 352. It would not change the rule that res judicata attaches to state court litigation of taking claims. But it suggests that the Court is ready to rethink the second holding in *Williamson County* and allow litigants to proceed directly to federal court with taking claims. Of course, that requires a litigant to volunteer to be first. In the meantime, expect most taking claims based on zoning claims to be brought in state court.

The Ninth Circuit applied the *San Remo* principle in *Adam Bros. Farming, Inc. v. Cnty. of Santa Barbara*, 604 F.3d 1142 (9th Cir. 2010), a case involving a particularly egregious abuse of wetland delineation authority by the local government. Recall that in *San Remo*, the plaintiff actually litigated its federal claims in state court and was then barred from re-litigating them in federal court. In *Adam Bros.*, in contrast, the plaintiff failed to pursue the federal takings claim in state court (after a dismissal without prejudice[121]). After prevailing in state court on some of its claims and losing others, the plaintiff brought a temporary takings claim under the Fifth Amendment in federal court. The Ninth Circuit ruled this was barred by res judicata because it could have been raised in state court along with the other claims. This is the logical consequence of *San Remo*. The federal takings claim was not merely un-ripe. Having failed to raise it in the state court litigation, plaintiff is forever barred from raising it federal court. Note that the *Adam Bros*. court reached this issue and was able to rule on the merits of this procedural flaw by waiving the prudential ripeness tests in *Williamson County* This is discussed further in section 29.H(1)(h) at page 162.

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[121] The plaintiff began the suit in state court, where it initially included a federal taking claim. The state district court dismissed the federal taking claim along with its state inverse condemnation claim because it had failed to pursue administrative remedies. Adam Bros., 604 F.3d at 1145. "After the dismissal without prejudice, Adam Bros. chose to file an amended complaint that omitted the takings and inverse condemnation claims. Res judicata bars 'not only claims actually litigated in a prior proceeding, but also claims that could have been litigated.' *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364 (9th Cir. 1993) (emphasis added) (citing *Busick v. Workmen's Compensation Appeals Bd.*, 7 Cal.3d 967, 975, 104 Cal.Rptr. 42, 500 P.2d 1386 (1972)). By choosing to proceed in state court without the takings claim, Adam Bros. risked that the state court's later judgment would forever bar that takings claim." *Adam Bros*., 604 F.3d at 1149 n.5.

In 2007, the Ninth Circuit summed up the situation: "The holding of the Supreme Court in *San Remo* changed the landscape of federal regulatory taking claims, making clear that the failure to simultaneously pursue federal claims in state court with state inverse condemnation claims will likely result in a state court judgment that has a preclusive effect on a later federal action." *Doney v. Pacific Cnty.*, 2007 WL 1381515, at *5 (E.D. Wash. 2007) (unpublished).

(g) Statute of limitations

If a federal claim is not ripe under *Williamson County* (which was overruled in 2019), does this mean that the statute of limitations has not yet begun to run? This question is addressed in Volume 1 of this Handbook.

(h) The ripeness tests are "prudential"; impact on removal

In *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-34 & n.7 (1997), the U.S. Supreme Court described the two *Williamson County* tests as "prudential" ripeness principles, in contrast to jurisdictional Article III barriers. This point has been emphasized by the Ninth Circuit on many occasions.

In *Beverly Blvd. LLC v. City of West Hollywood*, 238 Fed. Appx. 210 (9th Cir. 2007), *cert. denied*, 552 U.S. 1309 (2008), the court explained that these prudential ripeness tests could be waived in order to reach the merits and dismiss the case:

> We need not resolve whether this claim is ripe under the standards articulated in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L.Ed.2d 126 (1985). *Williamson* sets forth a prudential rule, *see Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 & n. 7, 117 S. Ct. 1659, 137 L.Ed.2d 980 (1997), and we may therefore assume without deciding that the takings claims are ripe in order to reject them on the merits. *See Weinberg v. Whatcom County*, 241 F.3d 746, 752 n. 4 (9th Cir. 2001); *accord Grubbs v. Bailes*, 445 F.3d 1275, 1281 (10th Cir. 2006).[122]

Beverly Blvd. at 210.

[122] In *Weinberg v. Whatcom Cnty.*, 241 F.3d 746, 752 n.4 (9th Cir 2001), the court announced in a footnote without discussion, "We assume without deciding that the Federal taking claim is ripe." *Grubbs v. Bailes*, 445 F.3d 1275, 1280 (10th Cir. 2006), *cert. denied*, 549 U.S. 953 (2006), dealt with waiver of prudential standing concerns. "Questions relating to prudential standing, however, may be pretermitted in favor of a straightforward disposition on the merits." *Grubbs*, 445 F.3d at 1280.

Similarly, in *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2765 (2009), the Ninth Circuit recognized that the ripeness tests in *Williamson County* are prudential and may be waived so as to reach the merits and deny the takings claim:

> Because this case raises only prudential ripeness concerns, we have discretion to assume ripeness is met and proceed with the merits of the McClungs' takings claim. Accordingly, we do not resolve whether this claim is ripe under the standards articulated in *Williamson*, and instead assume without deciding that the takings claim is ripe in order to address the merits of the appeal.

McClung, 548 F.3d at 1224. The Court then ruled on the merits that the city's action was not a taking.

It appears that the *McClung* court was motivated to waive ripeness in order to dispose of the case because the McClungs had waited years to bring their suit. "In this case, we easily conclude that the facts presented raise only prudential concerns. The McClungs installed the storm pipe over ten years ago, resulting in a clearly defined and concrete dispute." *McClung*, 548 F.3d at 1224. Note that this was a case initially filed by the McClungs in state court, which was removed to federal court by the city. The Ninth Circuit raised *Williamson County* ripeness tests *sua sponte* and then waived them.

Again, in *Adam Bros. Farming, Inc. v. Cnty. of Santa Barbara*, 604 F.3d 1142 (9th Cir. 2010), the Ninth Circuit waived the prudential *Williamson County* ripeness tests and "assumed without deciding" that the takings claim was ripe. *Adam Bros.*, 604 F.3d at 1148. It then promptly dismissed the case under *San Remo* on res judicata grounds. *Adam Bros.*, 604 F.3d at 1148-50.

The Ninth Circuit followed suit a month later with *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010), yet another rent control / takings case. This was a procedurally complicated case. It began in federal court, but the federal action was stayed pursuant to *Pullman* abstention to allow the plaintiffs to pursue a state action. When that case was settled, the Guggenheims returned to federal court. After an initial appeal and remand, the district court dismissed the case. On appeal again to the Ninth Circuit, the court raised the issue of *Williamson County* ripeness *sua sponte*, and then, citing *Suitum*, *McClung*, and *Adam Bros.*, decided to waive it.

> In this case, we assume without deciding that the claim is ripe, and exercise our discretion not to impose the prudential requirement of exhaustion in state court. Two factors persuade us to follow this course. First, we reject the Guggenheims' claim on the merits, so it would be a

> waste of the parties' and the courts' resources to bounce the case through more rounds of litigation. Second, the Guggenheims did indeed litigate in state court, and they and the City of Goleta settled in state court. Unfortunately the law changed after their trip to state court, so they might well have proceeded differently there had they been there after Lingle came down, but it is hard to see any value in forcing a second trip on them.

Guggenheim, 638 F.3d at 1118.

(i) Is removal appropriate?

This leads to an interesting question. If a plaintiff brings its federal taking claim in state court, may the defendant remove it to federal court under federal question jurisdiction?

8679 Trout, LLC v. North Tahoe Public Utilities Dist., 2010 WL 3521952 (E.D. Cal. 2010) (publication pending) involved a federal takings claim that was properly filed in state court but would have not have been ripe if removed to federal court. The court held:

> Because Defendants removed this litigation from state court, Plaintiff was denied the opportunity to seek state reimbursement. As ripeness is a threshold jurisdictional question, Defendants cannot confer jurisdiction to this Court by removal. Therefore, Plaintiff has yet to satisfy the requirements under the *Williamson* analysis to make its claim ripe for federal court adjudication. Although the claim was ripe when it was originally filed in state court, it became unripe the moment that Defendants removed it.

8679 Trout at *5. Curiously, the court then dismissed the federal claims without prejudice, rather than remanding. It remanded just the state claims. This appears to be consistent with what the plaintiff asked for in its motion. "Plaintiff filed its Motion to Remand on July 21, 2010 requesting that this Court remand the state claims and stay the federal causes of action." *8679 Trout* at *2. But for plaintiff's motion, it would seem that remand of both the state and federal claims would have been appropriate.

A remand was the result in *Doney v. Pacific Cnty.*, 2007 WL 1381515 (E.D. Wash. 2007) (unpublished). "Plaintiffs have not pursued a regulatory takings claim in state court because Pacific County removed the case before Plaintiffs had a chance to proceed. . . . Because *Williamson County* remains valid legal authority and because Plaintiffs have not adjudicated an inverse condemnation claim in state court, the federal takings claim is not yet ripe and should accordingly be remanded to state

court. Therefore, to this extent, Plaintiffs' Motion to Remand should be granted." *Doney* at *4.

In *Doak Homes, Inc. v. City of Tukwila*, 208 WL 191205 (W.D. Wash. 2008) (unreported), a land developer brought suit in state court against the city, which had denied it various permits. The city removed, but the federal district court ruled that it lacked subject matter jurisdiction because the claim was unripe under prong one of *Williamson County*. Similar to *8679 Trout* and *Doney*, the court also found the case unripe under prong two: "Defendants' decision to remove this case from state court effectively denied Doak an opportunity to utilize Washington's procedure for reimbursement, and brought a takings claim to this Court that was not ripe for review." *Doak Homes* at *4. (The *Doak Homes* decision, however, seems to confuse prong one and prong two. The body of the opinion speaks only of prong one, but conclusion speaks in terms of prong two. Thus, it is difficult to understand how the court thought Doak could proceed in state court. Be that as it may, the court believed that the removal "denied Doak an opportunity" that it otherwise had. In any event, this unreported decision does not address *Suitum* or any of the Ninth Circuit cases holding that ripeness can we waived.)

A different situation was presented in *Stathoulis v. City of Downey*, 2011 WL 759559 (D.C. Calif. 2011) (publication pending). This case involved state and federal constitutional claims initially brought in state court. The claims arose out of the city's allegedly unfair treatment of plaintiffs' 1950s-style restaurant. The taking claim was dismissed in an early round of the case. The case then proceeded on equal protection and procedural due process claims, along with other state and federal claims. The city removed the case to federal court and filed a motion to dismiss. The court granted the motion to dismiss with prejudice as to the federal claims.[123] Only the state law claims were remanded. The court found the equal protection and due process claims were unripe based on prong one of *Williamson County* (Prong two was not involved, presumably because there was no longer a taking claim.) Unlike cases like *Doney* and *8679 Trout*, remand was not appropriate here because the plaintiffs were not deprived of an opportunity bring a viable federal claim in state court. The prong one problem could not have been cured by pursuing the action in state court.

Moreover, the conclusion reached in *8679 Trout* and similar cases does not address the observation in *Suitum* and *Adam Bros*. (see above) that *Williamson County* tests are merely prudential. In other words, it would seem that the federal court would have the power to put aside the ripeness issue and accept jurisdiction if it

[123] In a parallel action referenced in footnote 3, another judge dismissed similar claims without prejudice. Presumably, however, that was not to allow the plaintiffs to proceed immediately to state court but, rather, to allow them to seek judicial relief after obtaining a final administrative decision. In footnote 4, the court explained that this time dismissal with prejudice was appropriate.

chose to do so. Indeed, this might be the appropriate thing to do if the federal claims could be disposed of quickly on other grounds, such as the statute of limitations. This was what the Ninth Circuit concluded in *Guggenheim*. "First, we reject the Guggenheims' claim on the merits, so it would be a waste of the parties' and the courts' resources to bounce the case through more rounds of litigation." *Guggenheim*, 638 F.3d at 1118.

A case with tangential bearing on this subject is *Ballou v. Vancouver Police Officers' Guild*, 389 Fed. Appx. 618 (9th Cir. 2010) (unpublished decision). In *Ballou*, a police officer sued her union in state court under the National Labor Relations Act ("NLRB") and other state claims. The union removed the case to federal court. Because the NLRB does plainly did not apply to the parties, the Ninth Circuit said that the claim was frivolous. The court held, "Because the federal claim was clearly frivolous, the [federal] district court lacked subject matter jurisdiction." *Ballou*, 389 Fed. Appx. at 682. Accordingly, the court ruled that removal was improper, and it remanded the case to state court.

(j) Supplemental jurisdiction

Federal courts that have acquired jurisdiction over a case based on a federal question also obtain jurisdiction over state law claims raised by the plaintiff.[124] This is known today as supplemental jurisdiction; it used to be called pendant jurisdiction.

When the federal court dismisses the federal constitutional claims under *Williamson County*, it may be confronted with the question of what to do with the remaining state law claims. A federal court may decline to exercise supplemental jurisdiction where it has dismissed all claims over which it obtained original jurisdiction. 28 U.S.C. § 1367(c)(3). The Supreme Court has pointed out that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7 (1988).

(k) *Williamson County* remains viable despite criticism

Despite criticism of *Williamson County*, the U.S. Supreme Court has continued to adhere to this formulation of ripeness. *MacDonald, Sommer & Frates v.*

[124] Federal question jurisdiction has been with us a long time. But it was not always part of the federal court system. It dates back to Reconstruction. Prior to that, there was no federal question jurisdiction, and, unless diversity jurisdiction was available, federal laws were enforced in state courts. Richard H. Fallon, Jr., *The Ideologies of Federal Court Law*, 74 Va. L. Rev. 1141, 1154 (1988); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L.Q. 499, 506 (1928).

Cnty. of Yolo, 477 U.S. 340 (1986); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 730 (1997); *Palazzolo v. Rhode Island*, 533 U.S. 606, 618-26 (2001). As the Ninth Circuit noted in 2007, "While the case law surrounding *Williamson County* is in a state of flux, and several courts have recently discussed the peculiar results produced by the second prong of the ripeness test, the Ninth Circuit has repeatedly interpreted the second prong of *Williamson County* as requiring Plaintiffs to pursue their claims in state court before they can bring a claim under the Fifth Amendment, so long as the state provides an adequate procedure for receiving just compensation." *Doney v. Pacific Cnty.*, 2007 WL 1381515, at *3 (E.D. Wash. 2007) (unpublished).

On the other hand, the four-justice concurring opinion in *San Remo Hotel, L.P. v. City and Cnty. of San Francisco*, 545 U.S. 323 (2005), contains a strongly worded suggestion that if the litigants simply had asked, the Court might have reconsidered the second prong of *Williamson County* (state remedies). "I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." *San Remo* at 352. While the drumbeat to do away with prong two has continued,[125] the suggestion in the *San Remo* concurrence has not been followed.[126]

[125] Some courts in the Ninth Circuit have weighed in in support of Justice Rehnquist's concurrence: "Recently, however, courts have begun to question the prudence of requiring plaintiffs to fulfill the second prong of *Williamson County*. Most notably, former Chief Justice Rehnquist, in a concurring opinion in *San Remo*, brought *Williamson County*'s second prong into question, stating that '*Williamson County's* state-litigation rule has created some real anomalies, justifying our revisiting the issue.' [San Remo, 545 U.S.] at 351 (Rehnquist, J. concurring). Chief Justice Rehnquist also noted that the Court's holdings in *San Remo* and *Williamson County* 'all but guarantee[ ] that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee.' *Id*." *Doney v. Pacific Cnty.*, 2007 WL 1381515, at *3 (E.D. Wash. 2007) (unpublished). "First, the state litigation ripeness doctrine articulated in *Williamson* has been weakened considerably since former Chief Justice Rehnquist and three other justices urged its reconsideration in *San Remo Hotel, L.P. v. City & Cnty.. of San Francisco*, 545 U.S. 323, 348–52 (2005) (Rehnquist, J., concurring). Lower courts, including the Ninth Circuit, have undercut the state litigation requirement by holding that *Williamson* is a 'prudential' ripeness rule which may not be applied when doing so would cause unfairness or an inefficient expenditure of court and party resources. *Emmert v. Clackamas Cnty.*, 2015 WL 9999211 (D. Or. 2015) (unpublished) (citing *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1116–18 (9th Cir. 2010)).

[126] "Because *San Remo* effectively sub silentio converted *Williamson County* into a decision stripping federal courts of jurisdiction over most taking claims, four Justices advocated overruling the state procedures requirement in an "appropriate case." However, *San Remo* was not that case, and despite repeated petitions to the Court, it has declined to revisit *Williamson County*." J. David Breemer, *Ripeness Madness: The Expansion of Williamson County's Baseless "State Procedures" Takings Ripeness Requirement to Non-Takings Claims*, 41 Urban Law. 615, 616-17 (2009) (footnotes omitted).

(2) Substantive due process claims no longer preempted.

Until recently, a body of law in the Ninth Circuit held that challenges to land use regulations based on substantive due process (that is, based a challenge to a land use regulation that does not substantially advance legitimate interests) are subsumed (and thereby precluded) by the Fifth Amendment's takings clause, which serves as the sole vehicle to remedy claims based on property rights. This conclusion was premised on *Armendariz v. Penman*, 75 P.3d 1311 (9th Cir. 1996), which, in turn was based on *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (Powell, J.). *Agins* was overturned by *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 545 (2005) (O'Connor, J.), which held that the "substantially advances" test is grounded in the due process clause, not the takings clause. Accordingly, in *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 852-53 (2007), the Ninth Circuit ruled that *Armendariz* is no longer good law. "We now explicitly hold that the Fifth Amendment does not invariably preempt a claim that land use action lacks any substantial relation to the public health, safety, or general welfare." *Crown Point*, 506 F.3d at 856. The court then remanded for further consideration, and the matter was resolved by stipulation. *Crown Point Dev., Inc. v. City of Sun Valley*, No. CV 05-492-ELJ, Docket Nos. 23, 25..

(3) Claims against the United States – Tucker Act

The Tucker Act, 28 U.S.C. § 1491 and the Little Tucker Act, 28 U.S.C. § 1346(a)(2), authorize suits against the federal government for money damages. The Tucker Act and Little Tucker act waive sovereign immunity and grant jurisdiction (with respect to certain money claims against the United States), but do not create a cause of action. The Tucker Act places jurisdiction in the U.S. Court of Federal Claims; the Little Tucker Act (for claims up to $10,000) allows money claims to be brought in federal district court.

Taking claims against the federal government are premature until the property owner has availed itself of the process provided by the Tucker Act. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-20 (1984); *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985) ("Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491."). This is analogous to the requirement imposed by the *Williamson County* Court that plaintiffs must first take advantage of opportunities available under state law to obtain compensation before initiating an inverse condemnation action.

Of course, the Tucker Act requirement does not come into play in local land use matters (even if brought in federal court pursuant to § 1983), because the claim is not against the federal government.

I. The Idaho Regulatory Takings Act

In 1994 the Idaho Legislature enacted the Idaho Regulatory Takings Act ("Takings Act"). Idaho Code §§ 67-8001 to 67-8004. (In addition, there are cross-references to the act found throughout LLUPA, *e.g.*, Idaho Code § 67-6512(a).) The law was enacted in response to concerns that state and local agencies were not acting consistently and correctly in evaluating their regulatory actions in light of constitutional takings law. According to the statute, the purposes of the Takings Act is "to establish an orderly, consistent review process that better enables state agencies and local governments to evaluate whether proposed regulatory or administrative actions may result in a taking of private property without due process of law." Idaho Code § 67-8001.

The statute defines a "regulatory taking" as a "regulatory or administrative action resulting in deprivation of private property that is the subject of such action, whether such deprivation is total or partial, permanent or temporary, in violation of the state or federal constitution." Idaho Code § 67-8002(4). This appears to be quite broad. Although there are some cross-references in LLUPA to the Takings Act, the Takings Act is not limited to actions that are subject to judicial review under LLUPA.

The Takings Act requires the Attorney General to prepare an "orderly, consistent process, including a checklist," designed to better enable state agencies and local governments to evaluate proposed regulatory or administrative actions, "to assure that such actions do not result in an unconstitutional taking of private property." Idaho Code § 67-8003(1). The Attorney General is required to update and review this process at least annually, to "maintain consistency with changes in the law." Idaho Code § 67-8003(1). All state agencies and local governments must use the guidelines set forth by the Attorney General to assess the impact of proposed regulations. Idaho Code § 67-8003(1).

Pursuant to the statute, the Attorney General issued the *Idaho Regulatory Takings Act Guidelines* (reproduced in Appendix I, also available at www.state.id.us/ag). The guidelines provide that state agencies and local governments must ask themselves the following six questions:

1. Does the regulation or action result in either a permanent or temporary physical occupation of private property?

2. Does the regulation or action require a property owner to either dedicate a portion of property or to grant an easement?

3. Does the regulation deprive the owner of all economically viable uses of the property?

4. Does the regulation have a significant impact on the landowner's economic interest?

5. Does the regulation deny a fundamental attribute of ownership?

6. (a) Does the regulation serve the same purpose that would be served by directly prohibiting the use or action; (b) does the condition imposed substantially advance that purpose?

Idaho Regulatory Takings Act Guidelines at 9-12 and Appendix C thereto (2003).

While an affirmative answer to any of the questions above does not necessarily mean there has been a "taking," it does mean there may be a constitutional issue, and that legal counsel should carefully review the proposed action. *Idaho Att'y Gen, Idaho Regulatory Takings Act Guidelines* C-1, app. C (2003).

Guidelines released by the Attorney General in December of 2003 contain an appendix providing a recommended form for use by property owners needing to request a regulatory taking analysis. *Idaho Att'y Gen., Idaho Regulatory Takings Act Guidelines* B-1, app. B (2003).

In 2003, the Legislature amended the Takings Act to give a property owner affected by a governmental action the right to request a regulatory taking analysis from the state agency or local government. The property owner must submit a written request within 28 days after the final decision concerning the matter at issue is made. Idaho Code § 67-8003(2). The government entity then has 42 days within which to provide the property owner with a completed taking analysis. Idaho Code § 67-8003(2). The "regulatory taking analysis shall be considered public information." Idaho Code § 67-8003(2). Should the state agency or government entity not complete the properly requested regulatory taking analysis within the 42 days allotted, the government action is voidable. Idaho Code § 67-8003(3). If the requested taking analysis is not provided within 42 days, the affected property owner may seek judicial determination of the validity of the governmental action in the district court in the county in which the property (or a portion thereof) is located. Idaho Code § 67-8003(3). When a request for a taking analysis is made, all deadlines (presumably including the 28-day deadline for seeking judicial review) are tolled until the analysis is provided. Idaho Code § 67-8003(4).

LLUPA was also amended in various locations to cross-reference this requirement. For example: "Denial of a subdivision permit or approval of a subdivision permit with conditions unacceptable to the landowner may be subject to the regulatory taking analysis provided for by section 67-8003, Idaho Code, consistent with the requirements established thereby." Idaho Code § 67-6513. A similar provision is found in connection with conditional use permits (Idaho Code § 6512(a)), planned unit developments (Idaho Code § 67-6515), and rezones (Idaho

Code § 67-6511(a)). Likewise, LLUPA's general provision on approvals and denials of all site-specific permits cross-references the regulatory takings provision. Idaho Code § 67-6535(3).

The Idaho Regulatory Takings Act should not be confused with an exhaustion exception relating to eminent domain authority found in Idaho Code § 67-6521(2)(b), which is discussed in Volume 1 of this Handbook.

On more than one occasion, the Idaho Supreme Court has cited a party's failure to timely seek a regulatory takings analysis as a failure to pursue an available state remedy which, in turn, leads to forfeiture of the party's federal takings claim under *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (Blackmun, J.) and its progeny. See discussion in section 29.H(1)(c)(ii) at page 146.

30. USER FEES, IMPACT FEES (IDIFA), AND THE "ILLEGAL TAX" ISSUE

A. Introduction

Ordinarily, cities and counties raise revenue to fund local services by taxing all property owners within their jurisdiction. Historically, efforts to "make development pay for itself" were limited to requirements that subdividers make in-kind contributions through dedication of streets, provision for sewer lines and sidewalks, and, occasionally, dedication of open space and school lands within their developments.

In recent decades, municipalities have sought to shift a greater portion of the financial burden imposed by new growth away from the general taxpayer onto the developers of residential and commercial properties through the imposition of impact fees, user fees, capitalization fees, buy-in fees, tap fees, and the like. Each of these are aimed at covering some or all of the additional cost of providing public infrastructure required by the development. In addition, some cities and counties have become more aggressive in demanding other "voluntary" exactions in exchange for approvals of entitlements, notably for affordable workforce housing.

This chapter explores the constitutional and statutory authority for local governments to impose these requirements. Specifically, it explores whether user fees, buy-in fees, impact fees, and exactions are authorized under the police power, the municipal taxation power provisions of Idaho's Constitution (which are not self-executing and require implementing legislation), or some other express or implicit grant of authority by the Legislation—or whether they are ultra vires. It does not address the separate question of regulatory takings[127] or the question of whether local ordinances imposing fees or other exactions are preempted by the Idaho Development Impact Fee Act ("IDIFA"), Idaho Code §§ 67-8201 to 67-8216.

The quick answer is that the authority to impose fees and other exactions to recover the costs of development is sharply limited in Idaho, more so than in some other jurisdictions.

[127] Thus, even if the local government has constitutional or statutory authority to impose fees or other exactions, those charges may still subject to the requirement under the federal *Nollan* and *Dolan* cases that the charges not be disproportionate or unrelated to the burden imposed by the development. That is an entirely separate subject and a special class of takings, known as exaction, which is discussed in section 29.E at page 126 ("the exaction cases"). Properly designed ordinances under IDIFA probably result in fees that meet the nexus and rough proportionality tests under the exaction cases. But impact fees or other exactions that are not narrowly tailored to remedy the burdens imposed by the development or which are disproportionately large may constitute a compensable taking.

Although this case law as emerged largely in the "make development pay for itself" context, it applies in other contests as well. The same principles have been applied, for example, in cases challenging stormwater fees and municipal franchise fees.

B. Terminology: exactions, impact fees, linkage fees, and inclusionary fees

The term "exaction" is an inclusive term intended to describe any sort of *quid pro quo* exchange in which a regulatory entity requires an applicant to give something of value in exchange for a regulatory approval. Over the years, various terms have come into use to describe particular types of exactions.

Perhaps the most common is the term "impact fee." The following definition of the term has been employed by our Attorney General and numerous commentators:

> An "impact fee" is a type of exaction which is:
> In the form of a predetermined money payment;
> Assessed as a condition to the issuance of a building permit, an occupancy permit or plat approval;
> Pursuant to local government powers to regulate new growth and development and provide for adequate public facilities and services;
> Levied to fund large-scale, off-site public facilities, and services necessary to serve new development;
> In an amount which is proportionate to the need for public facilities generated by new development.

Idaho Att'y Gen. Op. 93-5 (Apr. 7, 1993).[128]

Impact fees are traditionally used to fund public infrastructure, such as roads and water facilities. They can also be used for parks and open space.

More recently, the term "linkage fee" has come into use (more in other states than in Idaho). This is a sub-species of the impact fee in which the facilities to be constructed are typically not public. Thus, the term "linkage fee" is often employed where the exaction is designed to provide land or funding for subsidized workforce housing or, occasionally, private recreational facilities. The term "linkage" is used to

[128] The identical formulation is found in: Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulations: Paying for Growth with Impact Fees*, 59 S.M.U. L. Rev. 177, 205 n.104 (2006) (citing Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The Second Generation*, 38 Wash. U. J. Urb. & Contemp. Law 55, 64 (1990)). Yet another identical description is found in Olson, Greensweig & Riggs, *The Future of Impact Fees in Minnesota*, 24 William Mitchell Law Review 635, 638 (1998).

convey the idea that approval of the building permit is linked to need for and funding of these facilities. Of course, all exactions are linked in this way, so the term is not particularly illuminating.

Another confusing term is the "inclusionary fee," which is also employed to describe impact fees for affordable housing. For reasons that are neither intuitive nor logical, the term "inclusionary fee" is typically (but not consistently) associated with fees on residential projects, while linkage fees are often associated with commercial development. However, this terminology is not consistently employed and, in any event, does nothing to clarify or enlighten the legal analysis. The legal analysis is the same whatever it is called.[129]

C. Overview of constitutional authority: Dillon's Rule

Idaho follows Dillon's Rule under which local governments' powers are limited to those granted or clearly implied by the state Constitution or state legislation.[130] Home rule cities, in contrast, hold broader authority to legislate with

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[129] The workforce housing fee struck down in *Schaefer v. City of Sun Valley*, Case No. CV-06-882 (Idaho, Fifth Judicial Dist., July 3, 2007) (reproduced in Appendix E) was styled a "linkage fee." The similar fee struck down in *Mountain Central Bd. of Realtors, Inc. v. City of McCall*, Case No. CV 2006-490-C (Idaho, Fourth Judicial Dist., Feb. 19, 2008) (reproduced in Appendix F) was styled an "inclusionary fee."

[130] Dillon's Rule is named after the former chief justice of the Iowa Supreme Court. Justice Dillon stated:

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

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

Another decision authored by Chief Justice Dillon in the same year (and quoted by the U.S. Supreme Court) provided:

> Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, and the *corporation* could not

respect to citizens and property within the boundary of the city. Home rule is typically granted by state constitutional amendment, the effect of which is to displace Dillon's Rule as to those municipalities who adopt a home rule charter. *See* 56 Am. Jur. 2d *Municipal Corporations, Etc.* §§ 91, 109-10 (2010). This legislative power includes the power to tax. Idaho cities, however, are not home rule cities in that sense.[131]

The term "home rule," however, can mean different things. The most extreme form of home rule is one espoused by Judge Cooley[132] who subscribed to the inherent right of cities to self-government, even in the absence of express authority. This approach has few followers. *E.g.*, C. Rhyne, *Municipal Law* §§ 3-4, 4-2 (1957). Most view home rule as something that is granted to cities either by the state constitution or by statute.

> There are two types of home rule. Under "constitutional" home rule, the guarantees of local home rule proceed directly from the state constitution. These guarantees are theoretically immune from incursions by the state legislature. . . . Under "legislative" home rule, a city's home rule powers proceed from state legislative enactments or legislatively authorized home rule charters.

Michael C. Moore, *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?*, 14 Idaho L. Rev. 143, 148 (1977).

Under the most common form of home rule, the municipal governance is nonetheless constrained by various limits, such as not conflicting with state laws. "In contrast, under 'true' home rule systems, if a subject is within an area of purely local concern, the legislature cannot legislate in that area and thereby pre-empt the city." Moore, at 149.

> prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere *tenants at will* of the legislature.

City of Clinton v. Cedar Rapids & Missouri River Railroad. Co., 24 Iowa 455,475 (1868) (emphasis original) (Dillon, C.J.) (quoted approvingly by the U.S. Supreme Court in *Atkin v. Kansas*, 191 U.S. 207, 221 (1903) (Harlan, J.)).

As discussed below, Dillon's rule was expressly adopted in Idaho, *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980) (Donaldson, C.J.), and remains in effect, *e.g.*, .

[131] Historically, there were three exceptions to this. The cities of Boise, Lewiston, and Bellevue were created as "home rule" cities with broader legislative powers. Boise is no longer a home rule City. *Caesar v. State*, 101 Idaho 158, 161, 610 P.2d 517, 520 (1980). The authors have not researched the home rule status of the other two cities.

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

The Idaho Supreme Court repeatedly has rejected any of the extreme forms of home rule. There is no inherent right of cities to self-governance, and what powers are granted to cities remain subject to overriding state control.

As early as 1918, our Supreme Court said:

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation - not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

Bradbury v. City of Idaho Falls, 32 Idaho 28, 32, 177 P. 388, 389 (1918) (quoting 1 *Dillon on Municipal Corporations* § 237 (5th ed.)).

Dillon was quoted again in 1956. *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 320, 303 P.2d 672, 674-75 (1956) (Porter, J.) (finding that the city unlawfully circumvented bonding requirements under the Revenue Bond Act by having the bonds issued by a non-profit controlled by the city).

The most quoted case of all was decided in 1980:

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

Caesar v. State, 610 P.2d 517, 519 (Idaho 1980) (Donaldson, C.J.) (citations omitted).

In a case invalidating a city's grant of a solid waste disposal monopoly, the Court said:

> Municipal power is a classic example of derivative power. It is a longstanding rule in Idaho that cities possess only the powers expressly conferred on them by the legislature or which can be derived by necessary implication. This Court has articulated this rule as a strict limitation when construing municipal powers: "municipalities may exercise only those powers granted to them or necessarily implied from the powers granted . . . . If there is a fair, reasonable, substantial doubt as to the existence of a power, the doubt must be resolved against the city." *City of Grangeville v. Haskin*, 116 Idaho 535, 538, 777 P.2d 1208, 1211 (1989). This rule is especially applicable to proprietary functions, of which garbage collection services are included.

Plummer v. City of Fruitland, 140 Idaho 1, 4-5, 89 P.3d 841, 844-45 (2003) (Trout, J.) (other citations omitted, brackets and ellipses original), *modified on rehearing*, 139 Idaho 810, 87 P.3d 297 (2004).

Accordingly, in Idaho we look first to the Idaho Constitution to determine what authority has been granted to municipal corporations. The Idaho Constitution contains two provisions that could support city or county authority to impose taxes, fees, and exactions:

Taxation power:

> The legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may by law invest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation.

Idaho Const. art. VII, § 6.

Police power:

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

Idaho Const. art. XII, § 2.

The constitutional provision dealing with local taxation is not a self-executing grant of taxing authority to cities and counties.[133] Rather, it is a grant of authority to the Legislature which, in turn, may elect to grant taxing powers to local governments as it sees fit.

The effect of this constitutional provision is simply to authorize the Legislature to delegate taxing power to local governments. "Although the state legislature may not pass local laws for the assessment and collection of taxes, it may by law invest in municipal corporations, the power to assess and collect taxes for all purposes of such corporations." *City of Lava Hot Springs v. Campbell*, 125 Idaho 768, 769, 874 P.2d 576, 580 (1994). In other words, this constitutional provision is not a grant of taxing authority at all. Instead, Idaho cities and counties must look to some statutory authorization (or other constitutional delegation of power) for taxing authority.

In addition to actions under the self-executing police power and the taxation power (which required authorizing legislation), local governments may also act in a proprietary function. But proprietary functions, like the imposition of taxes, must be authorized by some legislative act.

The authority may be express or implied, but in Dillon's Rule jurisdictions implied powers are disfavored. "In some instances, even if there is no express authorization, courts will find implied authority. In jurisdictions that adhere to Dillon's Rule, however, the powers of local governments will be construed narrowly, and an exaction or fee not expressly authorized or necessarily implied from such express authorization will not survive judicial scrutiny." Delaney, Gordon & Hess, *Exactions: A Controversial New Source for Municipal Funds*, 50 L. & Contemporary Problems 139, 146 (1987).

In Idaho, there are only a few express delegations of the power to tax. For instance, the Legislature has granted cities and counties the authority to impose certain *ad valorem* taxes, which are taxes imposed on all taxable property within the jurisdiction. Idaho Code §§ 50-235, 50-1007 (authority for cities to impose *ad valorem* taxes); Idaho Code § 63-203 *et seq.* (assessment procedures); Idaho Code § 42-3213 (authority of water and sewer districts to impose *ad valorem* taxes). Under very limited circumstances, cities and counties also have the authority to

[133] "Thus the grant of taxing powers to cities is not self-executing or unlimited." *Brewster v. City of Pocatello*, 768 P.2d 765, 766 (Idaho 1988) (Shepard, J.) "However, that taxing authority is not self-executing and is limited to that taxing power given to the municipality by the legislature." *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene* ("*IBCA*"), 890 P.2d 326, 328 (Idaho 1995) (Trout, J.). "Thus the grant of taxing power to cities is not self-executing or unlimited. It is limited by what taxing power the legislature authorizes in its implementing legislation." *Sun Valley Co. v. City of Sun Valley*, 708 P.2d 147, 150 (Idaho 1985) (Donaldson, J.) (upholding the local option resort city tax law, Idaho Code §§ 50-1043 to 40-1049).

impose certain sales taxes. *E.g.*, Idaho Code §§ 50-1043 to 40-1049 (local option resort city tax authority). In addition, there are various specialized tax and fee authorization statutes, *e.g.*, Idaho Code § 31-4404 (authorizes counties to impose taxes and fees for solid waste disposal).

The Legislature has also granted cities and counties the authority to impose certain "impact fees" for specified capital development projects under the Idaho Development Impact Fee Act of 1992 ("IDIFA"), Idaho Code §§ 67-8201 to 67-8216. (See discussion of IDIFA in section 33 at page 284.) Unlike *ad valorem* taxes, which are assessed on all property owners, impact fees are directed only to homebuilders and other developers engaged in new development.

In contrast to the taxation power, the police power granted by the Idaho Constitution is broad and self-executing. "The great majority of the decisions of the Idaho Supreme Court, however, view article XII, section 2 of the Idaho Constitution as a direct grant of the police powers to Idaho counties and cities, for which no additional enabling legislation is required." Michael C. Moore, *The Idaho Constitution and Local Governments*, 31 Idaho L. Rev. 417, 423-24 (1995).

In addition to the power to regulate, the police power carries with it limited authority to impose what are known as regulatory fees. However, this incident to the police power does not include the power to tax—hence, the key distinction between proper regulatory fees and unauthorized taxes. In the words of our Supreme Court: "In addition, under its police powers, the municipality may provide for 'the collection of revenue incidental to the enforcement of that regulation.' However, if the fee or charge is imposed primarily for revenue raising purposes, it is in essence a tax and can only be upheld under the power of taxation." *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene*, 126 Idaho 740, 742-43, 890 P.2d 326, 328-29 (1995) (citation omitted).

Accordingly, in states like Idaho that follow Dillon's Rule, the courts have carefully limited the police power to regulation, not taxation. These are distinct powers. "[T]he Idaho Supreme Court has always treated [the powers to tax, to annex, and to condemn] as separate and distinguishable from the police power." Michael C. Moore, *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?*, 14 Idaho L. Rev. 143, 145 (1977). "As already noted, the police power does not include the power to tax." Moore at 159.

In a few cases, the Idaho Supreme Court has recognized a third category of authority whereby cities and counties may impose fees for services rendered as part of their proprietary function.

D. Idaho Code § 50-301 does not provide home rule to Idaho cities.

It is well established that Idaho is a Dillon's Rule state, and that Idaho's Constitution extends home rule only to the police power. The authors of two law review articles, however, contend that a statutory amendment in 1976 contains a broad grant that extends home rule in Idaho past the police power. Michael C. Moore, *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?*, 14 Idaho L. Rev. 143 (1977); James S. Macdonald & Jacqueline R. Papez, *Over 100 Years Without True "Home Rule" in Idaho: A Time for Change*, 46 Idaho L. Rev. 587, 608 (2010).

Idaho Code § 50-301 sets out the basic authorities of cities.[134] In 1976, the Idaho Legislature amended the statute to read as follows:

> 50-301. CORPORATE AND LOCAL SELF-GOVERNMENT POWERS. Cities governed by this act shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; accept grants-in-aid and gifts of property, both real and personal, in the name of the city; acquire, hold, lease, and convey property, real and personal; have a common seal, which they may change and alter at pleasure; may erect buildings or structures of any kind, needful for the uses or purposes of the city; and exercise ~~such other powers as may be conferred by law~~ all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.

[134] The parallel provisions governing counties differ considerably:

> Every county is a body politic and corporate, and as such has the powers specified in this title or in other statutes, and such powers as are necessarily implied from those expressed.

Idaho Code § 31-601.

> It [every county] has power: 1. To sue and be sued. 2. To purchase and hold lands. 3. To make such contracts, and purchase and hold such personal property, as may be necessary to the exercise of its powers. 4. To make such orders for the disposition or use of its property as the interests of its inhabitants require. 5. To levy and collect such taxes for purposes under its exclusive jurisdiction as are authorized by law. 6. Such other and further authority as may be necessary to effectively carry out the duties imposed on it by the provisions of the Idaho Code and constitution.

Idaho Code § 37-604 (emphasis supplied).

Idaho Code § 50-301 (showing amendment made by R.S. 685, H.B. 422, 1976 Idaho Sess. Laws, ch. 214 § 1).

Prior to its revision in 1976, the statute contained an explicit recognition of the Dillon's Rule limitation (limiting a city's powers to those "conferred by law").[135] The 1976 amendment struck that provision, replacing it with what appears to be a sweeping grant of home rule, albeit still subject to any limitations imposed by the Legislature. Yet no Idaho court has so ruled, or even considered the matter. Although several post-1976 decisions (*e.g., Caesar v. State*, 610 P.2d 517, 519 (Idaho 1980) (Donaldson, C.J.)) have reiterated the applicability of Dillon's Rule in Idaho, none has discussed the effect of Idaho Code § 50-301.

In a 2010 law review article, Professor Macdonald commented on this situation:

> As a matter of statutory construction, an amendment to a statute is presumably to change its meaning. Because the Idaho courts had consistently interpreted Article XII, Section 2 as granting home rule with regard to police powers for Idaho municipalities, it seems unlikely that the legislature's revision of Section 50-301 was intended to duplicate this result. Instead, Section 50-301 must serve a different function than Article XII, Section 2. This conclusion is supported by the 1976 Legislative News, which noted that the purpose of the amendment to Section 50-301 was to reverse the current relationship between Idaho's state and local governments by allowing local governments to exercise any power and perform any function or service not prohibited by law. This was also the interpretation of the Association of Idaho Cities, which also noted that, with passage of the local self-government act, "where the Constitution or the Code was silent, local governments would be free to act." Enactment of this legislation would permit the exercise of true local self-government in Idaho.

[135] In 1976 the Idaho Attorney General concluded that that the pre-amendment statute did nothing to extend home rule past the constitutional grant of police power authority. "Idaho cities and counties do not enjoy constitutional home rule powers in local matters which fall outside the realm of local police powers. . . . [N]either Section 50-301, Idaho Code, nor Section 50-302, Idaho Code, can be considered a grant of legislative home rule regarding matters beyond the realm of police powers." Idaho Attorney General Opinion No. 76-3 at 7 (Jan. 20, 1976) (Wayne Kidwell, A.G.).

James S. Macdonald & Jacqueline R. Papez, *Over 100 Years Without True "Home Rule" in Idaho: A Time for Change*, 46 Idaho L. Rev. 587, 608 (2010) (footnotes omitted).

In *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J.), the City of Hayden presented the home rule issue as an argument in the alternative. The Idaho Supreme Court dismissed the argument out of hand. "There is a difference between the power of a city to act and the power of a city to tax. A municipal corporation's taxes on the general public require specific legislative authorization. Idaho Code section 50–301 does not grant the City the power to tax in order to expand its sewer system." *NIBCA I*, 158 Idaho at 86, 343 P.3d at 1093. The Court did not explain why section 50-301 did not constitute the requisite "specific legislative authorization," particularly in light of clear and unmistakable legislative history provided to the Court showing that the legislation was intended to establish home rule. Be that as it may, the issue was squarely presented, and rejected. Accordingly, the *NIBCA I* decision puts to rest the argument that Idaho cities enjoy home rule.

E. Lawful fees and exactions

(1) Overview

As noted above, the Idaho Constitution contains a broad, self-executing grant of police power to municipalities. Idaho Const. art. XII, § 2. In Idaho and elsewhere, the police power is broadly construed. Broad as it is, however, this provision does not include a general power to tax. "A city or village cannot, in the exercise of its police power, levy taxes." *State v. Nelson*, 36 Idaho 713, 722, 213 P. 358, 361 (1923) (Lee, J.), *overruled on other grounds by Greater Boise Auditorium Dist. v. Royal Inn of Boise*, 106 Idaho 884, 684 P.2d 286 (1984). Rather, its thrust is to authorize cities to make and enforce local regulations and to charge those served for particular services provided pursuant to the local government's police power.

A well-developed body of law has emerged to distinguish proper fees and exactions under the police power from unauthorized taxes masquerading as fees. The Idaho Attorney General offered this summary: "To be valid under the police power delegation, the fee must (1) be charged for a service or benefit not shared by members of the general public; (2) not be a forced contribution; and (3) not raise revenue, but only compensate the governmental entity for the expenses it incurred in providing the service." Idaho Att'y Gen. Op. 93-5 (Apr. 7, 1993) at 58.[136]

[136] Although this Attorney General's opinion describes user fees as falling under the police power, our Supreme Court has generally described it as being a proprietary function. Either way such fees are lawful, but calling it proprietary may suggest that it requires a statutory basis. See discussion in section 30.E(3)(a) at page 190.

It bears emphasis that the only time one needs to evaluate whether a user fee is an unlawful tax is in the absence of authorizing legislation, such as Idaho Code §§ 63-1311(1) and 31-870(1) (authorizing user fees), the Revenue Bond Act, Idaho Code §§ 50-1027 to 50-1042 (authorizing user fees), or the Idaho Development Impact Fee Act (authorizing impact fees), all of which are discussed below. If there is legislation authorizing the imposition of a charge, fee, assessment, exaction, or tax of any kind, the only constitutional question is whether the monetary requirement imposed fits within the legislation or whether it is merely masquerading as something that falls under the statute. In other words, if the charge has been authorized by the Legislature, and if the charge fairly falls within that legislative authorization, it makes no difference whether it is labeled a fee or a tax. Whatever one wishes to call it, it has been authorized, and that is all that Dillon's Rule requires.[137]

Over the years, the Idaho Supreme Court has recognized the following categories of fees and exactions that are proper exercises of the local authority power:

(1) fees incidental to a regulation (such as a dog license, vehicle registration, or building permit fee)

(2) user fees for services (such as a sewer connection charge or a park admission fee)

(3) conditions imposed in the context of zone changes or CUPs to address the need for public services provided by public entities, including school districts (Idaho Code §§ 67-6511 and 67-6512)

(4) outright and unconditional denial of a rezone, permit, or annexation request.

(5) traditional, on-site entitlement exactions tangibly related to and for the direct benefit of the property (such as a requirement that developers dedicate streets within the development).

[137] This point seems to have been lost on the Attorney General who issued an opinion in 1993 stating: "The characterization of impact fees presents a complex problem. If the impact fees are found to be disguised taxes rather than fees, the ordinance, and possibly the enabling statute, would be in violation of article 7, § 4 (exempting public property from taxation) and § 5 (requiring uniform taxation), of the Idaho Constitution." Idaho Att'y Gen. Op. 93-5 (Apr. 7, 1993) at 58. In fact, there is nothing complex about this. The "is it a tax?" constitutional complexity disappears with the enactment of enabling legislation. If the Legislature clearly authorized the revenue measure, it makes no difference that it is a tax. If the tax is authorized by legislation, it is constitutional. Consequently, there is no need to ponder, as the Attorney General did, whether IDIFA or ordinances created pursuant to it create disguised taxes. The Attorney General mistakenly applied law developed to analyze local ordinances in the absence of state legislation to the state legislation (IDIFA).

(6) municipal franchise fees.

The first (incidental regulatory fees) falls within the police power.

The second (service fees, also known as user fees) might be seen as part of the police power, but our courts have tended to view these fees as falling into a separate category—a "proprietary function" of local government. The effect of this is simple: It clarifies that there must be some legislative authorization (explicit or implicit) to engage in the proprietary function and to charge a fee associated with that function.

The third (impacts on facilities in the context of CUPs and zone changes) is expressly authorized by statute.

The fourth (outright denial of a rezone, permit, or annexation request) is plainly authorized under LLUPA.

The authority for the fifth (on-site entitlement exactions) is rarely discussed in Idaho case law (because they are rarely challenged). They presumably fall within the police power and, in any event, are authorized by statute under LLUPA.

In a 1990 case, the Court held that franchise fees (the sixth category above) are not illegal taxes.

The first five categories are discussed in turn below; the franchise fee issue is discussed in section 33.E ("The *Alpert* case—Franchise agreements and fees are lawful") on page 308.

(2) Incidental regulatory fees

The police power authorized under Idaho Const. art. XII, § 2 is a broad, self-executing grant of power to local governments empowering them "to enact regulations for the furtherance of the public health, safety or morals or welfare of its residents." *Brewster v. City of Pocatello,* 768 P.2d 765, 767 (Idaho 1988) (Shepard, J.).[138]

The grant of police power to local governments has been construed to contain within it the implicit authority to collect revenue necessary to fund its regulatory programs through fees. Because such revenue collection falls within the police power expressly granted to municipal governments by the Idaho Constitution, it requires no separate statutory authorization.

[138] "The 'police power' is the power of a governmental body to impose laws and regulations or enact ordinances that are reasonably related to the protection or promotion of the public health, safety, or welfare. It denotes the authority to regulate the actions of its citizens, to protect or promote their health, safety, morals, peace, or general welfare." 56 Am. Jur. 2d *Municipal Corporations, Etc.* § 369 (2010).

Thus, for instance, a city might adopt an ordinance requiring dog owners to obtain dog licenses. To fund enforcement of this regulatory requirement, the city might charge the dog owner a license fee. Such an incidental regulatory fee is different from an ordinary or general tax, because it targets the individual (in this case, the dog owner) and makes that person pay the administrative costs of the regulatory program. The same logic applies to vehicle emission testing fees, fees for recording documents, professional licensing fees, building permits, and all manner of incidental regulatory fees. *E.g.*, *State v. Bowman*, 104 Idaho 39, 655 P.2d 933 (1982) (Walters, J.) ($100/year license fee for dance halls found to be a lawful incidental regulatory fee); *Brewster v. City of Pocatello*, 768 P.2d 765, 768 (Idaho 1988) (Shepard, J.) (giving fees for "the recording of wills or the filing of legal actions" as examples of appropriate incidental regulatory fees).

Most litigation over incidental regulatory fees centers on whether the fee charged goes beyond what is necessary to pay for the regulatory program and is instead a revenue-generating tax. E.g., *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene* ("*IBCA*"), 126 Idaho 740, 890 P.2d 326 (1995) (Trout, J.). It bears emphasis, however, that there is a threshold issue. To be an incidental regulatory fee, there must be some underlying regulation (i.e., exercise of the police power) that the fee funds. "A[n incidental regulatory] fee's purpose is regulation . . . . [F]unds generated thereby must bear some reasonable relationship to the cost of enforcing the regulation." *Lewiston Independent School Dist. No. 1 v. City of Lewiston*, 264 P.3d 907, 912 (Idaho 2011) (W. Jones, J.). In *Lewiston*, the Court found that the city's stormwater fee was not an incidental regulatory fee because (among other reasons) the stormwater fee ordinance "contains no provisions of regulation and is not incidental to regulation." *Lewiston*, 151 Idaho at 805. 264 P.3d at 913.

To be a proper regulatory fee, the size of the fee must be reasonably related to the cost of the regulatory program that it funds:

> Such police power regulation may provide for the collection of revenue incidental to the enforcement of that regulation. . . . If municipal regulations are to be held validly enacted under the police power, funds generated thereby must bear some reasonable relationship to the cost of enforcing the regulation.

Brewster at 767.

Our Supreme Court has drawn a bright line on this point: "However, if the fee or charge is imposed primarily for revenue raising purposes, it is in essence a general tax and can only be upheld under the power of taxation." *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene* ("*IBCA*"), 890 P.2d 326, 329 (Idaho 1995) (Trout, J.). In other words, if it is really a revenue-generating mechanism to fund services or

capital expenses for the general benefit of the community, there must be authorizing legislation.

This distinction has been recognized for decades. In a 1923 decision, the Court provided this clear guidance:

> It is quite clear that the ordinance in question in the instant case was enacted for the purpose of raising revenue only, first because by its terms it so provides, and secondly, it has no provisions of regulation. A license that is imposed for revenue is not a police regulation, but a tax, and can only be upheld under the power of taxation.
> . . .
> One of the distinctions between a lawful tax for regulatory purposes and one solely for revenue is: If it be imposed for regulation, under the authority of section 2, art. 12, of the Constitution [the police power], the license fee demanded must bear some reasonable relation to the cost of such regulation . . . .

State v. Nelson, 213 P. 358, 361 (Idaho 1923) (Lee, J.) (citation omitted) (striking down a "license tax on certain occupations" imposed by the City of Rexburg), *overruled on other grounds by Greater Boise Auditorium Dist. v. Royal Inn of Boise*, 684 P.2d 286 (Idaho 1984).

While the fee must bear a "reasonable relation" to the cost of the regulatory program it funds, precision is not required. In *Foster's Inc. v. Boise City*, 118 P.2d 721, 728 (Idaho 1941) (Ailshie, J.), the owner of a furniture store challenged the city's authority to install parking meters on the public street in front the store—alleging that the meters were illegal taxes. The Court upheld the parking meter fees as a proper exercise of the police power, despite the fact that they apparently generated somewhat more income than required to cover the cost of the meters:

> The fact, that the fees charged produce more than the actual costs and expense of the enforcement and supervision [of traffic and parking regulation], is not an adequate objection to the exaction of the fees. The charge made, however, must bear a reasonable relation to the thing to be accomplished.
> The spread between the actual cost of administration and the amount of fees collected must not be so great as to evidence on its face a revenue measure rather than a license tax measure.

Foster's at 728 (citations omitted).

The Idaho Supreme Court has made it plain that it will look past the label assigned by the city or county to a particular charge, and examine its actual nature. In 1988, the Idaho Supreme Court struck down the City of Pocatello's "street restoration and maintenance fee" imposed on all owners and occupiers of property in the City. *Brewster v. City of Pocatello*, 768 P.2d 765 (Idaho 1988) (Shepard, J.). City voters twice rejected property tax increases (in levy override elections) to improve the city's streets. In response, city officials imposed a street fee, claiming it was not a tax, but an incidental regulatory fee under the police power. The Court said that, irrespective of what it was called, it had the attributes of a general tax:

> We view the essence of the charge at issue here as imposed on occupants or owners of property for the privilege of having a public street abut their property. In that respect it is not dissimilar from a tax imposed for the privilege of owning property within the municipal limits of Pocatello. The privilege of having the usage of city streets which abuts [sic] one's property, is in no respect different from the privilege shared by the general public in the usage of public streets.

Brewster at 767.[139]

The *Brewster* court further explained that when the purpose of a permit fee is not to fund regulation or enforcement, it is a tax:

> In the instant case it is clear that the revenue to be collected from Pocatello's street fee has no necessary relationship to the regulation of travel over its streets, but rather is to generate funds for the non-regulatory function of repairing and maintaining streets. The maintenance and repair of streets is a non-regulatory function as the terms apply to the facts of the instant case.

Brewster at 767.

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

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[139] *Brewster* demonstrates that distinction between fees and taxes is based on practical and functional considerations, not semantics, and that the courts will not be confused by labels. "Not surprisingly, local governments will frequently attempt to employ the label most likely to survive judicial scrutiny. However, they do not always use consistent terminology, and therefor cash payments related to land development have been called many things. . . . This ploy is met with mixed success since courts feel free to take a fresh look at the device under attack and to characterize it as they see fit." Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulations: Paying for Growth with Impact Fees*, 59 S.M.U. L. Rev. 177, 204-05 (2006).

Seven years later, in *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene* ("*IBCA*"), 890 P.2d 326 (Idaho 1995) (Trout, J.), the Court struck down the City of Coeur d'Alene's development impact fee ordinance. The ordinance, which was not enacted pursuant to IDIFA,[140] required developers to pay an impact fee as a precondition to the issuance of a building permit "to pay for a proportionate share of the cost of improvements needed to serve development." *IBCA* at 327. The fees apparently were not targeted or quantified for any particular use or service, but were generally "spent on capital improvements serving such things as libraries, police, fire, and streets. *IBCA* at 327-28. The city defended the fee as an exercise of its police power. *IBCA* at 329. The Court analyzed it as an incidental regulatory fee, and found it fell short.

Citing the *Brewster* case, the *IBCA* Court reiterated that a fee to provide for services benefiting the entire community which are not tied to use of a particular service by individual consumers is really a disguised tax:

> The City's impact fee ordinance purports to assess a fee to support additional facilities or services made necessary by the development, and to shift the cost of those additional facilities and services from the public at large to the development itself. Unfortunately there is otherwise nothing in the ordinance which in any way limits the use of the revenue created. It is to be used for "capital improvements" without limitation as to the location of those improvements or whether they will in fact be used solely by those creating the new developments. This is antithetical to this Court's definition of a fee. "[A] fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs." *Brewster v. City of Pocatello*, 115 Idaho 502, 505, 768 P.2d 765, 768 (1988).
>
> . . .
>
> Similarly, the assessment here is no different than a charge for the privilege of living in the City of Coeur d'Alene. It is a privilege shared by the general public which utilizes the same facilities and services as those purchasing building permits for new construction. The

[140] Note that at the time of this litigation the City of Coeur d'Alene could not enact an IDIFA-compliant ordinance because IDIFA (discussed in section 33 at page 284) applied only to cities with a population of 200,000 or more. The Act was amended in 1996 to remove this limitation. 1996 Idaho Sess. Laws, ch. 366. In any event, the city's impact fee ordinance was broader than allowed under IDIFA.

> impact fee at issue here serves the purpose of providing funding for public services at large, and not to the individual assessed, and therefore is a tax.

IBCA at 329-30.

Note that the *IBCA* case (in Coeur d'Alene) involved an impact fee (which fell outside the impact fees authorized by statute) masquerading as an incidental regulatory fee. In contrast, the *Brewster* case (in Pocatello) did not involve an impact fee on new development. The street tax at issue in that case applied to all residents. Thus, the Pocatello case involved a general tax masquerading as an incidental regulatory fee. Either way, the charges were unconstitutional.

It bears emphasis that the good intentions of the local government and legitimacy of the public policy served are not relevant to the constitutional analysis. Pocatello's street maintenance fee was not saved by the fact that it was urgently needed. "The issue is not the need for funding . . . . [It does not matter] how well-intentioned and desirable the ultimate result may be." *Brewster v. City of Pocatello*, 768 P.2d 765, 766, 768 (Idaho 1988) (Shepard, J.). Likewise, Coeur d'Alene's impact fee was struck down "no matter how rationally and reasonably drafted" it was. *IBCA* at 331.

Finally, the Court has been clear that it matters not that the fees are designed to offset the costs of new development. Money raised for capital investments or services benefiting the general community (even if the need for those expenditures is increased by new development) is a tax, not a fee. As the Court said in *IBCA*, "The fact that additional services are made necessary by growth and development does not change the essential nature of the services provided: they are for the public at large." *IBCA* at 330.

In a recent action, the district court invalidated a "linkage fee" for affordable housing established by the City of Sun Valley. The Court tracked the reasoning and decisions described above. A copy of the decision is reproduced in Appendix E. Sun Valley elected not to appeal the decision. The district court then awarded attorney fees to the plaintiff, noting that the law on this subject is well settled and that the city proceeded "at its peril" in ignoring the precedent. Another district court, acknowledging the recent Sun Valley decision, struck down the City of McCall's affordable housing fee. That decision is reproduced in Appendix F.

(3) User fees for services

This section addresses a different sort of fee—the "user fee" or "service fee" (interchangeable terms). These are fees charged for services provided by the governmental agency that are not connected with a regulatory program. For example, user fees may be charged for municipal water, sewer, or other services. As will be discussed in detail below, user fees are valid so long as they are truly fees

charged for a service provided and not a disguised revenue-generating measure unrelated to a particular service provided to the user.

(a) Provision of services by a local government is a proprietary function, not part of the police power.

One might think that the provision of traditional municipal services (such as sewer, water, solid waste collection and disposal, and stormwater management) by local governments would fall within the police power so long as the service is provided for the protection of the public health, safety, and welfare. In other words, one might think that the provision of such services is a part of a city's inherent authority—*i.e.*, part of its police power. After all, cities have been constructing sewer and water systems much longer that the legislative authorizations relied on in the cases discussed below.

Idaho courts, however, are not of that view. They draw a sharp distinction between governmental (*i.e.*, regulatory) and proprietary (*i.e.*, business-like) functions of local governments, and only the former are deemed to fall within the police power.

> There is no inconsistency between the holding herein that in the operation of a public utility the village exercises a proprietary function, and the holding that in requiring connections to be made with the sewage system the village is exercising its police power, which is a governmental function. The fact that an ordinance, providing for the establishment and operation of a municipal water and sewage system, may also contain regulations within the police power, is not conflicting, inconsistent, or an improper commingling of the two recognized functions of a municipality. The one is regarded as complimentary of the other. If the water and sewage system were privately owned and operated, unquestionably the municipality could by ordinance regulate the operation in the interests of public health, and, in so doing, require residents to connect with and use the system.

Schmidt v. Village of Kimberly, 256 P.2d 515 (Idaho 1953) (Taylor, J.) (this statement was later quoted in full in *Loomis v. City of Hailey*, 807 P.2d 1272, 1275 (Idaho 1991) (Boyle, J.).

In a 1989 case, the Idaho Supreme Court reiterated that the provision of city services for a fee does not fall under the police power, but is a "proprietary" function (hence requiring some legislative authorization):

> This Court has repeatedly held that municipalities may exercise only those powers granted to them or necessarily implied from the powers granted. If there is a fair, reasonable, substantial doubt as to the existence of a power, the doubt must be resolved against the city. This is especially true where the city is exercising proprietary functions instead of governmental functions. The operation of a water system, a sewer system and a garbage collection service by the city is a proprietary function, not a governmental function.

City of Grangeville v. Haskin, 777 P.2d 1208, 1211 (Idaho 1989) (Johnson, J.) (emphasis added; citations omitted). (The *Grangeville* case is discussed in section 30.E(3)(g) on page 219.)

In *Loomis v. City of Hailey*, 807 P.2d 1272 (Idaho 1991) (Boyle, J.), the Court noted:

> There is, however, a difference between the exercise of a police power and the proprietary functions of a municipality. . . .
>
> . . .
>
> Pursuant to this proprietary function municipalities may construct and maintain certain public works. The Idaho Constitution, art. 8, § 3 allows municipalities to impose rates and charges to provide revenue for public works projects, and pursuant to this section of the Constitution, the Idaho legislature enacted the Idaho Revenue Bond Act, codified at I.C. § 50-1027 through § 50-1042. It is pursuant to this Act and a municipality's proprietary function that the City of Hailey derives its authority to charge water and sewer connection fees.

Loomis at 1275-76 (footnote omitted) (emphasis added) (citing *Schmidt v. Village of Kimberly*, 256 P.2d 515 (Idaho 1953) (Taylor, J.).

In *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 233 P.3d 118 (Idaho 2010) (Eismann, C.J.), the Court reiterated that fees for services are neither regulatory fees nor taxes, but fall into a third category of "proprietary" action:

> *Loomis* recognized three categories of authority that could possibly be applicable and held that the connection fee was neither a tax nor a regulatory fee, but was a fee imposed pursuant to the city's proprietary function. . . .
>
> . . .

> Thus, this Court held in *Loomis* that the city imposed the connection fee pursuant to its proprietary function, not pursuant to its police power.

Viking at 124.

Again, in 2004, the Court noted: "'Proprietary function' refers to the actual act of hauling garbage. Passing laws regulating solid waste collection is a government function." *Plummer v. City of Fruitland*, 87 P.3d 297, 300 (Idaho 2004) (Trout, J.).

The reason this matters is that local governments may not engage in proprietary functions absent a grant of legislative authority.[141]

> As indicated above, art. 12, § 2, of the Idaho Constitution grants a form of home rule authority only in the area of the police power, and then only to the extent that the particular enactment does not conflict with state law. For proprietary powers, cities must look for a legislative grant of power.

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

Thus, a local government may not provide services, or charge for them, without some express or clearly implied authority beyond the constitutional grant of police power. Indeed, to the authors' knowledge, in every instance in which the courts have upheld a user fee, they have relied on some express statutory or constitutional authorization.

This conclusion is consistent with that set out in a 1995 law review article:

> Fees for proprietary services, not being directly authorized by the constitutional grant of police powers, must be authorized, expressly or impliedly, by legislative act, must conform to the statutory requirements, and must be reasonable, but do not appear to be subject to the same degree of judicial scrutiny as is a fee which purports to be imposed as a police power regulatory fee.

Michael C. Moore, *The Idaho Constitution and Local Governments*, 31 Idaho L. Rev. 417, 445 (1995) (footnotes omitted).

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[141] See footnote 152 on page 200 explaining that implementing legislation, although not required, was enacted with respect to the direct constitutional grant of authority to cities to undertake water and sewer works pursuant to Idaho Const. art. VIII, § 3.

Accordingly, the sections below explore a variety of statutory authorities for user fees.[142]

(b) Idaho Code §§ 63-1311(1) and 31-870(1) (city and county user fees)

(i) Overview of the statutes

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

> (1) Notwithstanding any other provision of law, the governing board of any taxing district may impose and cause to be collected fees for those services provided by that district which would otherwise be funded by property tax revenues. The fees collected pursuant to this section shall be reasonably related to, but shall not exceed, the actual cost of the service being rendered.

Idaho Code § 63-1311(1) (emphasis supplied).[143]

A virtually identical provision authorizes county governments to impose such user fees:

> (1) Notwithstanding any other provision of law, a board of county commissioners may impose and collect fees for those services provided by the county which would otherwise be funded by ad valorem tax revenues. The

[142] Idaho Code § 63-1311 and the Revenue Bond Act have received most of the attention in cases involving user fees. In *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 343 P.3d 1086 (Idaho 2015) (Eismann, J.),the City of Hayden relied primarily on those statutes. However, the city also made a "kitchen sink" argument under a third statute, Idaho Code § 50-323 (as interpreted in *Alpert v. Boise Water Corp*., 795 P.2d 298, 305 (Idaho 1990) (Boyle, J.), *City of Grangeville v. Haskin*, 116 Idaho 535, 777 P.2d 1208 (1989) (J. Johnson, J.), and *Snake River Homebuilders Ass'n v. City of Caldwell*, 607 P.2d 1321, 1322 (Idaho 1980) (Donaldson, C.J.)). The *NIBCA I* Court found no merit in the argument.

[143] When enacted in 1980, the first sentence of what is now section 63-1311(1) was enacted and codified as Idaho Code § 63-2201A. H.B. 680, 1980 Idaho Sess. Laws, ch. 290 § 2. (This was the codification referred to in *Brewster v. City of Pocatello*, 768 P.2d 765, 766 (Idaho 1988).) In 1988, section 63-2201A (now section 63-1311(1)) was amended to add what is now the second sentence (requiring that fees be reasonably related). S.B. 1340, 1988 Idaho Sess. Laws, ch. 201 § 3. In 1996, the entire revenue and taxation code was re-enacted, and section 63-2201A was recodified as section 63-1311. S.B. 1340, 1996 Idaho Sess. Laws, ch. 98 § 14 at 393; see also 1996 Idaho Sess. Laws, ch. 322 §7 (correcting cross-reference to section 63-1311 in section 31-870). In 1997, the provision was renumbered as section 63-1311(1) and what is now section 63-1311(2) was added. 1997 Idaho Sess. Laws, ch. 117 § 35 at 333.

> <u>fees collected pursuant to this section shall be reasonably related to, but shall not exceed, the actual cost of the service being rendered.</u> Taxing districts other than counties may impose fees for services as provided in section 63-1311, Idaho Code.

Idaho Code § 31-870(1) (emphasis supplied).[144] (Note that a separate provision provides specific authority for county governments to fund solid waste disposal facilities through either property taxes or fees. Idaho Code § 31-4404.)

The underlined portion of the statutes was added in 1988. See footnote 145 at page 194. This amendment was a codification of the Idaho Supreme Court's holding in *Brewster v. City of Pocatello,* 768 P.2d 765 (Idaho 1988) (Shepard, J.) discussed below. The portion of the statute enacted in 1980 pre-dated *Brewster* and was discussed in that case (see footnote 149 on page 197)

Both section 31-870 and the predecessor of section 63-1311 were enacted via the same bill in 1980 (H.B. 680, 1980 Idaho Sess. Laws, ch. 290). The legislative history confirms that the language was intended to confirm the authority of cities and counties to impose service fees (rather than rely exclusively on *ad valorem* taxes) where the charge is for "garbage, water and sewage" and other "functions that are clearly user oriented."[145]

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[144] Section 31-870(1) was enacted in 1980 as section 31-870. It was part of the same act that created section 63-2201A (the predecessor of section 63-1311). 1980 Idaho Sess. Laws, ch. 290 § 1. In 1988, what is now this section 31-870(1) was amended to add what is now the second sentence. 1988 Idaho Sess. Laws, ch. 201 § 2. This provision was amended in 1993 to add a second section dealing with fees for solid waste, authorizing such fees to be collected "in the same manner provided by law for the collection of real or personal property taxes." This allowed fees for fees for solid waste facilities to be collected as part of the property tax bill, rather than as a separately billed service fee. 1993 Idaho Sess. Laws, ch. 41 § 1. A technical amendment in 1996 conformed the cross reference to the recodified version of Idaho Code § 63-1311. 1996 Idaho Sess. Laws, ch. 322 § 7 at 1,036. In 1999, a new section 3 was added dealing with motor vehicle registration. 1999 Idaho Sess. Laws, ch. 90 § 1.

[145] The legislative history to the original 1980 enactment (H.B. 680, based on R.S. 5694) is not extensive, but it shows that the legislation means what it says. "The purpose of this legislation is to give county commissioners and the governing boards of other taxing districts the power to collect fees for services in lieu of ad valorem taxes." Statement of Purpose (R.S. 5694). "Mr. Young explained that RS 5694 is permissive legislation for those levies that county commissioners do not have the power to impose. It will allow authority which many already have." Minutes of the Munger Subcommittee of the House Committee on Revenue and Taxation (Feb. 28, 1980). "Mr. Young explained that the purpose of RS 5694 is to allow county commissioners and governing boards of other taxing districts the authority to collect fees in lieu of ad valorem taxes. Many are now already doing this and this makes it all inclusive. Some examples of those fees are: garbage, water and sewage. Mr. Munger stated that it is permissive legislation and is not mandatory." Minutes of the House Revenue and Taxation Committee (Feb. 29, 1980). "Chuck Holden, Association of Idaho Counties, stated H 680 adds to the existing law to allow counties and taxing

It is unclear why both sections 31-870 and 63-1311 are needed. Both cities and counties are taxing districts,[146] so it would seem that both would be covered by section 63-1311 and that section 31-870 is unnecessary. For one reason or another, the drafters chose to enact duplicate legislation, placing the county authorization (codified at section 31-870) in Title 31, which deals with the counties and county law, and the city authorization in Title 63, which deals with revenue and taxation.

(ii) User fees may be imposed on entities not subject to *ad valorem* taxes.

Idaho Code §§ 63-1311(1) and 31-870(1) authorize the collection of fees "for those services provided by the county which would otherwise be funded by ad valorem tax revenues." At first blush this language might be thought to authorize

districts to impose fees for providing services which are normally funded by ad valorem tax revenues. Cities have had this authority for a number of years and haven't abused it and we feel the counties should have it. Much discussion followed." Minutes of Senate Local Government and Taxation Committee (Mar. 22, 1980). It is not clear, by the way, what city authority Mr. Holden was referring to. In any event, the legislation affirmed the authority of cities to charge service fees. "H680 Tax and Taxation – Adds to existing law to allow counties and taxing districts to impose fees for providing services which are normally funded by ad valorem tax revenues." Official computer summary of legislation by House Revenue and Taxation Committee (tracking action through passage of H.B. 680 on April 1, 1980).

In 1988, both provisions were amended by adding the same identical sentence: "The fees collected pursuant to this section shall be reasonably related to, but shall not exceed, the actual cost of the services being rendered." S.B. 1340, 1988 Idaho Sess. Laws, ch. 201 (amending Idaho Code §§ 31-870 and 63-2201A). The legislative history of the 1988 amendment reinforced the purpose of the original legislation. "The concept of this bill is to start the move to fund those functions that are clearly user oriented with fees collected from the users themselves, rather than have so much reliance on ad valorem tax." Minutes of House/Senate Legislative Council, Committee on Local Government Revenues, at 4 (Sept. 10, 1986) (regarding R.S. 12966 in 1986, which initially was limited to amending Idaho Code § 49-158 dealing with motor vehicle fees; that bill was replaced by S.B. 1304AA in 1988 which added the provisions amending sections 31-870 and 63-2201A). The only discussion bearing directly on the language added in 1988 was this statement: "S1340AA has language added to I.C. 31-870 and I.C. 63-2201A, ie, 'The fees collected pursuant to this section shall be reasonably related to, but shall not exceed, the actual cost of the service being rendered'. This language, he felt, would more clearly define the parameters of the amount of fee charged." Statement of Senator Anderson, House Local Government Committee Minutes (Mar. 16, 1988).

[146] The term "taxing district" is defined as follows: "'Taxing district' means any entity or unit with the statutory authority to levy a property tax." Idaho Code § 63-201(23). Plainly, this includes cities and counties, as well as special taxing districts for specific purposes like schools, irrigation, mosquito abatement, etc. That cities and counties are included among taxing districts is also reflected by use of the term elsewhere in the Idaho Code. For example, a provision of the Credit Report Protection Act refers to "a county, municipality or other taxing district." Idaho Code § 28-52-105(2)(e).

user fees only if the person or entity receiving the service is subject to local property taxes. Governmental and university property is not subject to property tax.[147]

However, both the language and the context of sections 63-1311(1) and 31-870(1) show that the authority to impose fees confirmed by these statutes is not limited to users who are subject to *ad valorem* taxes. The statutes are focused on the type of services provided, not the individual recipient of the services. If it is the type of service that might otherwise be funded with *ad valorem* taxes then the city or county is authorized to charge the fee. This is evident in the language of the statutes and is confirmed by the legislative history. See footnote 145 at page 194.

In sum, the key limitation—evident in both the language and the purpose of the statutes—is that the fee be reasonably related to the value of the service provided, irrespective of whether the entity receiving the service is subject to *ad valorem* taxes. As a practical matter, this is confirmed by the fact that user fees are sometimes imposed on tenants who pay no *ad valorem* taxes.

In any event, even if the authorization in sections §§ 63-1311(1) and 31-870(1) were read narrowly, that would not eliminate other statutory and constitutional authority for imposing such fees. The legislative history of sections 63-1311(1) and 31-870(1) makes clear that the purpose of the legislation was to confirm or expand existing governmental authority to impose fees, not to eliminate any other authorization for fees. See footnote 145 on page 194.

(iii) Case law construing these statutes

Two Idaho Supreme Court decisions have confirmed that user fees may be upheld on the basis of these statutes, but only if the fee charged is reasonably related to the service provided to identifiable users:

- *Brewster v. City of Pocatello*, 768 P.2d 765 (Idaho 1988) (Shepard, J.).
- *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J).

The Idaho Supreme Court discussed the predecessor to section 63-1311 in *Brewster v. City of Pocatello*, 115 Idaho 502, 768 P.2d 765 (1988) (Shepard, J.).[148]

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[147] "The Idaho Constitution prohibits a municipality from imposing a tax on other governmental entities. See IDAHO CONST. art. VII, § 4 (providing that '[t]he property of . . . the state, counties, towns, cities, villages, school districts, and other municipal corporations and public libraries shall be exempt from taxation . . . .')." *Lewiston*, 151 at 805, 264 P.3d at 912. See also Idaho Code § 63-602A(1) (exempting from taxation property belonging to the federal government, the state, local governments, and Indian tribes).

[148] The Court sidestepped a tricky standing issue. It would seem that this was a classic "taxpayer standing" case, in which taxpayers are found not to have standing to challenge ordinances that raise issues common to all taxpayers. The Court noted that "[s]uch assertion would appear to

In the case, city voters repeatedly failed to approve bonds for street maintenance. In response, the city imposed a "street restoration and maintenance fee" on all property owners. Property owners challenged the fee as an unauthorized tax. The city contended it was a service fee authorized by section 63-2201A (the predecessor to section 63-1311[149]). *Brewster*, 115 Idaho at 503, 768 P.2d at 766.

The *Brewster* Court rejected the city's contention, finding that the statute authorized certain fees, but not "to impose a *tax* upon users or abutters of public streets." *Brewster*, 115 Idaho at 504, 768 P.2d at 767 (emphasis original).

The *Brewster* Court first noted that the fee charged was not an incidental regulatory fee of the sort allowed under *Nelson* and *Foster's* (discussed above), because "the revenue to be collected from Pocatello's street fee has no necessary relationship to the regulation of travel over its streets, but rather is to generate funds for the non-regulatory function of repairing and maintaining streets." *Brewster*, 115 Idaho at 504, 768 P.2d at 767.

The Court then turned to whether the fee could be upheld as a user fee. The Court found that the street fee was not a user fee. However, the only thing that *Brewster* requires is that the fee be charged for a service provided "to the particular consumer," citing "sewer, water and electrical services" examples of appropriate user fees:

> We agree with appellants that municipalities at times provide sewer, water and electrical services to its residents. However, those services, in one way or another, are based on user's consumption of the particular commodity, as are fees imposed for public services as the recording of wills or filing legal actions. In a general sense a fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs.

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find support in *Bopp v. City of Sandpoint*, 110 Idaho 488, 716 P.2d 1260 (1986); *Greer v. Lewiston Golf & Country Club*, Inc., 81 Idaho 393, 342 P.2d 719 (1959)." Nevertheless, the Court allowed the case to proceed because "it is in the interest of both the city and the plaintiffs-respondents that the question be resolved." *Brewster*, 115 Idaho at 503, 768 P.2d at 766.

[149] When enacted in 1980, the first sentence of what is now section 63-1311(1) was enacted and codified as Idaho Code § 63-2201A. H.B. 680, 1980 Idaho Sess. Laws, ch. 290 § 2. In 1988, section 63-2201A (now section 63-1311(1)) was amended to add what is now the second sentence (requiring that fees be reasonably related). S.B. 1340, 1988 Idaho Sess. Laws, ch. 201 § 3. In 1996, the entire revenue and taxation code was re-enacted, and section 63-2201A was recodified as section 63-1311. S.B. 1340, 1996 Idaho Sess. Laws, ch. 98 § 14 at 393; see also 1996 Idaho Sess. Laws, ch. 322 §7 (correcting cross-reference to section 63-1311 in section 31-870). In 1997, the provision was renumbered as section 63-1311(1) and what is now section 63-1311(2) was added. 1997 Idaho Sess. Laws, ch. 117 § 35 at 333.

Brewster at 768 (emphasis supplied).[150]

On February 26, 2015, the Idaho Supreme Court handed down its decision in *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 343 P.3d 1086 (Idaho 2015) (Eismann, J.). NIBCA's chief contention in the case was that the city's sewer capitalization fee ("cap fee") was an illegal tax because it would be "solely used to pay for future expansion." Appellants' brief at 23 ("Issues Presented on Appeal").

The city charges its customers two sewer fees, a bi-monthly operation and maintenance fee and a one-time cap fee. The monthly fee was not in contention. In 2007, the City increased the cap fee from $735 to $2,280 per residential unit based on a cost-of-service study performed by its engineer, Welch Comer. The new cap fee was based on the cost of replacing the excess capacity within the existing sewer system that would be consumed by the new user. That cost was determined by taking the total cost to build out the sewer system to the city's area of city impact (some $20 million) divided the number of new residential unit equivalents ("ERs").

The city defended the fee under four statutes, relying primarily on Idaho Code § 63-1311(1) (the user fee statute) and Idaho Code § 50-1030(f) (part of the Revenue Bond Act). The city also presented two "long shot" statutory authorities as arguments in the alternative: Idaho Code §§ 50-323 (domestic water systems) and 50-301 (home rule). (See discussion in section 30.E(3)(g) on page 219 and section 30.D on page 180, respectively.)

The Idaho Supreme Court rejected NIBCA's argument that fee revenue may not be expended on future expansion of the system. It also confirmed prior precedent that the fee may be quantified on the basis of the replacement value (not just the historical cost) of the sewer capacity that will be consumed by the new user. However, the Court found that the city's quantification of replacement value was improper because it was based on the cost of building the next round of infrastructure rather than on the value of the existing capacity in the ground when the fee is

[150] While it seems readily apparent that the street fee was not an incidental regulatory fee, the closer question was whether it was a legitimate user fee. At the outset of the opinion, the Court acknowledged that that the fee purportedly was based on "a formula reflecting the traffic which is estimated to be generated by that particular property." *Brewster* at 765. But the Court never returned to that issue nor explained how the formula worked. Apparently the Court viewed this as a sham justification. In the end, the Court concluded: "The privilege of having the usage of city streets which abuts one's property, is in no respect different from the privilege shared by the general public in the usage of public streets." *Brewster* at 767. In any event, most of the Court's opinion was devoted to the other theory – a discussion of why it was not an incidental regulatory fee. If we speculate as to what was in the minds of the justices, it would seem that they were motivated primarily by the fact that the city repeatedly had sought and failed to achieve voter approval for a levy override. Thus, the Court saw this fee as an end-run around clearly expressed voter disapproval of a new tax. Indeed, the Court concluded its opinion on this very point. *Brewster* at 766.

charged. Each statutory authority is discussed in turn in this and the following sections.

First, the Court found that the city's quantification of the fee under section 63-1311(1) was improper because it was not based on "the actual cost of the service being rendered":

> As the statute states, any fee collected pursuant to the statute "shall be reasonably related to, but shall not exceed, the actual cost of the service being rendered." The issue is whether there was evidence supporting a finding that $2,280 was the actual cost of the service being rendered as of June 7, 2007. There is no evidence in the record that it was. In fact, the evidence in the record shows that it was not.

NIBCA I at 1088 (emphasis supplied).

The Court found that the fee may not be calculated by looking forward to the cost of building the next round of infrastructure. Rather, it must be based on the value of the existing capacity in the ground when the fee is charged:

> Because there is nothing in the record showing that as of June 7, 2007, the sum of $2,280 was the actual cost of providing sewer service to a customer connecting to the City sewer system and there is no showing that the amount of the fee was based upon any such calculation, the fee was not authorized by Idaho Code section 63–1311(1). The district court erred in holding that it was.

NIBCA I at 1088.

This portion of the opinion (dealing with section 63-1311(1)) was very short and provided no particular guidance on how a city should calculate "the actual cost of the service being rendered." In the next section of the opinion (dealing with the Revenue Bond Act), the Court expressly provided that the fee may be based on current replacement cost of the existing system and that money generated by the fees may be expended on future expansion of the system. Given that discussion in both sections was based on broad principles law dealing with fees versus taxes, it would follow that the fees under section 63-1311(1) may also be based on replacement cost of the existing infrastructure and that revenues therefrom may be expended on future expansion. This does not matter much for cities, because they have belt and suspenders authority under section 63-1311(1) and the Revenue Bond Act. It does matter, however, to governmental entities other than cities and irrigation districts, because they are not covered by the bond act.

(c) The Revenue Bond Act and Irrigation District Bond Act

(i) Overview of the bond acts

Idaho's Revenue Bond Act, Idaho Code §§ 50-1027 to 50-1042[151] implements the authority granted by Idaho Const. § VIII, § 3 allowing cities to construct water and sewer systems.[152] By enacting the Revenue Bond Act, the Legislature not only implemented but broadened the scope of the constitutional provision. For example, the statutory definition of "works" includes "drainage systems" (which are not mentioned in the Constitution). Idaho Code §§ 50-1029(a) and 50-1029(g).

Both the constitutional provision and the Revenue Bond Act apply only to Idaho cities. A separate statute, the Irrigation District Bond Act, Idaho Code §§ 43-1906 to 43-1920, provides functionally identical authority to irrigation districts.[153] This is important because legal precedents construing one statute are applicable to the identical language in the other statute.

Yet another statute, the Solid Waste Disposal Site Act, Idaho Code §§ 31-4401 *et seq.* (discussed in section 30.E(3)(d) on page 215), authorizes counties to issue bonds and charge user fees in connection with solid waste facilities. Its terms differ in some respects from the other bond acts.[154]

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[151] The Revenue Bond Act was enacted in its present form in 1967. 1967 Idaho Sess. Laws, ch. 429. A predecessor to the Act was enacted in 1951. S.B. 5, 1951 Idaho Sess. Laws, ch. 47. Earlier versions were in place early in the last century.

[152] By its own terms, Idaho Const. art VIII, § 3 (authorizing cities to construct water and sewer systems) constitutes an express grant of authority to engage in these functions and an implicit grant of authority to charge a user fee for the service provided. Any question about whether implementing legislation is necessary is mooted by the enactment of the Revenue Bond Act a century ago. "The Idaho Constitution, art. 8, § 3 allows municipalities to impose rates and charges to provide revenue for public works projects, and pursuant to this section of the Constitution, the Idaho legislature enacted the Idaho Revenue Bond Act, codified at I.C. § 50–1027 through § 50–1042. " *Loomis v. City of Hailey*, 807 P.2d 1272, 1275-76 (Idaho 1991) (Boyle, J.).

[153] The operative provision in the Irrigation District Bond Act (Idaho Code § 43-1909(a)) is identical to the operative provision of the Idaho Revenue Bond Act (section 50-1030(a)). Section 43-1909(a) was relied on by the Idaho Supreme Court to support the district's authority to use its connection fee for future expansion of its system. *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 233 P.3d 118, 128 (Idaho 2010) (Eismann, C.J.) ("spending revenues from connection fees for these purposes would be consistent with the Act."). Likewise, the *Viking* Court relied on section 43-1909(e) of the Irrigation District Bond Act, which is identical to section 50-1030(f) of the Revenue Bond Act. *Viking* at 122 (this statute "authorizes charging a connection fee to connect to an irrigation district's domestic water system.").

[154] The only pertinent difference that has been discussed by the appellate courts is the somewhat broader language in the Solid Waste Disposal Site Act allowing the user fee to be calculated on the basis of the cost of expanding the system. In *N. Idaho Bldg. Contractors Ass'n v.*

The Revenue Bond Act authorizes cities to issue revenue bonds for the construction, acquisition, or improvement of specified "works." It also contains provisions authorizing user fees:

> In addition to the powers which it may now have, any city shall have power under and subject to the following provisions:
>
> (a) To acquire by gift or purchase and to construct, reconstruct, improve, better or extend any works within or without the city, or partially within or partially without the city, or within any part of the city, and acquire by gift or purchase lands or rights in lands or water rights in connection therewith, including easements, rights-of-way, contract rights, leases, franchises, approaches, dams and reservoirs; to sell excess or surplus water under such terms as are in compliance with section 42-222, Idaho Code, and deemed advisable by the city; to lease any portion of the excess or surplus capacity of any such works to any party located within or without the city, subject to the following conditions: that such capacity shall be returned or replaced by the lessee when and as needed by such city for the purposes set forth in section 50-1028, Idaho Code, as determined by the city; that the city shall not be made subject to any debt or liability thereby; and the city shall not pledge any of its faith or credit in aid to such lessee;
>
> . . .
>
> (e) To issue its revenue bonds hereunder to finance, in whole or in part, the cost of the acquisition, construction, reconstruction, improvement, betterment or extension of any works, or to finance, in whole or in part, the cost of the rehabilitation of existing electrical generating facilities;
>
> (f) To prescribe and collect rates, fees, tolls or charges, including the levy or assessment of such rates, fees, tolls or charges against governmental units, departments or agencies, including the state of Idaho and

City of Hayden ("*NIBCA I*"), 343 P.3d 1086 (Idaho 2015) (Eismann, J.), the Court limited a portion of its holding in *Kootenai Cnty. Property Ass'n v. Kootenai Cnty.*, 769 P.2d 553, 556 (Idaho 1989) (Bakes, J.) to the particular statute involved. That statute, Idaho Code § 31-4404, authorized the county to base its fee on the cost of "future acquisition of landfill sites." *NIBCA I* at 1091. This is in contrast, the Court said, to the Revenue Bond Act, which authorizes fees only based on the replacement cost of existing infrastructure.

> its subdivisions, for the services, facilities and commodities furnished by such works, or by such rehabilitated existing electrical generating facilities, and to provide methods of collections and penalties, including denial of service for nonpayment of such rates, fees, tolls or charges;

Idaho Code §§ 50-1030(a), (e) & (f) (emphasis supplied) (corresponding closely but not identically to sections 43-1909(a), (d) & (e) of the Irrigation District Bond Act).[155]

The term "works" referenced in section 50-1030 is defined to include "water systems, drainage systems, sewerage systems, recreational facilities, off-street parking facilities, airport facilities, air-navigation facilities, [and] electrical systems." Idaho Code § 50-1029(a). The "works" may be located inside or outside of the city. Idaho Code § 50-1030(a).

The only restriction is: "No city shall operate any works primarily as a source of revenue to the city, but shall operate all such works for the use and sole benefit of those served by such works and for the promotion of the welfare and for the improvement of the health, safety, comfort and convenience of the inhabitants of the city." Idaho Code § 50-1028 (emphasis supplied). (An identical provision is set out in Idaho Code § 43-1907 of the Irrigation District Domestic Water System Revenue Bond Act.)

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[155] The Revenue Bond Act requires that the works be provided "at the lowest possible cost" and not be operated "as a source of revenue." Idaho Code § 50-1028. The act authorizes and requires cities to charge rates, fees, tolls, or charges that are sufficient to ensure that the works are "self-supporting," that is, sufficient (1) to pay all bonds and interest and reserves therefore and (2) to pay for all operating and maintenance ("o&m") costs. Idaho Code § 50-1032. Thus, the bonds cover only capital expenditures, but the fees cover both repayment of capital expenses and ongoing o&m.

The Revenue Bond Act provides that "[a]ny city issuing bonds . . . shall have the right to appropriate, apply or expend the revenue of such works" for (1) repayment of bonds and interest, (2) o&m as well as replacement and depreciation costs, (3) payoff of certain other bonds and obligations, and (4) a reserve for improvements to the works. Money from fees may be allocated to general funds only if all of the proceeding have been fully paid. Idaho Code § 50-1033. This provision was relied on by the Court in Loomis, *Loomis*, 119 Idaho at 440, 807 P.2d at 1278. The *Viking* Court, however, made clear that this provision does not apply if no bonds are issued. *Viking*, 149 Idaho at 192, 197, 233 P.3d at 123, 128. This is in contrast to section 50-1030 (identical to section 43-1909) of the bond act which does apply even if no bonds are issued. *Viking* at 122-23.

Before any construction of works, the city must adopt an ordinance setting out the terms of the financing. No indebtedness shall be incurred beyond one year without an approval of the voters in an election on the bond. Certain bonds require approval of two-thirds of the electorate, others require only a majority vote. Idaho Code § 50-1035. Bonds must be repaid by fees generated by the services provided by the works. The city is not liable, and the city cannot levy taxes to pay the bonds. Idaho Code §§ 50-1040, 50-1041.

The Idaho Supreme Court has upheld user fees based on the Revenue Bond Act and its sister statutes (the Irrigation District Bond Act and the Solid Waste Disposal Site Act) in the following decisions:

- *Schmidt v. Village of Kimberly*, 256 P.2d 515 (Idaho 1953) (Taylor, J.).
- *Kootenai Cnty. Property Ass'n v. Kootenai Cnty.*, 769 P.2d 553, 556 (Idaho 1989) (Bakes, J.).
- *Loomis v. City of Hailey*, 807 P.2d 1272, 1275-76 (Idaho 1991) (Boyle, J.).
- *City of Chubbuck v. City of Pocatello*, 899 P.2d 411 (Idaho 1995) (Reinhardt, J. Pro Tem.).
- *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 233 P.3d 118, 128 (Idaho 2010) (Eismann, C.J.).
- *Manwaring Investments, L.C. v. City of Blackfoot*, 405 P.3d 22 (Idaho 2017) (Burdick, C.J.).

In other cases, the Court rejected user fees premised on these bond statutes, but only because the fee charged was excessive or otherwise not tied to the cost of the service provided to the fee payer:

- *Waters Garbage v. Shoshone Cnty.*, 67 P.3d 1260 (Idaho 2003) (Eismann, J.).
- *Lewiston Independent School Dist. No. 1 v. City of Lewiston*, 264 P.3d 907 (Idaho 2011) (W. Jones, J.)
- *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J) and *N. Idaho Bldg. Contractors Ass'n v. City of Hayden*, 432 P.3d 976 (Idaho 2018) ("*NIBCA II*") (Bevan, J.).
- *Hill-Vu Mobile Home Park v. City of Pocatello*, 402 P.3d 1041 (Idaho 2017) (Eismann, J.).

These cases, discussed below and elsewhere in this Handbook, make clear that cities and others operating under the various bond acts are authorized to charge user fees for specified works, and that revenue from those fees may be used to retire costs associated with their construction, for ongoing operation and maintenance, and for future expansion of the works.

In *Schmidt v. Village of Kimberly*, 256 P.2d 515 (Idaho 1953) (Taylor, J.), the Court upheld the constitutionality of the Revenue Bond Act in a "friendly" declaratory judgment action aimed at resolving the concerns of bond brokerages. The Court upheld the act and the user fee imposed by the city to recover the cost of bonds. Language in this seminal case has been quoted by the Supreme Court in the cases that follow.

In *Loomis v. City of Hailey*, 807 P.2d 1272 (Idaho 1991) (Boyle, J.), the City of Hailey approved revenue bonds to fund improvements in the city's sewer system.[156] The city passed an ordinance mandating that all residents connect to the sewer system and pay a connection fee to fund expansion of the system. That fee was successfully challenged in district court, and no appeal was taken. *Loomis* at 1277 n.2 (1991) (citing *Redman v. City of Hailey*, Blaine County District Court Case No. 11855, Memorandum Decision (June 4, 1984)). The city then adopted a more limited "equity buy-in" connection fee. Revenues collected pursuant to the new fee were placed into a separate account used only for replacement of existing system facilities and equipment; none were allowed to be used for expansion or improvement of the existing system. *Loomis* at 1274. Nor were the funds used to retire the bond indebtedness. *Loomis* at 1277. A separate monthly utility fee, which was not challenged, covered operating expenses and funded revenue bond retirement. *Loomis*, 119 Idaho at 436, 807 P.2d at 1274. Two local residents then challenged the equity buy-in fee of about $1,800 per connection.

The Court recognized that some fees may be upheld as incidental regulatory fees.[157] This fee, however, did not fall into that category of police power functions. Instead, the Court analyzed the equity buy-in as a "proprietary" function of the city. (See discussion of proprietary functions in section 30.E(3)(a) at page 190.) In other words, the fee could be upheld even if it was not imposed under the city's police power, so long as there was legislative authority for the action.

The Court then ruled that the fee was authorized under the Idaho's Revenue Bond Act, Idaho Code §§ 50-1027 to 50-1042, which, in turn, was authorized by Idaho Const. art. VIII, § 3 dealing with limitations on municipal indebtedness.

> Thus, when rates, fees and charges conform to the statutory scheme set forth in the Idaho Revenue Bond Act

[156] In reciting the facts of the case, the *Loomis* Court notes that bonds were issued. *Loomis*, 119 Idaho at 435, 807 P.2d at 1273. Elsewhere in the opinion, the Court says "the City of Hailey is not incurring any indebtedness." *Loomis* at 1278. Perhaps this seeming inconsistency may be explained by the fact that the revenue from the sewer connection fees was not used to retire the bonds. Instead, the bonds were retired with funds from the monthly charges. *Loomis* at 1277.

[157] Citing *Brewster*, the Court observed that cities may impose incidental regulatory fees so long as they "bear some reasonable relationship to the cost of enforcing the regulation." *Loomis* at 1275.

> or are imposed pursuant to a valid police power, the charges are not construed as taxes. *Schmidt v. Village of Kimberly*, 74 Idaho 48, 256 P.2d 515 (1953). However, if the rates, fees and charges are imposed primarily for revenue raising purposes they are in essence disguised taxes and subject to legislative approval and authority.

Loomis at 1276.

The Court launched into a detailed discussion of what was allowed under the Revenue Bond Act and found that the city's connection fee was consistent with the statute's requirements.[158] Indeed, the Court read those requirements generously and deferentially as to cities. The Court rejected plaintiffs' contention that the connection fee was too steep and should have been limited to the actual cost of the connection. It held that it was appropriate for the city to base the fee on the "replacement cost of the system components" and to charge the new user for "that portion of the system capacity that the new user will utilize at that point in time." *Loomis* at 1281 (emphasis supplied) (cited with approval in *Viking*, 149 Idaho at 194, 233 P.3d at 125 and *NIBCA I*, 158 Idaho at 82, 343 P.3d at 1089).

In *Loomis*, the Court found it unnecessary to address whether revenue from the fee could be expended on future expansion, because the city had tailored its equity buy-in fee so that it was not used to fund future expansion of the sewer system. *Loomis*, 119 Idaho at 439-40, 807 P.2d at 1277-78. As noted above, this restriction was imposed to comply with an earlier district court decision that the City of Hailey chose not to appeal. In a footnote, the *Loomis* court noted that "[s]ince the precise issue of whether fees may be collected for future expansion of a sewer or water system is not before us on this appeal, we leave for another day the determination of that issue." *Loomis* at 1277 n.3. Yet, on the very next page the Court noted that the Revenue Bond Act expressly authorizes use of fee revenue for "*replacement and depreciation* of such works . . . including *reserves therefor*." *Loomis* at 1278 (emphasis and ellipses original).

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[158] In *Loomis*, the plaintiffs relied on *O'Bryant v. City of Idaho Falls*, 303 P.2d 672 (Idaho 1956) (Porter, J.) to support its contention that the City of Hailey was unlawfully circumventing bonding requirements under the Revenue Bond Act because it did not put the connection fee to a vote of the public. In *O'Bryant*, the Court struck down a scheme by the City of Idaho Falls to do just that. In *O'Bryant*, the Court found it necessary to "pierce the corporate veil" on a plan to have the bonds issued by a non-profit controlled by the city. *O'Bryant* at 678. The *Loomis* court found *O'Bryant* to be inapposite. "In the instant case the City of Hailey is not incurring any indebtedness and voter approval pursuant to art. 8, § 3 of the Idaho Constitution is required only when the city is incurring indebtedness." *Loomis* at 1278. In discussing *O'Bryant*, the *Loomis* Court expounded on the "ordinary and necessary" limitation on indebtedness, which the City of Idaho Falls had sought to evade with its scheme. That discussion, however, was essentially dictum.

The *Loomis* court went on to note that the retention of fee revenue is not subject to the election requirement in Idaho Const. art. VIII, § 3 because "the City of Hailey is not incurring any indebtedness and voter approval pursuant to art. VIII, § 3 of the Idaho Constitution is required only when the city is incurring indebtedness." *Loomis* at 1278. The Court noted that the outcome would be different if the funds were used for general purposes. *Loomis* at 1279.

Finally, the plaintiffs complained that the fee should have been limited to the actual cost of the connection. The Court found that the Revenue Bond Act gives cities broad flexibility in setting fees, and that the city's approach was not unreasonable. *Loomis* at 1279-82.

A subsequent case, *City of Chubbuck v. City of Pocatello,* 899 P.2d 411 (Idaho 1995) (Reinhardt, J. Pro Tem.), also involved a challenge to a fee imposed under the Revenue Bond Act but added little to the law. The City of Pocatello operates a wastewater treatment plant that also serves the City of Chubbuck. Chubbuck challenged a fee increase by Pocatello, alleging that the fee (which included something called a "rate of return") violated the provision in Idaho Code § 50-1028 prohibiting cities from operating "any works primarily as a source of revenue." The Court rejected the argument without any real analysis. The Court simply found that "Chubbuck has made no showing that the fees collected by Pocatello have been used for any purpose other than those purposes specifically provided for by the Revenue Bond Act." *Chubbuck* at 415.

In *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 233 P.3d 118 (Idaho 2010) (Eismann, C.J.), a land developer challenged a domestic water system connection fee (including an "equity buy-in"[159]) of $2,700 per home imposed by an irrigation district. (Unlike many irrigation districts, this one also provided domestic water.)

Viking did not arise under the Revenue Bond Act. It arose under the functionally identical provisions of the Irrigation District Domestic Water System Revenue Bond Act ("Irrigation District Bond Act") §§ 43-1906 to 43-1920. However, the *Viking* Court expressly equated the two provisions.[160] Accordingly,

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[159] "A portion of the connection fee covers the actual cost of connecting to the water system, but the majority of the fee is intended to be the cost of buying an equity interest in the system." *Viking*, 149 Idaho at 190, 233 P.3d at 121.

[160] The Idaho Supreme Court noted: "The [district] court compared this provision with the identical language in Idaho Code § 50-1030(f), which this Court held in *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991) (Boyle, J.), authorized a city to collect a sewer and water connection fee. Since there is no basis for giving differing constructions to the identical language in the two statutes, Idaho Code § 43-1909(e) authorizes charging a connection fee to connect to an irrigation district's domestic water system." *Viking*, 149 Idaho at 191, 233 P.3d at 122. *Viking* also relied on section 43-1909(a) of the Irrigation District Bond Act, which is functionally identical to section 50-1030(a) of the Revenue Bond Act. *Viking*, 149 Idaho at 197, 233 P.3d at 128. This

Viking is good authority for how both the Irrigation District Bond Act and the Revenue Bond Act are construed. See discussion in section 30.E(3)(c)(ii) on page 210.

The *Viking* Court ruled that the connection fee (aka cap fee) need not be based on the historical cost of the plumbing in the ground, but may be based on the cost to replace the excess capacity consumed by the development:

> Thus, this section permitted the Irrigation District to charge new users of the domestic water system a connection fee that included an amount equal to the value of that portion of the system capacity that the new user will utilize at that point in time.
>
> The Irrigation District had discretion to decide what methodology to use in order to determine that value. For example, it is entitled to use replacement cost rather than historical cost as the basis of its calculations. The court's limited role is simply to determine whether the methodology used to determine the value is reasonable and not arbitrary.

Viking at 125 (emphasis supplied).

The Court further noted that the bond act authorizes governments to maintain reserves: "The statute cannot be read as only permitting irrigation districts that did issue bonds under the Act to provide a reserve for improvements to their works." *Viking* at 128. Moreover, the bond act authorizes governments to not just to maintain or replace systems but to "extend any works" and that "[s]pending revenues from connection fees for these purposes would be consistent with the Act." *Viking* at 125 (emphasis supplied). In other words, moneys may be held in reserve and expended as needed for future expansion.

The *Viking* Court went on to rule that there was a material fact in dispute (therefore denying summary judgment) on the question of whether the particular fee charge was "a reasonable method of determining an amount equal to the value of that portion of the system capacity that the new user will utilize at that point in time." *Viking* at 126.[161] The Court then proceeded to rule on additional questions of law that would govern the remand. Most notably, it elaborated on its holding in *Loomis* and ruled that the only fundamental limitation is that the fees not serve primarily as a

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section provides that revenues from fees may be spent to "extend any works," thus allowing funds to be used for construction of new system capacity to replace that consumed by the new user.

[161] By all indications—as reflected in extensive trial transcript quotations included by the Idaho Supreme Court—the irrigation district's determination of the fee amount was entirely arbitrary.

source of revenue to the governmental entity. *Viking* at 127. Indeed, this restriction is spelled out in bond act itself. Idaho Code § 50-1028 (Revenue Bond Act); Idaho Code § 43-1907 (Irrigation District Domestic Water System Revenue Bond Act). This means that the funds generated cannot be used "for purposes other than its sewer and water system." *Viking* at 127. However, the connection fee may "exceed the actual cost of the labor and materials necessary to connect to the sewer and water system" and must be "dedicated to those systems."[162] *Id*.

Recall that in *Loomis* the Idaho Supreme Court had reserved until another time the question of whether fee revenue could be used to fund future expansion. In *Viking*, the Court answered the question in the affirmative:

> The powers of an irrigation district under the Irrigation District Bond Act include "to construct, reconstruct, improve, better or extend any works within or without the district" and "[t]o operate and maintain any works within or without the boundaries of the district." I.C. § 43–1909(a) & (c). Spending revenues from connection fees for these purposes would be consistent with the Act. . . . .
>
> . . .
>
> The statute cannot be read as only permitting irrigation districts that did issue bonds under the Act to provide a reserve for improvements to their works.

Viking at 128. In other words, even entities that have not issued bonds may reserve funds generated by fees and spend them on future improvements or system expansion.

Viking held that section 43-1909(e) of the Irrigation District Bond Act (which is identical to section 50-1030(f) of the Revenue Bond Act) "authorized the city to charge new users of the sewer and water system a connection fee that was more than the actual cost of the physical hookup. The connection fee could include an amount equal to 'the value of that portion of the system capacity that the new user will utilize at that point in time.'" *Viking* at 125 (quoting *Loomis*, 119 Idaho at 443, 807 P.2d at 1281).

In *Lewiston Independent School Dist. No. 1 v. City of Lewiston*, 151 Idaho 800, 264 P.3d 907 (2011) (W. Jones, J.), the Idaho Supreme Court invalidated the city's stormwater utility fee, finding it to be an unlawful disguised tax. The city had

[162] It is not necessary that the funds be maintained in a separate, segregated account. "The important issue was not that the fees were kept in a separate, segregated account. It is that they were not *used* for city functions other than the sewer and water systems." *Viking*, 149 Idaho at 196-97, 233 P.3d at 127-28 (emphasis original).

created a stormwater utility funded by a stormwater fee assessed on the basis of the extent of impermeable surface. The fee was charged irrespective of whether the property is served by the city's stormwater system.[163] The funds collected were used to fund the city's street sweeping, maintenance of the stormwater system, and NPDES compliance. Some of these functions were previously assigned to the Street Maintenance Department and were funded by general revenues.

The city sought to characterize the new utility fee primarily as an incidental regulatory fee under the police power. The city also contended the fee was a lawful user fee. In support of that argument, it mentioned in passing the Revenue Bond Act and various other provisions of Title 50 without any meaningful briefing. (See discussion in section 30.E(3)(c)(ii) on page 210.)

The Court found that the fee was not incidental to any regulation, because the authorizing ordinance did not regulate any activity related to stormwater. Rather, the Court said, it was simply imposed to raise revenue. "It is apparent that Ordinance 4512 is a revenue generating tax created to benefit the general public by charging all property owners for the privilege of using the City's preexisting stormwater system, regardless of whether they are using the stormwater system or not. . . . Thus, by its terms, the Ordinance is purely concerned with revenue generation." *Lewiston*, 151 Idaho at 805, 264 P.3d at 912.

The Court also rejected the argument that it was a service fee, emphasizing that the fee applied to all property owners regardless of whether stormwater left their property. "The Stormwater Utility provides no product and renders no service based on user consumption of a commodity." *Lewiston*, 151 Idaho at 806, 264 P.3d at 913. The Court found that the stormwater utility and fee was a transparent effort to shift funding of the street department from general revenues to the new fee. The Court also distinguished *Waters Garbage*, *Kootenai County Property Ass'n*, and *Loomis*, noting that they dealt with the application and interpretation of specific statutory authorizations.

The *Lewiston* Court brushed aside the city's half-hearted contention (see footnote 169 on page 214) that the fee was supported by the Revenue Bond Act, noting that the argument was not properly presented "because the City did not proceed under the Revenue Bond Act." *Lewiston*, 151 Idaho at 807, 264 P.3d at 915. See discussion in section 30.E(3)(c)(ii) on page 210.

[163] The Court explained: "As a result of the rate structures applying to all owners of property, there are many properties with impervious surfaces whose owners are charged by the Stormwater Utility, but whose runoff does not enter the stormwater drain because they have their own stormwater systems or because their neighborhoods are not connected to the stormwater system." *Lewiston*, 151 Idaho at 802, 264 P.3d at 909.

The fatal flaw in Lewiston's utility fee, it would seem, is that it was not a charge for a service provided. "Unlike water, sewer, or electrical service fees, which are based on user consumption of a particular commodity, the stormwater fee is assessed on those who do not use the Stormwater Utility." *Lewiston*, 151 Idaho at 806, 264 P.3d at 913. If it had been more carefully tailored to assess only those who directly benefited by the stormwater system (*e.g.*, providing an opt-out to those whose land drained water to the city's stormwater system), it might have survived. The inclusion of general street sweeping functions within the utility also made the fee more suspect.

In *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J), and *N. Idaho Bldg. Contractors Ass'n v. City of Hayden*, 164 Idaho 530, 432 P.3d 976 (2018) ("*NIBCA II*") (Bevan, J.) the Court rejected (on the basis of an inadequate record) the City of Hayden's sewer capitalization fee. The city had defended the fee as a user fee under both Idaho Code § 63-1311(1) and the Revenue Bond Act (notwithstanding that no bonds had been issued). The *NIBCA I* Court rejected the city's reliance on the Revenue Bond Act not because no bonds had been issued (see also the discussion in section 30.E(3)(c)(ii) below), but because the city used the wrong methodology for calculating the fee (calculating replacement cost on the basis of future expansion rather than replacing the in-ground system). The methodology issue is discussed in section 31 beginning on page 250. *NIBCA I*'s application of section 63-1311(1) is discussed in section 30.E(3)(b) beginning on page 193.

In 2017, the Idaho Supreme Court decided *Hill-Vu Mobile Home Park v. City of Pocatello*, 402 P.3d 1041 (Idaho 2017) (Eismann, J.). The case involved a challenge to water and sewer fees imposed pursuant to the Revenue Bond Act. The Court invalided the fee not because of any lack of authority under the Revenue Bond Act but because the fee was a blatant revenue-generating overreach. See discussion in section 30.E(3)(h) beginning on page 221.

In *Manwaring Investments, L.C. v. City of Blackfoot,* 162 Idaho 763, 405 P.3d 22 (2017) (Burdick, C.J.) the Court upheld a user fee charged by the City of Blackfoot under the authority of the Revenue Bond Act. The Court found the fee structure was reasonably related to the value of the service provided. This case is discussed in section 30.E(3)(c)(ii) below.

(ii) The issuance of bonds is not a prerequisite to reliance on the authority granted by the bond acts.

A. Overview

As discussed above, the Revenue Bond Act authorizes cities to issue bonds for certain city services and to charge user fees to recoup the cost of those services and to

pay off the bonds. One might imagine that the issuance of bonds is a prerequisite in order for a city to rely on the authority of the bond act to charge user fees.

Indeed, in three cases in which local governments justified user fees on the basis of the Revenue Bond Act, it appears that they had issued revenue bonds: *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991) (Boyle, J.); *Waters Garbage v. Shoshone Cnty.*, 138 Idaho 648, 67 P.3d 1260 (2003) (Eismann, J.); *Schmidt v. Village of Kimberly*, 74 Idaho 48, 256 P.2d 515 (1953) (Taylor, J.). But in other cases the Idaho Supreme Court has ruled (either expressly or implicitly) that the issuance of bonds is not a prerequisite to reliance on the Revenue Bond Act or its sister statutes. The only confusion on this point comes from faulty dictum in *Lewiston Independent School Dist. No. 1 v. City of Lewiston*, 151 Idaho 800, 264 P.3d 907 (2011) (W. Jones, J.) discussed below.

B. *Viking*

This issue is addressed most squarely in *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 149 Idaho 187, 233 P.3d 118 (2010) (Eismann, C.J.). In that case a land developer challenged a domestic water system connection fee. (See discussion of *Viking* in section 30.E(3)(c)(i) beginning on page 200.) The Court held that the irrigation district had authority under the Irrigation District Bond Act to impose the user fee notwithstanding the fact that it had not issued bonds under the act.

Viking did not arise under the Revenue Bond Act. It arose under the functionally identical provisions of the Irrigation District Domestic Water System Revenue Bond Act ("Irrigation District Bond Act") §§ 43-1906 to 43-1920. However, the *Viking* Court expressly equated the two provisions.[164] Accordingly, *Viking* is good authority for how both the Irrigation District Bond Act and the Revenue Bond Act are construed. See discussion in section 30.E(3)(c)(ii) on page 210.

Although the irrigation district in *Viking* had not issued revenue bonds to construct the facilities, it relied on a provision of the Irrigation District Bond Act, Idaho Code § 43-1909, authorizing the imposition of fees. This provision is functionally identical to the provision of the Revenue Bond Act, Idaho Code

[164] The Idaho Supreme Court noted: "The [district] court compared this provision with the identical language in Idaho Code § 50-1030(f), which this Court held in *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991) (Boyle, J.), authorized a city to collect a sewer and water connection fee. Since there is no basis for giving differing constructions to the identical language in the two statutes, Idaho Code § 43-1909(e) authorizes charging a connection fee to connect to an irrigation district's domestic water system." *Viking*, 149 Idaho at 191, 233 P.3d at 122. *Viking* also relied on section 43-1909(a) of the Irrigation District Bond Act, which is functionally identical to section 50-1030(a) of the Revenue Bond Act. *Viking*, 149 Idaho at 197, 233 P.3d at 128. This section provides that revenues from fees may be spent to "extend any works," thus allowing funds to be used for construction of new system capacity to replace that consumed by the new user.

§ 50-1030(f),[165] construed in *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991) (Boyle, J.).

The plaintiff in *Viking* argued that the irrigation district could not rely on the bond act's authorization of user fees because it had not issued revenue bonds.[166] The Idaho Supreme Court squarely rejected Viking's argument.

> According to Viking, "The power granted in I.C. § 43–1909(e) is contingent on the issuance of revenue bonds, after and only after, approval of the electorate." . . .
>
> . . .
>
> Viking has not pointed to any ambiguity in Idaho Code § 43–1909. . . . By its terms, it is not limited to a district issuing bonds . . . .
>
> Viking also contends that the words "under and subject to the following provisions" limit the powers granted by Idaho Code § 43–1909 to irrigation districts that have issued revenue bonds. According to Viking, because the power granted is "under and subject to" subsections (a) through (g), "[t]he Act clearly demonstrates the legislature's express intention for a comprehensive plan." Thus, Viking's argument is that an irrigation district must exercise all of the listed powers, or it cannot exercise any of them. Viking cites no authority for so construing a statute such as section 43–909 that lists powers granted by the legislature, nor is such construction logical. The statute lists powers that any district may exercise. There is nothing in the language of the statute requiring an irrigation district to exercise all of the powers in order to exercise any of them. If that were the proper construction, in order to "operate and maintain any works," I.C. § 43–1909(c), the district would also have to "exercise the right of eminent domain," I.C. § 43–

[165] The key language of the bond act in *Viking* provides that the district shall have power "[t]o prescribe and collect rates, fees, tolls or charges . . . for the services, facilities and commodities furnished by works." Idaho Code § 43–1909(e). This corresponds to the virtually identical language of the Revenue Bond Act at Idaho Code § 50-1030(f)—the only difference being the inconsequential addition of the word "such": "[t]o prescribe and collect rates, fees, tolls or charges . . . for the services, facilities and commodities furnished by such works."

[166] This argument could have been presented in *Loomis*, but was not. In *Loomis*, the City of Hailey had issued revenue bonds, but its connection fee was not used to repay those bonds. "[N]o monies from this fund are transferred to the city's general fund, and none are used to retire the bond indebtedness." *Loomis*, 119 Idaho at 439, 807 P.2d at 1277.

> 1909(b), and to "issue its revenue bonds," I.C. § 43–1909(d), regardless of whether it desired to acquire more property or finance a project. The district court did not err in holding that Idaho Code § 43–1909(e) applies to the Irrigation District even though it has not issued revenue bonds.

Viking, 149 Idaho at 192-93, 233 P.3d at 123-24 (emphasis supplied).[167] (Section 43-1909(e) corresponds to section 50-1030(f) of the Revenue Bond Act.)

Near the end of the opinion, the Court reiterated this conclusion: "The statute cannot be read as only permitting irrigation districts that did issue bonds under the Act to provide a reserve for improvements to their works." *Viking*, 149 Idaho at 197, 233 P.3d at 128.

C. *Lewiston*

The only confusion on this issue comes from dictum in *Lewiston Independent School Dist. No. 1 v. City of Lewiston*, 151 Idaho 800, 264 P.3d 907 (2011) (W. Jones, J.). In that case, the plaintiff argued, contrary to the express holding in *Viking*, that the Revenue Bond Act is applicable only to cities that have issued bonds. The Court declined to consider this argument because it was not properly presented.[168] Nevertheless, elsewhere in the decision, the Court said, "The Revenue Bond Act is not applicable because no revenue bonds were issued by the City." *Lewiston*, 151 Idaho at 808, 264 P.3d at 915. The latter statement cannot be reconciled with the Court's holding in *Viking* (that the act applies even when no revenue bonds are issued) and is best understood as dictum on an issue that was not properly briefed.

Indeed, neither party's brief contains even a reference to *Viking*. Lewiston's brief, 2011 WL 700489 (Feb. 2, 2011); Respondents' brief, 2011 WL 5526052 (Mar. 10, 2011). It appears that the parties and the Court were uninformed of the *Viking* precedent. Perhaps for that reason, the city virtually abandoned its Revenue Bond

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[167] In *Alliance for Property Rights and Fiscal Responsibility v. City of Idaho F*alls, 742 F.3d 1100, 1105 n.3 (9th Cir. 2013) (N.R. Smith, J.) (internal quotation marks omitted), the Ninth Circuit relied on *Viking* for the proposition that the "revenue bond act is not limited to a district issuing bonds."

[168] "The City contends that the stormwater fee was enacted pursuant to valid police power authority under the Revenue Bond Act, the Local Improvement District Code, and numerous provisions of Title 50 of the Idaho Code. The City does not provide any arguments for how those provisions authorize a fee; neither does the City refer to the specific sections on which it relies. The only argument that the City makes is that the stormwater fee is valid under the Revenue Bond Act, I.C. § 50–1027, et seq. That issue, however, is not before this Court because the City did not proceed under the Revenue Bond Act." *Lewiston*, 151 Idaho at 808, 264 P.3d at 915.

Act argument, seemingly conceding that the act would apply only if the city later decided to issue revenue bonds.[169] Thus, the Court's faulty dictum is understandable.

D. Post-*Lewiston* cases

In any event, that dictum is contradicted not only by the Court's prior decision in *Viking*, but also by these subsequent decisions:

- *Alliance for Property Rights and Fiscal Responsibility v. City of Idaho Falls*, 742 F.3d 1100, 1105 (9th Cir. 2013).
- *Manwaring Investments, L.C. v. City of Blackfoot*, 162 Idaho 763, 405 P.3d 22 (2017) (Burdick, C.J.).
- *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 87, 343 P.3d 1086, 1094 (2015) (Eismann, J.), and *N. Idaho Bldg. Contractors Ass'n v. City of Hayden*, 164 Idaho 530, 432 P.3d 976 (2018) ("*NIBCA II*") (Bevan, J.).

The holding in *Viking* was recognized and followed by the Ninth Circuit in 2013. "The City may exercise the powers granted in the [Revenue Bond Act], even if the City is not issuing bonds." *Alliance for Property Rights*, at 1105.

Although *Manwaring* did not address the question directly, it upheld a wastewater fee charged by Blackfoot based on the Revenue Bond Act. There is no indication in the decision that the city issued bonds under the act. And by implication there is no indication that doing so is a prerequisite to relying on the act's authority to charge user fees. Instead, the Court simply noted that the city relied on the "grants of authority" found in the act. *Manwaring*, 162 Idaho at 769, 405 P.3d at 28. It then addressed whether the fee structure was reasonably related to the value of the service provided (finding that it was).

In *NIBCA I* and *NIBCA II*, the City of Hayden expressly relied on the bond act to defend its "sewer capitalization fee" notwithstanding that it has issued no revenue bonds.[170] The Court confirmed that the bond act could be used for that purpose, so long as the fee is reasonably related to the service charged. An entire section of the *NIBCA II* decision is entitled "The Idaho Revenue Bond Act Provides Authority for

[169] The city stated: "As a related note, the City argues that the storm water fee is valid under the Revenue Bond Act. . . . The City has not sought to incur such indebtedness at this point, but would submit that there is high likelihood that the storm water utility fee established by the Ordinance would qualify as a fee for the purpose of the Revenue Bond Act." Lewiston's brief, 2011 WL 700489 at *23.

[170] The Court was well aware that the city had issued no bonds. See City of Hayden's response brief, 2014 WL 2434901 (May 19, 2014) at *26-27 (calling the Court's attention to the fact that cities may rely on the bond act "irrespective of whether bonds were issued" and "even those that have not issued revenue bonds").

Cities to Charge a New, One-time 'Buy-in" Fee." *NIBCA II*, 164 Idaho at 537, 432 P.3d at 983. Although the Court found it unnecessary to address issue that no bonds had been issued, the *NIBCA* decisions implicitly recognized that the issuance of bonds is not a prerequisite to reliance on the bond act's authority to charge user fees for services. Indeed, the *NIBCA* decisions discuss and rely on *Viking* extensively without any suggestion that this aspect of the *Viking* decision was in doubt, much less overturned.

(d) Idaho Code § 31-4404(2) (county solid waste systems)

In 1989, the Court upheld Kootenai County's mandatory solid waste disposal fee in *Kootenai Cnty. Property Ass'n v. Kootenai Cnty.*, 115 Idaho 676, 769 P.2d 553 (1989) (Bakes, J.). This was an annual fee imposed on all homeowners (not a connection fee to new users). In this case, the county relied on a specific statutory authorization for taxes and/or fees to fund solid waste programs, Idaho Code § 31-4404. Under the statute, there was no doubt that counties had authority to charge a fee for solid waste services. The question was whether Kootenai County's fee, which applied to all homeowners, was a fee or really a disguised tax. Opponents of the fee contended that it was not a lawful user fee because (1) it was imposed on all homeowners whether they chose to use the landfill services or not, (2) the fee was not precisely tailored to match the quantity of services consumed, and (3) it funded a future benefit (acquisition and preparation of new landfill sites) rather than providing an immediate "service." The Idaho Supreme Court rejected all three arguments.

First, the Court rejected the idea that a charge for service must be voluntary in order to be a "fee":

> The association further argues that when the benefit derived is a benefit to the general public, fees to provide the benefit must be considered a tax. A fee, according to the association, is voluntarily paid for specific services while a tax is involuntarily obtained for the general public benefit. However, the legislature, under its police powers, may mandate that citizens must accept certain services, and then require a fee for the receipt of those services. *See, e.g., Schmidt v. Village of Kimberly,* [74 Idaho 48, 256 P.2d 515 (1953)] (ordinance requiring mandatory sewer hookup and requiring payment of reasonable fee, approved); *City of Glendale v. Trondsen,* [308 P.2d 1 (Cal. 1957)] (ordinance establishing rubbish collection service and requiring payment for service regardless of whether building occupants use the service, approved) . . . .

Kootenai Cnty. Property Ass'n v. Kootenai Cnty., 115 Idaho 676, 679, 769 P.2d 553, 556 (1989) (Bakes, J.).

The Court said it made no difference that there is no opportunity to "opt out." "Their basic premise was that all humans live in residences and create solid waste, and whether they put it in their own trash cans or someone else's, or on the street, the refuse ultimately ends up in the same place, an authorized county waste disposal site (landfill)." *Kootenai County Property Ass'n*, 115 Idaho at 678, 769 P.2d at 555 (parentheses original).

Second, the Court ruled that it is not necessary that the fee be based precisely on how much garbage is generated and that a flat fee for residential use is reasonable.

> No one suggests that each and every residence generates the same amount of solid waste. Presumably, the precise annual cubic yardage of solid waste from each residence could be painstakingly monitored and determined for each residence by county employees. However, all users would have to pay substantially more to cover the additional salaries of trash monitors. A solid waste disposal system is comparable to a sewer system. Charging a flat residential sewage fee is reasonable even though the actual use (outflow volume) varies somewhat from house to house. *See Schmidt v. Village of Kimberly*, 74 Idaho 48, 256 P.2d 515 (1953). The legislature has not imposed exacting rate requirements upon localities for measuring actual residential solid waste disposal or sewage use. Reasonable approximation is all that is necessary. *Id.*

Kootenai County Property Ass'n, 115 Idaho at 678-79, 769 P.2d at 555-56 (emphasis supplied). (Note: the *Waters Garbage* case discussed below found that an opt out is required where the user makes other arrangements and does not require the service.)

Third, the Court rejected the plaintiffs' argument that the solid waste charge was not a fee because "it would not provide an immediate benefit, but rather would only provide a future benefit, i.e., acquisition and preparation of new landfill sites." *Kootenai County Property Ass'n*, 115 Idaho at 679, 769 P.2d at 556. Whether the fee is used to fund immediate services or the acquisition of new sites makes no difference, said the Court, because both were authorized activities under the statute. *Id*. In other words, fees may be user fees (and not taxes) even if the funds are used to expand the system.

In *Waters Garbage v. Shoshone Cnty.*, 138 Idaho 648, 67 P.3d 1260 (2003) (Eismann, J.), the county constructed solid waste disposal facilities funded by the

issuance of revenue bonds. To recoup its costs, the county imposed a mandatory solid waste disposal fee on all county property owners regardless of whether they used the county landfill or not. The fee premised on Idaho Code § 31-4404(2) (authorizing user fees to fund county solid water systems.

A private solid waste disposal firm that competed with the county's landfill asked the county to exempt its customers from the fee. When the county refused, the firm sued the county. This time, the Idaho Supreme Court backed off its broad proclamation in *Kootenai Cnty. Property Ass'n* that a county is not required to provide an "opt out" for persons not wishing to use the county service. The *Waters Garbage* Court agreed with the plaintiff that the "basic premise" in *Kootenai County Property Ass'n* (that all humans send waste to the local landfill) was not true here. Here, local residents could lawfully avoid sending their waste to the landfill by contracting with the private service provider. Accordingly, the Court concluded that the county could not legitimately deem its charge to be a fee for services if it was imposed on people who did not use the service. *Waters Garbage*, 138 Idaho at 651-52, 67 P.3d at 1263-64.

In *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J.), the Court limited a portion of its holding in *Kootenai County Property Ass'n* to the particular statute involved. See footnote 154 on page 200

(e) Idaho Code §§ 42-3201 and 42-3212 (water and sewer district fees)

In *Potts Const. Co. v. N. Kootenai Water Dist.*, 141 Idaho 678, 116 P.3d 8 (2005) (Schroeder, C.J.), the Court upheld a one-time capitalization fee based on an equitable buy-in structure charged to those seeking connections to the district's sewer system. The Court found that it was justified under Idaho Code §§ 42-3201 and 42-3212.[171] The latter "grants municipal water service boards the authority to increase or decrease rates and fees as needed and to proscribe those actions necessary and proper to carry out their duties." *Potts*, 141 Idaho at 682, 116 P.3d at 12. The Court concluded:

> Similar to Loomis, Ordinance 99–4's capitalization fee created an equitable buy-in structure, with revenues delegated for repairs, replacement and maintenance of system components proportionally used by those within the water district's system. Additionally, the capitalization fee is reasonable and rationally related to the purpose of the municipal's regulatory function of insuring clean and safe water for those users of the

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

> district's system. The capitalization fee imposed by Ordinance 99–4 only applies to those who pay into the system and is reasonably related to public health. It is a valid exercise of NKWD's police power.

Potts, 141 Idaho at 682, 116 P.3d at 12.

The Court's description of the fee as being within the police power is out of sync with other decisions that describe the provision of such services as being a proprietary function that requires statutory authorization. Indeed, the Court noted this error in a subsequent decision.[172]

In any event, there was statutory authorization to support the fee, which the Court relied on. The decision also includes some discussion of *Brewster* regarding incidental regulatory fees that seems out of place. A capitalization fee is not an incidental regulatory fee, because it is not intended to cover merely the cost of enforcing or administering some regulation.

Note that the case did not address the question of whether the such fees could be used to fund system expansion.[173] That question was left for the *Kootenai Cnty. Property Ass'n* and *NIBCA* cases.

(f) Idaho Code §§ 50-332 and 50-333 (drains and flood prevention) coupled with Idaho Code § 50-1008(assessments)

Idaho Code §§ 50-332 and 50-333 authorize Idaho cities to engage in activities relating to drains and flood prevention and to assess the cost thereof to property owners in accordance with Idaho Code § 50-1008. These appear to constitute express legislative authorizations of user fees of the kind required by such cases as *City of Grangeville v. Haskin*, 116 Idaho 535, 538, 777 P.2d 1208, 1211 (1989) (Johnson, J.).

Unlike Idaho Code §§ 50-1030(f), 63-1311(1), and 31-870(1) (discussed above), Idaho Code §§ 50-332 and 50-333 set out no guidance or limitation as the how the fee should be determined. One may predict, however, that, if called upon, the Idaho Supreme Court would apply the same principles to these statutes that it has

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[172] "In *Potts Construction Co. v. North Kootenai Water District*, 141 Idaho 678, 681, 116 P.3d 8, 11 (2005), we incorrectly stated that the connection fee in *Loomis* 'was upheld as a valid exercise of police power authority.'" *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 149 Idaho 187, 193 n.4, 233 P.3d 118, 124 n.4 (2010) (Eismann, C.J.).

[173] It describes the funds from the capitalization fee as being used solely for "repairs, replacement and maintenance of system components proportionally used by those within the water district's system." *Potts*, 141 Idaho at 682, 116 P.3d at 12.

applied elsewhere.[174] In other words, user fees authorized by these statutes must be reasonably tailored to the pro-rata cost of the benefit conferred in order to avoid being labeled "illegal taxes." "

To the authors' knowledge, no court has ruled on the extent of user fee authority conferred by these statutes. In any event, the authority they confer is clear on the face of the statutes and is in addition to (and redundant with) that already provided to cities by Idaho Code §§ 50-1030(f) and 63-1311(1).

(g) Idaho Code §§ 50-323 and 50-344 (domestic water systems and solid waste disposal)

Two other statutes authorize cities to establish and operate domestic water systems and solid waste facilities. Idaho Code §§ 50-323 and 50-344. These statutes provide additional (belt-and-suspenders) authority for cities to impose user fees to finance these systems.

These statutes have been addressed by four cases:

- *Snake River Homebuilders Ass'n v. City of Caldwell*, 101 Idaho 47, 607 P.2d 1321 (1980) (Donaldson, C.J.) (addressing Idaho Code § 50-323).
- *City of Grangeville v. Haskin*, 116 Idaho 535, 777 P.2d 1208 (1989) (Johnson, J.) (addressing Idaho Code §§ 50-323, 50-344, and 1030(f)).
- *Alpert v. Boise Water Corp*., 118 Idaho 136, 795 P.2d 298 (1990) (Boyle, J.) (addressing Idaho Code §§ 50-323 and 50-344)[175].
- *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 87, 343 P.3d 1086, 1094 (2015) (Eismann, J.) (addressing Idaho Code § 50-323 and 50-344).

The *Snake River* case involved a challenge by a homebuilders association to an increase in Caldwell's fee for sewer line extensions, which was imposed pursuant to Idaho Code § 50-323. The case dealt primarily with procedural and due process issues. The Court held (1) the city could raise the rate by adoption of a resolution (as opposed to an ordinance) and (2) because the action was legislative in nature, it could

[174] For example, as discussed above, in *Brewster*, the Court imposed its general principles regarding illegal taxes on Idaho Code § 63-1311(1) before the statute was amended to codify them: "We hold that while such statute provides for the imposition of certain fees, nowhere does it authorize a municipality to impose a tax upon users or abutters of public streets." *Brewster*, 115 Idaho at 503-04, 768 P.2d at 766-67.

[175] The *Alpert* opinion refers to the domestic water system statute as section 50-322. This is a typographical error. It should be section 50-323.

act without public notice and hearing. The Court then ruled on the merits (albeit with little analysis) that that the fee itself was not "a void general revenue measure."[176]

The *Grangeville* case involved user fees charged for the city's water, and garbage services. The issue was not the legitimacy of the fees themselves—which the Court acknowledged to be properly imposed on the tenants receiving the service. Instead, the issue was the city's attempt to go after a property owner (the landlord) to collect fees unpaid by tenants receiving the services. The Court found that the fees charged to tenants were justified under both Idaho Code § 50-323 and the Revenue Bond Act (Idaho Code § 50-1030(f)). However, the Court did not premise the power to collect the fees on the statutes themselves but on contract law.[177] The *Grangeville* Court did not explain its reluctance to find authority in the statutes themselves. In any event, the Court was not troubled by the city's reliance on a combination of Idaho Code § 50-323 and contract law to support its user fee.

A third case, *Alpert*, mentions Idaho Code §§ 50-323 and 50-344 noting that they authorize cities to operate water and solid waste collection systems. The decision also contains a discussion of the "illegal tax" issue, concluding that the 3% fee tacked on by a city's franchise agreement (and passed along to the consumer) is not such a tax. (See discussion in section 33 on page 284.) The *Alpert* Court did not find it necessary to expressly state that Idaho Code §§ 50-323 and 50-344 provide the requisite statutory authority for a city to charge a user fee (because that was not the

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[176] The *Snake River* Court said:

> Appellant's final contention is that the resolution places no control over the city's expenditure of the funds collected for extension of water mains, and is therefore a void general revenue measure levied against a particular class of citizens. Respondent, on the other hand, maintains the resolution is in no way a revenue measure, but rather was passed to defray some of the cost of a service rendered. . . .
>
> . . .
>
> In granting summary judgment in favor of respondent city, the district court concluded, from the facts before it, that the increase set forth in the resolution was predicated upon a cost recovery basis and did not constitute a revenue-raising measure. Our review of the record discloses nothing to the contrary.

Snake River, 101 Idaho at 49-50, 607 P.2d at 1323-24.

[177] The *Grangeville* Court said:

> We acknowledge that the city may collect the charges for the water, sewer and garbage services provided by the city from those who use the services. This right to collect does not depend on any expressed or implied power of the city, but rather on principles of contract law that obligate one who accepts a service to pay for it.

Grangeville, 116 Idaho at 538-39, 777 P.2d at 1211-12.

focus of the case). But this would seem to be a necessary implication of the decision to uphold the user fees and associated franchise fees.

The fourth case addressing Idaho Code § 50-323 is *NIBCA I*. The *NIBCA I* Court found that section 50-323 (which deals with domestic water systems) was not relevant to and could not support user fees for Hayden's sewer system. *NIBCA I*, 158 Idaho at 84-85, 343 P.3d at 1091-92. In its discourse on the statute, however, the Court quoted with approval statements made in *Grangeville* to the effect that Idaho Code §§ 50-323, 50-344, and 50-1030(f) support the imposition of user fees on users of public services.[178] It should be said that the Court's discussion of this statute is difficult to follow.[179]

(h) All user fees must reasonably reflect the cost of the service provided.

Note: The subsections above are organized on the basis of statute authorizing the user fee. This subsection collects cases based on various statutes. This is because when the Idaho Supreme Court speaks on the subject of what is a lawful fee versus an unlawful tax, it tends to apply the same principles across-the-board, without regard to the particular statute.

To be valid, the user fee under the Revenue Bond Act or any other statute must reasonably reflect the cost of the service provided to the user. But this does not mean that the fee must reflect the exact amount of service consumed. Tailoring a fee with such precision is impossible. The Idaho Supreme Court has explained repeatedly that the standard is not precision but reasonableness.

> Charging a flat residential sewage fee is reasonable even though the actual use (outflow volume) varies somewhat from house to house. *See Schmidt v. Village of Kimberly*, 74 Idaho 48, 256 P.2d 515 (1953). The legislature has

[178] For example: "I.C. § 50–344 grants cities 'the power to maintain and operate solid waste collection systems.' . . . 'We acknowledge that the city may collect the charges for the water, sewer and garbage services provided by the city from those who use the services.'" *NIBCA I*, 158 Idaho at 85, 343 P.3d at 1092 (quoting *Grangeville*, 116 Idaho at 538, 777 P.2d at 1211) (emphasis in *NIBCA I* only)

[179] For instance, the *NIBCA I* Court recites this quotation from *Grangeville*:

> The district court also ruled that the power of the city to collect from the owner *was necessarily implied* from the powers granted to the city in I.C. §§ 50–323 and 50–1030(f). *We disagree.*

NIBCA I, 158 Idaho at 85, 343 P.3d at 1092 (quoting *Grangeville*, 116 Idaho at 537, 777 P.2d at 1210) (emphasis in *NIBCA I* only).

That quotation, if read out of context, could be misunderstood. Indeed, it is unclear why the *NIBCA I* Court thought this quotation was relevant. The *Grangeville* Court held that user fees may be lawfully imposed, but only on the user of the service (the tenant in that case) not on the non-user, owner of the property (the landlord in that case). In any event, *NIBCA I* did not disturb that ruling.

> not imposed exacting rate requirements upon localities for measuring actual residential solid waste disposal or sewage use. Reasonable approximation is all that is necessary.

Kootenai Cnty. Property Ass'n v. Kootenai Cnty., 115 Idaho 676, 678-79, 769 P.2d 553, 555-56 (1989) (Bakes, J.). Note: The *Kootenai Cnty.* case did not involve the Revenue Bond Act; the county's fee was based on Idaho Code § 31-4404.

> The Irrigation District had discretion to decide what methodology to use in order to determine that value. For example, it is entitled to use replacement cost rather than historical cost as the basis of its calculations. <u>The court's limited role is simply to determine whether the methodology used to determine the value is reasonable and not arbitrary.</u>

Viking Const., Inc. v. Hayden Lake Irrigation Dist., 149 Idaho 187, 194, 233 P.3d 118, 125 (2010) (Eismann, C.J.) (emphasis supplied).

> It is not the province of this Court to determine how a municipality should allocate its fee and rate system. So long as the fees and rates charged conform to the statutory requirements and are reasonable, the fees, rates and charges will be upheld.

Loomis v. City of Hailey, 119 Idaho 434, 442, 807 P.2d 1272, 1280 (1991) (Boyle, J.).

> [The] funds generated thereby must bear some reasonable relationship to the cost of enforcing the regulation.

Brewster v. City of Pocatello, 115 Idaho 502, 504, 768 P.2d 765, 767 (1988) (Shepard, J.).

> The fact, that the fees charged produce more than the actual costs and expense of the enforcement and supervision [of traffic and parking regulation], is not an adequate objection to the exaction of the fees. The charge made, however, must bear a reasonable relation to the thing to be accomplished.
> The spread between the actual cost of administration and the amount of fees collected must not be so great as to evidence on its face a revenue measure rather than a license tax measure.

Foster's Inc. v. Boise City, 63 Idaho 201, 219, 118 P.2d 721, 728 (1941) (Ailshie, J.) (citations omitted).

> Creating a fee structure 'whereby every member of the general public would be charged only for his exact contribution of waste presumably could be established, but the system would be cumbersome and perhaps prohibitively expensive to maintain. The law only requires that the fee be reasonably related to the benefit conveyed.'

Manwaring Investments, L.C. v. City of Blackfoot, 162 Idaho 763, 768-69, 405 P.3d 22, 27-28 (2017) (Burdick, C.J.) (quoting *Kootenai Cnty. Property Ass'n v. Kootenai Cnty.*, 115 Idaho 676, 680, 769 P.2d 553, 557 (1989) (Bakes, J.).

Indeed, this reasonableness standard is built right into the authorizing legislation. "The fees collected pursuant to this section shall be reasonably related to, but shall not exceed, the actual cost of the service being rendered." Idaho Code § 63-1311(1) (applicable to cities); Idaho Code § 31-870 (applicable to counties).[180]

In 2015, the Idaho Supreme Court handed down *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J.), in which a builders association challenged the city's sewer cap fee. The case is discussed above in the context of Idaho Code § 63-1311(1). The city also defended its fee under section 50-1030(f) of the Revenue Bond Act.

The *NIBCA I* Court began its discussion under the Revenue Bond Act by recognizing that the cap fee is not limited to the mere cost of connecting to the sewer. To the contrary, the new user may be charged a buy-in fee reflecting the value of the system to which it is connecting.

> In *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991), we held that a connection fee charged to connect to a city's sewer and water system could exceed the actual cost of physically connecting to the system. *Id*. at 442, 807 P.2d at 1280. We upheld a fee that required a new user to pay a one-time connection fee to "buy in" to the city's sewer and water system. We held that Idaho Code section 50–1030(f) "specifically gives the municipality the power to set and prescribe the rates, tolls and charges to support the system" and that the city could

[180] In 1988, both provisions were amended by adding the same identical sentence: "The fees collected pursuant to this section shall be reasonably related to, but shall not exceed, the actual cost of the services being rendered." S.B. 1340, 1988 Idaho Sess. Laws, ch. 201 (amending Idaho Code §§ 31-870 and 63-2201A (the predecessor to Idaho Code § 63-1311)).

> calculate the amount of the buy-in "by dividing the net system replacement value by the number of users the system can support. The new user is charged the value of that portion of the system capacity that the new user will utilize at that point in time." *Id*. at 441, 443, 807 P.2d at 1279, 1281.

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

Moreover, the *NIBCA I* Court stood by its prior precedent that the fee may be based on today's replacement value, rather than the historical cost. The Court nonetheless ruled that Hayden had failed to establish on the record that its fee did not exceed the cost of replacing existing system capacity:

> In this case, the City did not calculate the fee by dividing the value of its current system by the number of users that system could support to determine the amount of the fee to be charged to each new user as an equity buy-in. Rather, it divided the estimated cost of increasing the size of the system from 5600 ER's to 14,550 ER's by the increase in capacity that would result from the construction and then charged each new user a proportionate amount of the cost of that increase.

NIBCA I, 158 Idaho at 82, 343 P.3d at 1089.[181]

In sum, a buy-in fee is lawful, but it must be based on an appropriate portion of today's replacement value of the existing system. It must not be measured by the cost of building new capacity to replace what is being consumed by the new user. The Court reached this conclusion based on the phrase "at that point in time" which appeared in the *Loomis* case and the *Viking* case. *NIBCA I*, 158 Idaho at 82, 343 P.3d at 1089.

[181] In a footnote, the *NIBCA I* Court made reference to the City of Hailey's buy-in formula in *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991) (Boyle, J.). *NIBCA I*, 158 Idaho at 82 n.2, 343 P.3d at 1089 n.2 (quoting from *Loomis*, 119 Idaho at 443 n.4, 807 P.2d at 1281 n.4). This discussion is quite technical. For instance, footnote 4 of *Loomis* says that gross replacement value is determined by multiplying the actual original cost of each system component by a ratio of today's cost index divided by the cost index at the time of construction—in other words, the dollar value for what it would cost to build the same system today. This gross replacement value is then "adjusted by subtracting the remaining bond principal to be retired and the unfunded depreciation." *Loomis*, 119 Idaho at 443 n.4, 807 P.2d at 1281 n.4. A concurrence in *NIBCA I* by Justice Jim Jones joined in by Chief Justice Burdick urged that the footnote 2 discussion in *NIBCA I* "may be correct but it seems to me that expert opinion below should address that issue." *NIBCA I*, 158 Idaho at 87, 343 P.3d at 1094.

The *NIBCA I* Court went on to reiterate what it had previously held in *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 149 Idaho 187, 196, 233 P.3d 118, 127 (2010) (Eismann, C.J.), that "connection fees collected by [the governmental entity] could be spent to extend the domestic water system." *NIBCA I*, 158 Idaho at 82, 343 P.3d at 1090 (emphasis original). In other words, the *NIBCA I* plaintiffs' contention that fee revenue could not be expended for future system expansion was wrong.

Thus it is clear that a city may charge a buy-in fee based on the current replacement value of the existing system (which is certain to be more that was actually spent on the system) and then use that money to pay for new infrastructure.

> When a new user pays a sewer connection fee to a city based upon the value of that portion of the sewer system's capacity that the new user will be utilizing at that point in time, the connection fee will probably allow the city to accumulate a fund to increase the capacity of its sewer system. That proportionate value of the system capacity used by the new user will undoubtedly be more than any increased operational costs of adding the new user to the current system. Assuming that the city is able to extend its sewer system by accumulating a fund from charging new users a connection fee based upon the value of the system capacity that each of them will be using, the Idaho Revenue Bond Act would not prevent a city from using those funds to extend its system, as long as it did so consistent with Idaho Code section 50–128 [sic, should be 50-1028].

NIBCA I, 158 Idaho at 83, 343 P.3d at 1090.[182]

In footnote 2, the *NIBCA I* Court described the particular methodology that should be employed in calculating the replacement value:

> The three methods of valuing real property are the income approach, the sales comparison approach, and the cost approach. Because city sewer systems are not to be operated primarily as a source of city revenue and the services are to be furnished at the lowest possible cost, I.C. § 50–1028, and because of the lack of comparable sales of city sewer systems, the cost approach is the most feasible method for valuation. Under that method, value

[182] The Court's reference to section 50-128 should be to 50-1028. This is the "grant of authority" under the bond act, which mandates that "works shall be furnished at the lowest possible cost. No city shall operate any works primarily as a source of revenue to the city . . . ."

> is based upon the estimated cost of duplicating the improvements to the real property, minus accrued depreciation, plus the value of the land, if any. Thus, in *Loomis*, the city calculated the net system replacement value "by first determining the gross replacement value of the system by using an engineering cost index to determine present day replacement cost of the system components," and it then subtracted from the gross replacement value "[u]nfunded depreciation and bond principal" to determine the net system replacement value.

NIBCA I, 158 Idaho at 82 n.2, 343 P.3d at 1089 n.2 (quoting *Loomis*, 119 Idaho at 443, 807 P.2d at 1281).[183]

So long as the fee can be shown not to exceed the replacement value of the existing system, the only constraint is that it be "consistent with Idaho Code section 50-1028." *NIBCA I*, 158 Idaho at 84, 343 P.3d at 1091 (referring to the provision in the Revenue Bond Act that the city shall not "operate any such works primarily as a source of revenue.")

In sum, the City of Hayden incorrectly assumed that it could calculate the replacement value of its existing sewer system (for purposes of its cap fee) by calculating the cost of building the next increment of its sewer system. The *NIBCA I* Court said that was not permissible because the replacement value must be based on the cost of replacing the existing system. But the Court remanded to allow the city justify its fee on that basis. The city did just that. On remand, the city calculated the per-user replacement value of its existing system and demonstrated to the district court that the cap fee it charged was less than that number. The plaintiff complained that this was an unfair, after-the-fact justification of the fee—what it called a "do over." The district court agreed, and the city appealed again. On the second appeal, *N. Idaho Bldg. Contractors Ass'n v City of Hayden* ("*NIBCA II*"), 164 Idaho 530, 432 P.3d 976 (2018) (Bevin, J.), the Court overturned the district court's rejection of the evidence offered by the City (which showed that its sewer buy-in fee, even though calculated on the basis of an improper methodology, did not exceed the amount that could be lawfully charged had the proper methodology been employed).[184] This was

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

[184] "[T]he City can make a case that the 2007 Cap Fee was reasonable when it was adopted, even though the method used to arrive at the amount of the fee was flawed." *NIBCA II*, 164 Idaho at 539, 432 P.3d at 984.

"The City was precluded from establishing a legal, even if tardy, basis for the fee here. In not allowing the City to pursue its case the district court erred. Allowing its determination to stand could lead to a windfall to developers at taxpayer expense. The FCS study indicated that the $2,280

followed by a second remand, which should have been a slam dunk for the city. Instead, the city inexplicably and ill-advisedly threw in the towel.

In 2017, the Idaho Supreme Court decided *Hill-Vu Mobile Home Park v. City of Pocatello*, 402 P.3d 1041 (Idaho 2017) (Eismann, J.). The case involved a challenge to water and sewer fees charged by the City of Pocatello. The city imposed the fees pursuant to the Revenue Bond Act. Notwithstanding an opinion letter from the Idaho Attorney General warning of the illegality of the fee, the city added on two fees aimed at generating a profit off of its water and sewer systems. One was a "return-on-equity" add-on, which mimicked the return a public utility is allowed to keep as profit. The other was a "payment in lieu of taxes" (or PILOT) in which the water and sewer departments paid a PILOT to the city, which, in turn, was passed along to the water and sewer customers. It appears that the city agreed to drop the return-on-equity charge. The Building Contractors Association of Southeastern Idaho then brought suit challenging the PILOT. In 2013, the district court enjoining the city from charging the PILOT. No appeal was taken.

Apparently only injunctive relief was sought in the first case. In 2014, a second suit was brought, this time by the mobile home park, seeking a refund of PILOT sums that had been paid by the city department and passed through to rate payers. In this case, the illegality of the fees was taken as a given. (Indeed, it is beyond comprehension that Pocatello ever thought these fees were lawful.) The second case involved technical defenses to damage claims.

First, the Idaho Supreme Court found that Idaho Code § 6-904A does not immunize cities from charging illegal fees. (See discussion of this defense in Volume 1 of this Handbook.) This provision provides immunity (with some limitations) for actions that arise "out of the assessment or collection of any tax or fee." Next, the Court reversed the district court's conclusion that money is not property within the meaning of the takings clause. *Hill-Vu* at 1048. The Court further held that the district court improperly failed to apply the decision in the earlier district court litigation that declared the fees illegal.

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fee was less than the actual cost for new users to connect to the system; this was sufficient evidence to withstand summary judgment. Ordering the City to reimburse NIBCA an amount exceeding $700,000 would require taxpayers in general to foot that bill." *NIBCA II*, 164 Idaho at 539, 432 P.3d at 985.

"The City erroneously failed to follow the *Loomis* criteria in establishing the fee in the first instance. Even so, because of the reversal of summary judgment in *NIBCA I*, it sought to justify the amount of its fee based on the reality that the cost in applying the *Loomis* and *Viking* methodology *exceeded* the amount it charged for the fee. It was not allowed to make that case. Thus, while the City originally relied on faulty logic in coming to the amount of the 2007 Cap Fee, using the *Loomis* criteria could allow the City to establish that its fee was in fact an authorized, lawful fee. The district court must then determine whether that fee is reasonable given the totality of the facts in the record." *NIBCA II*, 164 Idaho at 539-40, 432 P.3d at 985-86 (emphasis original).

Due to the posture of the case, there was no ruling on the merits. The Court left little doubt, however, about its take on the situation:

> The PILOT [fee charged by the City] was not a reasonable user fee to reimburse the City for the cost of government services. It was an exaction that was designed to be in addition to what would be a reasonable charge for the water and sewer systems to remain self-supporting. In the *Building Contractors* case [the earlier district court case], the City conceded that fact.

Hill-Vu at 1050.

(i) User fees regulated by the Idaho Public Utilities Commission.

In *Building Contractors Ass'n of Southwestern Idaho, Inc. v. Idaho Public Utilities Comm'n.*, 128 Idaho 534, 916 P.2d 1259 (1996) (Schroeder, J.), the Idaho Supreme Court invalidated a rate increase granted by the commission to Boise Water Corporation (now Veolia). The fee would have imposed the entire cost of the newly constructed Marden Treatment Plant on new users through sharply higher connection fees. The treatment plant was necessitated by recently toughened requirements under the Safe Drinking Water Act. The Court determined that the rate was discriminatory because the cost of improved water quality was not related to new development and should be borne proportionately by new and existing users. Although this case arose in the context of public utility law, the principle would seem to be applicable in the context of an illegal tax challenge to a connection fee or other user charge.

(4) Express statutory authority to address impacts on public facilities or services in the context of CUPs and zone changes.

On of LLUPA's stated goals is "To ensure that adequate public facilities and services are provided to the people at reasonable cost." Idaho Code § 67-6502. That goal finds expression in many requirements of LLUPA—from comprehensive planning to the establishment of areas of city impact—all of which are intended foster the efficient development of public services.

LLUPA expressly authorizes planning and zoning entities to address the need for additional public facilities and services, including school districts, resulting from new development. Thus it appears that cities and counties may condition the approval of CUPs and zone changes with requirements that the applicant mitigate for the impact of the development. This might entail contributions made to the entity providing the service, which may be different than the city or county granting the land use entitlement. This particular statutory authority is found only in the context of CUPs and zone changes, not other land use entitlements such as subdivision.

(a) CUPs (Idaho Code §§ 67-6512(a), 67-6512(d)(6), and 67-6512(d)(8))

Section 67-6512 of LLUPA deals with conditional use permits ("CUPs") also known as special use permits. Section 67-6512(a) recognizes that such permits may take into account the public services that will be required by the development:

> A special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms of the ordinance . . ., subject to the ability of political subdivisions, including school districts, to provide services for the proposed use . . . .

Idaho Code § 67-6512(a). This section then sets out a non-exclusive list of conditions that may be imposed on a CUP. Two are notable here.

The first allows conditions "[r]equiring the provision for on-site or off-site public facilities or services." Idaho Code § 67-6512(d)(6). The second authorizes conditions "[r]equiring mitigation of effects of the proposed development upon service delivery by any political subdivision, including school districts, providing services within the planning jurisdiction." Idaho Code § 67-6512(d)(8).

Note that there is a question as to the scope of what constitutes "public facilities or services" (under section 67-6512(d)(6)) and "service delivery" (under section 67-65-(d)(8)). One might read these as including mitigation of impacts on such things as roads and schools, but not to reach such things as affordable housing.

These constitute an express authorization by the Legislature for such conditions even in the absence of an IDIFA-complaint ordinance. Because they are legislatively authorized, they are not unlawful taxes.

The Idaho Supreme Court recognized the county's authority to impose mitigation conditions in *Buckskin Properties, Inc. v. Valley County*, 154 Idaho 486, 300 P.3d 18 (2013):

> Furthermore, even without the agreement of the developer, a governing board may attach a condition to a CUP requiring the provision for off-site public facilities or requiring mitigation of effects of the proposed development upon service delivery by any political subdivision. I.C. § 67-6512(d)(6) and (8). If a governing board attaches a condition unacceptable to the developer, the developer may seek judicial review (I.C. § 67-6519(4)) or request a regulatory taking analysis pursuant to I.C. § 67-8003. I.C. § 67–6512(a).

Buckskin, 154 Idaho at 492, 300 P.3d at 24. Thus, a mitigation condition might still be challenged as a taking if, for instance, it was disproportionate or unrelated to the impact of the development (per *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 860 (1987) (Scalia, J.) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (Rehnquist, J.)). But it is not a *per se* taking as an illegal tax, because such conditions are authorized by LLUPA.

Moreover, the *Buckskin* Court made the following observation about the authority to require mitigation under section 67-6512(d) in the context of its discussion of IDIFA. The Court first observed that "IDIFA does not prohibit governmental entities and developers from voluntarily entering into contracts to fund and construct improvements." *Buckskin*, 154 Idaho at 491, 300 P.3d at 23. In that context, the Court noted even in the absence of a voluntary agreement, mitigation may be required under section 67-6512(d). *Buckskin*, 154 Idaho at 492, 300 P.3d at 24.

One might ask, why would the Legislature enact IDIFA if it already had authority to impose these requirements under LLUPA? In response, it should be noted that this LLUPA provision is much narrower than IDIFA. First, LLUPA's CUP provision does not authorize impact fees for <u>all</u> development (*e.g.*, anyone pulling a building permit). Rather, it is limited to developers who file an application for a CUP. Second, it is limited to "public facilities and services." Arguably the reference to "public facilities" in LLUPA is quite broad, but this has not been tested. For example, does it include parks and open space? IDIFA, on the other hand, expressly encompasses certain specified public facilities, which includes parks and open space.

Thus, it appears that LLUPA's section 67-6512(d) would justify requiring mitigation fees (without IDIFA compliance) in connection with CUPs sufficient to cover the developer's proportionate share of increased government infrastructure and other costs associated with the new development. However, if the local government wishes to impose fees for development impacts in contexts other than CUPs, it would need to enact an IDIFA-compliant ordinance.

The conclusion that sections 67-6512(d)(6) and (8) authorize such conditions without enactment of an IDIFA-complaint ordinance is reinforced by dictum in *Burns Holdings, LLC v. Teton Cnty. Bd. of Comm'rs* ("*Burns Holdings II*"), 152 Idaho 440, 272 P.3d 412 (2012) (Eismann, J.). There the Court held a variance is the only means by which cities and counties may grant relief from bulk and height restrictions and that such relief could not be provided by conditions in a conditional use permit. (This result was promptly overturned by the Legislature. See discussion under "Variances" in Volume 1 of this Handbook.) In the course of its ruling, however, the Court had occasion to describe the conditional use permit provision of LLUPA, Idaho Code § 67-6512(a). It noted:

> A CUP is used for classifications of uses that the zoning authority has determined will be permitted only if it is allowed to require specified types of conditions that are typically developed on a case-by-case basis in order to mitigate the adverse effects that the development and/or operation of the proposed use may have upon other properties or upon the ability of political subdivisions to provide services for the proposed use. Section 67–6512(d) includes a non-exhaustive list of the types of conditions that can be attached to a CUP.

Burns Holdings II, 152 Idaho at 444, 272 P.3d at 416 (footnote omitted). Although not an issue in this case, the Court noted that cities and counties have express statutory authority to impose certain mitigation conditions as part of a conditional use permit. In a footnote, the Court quoted Idaho Code § 67-6512(d), which sets out examples of categories of conditions that might be attached to a conditional use permit. *Burns Holdings II*, 152 Idaho at 444 n.5, 272 P.3d at 416 n.5.

On the other hand, another provision of LLUPA dealing with subdivision could be read as overriding the authority found in section 67-6512(d)(6) and (8) and making IDIFA the exclusive means of imposing development mitigation fees. A sentence in the section of LLUPA dealing with subdivision ordinances states: "Fees established for purposes of mitigating the financial impact of development must comply with the provisions of chapter 82, title 67, Idaho Code [IDIFA]." Idaho Code § 67-6513. No appellate court has addressed the interaction between this provision and sections 67-6512(d)(6) and (8). One could argue that section 67-6513 is more specific and therefore overrides or limits sections 67-6512(d)(6) and (8). On the other hand, one could argue that the provision in sections 67-6512(d)(6) and (8) are more specific (because they narrowly authorize provision for "mitigation" and "public facilities or services") and are not overridden by the more general provision in section 67-6513 as to fees for a broader range of issues (*e.g.*, affordable housing). Moreover, one could argue that the two provisions do not interact at all because section 67-6512(d) applies to CUPs while section 67-6513 applies to subdivisions. In any event, the conclusion in *Buckskin* (discussed above)that section 67-6512(d) provides authority for mitigation fees independent of and notwithstanding IDIFA remains the only law on the subject.

Note also that IDIFA expressly excludes the imposition of "[c]onnection or hookup charges" and "[a]vailability charges." Idaho Code §§ 67-8203(9)(b) and (c). The former (connection or hookup charges) appear to correspond to the physical cost of making a connection to a sewer or other infrastructure). The latter (availability charges) appear to refer to cost of system-wide infrastructure necessary to provide the capacity to serve the new customer. In Idaho, the term "capitalization fee" or

"connection fee" is typically used to cover both of these. Thus, a sewer capitalization fee or other connection fee need not (and indeed cannot) be implemented via IDIFA.

(b) Zone changes (Idaho Code §67-6511(2)(a))

Similarly, the re-zone provision of LLUPA states: "Particular consideration shall be given to the effects of any proposed zone change upon the delivery of services by any political subdivision providing public services, including school districts, within the planning jurisdiction." Idaho Code § 67-6511(2)(a). That section goes on to discuss conditional rezones, suggesting that governmental entities have authority to condition the rezone on measures taken by the applicant to address public services. The section notes that a condition approval or denial is subject to a regulatory takings analysis.

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

As discussed below (section 30.F(3) at page 237) with the respect to the *Cove Springs* litigation, Judge Elgee ruled that a local government may not condition permit approval on payment of an unlawful impact fee (outside of IDIFA). That much is clear. But could that same governmental entity instead simply deny the permit outright? The answer is yes, assuming the denial is legitimately based on the inability to serve the development taking into account the revenues that will be generated by the development.

For instance, LLUPA's provision on CUPs (aka special use permits) states: "A special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms of the ordinance, . . . subject to the ability of political subdivisions, including school districts, to provide services for the proposed use . . . ." Idaho Code § 67-6512(a).

Similarly, as noted above, the zoning provision of LLUPA states: "Particular consideration shall be given to the effects of any proposed zone change upon the delivery of services by any political subdivision providing public services, including school districts, within the planning jurisdiction." Idaho Code § 67-6511(2)(a).

In addition, zoning and conditional use permits must be consistent with the comprehensive plan, which is mandated to address such things as school facilities and transportation. Idaho Code § 67-6508(c).

IDIFA states: "Nothing in this chapter shall obligate a governmental entity to approve any development request which may reasonably be expected to reduce levels of service below minimum acceptable levels established in the development impact fee ordinance." Idaho Code § 67-8214(4). "Nothing in this chapter shall obligate a governmental entity to approve development which results in an extraordinary

impact." Idaho Code § 67 8214(3). (Note, however, that these provisions apply only to governmental entities that have adopted an IDIFA-compliant ordinance.)

Likewise, the governmental entity could grant the permit subject to the condition that the development be postponed until such time as funds become available to provide essential services. One of the conditions expressly authorized for conditional use permits is "[c]ontrolling the sequence and timing of development." Idaho Code § 67-6512(d)(2).

Annexations are a different animal. The quick answer is that the denial of an annexation request is generally viewed as not subject to judicial review or any court challenge (notwithstanding the 2002 statutory authorization of judicial review of Category B and C annexations). See discussion in Volume 1 of this Handbook. Hence, it appears clear that a city may deny an annexation request based on the inadequacy of public services—or virtually any other reason.

(6) Traditional, on-site entitlement exactions

In addition to regulatory fees and user fees, a third category of exaction falls within the proper exercise of the police power. Local governments have long required developers to dedicate streets, provide for sewers and sidewalks, and, sometimes, dedicate open space or school sites within the subdivision, as a condition of approval for entitlement applications.[185]

The Idaho Supreme Court has not had occasion to explore the bounds of lawful on-site exactions.[186] However, it has said this: "This Court has recognized that aesthetic concerns, including the preservation of open space and the maintenance of the rural character of Blaine County, are valid rationales for the county to enact zoning restrictions under its police power. The purpose of the MOD [mountain overlay district], as set forth in B.C.C. § 9-21-1(B), falls squarely within the recognized powers of the County." *Terrazas v. Blaine Cnty.*, 147 Idaho 193, 198, 207 P.3d 169, 174 (2009) (Horton, J.) (citation omitted).[187]

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[185] "Dedications have been common for decades. A survey conducted in 1958 revealed that the vast majority of cities then required subdividers to install various types of physical improvements, such as roads, sewers, and storm drains, within the subdivision." Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 Colum. L. Rev. 473 (1991).

[186] The closest the court came was in *KMST, LLC v. Cnty. of Ada*, 138 Idaho 577, 67 P.3d 56 (2003) (Eismann, J.), in which the plaintiff challenged a requirement that it dedicate a street as a condition of a zone change. The challenge, however, was framed as a Fifth Amendment takings rather than as a Dillon's Rule violation. In any event, for procedural reasons, the Court did not reach the takings issue.

[187] *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

Courts in other states have recognized limited exactions of this sort as being proper. *E.g., Ridgefield Land Co. v. City of Detroit*, 217 N.W. 58 (Mich. 1928) (requirement to dedicate streets of a particular width as a condition of plat approval is within the police power and does not require an exercise of eminent domain); *Patenaude v. Town of Meredith*, 392 A.2d 582, 586 (N.H. 1978) (upholding requirement that developer dedicate recreational space so that "those moving into the subdivision will have an adequate recreational area"); *Mid-Continent Builders, Inc. v. Midwest City*, 539 P.2d 1377 (Okla. 1975) (upholding requirement that developer install sewer lines within the development and dedicate them to the city).

In any event, this practice is deeply engrained in the fabric of land use law and is unlikely to be viewed as *per se* unconstitutional, so long as the exaction is of the traditional kind (an on-site dedication of roads, sidewalks, curbs, school land, open space, or the like).[188]

Courts and commentators have justified these traditional exactions on the basis that "they will benefit the subdivision almost exclusively." John Martinez, *Local Gov't Law*, § 16.23 (2007) (citing *Blevens v. City of Manchester*, 170 A.2d 121 (N.H. 1961); *City of College Station v. Turtle Rock Corp.*, S.W.2d 802 (Tex. 1984); *Crownhill Homes, Inc. v. City of San Antonio*, 433 S.W.2d 448 (Tex. App. 1968). "[R]equirements to dedicate streets, roads, and similar facilities have also been upheld when the subdivision is found to be creating the need for such facilities and such facilities will benefit the subdivision exclusively." 8 McQuillin, *Law of Municipal Corporations*, § 25.118.40 (1999).[189]

The Idaho Legislature has codified this particular point—that exactions must benefit the particular development—in enacting the Idaho Development Impact Fee Act, Idaho Code §§ 67-8201 to 67-8216 ("IDIFA"). "Nothing in this chapter shall

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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.

[188] "The impacts on the municipality to be minimized by such regulatory conditions as the dedication of streets – to consider the most common of the conventional exactions – clearly fall within the permissible scope of regulation. No court to our knowledge has rejected the validity of objectives such as convenient access to houses for fire and police protection and rational street plans to handle traffic adequately." Ira Michael Heyman & Thomas K. Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 Yale L. J. 1119 (1964).

[189] Some states allow exactions in a broader set of circumstances, for instance, for off-site improvements or for purposes benefiting the community in general. These, however, are readily distinguishable for one or both of the following reasons: (1) They arise in home rule cities where, unlike Idaho, municipalities have broad inherent powers to tax, and/or (2) local governments are acting pursuant to authorizing legislation.

prevent a governmental entity from requiring a developer to construct reasonable project improvements in conjunction with a development project." Idaho Code § 67-8214(1). Moreover, IDIFA expressly exempts from the definition of development impact fees, and thus by clear implication allows, the imposition of certain site-related entitlement exactions and user fees. Idaho Code § 67-8203(9)(b) (fees allowed for "connection or hook-up charges"); Idaho Code § 67-8203(9)(c) (fees allowed for "availability charges"); Idaho Code § 67-8203(9)(d) (certain voluntarily negotiated payments that the "developer has agreed to be financially responsible for").[190]

In sum, Idaho's Constitution, IDIFA's restriction of exactions to those benefiting the project development, and common law foundational principles all point to the same conclusion: A city or county may lawfully require a developer to dedicate land for streets, school sites, and other such facilities within the project where the contributions will primarily (if not exclusively) benefit landowners within the subdivision. But a requirement to dedicate land (or to make other contributions) for services or projects benefiting the public generally is not permissible. Note, however, that conditions "[r]equiring the provision of on-site or off-site public facilities or services" are expressly allowed by LLUPA. Idaho Code § 67-6512(d)(6).

Finally, a question arises about what happens to the entitlement when an exaction is successfully challenged. Obviously, the developer gets its money back, if it has already been paid. But does the developer get to keep the permit, too? In most instances, the answer is, yes. Professor Martinez of the University of Utah School of Law offers this assessment: "Exactions cannot simply result from ad hoc bargaining between the permitting agency and a developer, they must be authorized by enabling statutes and implementing ordinances. If a developer accepts an exaction, but the exaction is subsequently invalidated as contrary to the statutory authority of the permitting agency to impose, then the entire permit will be stricken if the transaction bore the hallmarks of a blatant sale of a permit, but if the exaction was instead imposed through a good faith attempt to ameliorate the effects of the development, then only the exaction will be stricken and the permit itself will be upheld." John Martinez, *Local Gov't Law*, § 16.23 (2007). *See*, 8 McQuillin, *Law of Municipal Corporations*, § 25.118.50 (1999), which echoes Professor Martinez's conclusion that "impact fees and exactions cannot simply result from ad hoc bargaining."

[190] The former (connect charge) appears to correspond to the physical cost of making a connection to a sewer or other infrastructure). The latter (availability charge) appears to refer to cost of system-wide infrastructure necessary to provide the capacity to serve the new customer. In Idaho, the term "capitalization fee" or "connection fee" is typically used to cover both of these.

F. District court decisions addressing unlawful fees

Three district court decisions invalidated impact fees imposed by the City of Sun Valley, the City of McCall, and Blaine County. These decisions were the impetus for other cases that reached the appellate level. Each decision is reproduced in the appendix to this Handbook.

(1) The *Schaefer* case

In *Schaefer v. City of Sun Valley*, Case No. CV-06-882 (Idaho, Fifth Judicial Dist., July 3, 2007) (Robert J. Elgee, J.) (reproduced in Appendix E), the district court invalidated Sun Valley's Workforce Housing Linkage Ordinance (Ordinance 364), which imposed a requirement on applicants for building permits for residential and multi-family developments that they make certain contributions to address workforce housing needs in the community. The applicant had the choice of constructing the workforce housing, contributing land, or paying an in lieu fee. The Schaefers challenged the city's imposition of a fee of $11,989.97 for workforce housing. The district court invalidated the ordinance.

Tracking the analysis of Idaho Supreme Court decisions discussed above, Judge Elgee determined that the imposition of an in lieu fee was not a proper exercise of the police power, because it was not a fee incidental to a regulatory program. Rather, it was a revenue-generating measure intended to benefit the community as a whole, and therefore it was a tax.[191] The district court said that the fact that the city segregated funds from the fee in a special account, although a factor to be considered, did not save it.

As such, the fee would be permissible only if authorized by the Idaho Legislature. The city acknowledged that the fee was not imposed pursuant to IDIFA, which does not authorize fees for affordable housing. Instead, it contended that LLUPA provides an independent legislative authorization for the fee. The court rejected this argument, noting that LLUPA authorizes regulation of land use, not the imposition of fees. *Schaefer* at 17-18. The Court did not reach the Schaefers' second argument, that IDIFA preempted the city's ordinance.[192]

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[191] "The City spends a considerable amount of time arguing that the in-lieu fee is an exaction rather than an impact fee. . . . The City, however, cites no Idaho law supporting these propositions and this Court can find none. The analysis is the same whether it is labeled a fee or an exaction." *Schaefer v. City of Sun Valley*, Case No. CV-06-882, at 7 (Idaho, Fifth Judicial Dist., July 3, 2007) (reproduced in Appendix E).

[192] In a separate decision, the court awarded attorney fees to the Schaefers. The city appealed neither the decision on the merits nor the attorney fee award.

(2) The *Mountain Central* case

In *Mountain Central Bd. of Realtors, Inc. v. City of McCall*, Case No. CV 2006-490-C (Idaho, Fourth Judicial Dist., Feb. 19, 2008) (Thomas F. Neville, J.) (reproduced in Appendix F), Judge Thomas F. Neville invalidated two ordinances imposing fees on developers to fund the city's affordable housing efforts. Judge Neville's decision closely followed, and referenced, Judge Elgee's decision in *Schaefer*. Similar to the holding in *Schaefer*, Judge Neville ruled, "The inclusionary zoning ordinances at issue in this case go well beyond the traditional zoning standards relating to height, size, construction, zoning areas, open space requirements, density, and location." *Mountain Central* at 9. Accordingly, they are not authorized by LLUPA or the police power, but are illegal taxes.

(3) The *Cove Springs* case

In *Cove Springs Development, Inc. v. Blaine Cnty.*, Case No. CV-2008-22 (Idaho, Fifth Judicial Dist., July 3, 2008) (Robert J. Elgee, J.), the district court granted summary judgment invalidating five county ordinances which sought to impose various development impact fees for purposes including schools, school buses, police and fire protection, emergency services, roads, trails, and affordable housing. The court's reasoning was essentially identical to that in the *Sun Valley* case decided exactly a year earlier.

The county sought, unsuccessfully, to distinguish its ordinances from Sun Valley's. The county's ordinances did not quantify a specific fee, but instead authorized the county to evaluate whether the applicant's proposal sufficiently addressed the impact of the project on county services. In this case, the county never imposed a particular fee, but simply denied Cove Springs' application because it found its "voluntary" contributions were inadequate. The court rejected this argument:

> Approval of a plat may <u>not</u> be conditioned upon payment by the subdivider of a specified portion of the cost of improvements if no power to exact such a payment is delegated by the statutes. The county has a duty to keep all roads in reasonable repair and may not discharge that duty by imposing the costs on local developers, absent statutory authority; thus, <u>requiring a developer to pave a county road as a condition for approving a site plan is ultra vires</u>.

Cove Springs at 8 (quoting 83 Am. Jur. 2d *Zoning and Planning* § 485, at 420 (2003) (emphasis by the Court).

The court continued:

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

Cove Springs at 9 (emphasis by the court).

In *Sun Valley*, the Court did not reach the preemption argument. In *Cove Springs*, it did:

> In addition, even if the County had inherent authority to impose taxes (which it does not), Subdivision Ordinance §§ 10-5-2.C, 10-6-8.A.9, and 10-9-8.D are void because they have been preempted by IDIFA. IDIFA is a broad regulatory program that comprehensively addresses development impact fees in Idaho and was intended "to occupy the entire field of regulation." *Envirosafe Services of Idaho v. Cnty. of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987).

Cove Springs at 8.

In each of these challenges, the local governments sought to defend their exactions on the basis that they passed muster under *Nollan* and *Dolan*, the seminal federal exaction cases.[193] Sun Valley, McCall, and Blaine County each contended that their ordinances were not regulatory takings because they were carefully tailored to meet the *Nollan-Dolan* tests. But *Nollan* and *Dolan* are irrelevant. Those cases arose in home rule states that give broad latitude to local governments. If an exaction

[193] These cases hold that an exaction is not a regulatory taking requiring compensation if (1) the exaction has an essential nexus to some public need created by the development and (2) the exaction is roughly proportional to the burden imposed on the government by the development. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (Scalia, J.), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (Rehnquist, J.). See discussion in section 29.E at page 126.

is otherwise lawful under state law, then the issue becomes whether it is nonetheless a regulatory taking. But one does not get to the taking analysis if the ordinance is void to begin with. The municipalities' error was to hire consultants from other states unfamiliar with Dillon's Rule. They believed, incorrectly, that so long as they could establish nexus and proportionality (which they probably could), they were home free.

The *Cove Springs* decision also addressed two other issues unrelated to impact fees. It invalidated three county ordinances that mandated that applications for certain permits (planned unit developments and cluster developments) comply with the comprehensive plan. The court ruled that some weight could be given to the comprehensive plan, but that these ordinances made the comprehensive plan determinative, thereby improperly elevating the comprehensive plan to the level of legally controlling zoning law. *Cove Springs* at 3. The court also invalidated the county's wildlife overlay district ordinance, finding that it improperly delegated authority to set the district's boundary to the Idaho Department of Fish and Game. *Cove Springs* at 14-19.

G. The Idaho Development Impact Fee Act ("IDIFA")

(1) Overview of IDIFA

The Idaho Development Impact Fee Act, Idaho Code §§ 67-8201 to 67-8216 ("IDIFA" or the "Act"), was enacted in 1992 and has been amended on several occasions.[194] The purpose of the Act was to resolve disputes over the authority of local governments to impose impact fees. The Act authorizes impact fees, but only for specified purposes and pursuant to detailed procedures to ensure fairness.

IDIFA is not a carte blanche authorization for local governments to impose development impact fees. Rather, IDIFA ensures that the developer pays only its fair and proportionate share of the cost of the new facilities. Idaho Code § 67-8204. The purpose of the Act is to ensure that adequate public facilities are available to serve new growth and development. Idaho Code § 67-8202(1). In order to ensure that impact fee ordinances adopted by governmental entities are uniform, the Act sets forth a series of minimum requirements by which each governmental entity must comply.

To the extent an impact fee ordinance falls within the scope of IDIFA and was adopted in compliance with substantive and procedural requirements (of which there are many), there is no need to engage in a debate over whether it is a regulatory fee or a disguised tax. Even if it is a tax, it is expressly authorized by the Legislature

[194] 1992 Idaho Sess. Laws, ch. 282; 1996 Idaho Sess. Laws, ch. 366; 2002 Idaho Sess. Laws, ch. 347; 2002 Idaho Sess. Laws, ch. 347; 2006 Idaho Sess. Laws, ch. 321; 2007 Idaho Sess. Laws, ch. 252; 2008 Idaho Sess. Laws, ch. 389.

pursuant to article VII of the Idaho Constitution. Thus, this constitutional issue is moot.[195]

IDIFA originally applied only to larger cities (with population over 200,000). It was amended in 1996 to make it applicable to all units of local government empowered to develop an impact fee ordinance. 1996 Idaho Sess. Laws, ch. 366 (codified at Idaho Code § 67-8203(14)). This seemingly circular definition includes county governments as well as cities. The operative provision of the Act, Idaho Code § 67-8204, provides that governmental entities may impose impact fees "as a condition of development approval." Plainly, counties have such authority. In addition, the Ada County Highway District ("ACHD") has adopted its own impact fee ordinance.[196]

IDIFA empowers governmental entities to impose impact fees on those who will benefit from new growth and development. The impact fees are limited, however, to funding for certain types of capital improvements.

> Expenditures of development impact fees shall be made only for the category of system improvements and within or for the benefit of the service area for which the development impact fee was imposed as shown by the capital improvements plan and as authorized in this chapter. Development impact fees shall not be used for any purpose other than system improvement costs to create additional improvements to serve new growth.

Idaho Code § 67-8210(2) (emphasis added). This statement employs several defined terms, which are discussed below.

(2) No double dipping

IDIFA provides in its statement of purpose that one of its central goals is "to prevent duplicate and ad hoc development requirements." Idaho Code § 67-8202(4). "No system for the calculation of development impact fees shall be adopted which

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[195] In theory, there could be other constitutional challenges to an impact fee. For example, does it meet the nexus and proportionality requirements in *Nollan-Dolan*? Does it afford due process and equal protection? However, compliance with IDIFA, which contains many procedural and substantive safeguards, would seem to ensure that it violates none of these constitutional provisions.

[196] In order to be "empowered" to develop an impact fee, the governmental entity must have the authority to promulgate ordinances (a prerequisite to imposing impact fees). Unlike other road districts, ACHD has this authority. Moreover, unlike other all other road districts, ACHD has authority to impose "a condition on development approvals" as required by Idaho Code § 67-8204. This is found in ACHD's authority to sign off on plats. Idaho Code § 40-1415(6). ACHD has successfully defended its authority to impose impact fees under IDIFA at the district court level, but there has been no appellate review.

subjects any development to double payment of impact fees." Idaho Code § 67-8204(19). The Act contains a section setting out "credits" that must be provided to avoid charging the developer twice for the same impact costs. It specifically provides that developers paying impact fees shall receive a credit for all taxes and user fees charged to the developer which revenue is used for the same system improvements. Idaho Code § 67-8209(2). IDIFA carves out connection fees from the definition of impact fee, Idaho Code §§ 67-8203(9)(b) and (c), thus allowing the government to charge both a connection fee and an impact fee. In so doing, however, credit must be given for the connection fee, if it will fund the same new infrastructure:

> In the calculation of development impact fees for a particular project, credit or reimbursement shall be given for the present value of any construction of system improvements or contribution or dedication of land or money required by a governmental entity from a developer for system improvements of the category for which the development impact fee is being collected, including such system improvements paid for pursuant to a local improvement district.

Idaho Code § 67-820(1).

The prohibition against double-dipping appears also in the section of IDIFA dealing with the calculation of the impact fee. It provides that the fee shall reflect a proportionate share of the costs incurred taking into account, among other things, user fees and debt service payments as a result of the new development. Idaho Code § 67-8207(1). This is reiterated in another part of the same section, providing that the calculation of the impact fee shall take into account "taxation, assessment, or developer or landowner contributions" by the developer used for the same system improvements. Idaho Code § 67-8207(2)(c). Likewise, it shall take into account the "extent to which the new development is required to contribute to the cost of existing system improvements in the future." Idaho Code § 67-8207(2)(d).

On the other hand, IDIFA specifically provides that "[c]redit or reimbursement shall not be given for project improvements." Idaho Code § 67-8209(1). Project improvements site-specific improvements (*e.g.*, curb cuts, traffic lights, etc.) that benefit the particular project. Idaho Code § 67-8203(22). "Nothing in this chapter shall prevent a governmental entity from requiring a developer to construct reasonable project improvements in conjunction with a development project." Idaho Code § 67-8214(1).

(3) System improvements

"System improvements" are a set of capital improvements identified by governmental entity in its "capital improvements plan." System improvements serve not just an individual development but an entire "service area" identified by the governmental entity.[197] System improvements are defined as "capital improvements" to "public facilities" designed to provide serve to a "service area." Idaho Code § 67-8203(28). "Capital improvements" are projects that have a life of at least ten years—thus excluding maintenance expenditures. Idaho Code § 67-8203(3). "Public facilities," in turn, are defined as any of six categories of capital expenditures:

1. water supply,
2. wastewater facilities,
3. roads,
4. storm water collection facilities,
5. parks and open space, and
6. public safety facilities.

Idaho Code § 67-8203(24).[198] Note that workforce housing is not among them.[199]

(4) Project improvements

As a counterpoint to "system improvement," the Act defines "project improvements" as "site improvements and facilities that are planned and designed to provide service for a particular development project and that are necessary for the use and convenience of the occupants or users of the project." Idaho Code § 67-8203(22). IDIFA draws a bright line between system improvements and project improvements. Only system improvements are included in the capital improvements plan (for which is funded by the impact fee). Idaho Code §§ 67-8208(1)(e) – (j).

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[197] In contrast to system improvements, IDIFA employs the term "project improvements" to describe "site improvements and facilities that are planned and designed to provide service for a particular development project and that are necessary for the use and convenience of the occupants or users of the project." Idaho Code § 67-8203(22).

[198] "'Public facilities' means: (a) Water supply production, treatment, storage and distribution facilities; (b) Wastewater collection, treatment and disposal facilities; (c) Roads, streets and bridges, including rights-of-way, traffic signals, landscaping and any local components of state or federal highways; (d) Storm water collection, retention, detention, treatment and disposal facilities, flood control facilities, and bank and shore protection and enhancement improvements; (e) Parks, open space and recreation areas, and related capital improvements; and (f) Public safety facilities, including law enforcement, fire, emergency medical and rescue and street lighting facilities." Idaho Code § 67-8203(24).

[199] This was no oversight. Affordable housing is specifically discussed in the statute, but only in the context of allowing an exemption from impact fees for project that provide affordable housing. Idaho Code § 67-8204(10).

The Act provides that the fee payer shall receive a credit for various contributions and dedications made in connection with the development, but not for project improvements. Idaho Code § 67-8209(1).

IDIFA further provides: "Nothing in this chapter shall prevent a governmental entity from requiring a developer to construct reasonable project improvements in conjunction with a development project." Idaho Code § 67-8214(1). In other words, for example, the government might require the developer to contribute land for left turn lane into the subdivision. And at cost would not be credited toward impact fee.

(5) Impact fee advisory committee

IDIFA requires that a governmental entity choosing to enact an impact fee ordinance must establish a "development impact fee impact fee advisory committee." Idaho Code § 67-8205. The committee may be established prior to adoption of the impact fee ordinance. After adoption of the ordinance, the committee will continue to operate on an ongoing, advisory basis reviewing the capital improvements plan and other functions specified in the statute.[200] The governmental entity appoints the members of the committee, which shall consist of at least five members. At least two of the members "shall be active in the business of development, building or real estate." Idaho Code § 67-8205(2). The planning and zoning commission itself may serve as the impact fee advisory committee if it meets the requirement that two of the members are from the development community.

(6) Capital improvements plan

IDIFA sets out detailed procedures for the establishment of impact fees. Central to this procedure is adoption of a "capital improvements plan" which must be developed in coordination with the development impact fee impact fee advisory committee. Idaho Code §§ 67-8203(5), 67-8206(2), 67-8208. The capital improvements plan will identify one or more "service areas" within which growth is to be projected over at least a 20-year planning period based on "land use assumptions." The capital improvements plan identifies a set of specific "system improvements" that may be funded with impact fees.

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[200] The impact fee advisory committee will review and file written comments on any proposed capital improvements plan or amendment thereto. Idaho Code §§ 67-8205(3)(b), 67-8206(2), 67-8208(1). Once the plan is adopted, the impact fee advisory committee will monitor and evaluate the implementation of the capital improvements plan and submit a written report to the governmental entity at least once a year evaluating the capital improvements plan and any perceived inequity in implementation of the plan and the imposition of impact fees. Idaho Code § 67-8205(c)-(d). In addition, the impact fee advisory committee assists the governmental entity in adopting and updating land use assumptions, Idaho Code § 67-8205(a) and advises the governmental entity on the need to revise the capital improvement plan and impact fees, Idaho Code § 67-8205(e).

In the case of cities and counties with land use planning obligations, the capital improvements plan must be developed in conjunction with the comprehensive planning process. Idaho Code §§ 67-6509, 8208(1). Thus, it would seem that the "land use assumptions" required by IDIFA would be reflected in and form the basis of the comprehensive plan.

The selected system improvements cannot be pulled out of thin air. IDIFA specifies a methodology for determining the extent of system improvements required. The governmental entity determines a planning horizon (our term, not defined in IDIFA) of at least 20 years. Idaho Code § 67-8208(1)(h). The governmental entity then specifies one or more service area. Idaho Code § 67-8208(1). These service areas, apparently, may cover all or just a portion of the land within the governmental entity's jurisdiction. The system improvements are based on a quantification of "service units"[201] within each service area during the planning horizon. The statute requires that the amount of an impact fee per service unit be calculated by dividing the total cost of the capital improvements by the total number of projected service units. Idaho Code § 67-8204(15)(a).

The governmental entity must hold at least one public hearing in before adopting, amending, or repealing a capital improvements plan. Idaho Code § 67-8206(3).[202] Detailed public notice requirements are set out in Idaho Code §§ 67-8206(3) - (6). In addition, Idaho Code §67-8208(1) requires that cities and counties comply with the hearing requirements in LLUPA, Idaho Code §67-6509, and include the capital improvements plan as an element of the comprehensive plan. Finally, section 67-8208 sets out other detailed requirements governing the capital improvements plan.

(7) Impact fees limited to "new development"

The thrust of IDIFA is to impose impact fees on new growth and development.[203] The Act's operative provision reads: "Governmental entities which

[201] The term "service unit" is a fixed quantification reflecting the increase in demand for a particular type of public services generated by single home or other standardized unit of construction or land use. For example, a service unit might be "X" number of vehicle miles traveled associated with a new home. The total number of service units is a quantification of the total new demand for services of a particular type (*e.g.*, total additional vehicle miles traveled) associated with a new development.

[202] If the governmental entity makes a "material change" in the capital improvements plan, it may hold further hearings if it finds necessary in the public interest. Idaho Code § 67-8206(4). This flexibility appears to be in contrast to "amendments" to the plan, which require a public hearing. IDIFA does not explain what the difference is between a material change and an amendment.

[203] The purposes section of the Act states that IDIFA is intended to "[p]romote orderly growth and development by establishing uniform standards by which local governments may require

comply with the requirements of this chapter may impose by ordinance development impact fees as a condition of development approval on all developments." Idaho Code § 67-8204 (emphasis added).

The term "development" is defined to include: "construction or installation of a building or structure, or any change in use of a building or structure, or any change in the use, character or appearance of land, which creates additional demand and need for public facilities or the subdivision of property that would permit any change in the use, character or appearance of land." Idaho Code § 67-8203(7). Under this broad definition, impact fees can be assessed not only against new construction but also against existing structures or land if the use or character of the structure or land changes in a way that will generate new demand for public services.

The term "development approval" is also a defined term. It means "any written authorization from a governmental entity which authorizes the commencement of a development." Idaho Code § 67-8203(8). This term is also drawn very broadly. It appears to encompass virtually any approval authorizing new use of land, including zoning changes, conditional use permits, planned unit development permits, variances, building permits, subdivision, and, perhaps, annexation. Although the definition does not say so in so many words, it is presumably limited to situations in which the developer has sought the authorization. For instance, one would not expect it to apply to a landowner whose land was rezoned by action of the government not based on a request by the landowner.

(8) Timing of fee collection.

Figuring out exactly what approvals trigger the fee (*e.g.*, whether it applies at annexation) is not particularly important at a practical level because no fee will be imposed until building permits are issued, unless the developer agrees to an earlier payment schedule.

> A development impact fee ordinance shall specify the point in the development process at which the development impact fee shall be collected. The development impact fee may be collected no earlier than the commencement of construction of the development, or the issuance of a building permit or a manufactured home installation permit, or as may be agreed by the developer and the governmental entity.

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that those who benefit from new growth and development pay a proportionate share of the cost of the new public facilities needed to serve new growth and development." Idaho Code § 67-8202(2).

Idaho Code § 67-8204(3).[204]

Thus, a developer may subdivide a property, develop lots, and sell them, without paying any impact fees. Instead, the impact fees for each lot would be paid by the builder or purchaser—whomever seeks the building permit.

As noted, however, a developer may agree to an earlier payment schedule for the impact fees. Idaho Code § 67-8204(3). Moreover, the local government is not obligated to issue a development approval if it determines that there is insufficient public infrastructure to support the development. LLUPA so provides,[205] as does IDIFA.[206] Under such circumstances, the local government could deny the development approval outright, or condition it upon the developer's agreement to pay the impact fee in advance of construction.

(9) Individual assessments

In order to ensure that all developers are treated equally, IDIFA requires any impact fee ordinance to contain a provision providing for individual assessments. Idaho Code § 67-8204(5).

(10) Exemptions from fees

IDIFA provisionally exempts developments undertaken by other "taxing districts" within the city or county, unless the ordinance expressly provides that they shall be taxed. Idaho Code § 67-8203(7).

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[204] This section refers to both "commencement of construction of the development" and "issuance of a building permit." The ordinance is not clear on how these interact. Arguably, the local government could require payment of the impact fee for the entire development when dirt is first turned. However, most jurisdictions implement this by requiring the fee to be paid when the building permit is issued or when construction occurs if no building permit is required.

[205] "A special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms of the ordinance, . . . subject to the ability of political subdivisions, including school districts, to provide services for the proposed use . . . ." Idaho Code § 67-6512(a). Similarly, the zoning provision of LLUPA states: "Particular consideration shall be given to the effects of any proposed zone change upon the delivery of services by any political subdivision providing public services, including school districts, within the planning jurisdiction." Idaho Code § 67-6511(a). In addition, zoning and conditional use permits must be consistent with the comprehensive plan, which is mandated to address such things as school facilities and transportation. Idaho Code § 67-6508(c). Likewise, the governmental entity could grant the permit subject to the condition that the development be postponed until such time as funds become available to provide essential services. One of the conditions expressly authorized for conditional use permits is "[c]ontrolling the sequence and timing of development." Idaho Code § 67-6512(d)(2).

[206] "Nothing in this chapter shall obligate a governmental entity to approve any development request which may reasonably be expected to reduce levels of service below minimum acceptable levels established in the development impact fee ordinance." Idaho Code § 67-8214(4).

In addition, IDIFA exempts several other types of developments from impact fees. Exempt developments include: (1) rebuilding the same amount of floor space of a structure which was destroyed by fire or other catastrophe, provided the structure is rebuilt and ready for occupancy within two years of its destruction; (2) remodeling or repairing a structure which does not increase the number of service units; (3) replacing a residential unit, including a manufactured home, with another residential unit on the same lot, provided that the number of service units does not increase; (4) placing a temporary construction trailer or office on a lot; (5) constructing an addition on a residential structure which does not increase the number of service units; and (6) adding uses that are typically accessory to residential uses, such as tennis courts or a clubhouse, unless it can be clearly demonstrated that the use creates a significant impact on the capacity of system improvements. Idaho Code §§ 67-8204(20)(a) - (f).

IDIFA provides that local governments may require developers "to construct reasonable project improvements in conjunction with a development project." Idaho Code § 67-8214(1). In other words, reasonable exactions for traditional project-specific facilities may be required in addition to any fee imposed by IDIFA procedures. Note also that connection and hook-up charges are not treated as development impact fees and are likewise excluded from IDIFA's procedural requirements. Idaho Code § 67-8203(9)(b).

(11) Impact fees must be spent within the service area and within a fixed number of years

Under IDIFA, any expenditure of fees must be made only for system improvements for the benefit of or within the service area for which the impact fees were collected. Idaho Code § 67-8204(11). The statute also requires that they be spent within a fixed number or years or be refunded to the developer: within 20 years for "wastewater collection, treatment and disposal and drainage facilities" and within eight years for all others. Idaho Code §§ 67-8210(4), 67-8204(12), 67-8211.

(12) Interaction of LLUPA (section 67-6513) and IDIFA (section 67-8215(1))

After the enactment of IDIFA, the section in LLUPA dealing with subdivisions was amended to cross-reference IDIFA: "Fees established for purposes of mitigating the financial impacts of development must comply with the provisions of [IDIFA]." Idaho Code § 67-6513 (contained in the section of LLUPA authorizing consideration of the effects of subdivision on the ability of local governments to deliver services). This could be read to mean that the only way to impose mitigation fees on new developments is through an IDIFA-compliant impact fee. On the other hand, this provision appears only in this subdivision section of LLUPA, and may be so limited. See discussion in section 30.E(4) at page 228.

A confusing and ambiguously drafted "transition" section of IDIFA provides:

> The provisions of this chapter shall not be construed to repeal any existing laws authorizing a governmental entity to impose fees or require contributions or property dedications for capital improvements. All ordinances imposing development impact fees shall be brought into conformance with the provisions of this chapter within one (1) year after the effective date of this chapter. Impact fees collected and developer agreements entered into prior to the expiration of the one (1) year period shall not be invalid by reason of this chapter. After adoption of a development impact fee ordinance, in accordance with the provisions of this chapter, notwithstanding any other provision of law, development requirements for system improvements shall be imposed by governmental entities only by way of development impact fees imposed pursuant to and in accordance with the provisions of this chapter.

Idaho Code § 67-8215(1).

In the first sentence, it preserves "any existing laws authorizing a governmental entity to impose fees or require contributions or property dedications for capital improvements." That would seem to recognize and preserve, for example, the authority under sections 67-6512(d)(6) and (8) of LLUPA to include mitigation conditions in conditional use permits. The section then requires impact fee ordinances existing at the time of enactment to be brought into conformity with IDIFA. Does this mean that the preservation of authority under sections 67-6512(d)(6) and (8) only lasts one year? Or are ordinances implementing those sections not considered "development impact fee" ordinances? The provision then declares that after adopting a new development impact fee ordinance, IDIFA shall provide the sole means of imposing development requirements for system improvements. Does this exclusivity provision come into play only if a development impact fee ordinance is enacted? The statute is confoundingly confusing, and the courts have offered no insights. This provision has never even been mentioned in an Idaho appellate decision.

Even if it were true that, a year after its enactment, IDIFA is generally exclusive, certain types of fees and requirements associated with development costs are still allowed outside of IDIFA, because IDIFA expressly so provides. For example, IDIFA expressly does not prohibit requirements that developers construct reasonable site-specific project improvements. "Nothing in this chapter shall prevent a governmental entity from requiring a developer to construct reasonable project

improvements in conjunction with a development project." Idaho Code § 67-8214(1). Likewise, IDIFA expressly exempts from the definition of development impact fees, and thus by clear implication allows, the imposition of certain site-related entitlement exactions and user fees. Idaho Code § 67-8203(9)(b) (fees allowed for "connection and hook-up charges"); Idaho Code § 67-8203(9)(c) (fees allowed for "availability charges"—another term for connection fees); Idaho Code § 67-8203(9)(d) (certain voluntarily negotiated payments that the "developer has agreed to be financially responsible for").

H. Implementing ordinances under IDIFA

(1) Boise parks ordinance

Boise City has an impact fee ordinance for parks. Boise City adopted Ordinance No. 6144 on December 11, 2001 to collect impact fees to finance new parks to alleviate the burden new development creates on existing parks. Boise Municipal Code § 11-15-0. The amount of the fee varies depending on the type of park that will be built within any given area. The park types include neighborhood parks,[207] community parks,[208] special parks, recreational trails, and natural open space. The park impact fees range from $315.76/single family residence for a neighborhood park to $121.01/single family residence for a natural open space park. Boise Municipal Code § 4-12-13(G). The fees also vary depending upon whether the development is a single-family residence, a multi-family residence under 800 square feet, and a multi-family residence 800 square feet and over, or a hotel or motel. Boise Municipal Code § 4-12-13(G). The Boise City Park impact fee schedule is located in section 4-12-12(G) of the Boise Municipal Code.

(2) The ACHD impact fee ordinance

The ACHD impact fee ordinance is the most complex impact fee ordinance in Idaho and has been the most controversial. The most recent Ordinance, Ordinance 198, was enacted in September of 2003. This ordinance was enacted pursuant to the ACHD's capital improvements plan, which was also adopted in September of 2003.

[207] A "neighborhood park" is defined as a combination playground and park, designed primarily for non-supervised, non-organized activities. Boise Municipal Code § 4-12-13 (C)

[208] A "community park" is defined as a park planned primarily to provide active and structured recreation activities for young people and adults. In general, community park facilities are designed for organized activities and sports. Boise Municipal Code § 4-12-13(C)

31. COMPARISON OF METHODOLOGIES FOR CALCLUATING CAP FEES

A. Overview

This section discusses standard methodologies for the calculation of capitalization ("cap") fees, which are also known as connection fees, hook-up fees, system development charges, capital facility charges, plant investment fees, capital investment fees, and improvement charges.

Cap fees most often are used in connection with municipally-provided sewer (aka waste water) or water service, but could be used for any "utility-like" service provided by the municipality, *e.g.*, electric power or solid waste collection.

Cap fees are used solely to cover the capital cost of the system infrastructure. Cap fees are on-time charges imposed on a new user or an existing user who has significantly expanded his or her use of the community infrastructure. Cap fees stand in contrast to operation and maintenance ("O&M") fees, which are typically charged on a monthly or bi-monthly basis to cover ongoing operation and maintenance costs and, sometimes, debt service on infrastructure.

When revenue from cap fees is used for system expansion, the fees serve purposes similar to impact fees. However, the term impact fee is a distinct term of art in Idaho, describing a fee developed pursuant to the Idaho Development Impact Fee Act ("IDIFA").

B. Supreme Court guidance

In *NIBCA I*, the Idaho Supreme Court struck down a cap fee that measured the replacement value of the excess capacity consumed by the new user by looking to the cost of building the user's proportionate share of system expansion costs. Thus, in Idaho, it appears that the only lawful approach to calculating a cap fee is to look to new user's proportionate share of the replacement value of the system in place "at that point in time." *Loomis*, 119 Idaho at 443 and 443 n.4, 807 P.2d at 1281 and 1281 n.4; *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 149 Idaho 187, 194, 233 P.3d 118, 125 (2010) (Eismann, C.J.); *NIBCA I*, 158 Idaho at 82, 343 P.3d at 1089.[209]

The guiding principles for a lawful fee methodology based on the replacement value of the existing system are set out in two Idaho Supreme Court cases:

[209] A tiny opening is left in the concurring opinion in *NIBCA I*, in which Justice Jim Jones suggested that Loomis may not provide the only lawful method of lawfully calculating a cap fee. *NIBCA I*, 158 Idaho at 87, 343 P.3d at 1094 (J. Jones, J., concurring).

(1) The *Loomis* case

The text of *Loomis* reads:

> The Ordinance drafted after receiving the engineers' report calculates the connection fee by first determining the gross replacement value of the system by using an engineering cost index to determine present day replacement cost of the system components. Unfunded depreciation and bond principal are then subtracted from the gross replacement value to determine the net replacement value of the system for the current year. The final connection fee is then ultimately determined by dividing the net system replacement value by the number of users the system can support. The new user is charged the value of that portion of the system capacity that the new user will utilize at that point in time.

Loomis v. City of Hailey, 119 Idaho 434, 443, 807 P.2d 1272, 1281 (1991) (Boyle, J) (footnote 4 omitted).

Footnote 4 of *Loomis* 4 reads:

> Ordinance 495 requires an annual valuation process to set the amount of the connection fee and provides in pertinent part:
>
> > *(2) Connection Fee. The basis for the connection fee charge* for those persons or entities connecting to the water and sewer systems is to *charge the value of that portion of the system capacity that the new user will utilize at that point in time. The value of the system is determined each year* by taking the original construction cost of each major capital improvement to the system and determining the cost to replace that improvement in that particular year. This is accomplished by determining the engineering news record construction costs index (ENR(CC1) in the year that the improvements were made and the year that the connection fee is being determined. The ENR(CC1) for the year that the connection fee is being calculated is divided by the ENR(CC1) for the year in which the

> improvements were made. This value is then multiplied by the original cost for the improvements. The value obtained is the estimated cost to replace the improvements at the time the connection fee is calculated. The gross value to replace the system must be adjusted by subtracting the remaining bond principal to be retired and the unfunded depreciation to obtain the net value.

Loomis v. City of Hailey, 119 Idaho 434, 443 n.4, 807 P.2d 1272, 1281 n.4 (1991) (Boyle, J) (emphasis added by Court).[210]

Further guidance is found in footnote 2 of *NIBCA I*:

> The three methods of valuing real property are the income approach, the sales comparison approach, and the cost approach. Because city sewer systems are not to be operated primarily as a source of city revenue and the services are to be furnished at the lowest possible cost, I.C. § 50–1028, and because of the lack of comparable sales of city sewer systems, the cost approach is the most feasible method for valuation. Under that method, value is based upon the estimated cost of duplicating the improvements to the real property, minus accrued depreciation, plus the value of the land, if any. Thus, in *Loomis*, the city calculated the net system replacement value 'by first determining the gross replacement value of the system by using an engineering cost index to determine present day replacement cost of the system components,' and it then subtracted from the gross replacement value '[u]nfunded depreciation and bond principal' to determine the net system replacement value.

N. Idaho Bldg. Contractors Ass'n v. City of Hayden ("*NIBCA I*"), 158 Idaho 79, 82 n.2, 343 P.3d 1086, 1089 n.2 (2015) (Eismann, J) (quoting *Loomis*, 119 Idaho at 443, 807 P.2d at 1281).

In short: Begin with the actual construction cost. Adjust this upwards (using an engineering construction cost index to the current gross replacement value). Note that *NIBCA I* allows the "value of the land" to be included in the gross replacement value. Then adjust the gross replacement value downward by subtracting (1)

[210] The reference to ENR(CC1) should be to ENR(CCI).

remaining bond principle and (2) unfunded depreciation. This is called the "net replacement value" (or "net system replacement value"). To calculate the cap fee, the "net replacement value" is the nominator of the fraction. The denominator is the number of users capable of being served at that point in time.

(2) The *NIBCA I* case

> The three methods of valuing real property are the income approach, the sales comparison approach, and the cost approach. Because city sewer systems are not to be operated primarily as a source of city revenue and the services are to be furnished at the lowest possible cost, I.C. § 50–1028, and because of the lack of comparable sales of city sewer systems, the cost approach is the most feasible method for valuation. Under that method, value is based upon the estimated cost of duplicating the improvements to the real property, minus accrued depreciation, plus the value of the land, if any. Thus, in *Loomis*, the city calculated the net system replacement value "by first determining the gross replacement value of the system by using an engineering cost index to determine present day replacement cost of the system components," and it then subtracted from the gross replacement value "[u]nfunded depreciation and bond principal" to determine the net system replacement value. 119 Idaho at 443, 807 P.2d at 1281 (footnote omitted).

N. Idaho Bldg. Contractors Ass'n ("*NIBCA I*") *v. City of Hayden*, 158 Idaho 79, 82 n.2, 343 P.3d 1086, 1089 n.2 (2015) (Eismann, J.)

The *NIBCA I* footnote is consistent with the *Loomis* footnote, except for the following:

- *NIBCA I* refers to "accrued depreciation" instead of "unfunded depreciation." It then goes on to quote *Loomis'* "unfunded depreciation" suggesting that there is no difference between them.
- *NIBCA I* notes that the "value of the land" may be included in the replacement value.
- *NIBCA I* gives the name "net system replacement value" for what *Loomis* calls the "net replacement value."

Loomis and *NIBCA I* are aimed at calculating the numerator (the net system replacement value). This must then be divided by the number of users to produce the cap fee. See section 31.C(4) at page 257.

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

(1) Original cost

The cap fee determination begins with a determination of the value of the existing system. (The existing system includes both the used capacity and the excess capacity.)

The first step is to determine the original cost of each system component (each pipe, etc.).

(2) Gross replacement value

(a) Upward adjustment based on engineering cost index

The original cost of the system components is likely to be considerably less than what it would cost to construct the system today.

Loomis and *NIBCA I* unequivocally provide that municipalities are not required to base cap fees on the original system cost. Instead, they may base the fees on the replacement value of the system. This is referred to as "gross replacement value."

In *Loomis*, the replacement value was calculated by taking the original cost of each system component and adjusting it upward on the basis of an engineering cost index.[211] For example, the engineering cost index would specify the percentage increase in cost for a particular type of pipe for each year or period of years. Thus, the City could calculate that if it spent $X on pipe in 1995, it would cost $Y to purchase that much pipe today.

(b) Inclusion of land cost

It is generally assumed to be appropriate to include the cost of land (or easements) in addition to the cost of the infrastructure installed. Indeed, the *NIBCA II* footnote expressly authorizes the inclusion of the "value of the land." This presumably authorizes use of today's land value, rather than the original cost or value at the time it was acquired by the municipality.

(c) Inclusion of surface replacement cost

For both existing system and future expansion cost calculations, there is an issue of whether to include "surface restoration cost" in addition to "installation cost."

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[211] The *Loomis* Court referred to the ENR(CC1). The correct acronym is ENR(CCI) for Engineering News Record Construction Cost Index.

Experts generally agree that it is appropriate to include the cost of surface restoration in the calculation of system replacement cost because, in order to install or replace sewer infrastructure, it is necessary to remove and restore road and other hard surfaces. In other words, including surface replacement cost more accurately reflects what it would cost to build the system from scratch today. However, there is no Idaho appellate precedent on this issue. *Loomis* and *NIBCA I* are silent on this.

(d) Earlier contributed capital and other funding sources

Another issue is whether to include in system valuation system components (or other funding) that were previously contributed by prior developers or obtained from other sources (such as federal grants). This is typically referred to as "contributed capital."

Loomis and *NIBCA I* do not specifically address this question. However, the fact that they do not call for the exclusion (or other special treatment) of such contributed capital suggests that contributed capital should be treated no differently than system components paid for with municipal tax revenue. Such treatment would be consistent with the philosophy of *Loomis* and *NIBCA I*, which says that new users may be required to pay their share of what the system is worth today, irrespective of how much the municipality originally paid for it.

(3) Net replacement value

(a) Replacement value vs. depreciated value

Loomis and *NIBCA I* expressly provide that "gross replacement value" must be adjusted downward by deducting "unfunded depreciation." The result is called "net system replacement value" (or simply "net replacement value"). Net replacement value drives the cap fee.

The idea is that if a user is required to buy into an "old" system, he or she should be required to pay their share of what the system is worth today. If it is old, its replacement value should reflect depreciation.

However, only the "unfunded" depreciation need be deducted. To the extent there is a fund available to pay for replacement of an aging system, that eliminates the need to adjust for depreciation. In other words, the new user is expected to pay for its share of the value of the pot of money sitting there to fund depreciation.

The depreciation issue does not apply to future expansion costs, because there is nothing to depreciate. But this is not relevant in Idaho, because cap fees may not be calculated on the basis of future expansion costs. (However, revenue from cap fees may be spent to construct new, expanded facilities.)

The methods of calculating depreciation are discussed below.

(i) Straight line depreciation

Straight line depreciation simply takes into account the age of each system component. It assumes that the component will age "in a straight line" losing an equal fraction of its value in each year of its life. Specifically, today's replacement value of each system component is divided by the ratio of its remaining useful life over its original useful life. Thus, if something cost $100 and will last 100 years, it will depreciate at $1 per year. If it is 40 years old, its depreciated value is $60.

In theory, other forms of depreciation could take into account the fact that infrastructure does not lose its value in a perfect straight line. However, I am not aware of such an alternative approach being employed in cap fees.

NIBCA I expressly approves straight line depreciation (based on its reference to Engineering News Record Construction Cost Index calculations). However, neither case expressly say that this is the only lawful approach to calculating depreciation.

(ii) Unfunded depreciation

Once depreciation is determined, the next question is whether to make an adjustment to reflect available funding for replacement. As noted, *Loomis* and *NIBCA I* both endorse the use of unfunded depreciation, which reduces the deduction for depreciation and allows for a higher cap fee.

Unfunded depreciation takes into account that the user paying the cap fee may be buying into both (1) aging infrastructure and (2) a fund or funding source set aside by the city or other local government that may be used for replacement or repair of that infrastructure. This funding source might be, for example, excess revenue generated by monthly fees, which is made available for infrastructure improvement. Under this approach, the reserved funding offsets the depreciation in each fiscal year.

This may be determined by deducting system operating expenses from operating revenue to determine if a surplus existed for each fiscal year. If a surplus existed for a given year, that number is compared to the total annual depreciation for that year. If the funding surplus is greater than or equal to the annual depreciation, then all depreciation for that year is treated as "funded depreciation" and no "unfunded depreciation" is included for that year. If there was no surplus or the surplus was less than the annual depreciation, the amount of depreciation not covered by surplus was included in the total of unfunded depreciation.

(b) Remaining bond principal

If the capital improvements have been or will be funded by revenue bonds, the debt associated with the bonds (remaining bond principal) is typically subtracted

from the cost or replacement value of the system.[212] Indeed, *Loomis* and *NIBCA I* expressly require this deduction.

The idea is that it is fair to charge the newcomer the pro rata value of the system he or she will connect to. But if the infrastructure is burdened by debt (which the newcomer will participate in repaying), the newcomer is receiving less value. Hence, the unpaid debt must be deducted from the value of the infrastructure.

On the other hand, if the debt is incurred by a third party (such as an urban renewal agency) who will repay that debt in a manner that does not burden the newcomer, there would seem to be no basis for deducting that remaining bond principle.

(4) Number of customers

Once the "net system replacement value" is determined, the next step is to divide by the number of customer units that the system is capable of supporting. This may be more than the number of current customers.

In Idaho, this would be the number of customers that the current, constructed system is capable of supporting.[213] In other jurisdictions, depending on the methodology employed, it might be the number of customers that will be served by the system expansion or by the combination of the current system and the system expansion.

Not all users use the same quantity of services, particularly in comparing commercial and industrial customers to residential customers. Accordingly, it is necessary to develop a customer unit definition to allow an "apples to apples" analysis across types of customers. The most common unit of measurement of the "ERU," which stands for "equivalent residential unit."

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[212] In, footnote 4 of *Loomis v. City of Hailey*, 119 Idaho 434, 443 n.4, 807 P.2d 1272, 1281 n.4 (1991) (Boyle, J.), the Court said that gross replacement value is determined by multiplying the actual original cost of each system component by a ratio of today's cost index divided by the cost index at the time of construction—in other words, the dollar value for what it would cost to build the same system today. This gross replacement value is then "adjusted by subtracting the remaining bond principal to be retired and the unfunded depreciation." *Id*.

[213] "The final connection fee is then ultimately determined by dividing the net system replacement value by the number of users the system can support." *Loomis*, 119 Idaho at 443, 807 P.2d at 1281.

(5) Credit for required on-site contributions vs. off-site impact fees

Most developments are required to shoulder the cost of on-site sewer, water, road, and other infrastructure. This is viewed as a cost of doing business, and does not entitle the developer or builder to a credit against a cap fee.

On the other hand, if the developer or builder is required as a condition of development to contribute beyond the traditional on-site components (either through an impact fee or as a condition of a land use permit), there is a strong argument (at least in Idaho) that he or she is entitled to an offsetting credit for any cap fee whose purpose is to pay for the same type of infrastructure.

Although *Loomis* and *NIBCA I* do not address this, I believe the philosophy of those cases is clear: Users are expected to pay the reasonable value of what they receive. Failure to give a credit for mandatory in-kind contributions to system infrastructure may be viewed as charging twice for the same thing, and hence unconstitutional.

(6) Common benefit projects

Improvements in infrastructure often serve the dual purpose of replacing existing infrastructure and expanding system capacity. These are referred to as "common benefit projects." For example an aging 12-inch pipe (sufficient to meet current demand) might be replaced with a new 16-inch pipe (adding four inches of excess capacity).

In fees based on the cost of future expansion, it is critical to separate the cost attributable to each category of use. Thus, in the example above, only the additional cost of adding four inches should be included as a capital cost that is plugged into the cap fee calculation.

However, as noted above, cap fees in Idaho may be based only the value of existing capital infrastructure. So this issue is not relevant for cap fee calculation in Idaho. Nor is it relevant in Idaho to how cap fee revenues are spent. Our Supreme Court has left no doubt that money collected for infrastructure must be spent on infrastructure. *E.g.*, that money may not be co-mingled or put into the general fund. However, such funds may be spent for either replacement or expansion of the relevant infrastructure.

In sum, this financial allocation for common benefit projects is not constitutionally required in Idaho, either for cap fee calculation or spending of cap fee revenue.

(7) Planning period and geographic scope

Another issue that is important elsewhere, but not in Idaho, is the issue of the planning period and geographic scope of the system expansion.

For any of the methodologies that include valuation of future system expansion (Methods 2, 3 and 4, below (none of which are permissible in Idaho for non-IDIFA cap fees), it is necessary to carefully define the duration of the planning period and/or the geographic scope of the future expansion. Often the expansion is keyed to the area of city impact (the formally defined area into which the city expects to grow). If the geographic area is clearly defined, it may not be necessary to precisely define that duration of the planning horizon, instead basing it on however long it takes to fully build out the new area.

In any event, it is critical that the number of customers used to calculate the fee correspond to the number of customers within the expansion area. In other words, the denominator corresponds to the numerator (see table in the section below).

D. Five examples of cap fee methodologies

The chart and discussion below relies on materials provided by John Ghilarducci of FCS GROUP. It evaluates cap fee methodologies uses throughout the country, not just in Idaho.

Methodology		Numerator			Denominator
		Existing system – used capacity	Existing system – excess capacity	Future system expansion (including share of "common benefit projects")	
1.	Average Existing Cost Approach	Yes	Yes		Existing customers
2.	Incremental Future Cost Approach			Yes	Future customers
3.	Allocated Capacity Share Approach		Yes	Yes	Future customers
4.	Average Cost – Integrated Approach	Yes	Yes	Yes	Existing & future customers
5.	Idaho Mandated "Buy-in Formula"	Yes	Yes		Customers capable of being served by existing system

Method 1: Average Existing Cost Approach (aka "Existing System Buy-In")

Cap fee = value of the existing system divided by the number of existing customers.

This is a purely "backwards looking" approach—focusing on things already built.

Includes both used capacity and unused capacity within the existing built system.

Method 2: Incremental Future Cost Approach

Cap fee = cost of capacity expansion divided by number of future customers.

Future "common benefit projects" that will provide both existing system replacement and capacity expansion are allocated proportionately. Only the capacity expansion component is included in cap fee.

This is a purely "forwards looking approach"—focusing on things not yet built.

This is the method used by the City of Hayden in its 2007 cap fee, which the Idaho Supreme Court declared unlawful. The City has now switched to a Method 5 approach (developed by FCS Group) which, ironically, produced a higher cap fee than the rejected Method 2.

Method 3: Allocated Capacity Share Approach

Cap fee = (cost of unused capacity in existing system plus cost of future capacity expansion) divided by number of future customers.

Same rule for "common benefit projects."

This is also a forward-looking approach. But it defines "forward" more broadly. It begins with future expansion costs (as in the Incremental Future Cost Approach) and adds in the cost of the existing system's unused capacity.

Both Method 2 and Method 3 have the same denominator (future customers). Consequently, Method 3 will produce a higher cap fee than Method 2.

Method 4: Average Cost – Integrated Approach

Cap fee = (cost of existing system plus future expansion) divided by (both existing and future customers).

This approach is all-inclusive, both forward- and backward-thinking.

Method 5: Equity Buy-In Approach (mandated by Idaho Supreme Court)

Cap fee = net replacement value of existing system divided by number of customers capable of being served by existing system.

This approach is also backwards-looking.

It may be identical to Method 1, except that the denominator is larger (including all customers capable of being served today, not just those actually served). (The numerator in Method 1 may be either original cost or replacement cost.)

This is the methodology described in footnote 2 of In *N. Idaho Bldg. Contractors Ass'n* ("*NIBCA I*") *v. City of Hayden*, 158 Idaho 79, 82 n.2, 343 P.3d 1086, 1089 n.2 (2015) (Eismann, J.) and footnote 4 of *Loomis v. City of Hailey*, 119 Idaho 434, 443 n.4, 807 P.2d 1272, 1281 n.4 (1991) (Boyle, J). Specifically, the Court endorsed a cap fee based on gross replacement value less unfunded depreciation and remaining bond principal.

The Court has not addressed the issue of "surface replacement costs." However, nothing in its decisions suggests that including this cost of service would be improper.

Likewise, the Court has not addressed this issued of "earlier contributed capital." However, given that the basis for its approved formula is requirement that the new user buy into the replacement value of the existing system, it would seem to make no difference what the actual cost of the existing system is or how the existing system was paid for.

Nor has the Court addressed the question of whether a credit must be provided for required contributions and impact fees that are duplicative with the infrastructure financed by the cap fee. The Idaho Supreme Court has held in a number of occasions, however, that lawful fees cannot exceed the reasonable value of the benefit provided. Thus, there is an argument that failing to provide such a credit would amount to double charging (constituting an unconstitutional taking).

32. THE "VOLUNTARY AGREEMENT" ISSUE

Under what circumstances may a party who enters an agreement with a local government in connection with a land use application subsequently challenge that agreement as an unconstitutional taking or contend that it is non-binding because it was *ultra vires*? In a 1992 case, *Black v. Young*, 122 Idaho 302, 834 P.2d 304 (1992) (McDevitt, J.), the Idaho Supreme Court invalidated an agreement between a city and an applicant for a street vacation where the conditions agreed to were deemed *ultra vires* because the statute authorizing the vacation of streets did not authorize those types of conditions. More recently, the Court has distinguished this precedent (*Boise Tower Assoc., LLC v. Hogland*, 147 Idaho 774, 215 P.3d 494 (2009) (W. Jones, J.)). But, in over two decades, that is the only Idaho case to even mention *Black* in this context. In a number of other cases, the Court has ignored the *Black* precedent in holding that voluntary agreements may not be challenged as unconstitutional takings. In 2014, however, a federal court revived the *Black* case in the context of a bankruptcy proceeding. *City of Hailey v. Old Cutters, Inc.*, 2014 WL 1319854 (D. Idaho Mar. 31, 2014) (Lodge, J.) (unpublished). This section attempts to sort out these precedents.

A. *Black v. Young* (1992)

In *Black v. Young*, 122 Idaho 302, 834 P.2d 304 (1992) (McDevitt, J.), a developer was required to agree to certain conditions in exchange for the vacation of an alley on its property. Specifically, the City of Ketchum enacted an ordinance approving the vacation subject to certain conditions, including funding of a $2.5 million construction loan. Essentially, the city took the position that vacation of the alley was in the public interest "provided that the motel is built." *Black*, 122 Idaho at 309, 834 P.2d at 311 (ellipses and italics omitted). On the same day, the landowners signed an estoppel affidavit stating that the conditions in the ordinance were acceptable to them and would not be challenged by them. *Black*, 122 Idaho at 305, 834 P.2d at 307.

Sometime later, the city denied various development plans for the parcel. The landowners then sued the city alleging that the vacation ordinance was *ultra vires*. They sought to have the alley vacated notwithstanding the fact that they were not able to build their motel. The Idaho Supreme Court overruled the district court and ruled for the developers. The Court found that Idaho Code § 50-311, which governs vacations of city streets, only allows conditions relating to the protection of access, easements, and franchise rights, and that the conditions imposed by Ketchum fell outside of that limited authority. Because the conditions imposed by the city were *ultra vires*, the developers were not bound by their promise not to challenge the conditions.

The Court remanded for a determination of whether the entire action (both the vacation and the conditions) must be invalidated, or whether the landowner could have his cake and eat it too by invalidating the conditions but keeping the vacation.

The concurring opinion described the city as asking, "What is in it for the City?" This, Justice Bistline said, was "unconscionable conduct" and "extortion." *Black*, 122 Idaho at 315, 834 P.2d at 317 (J. Bistline, concurring). But the decision did not turn on, or even discuss, whether the agreement was entered into voluntarily. The implication, however, seems to be that this was not a truly voluntary situation.

The *Black* decision, however, has been all but ignored by the Idaho appellate courts. The only case to mention it in this context is *Boise Tower Assoc., LLC v. Hogland*, 147 Idaho 774, 215 P.3d 494 (2009) (W. Jones, J.), which distinguished it. The *Black* case was cited and relied on by a federal court to invalidate a superficially voluntary *ultra vires* agreement in *City of Hailey v. Old Cutters, Inc.*, 2014 WL 1319854 (D. Idaho Mar. 31, 2014) (Lodge, J.) (unpublished).

B. *KMST* (2003)

In *KMST, LLC v. Cnty. of Ada*, 138 Idaho 577, 67 P.3d 56 (2003) (Eismann, J.), a developer brought a civil action[214] presenting two claims against the Ada County Highway District ("ACHD"), one in connection with ACHD's road dedication requirement and another in connection with ACHD's impact fees. (Despite the case name, the claims against Ada County were not pursued on appeal.) The Idaho Supreme Court dismissed both ACHD claims on technical grounds—*Williamson County* ripeness (as to the dedication) and exhaustion (as to the impact fees). Nevertheless, the Court went on to opine as to the merits of the taking claim on the road dedication saying that this was, in essence, not a taking because it was voluntarily offered. In essence, it was a not a "taking" but a "giving" (our words, not the Court's).

The procedural posture is a bit complicated. KMST's zone change application was before the county, but the county required the developer to obtain recommendations from ACHD with respect to streets. Based on conversations between the developer and an ACHD staff member, the developer included a provision in its own applications (to both ACHD and the county) agreeing to construct a street adjacent to the property and dedicate it to the public. Indeed,

[214] The issue of whether the actions should have been challenged via judicial review under LLUPA was not discussed in *KMST*. Failure to pursue exclusive judicial review under LLUPA would seem to be a defense to the challenge to Ada County conditioning of the re-zone approval. However, as noted, the challenge to Ada County was not pursued on appeal. LLUPA review presumably would not have been available to challenge ACHD's recommendation of the road dedication nor its imposition of impact fees under its IDIFA-based ordinance. This would explain why the civil action was the appropriate vehicle to present the claims and why LLUPA review was not discussed by the Court.

KMST touted the offer in its application noting that the road "will limit curb cuts on Overland Road and provide for a better circulation pattern within and adjacent to the project." *KMST*, 138 Idaho at 582, 67 P.3d at 61. ACHD included the street dedication in its recommendation to Ada County. The developer then, apparently, had a change of heart. When ACHD's recommendation reached the county, the developer suggested that it be deleted, but the county included it as a condition of the zone change. In accordance with the requirement, KMST constructed and dedicated the road. Meanwhile, ACHD imposed impact fees pursuant to its impact fee ordinance, which the developer paid. Then, the developer sued the county and ACHD on several counts, the most significant being an inverse condemnation for a regulatory taking.[215]

For reasons that are unclear, the developer did not pursue its appeal of the county's decision.[216] Instead, it pursued only the inverse condemnation action against ACHD—based on the road dedication requirement and "excessive" impact fees. The Court disposed of the road dedication taking claim on ripeness grounds, noting that ACHD's recommendation was not final agency action, and the plaintiff should have pursued its claim against Ada County, which actually imposed the condition. The Court pointed out that ACHD merely made what amounted to a recommendation. It was Ada County that actually imposed the road dedication requirement. "Because the condition imposed by the ACHD was not a final decision of the governmental entity that had authority to approve the development, it did not constitute a taking of KMST's property." *KMST*, 138 Idaho at 582, 67 P.3d at 61. Citing *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Court concluded that KMST sued the wrong entity (ACHD—which lacked the power to issue a final decision) and missed the boat by not pursuing its challenge to the county's zoning decision.[217]

The Court then went on to say that even if ACHD's recommendation had been a final decision, it would not have constituted a taking because the dedication was

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[215] The developer raised this as a traditional regulatory takings (inverse condemnation) claim against ACHD. The district court and the parties analyzed the street dedication as an exaction. The district court found that the ACHD met the nexus and proportionality tests in *Nollan* and *Dolan* and was therefore not a taking. (See discussion in section 29.E at page 126.) The Idaho Supreme Court reported this history, but never reached the *Nollan-Dolan* analysis. "We affirm the judgment dismissing KMST's claim against the ACHD, but for reasons different than those of the district court." *KMST*, 138 Idaho at 581, 67 P.3d at 60.

[216] The original lawsuit named both Ada County and the ACHD. The district court dismissed the claim against Ada County, and KMST did not appeal that dismissal. Instead, the appellate litigation focused exclusively on the ACHD, the only other party to the appeal. As explained below, this proved to be a fatal flaw for the plaintiff.

[217] "KMST has not appealed the judgment dismissing its claim against Ada County, and therefore we do not address the issue of whether the conduct of the Ada County Commissioners constituted a taking." *KMST*, 138 Idaho at 582, 67 P.3d at 61.

voluntary.[218] In a pre-application meeting with ACHD staff, KMST was advised that staff would recommend a requirement of a road dedication. In order to move things along, KMST agreed to the dedication and included it in its application. This proved fatal to KMST's taking claim.

> KMST representatives included the construction and dedication of Bird Street in the application because they were concerned that failing to do so would delay closing on the property and development of the property. KMST's property was not taken. It voluntarily decided to dedicate the road to the public in order to speed the approval of its development. Having done so, it cannot now claim that its property was "taken."

KMST, 138 Idaho at 582, 67 P.3d at 61 (emphasis supplied; internal quotations identifying district court's language omitted). This language is significant because it shows that it makes no difference that the developer was motivated by a desire to speed the processing of its application; the developer's action is still voluntary.

In a footnote, the Court clarified the narrow scope of its holding. "We are not holding that there was no taking simply because KMST built the public street before challenging that requirement in court. We are holding that there was no taking because KMST itself proposed that it would construct and dedicate the street as a part of its development." *KMST*, 138 Idaho at 582, n.1, 67 P.3d at 61, n.1.

That was the first claim. In addition, KMST challenged an impact fee that ACHD imposed pursuant to the ACHD's own ordinance, which had been adopted pursuant to IDIFA.[219] This claim was also dismissed on a technical basis. This time it was exhaustion:

> [KMST] simply paid the impact fees in the amount initially calculated. Having done so, it cannot now claim that the amount of the impact fees constituted an unconstitutional taking of its property.
> As a general rule, a party must exhaust administrative remedies . . . . KMST had the opportunity to challenge the calculation of the impact fees administratively, and it chose not to do so.

KMST, 138 Idaho at 583, 67 P.3d at 62.

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

[219] ACHD is the only road district in the State with the authority to impose impact fees. See footnote 196 at page 240.

Note that although this part of the case arose in the context of IDIFA, the Court's discussion of exhaustion was based on general principles of administrative law. Thus it would apply in contexts outside of IDIFA. In so ruling, however, the Court noted (in dictum) two exceptions that apply to the general exhaustion rule: "We have recognized exceptions to that rule in two instances: (a) when the interests of justice so require, and (b) when the agency acted outside its authority." *KMST*, 138 Idaho at 583, 67 P.3d at 62.

The district court had found that the exhaustion requirement did not apply,[220] due to a special provision in LLUPA exempting certain taking claims from exhaustion, Idaho Code § 67-6521(2)(b). The Idaho Supreme Court reversed on this point, concluding, without discussion, that this LLUPA provision is inapplicable.

It is worth mentioning what *KMST* did not decide.

First, as noted above, the Court emphatically adopted a narrow definition of what is voluntary, explaining that it was speaking in terms only of situations in which the developer included a dedication proposal in its own application. Arguably, *KMST's* concept of a voluntary payment would extend to those circumstances when a developer does not propose a payment, but also does not object to it. This would be particularly compelling where the developer enters into a development agreement in which he or she expressly "agrees" to payments imposed by the local government. (Indeed, the Court addressed this situation in *Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 496-97, 300 P.3d 18, 27-28 (2013) discussed below.)

Second, the Court did not consider other contexts in which an exaction might or might not be "voluntary." For instance, if a developer is given the option of paying an exaction in order to obtain additional density or other benefits, does that make the exaction "voluntary"? Indeed, can a municipality lawfully offer to trade zoning approvals for payments to the municipality?

Third, *KMST* was a regulatory takings case. (The developer did not allege that the exactions were illegal taxes (see discussion in 30 at page 172), only that they required compensation under *Nollan-Dolan*.) The Court ruled that because KMST had given the property away, it was not constitutionally "taken." Does the fact that it was not a taking also mean that it is not a tax? Presumably so. After all, people do not ordinarily volunteer to pay taxes. Moreover, illegal taxes are described as *per se* takings. *BHA Investments, Inc. v. City of Boise* ("*BHA I*"), 138 Idaho 356, 63 P.3d 482 (2003) (Schroeder, J.). But *KMST* did not directly answer that question.

[220] The district court nonetheless ruled against KMST, finding that the impact fee was not excessive or inappropriate under *Nollan* and *Dolan*. Given its ruling on exhaustion, the Idaho Supreme Court had no occasion to reach the *Nollan-Dolan* analysis.

Fourth, because ACHD had adopted an impact fee ordinance under IDIFA, the Court did not need to address the exception to the exhaustion rule for when the agency acts outside its authority. Does this exception mean that no exhaustion is required if an exaction is challenged as an illegal, disguised tax? The answer may depend on whether the challenge is facial or as applied.

Finally, there is a question as to whether ordinances offering to relax zoning standards (such as height, mass, or density) in exchange for payments of unauthorized fees are consistent with LLUPA's mandate that "[a]ll standards shall be uniform for each class or kind of buildings and structures . . . ." Idaho Code § 67-6511. In other words, is it "uniform" for the government to impose one standard on those who agree to pay an unauthorized fee and another standard on those who do not? Or is giving each landowner this choice sufficient uniformity? The authors are not aware of any Idaho court that has addressed this question.

By the way, a federal case arising in Washington, *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2765 (2009), reached much the same conclusion under federal takings law. "As for the installation of the 24-inch pipe, we conclude that the McClungs voluntarily contracted with the City to install the 24-inch pipe and thus the installation of that pipe was not a 'taking' by the City." *McClung*, 548 F.3d at 1222 (see also pages 1228-29).

C. *BHA II* (2004)

The recognition in *KMST* that voluntary actions do not give rise to takings is not undercut by the Court's holding in *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 108 P.3d 315 (2004) (Eismann, J.), which held that plaintiffs are not required to pay under protest as a prerequisite to challenging an unlawful tax. *BHA II* involved a challenge to a transfer fee charged by the City of Boise on liquor licenses. The Court ruled in a prior case, *BHA Investments, Inc. v. City of Boise* ("*BHA I*"), 138 Idaho 356, 357-58, 63 P.3d 482, 483-84 (2003) (Schroeder, J.), that the city had no regulatory authority whatsoever with respect to the transfer of liquor licenses. Only the State has such authority. *Id*.

BHA II involved two consolidated cases, the original *BHA I* case following remand and a different case.[221] In *BHA II*, the district court dismissed a claim by a

[221] On remand, the district court granted BHA summary judgment and awarded it judgment against the city on the illegal fee issue. However, BHA also sought certification as a class action, which the district court denied. BHA appealed only the class action issue, and the Idaho Supreme Court affirmed. However, the case was consolidated with another case involving other similarly situated parties (Bravo Entertainment and Splitting Kings). This portion of the case became the foundation for most of the discussion in *BHA II*.

different set of plaintiffs because they had not paid the fee under protest.[222] This was based on an old line of cases (*e.g., Walker v. Wedgwood*, 64 Idaho 285, 130 P.2d 856 (1942)) holding that plaintiffs must pay taxes under protest to preserve the right to request a refund. In essence, the City of Boise tried to pull a fast one by saying, "OK, if you claim that our liquor license transfer fee is really a tax, you should have paid it under protest." The Court did not buy it.

The Supreme Court reversed the district court on that point, ruling that the requirement that taxes be paid under protest applies "when a governmental entity imposes what is on its face a tax" but is inapplicable "when a city imposes a fee that it has no authority to impose at all." *BHA II*, 141 Idaho at 176, 108 P.3d at 323. It contrasted the later situation (no authority to impose a fee at all) with the situation in which "a purported fee . . . does not bear a reasonable relationship to the services to be provided by the city [which is] in reality the imposition of a tax." *Id*.

The *BHA II* Court discussed *KMST*, but only in another context (exhaustion). The issue of voluntariness did not arise. Indeed, the facts are different. In *KMST*, the developer affirmatively agreed to a dedication of property. In *BHA II*, the city charged a fee, and the operator paid it (without protest). Thus, it is permissible not to protest, but if a party affirmatively offers to do something or expresses its agreement to a condition or payment, that constitutes voluntariness barring a taking claim.

D. *Lochsa Falls* (2009)

In *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 207 P.3d 963 (2009) (Horton, J.), a developer filed a civil complaint seeking reimbursement of fees it paid to the Idaho Department of Transportation ("ITD") for signalization. The developer sought an encroachment permit from ITD to install an intersection on a limited access state highway. In connection with its application to ITD, the developer submitted a Transportation Impact Study recommending the installation of the signal. ITD approved the encroachment permit upon condition that the developer install the signal, which it did. After constructing the intersection and signal, the developer sued ITD claiming that it should be reimbursed for the cost of the signal because it benefited the public as a whole and was therefore an illegal tax.

The district court threw out the case for failure to exhaust. The Idaho Supreme Court reversed, holding that, under ITD's rules, there are no remedies to exhaust. Accordingly, the Court remanded for evaluation of the constitutional challenge.

Note that ITD's permit was not issued pursuant to the Local Land Use Planning Act, Idaho Code §§ 67-6501 to 67-6538, and, therefore, was not subject to

[222] The decision recites that one of the plaintiffs paid the fee, *BHA II*, 141 Idaho at 170, 108 P.3d at 317. So, apparently, the issue was that no formal "protest" accompanied the payment.

any of the procedures available to applicants for planning and zoning permits. Instead, it was governed by special rules that allow administrative review of the denial of an ITD permit but allow no review or other remedy where a permit application is approved with unacceptable conditions. Because no permit was denied (but was granted with a condition), there were no remedies to exhaust. *Lochsa Falls*, 147 Idaho at 240, 207 P.3d at 971. Thus, *Lochsa Falls* describes a rare circumstance where no exhaustion is required (due to poorly drafted administrative rules). *Lochsa Falls* is also peculiar in that the Court addressed the issue as a matter of exhaustion of administrative remedies. But even if there were no administrative remedies to exhaust, that does not explain why the plaintiff was allowed to bring a collateral attack on the administrative decision outside of the IAPA.

Though not ruling on the constitutional issue, the Court offered the observation that "generally speaking, it is not an impermissible tax for the ITD to impose the condition of erecting a traffic signal as a requirement for a developer seeking to be granted an encroachment permit to a controlled access highway . . . ." *Lochsa Falls*, 147 Idaho at 241, 207 P.3d at 972. The Court then remanded for a determination of whether this particular requirement was reasonable.

Justice Jim Jones concurred, but dissented in the denial of attorney fees to ITD. While recognizing that a remand was technically required, he allowed, "In my estimation, Lochsa Falls' claims contain little substance." *Lochsa Falls*, 147 Idaho at 242, 207 P.3d at 973. He suggested that, on remand, the case should be decided against the developer based on the voluntary nature of the transaction—an issue that the majority did not address:

> This case could appropriately be analyzed in a contractual context. Lochsa Falls requests that ITD grant it the right to have a signalized intersection to benefit its subdivision. ITD agrees, provided that Lochsa Falls pays for signalizing the intersection. Lochsa Falls accepts the proposal without protest and proceeds to perform the signalizing work. Upon completion of the work, Lochsa Falls unilaterally changes its mind and decides it needs to be paid for the signalizing, but expresses no intention of giving up the valuable benefit it has derived from the deal. Lochsa Falls got what it bargained for but does not wish to honor its undertaking to bear the cost of such benefit. Had Lochsa Falls objected to the requirement that it pay for signalizing the intersection, it could simply have said "thanks, but no thanks" and done without a signal. One suspects there is not the slightest chance it would have done so, as the increase in the value of its lots would substantially outweigh the cost of the traffic signal.

Lochsa Falls, 147 Idaho at 242-43, 207 P.3d at 973-74 (J. Jones, J, concurring and dissenting). Given the cases that follow, this dissent seems now to reflect the majority view of the Court.

E. *Boise Tower* (2009)

In 2009, the Idaho Supreme Court distinguished its holding *Black v. Young*. As of 2016, this is the only Idaho appellate decision to revisit the *ultra vires* exception created in *Black*. In *Boise Tower Assoc., LLC v. Hogland*, 147 Idaho 774, 215 P.3d 494 (2009) (W. Jones, J.), the developer of a failed condominium tower in downtown Boise sued the city and its planning director. The planning director issued a building permit to the developer on May 3, 2000. The applicable ordinance provided the permit expires if no work is performed for 180 days. In 2002, the city mistakenly issued a stop work order to the developer based on a miscalculation of the 180-day rule. In order to resume work, the developer was required to enter into a stipulation requiring the developer to provide documentation of a funding commitment from its lender. The developer complained, but signed the agreement. Ultimately, the developer was unable to meet the funding commitment required by the stipulation, and the planning director again notified the developer that its building permit had expired. On appeal to the city council, the city found that the planning director had miscalculated the 180-day period, and reinstated the permit. Despite this victory, the developer sued the city and the planning director, alleging that the negative publicity led to cancellation of condominium purchases and doomed the project. The district court granted summary judgment to the city, and the developer appealed.

The developer argued that, under *Black*, the stipulation was *ultra vires*. The Idaho Supreme Court distinguished *Black*:

> *Black* is distinguishable from the present case because there the city's authority was limited to the processes set out in the statute for vacating streets and alleys. *Id*. In the present case, Hogland's authority was not narrowly circumscribed; rather, he had broad discretion to direct and enforce all provisions of the UBC [Uniform Building Code].

Boise Tower Assoc., LLC v. Hogland, 147 Idaho 774,797, 215 P.3d 494, 499 (2009) (W. Jones, J.).

Boise Tower appears to leave *Black* intact, but only by implication. The implication is that if the planning director had lacked authority to impose the type of conditions set out in the stipulation, the agreement would have been *ultra vires*.

It bears emphasis, however, that the stipulation in *Boise Tower* was clearly not voluntary. The Court emphasized in its recitation of facts that the developer

protested vigorously, and agreed only under threat that the expiration of the permit would be made public the following day. Thus, *Boise Tower* does not address whether an *ultra vires* agreement is nevertheless enforceable if entered voluntarily.

F. *Wylie* (2011)

The Court faced the question of a voluntary agreement that was arguably *ultra vires* in *Wylie v. State*, 151 Idaho 26, 253 P.3d 700 (2011) (J. Jones, J.). This case, which did not mention *Black*, appears to hold that a voluntary agreement is enforceable, notwithstanding being *ultra vires*. Deciphering the case is a bit tricky, however.

In *Wylie*, a developer entered into a development agreement with the City of Meridian in conjunction with the annexation, initial zoning, and approval of a preliminary plat of a subdivision along Chinden Boulevard.[223] In the development agreement, Wylie's predecessor agreed to limit access to Chinden Boulevard from his proposed development. After acquiring the property, Wylie sought a variance allowing direct access to Chinden Boulevard. The City denied the variance request, after which Wylie sought a judgment declaring that ITD had exclusive jurisdiction to control access and that the City's ordinance dealing with access was void. As the Idaho Supreme Court pointed out, it is unclear why Wylie did not seek judicial review of the denial of the permit or an amendment of the development agreement (despite earlier having obtained a modification on a different aspect of the agreement). *Wylie*, 151 Idaho at 32, 253 P.3d at 706.

Wylie argued that the agreement waiving access was *ultra vires* and unenforceable because Idaho statutes preempt the authority of the city to control access to a state highway.

The Court first ruled that the development agreement's unambiguous requirement limiting access mooted any claims that Wylie might have under the development agreement. "Since the Agreement unambiguously restricts the ability of Wylie's property to have direct access to SH 20–26, there is simply no justiciable issue based on the Agreement." *Wylie*, 151 Idaho at 32, 253 P.3d at 706. It is unclear from the opinion, however, what claims were "based on the Agreement."

The Court noted that the "main thrust of his complaint is that the Ordinance is invalid, either because it is preempted by state law or an ultra vires act of the City." *Wylie*, 151 Idaho at 33, 253 P.3d at 707. The Court held that these "claims were not rendered nonjusticiable by virtue of the Agreement." *Id*. The Court suggested that

[223] No one, it appears, challenged the validity of the development agreement itself. Nor did the parties or the Court draw a distinction between initial zoning and rezoning. See discussion in section 28.B at page 88.

the ordinance would pass muster because it "does not usurp the authority of ITD, nor is it preempted by statute." *Id.*

Despite making that observation, the Court never actually ruled on the ordinance. Instead, it found that the whole case is non-justiciable:

> Turning to the question of justiciability, Wylie has been unable to articulate how a judgment declaring the Ordinance invalid would provide him any relief. The Agreement clearly precludes direct access to SH 20–26 and the provisions of the Agreement are not dependent upon the Ordinance.

Wylie, 151 Idaho at 34, 253 P.3d at 708.

This last point is crucial. The effect is that, even though the voluntary agreement does not prevent the Court from considering the legality of the ordinance, even a ruling that the ordinance was *ultra vires* would not relieve the developer from an agreement that was voluntarily entered. The Court did not discuss *Black*, but this conclusion appears to be a departure from *Black*.

G. *Buckskin* (2013)

In *Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 300 P.3d 18 (2013) (J. Jones, J.), the Idaho Supreme Court applied its holding in *KMST* to conclude that a development impact fee was paid voluntarily and therefore did not constitute a taking. The Court began by rejecting the developer's argument that the County lacked the authority to enter into voluntary agreements with developers.[224] It further held that while IDIFA is one way that local governments may impose impact fees, it is not the only way. Voluntary agreements are an alternative to IDIFA. "IDIFA does not prohibit governmental entities and developers from voluntarily entering into contracts to fund and construct improvements." *Buckskin*, 154 Idaho at 491, 300 P.3d at 23.

[224] "Buckskin provides no authority for the proposition that a developer and governing board are prohibited from voluntarily entering into an agreement to fund and construct capital improvements that will facilitate the developer's development plans. Indeed, such agreements can benefit both the County taxpayers and developers. There is no reason why a governing body should be required to resort to taxpayer-derived revenue as the sole source of moving forward with capital improvements, such as road construction, that will primarily benefit a developer. On the other hand, it makes little sense to prohibit developers from voluntarily agreeing to shoulder a portion of the development costs in order to more quickly move forward with development of their property." *Buckskin*, 154 Idaho at 491, 300 P.3d at 23.

The Court then evaluated whether the developer's acquiescence in the County's practice of requiring developers to enter into road development agreements was voluntary.[225]

> In this case, there was no taking because Buckskin initially proposed in its application that the parties enter into a capital contribution agreement that called for it to pay "agreed-upon compensation" to the County. . . . Buckskin stated no objection to the [Capital Contribution Agreement] or the requirement of paying the compensation. At that time, it was seeking approval of a subdivision plat, a PUD, and a CUP. . . . Buckskin could have requested a regulatory taking analysis pursuant to I.C. § 67–8003. S.L. 2003, ch. 142, §§ 24. Buckskin did not do so. It could have sought judicial review pursuant to I.C. §§ 67-6519 or 67–6521. It did not do so. It could have objected and paid under protest. It did not do so. There is no indication that Buckskin complained about, or objected to, the CCA, the RDA, or the impact charges to any representative of the County at any time. Buckskin does not claim that the improvements identified in the CCA and RDA were not completed or that the County failed to perform the terms of either agreement in any fashion. Nothing was taken from Buckskin and, therefore, it has no grounds for asserting an inverse condemnation claim.

Buckskin, 154 Idaho at 495-96, 300 P.3d at 27-28.

In so ruling, the Court made clear that a voluntary agreement is not necessarily inconsistent with some prodding by the governmental entity.

> As noted by the County, "[p]erhaps the developers of The Meadows were not pleased with the idea of paying for road improvements benefiting their property, but they did not say so and they certainly did not challenge the County's authority to require such mitigation." Buckskin's engineer simply believed that the County had legal authority to require the CCA, but he makes no contention that he was relying on any representation to that effect by any County official.

[225] Because the Court found that the voluntary agreement precluded a taking, it never reached the statute of limitations defense, which had been the basis of the district court's ruling. *Buckskin*, 154 Idaho at 494, 300 P.3d at 26.

Buckskin, 154 Idaho at 495, 300 P.3d at 27.

To the same point, the *Buckskin* Court quoted from the holding in *KMST*, to the effect that if a developer agrees to terms in hopes of speeding development approval, that does not necessarily render the action involuntary. "It voluntarily decided to dedicate the road to the public in order to speed the approval of the development." *Buckskin*, 154 Idaho at 492, 300 P.3d at 24 (quoting *KMST, LLC v. Cnty. of Ada*, 138 Idaho 577, 582, 67 P.3d 56, 61 (2003)).

The *Buckskin* Court did discuss *Black*. It would seem, however, that the only way to reconcile the two cases is to recognize a "voluntary agreement" exception to *Black*.

H. *Bremer* (2013)

In *Bremer, LLC v. East Greenacres Irrigation Dist*., 155 Idaho 736, 316 P.3d 652 (2013) (Burdick, J.), the Idaho Supreme Court once again applied the voluntary payment rule set out in *KMST* and *Buckskin*.

The owner of an industrial foam molding facility sought a water connection from the irrigation district ("EGID"). The district required the owner to extend the water main 800 feet to the property. The owner attempted to negotiate, but ultimately decided to build the extension and sue later. After construction, he paid a connection fee (which he did not challenge) and sued the district alleging the requirement to extend the main was an illegal tax. He alleged the extension was unnecessary to serve him, which the district disputed. The Court upheld a grant of summary judgment to the district. The Court found it unnecessary to wade into the question of whether the main extension was really for the benefit of the entire district. The Court ruled instead that the owner's construction of the main was voluntary and therefore defeated the takings claim.

> Here, Bremer's actions are similar to those of the developers in *KMST* and *Buckskin*. Similar to how the *KMST* developer took the initiative to propose the road to the highway district, Bremer approached EGID about water for their new building and had Bremer's own engineer submit his plans to EGID. Those plans included the main line extension. Analogous to the engineer in *Buckskin* who stated the fee was only included because the country required it, Bremer's engineer said that EGID told him that it required the extension. After submitting the plan, Bremer decided to build the main line extension to allow their business to operate, similar to how the developer in *KMST* voluntarily completed a road to speed the city's approval of the development. Thus, *KMST* and

> *Buckskin* generally indicate that a person cannot propose an improvement and thus voluntarily agree to the improvement, and then later contend there was no agreement because the improvement was for the public.

Bremer, 155 Idaho at 742, 316 P.3d at 658.

In another part of the decision, the *Bremer* Court made clear that the *KMST/Buckskin/Bremer* voluntariness rule is not the same as the "voluntary payment rule."

> The voluntary payment rule provides that "a person cannot, either by way of set-off or counterclaim, or by direct action, recover back money which he has voluntarily paid with full knowledge of all the facts, and without any fraud, duress or extortion, although no obligation to make such payment existed." *Breckenridge v. Johnston*, 62 Idaho 121, 133, 108 P.2d 833, 838 (1940). Under this rule, a person cannot recover a payment that he voluntarily made to satisfy a demand in excess of what is legally due, if he made that payment with full knowledge of the facts and free from mistake, fraud, duress, or extortion. *Id.*

Bremer, 155 Idaho at 745, 316 P.3d at 661.

I. *White Cloud* (2014)

The voluntary agreement issue was addressed yet again by the Court in *In the Matter of Certified Question of Law – White Cloud v. Valley Cnty.*, 156 Idaho 77, 320 P.3d 1236 (2014) (J. Jones, J.). This decision provided the Court's opinion on a question of law certified by the federal district court dealing with limitation periods. The Court included an extensive discussion under the heading "Questions this Court Declines to Answer" (because they were beyond the scope of the certified question). The Court nevertheless pointed out that the issue of the voluntary nature of the agreement by a developer to pay an exaction may be "central to the determination" of the question—essentially mooting the limitations period defense. *White Cloud*, 156 Idaho at 82, 320 P.3d. at 1241. The Court summarized its prior precedent on the subject as follows:

> In *Buckskin*, where the County had no IDIFA compliant ordinance, this Court held that "a developer and a governing board can legally enter into a voluntary agreement to fund capital improvements to be made by the governmental entity that facilitate the developer's development plans." 154 Idaho at 493, 300 P.3d at 25.

> That case also involved a suit by a developer against the County, seeking recovery of road development fees based on claims of an illegal impact fee and inverse condemnation. *Id*. at 489, 300 P.3d at 21. We first addressed the legality of the agreement, finding that issue to be "central to the determination" of the case. *Id*. at 490, 300 P.3d at 22. We observed that "a voluntary agreement between a governmental entity and a developer, whereby the developer voluntarily agrees to pay for capital improvements that will facilitate his development plans, does not run afoul of IDIFA. The key is whether the agreement is truly voluntary." *Id*. at 491, 300 P.3d at 23. In *Buckskin*, we upheld the district court's grant of summary judgment against Buckskin because the record contained no evidence "indicating that Buckskin was strong-armed into signing the . . . RDA [Road Development Agreement]; that it voiced any objection to anyone, at any time, to making the payment required under [the] agreement; or that it did not, as the County avers, benefit from the agreement by virtue of the road improvements facilitated by its payments." *Id*. at 492, 300 P.3d at 24.

White Cloud, 156 Idaho at 82, 320 P.3d. at 1241 (footnote omitted; first two bracketed inserts supplied; third original).

J. *Old Cutters* (2014)

Ketchum's actions in *Black* pale in comparison to the conduct of the City of Hailey in *City of Hailey v. Old Cutters, Inc.*, 2014 WL 1319854 (D. Idaho Mar. 31, 2014) (Lodge, J.) (unpublished), affirming the federal bankruptcy court in *Old Cutters, Inc. v. City of Hailey*, 488 B.R. 130 (Bankr. D. Idaho 2012) (Pappas, J.). Hailey's imposition of an annexation fee of over three million dollars (plus other requirements)—which it sought to collect even after the developer went bankrupt—makes the city the poster child for overreaching by a municipal government.

In this case, a developer sought to be annexed by the city in order to obtain water and sewer service. The city determined to impose annexation fees (as well as affordable housing requirements), which it raised incrementally from $350,000 to $3,787,500.[226] Ultimately, the developer signed an annexation agreement stating it

[226] Based on a prior fiscal study of annexation costs undertaken by the city, the developer estimated that it would be expected to pay about $350,000 as an annexation fee. Instead the city commissioned a new study, which called for an annexation fee of $788,000. Revisions to the study were then undertaken, resulting in a recommended fee of $1,875,920. Another revision by the City

agreed that the fees were "fair and equitable" and "agreed upon as consideration for the City providing essential governmental and utility services." *Old Cutters* at *3.[227] Despite finally agreeing to pay the fee, "Old Cutters repeatedly questioned Hailey's authority to impose an annexation fee in excess of actual costs, and protested Hailey's attempt to do so." *Old Cutters* at *23.

In 2011, the developer filed for bankruptcy. The city filed a claim for the unpaid portion of the annexation fee (over $2,500,000). The developer and another creditor objected to the city's claim, seeking to have it invalidated and also seeking release from the affordable housing obligation. The developer and creditor contended that the entire annexation agreement was an illegal tax and therefore *ultra vires*.[228] (The developer did not seek to recover fees already paid to the city. *Old Cutters* at *18 n.16.)

The district court said the city admitted that the costs of annexation were less than $788,000. *Old Cutters* at *18. The court was also troubled that the city seemed to be double dipping—charging the developer annexation fees for things that the developer would pay for again as a property tax payer.

Given this awkward factual setting, the case boiled down to whether the city had the explicit or implied power to charge fees in excess of its actual costs. *Old Cutters* at *13. Hailey contended that it had such authority under both the Annexation Statute (Idaho Code § 50-222) and the municipal powers statute (Idaho Code § 50-301). Judge Lodge disagreed as to both.

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resulting in the proposed fee being increased to $2,056,427. The developer then offered to pay a flat $2,000,000, although strongly disputing the validity of the city's calculation and objecting, in particular, to the fact that the fee exceeded that actual expenses that the city would incur in connection with the annexation. In a subsequent public hearing, the city council rejected both the developer's offer and the fee proposed by the newest fiscal study. The city determined to initiate negotiations with the developers and agreed that the fee should not be less than $3,000,000. Those negotiations occurred, and the parties agreed on an annexation fee of $3,787,500.

[227] In addition to the annexation fee, the annexation agreement obligated the developer to dedicate 20 percent of its residential lots to affordable housing. The annexation agreement contained a waiver specifically addressing this requirement whereby the developer waived any right to challenge the requirement. The city later repealed its affordable housing ordinance (following adverse litigation in Sun Valley and McCall), but declined to release the developer from the commitment based on the waiver. *Hailey* at *5; *Old Cutters*, 488 B.R. at 137, 157 n.23.

[228] The objectors also challenged the agreement as insufficiently precise under the statute of frauds. That argument failed. *Old Cutters*, 488 B.R. at 140-43. Another side issue involved the statute of limitations, raised as a defense by the city. The bankruptcy court brushed that aside holding that the statute of limitations was not applicable because the contract (or at least the challenged portions) were void *ab initio*. *Old Cutters*, 488 B.R. at 146-48. Although the bankruptcy court cited Idaho precedent, the cases cited do not clearly support such a sweeping exemption. The bankruptcy court elected not to certify these questions to the Idaho Supreme Court. *Old Cutters*, 488 B.R. at 143 n.14.

Section 50-222

Section 50-222 contains a grant of authority to cities to annex land. It says nothing, one way or the other, about annexation fees. Hailey contended that the power to impose annexation fees in excess of actual costs is implied, given that the decision to annex is discretionary. *Old Cutters* at *14.

Based on a "legislative declaration" set out in the act, the court found that cities have the power to charge an annexation fee to "equitably allocate the costs of public services" associated with the annexation. *Old Cutters* at *14-15. But that, said the district court, is the extent of a city's authority to impose annexation fees.

Because the fee charged by Hailey exceeded the incremental cost of service that would be incurred by the city, the district court found that the annexation agreement was *ultra vires* and unenforceable—notwithstanding the fact that that this was a voluntary Class A annexation to which both parties had expressly agreed. *Old Cutters* at *16-17. The court said this was similar to *Black v. Young*, 122 Idaho 302, 834 P.2d 304 (1992) (McDevitt, J.), discussed above, in which another *ultra vires* agreement between a city and a developer was held unenforceable despite the developer's signed estoppel affidavit promising not to challenge the agreement. "Even assuming the annexation fee was freely negotiated, and consent voluntary, this precise theory was advanced by Ketchum and expressly rejected by the Idaho Supreme Court in *Black*." *Old Cutters* at *17. In reaching this conclusion, however, the district court clearly was moved by the city's leveraging of its annexation power at a time of financial difficulty for the developer, noting that the consent may not really have been voluntary at all. *Old Cutters* at *17.

Thus, in both *Black* and *Old Cutters*, the cities undertook action pursuant to a specific statute (vacations and annexation, respectfully) that placed strict limits on their authority to impose other conditions. In that circumstance, placing conditions beyond their authority rendered the action *ultra vires* and invalidated the waiver.

Section 50-301

The *Old Cutters* court then turned to the municipal power authority set out in Idaho Code § 50-301.

> 50-301. CORPORATE AND LOCAL SELF-GOVERNMENT POWERS. Cities governed by this act shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; accept grants-in-aid and gifts of property, both real and personal, in the name of the city; acquire, hold, lease, and convey property, real and personal; have a common seal, which they may change and alter at pleasure; may erect buildings or structures of any kind, needful for the uses or

> purposes of the city; and exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.

Idaho Code § 50-301 (emphasis supplied).

This is the statute that some have suggested established a form of home rule in Idaho (see discussion in section 30.D at page 180.) A review of the briefing, however, shows that the home rule argument was not presented to either the bankruptcy court or the reviewing district court. Instead, the parties and the courts focused on a different part of the statute—the part authorizing cities to "contract and be contracted with." *Old Cutters* at *19.

The district court found that section 50-301 does not expand the limited authority to impose fees found in the Annexation Statute. In other words, the Court said that the statute adds nothing to the city's authority to enter into annexation contracts:

> Although Hailey is empowered to contract and be contracted with under this provision, it may not enter into contracts that are "in conflict with the general laws or the constitution of the state of Idaho." . . .
> Hailey claims . . . the Annexation Statute, I.C. § 50–222, does not conflict with I.C. § 50–301. However, as the court held in *Black*, a city cannot contract for provisions it is not statutorily authorized to impose. As the Bankruptcy Court held, I.C. § 50–222 only authorizes annexation fees to the extent such fees are necessary to equitably allocate costs. Hailey cannot expand this limited authority through its general authority to contract. . . . Because the authority to impose annexation fees in excess of an equitable allocation of costs is not authorized under I.C. § 50–222, Hailey cannot rely upon I.C. § 50–301 as authority for the imposition of such fees.

Old Cutters at *19.

The court seems to read section 50-301 as saying, in essence: "Cities have the power to contract only to the extent that some other statute grants that power."[229] This reading seems to turn section 50-301 on its head. A more natural paraphrasing

[229] Without discussing why, the district court read the final clause of the subsection ("specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho") as applying to the authorization to contract. This is not obvious, as it might be read to apply only to the authority to "exercise all powers" provision.

of Section 50-301 would seem to be: "Cities have the power to contract unless some other law prohibits it." Section 50-222 does not expressly prohibit any contracts. Indeed, elsewhere in the *Old Cutters* opinion, the court noted:

> . . . I.C. § 50–222 is silent as to whether a city may enter into a contractual annexation with a landowner. Assuming a city may do so, the statute is also mum about what terms and performance a city may require from the owner of annexed land within such agreement.

Old Cutters at *14. Thus, the *Old Cutters* court held that the absence of authority in section 50-222 (as it reads that statute) serves as a limit on contracting authority under section 50-301.

Section 67-8214(7)

The federal court (and presumably the parties) did not address another statute that provides authority for cities to impose conditions on annexations.

By its express terms, the various restrictions and requirements relating to impact fees imposed by the Idaho Development Impact Fee Act ("IDIFA") do not apply to applicants for voluntary annexation. Voluntary annexations are typically governed by agreements that addresses the annexation and the initial zoning. IDIFA provides:

> Nothing in this chapter [IDIFA] shall restrict or diminish the power of a governmental entity to annex property into its territorial boundaries or exclude property from its territorial boundaries upon request of a developer or owner, or to impose reasonable conditions thereon, including the recovery of project or system improvement costs required as a result of such voluntary annexation.

Idaho Code § 67-8214(7).

The only restrictions section 67-8214(7) places on conditions to a voluntary annexation are that the conditions must be "reasonable." This includes, but is not limited to, conditions for the recovery of project or system improvement costs. By negative implication, cities have the authority to impose conditions within that broad sweep.

Sprenger Grubb

The *Old Cutters* court also failed to address the holding in *Sprenger, Grubb & Associates v. Hailey* (*"Sprenger Grubb I"*), 127 Idaho 576, 903 P.2d 741 (1995) (Silak, J.), which upheld a development agreement that predated the express authorization for such agreements now contained in Idaho Code § 67-6511A. If

cities have inherent authority to enter into development agreements without more specific legislative authorization, one might think that they have similar authority to enter into annexation agreements.

Buckskin distinguished

After concluding that the city lacked authority to impose far-reaching conditions in the annexation agreement, the *Old Cutters* court turned to *Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 300 P.3d 18 (2013) (J. Jones, J.), which reaffirmed the principle that developers who voluntarily enter into agreements with cities may be held to their bargains. The federal court distinguished *Buckskin* on three bases. First, it noted that in *Buckskin* the county's action in imposing mitigation fees was found to be authorized. Second, in *Buckskin* the developer actually benefited from road construction funded by the fees. Third, in *Buckskin*, the agreement was truly voluntary while here "Old Cutters repeatedly voiced its objections" but ultimately "felt forced to sign." *Old Cutters* at *22.[230]

One might argue that the *Old Cutters* court had to stretch a bit to distinguish the broad holding in *Buckskin* regarding the enforceability of voluntary agreements.[231] The take home message, however, is clear. When governments flagrantly leverage their regulatory power to extort financial contributions that go

[230] The authors suggest that the three *Old Cutters* tests summarized above do not fairly capture Idaho case law on the subject. First, Idaho courts have not held that voluntary agreements are enforceable only when the governmental body has authority to impose the conditions. To the contrary, cases like *KMST* and *Bremer* have held that even an unconstitutional taking in violation Idaho's "illegal tax" prohibition is immune from challenge if the developer has voluntarily agreed to the condition. Similarly, in *Wylie*, the Court ruled that it lacks jurisdiction to hear a challenge to a voluntary agreement, even when it is alleged that it is *ultra vires*. Second, the fact that the developer benefits from the infrastructure that will be funded with the fees was mentioned in *Buckskin* as one factor in determining whether the agreement is voluntary. But it is only a factor. It has not determinative and may be offset by other factors. Third, in *KMST* and *Buckskin*, the Court ruled that even begrudging acquiescence calculated to speed up the permitting process may be deemed voluntary.

[231] As for the first distinction (whether the city was authorized to impose the fees) is like was saying, "You are bound by your contract only if your challenge has no merit. So long as you have a good *ultra vires* argument, you may invalidate a voluntary contract." That would seem to defeat the whole principle of holding parties to their bargains. The *Hailey* court's second distinction (whether the developer benefited from the agreement) suggests that the enforceability of voluntary agreements is not a fixed principle of law but just a case-by-case equitable balancing question. The third principle (whether the agreement was truly voluntary) likewise reinforces the idea this is all about the equities.

well beyond covering reasonable costs of government services, courts will find ways to invalidate those actions.

33. FRANCHISE LAW AND OTHER MUNICIPAL AUTHORITY OVER UTILITIES

The tables below serve as a quick reference to the statutes and constitutional provisions discussed in this section. They are divided into franchise and non-franchise provisions. The non-franchise provisions give cities regulatory authority over utilities that is not based on franchise agreements.

A. Citation tables (statutes and Constitution)

Constitutional provisions referencing franchises	
Citation	**Description**
Idaho Const. art. 15, § 2	Definition of franchise in the context of water providers, coupled with a requirement that such franchises be exercised in accordance with law.
Idaho Const. art. 11, § 8	Makes franchises subject to condemnation.

Precursors to modern franchise statutes (repealed in 1967 by recodification of Title 50)				
Chapter Heading (in 1948)	**Name of Statute (in 1948)**	**Enacted by**	**Idaho Code (prior codification)**	**Idaho Code (current version)**
Commission form of government—Franchises	(multiple)	1911 Idaho Sess. Laws, ch. 82, §§ 52-70	Idaho Code §§ 50-4102 to 50-4125	None (repealed)
Commission form of government—Miscellaneous provisions	Definitions	1911 Idaho Sess. Laws, ch. 82, § 73 (subd. 3)	Idaho Code § 50-4203(3)	None (repealed)
Cities of the first class	(multiple)	1913 Idaho Sess. Laws, ch. 74, §§ 24 (subd. 20) and 25	Idaho Code §§ 50-146 and 50-149	None (repealed)

Current franchise statutes				
Chapter Heading	**Name of Statute**	**Enacted by**	**Amended by**	**Idaho Code (current version)**
"Powers [of Cities]"	"Franchise ordinances -- Regulations"	1967 Idaho Sess. Laws, ch. 429, § 25	1995 Idaho Sess. Laws, ch. 226, § 1	§ 50-329
	"Franchise ordinances – Fees"	1995 Idaho Sess. Laws, ch. 226, § 2	1996 Idaho Sess. Laws, ch. 246, § 1	§ 50-329A
	"Rates of franchise holders – Regulations"	1967 Idaho Sess. Laws, ch. 429, § 26		§ 50-330

Non-franchise-based statutes providing municipal control over utilities						
Chapter Heading	**Name of Statute**	**1887 Rev. Stat.**	**1908 Rev. Codes of Idaho[232]**	**1919 Compiled Stat. of Idaho**	**Idaho Code (prior codification)**	**Idaho Code (current version)**
"Water and Canal Companies"	"Contracts for municipal water supply"	§ 2710	§ 2838	4842	§ 29-801	§ 30-801
	"Fixing water rates" (including free firefighting water)	§ 2711	§ 2839	repealed	none	none
	"Right of way granted"	§ 2712	§ 2840	§ 4843	§ 29-802	§ 30-802
	"Works not to obstruct highways"	§ 2713	§ 2841	§ 4844	§ 29-803	§ 30-803
"Rules and Restrictions Respecting the Use of Highways"	(none)	§ 863	§ 881	§ 1311	§ 40-305 § 39-305	§ 40-2308
Powers [of Cities]	"Utility transmission systems—Regulations"	none	none	none	none	§ 50-328

See footnote 250 on page 293 regarding Idaho Code § 42-1001.

B. What is a franchise?

A franchise is a special privilege bestowed on a person or entity. It has different meanings in different contexts.[233] As used here, the term refers to a unique type of contract between a municipality[234] and a private service provider,[235] authorized by the Idaho Constitution and implemented by the Legislature.

[232] Westlaw incorrectly identifies this as 1909 Rev. Codes of Idaho.

[233] In other contexts, a franchise may refer to a license granted by a corporation to sell a product or service (as in a McDonald's franchise). Franchise may also refer to suffrage—the right to vote. It is used as well in the context of a sports league. It may also describe a group of movies or television productions marketed as a series.

[234] This discussion focuses on franchises granted by cities. Idaho's municipal franchise statutes (Idaho Code §§ 50-329, 50-329A, and 50-330) address only cities. The same is true for the key non-franchise statutes (Idaho Code §§ 30-801, 40-2308, and 50-328). Notwithstanding the absence of express statutory authority, some counties and even highway districts have granted franchises to public utilities. The author was advised by a former chief civil deputy in the Ada County prosecutor's office that decades ago Ada County routinely entered into franchise agreements with utilities that place their infrastructure in county roads. Following the transfer of ownership of those roads to ACHD in 1971, the County Commissioners decided to enter into no more franchise agreements.

[235] Most franchise agreements today are with public utilities. In the early days, franchises were often granted to unregulated companies and even individuals. Even today, some entities (e.g., cable TV companies) are subject to franchise law, but are not regulated by the IPUC. See section 33.D(5)(b)(iii) on page 307.

Technically, a franchise agreement is both an enforceable contract[236] and a property right.[237]

Historically, the core feature of municipal franchise agreements was a grant allowing use of a city's streets by the franchisee to install infrastructure needed to deliver water, power, or other services that could have been provided by the city but is instead provided by the utility. This is reflected in the definition of franchise found in Idaho's first general franchise statute, enacted in 1911: "The word 'franchise' shall include every special privilege in the streets, alleys, highways and public places of the city, whether granted by the State or the city, which does not belong to the citizens generally by common right." 1911 Idaho Sess. Laws, ch. 82, § 73 (subd. 3) (codified until its repeal in 1967 at Idaho Code § 50-4203(3)).[238]

The Idaho Supreme Court provided this brief definition, also focusing on use of city property: "The term 'franchise' has been interpreted to mean a grant of a right to use property over which the granting authority has control." *Alpert v. Boise Water Corp*., 795 P.2d 298, 305 (Idaho 1990) (Boyle, J.) (citing 36 Am. Jur. 2d, *Franchises* § 1, which is quoted above).

The features of a franchise, including the use of city property, are summarized in the *American Jurisprudence* encyclopedia:

> The term "franchise" designates a right or privilege conferred by law for the provision of some public purpose or service, which cannot be exercised without the express permission of the sovereign power ….
>
> Franchises have been created when a governmental agency authorizes private companies to set up their infrastructures on public property in order to provide public utilities to the public; i.e., when railroad,

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[236] "Courts have repeatedly recognized that since a franchise is a contract between a government body and a private entity, it is binding upon the parties, enforceable and entitled to the respect a court must give all valid contracts." *Alpert v. Boise Water Corp*., 795 P.2d 298, 306 (Idaho 1990) (Boyle, J.) (emphasis added).

[237] "As a rule, franchises spring from contracts made between the sovereign power and private citizens, for a valuable consideration, for the purposes of individual advantage as well as public benefit. . . . Once granted, however, it becomes the property of the grantee . . . ." 36 Am. Jur. 2d *Franchises from Public Entities* § 4 (May 2023). The fact that a franchise is a property right is reflected also in Idaho's constitutional provision authorizing the condemnation of franchises. See footnote 246 on page 290.

[238] This definition did not survive the recodification of the municipal statutes in 1967. 1967 Idaho Sess. Laws, ch. 429. Today's franchise statutes do not include any definition of the word franchise.

> gas, water, telephone, or electric companies set up tracks, pipes, poles, etc. across the streets and other public ways of a city.

36 Am. Jur. 2d *Franchises from Public Entities* § 1 (May 2023).

In addition to authorizing the franchisee to install its infrastructure in city property, franchise agreements typically, but not necessarily, grant exclusive business rights (a monopoly) to the franchisee. Specifically, the franchise may include guarantees by the municipality that it will not (1) grant a franchise to a rival company for the same service area and/or (2) enter into competition itself.

C. The franchise system is unnecessary and anachronistic, especially in Ada County

Although the franchise concept is deeply rooted in history and practice, it is also outdated. It is premised on the antiquated idea that cities must have the power to regulate the operation of utilities within their boundaries and to grant monopoly power because, if they don't, no one will control abuses by these companies.[239] That premise has long since been supplanted by the regulatory control of the Idaho Public Utilities Commission ("IPUC") in 1913,[240] which is far better suited to the task.

In the case of Ada County, the idea of municipal franchise authority is uniquely obsolete due to the fact that, since 1971, cities in Ada County no longer own and control their streets. (See footnote 292 on page 313.) That said, cities and utilities, even in Ada County, still have the power to enter into franchise agreements with each other if they so choose. *Alpert v. Boise Water Corp.*, 795 P.2d 298 (Idaho 1990) (Boyle, J.). Whether cities have the power to demand that utilities enter into such contracts with them is a different question. See discussion in section 33.G ("Utilities are not obligated to enter into franchise agreements.") on page 315.

Even for Idaho cities that control their own streets (the case everywhere but Ada County), there is no real need for a franchise agreement in order to address use of a city's streets by a utility. Governmental entities routinely grant licenses and easements for that purpose. And they may charge fees incidental to such agreements

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[239] The early statutes granted to cities broad regulatory control over utilities. For example, the 1887 and 1913 statutes authorized cities to set rates charged to customers. 1887 Rev. Stat. of Idaho Terr. § 2711; 1913 Idaho Sess. Laws, ch. 74, § 24 (subd. 20). Those have been repealed, but cities retain authority to regulate service providers that are not subject to IPUC regulation (Idaho Code § 50-330). See Professor Colson's explanation of the historical origins of the constitutional provisions in section 33.D(2) on page 290.

[240] "The public utilities commission was created by act of the legislature in 1913. 1913, S.L. Chap. 61. By that act such powers as municipalities may have had to control and regulate public utilities was withdrawn and transferred to the commission." *Village of Lapwai v. Alligier*, 299 P.2d 475, 478 (Idaho 1956) (Taylor, C.J.).

to the extent the fee reflects regulatory or administrative costs actually incurred by the municipality.

As noted above, a franchise may also include a promise by the city that it will not (1) grant a franchise to a rival company and/or (2) enter into competition itself (which may or may not include an express or implied promise not to condemn the utility). The former was once important,[241] but is now a pointless anachronism in the case of a utility regulated by the IPUC (which will see to it that service areas do not overlap). Thus, the only meaningful promise a municipality can make to a franchisee is to avoid competing itself with the utility. In the early days, that was a real issue.[242] It is less so today, particularly for large utilities whose service areas cover more than

[241] An MIT article describes the ferocious fight between early companies seeking to provide municipal water to the City of Boise.

> The Boise Warm Springs Water District was born out of an intense competition for a local contract to provide public water to Boise that began in 1890. In 1890 the owners of the Overland Hotel in Boise were granted permission by the city to provide a public water system by expanding the hotel's system. They incorporated as the Boise Water Works but there was competition for the local contract from the Artesian Water and Land Improvement Company. Descriptions of the competition recall images of the Wild West, "It was reported in March 1891, in the Idaho Statesman, that 'hatred and strife' were rampant in Boise as a result of the battle between the two companies for customers" (Rafferty 1992, 1).

Boise's Geothermal District Heating System (MIT, 2009 student paper, 2009) (http://web.mit.edu/nature/archive/student_projects/2009/bjorn627/TheGeothermalCity/Boise.html. The contest between these early entities, leading to the formation of Boise Artesian Hot & Cold Water Co., is described briefly by the U.S. Supreme Court in *Boise Artesian Hot & Cold Water Co. v. Boise City* ("*Artesian III*"), 230 U.S. 84, 87 (1913) (Lurton, J.) (discussed in section 33.D(4) on page 293).

[242] For example, as described in *Denman v. Idaho Falls*, 4 P.2d 361 (Idaho 1931) (Budge, J.), the City of Idaho Falls drove out of business a private natural gas company that was competing with the city's own electric utility, both of which sought to provide power for stoves and furnaces.

Another stark example is found in *Village of Lapwai v. Alligier*, 299 P.2d 475 (Idaho 1956) (Taylor, C.J.). In this case, the village authorized private persons (the Alligers and their predecessor) to develop a municipal water supply, which they operated for many decades. Then, in 1953, sometime after the franchise had expired, the village adopted an ordinance requiring the water provider to cease operations and to remove all pipe and apparatus from city property. The water provider countered, contending the ordinance constituted an uncompensated taking. The Court sided with the village, holding that its control over city streets and its right to withdraw consent to their use (after the expiration of the franchise) was undiminished by the creation of the public utilities commission. Nor was the village obligated to seek permission of the IPUC to do so. *Village of Lapwai* at 478. (There was some question as to whether the original permission constituted a franchise or a license, but the Court said that did not matter. *Village of Lapwai* at 478.)

one municipality. As a financial, practical, and legal matter, utilities serving large geographic areas cannot realistically be taken over by an individual city.[243]

Today, it seems the main purpose of franchises is to serve as a hidden tax, collected by the utility and transferred to the municipality. Idaho cities are authorized to tack on a franchise fee of up to 3% of the utility's gross revenue. (See section 33.D(5)(b)(ii) on page 305.) This is convenient for the cities because they do not have to collect the fee and, accordingly, are insulated from public scrutiny and accountability for how the money is spent.[244] Meanwhile, utilities have little incentive to resist the imposition of these fees because the IPUC allows that cost to be passed through to the customer. See section 33.F on page 315.

D. Authority for cities to grant franchises, collect franchise fees, and otherwise regulate utilities

(1) Overview

The authority of cities to issue franchises and otherwise control utilities that provide services within the city comes in four forms.

1. There is a constitutional provision addressing franchises (which is limited to water providers). See section 33.D(2) on page 290.
2. There is early case law (probably now obsolete) describing an implied authority of cities to grant franchises. See section 33.D(3) on page 293.
3. There are statutes expressly authorizing cities to enter into franchise agreements. See section 33.D(5) on page 302.
4. There are statutes not involving franchises that authorize some municipal control over utilities operating within the city. See section 33.D(4) on page 293.

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[243] As a practical matter, a city cannot condemn just the part of a multi-city utility that serves the condemning city. For example, when a water diversion facility and treatment plant serve a large geographic area, a city cannot condemn just a portion of the facility. These are integrated facilities, not components that could be separated into those serving one area or another. If the city condemned the entire delivery system, it would place itself in the politically untenable position of becoming the water provider to neighboring cities. In any event, cities have no authority to condemn outside of their boundaries. In *Alliance for Property Rights and Fiscal Responsibility v. City of Idaho F*alls, 742 F.3d 1100 (9th Cir. 2013) (N.R. Smith, J.), the Ninth Circuit, applying Idaho law, ruled that Idaho cities have no general, extra-territorial power of eminent domain under Idaho's eminent domain statute, Idaho Code §§ 7-701 to 7-721 or Idaho's Revenue Bond Act, Idaho Code §§ 50-1027 to 50-1042. The decision relied substantially on the Dillon's rule concept embodied in *Caesar v. State*, 610 P.2d 517 (Idaho 1980) (Donaldson, C.J.).

[244] In the *Alpert* case, the Idaho Supreme Court found this practice to be lawful. See discussion in section 33.E(2) ("Franchise fees held not to be illegal taxes.") on page 309.

Today's statutes authorize and control the issuance of franchises and provide other regulatory control over utilities. None of them makes obtaining a franchise or other consent a legal prerequisite in order for a utility to serve customers within a city, unless the utility requires use of city streets or other city property. Utilities operating in Ada County (where cities do not control their streets) need not obtain a franchise or other consent if they are willing to forego the benefits of such an agreement, unless they need to lay new infrastructure in other city property. Where utilities need access to city property, the franchise and consent statutes give cities the ability to set the terms for franchises or other consents and force utilities to accept those terms. But there is no obligation for cities to exercise that leverage. Indeed, some cities elect not to require franchise agreements.[245] In any event, there is a limit to what cities can exact in return for a franchise or other consent. Franchise fees cannot exceed 1% without the agreement of the utility. See section 33.D(5)(b)(ii) on page 305. Arguably, a city may not impose requirements on a utility that are unrelated to the sound and safe provision of services or are otherwise unreasonable.

(2) Constitutional provision addressing franchises granted to water providers

Article 15 of Idaho's Constitution, adopted in 1889, addresses water rights, water providers, and the prior appropriation doctrine.[246] It is curious that an article of the Constitution dealing with water rights contains a reference to franchises, but there it is. Section two of this article sets out a definition of a franchise (for water service) coupled with a requirement that any such franchise be exercised in accordance with law:

> **Right to collect rates a franchise.**—The right to collect rates or compensation for the use of water supplied to any county, city, or town or water district, or

[245] Not all cities require franchise agreements. For example, Veolia has franchise agreements with the cities of Boise and Eagle, but not with Meridian, all of which it serves at least in part.

[246] The only other constitutional provision dealing with franchises is one dealing with the right to condemn a franchise. It declares that franchises are subject to condemnation:

> The right of eminent domain shall never be abridged, nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals; and the police powers of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the state.

Idaho Const. art. 11, § 8 (emphasis supplied). This provision is odd in that it authorizes the Legislature to condemn a franchise held by a private party. Ordinarily, the Legislature itself does not engage in condemnation.

> the inhabitants thereof, is a franchise, and can not be exercised except by authority of and in the manner prescribed by law.

Idaho Const. art. 15, § 2 (emphasis supplied).

This article spells out no substantive law respecting franchises. Rather, it authorizes the Legislature to regulate franchises granted to private municipal water providers. A decision of the Idaho Supreme Court just five years after statehood confirmed that the constitutional provision is merely descriptive of what a franchise is and contains no mandate or prohibition:

> This section simply announces a general principle, and the first clause amounts only to a definition; that is, that the right to collect rates, etc., for water supplied to any county, city, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except in the manner prescribed by law. . . . In our view of it, this section is not prohibitory at all. It is, as said above, simply a definition.

City of Boise City v. Artesian Hot & Cold Water Co. ("*Artesian I*"), 39 P. 562, 563 (Idaho 1895) (Morgan, C.J.) (emphasis added) (modified on rehearing to address a procedural technicality, *City of Boise City v. Artesian Hot & Cold Water Co.* ("*Artesian II*"), 39 P. 566 (Idaho 1895)). *Artesian I* and related cases are discussed in section 33.D(4) which begins on page 293.

This constitutional reference to franchises should be read in context, which underscores its limited modern applicability. It appears in Article 15 of the Constitution dealing with water rights. It was copied word-for-word (except for the addition of "water district") from article X, section 6 of California's Constitution of 1879.[247] Its purpose in the Idaho Constitution was explained by Professor Colson of the University of Idaho Law School, a noted scholar on the subject:

> There are three important chapters in this story. The first chapter is the 1889 Convention, during which the Idaho Constitution was drafted. The principal challenge to irrigation farmers at the time of the Convention were the privately owned ditch companies appropriating water for resale and distribution to settlers.

[247] This constitutional language was not the only thing borrowed from California. In *Jack v. Village of Grangeville*, 9 Idaho 291, 74 P. 969, 973 (1903) (Sullivan, C.J.), the Court noted that the 1887 statute dealing with franchises (see section 33.D(4) on page 293) was lifted directly from California statutes enacted in 1852. This was noted again by the U.S. Supreme Court in *Boise Artesian Hot & Cold Water Co. v. Boise City* ("*Artesian III*"), 230 U.S. 84, 94 (1913) (Lurton, J.).

> All six sections of Article XV adopted at the Convention were designed to defeat the challenge by the ditch companies. Waters appropriated by the ditch companies were declared to be a public use, the sale of those waters was a franchise subject to state regulation, and irrigation was declared the exclusive use for those waters. Domestic and agricultural uses were given a preference over prior appropriators.

Dennis C. Colson, *Water Rights in the Idaho Constitution*, 53 Advocate 20, 20 (Dec. 2010) (emphasis added).

In other words, the purpose of the franchise provision was to subject private water providers to such regulation as the Legislature might deem appropriate. Today, that regulation comes primarily in the form of utility regulation. See Idaho Code § 61-526, which requires that a water utility submit to the jurisdiction of the IPUC and be certified before beginning construction or extending its operation.

Professor Colson concluded:

> The Ditch Companies which so dominated the development of water resources at the time of the 1889 Convention were burdened heavily by the Water Article incorporated into the Constitution. The companies were further damaged in the financial crash of 1893, and disappeared from Idaho shortly after the turn of the century. This, in turn, rendered much of the language in Article XV dead letter.

Dennis C. Colson, *Water Rights in the Idaho Constitution*, 53 Advocate 20, 21 (Dec. 2010) (footnote omitted) (brackets original).[248]

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[248] The term "Ditch Companies" used by Professor Colson is a term of art. This *Handbook* and the *Idaho Water Law Handbook* use the term "commercial water companies." Others employ the terms commercial irrigation companies, commercial ditch companies, or carrier ditch companies. They all refer to the same thing: private, for profit companies in the water delivery business. These are in contrast to mutual irrigation companies, irrigation districts, and other non-profit water providers. See *Idaho Water Law Handbook* (chapter on Water Delivery and Management Entities) for a discussion of the law and history of commercial water companies.)

In the early days of Idaho's settlement, commercial water companies were very common. Few remain. "The commercial ditch company's heyday was in the 1880's; almost none persist today." *Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc.*, 447 P.3d 915, 922 (Idaho 2019) (Burdick, C.J.).

To the author's knowledge, the only large private commercial water companies operating in Idaho today are Veolia and PacifiCorp. Based on IPUC filings, it appears that another 20 small commercial water companies (such as Capitol Water Corporation in Boise) provide municipal water to much smaller service areas. All of these are utilities regulated by the IPUC. Veolia and Capitol

In any event, the effect of the constitutional provision on the few for-profit, commercial water companies in operation today is inconsequential. The Constitution authorizes cities to enter into franchise agreements and makes those agreements subject to legislative control, but it sets out no substantive law or obligation.

(3) Implied authority to award franchises (based on city's right to provide services itself)

Before the enactment of Idaho's general franchise statutes in 1911 and 1913 (see footnote 275 on page 303), the Idaho Supreme Court recognized the implicit authority of cities to enter into franchise agreements based on a city's authority to establish its own municipal water system.[249] "Where a city or village is given power to establish a water system of its own, it would seem that it has power to contract with others for the establishment of a water system, or to buy water for fire and other village necessities." *Jack v. Village of Grangeville*, 9 Idaho 291, 74 P. 969, 974 (1903) (Sullivan, C.J.).

Presumably, the implied authority found by the Court in 1903 has been preempted and replaced by subsequent statutes, beginning in 1911, that explicitly provide general franchise authority.

(4) Statutory authority for non-franchise-based regulation of utilities by cities (Idaho Code §§ 30-801, 30-802, 30-803, 40-2308, and 50-328).

This section addresses six non-franchise statutes, five of which remain on the books. See citation table on page 285.

In addition to these statutes applicable to cities, there is an arcane and presumably no longer operative statute authorizing counties to set water rates.[250]

Water Corporation are municipal water providers serving the Boise area. PacifiCorp is an electric power company that also provides irrigation water, but no municipal water.

[249] Cities are authorized to operate their own utility systems for water, power, light, gas, and other services. Idaho Code §§ 50-323, 50-324, 50-325, and 50-326.

[250] Chapter 10 of Idaho's Water Code (Idaho Code §§ 42-1001 to 42-1005) is entitled "Fixing Water Rates." The first of them authorizes Idaho counties to set rates for "parties interested in either furnishing or delivering for compensation … water for irrigation or other beneficial purpose." Idaho Code § 42-1001. These statutes were enacted in 1899 and have never been amended or repealed. 1899 Idaho Sess. Laws (aka Gen. Laws), pp. 380-87, § 26. One presumes that this statutory dinosaur was implicitly preempted by the establishment of IPUC authority in 1913 and is a dead letter today. The only reported cases addressing the statute (*Jackson v. Indian Creek Reservoir Ditch & Irrigation Co.*, 16 Idaho 430, 101 P. 814 (1909) and *Green v. Jones*, 22 Idaho 560, 126 P. 1051 (1912)) predate the IPUC. One may only wonder why this statute was not repealed after 1913.

(a) Overview

In 1887, the Territorial Legislature enacted four statutes under the heading "Water and Canal Corporations" dealing with water supplied to Idaho cities.[251] The first, third, and fourth remain on the books as Idaho Code §§ 30-801, 30-802, and 30-803. The second was repealed sometime between 1908 and 1919.

The first two (Idaho Rev. Stat. §§ 2710 and 2711) are precursors to water utility regulation borrowed nearly verbatim from California statutes enacted in 1852.[252] The latter two are grants of authority to utilities to use city streets and county roads for their infrastructure, subject to reasonable regulation. Of these four 1887 statutes, only the first is relevant to the discussion here. It now codified under the Corporations title as Idaho Code § 30-801. It is discussed in section 33.D(4)(b) on page 296.

In the same year, 1887, the Territorial Legislature enacted a statute addressing the use of city streets by gas, water, and railroad companies.[253] It is now codified under the Highways and Bridges title as Idaho Code § 40-2308. It is discussed in section 33.D(4)(c) on page 300

The only other non-franchise-based statute that authorizes city regulation of utilities is Idaho Code § 50-238, enacted in 1967.[254] It is discussed in section 33.D(4)(d) on page 301.

Of the six non-franchise statutes, three require utilities to obtain some form of consent or permission from a city in order to provide service to customers within the

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Curiously, this 1899 statute existed at the same time as the 1887 statute giving cities authority to set rates for municipal water companies. 1887 Idaho Rev. Stat. § 2711 (municipal water rates to be set by a commission composed of city and water company representatives). Unlike the 1899 statute, the 1887 statute was repealed. The 1887 statute survived until at least 1908. (It appears in 1908 Idaho Rev. Codes § 2839.) It was repealed sometime before 1919. (It does not appear in the next recodification in 1919.) Thus, its repeal appears to coincide with the creation of the IPUC in 1913. However, from 1899 to at least 1908, two conflicting statutes gave both cities and counties control over water rates.

[251] 1887 Rev. Stat. of Idaho Terr. §§ 2710, 2711, 2712, and 2713 (June 1, 1887).

[252] These 1887 Idaho territorial statutes were based on 1852 Cal. Stats., p. 171 (May 3, 1852). "Said sections 2710 and 2711 were adopted literally from the statutes of California, which California statutes were enacted in May, 1852." *Jack v. Village of Grangeville*, 9 Idaho 291, 74 P. 969, 973 (Idaho 1903) (Sullivan, C.J.). *Jack*, in turn, cites *Santa Ana Water Co. v. Town of Buenaventura*, 56 F. 339, 348-49 (S.D. Cal. 1893), which interpreted these California statutes.

[253] 1887 Rev. Stat. of Idaho Terr. § 863 (June 1, 1887). It was later codified at 1908 Rev. Codes of Idaho, § 881. Following the complete revision of Title 40 (dealing with public roads) in 1985, the statute has remained on the books in slightly amended form as Idaho Code § 40-2308.

[254] Idaho Code § 50-328 was enacted as 1967 Idaho Sess. Laws, ch. 439, § 50.

city or to lay infrastructure in city streets or other property: Idaho Code §§ 30-801, 40-2308, and 50-328. They are discussed in turn in the following sections.

Of the remaining three non-franchise statutes, one has been repealed and two contain no mandate that utilities obtain permission of cities. They are discussed in the bullet points below.

- Section 2711 of the 1887 statute was a broad grant of control over utilities, including a much-litigated provision requiring utilities to provide free water for firefighting.[255] It is no longer on the books.[256]

- Section 2712 of the 1887 statute (now Idaho Code § 30-802) is a broad grant of right-of-way to water companies, authorizing them to place their pipes in city streets and county roads, so long as they abide by "reasonable rules and directions" of the local government.[257] The statute applies only to streets, alleys, ways, and public roads; it does not apply to the use of other municipal property. The statute gives some regulatory control to local governments over the "mode and manner" of using the right-of-way. Importantly, it gives them no veto power or ability to impose fees or extract concessions. Thus, it cannot be used as leverage by a city to compel a utility to enter into a franchise agreement or to make other concessions. Moreover, it no longer has any applicability to cities in Ada County (which do not own their streets).

- Section 2713 of the 1887 statute (now Idaho Code § 30-803) is a single sentence requiring that waterworks not obstruct public highways.[258] It

[255] The second (originally 1887 Rev. Stat. § 2711) provided detailed mechanisms for setting rates. It also mandated that private municipal water corporations furnish water for firefighting free of charge—giving rise to litigation.

[256] Section 2711 was amended in 1905 to eliminate the free firefighting water provisions. It was repealed altogether sometime between the codifications of 1908 and 1919.

[257] It reads in full today: "Any corporation created under the provisions of this title for the purposes named in this chapter, subject to the reasonable rules and directions of the city or town authorities as to the mode or manner of using such right of way within the city or town, and subject to the reasonable rules and directions of the board of county commissioners as to the mode and manner of using any right of way outside the corporate limits of such city or town, may use so much of the streets, alleys and ways in any city or town, or the public roads and highways within the county, as may be necessary for the laying of pipes for conducting water to its consumers, or the building and maintaining of ditches, canals, pipes, flumes and aqueducts in conducting water from outside points to the corporate limits of said city or town." Idaho Code § 30-802 (first enacted as 1887 Rev. Stat. § 2712, with minor amendments thereafter).

[258] It reads in full today: "All waterworks must be so laid and constructed as not to obstruct public highways." Idaho Code § 30-803 (first enacted as 1887 Rev. Stat. § 2713, substantially amended thereafter).

does not provide any regulatory or other governmental control over municipal water providers.

(b) Idaho Code § 30-801 (consent required to supply water)

The first of the 1887 statutes listed above (1887 Rev. Stat. § 2710) is now codified at Idaho Code § 30-801. (Title 30 is the Corporation Title.) As explained below, section 30-801 is an anachronism that has been implicitly preempted by more recent and specific statutes governing municipal water providers and by Idaho Code § 50-330. To the extent it has ongoing vitality, compliance with section 30-801 may come in a variety of ways. See discussion of Boise's "designated water provider" certification below.

The statute reads in full today:

> No corporation formed to supply any city or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but an exclusive right must not be granted. No contract or grant must be made for a term exceeding fifty (50) years.

Idaho Code § 30-801 (nearly identical to 1887 Rev. Stat. § 2710) (emphasis added).

At the outset, it should be noted that section 30-801 and the other 1887 statutes are not franchise statutes.[259] Thus, the permission contemplated by the statute need not come in the form of a franchise.

[259] Idaho Code § 30-801 is entitled "Contracts for municipal water supply." The word franchise appears nowhere in it nor in any of the 1887 statutes. Moreover, although not codified until later, it was eventually codified in Title 30 (dealing with corporations), not title 50 (dealing with the regulatory powers of municipalities). The fact that section 30-801 is not a franchise statute is reinforced by its provision that "an exclusive right must not be granted." Franchises, in contrast, typically are exclusive grants of authority. In addition, the franchise statute (Idaho Code § 50-329), authorizes franchises in excess of 50 years when agreed to by the franchisee. Finally, the conclusion that this is not a franchise statute is confirmed by the Court in *Boise Artesian Hot & Cold Water Co. v. Boise City* ("*Artesian III*"), 230 U.S. 84 (1913) (Lurton, J.), discussed further below. In the context of a discussion of 1887 Rev. Stat. §§ 2710 (now Idaho Code § 30-801), the Court held that Boise City "could not grant a corporate franchise to a water company." *Artesian III* at 91. (Although the appellate decision came down after 1911, *Artesian III* addressed an ordinance adopted in 1889 and a license fee imposed by the city in 1906.) Rather, the Court said, the City acted under authority of section 2710 to adopt an ordinance granting "the right to lay water pipes upon the streets for the purpose of distributing water" which constituted "a contract granting an easement." *Artesian*

On its face, the statute requires that private municipal water providers obtain some form of permission from the city before providing water to that city (and presumably to the city's inhabitants[260]). The Court said as much in 1895. "[T]his statute (section 2710) standing at the head of the chapter … absolutely forbids this corporation or any corporation to furnish any water to the city, either free or for a compensation, unless said corporation is previously authorized to do so by ordinance or by contract entered into between the corporation and the city." *City of Boise City v. Artesian Hot & Cold Water Corp*. ("*Artesian I*"), 39 P. 562, 563, (Idaho 1895) (Morgan, C.J.) (modified on rehearing to address a procedural technicality dealing with how the case would be handled on remand, 39 P. 566 (Idaho 1895)).[261] The water company, by the way, is not the same as Boise Water Corporation.[262]

The requirement in section 30-801 that water companies secure city approval before serving customers, although written as an absolute requirement, does not mean that a city may exercise its approval authority arbitrarily, i.e., for purposes of leverage or coercion unrelated to the safe and sound delivery of water within the city. The statute should be read in context with the following section (section 30-802). The latter is a remarkably broad grant of right of way allowing private water

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III at 90 and 91. In other words, the 1887 statute authorizes contracts for easements to city property, not franchise agreements.

[260] It may be that the statute means what it says and applies only to the provision of water to the city itself. The cases discussed in this section all arose in the context of water companies providing water to the City of Boise for firefighting purposes. Read in context with Idaho Code § 30-802, however, it appears likely that the municipal approval is required even if water is not provided directly to the city itself, but only to residents of the city.

[261] In *Artesian I*, a private water provider provided municipal water to the City of Boise and some of its residents. Initially, Boise paid the company for water used in its fire hydrants. After a few years, the city demanded that the water be provided for free. In response, the water company threatened to disconnect its pipes from the city's fire hydrants. The city brought suit seeking injunctive relief. In dictum, the Court upheld the constitutionality of the "free water" requirement, but threw out the City's complaint on procedural grounds. As discussed in section 33.D on page 289, the Court also commented on the meaning of the constitutional provision authorizing franchises for water service (noting that it is definitional, not prohibitory). The water company won on a technicality—bad pleading by the city. The company demurred to the complaint noting that the city failed to document the existence of any ordinance or contract authorizing the company to provide municipal water to Boise. *Artesian I* at 563 ("the plaintiff has not alleged that said company is authorized to furnish water at all"). The fact that such an agreement existed was not doubted, but the Court felt it necessary to see the agreement. *Artesian I* at 563 ("we think the court should know the exact condition of things between the city and water company, as there may be a contract or ordinance which would affect the character of the decree the court would be authorized to render").

[262] The Artesian Hot & Cold Water Co. (referred to in a subsequent case as Boise Artesian Hot & Cold Water Co.) is not the same as the Boise Water Corporation, a predecessor of Veolia. According to *Wikipedia*, the company's original geothermal wells are now managed by the Boise Warm Springs Water District. Further historical background is provided in an MIT paper: http://web.mit.edu/nature/archive/student_projects/2009/bjorn627/TheGeothermalCity/Boise.html.

companies to install their infrastructure under city and county streets. That sweeping grant is coupled with a burden. It subjects water companies to "reasonable rules and directions of the city." Read together, these statutes require a water company to submit to the reasonable regulatory requirements of the city before laying pipe in city streets or serving the city or its inhabitants with water. They do not give the city veto power over who may provide municipal water, so long as the water company meets reasonable requirements relating to public safety and the like.

The limited purpose of the 1887 statutes—requiring that private companies subject themselves to reasonable municipal requirements before placing their infrastructure within city property—is reinforced by the historical context of the statute. There was no public utilities commission until 1913 and, hence, no regulation of water utilities. It was the wild west, and these statutes filled that regulatory void as best they could by giving cities and towns authority to regulate water companies serving their citizens.

These statutes derived from a body of law crafted in gold-rush California and borrowed by Idaho's Framers to provide regulatory control over corporations that appropriate water not for their own use but for resale and distribution to early settlers. (The California roots are addressed in section 33.G on page 315.) See *Bothwell v. Consumers' Co*., 92 P. 533 (Idaho 1907) (Alshie, C.J.) and *Hatch v. Consumers' Co.*, 104 P. 670 (Idaho 1909) (Alshie, J.). In both cases the Court used these 1887 statutes to address rates charged by the water company. As Professor Colson said with respect to the corresponding constitutional provisions, this pre-IPUC regulatory framework has been rendered a dead letter (see section 33.D(5) beginning on page 302).

Only three cases have mentioned 1887 Rev. Stat. § 2710 (the predecessor to Idaho Code § 30-801). All of them are over 100 years old. In addition to *Artesian I*, discussed above, section 2710 was addressed in *Jack v. Village of Grangeville*, 9 Idaho 291, 74 P. 969, 974 (1903) (Sullivan, C.J.)[263] and *Boise Artesian Hot & Cold*

[263] In *Jack*, the Court recited the text of the first three sections of the 1887 statute, but the decision addressed only section 2711, the same "free water" provision discussed in *Artesian I* and *Artesian III*. Prior to 1898 the Village of Grangeville had no municipal water and consequently suffered from devastating fires and outbreaks of contagious disease. *Jack* at 969. In 1898, the village enacted authorizing ordinances and entered into a contract with Mr. Jack's predecessors for the provision of water to the city. The first ordinance authorized Messrs. Orchard and Graham to construct and operate the waterworks and to occupy the village's streets for a period of 30 years. The ordinance set the rates that could be charged to customers. It expressly provided that the rights given to Orchard and Graham were not exclusive. *Jack* at 970. The ordinance granted to the village an option to purchase the completed waterworks after ten years of operation at a price set by a formula in the ordinance. *Id*. The second ordinance was essentially a 30-year contract for the delivery of water to the village for firefighting. It also specified various conditions to be met by the waterworks in order that it may provide a water supply for up to 3,000 inhabitants. *Jack* at 970-71. The waterworks were constructed and everything went swimmingly until the Village elected new

Water Co. v. Boise City ("*Artesian III*"), 230 U.S. 84 (1913) (Lurton, J.).[264] In each case, the focus was on section 2711, not section 2710. Section 2711 (which required companies to provide free water for firefighting) no longer exists.

In sum, it is a curiosity that section 2710 (now Idaho Code § 30-801) remains on the books. The core function of these four 1887 statutes was to provide a primitive form of regulation of private water providers that was borrowed from pre-Civil War California statutes before the creation of Idaho's public utility commission in 1913[265] and before the first general franchising statutes were enacted in 1911.[266] That purpose has been supplanted by modern public utility statutes[267] which give the IPUC, not cities, authority to decide which companies will provide service to city residents. Accordingly, sections 30-801 and 30-802, should be read together, subjecting water companies to "reasonable rules and directions" necessary to protect the city's interests, not to IPUC-like control over and supervision of service providers.

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commissioners in 1902. They announced that the village would make no further payments to Mr. Jack for water used in its fire hydrants because the village was entitled to such water free of charge under section 2711. *Jack* at 972. Jack sued the city to recover $249.99 for hydrant water. The Court ruled in his favor, noting that the 1877 statutes requiring free water apply only to corporations, not to natural persons. *Jack* at 973. The Court never addressed the meaning or effect of section 2710.

[264] *Artesian III* was a decision of the U.S. Supreme Court. (The case reached the U.S. Supreme Court via an old statute granting direct appeal to that Court in cases alleging violation of the U.S. Constitution by a state statute. *Artesian III* at 90.) It addressed the "free water" statute (section 2711)—which continued to be a source of quarreling ever since *Artesian I*. In May 1906, Boise notified Artesian that it would no longer pay for water supplied to its fire hydrants. The next month, it adopted an ordinance requiring the water company to pay the city a "license fee" of $300/month for the use of its streets. *Artesian III* at 88, 92 . The Supreme Court held that the new license fee was in derogation of the license granted to the water company's predecessors in 1889, which was a substantial property right and not a mere revocable license. The Court also held that the 1889 license, if subject to section 2710, did not violate that statute's 50-year limit because it was of indefinite duration. *Artesian III* at 92. The Court then turned to the "free water" provision in section 2711. Here, Boise City had put itself in an awkward position. It notified Artesian that the city no longer needed water for firefighting, yet it continued to use water for that purpose. In response to the city's argument that its notice meant that Artesian had lost any contract right to be paid for firefighting water, the Court found the city's continued use of the water constituted an implied contract. Notably, the Court did not mention there being a need for a contract under section 2710. *Artesian* at 97. This was addressed purely as a matter of contract law, not a statutory obligation to secure a contract. The Court also observed that, in any event, the Legislature repealed the "free water" provision in 1905. *Artesian* at 93.

[265] See footnote 252 on page 294.

[266] See footnote 275 on page 303.

[267] As for companies that provide services not regulated by the IPUC, cities retain broad authority to regulate their rates pursuant to their franchise authority. Idaho Code § 50-330 (discussed in section 33.D(5)(b)(iii) on page 307).

It bears emphasis that, whatever the 1887 statutes do, they do not mandate franchise agreements. To the extent section 30-801 has not been implicitly preempted by more recent and specific statutes governing municipal water providers and by Idaho Code § 50-330, compliance with section 30-801 may come in a variety of ways. For example, the consent requirement may be met by being certified by a city as a Designated Water Provider (see discussion in 33.G(4)(b) on page 319).

(c) Idaho Code § 30-2308 (consent required to lay infrastructure in city streets and squares)

The last of the five 1887 statutes listed above (now Idaho Code § 40-2308) reads in full today:

> Every gas, water, or railroad corporation has the power to lay conductors and tracks through the public ways and squares in any city with the consent of the city authorities, and under reasonable regulations and for just compensation, as the city authorities and the law prescribe.

Idaho Code § 40-2308 (nearly identical to 1887 Rev. Stat. § 863).

In the words of the statute itself, consent is required only to "lay conductors and tracks through the public ways and squares in any city." Two important points flow:

First, the statute applies only to new infrastructure at the time it is laid (placed) in city streets. If a city consented or acquiesced at the time the infrastructure was laid, it has no power under the statute to bar the ongoing use of that infrastructure by the utility.

Second, in Ada County, where cities no longer own or control city streets, no consent is required at all unless new infrastructure is to be laid on the city's public squares (i.e., parks).[268]

Three cases have addressed section 40-2308. They offer nothing to change the conclusion laid out above.

- The first was *Trueman v. Village of St. Maries*, 123 P. 508 (Idaho 1912). The case was brought by two businessmen who sought damages

[268] The words of the section 40-2308 refer to "the public ways and squares in any city." Ada County cities might contend that the consent requirement still applies because the streets are still public ways even though owned by ACHD. However, it seems unlikely that a court would deem a consent and just compensation requirement applicable to something the city no longer owns. No compensation would be just, and withholding consent for use of something the city does not own or control would be difficult to justify.

against St. Maries when the village vacated a street and granted a franchise and right-of-way to a railroad company. The predecessor of Idaho Code § 40-2308 (1908 Rev. Codes of Idaho § 881) was identified as one of several bases justifying the city's action and defeating the damage claim.

- The second case was *Village of Lapwai v. Alligier*, 299 P.2d 475 (Idaho 1956) (Taylor, C.J.). It simply observed that gas, water, and railroad companies must obtain the consent of a city to lay infrastructure on city streets.[269]

- The last case to address the statute is *Alpert*. It did not identify section 30-2308 as a franchise statute. But it described section 30-2308 as laying the historical foundation for the franchise statute, Idaho Code § 50-329, noting that section 30-2308 requires that "utilities obtain consent from the cities to operate a service utility" and "provides for just compensation to be paid by the utility." *Alpert* at 304. That is certainly true, but it is triggered only if the utility seeks to lay new infrastructure within city streets and squares. *Alpert* is discussed in detail in section 33.E on page 308.

(d) Idaho Code § 50-328 (authority to regulate utility transmission systems using city streets or other property)

The last of the non-franchise statutes listed above is Idaho Code § 50-328. Unlike the 1887 statutes, this is a modern statute. It was enacted by 1967 as part of a comprehensive revision of Title 50 (the municipal code).[270] It reads in full:

> All cities shall have power to permit, authorize, provide for and regulate the erection, maintenance and

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[269] The Court observed:

> Moreover, the legislature, in providing for the use of streets and alleys by utilities, expressly required the consent of the municipal authorities, and authorized the municipal authorities to impose reasonable regulations upon such use. § 40-305, I.C. [now Idaho Code § 40-2308]. Thus, the legislature recognizing the duty it imposes upon the municipality to control and maintain its streets and alleys, has preserved to the municipality the power to deny their use to a utility, or to impose reasonable regulations thereon, when necessary to the use of such streets and alleys by the public in the usual manner.

Lapwai at 478 (quoted in *Alpert v. Boise Water Corp*., 795 P.2d 298, 305 (Idaho 1990) (Boyle, J.)).

[270] Unlike the other statutes addressed here, Idaho Code § 50-328 appears to have no predecessor prior to its enactment in 1967. Nor has it been amended since then.

> removal of utility transmission systems, and the laying and use of underground conduits or subways for the same in, under, upon or over the streets, alleys, public parks and public places of said city; and in, under, over and upon any lands owned or under the control of such city, whether they may be within or without the city limits.

Idaho Code § 50-328 (enacted in 1967 Idaho Sess. Laws, ch. 429, § 50) (emphasis added).

It is now codified adjacent to the franchise statutes (Idaho Code §§ 50-329, 50-329A, and 50-330). However, it makes no reference to franchises, and it is not a franchise statute.[271] Instead, it authorizes cities to regulate the placement of "utility transmission systems" within or under city streets and other city property. Indeed, the *Alpert* case did not list this statute among those authorizing franchises.[272] Instead, it described section 50-328 as dealing with "the regulation of utility transmission systems." *Alpert* at 305.

It gives cities authority to permit and regulate the provision of services by utilities, to the extent the utility needs to place its infrastructure within any streets or other property owned by the city. Note that this applies to any city property inside or outside the city, in contrast to Idaho Code § 40-2308 (which applies only to a city's "public ways and squares."

The reference to the city's power to "authorize" utility transmission systems using city property presumably equates to a consent requirement. This may be seen as a veto power. On the other hand, cities arguably may not withhold consent unreasonably (i.e., to coerce concessions on issues unrelated to the reasonable regulation of the transmission infrastructure).

(5) Statutory authority for municipal franchises.

This section addresses the six general franchise statutes, three of which remain on the books. See citation table on page 284.

[271] The City of Boise recognized in 2015 that its franchise agreement with United Water Idaho is based solely on Idaho Code §§ 50-329 and 50-329A. *Memorandum of Understanding* ("*MOU*"), 4th Whereas (executed by UWID on 10/21/2015 and by Boise on 10/27/2015) (entered into in conjunction with the *2015 Franchise Agreement*). In contrast, Veolia's 2022 franchise agreement with the City of Eagle cites those two statutes plus Idaho Code § 50-328.

[272] *Alpert* cited Idaho Code §§ 50-329 and 50-330 as the only franchise statutes. "Furthermore, I.C. §§ 50–329 and –330 confer on the cities the authority to grant franchises …." *Alpert* at 303. Idaho Code § 50-329A had not yet been enacted.

(a) Precursors to the current statutes

Idaho's first franchise statutes dealt with toll roads. Dating to the Civil War, these were among the earliest territorial statutes.[273] As is often the case with archaic laws, they remained on the books for over a century (until 1985).

In 1887, the Territorial Legislature adopted miscellaneous statutes under the heading "Sale of Franchises on Execution" addressing the corporate law side of municipal franchises.[274] They remain on the books, under the same heading, as Idaho Code § 30-201 to 30-206. These statutes are of no relevance to the authority of cities to grant municipal franchises.

The first general franchise statutes (i.e., statutes authorizing or regulating municipal authority to grant franchises generally, not just for toll roads) were enacted in 1911 and 1913.[275] The 1911 and 1913 laws remained intact in various codifications until they were re-written, with substantial changes, as part of a comprehensive recodification of the entire municipal code in 1967.

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[273] The toll road statutes were adopted in 1864 and 1867, 4 Idaho Terr. Sess. Laws (1867), ch. 64, §§ 1-4; 2 Idaho Terr. Sess. Laws (1864), ch. 440, § 10 & 13, 3 Idaho Terr. Sess. Laws (1866), ch. 179, § 2, ch. 181, § 1. They were re-codified over the years under the heading entitled "Miscellaneous Provisions Relating to Toll Roads, Bridges and Ferries" (since 1908). 1887 Idaho Rev. Stat. of Idaho Terr. §§ 1120-1123, 1128-1131); 1908 Rev. Codes of Idaho, §§ 1041 to 1048; Idaho Code §§ 39-1301 to 39-1308 (1932); 40-1401 to 40-1408 (1948). These long-obsolete statutes were not scrubbed from the code until 1985 when Title 40 (the municipal code) was entirely re-written. H.B. 265, 1985 Idaho Sess. Laws, ch. 253.

[274] 1887 Idaho Rev. Stat. §§ 2642-2647; 1908 Rev. Codes of Idaho, §§ 2778 to 2783; Idaho Code §§ 29-201 to 29-206 (1932). These statutes are no longer on the books.

[275] The first general franchise statutes were enacted in 1911 and 1913:

- 1911 Idaho Sess. Laws, ch. 82, §§ 52-70 and 73 (subd. 3) (codified until 1967 in relevant part at Idaho Code §§50-4102 to 50-4125 and 50-4203(3)).
- 1913 Idaho Sess. Laws, ch. 74, §§ 24 (subd. 20) and 25 (codified until 1967 in relevant part at Idaho Code §§ 50-146 and 50-149).

The 1911 statute was premised squarely on city control of city streets. The term "franchise" was expressly defined in terms of the right to use a city's streets. 1911 Idaho Sess. Laws, ch. 82, § 73 (subd. 3) (codified until 1967 at Idaho Code § 50-4203(3)). It expressly allowed cities to monetize the issuance franchise, going so far as to require cities to essentially auction off franchises to the highest bidder. 1911 Idaho Sess. Laws, ch. 82, § 54 (codified until 1967 at Idaho Code §§ 50-4104 to 50-4109).

The 1913 statute established procedures for granting franchises and authorizing cities to regulate rates charged by franchisees.

The fact that there were no general franchise statutes prior to 1911 is confirmed by the Court in *Artesian III* at 91 ("[Boise City] could not grant a corporate franchise to a water company."). Although the appellate decision came down in 1913, *Artesian III* addressed an ordinance adopted in 1889 and a license fee imposed by the city in 1906, which was before the first general franchise statutes were adopted in 1911.

The successors to the 1911 and 1913 franchise statutes are now codified to Title 50 (the municipal code) at Idaho Code §§ 50-329, and 50-329A and 50-330.[276] These three statutes are included in the chapter dealing with "Powers" of cities. Two of these (sections 50-329 and 50-330) were enacted in 1967.[277] The franchise fee statute (section 50-329A) was not enacted until 1995.[278]

(b) The current franchise statutes (Idaho Code §§ 50-329, 50-329A, and 50-330)

(i) Idaho Code § 50-329 (procedural rules governing the granting and duration of franchises)

Technically speaking, the words of this section do not state that cities are authorized to grant franchises. Rather, the statute sets out limitations on how cities may issue franchises. That said, the authority to grant franchises is implicit, and the statute has been interpreted as a grant of franchise authority. "Furthermore, I.C. §§ 50-329 and -330 confer on the cities the authority to grant franchises … ." *Alpert* at 303.

However, this authority to grant franchises includes no mandate that cities must issue franchises or that utilities obtain them prior to the provision of services. Note that *Alpert* dealt with franchise agreements entered into voluntarily by cities and utilities. (See discussion in section 33.E on page 308.) In a challenge brought by customers, *Alpert* found these voluntary franchises were lawful. *Alpert* did not discuss whether franchises are mandatory.

As a practical matter, however, cities that control city streets may leverage their authority to grant franchises to demand that utilities enter into franchise agreements and pay franchise fees. But Ada County cities do not have that leverage. See discussion in section 33.G ("Utilities are not obligated to enter into franchise agreements.") on page 315.

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[276] Idaho Code § 50-328 (discussed in section 33.D(4)(d) on page 301) is codified next to the Title 50 franchise statutes, but it is not a franchise statute.

[277] Section 50-329 was enacted by 1967 Idaho Sess. Laws, ch. 429, § 25 and amended by H.B. 329, 1995 Idaho Sess. Laws, ch. 226, § 1. Section 50-328 was enacted as part of this group of statutes by 1967 Idaho Sess. Laws, ch. 429, § 24

[278] Section 50-329A was enacted by H.B. 329, 1995 Idaho Sess. Laws, ch. 226, § 2, and amended by H.B. 806, 1996 Idaho Sess. Laws, ch. 246, § 1. Note that this statute did not exist at the time *Alpert* was decided.

Since 1995,[279] section 50-329 has provided that a franchise must be between ten and 50 years in duration "unless otherwise agreed to by the utility." In other words, the parties may agree on any duration they like, but a municipality may not force a utility to accept a franchise that is less than 10 or more than 50 years in duration.

The full text of Idaho Code § 50-329 is set out in the footnote.[280]

(ii) Idaho Code § 50-329A (franchise fees)

The second franchise statute is section 50-329A. It was enacted in 1995, decades after the other franchise statutes. It sets the substantive rules for franchise

[279] The provision on the duration of franchise agreements was added in 1995 by the same bill that capped franchise fees at 3%, as discussed below. H.B. 329, 1995 Idaho Sess. Laws, ch. 226.

[280] Section 50-329 reads in full:

> No ordinance granting a franchise in any city shall be passed on the day of its introduction, nor for thirty (30) days thereafter, nor until such ordinance shall have been published in at least one (1) issue of the official newspaper of the city; and after such publication, such proposed ordinance shall not thereafter and before its passage be amended in any particular wherein the amendment shall impose terms, conditions or privileges less favorable to the city than the proposed ordinance as published; but amendments favorable to the city may be made at any time and after publication; provided that an ordinance granting a franchise to lay a spur, railroad track or tracks connecting manufacturing plants, warehouses or other private property with a main railroad line, need not be published before the same is passed by the council. No franchise shall be created or granted by the city council otherwise than by ordinance, and the passage of any such ordinance shall require the affirmative vote of one-half (½) plus one (1) of the members of the full council. Franchises created or granted by the city council for electric, natural gas or water public utilities, as defined in chapter 1, title 61, Idaho Code, or to cooperative electrical associations, as defined in section 63-3501(a), Idaho Code, shall be for terms of not less than ten (10) years and not greater than fifty (50) years unless otherwise agreed to by the utility or cooperative electrical association. All publications of ordinances granting a franchise, both before and after passage, shall be made at the expense of the applicant or grantee. Where an ordinance granting a franchise is sought to be amended after the same has been in force, the provisions of this section as to publication, before final action upon such amendment, shall apply as in cases of proposed ordinances granting original franchises.

Idaho Code § 50-329 (enacted in 1967 Idaho Sess. Laws, ch. 429, § 25, amended by H.B. 329, 1995 Idaho Sess. Laws, ch. 226, § 1).

fees. It is limited to electric, gas, and water franchises. As with section 50-329, section 50-329A does not mandate the use of franchises.

Prior to 1995, there was no limit on the size of a franchise fee. Fees of 5% were not unheard of.[281] The franchise fee statute was amended by H.B. 329, 1995 Idaho Sess. Laws, ch. 226 (codified at Idaho Code §§ 50-329 and 50-329A) to add limits on the size of fees.

Specifically, it states that fees shall not exceed 1% without the consent of the utility (or approval of voters), but may be as high as 3% with such consent or voter approval. Idaho Code § 50-329A. In other words, if the utility and the city are not in agreement, the city may present a "take it or leave it" offer of no higher than 1%. In most parts of Idaho, the utility will have no option but to take the offer. In Ada County (where utilities do not need a franchise agreement to place infrastructure in city streets), a utility has the ability to decline the offer and operate without the benefits and burdens of a franchise agreement. See discussion in section 33.G ("Utilities are not obligated to enter into franchise agreements.") on page 315. However, declining to enter into a franchise may necessitate some other form of approval (licenses or easements) to the extent the utility needs access to other city property.

The full text of section 50-329A is set out in the footnote.[282]

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[281] In *City of Hayden v. Washington Water Power Co*., 700 P.2d 89 (Idaho 1985) (per curium), Hayden sought to impose a 5% franchise fee.

The City of Boise and United Water Idaho (now Veolia Water Idaho, Inc.) were on the verge of increasing the franchise fee to 4% (and later to 5%) when the 1995 legislation limiting fees to 3% was enacted. See discussion in footnote 295 on page 315.

[282] Section 50-329A reads in full:

> (1) This section applies to franchises granted by cities to electric, natural gas and water public utilities, as defined in chapter 1, title 61, Idaho Code, and to cooperative electrical associations, as defined in subsection (a) of section 63-3501, Idaho Code, which provide service to customers in Idaho and which shall also be known as "public service providers" for purposes of this section. Notwithstanding any other provision of law to the contrary, cities may include franchise fees in franchises granted to public service providers, only in accordance with the following terms and conditions:
>
> (a) Franchise fees assessed by cities upon a public service provider shall not exceed one percent (1%) of the public service provider's "gross revenues" received within the city without the consent of the public service provider or the approval of a majority of voters of the city voting on the question at an election held in accordance with chapter 4, title 50, Idaho Code. In no case shall the franchise fee exceed three percent (3%), unless a greater franchise fee is being paid under an existing franchise agreement, in

(iii) Idaho Code § 50-330 (rate-setting)

The third franchise statute, Idaho Code § 50-330 authorizes cities to regulate the rates and charges of a municipal franchisee, but only if the franchisee is not

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> which case the franchise agreement may be renewed at up to the greater percentage, with the consent of the public service provider or the approval of a majority of voters of the city voting on the question at an election held in accordance with chapter 4, title 50, Idaho Code. For purposes of this section, "gross revenues" shall mean the amount of money billed by the public service provider for the sale, transmission and/or distribution of electricity, natural gas or water within the city to customers less uncollectibles.
>
> (b) Franchise fees shall be collected by the public service provider from its customers within the city, by assessing the franchise fee percentage on the amounts billed to customers for the sale, transmission and/or distribution of electricity, natural gas or water by the public service provider within the city. The franchise fee shall be separately itemized on the public service provider's billings to customers.
>
> (c) Cities collecting franchise fees shall also be allowed to collect user fees from consumers located within the city in the event such consumers purchase electricity, natural gas or water commodities and services from a party other than the public service provider. The user fee shall be assessed on the purchase price of the commodities or services, including transportation or other charges, paid by the consumer to the seller and shall be collected by the city from the consumer. Except as provided in this subsection, user fees shall be subject to all of the same terms, rates, conditions and limitations as the franchise fee in effect in the city and as provided for in this section. This subsection shall not apply to a consumer to the extent that consumer is purchasing commodities and services from a party other than the public service provider on the effective date of this act, only until such time that the existing franchise agreement for the city in which the consumer is located either expires or is renegotiated.
>
> (d) Franchise fees shall be paid by public service providers within thirty (30) days of the end of each calendar quarter.
>
> (e) Franchise fees paid by public service providers will be in lieu of and as payment for any tax or fee imposed by a city on a public service provider by virtue of its status as a public service provider including, but not limited to, taxes, fees or charges related to easements, franchises, rights-of-way, utility lines and equipment installation, maintenance and removal during the term of the public service provider's franchise with the city.
>
> (2) This section shall not affect franchise agreements which are executed and agreed to by cities and public service providers with an effective date prior to the effective date of this act.

Idaho Code § 50-329A (enacted as H.B. 329, 1995 Idaho Sess. Laws, ch. 226, § 2, amended by H.B. 806, 1996 Idaho Sess. Laws, ch. 246, § 1).

governed by the IPUC. Accordingly, it appears that this statute would apply to cable TV, internet, and cellular companies.[283] But it has no applicability to private water, gas, or electric companies, which are regulated by the IPUC.

E. The *Alpert* case—Franchise agreements and fees are lawful, even in Ada County

The only significant modern case on the lawfulness of franchise agreements and fees is *Alpert v. Boise Water Corp*., 795 P.2d 298 (Idaho 1990) (Boyle, J.). This was a class action case challenging franchise agreements entered into by the cities of Boise, Meridian, Eagle, Kuna, and Garden City with the water and gas companies serving those cities.[284] Under these agreements, the utilities paid a franchise fee to each city which, in turn, was passed along by the utility to its customers in that city. Utility customers (who objected to paying the fee) challenged the agreements on various grounds including (1) antitrust violations, (2) an illegal tax claim, and (3) the city's lack of control over city streets (the ACHD issue). The first two are issues applicable to cities everywhere in Idaho. The third is unique to cities in Ada County.

(1) Franchises do not violate state antitrust laws.

The district court rejected the plaintiffs argument that the cities' franchise agreements violate state and federal antitrust laws. For some reason, only the state antitrust claim was pressed on appeal. Relying on *Denman v. Idaho Falls*, 4 P.2d 361 (Idaho 1931) (Budge, J.),[285] the Court found that "Idaho antitrust laws do not apply to municipal corporations." *Alpert* at 303-04. The *Denman* Court held that "it

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[283] According to the IPUC's website, "The Commission does NOT regulate utility cooperatives (owned by the customers) or utilities operated by cities. The Commission has no jurisdiction over sewer operations, cable or satellite television, Internet service providers or cellular telephone companies." https://puc.idaho.gov/Page/Info/35#:~:text=The%20Commission%20has%20no%20jurisdiction,providers%20or%20cellular%20telephone%20companies.

[284] Plaintiffs filed a class action suit naming the five cities and the three utilities as defendants. At the time, defendants Boise Water Company (a predecessor of Veolia) and Capitol Securities Water Corp. (a predecessor of Capital Water Corp.) had franchise agreements only with Boise. Defendant Intermountain Gas Company had franchise agreements with each of the five cities. *Alpert* at 300. ACHD was allowed to intervene; it argued that ACHD, rather than the cities, was authorized to grant franchises because it controls the streets in Ada County. The district court upheld the franchise agreements and denied plaintiffs' request to certify a class action. In addition to addressing the merits, the case involved two significant jurisdictional rulings. On appeal, the Idaho Supreme Court found that plaintiffs had standing to bring the suit. *Alpert* at 301-302 (relying on *Miles v. Idaho Power Co.*, 778 P.2d 757, 778 (Idaho 1989) (Johnson, J.)). In another jurisdictional ruling, the Court rejected the procedural defense that only IPUC has jurisdiction to resolve the franchise fee issues. *Alpert* at 302.

[285] In *Denman*, the Court upheld the right of Idaho Falls to essentially drive out of business a private natural gas company that was competing with the city's own electric utility.

was clearly the intention of the legislature that the use of the word "corporation" therein was to be limited to private corporations and not to include municipal corporations . . . ." *Denman* at 362.

Given the absolute immunity granted to cities by *Denman*, it is unclear why the Court then proceeded to apply general principles of antitrust law articulated by the U.S. Supreme Court and a legal encyclopedia (which do not grant absolute immunity but call for a probing examination of state policy on the subject). "[M]unicipalities, unlike the state, are not necessarily shielded from liability under the antitrust laws unless the municipality acts pursuant to an affirmatively expressed state policy to displace competition with regulation or monopoly public services." *Alpert* at 303. The Court found that Idaho's pro-monopoly policy is expressed in various statutes authorizing cities to provide utility services and enter into franchise agreements. *Id*.

In any event, whichever path of legal reasoning is followed (statutory interpretation under *Denman* or policy analysis), the outcome is the same. Municipal franchises do not violate state antitrust laws, notwithstanding the fact that they often grant monopolistic privileges and raise prices by imposing additional fees.

(2) Franchise fees held not to be illegal taxes.

Plaintiffs and intervenor ACHD argued that franchise fees are illegal taxes, because they are not based on the value of a service provided.[286]

The "illegal tax" case law is premised on the fact that Idaho is a Dillon's Rule state, meaning that Idaho cities are not "home rule" cities.[287] Instead, Idaho cities have only those powers expressly granted or clearly implied by the Idaho Constitution or state statute.

The constitutional grant of police power to municipalities is self-executing (requiring no legislative action). Idaho Const. art. XII, § 2. In contrast, the power of municipalities to impose taxes requires legislative action. Idaho Const. art. VII, § 6. Hence, a body of law has emerged to distinguish lawful fees from illegal taxes.[288] Accordingly, if a fee imposed by a municipality has the attributes of a tax (i.e., it is

[286] To put a finer point on it, ACHD did not contend that all franchise fees are illegal taxes. Indeed, it sought to grant franchises and impose its own franchise fees. "ACHD specifically sought to have the franchise contracts invalidated because the cities provided no consideration in exchange for fees received, due to their lack of ownership of the city highways and rights-of-ways after the creation of ACHD in 1971." ACHD's brief on appeal, 1989 WL 1820848 at *9.

[287] Dillon's Rule is named after Chief Judge Dillion of the Iowa Supreme Court, whose decisions and writing on the subject have been adopted in a minority of states, including Idaho.

[288] This subject is discussed in section 30 ("User Fees, Impact Fees (IDIFA), and the "Illegal Tax" issue") on page 172.

not a fee for a service provided nor a regulatory fee authorized by the police power) and it is not expressly authorized by statute, it is deemed an illegal tax.

If *Alpert* were decided today, there would be no need to look beyond Idaho Code § 50-329A, which expressly authorizes franchise fees. But *Alpert* was decided in 1990, five years before the enactment that statute. Because there was no express authorization for a franchise fee at the time, the *Alpert* Court went through the illegal tax analysis. The Court rejected the illegal tax claim, declaring that franchise fees are lawful because they are "reasonable compensation" for the deal struck in which a city agrees not to compete with the utility:

> The district court correctly held that the charge imposed was not a tax but was contract consideration for the franchise granted. We agree. The three percent charge is valid consideration for the cities granting the franchises and agreeing not to compete with the utilities. … The three percent surcharge is simply a payment in consideration for the franchise to operate the utilities by the various municipalities. The charging of a fee for the utility franchise is reasonable compensation and consideration to the cities as expressly allowed by art. 15, § 2 of the Idaho Constitution and I.C. § 40–2308.
>
> …
>
> … In addition, the franchise agreements in this case provide that the municipalities or cities will not compete with the utilities in providing these services.

Alpert at 306-07 (emphasis added).

The only illegal tax fee case discussed by the Court was *Brewster v. City of Pocatello*, 768 P.2d 765 (Idaho 1988) (Shepard, J.). *Brewster* struck down the City of Pocatello's street restoration and maintenance fee as an illegal tax because it was unconnected to any individual service provided to the fee payer. One might think the same logic would apply in *Alpert*, but the Court brushed aside *Brewster*, explaining that in *Alpert* the fee paid by each customer was related to the amount of water or gas consumed:

> The three percent franchise fee is not imposed on the residents directly by the cities, but is paid by the utilities to the cities and as a cost of business is then passed on to the consumers by the utilities. . . . The water and gas services provided by the utilities in this case are based on consumption and use by the resident. . . . As such the tax imposed in *Brewster* is clearly distinguishable from the

> fee charged on the accounts of the consumers of the utility service presented in this case.

Alpert at 307 (emphasis added).

The *Alpert* Court evidently was unconcerned that the franchise fee is a surcharge on an otherwise reasonable utility fee. The underlying utility fee reflects the value of service provided, but the surcharge does not. The surcharge is a product of negotiation in which the cities are given all the bargaining leverage and use it in ways unrelated to any costs they incur.[289] The *Alpert* Court said it was reasonable for cities to use that leverage to maximize the fee because "the cases, statutes and the Idaho Constitution cited herein clearly allow the charging of a reasonable fee for granting a franchise to a utility." *Alpert* at 307. In other words, because cities have something valuable to trade (e.g., their promise not to compete) franchise fees are automatically reasonable.

That conclusion is difficult to reconcile with subsequent decisions on illegal taxes. The *Alpert* Court's conclusion that franchise fees do not have the attributes of a tax is a head-scratcher today, because such fees are so obviously unrelated to any service provided by the city or to the cost of a regulatory program. But the case is easier to understand in historical context. At the time of the decision in 1990, the law of illegal taxes was in its infancy. There is now a well-developed body of law holding that revenue-generating measures (other than fees and taxes expressly authorized by the Legislature) that are unrelated to the cost of a service provided or a regulatory function are illegal taxes. That case law would suggest that to be "reasonable" a franchise fee must reflect something other than raw bargaining power. Instead, it should bear some relation to the cost of supervision or administration of the franchisee undertaken by the city.

However, most of this case law did not exist at the time of *Alpert*. *Brewster* (a slip opinion at the time *Alpert* was briefed) was only the second case in the history of the State to actually find an illegal tax (the first being in 1923).[290] The great body of

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[289] In a deposition briefed to the Court, the Mayor of Kuna was asked how the franchise fee related to any supervision, regulation, or service provided by the City. He responded: "I don't think that it relates at all." *Appellant Alpert's Opening Brief*, 1989 WL 1821160, *9 (Feb. 9, 1989).

[290] The only case prior to *Brewster* to declare an illegal tax was *State v. Nelson*, 213 P. 358, 361 (Idaho 1923) (Lee, J.) (striking down the City of Rexburg's license tax on physicians and other occupations on the basis that it was purely revenue generating and unrelated to regulation).

A handful of pre-*Brewster* cases addressing the subject followed *Nelson*, but they all upheld the cities' actions: *Foster's Inc. v. Boise City*, 118 P.2d 721, 728 (Idaho 1941) (Ailshie, J.) (upholding parking meter fees as a proper regulatory fee); *Schmidt v. Village of Kimberly*, 256 P.2d 515 (Idaho 1953) (Taylor, J.) (upholding the constitutionality of the Revenue Bond Act in a "friendly" declaratory judgment action aimed at resolving the concerns of bond brokerages); *State v. Bowman*, 655 P.2d 933 (Idaho 1982) (upholding an annual license fee for dance halls as a lawful regulatory fee) (Walters, J.); *Sun Valley Co. v. City of Sun Valley*, 708 P.2d 147, 150 (Idaho 1985)

case law on illegal taxes was developed after *Alpert*.[291]

(3) Cities in Ada County retain their authority to enter into franchise agreements notwithstanding ACHD's county-wide control over streets.

Intervenor ACHD took a different tack than the plaintiffs (who focused on illegal tax and antitrust arguments). ACHD offered a third argument. It contended that cities in Ada County lost their authority to enter into franchise agreements in 1971 and that ACHD became authorized to do so instead. This argument is premised on the fact that franchise agreements include a grant of access allowing the utility to use the city's streets to install its infrastructure (typically combined with a promise not to compete).

(Donaldson, J.) (upholding local option resort city tax law authorized by Idaho Code §§ 50-1043 to 40-1049); *City of Hayden v. Washington Water Power Co*., 700 P.2d 89 (Idaho 1985) (per curium) (declaring unlawful the city's unilateral amendment of its franchise agreement to add a franchise fee); *Kootenai Cnty. Property Ass'n v. Kootenai Cnty.*, 769 P.2d 553 (1989) (Bakes, J.) (upholding a mandatory solid waste disposal fee as a reasonable fee and not an illegal tax).

[291] These are post-*Alpert* cases dealing with illegal taxes: *Loomis v. City of Hailey*, 807 P.2d 1272 (Idaho 1991) (Boyle, J.); *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene* ("*IBCA*"), 890 P.2d 326 (Idaho 1995) (Trout, J.); *City of Chubbuck v. City of Pocatello*, 899 P.2d 411 (Idaho 1995) (Reinhardt, J. Pro Tem.); *Building Contractors Ass'n of Southwestern Idaho, Inc. v. IPUC*, 916 P.2d 1259 (Idaho 1996) (Schroeder, J.); *Waters Garbage v. Shoshone Cnty.*, 67 P.3d 1260 (Idaho 2003) (Eismann, J.); *Plummer v. City of Fruitland*, 87 P.3d 297, 300 (Idaho 2004) (Trout, J.); *Potts Const. Co. v. N. Kootenai Water Dist.*, 116 P.3d 8 (Idaho 2005) (Schroeder, C.J.); *Schaefer v. City of Sun Valley*, Case No. CV-06-882 (Idaho, Fifth Judicial Dist., July 3, 2007) (Robert J. Elgee, J.); *Mountain Central Bd. of Realtors, Inc. v. City of McCall*, Case No. CV 2006-490-C (Idaho, Fourth Judicial Dist., Feb. 19, 2008) (Thomas F. Neville, J.); *Cove Springs Development, Inc. v. Blaine Cnty.*, Case No. CV-2008-22 (Idaho, Fifth Judicial Dist., July 3, 2008) (Robert J. Elgee, J.); *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 233 P.3d 118 (Idaho 2010) (Eismann, C.J.); *Lewiston Independent School Dist. No. 1 v. City of Lewiston*, 264 P.3d 907, 912 (Idaho 2011) (W. Jones, J.); *Buckskin Properties, Inc. v. Valley County*, 300 P.3d 18 (Idaho 2013) (J. Jones, J.); *Alliance for Property Rights and Fiscal Responsibility v. City of Idaho Falls*, 742 F.3d 1100, 1105 (9th Cir. 2013); *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J); *Hill-Vu Mobile Home Park v. City of Pocatello*, 402 P.3d 1041 (Idaho 2017) (Eismann, J.); *Manwaring Investments, L.C. v. City of Blackfoot*, 405 P.3d 22 (Idaho 2017) (Burdick, C.J.); *N. Idaho Bldg. Contractors Ass'n v City of Hayden* ("*NIBCA II*"), 164 Idaho 530, 432 P.3d 976 (2018) (Bevin, J.).

In 1971, ownership and control of all city streets within Ada County was turned over to ACHD by operation of law.[292] Idaho Code § 40-1410(2)[293] Thus, ACHD became the owner of whatever interest (fee or right-of-way) the cities previously held in their streets. ACHD contended this implicitly overrode the authority of cities to enter into franchise agreements and transferred that power to ACHD. The Court rejected ACHD's argument.

The *Alpert* Court began by recognizing the well settled principle that cities may exercise only those powers granted to them by the Constitution or the Legislature (Dillon's rule). *Alpert* at 304. That test was easily met, said the Court, because the authority of cities to provide utility services and/or to enter into franchise agreements with private utilities is established by both the state Constitution and by statute. *Alpert* at 304.

ACHD's technical argument turned on a sentence in its authorizing statute which said that that statute's provisions control over any conflicting statutes.[294] ACHD contended this trumped the statutes authorizing cities to enter into franchise agreements and transferred that authority to ACHD. The Court said the statute did not go that far. "The language of I.C. § 40–1406 is primarily in reference to imposition of ad valorem taxes and cannot be extended to replace the constitutional and statutory provisions controlling utility franchises. . . . " *Alpert* at 305. The Court said that the franchise power is about more than control of city streets. "Idaho Code § 50–328, which expressly addresses the regulation of utility transmission systems, gives the "city" the authority over all lands, not solely the public streets, which are owned or under control of such city." *Alpert* at 305. The Court further noted that franchises are not just about access to city property; they are also about avoiding competition with the city. "It is undisputed that municipal corporations in Idaho have the power to operate their own utility systems and provide water, power, light, gas and other utility services within the city limits. I.C. § 50–323; § 50–325." *Alpert* at 305. Granting franchises is one way a city may exercise its authority to provide city services. That is not an authority the Legislature shifted to the highway district.

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[292] In 1971, the Legislature enacted a statute authorizing the creation of single, county-wide highway districts. H.B. 274, 1971 Idaho Sess. Law, ch. 273 (initially codified in chapter 27 of Title 40, codified since 1985 at Idaho Code §§ 40-1401 to 40-1418). The statute became effective on its date of enactment, March 25, 1971. Voters approved the creation of ACHD two months later on May 25, 1971, which became effective in January 1972.

[293] Idaho Code § 40-1410(2) was previously codified to Idaho Code § 40-2715. See *Worley Highway Dist. v. Kootenai Cnty*, 576 P.2d 206, 207 n.2 (Idaho 1978) (Donaldson, J.).

[294] "Wherever any provisions of the existing laws of the state of Idaho are in conflict with the provisions of this chapter, the provisions of this chapter shall control and supersede all such laws." Idaho Code § 40-1406.

In sum, ACHD stretched too far. It is one thing to say that franchise agreements with cities are no longer needed in order for utilities to gain access to city streets in Ada County. But that fact alone does not transfer statutory authority to ACHD to issue its own franchises, particularly given that there may be other reasons that cities and utilities might choose to enter into franchise agreements.

The bottom line is that, *Alpert* makes clear that franchise agreements and fees are lawful in Idaho—even in Ada County. Whether they are mandatory was not addressed by *Alpert* (which involved franchise agreements entered into voluntarily). However, the *Alpert* Court's "illegal tax" analysis (which rests on the city's right to strike a hard bargain with a utility who desires a franchise) underscores the point that bargaining is involved. In other words, if a utility does not need a city's promise not to compete and does not need the city's permission to use its streets, it may elect to conduct its utility business without a franchise agreement at all. See discussion in section 33.G on page 315.

(4) Post-*Alpert* decisions add nothing to the analysis

There has been little attention to the lawfulness of franchise fees in subsequent appellate decisions. Since *Alpert*, three cases have referenced that decision and its analysis of franchises. None of them shed any new light on the law of franchises and franchise fees.

In *Plummer v. City of Fruitland*, 140 Idaho 1, 89 P.3d 841 (2003) (Trout, J.), the Court distinguished *Alpert*, limiting its application to water and gas utilities. The *Plummer* Court concluded that Idaho statutes do not grant authority to cities to create private monopolies for solid waste disposal.

In *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 149 Idaho 187, 233 P.3d 118 (2010) (Eismann, C.J.), the Court upheld the authority of an irrigation district to charge a hook-up fee (aka connection fee) when providing domestic water to residential developments (but remanded for a determination of whether the particular fee in question was reasonable). The irrigation district served portions of the cities of Coeur d'Alene and Hayden, as well as some unincorporated areas. One of the developer's arguments was that the fee violated the franchise provision of the Idaho Constitution, Idaho Const. art. VI, § 2. The Court dismissed that argument out of hand saying only: "There is nothing indicating that the Irrigation District has granted any person or entity a franchise to supply water to the inhabitants of the District." *Viking*, 149 Idaho 199, 233 P.3d at 130.

In *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA I*"), 158 Idaho 79, 84, 343 P.3d 1086, 1091 (2015) (Eismann, J), the plaintiff alleged that the City of Hayden's sewer connection fee was an illegal tax. In addition to its principle arguments, the City cited Idaho Code § 50-323 (the statute authorizing cities to provide utility services) as an authority for the tax. The Court gave short shrift to

that argument, noting: "There is no contention in this case that the City cannot operate its sewer system." *NIBCA I*, 158 Idaho at 85, 343 P.3d at 1092. The Court recited its discussion of section 50-323 in *Alpert* and its conclusion that the franchise fee in that case was not a tax. But it offered no further analysis or commentary on that point. The Court simply concluded that the authorization to operate a utility system found in section 50-323 does not carry with it that implied right to impose fees in excess of the cost of services.

F. The IPUC has no review authority over franchise fees imposed on utilities it regulates.

The IPUC takes the position that it has no authority to review, approve, or disapprove franchise fees. The protocol is that the utility files a "tariff advice" with the Commission notifying it of the amount of the franchise fee that will be passed through to customers. The Commission exercises no judgment but simply "approves for filing" the tariff advice. See *In the Matter of United Water Idaho's Tariff Advice To Increase Customer Rates to Recover the City of Boise's 4% Franchise Fee* (Order No. 2935j9, Idaho Public Utilities Comm'n) 2003 WL 27091225 (Nov. 3, 2003).[295]

G. Utilities are not obligated to enter into franchise agreements.

(1) Overview

Since statehood, utilities providing services within cities have routinely entered into franchise agreements with those cities. Franchise agreements generally provide two historically important benefits to utilities. First, they may authorize the placement of utility infrastructure within or below city rights-of-way and other city property. Second, they often provide monopoly status to the utility, protecting it

[295] It is curious that a 4% rate was being reviewed by the IPUC in 2003, eight years after the Legislature imposed a 3% cap. The explanation is that the City and the franchisee (United Water Idaho aka UWID) were still negotiating when the 3% cap was enacted on March 20, 1995 and immediately went into effect (per an emergency clause). On April 11, 1995 they entered into a new franchise agreement with a retroactive effective date of November 1994 (the date the prior franchise expired). The new franchise authorized the City to raise the rate at a time of its choosing to 4% and two years thereafter to 5%. But the City did not adopt the 4% fee until July 22, 2003 (nearly nine years after the effective date of the franchise agreement). This prompted UWID to file a "tariff advise" informing the IPUC of the higher rate. The IPUC declined to rule on the validity of the retroactive franchise date and instead directed UWID to bring a declaratory action to resolve it thorny question. This had the effect of inducing the City to back off the fee increases. See *In the Matter of United Water Idaho's Tariff Advice To Increase Customer Rates to Recover the City of Boise's 4% Franchise Fee* (Order No. 29423, Idaho Public Utilities Comm'n) 2004 WL 233147 (Feb. 2, 2004). In this order, the IPUC removed the requirement for UWID to seek a court ruling, and directed UWID to return to its customers $50,000 in excess franchise fees it had collected for the City under the higher rate.

against competition within its service area by the city or by other utilities.[296] Protection from competition between private providers is a non-issue today, but was enormously important in the early days prior to regulation by the IPUC. Likewise, protection from competition between the provider and the city itself was of much greater concern in the early days. See footnotes 241 and 242 beginning on page 288.

These two benefits are identified in the *Alpert* decision.[297] In return, cities generally, but not always, impose a franchise fee corresponding to a percentage of the utilities' net revenue. Although the franchise fees are substantial, the cost is not borne by the utility. Because the entire fee is passed through to the utility's customers—a captive audience—there is little incentive for the utility to resist.

Cities in most of Idaho (but not in Ada County) have considerable leverage—they own the streets. Because utilities need permission to install infrastructure in city-controlled streets, they have no choice but to enter into a franchise agreement if the city requires one. Thus, as a purely practical matter (as opposed to an express legal mandate), franchise agreements are mandatory where a utility needs access to a city's property and the city insists on a franchise rather than a licensing agreement, easement, or other arrangement.

But what about utilities serving cities in Ada County where there is no need to obtain the city's permission to use its streets? May such a utility elect to forgo whatever protection may be provided by a franchise agreement?

For the reasons discussed below, the author concludes that cities may not compel utilities to enter into franchise agreements. However, in the case of municipal water providers, cities still have leverage under a non-franchise statute, Idaho Code § 30-801 (requiring city consent to provide water). In other words, a franchise may not be required, but some form of consent or agreement is. For water utilities operating in Boise that obtain certification as a Designated Water Provider, this requirement is satisfied without the need for a franchise agreement.

If a franchise is not needed to obtain access to city property or to satisfy section 30-801, the only practical incentive for a utility to secure a franchise is the

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[296] For example, in section 11 of the 2015 franchise agreement between Boise City and Veolia Water Idaho, Inc. (then United Water Idaho Inc.), the City promises neither to compete with Veolia nor to allow others to compete within Veolia's certificated area. The latter promise, of course, is superfluous given the protection provided by the IPUC. The agreement contains no promise that the city will not condemn Veolia. Any implicit promise not to condemn (based on the promise not to compete) is negated by the City's express reservation of its right to condemn in section 10 of the franchise.

[297] "The term 'franchise' has been interpreted to mean a grant of a right to use property over which the granting authority has control." *Alpert*, 118 Idaho at 143, 795 P.3d at 305. "The franchise agreements provide that as consideration the cities will not engage in the business of the utility or enter into competition with the utilities." *Alpert*, 118 Idaho at 138, 795 P.3d at 300.

possibility of negotiating a non-compete agreement with the city, including, potentially, a promise not to condemn the company. In the case of a small provider, like Capitol Water Corporation, securing a non-compete agreement might have some value. In the case of Veolia, the prospect of a take-over by Boise or any other city is remote. Veolia operates a vast and highly integrated water delivery system spanning multiple cities and unincorporated areas. It would be economically prohibitive for Boise to build its own water system. Likewise, takeover by condemnation is not possible. See footnote 243 on page 289 (explaining the practical impossibility of condemnation) and footnote 296 on page 316 (discussing the absence of condemnation protection in Veolia's franchise agreement).

(2) Idaho's Constitution does not compel franchise agreements.

Idaho's Constitution includes express authorization for cities to provide franchises for water service, thereby recognizing the vital role played by franchises in the early days before utility regulation.

> Right to collect rates a franchise.—The right to collect rates or compensation for the use of water supplied to any county, city, or town or water district, or the inhabitants thereof, is a franchise, and can not be exercised except by authority of and in the manner prescribed by law.

Idaho Const. art. 15, § 2 (emphasis supplied).

This oddly phrased sentence can best be understood to recognize the authority of cities to grant franchise rights, but only in compliance with statutory requirements. But it does not compel parties to enter into franchise agreements. This constitutional provision is discussed further in section 33.D(2) on page 290.

(3) Idaho's franchise statutes do not compel franchise agreements.

Likewise nothing in Idaho's franchise statutes gives cities the power to force a utility to enter into a franchise agreement if one is not needed to secure use of the city's streets. See discussion in section 33.D(5) on page 302.

The *Alpert* case makes clear that franchise agreements are lawful notwithstanding that Ada County cities do not control access to their own streets. As *Alpert* explains, there may be some other city property that the utility needs to use. And, in most cases, franchise agreements provide assurance that the city will not compete with the utility. Notably, nothing in *Alpert* says that franchise agreements

are mandatory in cities that do not control their own streets.[298] Indeed, the legal underpinning of the decision is that franchises are contractual nature. Contracts are inherently voluntary. See discussion in section 33.E on page 308.

(4) Idaho's non-franchise statutes require city consent.

(a) In general

Although nothing in the Idaho's Constitution or statutes mandates that a utility enter into a franchise agreement as a prerequisite to providing service within a city, three of the non-franchise statutes discussed in section 33.D(4) on page 293 (Idaho Code §§ 30-801, 40-2308, and 50-328) may be read to require utilities to obtain the consent or agreement of cities.

- Idaho Code § 30-801 requires that private municipal water providers obtain authorization from the city by ordinance or contract. Arguably, this 1887 statute has been preempted by the adoption of public utility regulation statutes 1913. In any event, the statute does not require a franchise agreement. Read in context with section 30-802, it does not authorize cities to exercise this authority arbitrarily for leverage purposes, but only to secure the public safety of water supplied to the city. This statute is discussed in section 33.D(4)(b) on page 296.

- Idaho Code § 40-2308 requires utilities to obtain the consent of cities to "lay conductors and tracks through the public ways and squares in any city." Once consent is given to lay infrastructure, no further or ongoing consent is required to use or maintain that infrastructure. Significantly in Ada County, where cities do not own or control city streets, no consent is required at all unless new infrastructure is to be laid in a public square of the city. This statute is discussed in section 33.D(4)(c) on page 300.

[298] The only other case touching on the question of whether there is an obligation to obtain a franchise is *Unity Light & Power Co. v. City of Burley*, 92 Idaho 499, 445 P.2d 720 (1968) (McFadden, J.). It is not on point. The Court ruled that Burley (which operates its own electric power system) could serve new customers in newly annexed areas, while the utility serving rural areas outside the city could continue to serve its existing customers within the annexed areas notwithstanding the fact that it neither sought nor received a franchise from the city. The decision includes the statement: "Until such time as Unity has secured a franchise from Burley, it is not entitled to extend its service to other than those members served at the time of annexation." *Unity* at 725. However, that statement was made in the context of annexation law and "pirating" law, not franchise law. For the quoted proposition, the Court cited no Idaho franchise statute or case law, but only annexation cases in North Carolina, Oklahoma, Arizona, and Washington. In any event, case involved a city that did control its own streets. Accordingly, the quoted statement cannot be read as a general principle that a franchise agreement is always required.

- Idaho Code § 50-328 gives cities authority to permit and regulate the provision of services by utilities, but only to the extent the utility needs to place its infrastructure within any streets or any other property owned by the city. This statute is discussed in section 33.D(4)(d) on page 301.

The consent or permission required by the non-franchise statutes discussed above may be satisfied by any manner of ordinance or agreement.

(b) Designated Water Provider

If a utility does not need city permission to use city streets or other property, the only applicable consent requirement is Idaho Code § 30-801, which applies only to municipal water providers.

In the case of the City of Boise, the consent requirement in section 30-801 may be satisfied by a utility obtaining certification by the City as a Designated Water Provider under the City's zoning code. This ordinance is discussed in the Idaho Water Law Handbook in the section dealing with Boise's Assured Water Supply ordinance.

34. THE LAW OF CONDEMNATION (EMINENT DOMAIN) IN IDAHO

A. Scope of topic and overview

Eminent domain is a complex topic that consumes volumes in many treatises. This treatment of eminent domain law provides an overview of the major issues and points out some of the peculiarities in Idaho law.

The discussion of eminent domain breaks into two main categories:

(1) The first is "eminent domain" (also known as "condemnation.") This usually, but not always, refers to formal actions taken by the government to take private property for public use. The government or other person exercising this authority must pay "just compensation" to the owner reflecting the fair market value of any property taken. Because just compensation must be paid, condemnation is essentially a forced sale.

(2) The second category is "inverse condemnation." These are lawsuits brought by property owners seeking compensation from the government for deprivation of property rights. Typically, inverse condemnation actions are premised on what are known as "regulatory takings" — that is, deprivation of property rights arising from governmental land use or other regulatory actions.[299] This section of the Handbook addresses only the first topic. Inverse condemnation is treated elsewhere.

B. The government's inherent power to condemn

The power to condemn is inherent in the federal government and state governments. "The power of eminent domain is a fundamental and necessary attribute of sovereignty, is superior to and independent of private rights of property, is inherent and essential to the independent existence of the nation and its sovereign states, requires no constitutional recognition, and cannot be surrendered." 26 Am. Jur. 2d *Eminent Domain* § 1. "The power of eminent domain arises as an incident to sovereignty of the state." *State ex rel. Flandro v. Seddon*, 94 Idaho 940, 943, 500 P.2d 841, 844 (1972).

C. Constitutional authority to condemn

The United States Constitution does not mention the right of eminent domain except to limit the power to condemn in the Fifth Amendment, which forbids "the

[299] Not all inverse condemnations are based on regulatory takings. In some (albeit rare) cases, governmental entities acquire "privately owned land summarily, by physically entering into possession and ousting the owner. In such a case, the owner has a right to bring an 'inverse condemnation' suit to recover the value of the land on the date of the intrusion by the Government." *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 (1984) (citation omitted).

taking of private property for public use without just compensation." U.S. Const. amend. V.

The Idaho Constitution contains substantially the same requirement in slightly different words, preceded by an expansive statement of what constitutes a public use:

> The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.
>
> Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.

Idaho Const. art. I, § 14 (emphasis added).

In addition to water development and mining, the section also includes two very broad catch-alls (underlined in the quotation above). These might be read as broad enough to encompass virtually any industrial or commercial purpose.

The Constitution does not expressly answer the question who has the authority to exercise the power of imminent domain. However, given that water development and mining are typically undertaken by private entities, it is implicit that the eminent domain authority extends to private parties. Presumably, the same is true for the catch-all provisions. As discussed in the following section, Idaho cases arising in the context of statutes implementing this constitutional provision recognize the authority of private parties to exercise the condemnation power.

Article XI, section 8, confirms that property belonging to private corporations may be taken by eminent domain, and that private corporations are subject to regulation under the police power:

> The right of eminent domain shall never be abridged, nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals; and the police powers of

> the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the state.

Idaho Const. art. XI, § 8.

Article VIII, section 5 forbids the use of the eminent domain power on behalf of any industrial development project supported by non-recourse development bonds.

D. The constitutional right to condemn is self-executing.

The Idaho Supreme Court has determined that the Idaho Constitution's authorization for eminent domain is self-executing.

> Art. 1, Sec. 14, of the Idaho Constitution is self-executing in the sense that the nature of the use required is established and constitutes a grant of the power of eminent domain in behalf of the uses therein expressed. Legislative action other than the appropriate procedural machinery through which the right may be applied is not required. The necessary procedural machinery is found in the provisions of Title 7, Chap. 7 of the Idaho Code.

McKenney v. Anselmo, 416 P.2d 509, 514-15 (Idaho 1966) (citation omitted). See also, *Cohen v. Larson*, 867 P.2d 956, 958 (Idaho 1993) (Bistline, J.) ("This section of the Idaho Constitution is self-executing, leaving to the legislature only the task of providing the procedure for implementation.").

E. Statutory authority to condemn—generally

Notwithstanding that the power to condemn in the Idaho Constitution is self-executing, the Legislature has seen fit to articulate substantive and procedural rules governing the exercise of eminent domain.[300] It has dispensed this power liberally, granting the eminent domain power to dozens of governmental entities and others. A partial listing of Idaho statutes granting and/or addressing eminent domain powers is set out in the footnote.[301] This includes counties, cities, urban renewal districts,

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[300] Congress has also adopted statutes and rules governing condemnation actions by the federal government. A discussion of those provisions is beyond the scope of this Handbook. *See, e.g.*, 40 U.S.C. §§ 257 and 258a to 258f; Federal Rule of Civil Procedure 71A; D. Idaho L. Civ. R. 71A.1.

[301] Partial list of Idaho statutes addressing eminent domain:

- Idaho Code §§ 7-701 to 7-721 (general condemnation statutes)
- Idaho Code § 21-106 (establishing, operating and maintaining state airports by the Idaho Transportation Department)
- Idaho Code § 21-508 (acquisition of air rights for airport approach protection)

- Idaho Code § 21-807(3) (regional airport authority board of trustees vested with eminent domain power)
- Idaho Code § 31-806 (acquisition of property for parks or recreational purposes by board of county commissioners, including by eminent domain)
- Idaho Code § 31-4114 (acquisition of real or personal property by television translator district which is necessary or convenient for its purposes)
- Idaho Code §§ 31-4204(d); 31-4214 (county housing authorities vested with eminent domain power)
- Idaho Code § 31-4906(6) (board of directors for a regional solid waste district vested with eminent domain power)
- Idaho Code § 33-601(8) (school district board of trustees vested with eminent domain power)
- Idaho Code § 33-2122(d) (dormitory housing commissions in each junior college district is vested with eminent domain power)
- Idaho Code § 33-3804(c) (state educational institutions are vested with eminent domain power)
- Idaho Code § 36-104(b)(7) (fish and game commission vested with power of eminent domain)
- Idaho Code § 39-1331(j) (board of health and welfare vested with power of eminent domain)
- Idaho Code § 39-2804(e) (mosquito and vermin abatement district board of trustees vested with power of eminent domain)
- Idaho Code § 40-313(3) (Idaho Transportation Board vested with eminent domain power re: "restoration, preservation, and enhancement of scenic beauty, for use as informational sites, and for rest and recreation of the traveling public")
- Idaho Code § 40-506 (Idaho Transportation Department vested with power of eminent domain re: advertising displays required to be removed)
- Idaho Code § 40-606 (condemnation of highway rights-of-way by county commissioners)
- Idaho Code § 40-1307 (highway districts vested with power of eminent domain)
- Idaho Code § 40-2316 (authorizing counties and highway districts to condemn roads to be used as "private highways") (see discussion in section 34.G on page 327)
- Idaho Code § 42-1103 (rights of way for ditches or other conduits for carrying water for irrigation, municipal, and factory use)
- Idaho Code § 42-1104 (rights of way for ditches or other conduits for carrying water across State lands)
- Idaho Code § 42-1105 (rights of way for ditches or other conduits used by riparian appropriators)
- Idaho Code § 42-1106 (the main condemnation provision for rights of way for ditches, and other conduits)
- Idaho Code § 42-1107 (locating drains for carrying off surplus water to natural waterways)
- Idaho Code § 42-1734(9) (Idaho Water Resource Board vested with eminent domain power)
- Idaho Code § 42-2939 (drainage districts vested with eminent domain power)
- Idaho Code § 42-3115(11) (board of commissioners of flood control districts vested with eminent domain power)
- Idaho Code § 42-3212(j) (board of directors of a sewer district vested with eminent domain power)
- Idaho Code § 42-3708(6) (directors of a watershed improvement district vested with eminent domain power)

irrigation districts, highway districts and a wide variety of other special purpose districts. As discussed below, private parties are also granted the right of condemnation under some circumstances. However, the Idaho Legislature has expressly denied the power of eminent domain to at least one governmental entity—county or city historic preservation commissions. Idaho Code § 67-4604. See also the discussion of Idaho Code § 7-701A (prohibiting condemnation in "*Kelo*-type" situations) in section 34.I(3) at page 331.

Idaho's general condemnation statutes are codified in Idaho Code, Title 7, Chapter 7 (Idaho Code §§ 7-701 to 7-721). They set out many requirements concerning the conduct of condemnation actions.

F. Authority for private persons to condemn

The main group of condemnation statutes are codified in Chapter 7 of Title 7 (entitled "Eminent Domain"). The first of these, Idaho Code § 7-701, recognizes a number of "public uses," many of which are tailored to private parties. The list includes, for example:

- "reservoirs, canals, ditches, flumes, aqueducts and pipes" (Idaho Code § 7-701(3)). (In addition, Title 42 contains condemnation authorization for condemnation of rights-of-way for canals, etc. See discussion of rights-of-way in *Idaho Water Law Handbook*.)

- "roads . . . for working mines" (Idaho Code § 7-701(4)). (In addition, Idaho Code §§ 47-903 to 47-913 authorize owners of mines to condemn rights-of-way.)

- Idaho Code § 42-5224(13) (board of directors for groundwater districts vested with eminent domain power)
- Idaho Code §§ 43-304; 43-908 (board of directors for an irrigation district vested with eminent domain power)
- Idaho Code §§ 47-901 to 47-913 (condemnation of access for mining properties)
- Idaho Code §§ 50-311; 50-320; 50-1030 (cities have various eminent domain powers)
- Idaho Code § 50-1914 (city housing authorities have eminent domain power)
- Idaho Code §§ 50-2007(c); 50-2010 (city urban renewal agencies have eminent domain power)
- Idaho Code § 50-2706 (city shall not delegate eminent domain power to public corporations)
- Idaho Code § 67-4604 (county or city historic preservation commissions are NOT vested with eminent domain power to acquire historic lands)
- Idaho Code § 67-6206(g) (housing and finance associations vested with power of eminent domain) Idaho Code § 67-6521(2)(b) ("affected persons" may seek a judicial determination of whether a zoning action constitutes an exercise of eminent domain)
- Idaho Code § 70-1903; 70-1907 (all port districts wherein industrial development district have been established are vested with eminent domain power)

- "Byroads, leading from highways to residences and farms" (Idaho Code § 7-701(5)).

- "Electric distribution and transmission lines" (Idaho Code § 7-701(11)).

Other condemnation statutes are found scattered throughout the Idaho Code. See footnote 301 on page 322.

These statutes do not expressly provide, in so many words, that the power of condemnation may be exercised by private parties, but this is evident in the listing of public uses that only a private entity would undertake (e.g., mining). It is also evident in the procedural provisions. For example, Idaho Code § 7-707(1) provides that a complaint for condemnation may be filed by a "corporation, association, commission or person."[302]

A number of court decisions have authorized private parties to use of the power of condemnation.[303] Although condemnation must be undertaken for a "public

[302] It is not clear why this statute does not also list governmental agencies as private parties.

[303] "We note that the Constitution of the State of Idaho, Article I, Section 13 [should be 14], supra, grants a right of eminent domain much broader than grants in most other state constitutions. For example, completely private interests in the irrigation and mining businesses can utilize eminent domain." *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 880, 499 P.2d 575, 579 (1972).

"The courts of this state have repeatedly held the right is granted to private enterprises in uses necessary to the complete development of the state. In behalf of a private lumber company, ... In behalf of a power company not a public utility, ... In behalf of a private mining company, ..." *Bassett v. Swenson*, 51 Idaho 256, 263, 5 P.2d 722, 725 (1931).

"The timber of this state is a material resource and where that resource cannot be completely developed without the exercise of the power of eminent domain that power may be lawfully exercised." "The fact that the use may be for private benefit is immaterial since the controlling question is whether the use is for the complete development of the material resources of the state" *McKenney v. Anselmo*, 91 Idaho 118, 123, 416 P.2d 509, 514 (1966) (private condemnation action by one landowner against another, decided on other grounds that did not question the condemnation right).

"Condemnation is an act of public power vested by statute in a private plaintiff . . . ." *MacCaskill v. Ebbert*, 112 Idaho 1115, 1119, 739 P.2d 414, 418 (Ct. App. 1987) (Burnett, J.). The court referenced Idaho Code §§ 7-701 and 40-2316 as examples of statutorily authorized private condemnation. *MacCaskill* 112 Idaho at 1118, 739 P.2d at 417. All this was said in dictum, contrasting condemnation with easement by necessity.

See also, *Eisenbarth v. Delp*, 70 Idaho 266, 215 P.2d 812 (1950) (a private party condemnor is not afforded the same deference as is a public condemnor as to the question whether the condemnation is necessary and located on the appropriate route); *Erickson v. Amoth*, 99 Idaho 907, 591 P.2d 1074 (1978) (private condemnor put to its proof as to necessity and insufficiency of alternate access route); *Blackwell Lumber Co. Empire Mill Co.*, 28 Idaho 556, 155 P. 680 (1916), *appeal dismissed* 244 U.S. 651 (1917) (temporary logging road for private company was necessary to develop resource of the state, so the road was a "public use" and therefore could be acquired by a private timber company by condemnation); *Yellowstone Pipe Line Co. v. Drummond*, 77 Idaho 36, 287 P.2d 288 (1955) (condemnation of right of way for pipeline by private entity); *Bassett v.*

purpose," the courts have held, essentially, that purposes like development of the State's resources is a public purpose, even when undertaken by private parties for profit.

In *Gibbens v. Weishaupt*, 98 Idaho 633, 570 P.2d 870 (1977) (Donaldson, J.), the Court explained that the strict prohibition on expanding the scope of use of a prescriptive easement is softened by the ability of private parties to condemn a broader scope of use if needed to access a farm or residence:

> Title 7, ch. 7 of the Idaho Code [Idaho Code 7-701(5)] allows private persons to exercise eminent domain rights to acquire by-roads for access from highways to farms and residences. Thus, our decision will not inhibit the development of property in this state or be an undue hardship on the parties in this case who commenced use of the road after 1970.

Gibbens, 98 Idaho at 639, 570 P.2d at 876.[304] Private condemnation under section 7-701(5) has been noted as well in *Eisenbarth v. Delp*, 70 Idaho 266, 215 P.2d 812 (1950) (Givens, J.); *Machado v. Ryan*, 153 Idaho 212, 219 n.3, 280 P.3d 715, 722 n.3 (2012) (Horton, J.).

Other cases, however, have limited *Gibbens*. They hold that the condemnation statutes should be read so as not to expand the scope of the constitutional eminent domain power to include the acquisition of property solely to enhance one's private enjoyment. In *Cohen v. Larson*, 125 Idaho 82, 867 P.2d 956 (1993) (Bistline, J.), the Court found that lakeside lot owners could not condemn access to their private residences across a neighbor's property (notwithstanding the statutory grant of condemnation power for byroads leading to residences):

> The legal concept of eminent domain generally applies only to the government or to its designated agents. However, there are certain Idaho cases which have upheld the right of private entities to exercise the power of eminent domain in certain limited circumstances. These cases involve exploitation of natural resources for

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Swenson, 51 Idaho 256, 263, 5 P.2d 722, 725 (1931) ("The courts of this state have repeatedly held the right is granted to private enterprises in uses necessary to the complete development of the state. In behalf of a private lumber company . . . . In behalf of a power company not a public utility . . . . In behalf of a private mining company . . . .") (citations omitted).

[304] Note that the scope of the easement may be expanded through an additional period of adverse use for the statutory period. At the time of the *Gibbens* case, that was five years; since 2006 it has been 20 years. In the *Gibbons* case, the expanded scope of use (for additional residences and a new business involving greenhouses) had occurred for only four years when the complaint was filed.

> the benefit and the use of the general public. [Examples and citations omitted.] All of these cases involved private condemnation but, clearly, the proposed use for which a party's land was taken was to serve the public of this state. This Court has never held that private individuals may take the property of other private individuals in order to enhance their purely private enjoyment of their property.

Cohen, 125 Idaho at 84-85, 867 P.2d at 958-59. *Cohen* was cited as authority for denying the right to condemn access to residences in *Backman v. Lawrence*, 147 Idaho 390, 399-400, 210 P.3d 75, 84-85 (2009) (Burdick, J.) and *Latvala v. Green Enterprises, Inc.*, 168 Idaho 686, 703, 485 P.3d 1129, 1146 (2021) (Bevan, C.J.).

The *Cohen*, *Backman*, and *Latvala* cases make clear that whether condemnation is available for residences and farms turns on the individual facts. But the rule of thumb may be that condemnation by private parties under section 7-701(5) ("highways, leading to residences and farms") remains available if needed to support agriculture (farm access), but is not available if it serves solely to enhance the enjoyment of a private residence.

In 2006, the Idaho Legislature enacted Idaho Code § 7-701A limiting the authority of governmental entities to exercise their eminent domain powers for the purpose of transferring condemned property to private parties (the "*Kelo*" situation). It appears that this legislation is limited to the exercise of eminent domain by the government, and does not affect or limit the ability of private parties to condemn property. See discussion in section 34.I(3) on page 331.

G. Condemnation of a "private highway" by the highway district or county

As an alternative to public road creation or to a private condemnation action, Idaho Code § 40-2316 provides for establishment of private highways for the benefit of specific landowners by highway districts and counties.[305] This is essentially a condemnation proceeding undertaken by the highway district or county with jurisdiction over local roads.[306]

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[305] "Private highways may be opened for the convenience of one or more residents of any county highway system or highway district in the same manner as public highways are opened, whenever the appropriate commissioners may order the highway to be opened. The person for whose benefit the highway is required shall pay any damages awarded to landowners, and keep the private highway in repair." Idaho Code § 40-2316 (emphasis added).

[306] In *MacCaskill v. Ebbert*, 112 Idaho 1115, 1118, 739 P.2d 414, 417 (Ct. App. 1987) (Burnett, J.), the court referenced Idaho Code §§ 7-701 and 40-2316 as examples of statutorily authorized private condemnation. *MacCaskill* 112 Idaho at 1118, 739 P.2d at 417. "Condemnation

Thus, even if the highway district or county determined that the road is not appropriate for designation as a public road, it may nevertheless be acquired as a "private highway" where the person(s) seeking access pay damages to the servient estate.

H. Cities' condemnation power is limited to city limits

In *Alliance for Property Rights and Fiscal Responsibility v. City of Idaho F*alls, 742 F.3d 1100 (9th Cir. 2013) (N.R. Smith, J.), the Ninth Circuit, applying Idaho law, ruled that Idaho cities have no general, extra-territorial power of eminent domain under Idaho's eminent domain statute, Idaho Code §§ 7-701 to 7-721 or Idaho's Revenue Bond Act, Idaho Code §§ 50-1027 to 50-1042. The decision relied substantially on the Dillon's rule concept embodied in *Caesar v. State*, 610 P.2d 517 (Idaho 1980) (Donaldson, C.J.):

> As a "creature of the state," the City has only those powers "either expressly or impliedly granted to it." *Caesar*, 610 P.2d at 519. Because the power to exercise eminent domain extraterritorially for the purpose of constructing electric transmission lines (1) has not been expressly granted to the City by the state, (2) cannot be fairly implied from the powers that the City has been given by the state, and (3) is not essential to accomplishing the City's objects and purposes, the City does not have that power.

Alliance, 742 F.3d at 1109. Accordingly, the court concluded: "If the City has no other option for providing sufficient electricity to its growing population, then it should ask the legislature—not the courts—to expand its eminent domain power to accommodate that growth." *Alliance*, 742 F.3d at 1107.

I. Condemnation must be for public use

(1) Idaho's definition of "public use"

Idaho's eminent domain statutes are codified at Idaho Code §§ 7-701 to 7-721.

Idaho law allows government entities to acquire property only for "public use." However, Idaho law defines "public use" broadly, and the Idaho Supreme Court has articulated no substantive limits on the uses for which government agencies may exercise eminent domain.

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is an act of public power vested by statute in a private plaintiff . . . ." *MacCaskill*, 112 Idaho at 1119, 739 P.2d at 418.

The "right" of eminent domain is strangely placed among the individual rights in the Idaho Constitution. In fact, article I, section 14 articulates a government power. It does so oddly, but appropriately for Idaho, by including a series of powers related to the delivery of water and drainage of mines:

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

Idaho Const. art. I, § 14,

The Idaho Supreme Court has relied on this provision to permit condemnation for a variety of water-related projects, including dam construction, hydropower, and irrigation and reclamation of arid lands. *Washington Water Power Co. v. Waters*, 19 Idaho 595, 115 P. 682 (1911); *Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 722 (1931); *Canyon View Irrigation Co. v. Twin Falls Canal Co*, 101 Idaho 604, 619 P.2d 122 (1980), *cert. denied*, 451 U.S. 912 (1981).[307] However, the Supreme Court denied the right to condemn a part of a canal for a pumping project for exchange of water. *Berg v. Twin Falls Canal Co.*, 36 Idaho 62, 213 P. 694 (1922).

Article I, section 14 goes on to define two other public uses, "any other use necessary to the complete development of the material resources of the state . . ." and "any other use necessary to . . . the preservation of the health of its inhabitants . . ." The first of these provisions has been cited to uphold the construction of timber roads as a public use, *Potlatch Lumber Co. v. Peterson*, 12 Idaho 769, 88 P. 426 (1906); *Blackwell Lumber Co. v. Empire Mill Co.*, 28 Idaho 556, 155 P. 680 (1916), appeal dismissed, 244 U.S. 651. The Supreme Court has relied on the second provision to vest the condemnation authority in a sewer and water district. *Payette Lakes Water & Sewer Dist. v. Hays*, 103 Idaho 717, 653 P.2d 438 (1982).

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[307] See discussion of condemnation by private persons in Patricia J. Winmill, *How Right is Your Right-of Way?*, 102A RMMLF Inst. 9 (1998). Other Idaho cases recognizing the right of private parties to condemn include *Codd v. McGoldrick Lumber Co.*, 279 P. 298 (Idaho 1929); *Marsh Mining Co. v. Inland Empire Mining & Milling Co.*, 165 P. 1128 (Idaho 1916); *Blackwell Lumber Co. v. Empire Mill Co.*, 155 P. 680 (Idaho 1916); *Potlatch Lumber Co. v. Peterson*, 88 P. 426, 431 (Idaho 1906).

The Supreme Court has also upheld the use of the eminent domain power by electric utilities, urban renewal agencies, pipeline companies, highway authorities, and public works agencies. *Hollister v. State,* 9 Idaho 8, 71 P. 541 (1903) (Ailshie, J.); *Boise Redevelopment Agency v. Yick Kong Corp.,* 94 Idaho 876, 499 P.2d 575 (1972); *Boise City v. Boise City Development Co.,* 41 Idaho 294, 238 P. 1006 (1925); *Powell v. McKelvey,* 56 Idaho 291, 53 P.2d 626 (1935).

Further, Idaho Code § 7-701 includes a long list of uses that the Legislature has defined as public uses, too numerous to list here. Suffice it to say that few eminent domain proceedings will be defeated on the grounds that they do not serve a public use.

(2) Public vs. private use nationally

Despite Idaho's broad definition of public use, the public use versus private use question remains hotly debated and litigated on a national level, especially in the area of economic development as a public purpose, which has its roots in the "blight" cases that rose to prominence in the 1950s. *Berman v. Parker,* 348 U.S. 26 (1954).

Cities and counties often seek to condemn dilapidated and/or abandoned (*i.e.*, "blighted") areas in the name of economic redevelopment or urban renewal. The *Berman* Court adopted a broad definition of "public use" (equating it with "public purpose") and upheld the constitutionality of urban renewal/economic redevelopment as a public use, despite that fact that often the condemned property is sold by the city to commercial or residential developers at a considerable profit, who in turn develop the property for private uses. After *Berman*, many states, including Idaho, followed suit and found urban renewal, though often directly benefiting private parties, to be a public use. *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972) ("The state, both through the power of eminent domain and the police powers, may legitimately protect the public from disease, crime, and perhaps even deterioration, blight and ugliness") (citing *Berman*).

Eventually, the definition of "blight" was expanded greatly by states and municipalities. For example, under a 1998 Pennsylvania statute, an area of property may be deemed blighted, and thus subject to condemnation, if it has "inadequate planning" or has "excessive coverage of land by buildings." 35 Pa. Cons. Stat. § 1702(a).

Not content with expanding the scope of what constitutes blight, government agencies began in the 1980s to condemn private property for the asserted public use of increasing employment opportunities and increasing tax revenues, *i.e.*, economic development. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled by Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765 (2004).[308]

[308] On July 30, 2004, the Supreme Court of Michigan overruled *Poletown*, finding that *Poletown's* "conception of a public use—that of 'alleviating unemployment and revitalizing the

Government entities began taking "non-blighted" private property solely on the ground that the private owner was not using the property for its highest and best use in the eyes of the government. This is where the national debate, and split of state courts, has occurred. *See infra*.

Cases holding that economic growth/development is not a public use include *Southwestern Illinois Development Authority v. Nat'l City Environmental*, 768 N.E.2d 1, 24-26 (Ill. 2002) (Illinois Supreme Court rejected the government's argument that the increase of economic growth is a public use because the intended beneficiary of the condemnation was a "private venture designed to result not in a public use, but in private profits"),*Georgia DOT v. Jasper Cnty.*, 586 S.E.2d 853 (S.C. 2003) (Supreme Court of South Carolina held that condemnation for a private marine terminal was not a public use even though it would have provided significant local economic benefit), and *Bailey v. Myers*, 76 P.3d 898 (Ariz. App. 2003) (finding no public use where government sought to condemn an existing auto repair shop in order to allow a private hardware store to occupy the property).

Cases/states holding economic growth/development is a public use include *Kelo v. City of New London*, 545 U.S. 469 (2005) (Stevens, J.) (Supreme Court upheld the condemnation of homes expressly for a private development that was going to bring economic growth to the community), *General Building Contractors, LLC v. Bd. of Shawnee Cnty. Comm'rs*, 66 P.3d 873 (Kan. 2003) (Supreme Court of Kansas found that economic development is a public use *per se* and upheld the condemnation of a viable construction business for the expressed purpose of allowing a Target store to occupy the condemned property), and *City of Toledo v. Kim's Auto & Truck Service, Inc.*, 2003 Ohio 5604 (Ohio App. 2003) (upholding economic development as a public use).

(3) Idaho's legislative response to *Kelo* (Idaho Code § 7-701A)

In response to *Kelo v. City of New London*, 545 U.S. 469 (2005) (Stevens, J.) (in which a woman's home was condemned for urban renewal purposes to facilitate a

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economic base of the community'—has no support in the court's eminent domain jurisprudence before the [Michigan] Constitution's ratification . . . ."

In *Hathcock*, Wayne County invoked its eminent domain power to condemn 1,300 acres of property owned by several defendants near the newly renovated airport for the asserted public use of "construction of a business park and technology park." The development was to be privately owned. The *Hathcock* Court found that these exercises of the eminent domain power did "not pass constitutional muster because they do not advance a public use as required," namely because the county intended "for the private entities purchasing defendants' properties to pursue their own financial welfare with the single-mindedness expected of any profit-making enterprise." In summation, the *Hathcock* Court wrote: "Our decision today does not announce a new rule of law, but rather returns our law to that which existed before Poletown and which has been mandated by our constitution since it took effect in 1963."

development by Pfizer Corporation), the Idaho Legislature enacted Idaho Code § 7-701A in 2006.[309] (In the same year, an even broader citizen initiative was defeated.[310])

In pertinent part, the statute provides: "Eminent domain shall not be used to acquire private property : (a) For any alleged public use which is merely a pretext for the transfer of the condemned property or interest in that property to a private party." Idaho Code § 7-701A(2)(a). This is clearly directed to *Kelo*-like condemnations by the government that are used to transfer the condemned property to private entities to promote economic development.

The statute is limited by the preceding paragraph which explains: "This section limits and restricts the use of eminent domain under the laws of this state or local ordinance by the state of Idaho, its instrumentalities, political subdivisions, public agencies, or bodies corporate and politic of the state to condemn any interest in property in order to convey the condemned interest to a private interest as provided herein." Idaho Code § 7-701A(1).

By limiting section 7-701A to condemnations undertaken by public entities, it is evident (though not expressly stated) that the statute does not apply to or limit the use of the condemnation power by <u>private</u> parties. If this anti-*Kelo* statute applied condemnations undertaken by private parties, that would destroy the long-recognized premise that private parties falling within the scope of constitutional and statutory authority may exercise the condemnation power.[311]

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[309] Section 7-701A was amended in 2015 (adding section 7-701(2)(c) (dealing with trails, paths, and greenways) and in 2021 (adding section 7-701A(3) (dealing with urban renewal agencies).

[310] A citizen initiative on the ballot on 2006, Proposition 2, was soundly defeated. The initiative would not only have halted local governments from condemning property to facilitate private development, but would have required local governments to compensate landowners whenever changes in zoning or subdivision rules reduce the fair market value of any property (except in specific circumstances such as nuisance abatement and nude dancing restrictions). Had this measure passed, it would have eliminated as a practical matter all new restrictive zoning by forcing governments to pay each affected landowner.

[311] By the way, a proviso in the statute may be read to significantly limit its application in any event. Section 7-701A(2)(b)(iii) provides that the limitation on the use of eminent domain for economic development purposes does <u>not</u> apply to "public and private uses for which eminent domain is expressly provided in the constitution of the state of Idaho." It would appear that this section was added to avoid having the statute declared unconstitutional. Thus, the statute must be interpreted to avoid conflict with or limitation of the self-executing constitutional grant of eminent domain authority. Plainly, then, section 7-701A may not be used to restrict use of condemnation for water development and mining—which are "expressly provide" in the Constitution. However, it would seem that the same is true for all uses falling within the broad "catch-all" provisions of the constitutional grant. After all, the catch-all provisions are also "expressly provided" in the Constitution. Arguably, then, the Legislature has largely gutted its own statute with this proviso.

J. All types of private property are subject to the just compensation requirement

Idaho law allows authorized entities to take all manner of private property for public use. "Private property of all classifications may be taken for public use." *Hughes v. State*, 80 Idaho 286, 328 P.2d 397 (1958). However, the corresponding obligation is that, if private property of any kind is taken, the property owner must be compensated.

(1) Fees and easements

The most obvious type of taking is the taking of a fee interest in real property. The government is specifically authorized to take a fee interest "when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris of a mine." Idaho Code § 7-702(1)

However, the statute also provides that the condemning party take "an easement, when taken for any other purpose." Idaho Code § 7-702(2).[312] (The statute is awkwardly written, but we read it to authorize creation of an easement on another fee property, not the condemnation of an existing easement.) This would seem to indicate that the condemning party can only take an easement for road building purposes and other uses that are not listed in Idaho Code Section 7-702(1). *See, Wooten v. Dahlquist*, 42 Idaho 121, 129, 244 P. 407, 409 (1926) ("[t]he right which the highway district acquires by the eminent domain proceedings is an easement for public road purposes. Title to the land, subject to such easement, still continues in the party owning the fee"). This is a curious provision. Does it also mean, for example, that a power company seeking to condemn land for a power plant under Idaho Code § 7-701(11) may only condemn an easement to site the plant? That makes little sense.

Note also that the statute only speaks only of an "easement." Presumably this reference to easements also includes negative easements (such as solar or wind easements[313]). But there is some risk that it could be more narrowly construed.

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[312] The eminent domain statute also permits the condemning entity to take "[t]he right of entry upon, and occupation of, lands, and the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for some public use." Idaho Code § 7-702(3).

[313] While Idaho has a conservation easement statute and a solar easement statute, it has no wind easement statute. The question is, does this matter? In other words, are wind easements enforceable in Idaho under common law without any express statutory authorization? Historically, at common law (going back to England), negative easements were strictly limited to only four types of easements (not including wind). Virtually every American court that has addressed this in modern times has expanded the allowable negative easements, and we find it close to inconceivably that Idaho would not do the same thing. But we are not aware of any decision on point. Indeed, we are not aware of any Idaho case dealing with solar easements, wind easements, or any negative

At least one Idaho statute purports to grant the power to condemn a fee simple outside the scope of Idaho Code Section 7-702(1). Idaho Code § 40-311 (giving the Idaho Transportation Department the power to "[p]urchase, exchange, condemn or otherwise acquire, any real property, either in fee or in any lesser estate or interest . . . deemed necessary by the board for present or future state highway purposes").

(2) Access rights (inverse condemnation cases)

Under Idaho law, a property owner has a right to "reasonable access" to his/her property. In *Johnston v. Boise City*, 390 P.2d 291 (Idaho 1964) (McFadden, J.), the Idaho Supreme Court held:

> Determination of whether damages are compensable under eminent domain or noncompensable under the police power depends on the relative importance of the interests affected. The court must weigh the relative interests of the public and that of the individual, so as to arrive at a just balance in order that the government will not be unduly restricted in the proper exercise of its functions for the public good, while at the same time giving due effect to the policy of the eminent domain clause of insuring the individual against an *unreasonable loss* occasioned by the exercise of governmental power.

Johnson at 295 (quoting a Kansas decision).

Johnston held that the elimination of a number of curb cuts did not violate the right of reasonable access.

Several other cases have denied taking claims for restriction of access. For example, in *Powell v. McKelvey*, 56 Idaho 291, 53 P.2d 626 (1935), the Court determined that no taking had occurred where a portion of a street was lowered to cross beneath a railroad track. The lowering adversely affected, but did not eliminate, access to adjacent parcels. Further, the Court upheld the installation of a median that required a circuitous access route in *Brown v. City of Twin Falls*, 124 Idaho 39, 855 P.2d 876 (1993). *See also Bane v. Dep't of Highways,* 88 Idaho 467, 401 P.2d 552 (1965) (holding that a gasoline station unlawfully erected had no right of access to a state highway).

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easements. Idaho has on many occasions expressly ruled that restrictive covenants are enforceable (within certain limits). Restrictive covenants are different in their historical development and different in how they are created from negative easements, but they are conceptually identical to negative easements in their operation. This further reinforces our conclusion that an express solar easement would be enforced in Idaho.

However, in *Farris v. City of Twin Falls*, 81 Idaho 583, 347 P.2d 996 (1959), the Court determined that a property owner stated a cause of action for inverse condemnation where a city impaired access to the property by raising the level of a street. *See also Hughes v. State*, 80 Idaho 286, 328 P.2d 347 (1958) (holding that cutting off the right of access to a business property constituted a taking).

Further, access rights may ripen into easements requiring compensation if they are taken. In *State v. Fonberg*, 80 Idaho 269, 328 P.2d 60 (1958), the Idaho Supreme Court explicitly stated that "the right of access to a public highway is a property right which cannot be taken or materially interfered with without just compensation." In *Monaco v. Bennion*, 99 Idaho 529, 585 P.2d 608 (1978), the Idaho Supreme Court held that platting a subdivision and dedicating rights-of-way creates an easement of access to the rights-of-way for each lot owner. The Supreme Court has never articulated the terms of this easement. It is not clear whether it is simply an easement for access somewhere to a piece of property or whether a government agency can change the place of access at will without compensation.

The Supreme Court has also not articulated whether a property owner has a right to rely on a particular curb cut or access if the property owner makes expenditures in reliance on that curb cut. *See Boise City v. Blaser,* 98 Idaho 789, 791, 572 P.2d 892 (1977). Another open issue is whether the property owner's expectation would pass to a subsequent purchaser of property if the use continued and what would happen if the use did not change.

(3) Leases, liens, mortgages and other real property interests

Leases of property are also private property to which just compensation requirements apply, although a lease of short duration may not require compensation because of the insignificant value or difficulty in valuation. 26 Am. Jur. 2d *Eminent Domain* § 259 (1996). The issue of how to allocate a compensation award between an owner, a lessee and other property interest holders is discussed below regarding damages. The lessee's rights may include compensation for fixtures to the extent that those fixtures belong to the lessee and increase the value of the leasehold. The lessee may be prevented from recovery if the fixture is not condemned or does not lose its value as a result of condemnation. 26 Am. Jur. 2d *Eminent Domain* § 262 (1996). The lessee is not entitled to compensation for personal property, unless it is condemned. *See State ex rel. Flandro v. Seddon*, 94 Idaho 940, 500 P.2d 841 (1972) (affirming a district court's denial of an injunction sought by the government to require the landowner to return all fixtures to the condemned property; finding that there was no evidence that the government intended to condemn the removed fixtures).

Mortgages and liens are also compensable property interests, as are a variety of other real property interests. 26 Am. Jur. 2d *Eminent Domain* §§ 266-287 (1996).

The Idaho Supreme Court has held that the owner of real property has reasonable airspace rights. *Roark v. City of Caldwell*, 87 Idaho 557, 394 P.2d 641 (1964)(invalidating a city ordinance that restricted building height in the vicinity of an airport as an unconstitutional taking).

(4) Franchise rights

The Idaho Constitution provides that franchises are subject to condemnation:

> The right of eminent domain shall never be abridged, nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals; and the police powers of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the state.

Idaho Const. art. 11, § 8 (emphasis supplied).

Idaho Code § 7-703(4) provides that franchise rights are property that require just compensation if taken by the government. The scope of this provision is unclear. It refers to "all other franchises," but the provision is plainly aimed at franchises for toll roads and the like.

Idaho Code §§ 61-333A, 61-333B, and 61-333C address condemnation of electrical facilities following annexation. See footnote 315 below.

In *Unity Light & Power Co. v. City of Burley*, 445 P.2d 720, 723 (Idaho 1968) (McFadden, J.), the Court protected a nonprofit electrical association which had acquired a franchise from a highway district to serve rural areas outside of the City of Burley. Burley, which operates its own electrical utility within the city, then annexed areas served by the nonprofit association. After annexation, "Unity continued to serve its members in the annexed areas, and continued to maintain its poles and transmission lines therein, although Burley had never granted any franchise to Unity for that purpose."[314] *Unity* at 721 (emphasis added).

Unity then sued the city seeking damages for the city's "pirating" of the association's customers. It also sought an injunction to prohibit the city from interfering with its operations. The city counterclaimed seeking an order directing

[314] The Court observed that the city never granted a franchise to the association. Apparently, none was sought by the association. The decision contains no suggestion that the failure to obtain a franchise was a problem. Indeed, the Court ruled in the association's favor—protecting its existing service territory and that of the city—notwithstanding the absence of a franchise.

Unity to remove all its poles and transmission lines within the annexed area.[315] The Court ruled in favor of the association, holding that both the city and the association were entitled to continue to serve their existing customers.

> The trial court enjoined Burley from interfering with Unity's present customers, and also enjoined Unity from serving any new customers in the area. Unity complains that the trial court erred in restricting it to service of its existing members. The trial court did not err in this regard. Until such time as Unity has secured a franchise from Burley, it is not entitled to extend its service to other than those members served at the time of annexation.

Unity at 725.

In *Coeur d'Alene Garbage Service v. City of Coeur d'Alene,* 759 P.2d 879 (Idaho 1988) (Johnson, J.), the Idaho Supreme Court determined that a taking had occurred when a garbage hauler was excluded from its prior service territory when the city annexed the area. The city's garbage contract required that a competitor haul all trash in the newly annexed area. The Court held that the exclusion of the prior hauler from any consideration for the hauling contract constituted a taking. The Court did not analyze the case in terms of franchise law. It did not even explain if the exclusive authority granted by ordinance to another garbage service was a franchise, though it certainly sounds like a franchise.

K. Condemnation of government property (waiver of sovereign immunity)

Idaho recognizes the principle that the State may be sued only when it gives its consent. See discussion of sovereign immunity in Volume 1 of this Handbook. The question is whether Idaho has consented to condemnation actions by private persons against State property. The answer is "yes."

Idaho's eminent domain statute provides that the condemnation power extends not only to the taking of private land but to condemnation of state and even federal land:

> The private property which may be taken under this chapter includes:

[315] The city also counterclaimed for condemnation. In 1963 (while the suit was pending), the Legislature enacted 1963 Idaho Sess. Laws, ch. 269 (codified in pertinent part at Idaho Code §§ 61-333A, 61-333B, and 61-333C), which provide a special condemnation remedy and procedures when land served by electric utilities and cooperatives is annexed. The Court held that the city had a right to condemn the association's property using the condemnation statutes in place when the suit was initiated. *Unity* at 724-25.

> . . .
>
> 2. Lands belonging to the government of the United States, to this state, or to any county, incorporated city, or city and county, village or town, not appropriated to some public use.
>
> 3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated.
>
> . . .

Idaho Code § 7-703 (enacted 1887 and codified in 1911 Idaho Sess. Laws, ch. 75 § 1; it has never been amended).

Note that subsection 7-703(2) includes state lands, but only those state lands that are "not appropriated to some public use." Idaho Code § 7-703(2). In the case of federal lands, that presumably corresponds to reserved land (e.g., for national forests). In the case of state lands, its meaning is less clear. But it does not include school lands.[316] In other words, school lands are subject to condemnation.

In any event, even if school lands were deemed to be "appropriated to some other use," they are still subject to condemnation under subsection 7-701(3) so long as the land is sought "for a more necessary public use than that to which it has been already appropriated." Idaho Code § 7-703(3). This "more necessary" requirement is reiterated (redundantly) in the next section. "If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use." Idaho Code § 7-704(3).

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[316] School lands are not "reserved" lands today. Prior to statehood, they may or may not have been reserved. When Idaho was established as a territory, school lands that had been surveyed were reserved from disposal by the federal government. But unsurveyed school lands were not reserved.

> Sec. 14. And be it further enacted, That <u>when the lands</u> in the territory <u>shall be surveyed</u>, under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby <u>reserved</u> for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same.

Organic Act of the Territory of Idaho, 12 Stat. 808, 814, § 14 (Mar. 3, 1863) (emphasis added).

But once the lands were conveyed to the State upon statehood, they were no longer federal lands and, hence, were no longer "reserved" by the federal government. Instead, they were "granted to said State for the support of common schools" with the expectation that they would be "disposed of only at public sale." Idaho Admission Act, ch. 656, 26 Stat. 215, 215, §§ 4 & 5 (July 3, 1890). Indeed, the whole purpose of this grant is to allow school lands to be developed and, when appropriate, disposed of for the financial benefit of schools.

The question of whether Idaho Code § 7-703(2) constituted a waiver of sovereign immunity was first addressed in *Hollister v. State*, 9 Idaho 8, 71 P. 541 (1903) (Ailshie, J.). The Court began by recognizing that, absent consent, the State may not be sued. *Hollister*, 71 P. at 542. It then turned to what is now section 7-703.[317] The Court stated, inexplicably: "This statute alone, however, would not authorize this action." *Id*. Yet the Court found another statute that it said was sufficient to provide consent.[318] More importantly, the Court turned to the issue of whether the State had the power to consent to condemnation of State school lands. The Court noted that the Idaho Admission Act[319] provided that school lands "shall be disposed of only at public sale." *Hollister*, 71 P. at 543. The Court found this provision was no bar to condemnation of school lands.

> When Idaho became a state, it at once necessarily assumed the power of eminent domain, one of the inalienable rights of sovereignty; and that right, we take it, may be exercised over all property within its jurisdiction. But even if congress had the authority, in granting these lands to the state, to restrict and prohibit the state in the exercise of the power of eminent domain, we do not think it was intended or attempted in the admission act. It was evidently the purpose of congress in granting sections 16 and 36 in each township to the state for school purposes to provide that the revenue and income from all such lands should go to the school fund, and that when sold it should be at the highest market price. We cannot believe that congress meant to admit into the Union a new state, and by that very act throttle the purposes and objects of statehood by placing a prohibition on its internal improvements. To prohibit the state the right of eminent domain over all the school lands granted would lock the wheels of progress, drive capital from our borders, and in many instances necessitate

[317] *Hollister* referred to section 7-703(2) as being a statute found in the territorial statutes of 1887. It is unclear why the Court did not refer to a more recent codification. This is immaterial; the statute has not be amended since territorial times.

[318] The other statute was what is now Idaho Code § 42-1104, which the *Hollister* Court referred to as section 13 of act approved February 25, 1899 (Sess. Laws 1899, p. 381). This statute granted rights-of-way across State lands for ditches. Why the Court landed on this statute is unclear, because the condemnation was not for a ditch but for development of electric power for the town of Shoshone.

[319] Hollister was quoting the Idaho Admission Act, ch. 656, 26 Stat. 215, 216, § 5 (July 3, 1890). This provision, as amended, now reads: "all land granted under this Act for educational purposes shall be sold only at public sale."

> settlers who have taken homes in the arid portions of the state seeking a livelihood elsewhere.

Hollister, 71 P. at 543 (citations omitted).

Idaho Code § 7-703(2) was examined again in *Petersen v. State*, 393 P.2d 585, 590 (Idaho 1964) (McQuade, J.). In that case, the Petersens sought to condemn a roadway across state property to their lake-front property bordering Priest Lake, which they hoped to subdivide and develop. After the Petersens acquired the property, the State closed the road previously used to access the property. The State moved to dismiss on grounds of sovereign immunity. The *Petersen* Court found that section 7-703(2) constituted express consent to sue the State. In so ruling, the Court said the statement in *Hollister* that section 7-703(2) standing alone was insufficient to authorize condemnation against the State was pure dicta. *Petersen* at 587. The Court concluded that the State's consent was crystal clear:

> Moreover, the negative statements made in the Hollister case concerning the State's consent to be sued seem peculiar in light of the clarity of I.C. § 7–703. While we approve of strict statutory construction in this area, there is no need to construe a statute when the language employed is clear and unambiguous. *Blue Note, Inc. v. Hopper*, 85 Idaho 152, 377 P.2d 373 (1962). As noted above, the statute states that: 'The private property which may be taken under this chapter (Eminent Domain) includes: * * * Lands belonging to * * * this state, * * *.' It is difficult to imagine how the State could more clearly grant its consent to suit.

Petersen at 587 (asterisks original).

Hollister and *Petersen* appear to be the only reported decisions in Idaho addressing this subject.[320] Together they show unequivocally that (1) the State has

[320] The case of *Hellerud v. Hauck*, 52 Idaho 226, 13 P.2d 1099, 1100-01 (1932) (Varian, J.) held that a statute of limitations (Idaho Code § 5-202) that authorizes adverse possession (or prescriptive easements) against the State has exceptions making it inapplicable to reserved lands or school lands held by the State. As for school lands, the exception derives from:

- The requirement in the Idaho Admissions Act that "None of the lands granted by this act shall be sold for less than ten dollars an acre." Idaho Admission Act, ch. 656, 26 Stat. 215, 217, § 11 (July 3, 1890).
- The provision of the Idaho Constitution stating that "no school lands shall be sold for less than ten dollars per acre." Idaho Const. art. IX, § 8.

Neither of these come into play in a condemnation action, which would require that the State receive fair market value for any property taken. Moreover, the restrictions above arguably apply only to the sale of the entire fee, not to a right-of-way or other easement. For a more thorough

consented to condemnation of State lands and (2) that consent is not violative of the special treatment of school lands in the Idaho Admission Act.

Section 7-703(2) also authorizes condemnation of federal land. However, we are not aware of this authority being employed in the context of federal land. If it were, that would raise questions under the Supremacy Clause.

L. Condemnation actions include many special requirements

Title 7, Chapter 7 of the Idaho Code governs the conduct of eminent domain proceedings in Idaho. This chapter creates a number of unique features that differentiate a condemnation proceeding from other civil proceedings. The following sections discuss the most important of these.

(1) Prerequisites to taking

The condemnation statute includes four factual prerequisites to a taking. Idaho Code § 7-704. First, the property must be put to a public use authorized by law. Second, the taking must be necessary to such use. Third, if the property is already put to a public use, that the replacement use is a more necessary public use. Finally, if the use is a 230KV or larger electrical transmission line over private property dedicated to agriculture, a public meeting must have been held with at least 10 days prior notice.

A number of cases have addressed the "necessity" requirement of Section 7-704. The Idaho Supreme Court has not addressed this issue for many years, but the general tenor of the cases is that the court will strongly defer to the government agency's determination of whether the acquisition is necessary or not. *Boise City v. Boise City Development Co.*, 41 Idaho 294, 238 P. 1006 (1925); *Washington Water Power Co. v. Waters*, 19 Idaho 595, 115 P. 682 (1911). Unlike the determination of whether a taking has occurred, which is an issue of law, the issue of necessity is an issue of fact, and the court will not disturb findings that are based on substantial conflicting evidence. *Blackwell Lumber Co. v. Empire Mill Co.*, 29 Idaho 421, 160 P. 265 (1916), appeal dismissed, 244 U.S. 651 (1917).

Idaho Code Section 7-705 further states that the property taken "must be located in the manner which will be most compatible with the greatest public good and the least private injury . . ." Idaho courts have not interpreted this provision substantively.

Idaho Code Section 7-711A requires that the condemning authority give the property owner a very specific "advice of rights" form at the commencement of negotiations. While giving such form is not a formal prerequisite to exercising

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discussion of *Hellerud* and the subject of adverse possession against governmental, see the *Idaho Road Law Handbook*.

eminent domain, there are potentially serious consequences for failure to provide the form:

> If the condemning authority does not supply the owner of the real property with this form, there will be a presumption that any sale or contract entered into between the condemning authority and the owner was not voluntary and the condemning authority may be held responsible for such relief, if any, as the court may determine to be appropriate considering all of the facts and circumstances.

Idaho Code § 7-711A.

(2) Special pleading requirements

The action must be commenced in the district court for the county in which the property is located. Idaho Code § 7-706.

Idaho Code Section 7-707 requires that the complaint must include several specific allegations, including:

- The name of the "corporation, association, commission or person in charge of the public use for which the property is sought, who must be styled as plaintiff;"
- "The names of all owners and claimants of the property, if known, or a statement that they are unknown." These are the defendants;
- "A statement of the right of the plaintiff" presumably to condemn the property;
- "If a right of way is sought, the complaint must show the location, general route and termini, and must be accompanied by maps thereof;"
- "A description of each piece of land sought to be taken, and whether the same includes the whole, or only a part, of an entire parcel or tract." The complaint may include all parcels needed in the county, but the court may consolidate or separate them "to suit the convenience of the parties."

If the owner resides in the county, "a statement that the plaintiff has sought, in good faith, to purchase the lands so sought to be taken, or settle with the owner for the damages which might result to his property . . . and was unable to make any reasonable bargain . . ." No such allegation is required if the property owner does not reside in the county, which raises some interesting equal protection and due process issues. The Idaho Supreme Court has held that the mere submission of a good faith offer by letter is insufficient to meet the requirements of this section. *State ex rel. Rich v. Blair,* 365 P.2d 216, (Idaho 1961). However, a process where the plaintiff engaged in significant negotiations over 13 months was considered sufficient. *Idaho Power Co. v. Lettunich*, 602 P.2d 540 (Idaho 1979). Further, where the property owner stated that he did not want an easement over his property and the testimony

supported the valuation of the offer, the court has upheld a finding of good faith negotiation. *Southside Water & Sewer District v. Murphy*, 555 P.2d 1148 (Idaho 1976).

Idaho Code Section 7-708 includes special requirements for the summons, which must include the names of the parties, a general description of the whole property; a statement of the public use, a reference to the complaint to describe the specific parcels and a notice to the defendants to appear and show cause why the property should not be condemned. Otherwise, the summons is the same as in a civil matter.

Idaho Code Section 7-709 empowers all persons occupying or claiming an interest in the property to appear and defend the action, whether or not they are named in the complaint. Presumably, this includes lessees, mortgagees, lien-holders and even adverse possessors.

(3) Elements of compensation

The heart of most condemnation cases is the amount of compensation. The sections below discuss the involved process of assessing damages in an inverse condemnation case.

(a) Market value of property

The primary measure of damages in a condemnation case is the value of the property at the time it is taken. Idaho Code § 7-711.1; *Spokane & Palouse Ry. v. Lieuallen*, 29 P. 854 (Idaho 1892). Several caveats apply to this basic principle, however. First, the requirement that the property be valued at the time it is taken means that the valuation cannot consider the value of the improvements the government will add to the condemned property. For example, if the property taken will be used for a new road that will increase the value of the taken property, the valuation cannot consider the addition of the road—rather, it must be valued at a "pre-project" value.

Second, the amount paid for the property cannot be less than the valuation of the property for property tax purposes unless the property has been altered substantially. Idaho Code § 7-711.1.

Further, the referee, judge or jury is required to assess the property and all improvements, and each and every separate interest or estate. Separate parcels must be separately assessed. Idaho Code § 7-711.1.

Lastly, in determining market value, the court or jury is not restricted to the current use of the property:

> The compensation which must be paid for property taken by eminent domain does not necessarily depend

> upon the uses to which it is devoted at the time of the taking; rather, all the uses for which the property is suitable should be considered in determining market value. The highest and best use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as a measure of value, but to the full extent that the prospect of demand for such use affects the market value of the property. It must be shown that the use for which the property is claimed to be adaptable is reasonably probable.

State ex rel. Symms v. City of Mountain Home, 493 P.2d 387, 389-90 (Idaho 1972).

(b) Time of valuation

The property must be valued as of the time of the issuance of the summons. Idaho Code § 7-712. Improvements added post-summons are not included in the amount of damages. Idaho Code § 7-712.

(c) Severance damages/benefits

"As a general rule, damages for the taking of an interest in property are measured by the fair market value of the property taken plus severance damages to any remainder." *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 619 P.2d 122, 132 (Idaho 1980). Idaho Code Section 7-711.2(a) requires that a court or jury ascertain and assess "the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff [*i.e.*, government]."

Idaho Code Section 7-711.3 likewise requires a court or jury to ascertain and assess whether the remaining property not condemned will be specially and directly benefited by the government's proposed improvement on the condemned property. If the benefit to the remaining property is equal to or greater than the severance damages suffered by the landowner, the landowner will not be allowed to recover any damages under Idaho Code Section 7-711.2. Rather, he will only be compensated for the value of the property actually taken.

If the damages to the remaining property are greater than the benefits resulting from the government's proposed improvements, then the value of the benefits shall be offset against the value of the severance damages. Idaho Code § 7-711.3

Any benefit to the land owner's remaining property that was not condemned in excess of any severance damages to the same remainder parcel may not be offset against the landowner's recovery for the government's condemnation. That is, if just

compensation for the taking of a land owner's property was determined to be $10,000, but the court also determined that the remainder parcel would incur benefits of $5,000 by reason of the government's proposed improvements, the court may not offset the landowner's recovery to take account of the benefits received. *See City of Orofino v. Swayne* 128, 504 P.2d 398, 401 (Idaho 1972) (recognizing that while some jurisdictions allow for such offsets, under Idaho law "benefits which may accrue to the remainder may not be considered except as a set-off against damages that have accrued to the remainder by reason of the severance from the portion condemned").

(d) Business damages

In addition to severance damages, Idaho Code Section 7-711.2(b) requires that a court or jury ascertain and assess:

the damages to any business qualifying under this subsection having more than five (5) years' standing which the taking of a portion of the property by the plaintiff may reasonably cause. The business must be owned by the party whose lands are being condemned or be located upon adjoining lands owned or held by such party. Business damages under this subsection shall not be awarded if the loss can reasonably be prevented by a relocation of the business or by taking steps that a reasonably prudent person would take, or for damages caused by temporary business interruption due to construction; and provided further that compensation for business damages shall not be duplicated in the compensation otherwise awarded to the property owner for damages pursuant to subsections (1) and (2)(a) of section 7-711, Idaho Code.

Any business owner seeking business damages must submit to the government copies of "federal and state income tax returns, state sales tax returns, balance sheets, and profits and loss statements for the five (5) years preceding" the condemnation action. Idaho Code § 7-711.2(b)(iii-iv).

For further requirements and conditions regarding recovering business damages in condemnation proceedings, refer to Idaho Code Section 7-711.2(b)(i-v).

(e) Attorney's fees/costs

Attorney's fees and other expenses are not recoverable in condemnation proceedings, except as authorized by statute. *Ada Cnty. Highway District ex. rel. Fairbanks v. Acarrequi*, 673 P.2d 1067 (Idaho 1983) (Shepard, C.J.).

Attorney's fees and costs are recoverable in condemnation proceedings pursuant to Idaho Rule of Civil Procedure 54(d)(1). As in most civil cases, fees and costs may be awarded only to the prevailing party. Idaho Code § 12-121. Idaho Rule of Civil Procedure 54(e)(1) provides that attorney's fees under Idaho Code Section 12-121 "may be awarded by the court only when it finds, from the facts

presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation."

The *Acarrequi* Court set forth several factors that a trial court should take into account when determining if a prevailing party is entitled to attorney's fees:

> a condemnor should have reasonably made a timely offer of settlement of at least 90 percent of the ultimate jury verdict. We also deem that an offer would not be timely if made on the courthouse steps an hour prior to trial. An offer should be made within a reasonable period after the institution of the action, to relieve the condemnee not only of the expense but of the time, inconvenience and apprehension involved in such litigation, and also to eliminate the cloud which may hang over the condemnee's title to the property. Other factors which may be considered by the trial court are any controverting of the public use and necessity allegations; the outcome of any hearing thereon and, as here, any modification in the plans or design of the condemnor's project resulting from the condemnee's challenge; and whether the condemnee voluntarily granted possession of the property pending resolution of the just compensation issue.

Acarrequi at 1072.

Furthermore, the *Acarrequi* Court hinted that a condemning government entity is not very likely to recover its attorney's fees: "Except in the most extreme and unlikely situation, we cannot envision an award of attorneys' fees and costs to a condemnor." *Acarrequi* at 1072.

"Costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides in the discretion of the court." Idaho Code § 7-718.

(f) Interest

"For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date, shall be the measure of compensation for all property to be actually taken…." Idaho Code § 7-712. "The compensation and damages awarded shall draw lawful interest from the date of the summons." Idaho Code § 7-712.

"Under the eminent domain statutes in the State of Idaho, Idaho Code § 7-701 *et seq.*, it is clear that a defendant is entitled to interest running from the date of the

summons." *Eagle Sewer Dist. v. Hormaechea*, 109 Idaho 418, 422, 707 P.2d 1057, 1061 (Ct. App. 1985).

(4) Allocation of Damages

The "owner" of condemned property includes any person having a lawful interest in the property. 26 Am Jur. 2d *Eminent Domain* § 257 (1996). The generally accepted method for apportioning the compensation paid among the owners of the property is commonly called the "unit rule", the "undivided fee rule" or the "undivided basis rule." 26 Am Jur. 2d *Eminent Domain* at § 258. It is a two-step process: (1) the court determines the total compensation due for the fee taken; and (2) the court apportions the award among the various ownership interests. 26 Am Jur. 2d *Eminent Domain* at § 258. There is no standard method for apportioning the condemnation award or otherwise determining what percentage of the award each separate interest is entitled to.

By way of example, a landlord cannot recover for a taking that only affects her tenant's interest in the property, *i.e.*, a temporary taking that ceases to exist before the lease term expires. In such a case, the tenant would be entitled to 100 percent of the compensation awarded for the taking.

Idaho seems to have eschewed the generally accepted "unit rule" and adopted the minority "summation rule," which values each interest separately and adds them together to arrive at the total just compensation due. Idaho Code Section 7-711.1 provides that the court or jury must ascertain and assess the value of the property sought to be condemned "and of each and every separate estate or interest therein…." This section goes on to say that "if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed." Idaho Code § 7-711.1 (emphasis added).

(5) Role of judge and jury

As in all civil court matters, in condemnation actions, issues of law are for the trial court to decide and issues of fact are for a jury or fact finder to decide. "In an eminent domain action, the only issue for the jury is compensation for the land and the damages thereto." *Reisenauer v. State Dep't of Highways*, 120 Idaho 36, 38, 813 P.2d 375, 377 (Ct. App. 1991). All remaining issues are issues of law for the trial court to determine. Of course, as previously indicated, just compensation is the heart of any condemnation action.

However, aside from cases tried before the court, there are certain other circumstances where a judge will determine just compensation, at least initially.

See discussion in context of takings case in section 29.G(4) at page 136.

(6) Taking possession before trial

Idaho Code Section 7-721 sets forth certain circumstances where the government may take possession of and use any property it seeks to acquire through condemnation "at any time after just compensation has been judicially determined and payment thereof made into court." Generally, the government may do this when it needs to take possession of land right away for the purposes of road-building or water/sewer purposes and it has been unable to negotiate a possession agreement with the property owner.

In these cases, the government will file a motion asking that it be placed in lawful possession of the property. Idaho Code § 7-721(1). Within 20 days, the court will hold a hearing on the motion to determine: (1) whether the government has the right of eminent domain; (2) whether or not the use to which the property is to be applied is authorized by law; (3) whether or not the taking is necessary to such use; and (4) whether or not the government has sought, in good faith, to purchase the property. Idaho Code § 7-721(1-2).

If the court finds these four criteria satisfied, then the court will hear "evidence as it may consider necessary and proper for a finding of just compensation…." Idaho Code § 7-721(3).

In its discretion, the court may appoint a disinterested appraiser as an agent of the court, at the expense of the government. Idaho Code § 7-721(3). The appraiser will be given 10 days to report his conclusions to the court. Idaho Code § 7-721(3). Within 5 days after receiving the appraiser's report or within 5 days after the hearing if no appraiser was appointed, the court shall "make an order of just compensation." Idaho Code § 7-721(3).

Thereafter, the government may deposit the ordered amount with the court, upon which the court will enter an order fixing a date when the government is entitled to possession of the property. Idaho Code § 7-721(5).

Once the money is deposited with the court, any "party defendant" may file with the court an application to withdraw her portion of the amount deposited by the government. Idaho Code § 7-721(6). If there is only one party defendant, then the court shall authorize the withdrawal. However, if there is more than one party defendant, then the court shall hold a hearing, giving notice to each party whose interest would be affected by the withdrawal. Idaho Code § 7-721(6). At the hearing, the court shall determine what portion of the deposited funds each party defendant may withdraw. Idaho Code § 7-721(6).

If more than 80 percent of the funds are withdrawn, then the defendant(s) withdrawing the money:

shall be required to make a written undertaking, executed by two (2) or more sufficient sureties, approved by the court, to the effect that they are bound to the plaintiff for the payment to it of such sum by which the amount withdrawn shall exceed the amount of the award finally determined upon trial of the case.

Idaho Code § 7-721(7).

Notably, the court's order of just compensation, the amount deposited with the court by the government, and the appraiser's report are not admissible in evidence in further proceedings to determine the actual just compensation owed to the property owner. Idaho Code § 7-721(4).

M. Practical issues in Idaho eminent domain

(1) Negotiating sale agreements and leases to address condemnation

Condemnation can become an issue in the purchase, sale or lease of real property. Condemnation becomes an issue in the purchase and sale of real property if part of the property is condemned between the entry of a purchase agreement and the sale of the property. The main question is what compensation, if any, the buyer owes the seller for property the buyer contracts to purchase that the government takes before closing.

For example, assume that a buyer contracts with a seller to purchase 100 acres of property at $100,000 per acre. The value is based on the installation of new road improvements adjacent to the property. Between entry of the purchase contract and the closing, the government condemns 10 acres for the contemplated road improvements. However, the government is only required to pay $50,000 per acre, the "pre-project" value of the land.

In the absence of a contractual provision, the condemnation creates a messy issue. Is the buyer bound by the contract or is he or she relieved from the obligation to pay for the condemned portion of the property by the intervening government action? To avoid this issue, the best practice is clearly to allocate the risks in the contract. As in all good contractual drafting, the parties should address all the possibilities. What happens if condemnation occurs? What if it does not? Is the seller entitled to the full price for the entire acreage or only for the acreage remaining? The answers to these questions are transaction specific, but they should be addressed.

A typical purchase and sale agreement will contain a "risk of loss" provision such as the following, which will most often encompass condemnation issues:

> Risk of Loss; Condemnation. Risk of loss or damage to the Property shall be borne by Seller until the Closing.

> From and after the Closing, loss of or damage to the Property shall be borne by Buyer. If the Property is or becomes the subject of any condemnation proceeding prior to the Closing, Buyer may, at its option, terminate this Agreement by giving notice of such termination to Seller within ten (10) days following the date Buyer learns about the condemnation proceeding, and upon such termination this Agreement shall be of no further force or effect and all Earnest Money and Review Period Extension Payments shall be returned to Buyer. Provided, however, Buyer may elect to purchase the Property, in which case the total Purchase Price shall be reduced by the total of any condemnation award received by Seller at or prior to the Closing. On Closing, Seller shall assign to Buyer all Seller's rights in and to any future condemnation awards or other proceeds payable or to become payable by reason of any taking of the Property. Seller agrees to notify Buyer of eminent domain proceedings within ten (10) days after Seller learns thereof.

While condemnation issues may be relatively rare in purchase and sale contracts, they are more common in leases. The question is what are the rights and obligations of the landlord and tenant if some or all of the leased property is condemned? Generally, the simpler cases are where the entire leased premises are condemned. The threshold question is whether the lease terminates at that point. If so, the landlord would hold the entire fee at condemnation and thus should be entitled to the condemnation award. If not, a question may remain about who is entitled to the condemnation award.

Another set of questions may arise if only a portion of the leasehold is taken. Does rent abate for the tenant for the portion of the leased premises taken? Is there additional compensation to the tenant if the value of the leasehold is harmed by the take? Is there additional rent due to the landlord if the take enhances the value of the leasehold? At what point does the property become uninhabitable, allowing the tenant to terminate the lease? The lease should address all of these issues if condemnation is a reasonable possibility during the lease term. Indeed, in the context of retail leases, failure to include provisions dealing with possible condemnation proceedings could amount to actionable malpractice. The following is an example of terms that should be included in a retail lease to address these issues:

> 1. Eminent Domain
>
> 1.1 Substantial Taking. Subject to the provisions of Section 1.4 below, in case the whole of the Premises, or such part thereof as shall substantially interfere with

Tenant's use and occupancy of the Premises as reasonably determined by landlord, shall be taken for any public or quasi-public purpose by any lawful power or authority by exercise of the right of appropriation, condemnation or eminent domain, or sold to prevent such taking, Landlord, subject to space availability, shall have the right to relocate Tenant to comparable space within the Retail Center, and if no such space is then available, Landlord shall notify Tenant and either party shall have the right to terminate this Lease effective as of the date possession is required to be surrendered to said authority.

1.2 Partial taking; Abatement of Rent. In the event of a taking of a portion of the Premises which does not substantially interfere with the conduct of tenant's business, then, except as otherwise provided in the immediately following sentence, neither party shall have the right to terminate this Lease and Landlord shall thereafter proceed to make a functional unit of the remaining portion of the Premises (but only to the extent Landlord receives proceeds therefore from the condemning authority), and the monthly installment of the Base Rent shall be abated with respect to the part of the Premises which Tenant shall be so deprived on account of such taking. Notwithstanding the immediately preceding sentence to the contrary, if any part of the Building or the Retail Center shall be taken (whether or not such taking substantially interferes with Tenant's use of the Premises), Landlord may terminate this Lease upon thirty (30) days' prior written notice to Tenant.

1.3 Condemnation Award. Subject to the provisions of Section 1.4 below, in connection with any taking of the Premises or the Building, Landlord shall be entitled to receive the entire amount of any award which may be made or given in such taking or condemnation, without deduction or apportionment for any estate or interest of Tenant, it being expressly understood and agreed by tenant that no portion of any such award shall be allowed or paid to Tenant for any so-called bonus or excess value of the Lease, and such bonus or excess value shall be the sole property of Landlord and Tenant hereby assign to Landlord any right Tenant may have to such damages or award, and Tenant shall make no claim against Landlord for the termination of the leasehold interest or

interference with Tenant's business. Tenant shall not assert any claim against Landlord or the taking authority for any compensation because of such taking (including any claim for bonus or excess value of the Lease); provided, however, if any portion of the Premises is taken, Tenant shall be granted the right to recover from the condemning authority (but not from Landlord) any compensation as may be separately awarded or recoverable by Tenant for the taking of Tenant's furniture, fixtures, equipment and other personal property within the Premises, for Tenant's relocation expenses, and for any loss of goodwill or other damage to Tenant's business by reason of such taking.

1.4 Temporary Taking. In the event of a taking of the Premises or any part thereof for temporary use, (a) this Lease shall be and remain unaffected thereby and at Landlord's election, (1) Rent shall abate in proportion to the square footage of the floor area of the Premises so taken, or (2) Tenant shall receive for itself such portion or portions of any award made for such use with respect to the period of the taking which is within the Term, provided that if such taking shall remain in force at the expiration or earlier termination of this Lease, Tenant shall perform its obligations under [other portions of the lease] with respect to surrender of the Premises and shall pay to Landlord the portion of any award which is attributable to any period of time beyond the Term expiration date. For purposes of this section 1.4, a temporary taking shall be defined as a taking for a period of two hundred seventy (270) days or less.

(2) Considerations in whether to settle an eminent domain case or try it

As previously indicated, Idaho law requires that before a government agency may institute condemnation proceedings, it must seek "in good faith, to purchase the lands so sought to be taken, or settle with the owner for the damages which might result to his property from the taking thereof…." Idaho Code § 7-707.6. Only after such attempts at purchase and settlement fail can the government then commence condemnation proceedings.

Therefore, the government cannot run absolutely roughshod over private landowners and must at least make some good faith effort at negotiating a purchase of the property or reaching a damages settlement. It is during this period of negotiations before the condemnation action has begun that a private landowner must

first begin to assess whether she wishes to dig in her heels (*i.e.*, contest public use or valuation), and potentially pay thousands of dollars in attorney's fees, which she may or may not recover later. The alternative is to reach some mutually agreeable settlement or arrangement that still gives the government what it wants (the land or use thereof; an inevitable conclusion in most cases) and saves the property owner the time and expense of protracted litigation.

However, private landowners should realize that government right-of-way agents do not necessarily see their jobs as to offer a fair settlement. Rather, the landowner should look at the right-of-way agent just as any potential purchaser: they are trying to get the best price they can for the property, subject to the additional requirement that they must provide an appraisal to support their proposed price. However, the values that different appraisers may set on a property may differ greatly based on the appraisal method used and the needs of the client.

The key for the property owner to successfully navigate these negotiations is to understand the value of his or her property. The property owner is at a natural disadvantage at the outset of the negotiations: the government has an appraisal and the property owner does not. This disadvantage may be exacerbated when surrounding uses have changed or the property has appreciated significantly so a long-term property owner may not have a good idea of value. Sometimes, figuring out the value may be a simple matter. If a comparable property next door has recently sold, and the price was not influenced by the upcoming condemnation, there may be little controversy about the price. However, there can be many complicating factors, and these are the things of which litigation is made.

When the government begins negotiations with a property owner, the owner should be given an appraisal. The first step is to review the appraisal carefully. This can often seem like an exercise in reading hieroglyphics, but there are some signs to look for. Ultimately, we believe the best advice is to affiliate experienced condemnation counsel and/or an appraiser if there is a significant amount of money potentially at stake.

Some of the signs the government's appraisal understate the value of the property include the following:

Has the appraisal correctly determined the highest and best use in contemplation of the land use plans for the area?

Does the appraisal rely on relevant comparable sales?

Does the appraisal include significant downward adjustments from the comparable sales?

Does the appraisal improperly discount damages to the remainder parcel? For example, does the appraisal address noise impacts, access restrictions or parcel configuration restrictions caused by the project?

Does the appraisal apply the pre-project requirement in a way that does not make sense? For example, does the appraisal treat the commercial use of a property as a post-project enhancement when the property could be put to commercial use whether the project goes through or not?

For commercial or industrial properties, does the appraisal improperly discount an income method of appraisal? Or a replacement method if structures are taken?

(3) Should the condemnee hire an appraiser?

As mentioned, our advice is that the property owner should retain experienced counsel and/or an appraiser whenever a significant amount of money is at stake. There may be exceptions for very sophisticated landowners, but they are few.

(a) What can the appraiser do?

An appraiser can help the property owner sort through the list of issues above and provide responses to the government agency. If necessary, the appraiser can prepare an alternate appraisal, and provide expert testimony in court.

(b) The appraiser should have specific expertise

At the very least, the property owner should hire an appraiser with experience in condemnation proceedings. If the property is anything other than bare ground, *e.g.* a residence with remainder damage, a business, a billboard, etc., then the property owner should look for an appraiser with specific expertise in those areas.

(c) Cost to retain an appraiser

In some circumstances, one can hire an appraiser on an hourly basis for relatively brief consulting for a few hundred dollars or less. If a full-blown appraisal is required, the price is generally between a few thousand dollars for a simple appraisal to more than $10,000 for complex appraisal issues. If court testimony is required, the price can range from a few thousand dollars to many tens of thousands of dollars, depending on the complexity of the issues.

(d) Protecting discussions with the appraiser

If the landowner is represented by counsel, it may be desirable to have the attorney retain the appraiser to assist the attorney in advising the client regarding just compensation negotiations. In this way, it may be possible to protect certain discussions and information with the appraiser as part of the attorney-client privilege and attorney work-product doctrines.

Idaho Rule of Evidence 502(b) provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client which were made (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the client's lawyer and the lawyer's representative, (3) among clients, their representatives, their lawyers, or their lawyers' representatives, in any combination, concerning a matter of common interest, but not including communications solely among clients or their representatives when no lawyer is a party to the communication, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

Where the attorney employs the appraiser to assist in the rendition of professional legal services, the appraiser likely would be considered the lawyer's representative. Upon a showing that the communications were made for the purpose of obtaining legal advice, Rule 502 would act to protect confidential communications made between and among the client, the attorney, and the appraiser—at least to the extent that the appraiser does not testify in court. 81 Am. Jur. 2d *Witnesses* § 426 (1992) ("[t]he attorney-client privilege has extended, in addition to polygraph examiners, and physicians, psychiatrists, and other psychotherapists, to accountants, engineers, and real estate appraisers…"); *see also* 14 A.L.R. 4th 594 §16(a).

However, once the appraiser is designated as an expert witness for trial, his or her opinions and the facts and data underlying those opinions, which may necessarily include some communications made between the client, attorney and appraiser, are discoverable. I.R.E. 705.

35. CONSTITUTIONAL LIMITS ON GOVERNMENTAL DEBT AND THE NON-APPROPRIATION LEASE

(1) Background

Since its adoption in 1890, Idaho's Constitution has set out strict limitations on the ability of local governments to take on debt or liability without voter approval. It provides, in pertinent part:

> No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose . . . . Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state . . . .

Idaho Const. art. VIII, § 3.[321] In other words, absent super-majority voter approval, local governments are prohibited from taking on any debt or liability that cannot be

[321] The entire section reads:

> No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state and provided further that any city may own, purchase, construct, extend, or equip, within and without the corporate limits of such city, off street parking facilities, public recreation facilities, and air navigation facilities, and, for the purpose of paying the cost thereof may, without regard to any limitation herein imposed, with the assent of two-thirds of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by, such facilities as may be prescribed by law, and provided further, that any city or other political subdivision of the state may own, purchase, construct, extend, or equip, within and without the corporate limits of such city or political subdivision, water system, sewage collection systems, water treatment plants, sewage treatment plants, and may rehabilitate existing electrical generating facilities, and for the purpose of paying the cost thereof, may, without

fully paid with funds that will be available in the year the debt or liability is incurred.[322]

The Constitution contains several exceptions to this prohibition (some original, some added later). The most notable of these is that liability for "ordinary and necessary" expenditures is not subject to the constitutional provision and

> regard to any limitation herein imposed, with the assent of a majority of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by such systems, plants and facilities, as may be prescribed by law; and provided further that any port district, for the purpose of carrying into effect all or any of the powers now or hereafter granted to port districts by the laws of this state, may contract indebtedness and issue revenue bonds evidencing such indebtedness, without the necessity of the voters of the port district authorizing the same, such revenue bonds to be payable solely from all or such part of the revenues of the port district derived from any source whatsoever excepting only those revenues derived from ad valorem taxes, as the port commission thereof may determine, and such revenue bonds not to be in any manner or to any extent a general obligation of the port district issuing the same, nor a charge upon the ad valorem tax revenue of such port district.

Idaho Const. art. VIII, § 3.

[322] This constitutional provision also requires that the governmental entity provide for the collection of an annual tax sufficient to pay the interest on any debt, and to pay off the debt within 30 years.

therefore does not require voter approval.[323] These exceptions are narrow, and Idaho appears to be the strictest state in the nation on the subject of public debt.[324]

Given the challenge of obtaining super-majority voter approval, cities and counties routinely employ a device known as a "non-appropriation lease" (also known as "annual appropriation lease") to facilitate long-term leases and/or financing. The distinguishing feature of the non-appropriation lease is the "walk away" provision allowing the governmental entity to terminate (or not renew) the lease at the end of any year.[325] The term "non-appropriation" recognizes that the

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[323] The key decisions discussing the "ordinary and necessary" exception are *City of Challis v. Consent of the Governed Caucus,* 159 Idaho 398, 361 P.3d 485 (2015) (Horton, J.), *City of Idaho Falls v. Fuhriman*, 149 Idaho 574, 237 P.3d 1200 (2010) (Burdick, J.), and *City of Boise v. Frazier*, 143 Idaho 1, 137 P.3d 388 (2006) (Burdick, J.).

In *Consent of the Governed*, the city sought judicial confirmation of its plan to incur $3.2 million in debt without voter approval to pay for needed repairs and improvements to the existing municipal water delivery system (including pipe replacement, metering upgrades, etc.). The Court found the actions funded by the debt were "ordinary" but the entire package was unconstitutional because at least one of the actions was not "necessary." In reaching this conclusion, the Court strictly applied precedent from *Frazier* and *Fuhriman*. To be "necessary," the Court found that the expense must be incurred without delay. The Court ruled for the first time that the "necessity-requires-urgency analysis" articulated in *Fuhriman*, 149 Idaho at 578-79, 237 P.3d at 1204-05 "applies in instances where public safety is implicated." *Consent of the Governed*, 159 Idaho at 402, 361 P.3d at 489. "As with the proposed long-term power agreement in *Fuhriman,* metering and telemetry upgrades are undoubtedly desirable from an economic perspective. However, the need for these upgrades cannot be characterized as urgent." *Consent of the Governed*, 159 Idaho at 404, 361 P.3d at 491.

In *Frazier,* the Court described the types of expenditures that the Founder contemplated falling within the "ordinary and necessary" proviso: "Those expenditures included unavoidable expenses, such as carrying on criminal trials and abating flood damage, that could not be delayed. We observe that the expenditures contemplated by the delegates involved immediate or emergency expenses, such as those involving public safety, or expenses the government entity in question was legally obligated to perform promptly." *Frazier*, 143 Idaho at 4, 137 P.3d at 391 (citation omitted).

In other words, it is not sufficient that the expense be important or a good investment. Nor is it enough that the expense be for an existing municipal undertaking (as opposed to new construction). To be deemed "necessary," it must be urgently needed <u>now</u>—without time to obtain voter approval. The Coalition argued that the expense must be shown to be needed within the same fiscal year. The Court did not expressly endorse that rule, but it seems to be a reasonable rule of thumb for what might pass muster. *Consent of the Governed*, by the way, was a 3-2 decision with a vigorous dissent.

[324] "While many states have a similar constitutional provision, this Court has held that Idaho's is among the strictest, if not the strictest, in the nation." *Greater Boise Auditorium Dist. v. Frazier* ("*GBAD*"), 159 Idaho 266, 271, 360 P.3d 275, 280 (2015) (W. Jones, J.) (Eismann, J., concurring). "[T]he framers of our Constitution employed more sweeping and prohibitive language in framing section 3 of article 8, and pronounced a more positive prohibition against excessive indebtedness, than is to be found in any other Constitution to which our attention has been directed." *Feil v. Coeur d'Alene*, 23 Idaho 32, 49, 129 P. 643, 649 (1912) (Ailshie, J.).

[325] The term "year" in the Constitution is interpreted to apply to the entity's fiscal year. "The applicable year is the District's fiscal year. *GBAD*, 159 Idaho at 277, 360 P.3d at 286 (Eismann, J.,

governmental entity, at any time, may elect not to appropriate funds to continue the lease for another year.

This non-renewal may come in the form of a one-year lease that is renewable by affirmative action, at the option of the government, for a specified number of years. Alternatively, it may come in the form of a lease for a set number of years that the government may terminate early, without penalty, at the end of any year. One could argue that the difference between the two is purely cosmetic. However, as discussed below, the only non-appropriation lease to be tested and approved by the Idaho Supreme Court was of the former variety. *Greater Boise Auditorium Dist. v. Frazier* ("*GBAD*"), 159 Idaho 266, 277, 360 P.3d 275, 286 (2015) (W. Jones, J.) (Eismann, J., concurring) ("The District must take affirmative action to renew the lease each year.").

There is a practical difference between the two formats. Under a renewable one-year lease, the local government cannot inadvertently become committed to another year by failure to timely terminate. The question is whether this is of constitutional significance. Were the framers concerned with protecting taxpayers from forgetful governments? Arguably not. But local governments will not have to face that unanswered question if they opt for the form of non-appropriation lease approved by the Court in *GBAD*.

Non-appropriation leases may or may not serve a financing function. In a non-financing context, a non-appropriation provision could be included in an ordinary lease (sometimes called a "true lease") that simply allows the government to use the property for a number of years. As with any ordinary rental agreement, when the lease concludes (or is terminated or not renewed), the lessor retakes the property and the lessee owns nothing.

Some non-appropriation leases are vehicles for long-term financing of a building or equipment purchase. Rather than simply renting, this is a "rent to buy" arrangement. At the end of such a lease (if it is renewed and paid for the requisite number of years), the lessee becomes the owner of the property for a nominal sum (or nothing at all). Those attacking such financing leases often refer to them, sometimes disparagingly, as disguised sales, conditional sale agreements, disguised mortgages, or equitable mortgages. Whatever they are called, the key point is that the lessor takes the risk that the lessee will not renew the lease at the end of each year. If the lessee does not renew, the lessor's only remedy is to foreclose or take possession of the subject of the lease. If the property has value only to the lessee (such as a

concurring) (citing *Theiss v. Hunter*, 4 Idaho 788, 794, 45 P. 2, 3 (1896) (Sullivan, J.). For this reason, in the typical non-appropriation lease, the first term is less than a year ending on the last day of the current fiscal year.

courthouse or police station), the lessor will need to carefully evaluate the risk of such a walk away.

The Greater Boise Auditorium District entered into two non-appropriation leases, one of each type. The Centre Lease was a financing lease used for the purchase of the new auditorium. The District sought judicial confirmation of this lease. As part of the same development package, however, the District also agreed to enter into a non-financing lease (aka "true lease") to rent the fourth floor of the neighboring Clearwater Building to be used for additional meeting room facilities. The Clearwater Lease and other deal documents were provided to the district and appellate courts as background information to explain how the Centre Lease fit into the overall deal. Although judicial confirmation was sought only with respect to the Centre Lease, the Idaho Supreme Court ultimately gave its blessing to "the overall agreement entered into by the District." *GBAD*, 159 Idaho at 168-69, 360 P.3d at 284-85.

The contract terms may involve some additional complexities. In many cases, an urban renewal agency will issue revenue bonds and enter into a non-appropriation lease directly with the local government. Bonds are a favored means of financing, because it is easier for the borrower to lock in long-term interest rates.

The sale of bonds generates funds sufficient to pay the purchase price of the property. If necessary, the builder or developer may use that revenue to pay off (or pay down) construction loans, thereby clearing construction liens so that it may issue free title to the buyer. The bond holders then take the risk that the governmental entity will fail to renew the lease and stop making payments. In other words, the "walk away" option is built into the bond documents.

A third party entity, typically an urban renewal agency, is often brought in to issue the revenue bonds, acquire the property, and lease it to the governmental entity. Auditorium districts have no authority to issue revenue bonds, but urban renewal agencies do. Even when the local government has the authority to issue revenue bonds, they typically bring in a third party conduit financer to issue the bonds, because that enables a simple way of describing the revenue stream (lease payments) that fund the bonds.

As an alternative to bond financing, the financing money may come from a private placement with banks and similar institutions.[326] In theory, banks could acquire the property and lease it to the governmental entity under a non-appropriation lease. However, for reasons including tradition, regulatory limitations, and the desire

[326] In the *GBAD* case, the District switched from bond financing to bank financing with its second petition for judicial review.

for consistency and certainty, banks do not typically care to be the owner and lessor of the property. They prefer to lend money in exchange for a note and deed of trust.

Consequently, if bank financing is involved, it is often necessary to bring another party into the transaction to serve as the lessor and conduit financer. As with revenue bonds, that additional party is frequently an urban renewal agency. The urban renewal agency obtains bank financing, purchases the real property, issues a "lease revenue note",[327] an "assignment of rent," and a deed of trust, and leases the property to the local government under a non-appropriation lease. Under Idaho law, urban renewal agencies are not subject to Article VIII, section 3.[328] Thus, they may obtain long-term bank financing (or bond financing, for that matter) wherein they pass through the rent payments made by the local government lessee.

Transactions involving building construction may entail more than one loan. The financing loan (used by the buyer, like a mortgage, to pay off the purchase cost over decades) is distinct from the construction loan (used by the builder to finance the construction). Typically, the construction loan is a short-term loan between a bank and the builder, which is paid off when construction is complete with proceeds from the new lender (or bond purchasers) at the time the financing loan is initiated. All of these arrangements may be tied together in one or more development agreements among the various parties.

(2) The *GBAD* Court rejects the "true lease" versus "financing lease" analysis.

Non-appropriation leases have been employed by cities, counties, and other governmental entities throughout Idaho for decades. Until 2015, there was no

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[327] A lease revenue note is no ordinary note. Ordinarily, a lender has recourse under a note if payments stop. In contrast, a "lease revenue note" is no more than a promise to pass through to the lender whatever payments are made by the lessee. If the lessee elects not to renew, this is not a default and the lender has no recourse other than to foreclose on the deed of trust.

For example, the bank's term sheet (at page 2) in the *GBAD* litigation provided: "Neither the Lease nor the Note constitutes indebtedness or multiple fiscal year direct or indirect obligation of the District within the meaning of any constitutional or statutory debt limitation. Neither the Lease nor the Note will directly or indirectly obligate the District to make any payments other than those which may be appropriated by the District for each District fiscal year. All obligations of the District under the Lease and the Note will terminate at the end of the Lease term following an event of non-appropriation."

[328] "Because the Agency is not a governmental subdivision, it is not subject to Article VIII, section 3." *GBAD*, 159 Idaho at 268, 360 P.3d at 277 (W. Jones, J.). "The Agency is not bound by the strictures of article VIII, section 3 because it lacks the power to levy and collect taxes and is not an alter ego of the City of Boise." *GBAD*, 159 Idaho at 279, 360 P.3d at 288 (Eismann, J., concurring) (citing *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 882–83, 499 P.2d 575, 581–82 (1972) (Shepard, J.)). See also; *Urban Renewal Agency of City of Rexburg v. Hart*, 148 Idaho 299, 302, 222 P.3d 467, 470 (2009) (Horton, J.) (urban renewal agency is not "simply the alter ego of the City").

appellate authority on their constitutionality. Nine have been challenged in district court with no appeal taken. (Six upheld the leases.[329] Three rejected them.[330]) Three cases reached the Idaho Supreme Court, but were not decided on the merits.[331] The first appellate decision on the merits was *Greater Boise Auditorium Dist. v.*

[329] Non-appropriation leases were upheld in the following district court decisions.

"*Dunn Decision*": *In the Matter of the Pocatello-Chubbuck Auditorium Dist.*, Case No. CV 2013-4838-00 (Idaho, Sixth Judicial Dist. Aug. 5, 2002) (Stephen S. Dunn, D.J.) (approving non-appropriation lease to finance acquisition of auditorium facilities).

"*Elgee Decision*": *In re School Dist. No. 61, Blaine Cnty., Idaho*, Case No. CV2010-170 (Idaho, Fifth Judicial Dist. May 5, 2010) (Robert J. Elgee, D.J.) (approving non-appropriation lease of school facilities).

"*Granata Decision*": *In re Ada Cnty.*, Case No. 95055 (Idaho, Fourth Judicial Dist. Jan. 23, 1992) (George Granata, Jr., D.J.) (approving non-appropriation lease to finance acquisition of land for Ada County Courthouse).

"*May Decision*": *In re School Dist. No. 61, Blaine Cnty., Idaho*, Case No. SP-022782, (Idaho, Fifth Judicial Dist. Aug. 5, 2002) (James J. May, D.J.) (approving non-appropriation lease to finance acquisition of school facilities).

"*Mitchell Decision*": *Spencer v. North Idaho College*, Case No. CV 2009 8934 (Idaho, First Judicial Dist. Mar. 19, 2010) (John T. Mitchell, D.J.) (approving non-appropriation lease to finance North Idaho College).

"*Woodland Decision*": *Ada Cnty. Prop. Owners Ass'n v. Cnty. of Ada*, Case No. CVOC 99 01055-A (Idaho, Fourth Judicial Dist. Aug. 18, 1999) (William E. Woodland, D.J.) (approving non-appropriation lease for Ada County Courthouse notwithstanding boilerplate indemnities).

[330] Three district courts rejected non-appropriation leases.

"*Copsey Decision*": *In the Matter of City of Boise*, Case No. CVOC0202395D (Idaho, Fourth Judicial Dist. Aug. 26, 2002) (Cheri C. Copsey, D.J.) (rejecting non-appropriation lease for new police facility because city conveyed land to secure financing and would be required to operate the facilities).

"*Hosac Decision*": *In the Matter of Cnty. of Bonner, Petition for Minimum Security Facility*, Case No. CV08-641 (Idaho, First Judicial Dist. Sept. 4, 2008) (Charles W. Hosac, D.J.) (rejecting non-appropriation lease for juvenile detention facility because county conveyed land to secure financing and would be required to operate the facilities). This decision was only recently discovered by the District.

"Stegner Decision": *In re: Kootenai Cnty., Idaho*, Case No. CV-2014-5205 (Idaho, First Judicial Dist. Sept. 2, 2014) (John R. Stegner, D.J.) (rejecting a purported non-appropriation lease because it failed to include a functional non-appropriation provision).

[331] *Lind v. Rockland School Dist. No. 382*, 120 Idaho 928, 821 P.2d 983 (1991) (McDevitt, J.) involved a non-appropriation lease, but the Court found the question of its constitutionality not to be ripe. *Koch v. Canyon Cnty.*, 145 Idaho 158, 177 P.3d 372 (2008) (Eismann, C.J.) also involved a non-appropriation lease, but the Court found the case moot and did not reach the merits. The *Koch* decision, however, established that taxpayers and citizens have standing to challenge alleged violations of Idaho Const. art. VIII, § 3. In *In re University Place / Idaho Water Center Project*, 146 Idaho 527, 547-48, 199 P.3d 102, 122-23 (2008), Justice Jim Jones wrote a concurrence commenting on non-appropriation leases and expressing disappointment that the issue was not presented by the parties.

Frazier ("*GBAD*"), 159 Idaho 266, 360 P.3d 275 (2015) (W. Jones, J.; Eismann, J., concurring).[332]

The *GBAD* suit was initiated when the District sought judicial confirmation of a proposed one-year non-appropriation lease between the District and the local urban renewal agency known as the Capital City Development Corporation ("CCDC").[333] Confirmation was opposed by David R. Frazier.[334] The lease would serve as a financing vehicle for the District's expansion of its Boise convention facilities (the Boise Centre).[335] The proposed lease would allow the District to renew the one-year lease, at its option, for 24 additional one-year terms, after which it could acquire the new convention building for a nominal sum. The Court upheld the District's non-appropriation lease as well as the development agreement that linked together the construction loan, the purchase and sale agreement, the non-appropriation lease, and various other agreements.

The Idaho Supreme Court's decision followed two unsuccessful attempts by the District to obtain judicial confirmation of its non-appropriation lease. Both district judges concluded that the lease created a full and complete liability for the entire 25 years of payments immediately upon its execution because it was not a true lease, but a financing lease.[336] That reasoning relied on precedent in other contexts

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[332] This was a 5-0 decision. The main opinion was authored by Justice Warren Jones, joined by Justices Jim Jones and Roger Burdick. A concurring opinion was authored by Justice Daniel Eismann, joined by Justice Joel Horton. The concurrence expresses no disagreement with the main opinion.

[333] Judicial confirmation refers to a statutory grant of jurisdiction, available since 1988, by which a local government may, at its option, seek a court's ruling on "the validity of any bond or obligation or of any agreement or security instrument related thereto." Idaho Code §§ 7-1301 to 7-1313. Where there is no controlling appellate precedent, bond counsel will not issue an unqualified opinion and lenders often require the local government to obtain judicial confirmation.

[334] Mr. Frazier is the same person who successfully challenged the City of Boise's airport parking project in *City of Boise v. Frazier*, 143 Idaho 1, 137 P.3d 388 (2006) (Burdick, J.) and the City of Boise's police facilities project in *In the Matter of City of Boise*, Case No. CVOC0202395D (Idaho, Fourth Judicial Dist. Aug. 26, 2002) (Cheri C. Copsey, D.J.). See discussion of Mr. Frazier's standing in section 35(7) at page 377.

[335] At the time the District sought judicial confirmation, it had already committed to purchase the new building from the developer, regardless of outcome. "The District has sufficient funds available to purchase the Centre Building, but it desires to finance that purchase in order to use its funds to purchase the facilities in the Clearwater Building, to construct a sky bridge connecting the Centre Building and the facilities in the Clearwater Building, and to make improvements to the Boise Centre." *GBAD*, 159 Idaho at 279, 360 P.3d at 288 (Eismann, J., concurring).

[336] "The next key question is whether the lease acts as a subterfuge for what is actually a conditional sales contract." *In the Matter of: Greater Boise Auditorium Dist.*, Case No. CV-OT-1411320, at 9 (Idaho, Fourth Judicial Dist., Aug. 28, 2014) (Melissa Moody, D.J.). (Technically, Judge Moody never answered her rhetorical question.) "Finally, the Court is not convinced that the lease agreement is, as a matter of law, a true lease. There are many circumstances under which a

and from other jurisdictions that draw complicated distinctions between true leases and financing leases.

On appeal, the Idaho Supreme Court held that the true lease analysis employed by the district courts was irrelevant, confirming what the Court first said in 1931:

> We doubt whether it makes any difference whether it may be appropriately denominated a lease or a conditional sales contract. The important matter is, does it create "any indebtedness or liability in any manner or for any purpose, exceeding in that year the income and revenue provided for it for such year"?

GBAD, 159 Idaho at 278-79, 360 P.3d at 287-88 (Eismann, J., concurring) (quoting *Williams v. City of Emmett*, 51 Idaho 500, 506, 6 P.2d 475, 477 (1931) (McNaughton, J.)[337]).

> We reaffirm that principle [in *Williams*] now. The relevant determination under Article VIII, section 3 is whether the governmental subdivision presently bound itself to a liability greater than it has funds to pay for in the year in which it bound itself. Questions about the

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lease will be deemed to be a disguised security interest in a sale." *In the Matter of: Greater Boise Auditorium Dist.*, Case No. CV-OT-2014-23695 (Idaho, Fourth Judicial Dist., Mar. 23, 2015) (Lynn Norton, D.J.) at 10.

[337] In *Williams v. City of Emmett*, 51 Idaho 500, 6 P.2d 475 (1931) (McNaughton, J.), the Court held that a multi-year lease (which was not subject to a non-appropriation provision) violated Idaho Const. art. VIII, § 3. The City of Emmett had entered into a three-year lease of a street sprinkling truck, coupled with an option to purchase, wherein the rent payments would be credited toward the purchase price (which equaled the sum of the rent payments over the term of the lease). Notably, the Court concluded that it made no difference whether the agreement was viewed as a lease or a sales contract. Either way, under the reasoning of *Boise Dev*., the agreement resulted in a "present *liability*" for the entire obligation at the time of execution and hence violated the Constitution. *Williams*, 51 Idaho at 507, 6 P.2d at 477 (emphasis original). Thus, the holding of *Williams* is that any no-escape lease violates the Constitution if the sum of rent over the entire lease term exceeds funding available in the current year.

The Court ruled that although the contract was illegal and void, "the parties in apparent good faith have largely carried out the terms of the agreement." *Williams*, 51 Idaho at 508, 6 P.2d at 477. Consequently, although the contract was terminated, the lessor was not required to disgorge lease payments it had received for prior terms. "Clearly, the court could not enter an equitable decree without taking account of the benefits to the city resulting from the execution of the contract. The city could not have these benefits and a return of the money paid out on account of them too, even though the agreement under which the benefits were had was illegal." *Williams*, 51 Idaho at 507, 6 P.2d at 477-78.

> characterization of the document only matter to the extent that they could provide additional liability.

GBAD, 159 Idaho at 273, 360 P.3d at 282, (W. Jones, J.).

> We follow our previous holdings and continue to "doubt whether it makes any difference whether [the document] may be appropriately denominated a lease or a conditional sales contract." We simply examine the terms of the agreement and consider whether they bind the District to more liability than it can pay off in the fiscal year.

GBAD, 159 Idaho at 275, 360 P.3d at 284 (W. Jones, J.) (brackets original) (citing *Williams*).

Justice Eismann's concurrence reinforces this conclusion.

> The district court held that the Centre Lease violated article VIII, section 3 because it was not a true lease; it was a conditional sale contract. . . . However, whether it is a lease or a conditional sale contract does not change the analysis under article VIII, section 3 of the Idaho Constitution. As this Court stated in *Williams v. City of Emmett*, 51 Idaho 500, 6 P.2d 475 (1931): "We doubt whether it makes any difference whether it may be appropriately denominated a lease or a conditional sales contract. The important matter is, does it create 'any indebtedness or liability in any manner or for any purpose, exceeding in that year the income and revenue provided for it for such year'?" *Id*. at 506, 6 P.2d at 477.

GBAD, 159 Idaho at 278, 360 P.3d at 287 (Eismann, J., concurring).

In sum, the nature or purpose of the lease makes no difference. The only thing that matters is what debt or liability is incurred. If a lease (whether true lease or a financing lease) commits the lessee to multiple years of payments without a walk-away provision, the liability for the entire commitment accrues when the lease is executed. If the government does not have the money on hand to pay all lease payments for the duration of the commitment, then it must seek voter approval.

The flip side is also true. If a lease (whether a true lease or a financing lease) contains a walk away provision, the only liability that accrues is the liability for the current term (the only one to which the government is committed). See *GBAD*, 159 Idaho at 272, 360 P.3d at 281 (W. Jones, J.) (distinguishing the multi-year commitment in *Williams* which had no walk away provision). So long as the

government has the money (or will have the money by the end of the fiscal year) to pay the initial commitment of rent, Article VIII, section 3 is not implicated.

This rejection of the "true lease versus financing lease" distinction sets Idaho apart from virtually every other jurisdiction.[338] The reason Idaho is different is that its reading of its constitution's debt provision is stricter than that of other states. The key difference is Idaho's broader reading of the word "liability."[339] In a multi-year lease, the debt accrues year by year as the rent falls due. In contrast, liability for the entire multi-year term accrues at the outset.[340] Other states hold that (at least for a true lease) both indebtedness and liability extend only to the current year's rent.

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[338] This is not to say that the "true lease versus financing lease" distinction does not exist in Idaho. It does, but it is relevant only in other contexts unrelated to Article VIII, section 3. *E.g.*, *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 388, 111 P.3d 73 (2005) (Schroeder, C.J.) (true lease vs. disguised mortgage loan in context of statute setting upper limit on loan value in mortgage loans); *Goodtimes, Inc. v. IFG Leasing Co.*, 117 Idaho 452, 788 P.2d 853 (Ct. App. 1990) (Weston, J. Pro. Tem.) (true lease vs. conditional sale in context of usury statute); *Excel Leasing Co. v. Christensen*, 115 Idaho 708, 769 P.2d 585 (Ct. App. 1989) (Swanstrom, J.) (true lease vs. security agreement in context of Uniform Commercial Code); *Transp. Equip. Rentals, Inc. v. Ivie*, 96 Idaho 223, 526 P.2d 828 (1974) (McQuade, J.; Bakes, J., dissenting) (true lease vs. financing arrangement in context of usury laws); *Swayne v. Dep't of Employment*, 93 Idaho 101, 456 P.2d 268 (1969) (Spear, J.) (true lease vs. employment contract in context of employment security law).

[339] In *GBAD*, the Court harkened back to its seminal decision in 1912:

> This Court in *Feil* was careful to distinguish an "indebtedness" from a "liability," the latter being "a much more sweeping and comprehensive term than the word 'indebtedness[.]'"

GBAD, 159 Idaho at 271, 360 P.3d at 280 (W. Jones, J.) (quoting *Feil*, 23 Idaho at 49–50, 129 P. at 649). The *GBAD* Court continued:

> This Court found that presently obligating oneself to future payments is not a present indebtedness, but it is a present liability. . . .
>
> . . . Accordingly, governmental subdivisions are liable for the aggregate payments due over the total term of a contract rather than merely for what is due the year in which the contract was entered. . . .
>
> The aggregation principle was specifically extended to leases by this Court in *Williams v. Emmett*, 51 Idaho 500, 506, 6 P.2d 475, 477 (1931).

GBAD, 159 Idaho at 272, 360 P.3d at 281 (W. Jones, J.) (citing and quoting *Boise Dev. Co. v. City of Boise*, 26 Idaho 347, 363, 143 P. 531, 535 (1914) (Truitt, J.)).

[340] "If A. by a valid contract employs B. to work for him for the term of one year at $50 per month, payable at the end of each and every month, would this contract not be a liability on A. as soon as executed? A debt of $50 would accrue thereon at the end of each month, but the liability would be incurred at the time the contract was entered into." *Boise Dev. Co.* 26 Idaho at 363, 143 P. at 535.

Accordingly, other states struggle mightily with whether the lease is a true lease or not, often tying themselves in knots with result-oriented logic.[341]

Because Idaho "aggregates" the liability over the entire commitment irrespective of whether the lessee obtains ownership of the property at the end of the lease, in Idaho all multi-year financial commitments require voter approval unless the government has funds available at the outset for the entire commitment. In Idaho, labels do not matter. The only issue is: what is the extent of the commitment? The government is required only to have funds available to the cover those promises from which it cannot walk away.

The District satisfied this requirement:

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[341] For example, California purports to follow the "true lease vs. sales contract" distinction, but applies it in a way that destroys its meaning, in order to uphold the constitutionality of virtually all long-term leases. In this respect, California is even more generous to municipalities than the rest of the nation. This is ironic, because California has a constitutional restriction on debt and liability equal to Idaho's.

The seminal case in California is *Dean v. Kuchel*, 218 P.2d 521 (Cal. 1950). The State of California sought judicial approval of a lease and lease-back arrangement whereby the State leased bare land to a development company for 25 years for a nominal sum (the ground lease), and the company would build an office building on the land and lease it back to the State for 25 years at a monthly rental of $3,325 (the building lease). The State is allowed to terminate the building lease after 15 years if certain payments are made. If all covenants under the building lease are performed for 25 years, the ground lease ends and all title vests in the State. The court began by reciting the state of the law: Multi-year leases with options to purchase do not violate the constitution unless the lease is a subterfuge for a conditional sales contract. The court then concocted a strange rule to the effect that if the payments are "in payment of the consideration furnished that year," the contract is constitutional irrespective of whether it is "denominated a mortgage, lease, or conditional sale." *Dean*, 218 P.2d at 523. Based on this, the court found that the payments made by the state were "for a month to month use" and that the transaction therefore "qualifies as a lease for the purpose of the debt limitation." *Dean*, 218 P.2d at 523.

This holding was reinforced by an even stronger statement in *Rider v. City of San Diego*, 959 P.2d 347 (Cal. 1998). There, the California Supreme Court upheld a financing agreement for the expansion of the San Diego Convention Center. The deal involved a lease and lease-back arrangement not unlike the arrangement in *Dean*. The issue was whether the City's commitment to pay "rent" equal to the debt service on the bonds sold by another entity converted this lease into a sales contract for purposes of the constitutional debt and liability limit. The plan was attacked as "a 'subterfuge,' 'artifice,' 'ruse,' and 'scheme.'" *Rider*, 959 P.2d at 350. The court bluntly said it did not matter. However one "might characterize the financing plan at issue here, we cannot characterize it as unlawful." *Rider*, 959 P.2d at 351.

Note that the leases approved in *Rider* and *Dean* were long-term leases without opt-out provisions. ("Thus, in effect, the City agreed to provide funds to meet all the Financing Authority's obligations as they arose, calling those funds rent payments." *Rider*, 959 P.2d at 349.) Thus, California has taken a position to the left of the Idaho Supreme Court and even to the left of most other states. Not only are multi-year lease commitments unobjectionable in California, they are unobjectionable even where the terms functionally mimic an installment sales contract.

> In the present case, the Centre Lease does not bind the District to any specifiable liability beyond the District's ability to pay in the year in which it was entered. It binds the District to pay rent of one year, something it currently has the funds to do. After the fiscal year's end, if the District has the funds to again pay for one year's rent, then it may renew the lease; if it does not, it does not have to pay anything by the terms of the contract. The District simply has not bound itself to a contractual liability beyond the fiscal year under the Centre Lease.

GBAD, 159 Idaho at 273, 360 P.3d at 282 (W. Jones, J.).

> Drafting a contract that does not violate the constitutional provision is not circumventing it. It is simply seeking to comply with it.

GBAD, 159 Idaho at 279, 360 P.3d at 288 (Eismann, J., concurring).

After the first attempt at judicial confirmation, the parties switched from bond financing to bank financing. The logic of the *GBAD* decision, however, compels the conclusion that bond financing with a walk-away provision would be treated the same as a lease with a walk-away provision. After all, the Court could hardly have been clearer that the nature of the agreement is beside the point; only the extent of the commitment matters.

(3) The constitutional prohibition does not extend to speculative future liability.

Idaho courts have long recognized that Article VIII, section 3 prohibits multi-year, unfunded commitments as to all forms of liability, not just debt. This is in contrast to a more lenient approach adopted in most other states. Writing in 1912, Justice Ailshie gave short shrift to out-of-state precedents, dismissively describing how other courts have "indulged in various subtleties and refinements of reasoning to show that no debt or indebtedness [had] occurred." *Feil v. City of Coeur d'Alene*, 23 Idaho 32, 49, 129 P. 643, 649 (1912) (Ailshie, J.).[342]

[342] The *Feil* Court was particularly offended by shifting of the responsibility for payment from the landowner to the consumer, describing this as a "subtle and dangerous" shift that was "clearly repugnant to the Constitution" and which "shocks the sense of justice and municipal honesty and integrity." *Feil*, 23 Idaho at 57, 129 P. at 652. This is ironic in that the prevailing public policy today tends to see user fees as a legitimate and desirable alternative to taxpayer funding. *See, e.g.*, Idaho Code §§ 50-329A(1)(c); 63-1311(1), 31-870(1). Indeed, 18 years after *Feil*, the Court expressed some misgiving on this point, but stuck to its precedent. "If this question were here for the first time, in view of the decisions relied on by defendants, this court might not reach the conclusion arrived at in the *Feil* Case. Indeed, it might be better, in view of the tax burden imposed on real

In *Feil*, the City of Coeur d'Alene purchased a private waterworks funded with bonds payable over 20 years that were chargeable only against a special fund of fees paid by water users.[343] The city contended that, since the taxpayers were not at risk, the constitutional restriction did not come into play. The Court thought otherwise, rejecting the "special fund" defense and putting Idaho on a path at odds with most other states.

The Court rejected the conclusions reached by the highest courts of Washington, Iowa, North Carolina, and Wisconsin, declaring that "none of those cases deals with the word 'liability,' which is used in our Constitution, and which is a much more sweeping and comprehensive term than the word 'indebtedness.'" *Feil*, 23 Idaho at 50, 129 P. at 649.

The *Feil* decision has received its share of criticism,[344] but remains the law in Idaho.[345] What was unclear, until *GBAD*, was just how far the liability prohibition

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property, for the consumers of water, electricity, etc., to provide the funds necessary to purchase such water and light systems." *Miller v. City of Buhl*, 48 Idaho 668, 284 P. 843 (1930) (Wm. E. Lee, J.).

[343] Though not denominated as such, these amounted to revenue bonds. Michael C. Moore, *Constitutional Debt Limitations on Local Gov't in Idaho – Article 8, Section 3, Idaho Constitution*, 17 Idaho L. Rev. 55, 60 n.26 (1980). When *Feil* was decided, Idaho Const. art. VIII, § 3 did not contain its current provisions dealing with revenue bonds.

[344] In *Foster's, Inc. v. Boise City*, 63 Idaho 201, 219, 118 P.2d 721, 729 (1941), Justices Morgan and Holden added a brief concurrence in which they expressly stated their disagreement with *Feil* and its progeny. More recently, a commentator observed:

> The *Feil* decision has not fared well outside of Idaho. The overwhelming majority of cases, including those decided under constitutional provisions which are similar, and sometimes virtually identical, to Idaho's, have rejected the *Feil* case and have adopted the view that a municipality does not incur an indebtedness or liability, within the constitutional limitation, by purchasing property to be paid for wholly from the income or revenue to be derived from the property purchased. Many cases have expressly considered *Feil* and either distinguished or rejected it. Even some Idaho cases have expressed second thoughts about *Feil*. However, it can safely be said that, at least as applied to local governmental bodies, the Idaho Supreme Court has consistently adhered to *Feil* over the years.

Michael C. Moore, *Constitutional Debt Limitations on Local Gov't in Idaho – Article 8, Section 3, Idaho Constitution*, 17 Idaho L. Rev. 55, 64-66 (1980) (footnotes omitted).

[345] In *Miller v. City of Buhl*, 48 Idaho 668, 284 P. 843 (1930) (Wm. E. Lee, J.), the Court noted that the majority of courts in other jurisdictions, including California (which had a functionally identical constitutional provision), have embraced the special fund doctrine. But the *Miller* Court stuck to its precedent.

A second direct attack on *Feil* came two years later, in which the appellants urged that it be overruled because it was "not in keeping with the modern trend of municipal political economy."

reaches. In *GBAD*, the district court read the prohibition expansively to include even unnamed and unknown liabilities that conceivably might arise someday as a consequence of the agreement. The Supreme Court described the district court's view this way:

> The district court's concern was that the "entire financing structure" could fail, which, in the district court's view, would allow the financier Wells Fargo to pursue remedies against the district. . . .
> . . . But instead of identifying any theory under which Wells Fargo could recover against the District, the district court simply was "not convinced that there is *no* theory of law or set of facts under which Wells Fargo could not recover against the District." It was concerned with "potential liabilities."

GBAD, 159 Idaho at 273, 360 P.3d at 282 (W. Jones, J.) (emphasis original).

The Idaho Supreme Court rejected this expansive reading. It concluded that "liability" does not encompass every hypothetical financial setback that might someday emerge from a contractual relationship.

> The framers, while being quite concerned with incurring contingent liabilities, were not worried about all potential liabilities. . . .
> . . .
> This is not to say that every non-appropriation lease necessarily yields no long-term liabilities. But, as is the case here, in a lease where the subdivision is truly not subject to damages from not renewing the lease, and

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Straughan v. City of Coeur d'Alene, 53 Idaho 494, 496, 24 P.2d 321, 321 (1932) (Givens, J.). The Court declined.

A third direct attack on *Feil* came in 1983. *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983) (Huntley, J.). This one came closer, but did not quite make it. In *Asson*, five Idaho cities made the mistake of signing "dry hole" power contracts with the Washington Public Power Supply System ("WPPSS"). The planned nuclear power plants were terminated, but, due to the "dry hole" provision of the contracts, the cities remained on the hook to repay millions of dollars in bond indebtedness that WPPSS had acquired. Ratepayers brought suit seeking a declaration that the contracts were unconstitutional. The defenders of the contracts urged the Court to overrule *Feil* and apply the special fund doctrine. *Asson*, 105 Idaho at 438, 670 P.2d at 845. The Court declined to go there. It noted that, at least in the context of revenue bonds, a modified version of the special fund doctrine has been essentially constitutionalized via subsequent amendments, which still require voter approval, and, in any event, the exception would not apply here even if it was available in Idaho because "the WPPSS bonds [have] created no revenue-producing property." *Asson*, 105 Idaho at 438, 670 P.2d at 845. In sum, the Court found that, at least under these facts, *Feil* is still good law, the contracts were unconstitutional and the ratepayers were off the hook.

> where no party has identified a specific liability, it does not make sense to require the District to disprove all *potential* liabilities.
> . . . An equitable remedy that does not require the District to pay monetary damages (even if the District already committed the wrong), is not the sort of liability the framers intended to prevent with Article VIII, section 3. . . .
> Even an action resulting in an order for specific performance of the terms of the lease would not bind the District to pay for more than it has available in the fiscal year because the terms of the lease are clear in that it is only for one year at a time and renewable in the District's sole discretion. . . .

GBAD, 159 Idaho at 274-75, 360 P.3d at 283-84 (W. Jones, J.) (emphasis original) (citing *Koch v. Canyon Cnty.*, 145 Idaho 158, 177 P.3d 372 (2008) (Eismann, C.J.)).

(4) The issue of indemnities was not before the Court.

As discussed above, the District twice sought judicial confirmation of its Centre Lease. The District's first non-appropriation lease contained standard, boilerplate indemnity provisions addressing liability for such things as environmental harm. These provisions were virtually identical to the indemnities approved by the district court in litigation over the Ada County Courthouse. *Ada Cnty. Prop. Owners Ass'n v. Cnty. of Ada*, Case No. CVOC 99-01055-A (Idaho, Fourth Judicial Dist. Aug. 18, 1999) (William E. Woodland, D.J.). Judge Moody, however, ruled that the indemnity provision gave rise to unconstitutional liability.

Rather than fight over that issue, the parties agreed to remove the indemnities in an effort to speed approval of its lease (which did not work).[346] Accordingly, the indemnities were not before the Court on appeal. Consequently, we do not have definitive appellate guidance on whether such provisions pass constitutional muster. Instead, we are left to grapple with the issue based on the guidance provided.

The Court observed, "The framers, while being quite concerned with incurring contingent liabilities, were not worried about all potential liabilities." *GBAD*, 159 Idaho at 274, 360 P.3d at 283 (W. Jones, J.). While the distinction between "contingent liabilities" and "potential liabilities" in the quotation above is not spelled

[346] The standard, open-ended indemnities in the first lease were replaced with a pre-funded $350,000 "Lease Contingency Fund" which provided up to $250,000 in protection to the urban renewal district (CCDC) and up to $100,000 in protection to the financing bank (Wells Fargo). This fund did not provide recourse for any party based on non-renewal. The lease provided that the $250,000 component would survive non-renewal, but the $100,000 for the bank would not.

out by the Court, one might surmise that "contingent liabilities" refers to known risks of liability that may become an actual liability based on the outcome of future events, which risks have been identified and allocated by the agreement. In contrast, "potential liabilities" may refer to claims, causes of action, regulatory violations, negligence, or torts that have not yet occurred, which risks of liability have not been identified and allocated by the agreement.

The Court further noted that "liability" within the meaning of Article VIII, section 3 only encompasses present liability arising under contracts entered and torts committed, not future torts:

> A liability "may arise from contracts, either express or implied, or in consequence of torts committed." *Feil*, 23 Idaho 32, 129 P. 643, 649 (1912). Notably, this definition includes "torts committed," not potential torts that may be committed. *Id.* . . . The District further has not committed any torts that have been raised before this Court. It may commit a tort in the future that could subject it to damages to Wells Fargo, but as discussed above, only torts committed can result in constitutional liabilities, not torts not yet committed. *Id*.

GBAD, 159 Idaho at 274, 360 P.3d at 283 (W. Jones, J.).

This point is reinforced in Justice Eismann's concurrence:

> Article VIII, section 3, only applies to voluntarily incurring a debt or liability; it does not apply to liability created by negligent acts. Therefore, even if in some manner the District became liable to the Agency for an amount exceeding $250,000 [the amount prefunded by the District] due to the District's negligence, there would be no violation of article VIII, section 3.

GBAD, 159 Idaho at 278, 360 P.3d at 287 (Eismann, J., concurring) (citing *Cruzen v. Boise City*, 58 Idaho 406, 418–19, 74 P.2d 1037, 1042 (1937) (Givens, J.).

This guidance describes certain things—future negligence and other torts—that it says do not constitute present liability in violation of the Constitution. But is it permissible for a local government to indemnify against those things? If such an indemnity is permissible, may the indemnification cover known or undiscovered past actions, as well as future actions? May the indemnity cover environmental and other regulatory violations as well as torts and negligence?

On the one hand, any indemnity might be seen, in the words of Justice Eismann quoted above, as "voluntarily incurring a debt or liability." On the other

hand, the Court has expressed concern over stretching the concept of present liability too far. Does the Constitution really prohibit governments from entering into standard, boilerplate indemnities of the sort routinely employed by businesses simply because once in a great while they might get stuck with an obligation?

The *GBAD* Court did not answer this question. But it did quote with approval dictum in another case emphasizing the need to be practical in evaluating non-appropriation leases:

> It is a virtual impossibility to present every multi-year governmental contract or lease to the public for a vote. Thus, leases and other contracts that are intended to extend beyond one year always contain provisions (1) making the government's performance subject to availability of appropriated funds and (2) making the agreement renewable on an annual basis for the contemplated term.

In re University Place / Idaho Water Center Project, 146 Idaho 527, 547-48, 199 P.3d 102, 122-23 (2008) (Jim Jones, J., concurring) (quoted in *GBAD*, 159 Idaho at 275, 360 P.3d at 284 (W. Jones, J.)).

The *GBAD* Court then expressly embraced and expanded on Justice Jim Jones' observation:

> Instead, the district court should have applied the logic from the passage, and concluded that requiring governmental subdivisions to disprove the existence of *any* potential liability before entering into an agreement would result in every agreement being unconstitutional without a vote; and similarly requiring subdivisions to present any agreement for a vote before proceeding would result in undue delays and restrictions to governmental progress.

GBAD, 159 Idaho at 275, 360 P.3d at 284 (W. Jones, J.).

Does this mean that indemnity provisions are permissible because they only deal with potential liabilities? We do not know the answer because the agreement before the Court contained no unfunded, open-ended indemnity provision. The only thing we know for certain is that the approach the District took—an agreement in which liability is capped at a dollar amount and funded with money available during the first year—is permissible.

(5) The "economic compulsion" issue.

(a) The desire to renew does not create an unconstitutional liability.

Prior to the *GBAD* litigation, two district court decisions invalidated non-appropriation leases on the basis of so-called "economic compulsion" (an issue that was not central to the *GBAD* litigation. Judge Copsey and Judge Hosac concluded that even though the leases authorize the city to walk away, as a practical matter, the city may be unable to do so. (See footnote 330 at page 362.)

The "economic compulsion" concern is that, after renewing for a number of years, local governments will feel they have too much invested to walk away. Likewise, they may feel they have no option to walk away if the lease is financing a facility that is vital to their public service obligation.

The district courts in the *GBAD* case did not deny confirmation on this basis. Although the economic compulsion issue was briefed and discussed at oral argument, the main opinion in *GBAD* did not mention it. Thus, by implication at least, perceived economic compulsion is not a constitutional consideration and does not render a walk away provision ineffective.[347]

The concurrence, however, addressed the issue and directly rejected the argument perceived economic compulsion creates a liability within the meaning of the Constitution:

> Implicit in Mr. Frazier's argument is that if the District renews the lease for a number of years, it will be compelled to continue doing so in order to protect its "equity" in the building. . . . There is nothing in the wording of article VIII, section 3 that would permit a contract for the purchase of real estate to be treated differently from a contract to purchase goods or services. Likewise, there is nothing in the wording of the provision

[347] This makes sense. The historical context and the framers' concern in adopting Article 8, section 3 was explained by the Court contemporaneously in 1896: "Warned by a fearful experience, the makers of the constitution were desirous of protecting the people from the cupidity and rapacity which past experience admonished them sometimes influenced those who had the management and control of state and county finances . . . ." *Cnty. of Ada v. Bullen Bridge Co.*, 5 Idaho 79, 90, 47 P. 818, 823 (1896) (Huston, J.), *on reconsideration*, 5 Idaho 188. What was that "fearful experience"? At that time, towns were going huckledebuck making multi-year commitments on the hope of good economic times to come. They were operating on a "build it and they will come" philosophy. Article VIII, section 3 ensured that taxpayers would not be bound by bad multi-year commitments. The framers were not concerned that officials might be sorely tempted to renew a commitment.

> that applies to any compulsion to continue renewing a contract where there is no contractual obligation to do so.

GBAD, 159 Idaho at 279, 360 P.3d at 288 (Eismann, J., concurring).

In the course of this discussion, Justice Eismann also rejected the notion that liability under Article VIII, section 3 might extend to a moral obligation, such as a decision to voluntarily renew a lease because it is the right thing to do.

> In order for the constitutional provision to apply, the entity must "incur any indebtedness, or liability, in any manner." Those words must be construed according to what they were understood to mean at the time the Constitution was ratified. . . . It is clear that the word *liability* meant a legal responsibility that could be enforced in a court of law. . . . Thus, a debt and a liability must be a legal obligation to pay a sum of money.

GBAD, 159 Idaho at 279, 360 P.3d at 288 (Eismann, J., concurring) (emphasis original).

(b) Does the loss of property constitute economic compulsion?

Two district courts (decisions by Judge Copsey and Judge Hosac, see footnote 330 at page 362.) rejected non-appropriation leases because the financing arrangement put property owned by the governmental entity at risk in the event of a non-renewal. In those cases, the governments owned the ground and used a non-appropriation lease to finance purchase of a building constructed on that ground, under terms of which they lost both the building and the ground in the event they elected to walk away. The district courts found this constituted an economic compulsion to renew, thereby rendering the entire obligation a liability under the Constitution.

This issue was not presented in the *GBAD* case, because the District did not own the land adjacent to the existing convention facilities where the new construction would occur. Rather, the non-appropriation lease financed the purchase of both the land and the building. Consequently, if the District walked away, it walked away from something it never owned (or, depending on the timing of the transaction, owned only briefly and was fully compensated for).

As discussed above, the *GBAD* decision contains some broad guidance suggesting that the Constitution is concerned with judicially enforceable debt and liability, not mere "economic compulsion." On the other hand, that discussion was

not in the context the loss of an asset previously owned by the governmental entity, so this remains an open question.

This uncertainty is another reason that third party conduit financiers (typically urban renewal agencies) are likely to continue to play a role in the financing of real estate. This enables the third party to acquire the property from the builder/developer (or from the governmental entity based on a full-price purchase), making it crystal clear that, in the event of a non-renewal, the government's property is not at risk of loss without compensation.

In the *GBAD* case, the District doubled down on this protection with a provision in the non-appropriation lease enabling the District to re-acquire the property for a nominal sum even after it walked away. Nothing in the decision, however, suggests that the Court found such an extraordinary provision to be required for the non-appropriation lease to pass muster. Indeed, the Court did not even mention it.

(6) Judicial confirmation encompasses all related documents.

In *GBAD*, the District was forthcoming as to the entire suite of project documents, but sought judicial confirmation of only one document, the Centre Lease, on the basis that the other documents presented no constitutional issues. The Idaho Supreme Court agreed with the district courts that in a judicial confirmation the court should not review one document in isolation, but should consider any related documents as well. Indeed, the Idaho Supreme Court went even further. It not only considered the other documents, but ruled on them, holding that they all passed constitutional muster.[348]

Specifically, the Court upheld a provision in the master development agreement that provided construction loan priority and allowed the builder's construction lender to impose unspecified additional obligations relating to the District's performance of its obligation to purchase.[349] Essentially, this provision

[348] "We now hold that courts have a duty to examine other documents which affect the question submitted, and then to determine the propriety of the contracts before them." *GBAD*, 159 Idaho at 271, 360 P.3d at 280 (W. Jones, J.) "The statute under which this case was brought provides that 'upon hearing the court shall examine into and determine all matters and things affecting each question submitted [and] shall make such findings with reference thereto and render such judgment and decree thereon as the case warrants.' I.C. § 7–1308. We find this case warrants examination of the comprehensive agreement, and hold it constitutional as the MDA, the PSA, and the RDA do not subject the District to greater liabilities than it has funds to pay in the fiscal year in which they were entered." *GBAD*, 159 Idaho at 275, 360 P.3d at 284 (W. Jones, J.) (brackets original).

[349] The master development agreement was an over-arching agreement between the builder (K.C. Gardner Company, L.C.) and the District. It provided that the builder will build the new facilities (with the Builder's own construction financing) and that, upon completion, the District

(section 3.3.2) allowed the construction lender (not to be confused with the financing lender) to demand that the District perform its obligation to purchase in the event of a default by the builder, if the bank provided another builder who satisfactorily completed the building. The Idaho Supreme Court ruled that this presented no ongoing open-ended liability, because these construction-related performance obligations would end when the District enters into the lease agreement and free title is delivered.[350]

(7) All property owners have standing to challenge violations of Article VIII, section 3.

One might think that it would be difficult for a private party to establish standing to challenge a local government's action as a violation of Article VIII, section 3. Such a challenge is in the nature of a taxpayer challenge, and taxpayer standing is quite narrow.[351] *Thomson v. City of Lewiston*, 137 Idaho 473, 476-77, 50 P.3d 488, 491-92 (2002) (Trout, C.J.) (taxpayer lacked standing to challenge urban renewal plan); *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002) (Trout, C.J.) (taxpayers lacked standing to challenge city's payments to Chamber of Commerce); *Greer v. Lewiston Golf and Country Club, Inc.*, 81 Idaho 393, 342 P.2d 719 (1959) (Taylor, J.) (taxpayers lacked standing to challenge disannexation of golf course).

But these standing restrictions do not apply when it comes Article VIII, section 3. First, the judicial confirmation statute expressly grants standing to "[a]ny owner of property, taxpayer, elector or rate payer . . ." to oppose judicial confirmation. Idaho Code § 7-1307(1). In 2008, the Idaho Supreme Court said (albeit in dictum) that this means was it says. "Had [the city sought judicial confirmation], the Plaintiffs could have appeared in the proceeding to raise their objections. I.C. § 7-1307." *Koch v. Canyon Cnty.*, 145 Idaho 158, 162, 177 P.3d 372, 376 (2008) (Eismann, C.J.).

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would purchase them, but that if judicial confirmation is obtained, the District could convey the right to purchase or the facilities themselves to the urban renewal agency (which would lease them back to the District under a non-appropriation lease). It also addressed a separate set of facilities in an adjacent building.

[350] "Appellant points to a PSA provision, which requires the Developer (Gardner) to deliver clear title by special warranty to the District (or the Agency if judicial confirmation is obtained before), to show that the Lender would not have an interest in the Centre Facilities extending beyond their sale. Appellant's analysis is correct." *GBAD*, 159 Idaho at 276, 360 P.3d at 285 (W. Jones, J.).

[351] Indeed, Mr. Frazier's standing in the *GBAD* case might seem even more tenuous in that he is not even an affected taxpayer. The District is not funded with ad valorem taxes, but by a room tax paid by hotel guests. However, given the clear law and precedent granting broad standing in such cases, Mr. Frazier's standing was not challenged, and the Court did not comment on it.

Moreover, the Idaho Supreme Court has rejected the taxpayer standing limits that would otherwise apply when private parties bring challenges under Article VIII, section 3 outside of the judicial confirmation statute. "For over one-hundred years this Court has entertained taxpayer or citizen challenges based upon that constitutional provision." *Koch*, 145 Idaho at 162, 177 P.3d at 376. "If this Court were to hold that taxpayers do not have standing to challenge the incurring of indebtedness or liability in violation of that specific constitutional provision, we would, in essence, be deleting that provision from the Constitution." *Koch*, 145 Idaho at 162, 177 P.3d at 376.

36. OPEN MEETINGS ACT AND EXECUTIVE SESSIONS

A. Scope of the Open Meetings Act

Idaho's Open Meetings Act was first enacted in 1974, and was recodified to a new Title in 2015. Idaho Code §§ 74-201 to 74-208.[352] The Act also sets out key exceptions allowing governmental entities to meet in "executive sessions" that exclude the public. Idaho Code §§ 74-202(3), 74-206.

The Open Meetings Act was enacted in 1974 with this bold statement of purpose:

> The people of the state of Idaho in creating the instruments of government that serve them, do not yield their sovereignty to the agencies so created. Therefore, the legislature finds and declares that it is the policy of this state that the formation of public policy is a public business and shall not be conducted in secret.

Idaho Code § 74-201.

The Act applies broadly to virtually all decision-making bodies headed by more than one person. Idaho Code § 74-202(5). Specifically, the Act applies to "all meetings of a governing body of a public agency." Idaho Code § 74-203(1)).[353] Plainly, this includes cities, counties, and planning and zoning commissions when they act on land use matters of all kinds.

There are a handful of exceptions, including the court system, Idaho Code § 74-202(4)(a), and the Idaho Public Utilities Commission, the Industrial Commission, and the Board of Tax Appeals. Idaho Code § 74-203(2). The Legislature falls outside of the definition of public agency, because it was not created pursuant to statute or executive order. Idaho Code § 74-202(4)(a). Notably, the Act

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[352] The Open Meetings Act was recodified in 2015 to Idaho Code § 74-201 to 74-208. 2015 Idaho Sess. Laws, ch. 140. It was formerly codified to Idaho Code §§ 67-2340 to 67-2347. A subsequent amendment in 2015, 2015 Idaho Sess. Laws, ch. 271, delayed the effectiveness of certain of the amendments dealing labor negotiations until 2020. Quotations of the statute set out in this Handbook will be based on 2015 Idaho Sess. Laws, ch. 140. The reader should consult 2015 Idaho Sess. Laws, ch. 271 prior to 2020 if the matter involves labor negotiations.

[353] "Governing body" is broadly defined to include "the members of any public agency that consists of two (2) or more members, with the authority to make decisions for or recommendations to a public agency regarding any matter." Idaho Code § 74-202(5). "Public agency" is defined to include (among other things): "Any state board, committee, council, commission, department, authority, educational institution"; "Any county, city, school district, special district, or other municipal corporation or political subdivision of the state of Idaho"; and "Any subagency of a public agency." Idaho Code § 74-202(4).

does not apply to the Governor or to state agencies headed by a single individual (as most are). Idaho Code § 74-202(5).

The Act prohibits any such governing body from meeting to make a decision or meeting to deliberate toward a decision unless the meeting is properly noticed and open to the public. Idaho Code §§ 74-202, 74-203, 74-204.[354] An additional requirement for a meeting is that a quorum be present. *Idaho Water Resources Bd. v. Kramer*, 97 Idaho 535, 571, 548 P.2d 45, 71 (1976). This applies any time a quorum of members is present, whether in a formal meeting or at a backyard BBQ.

Not every conversation in which quorum is present constitutes a "meeting" subject to the Act. The term "meeting" is defined as "the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter. Idaho Code § 67-2341(6). "Decision" and "deliberation" are also defined terms. Thus, if a quorum of decision-makers happens to meet at a BBQ, they may freely discuss the weather or the brisket. But if they discuss an application pending before them, they are in violation of the Open Meeting Act.

The Open Meetings Act does not address whether a series of meetings, each with fewer than a quorum, may trigger the Act. Nor has any Idaho case addressed the question. A number of other jurisdictions have found that such "serial meetings" trigger the Act.

Violations of the Open Meetings Act must be challenged by filing an action in the district court within 30 days of the alleged violation. Idaho Code § 74-208(6); *Petersen v. Franklin Cnty.*, 181, 938 P.2d 1214, 1219 (Idaho 1997).

In *Noble v. Kootenai Cnty.*, 231 P.3d 1034 (Idaho 2010) (Burdick, J.), the Court found that a site visit violated the open meeting laws because the public was not allowed to be close enough to hear what was being said.

The mediation provision of LLUPA (Idaho Code § 67-6510) does not say that mediations are exempt from the Open Meetings Act. The authors aware of no

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[354] The operative provision reads: "Except as provided below, all meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act. No decision at a meeting of a governing body of a public agency shall be made by secret ballot." Idaho Code § 74-203(1).

The term, "meeting" is defined as follows: "'Meeting' means the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter." Idaho Code § 74-202(6). The definition goes on to define two types of meetings (regular and special).

The terms "decision" and "deliberate" are also defined terms, and are defined broadly. Idaho Code §§74-202(1) and 67-2341(2). Arguably, occasions when decision makers exchange information outside of meetings of the governing body (such as at the country club or in a mediation) do not meet the definition of "meeting" under the act—even if such exchange of information meets the definition of deliberation. *See, Safe Air for Everyone v. Idaho State Dep't of Agriculture*, 145 Idaho 164, 177 P.3d 378 (2008).

reported decision on the subject. Caution would suggest operating on the assumption that the Open Meetings Act applies to mediation.

B. Executive sessions

Section 74-206 sets out a number of exceptions to the open meeting requirement authorizing governmental entities to go into "executive session" for purposes of discussing matters outside the presence of the public. The exception most applicable in the land use context is section 74-206(1)(f) dealing with pending or imminent litigation. It authorizes executive sessions "[t]o communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. The mere presence of legal counsel at an executive session does not satisfy this requirement." Idaho Code § 74-206(1)(f).

On occasions, persons with matters pending before a local government (or on appeal) have sought to engage in negotiation discussions with the government officials in executive session. Of course, no decision on a matter could be made in executive session. But the thought is that more productive preliminary discussions could occur behind closed doors. Is this permissible? The answer is maybe; the Act is not clear.

On the one hand, the exception for meetings to discuss litigation matters with legal counsel sounds like it is aimed at allowing private discussions between lawyer and client (*i.e.*, those to which attorney-client privilege would attach), rather than discussions with an opposing side or an interested party. On the other hand, the Open Meetings Act was amended in 2015 adding a provision specifically prohibiting the use of executive sessions for labor negotiations. Idaho Code § 74-206A (effective only until 2020 per 2015 Idaho Sess. Laws, ch. 271). By implication, the use of executive sessions for all other negotiations is permissible.

It bears great emphasis, however, that, in any event, the government decision-makers cannot reach a final decision in the executive session. Idaho Code § 74-206(4). Rather, once a tentative solution has been reached, the elected officials must go into a public meeting, fully disclose the nature of the discussions and the proposed settlement, allow the public to comment on it, and then reconsider the whole thing with an open mind.

It also bears emphasis that communications by persons to decision-makers in the executive session are, by definition, *ex parte* communications. This is the reason that full, complete, and timely disclosure of the substance of the discussions is essential. (It is the authors' view that *ex parte* communications may be "cured" by such disclosure. But that is not a settled matter. See discussion in section 26.C at page 69.)

Even if lawful (and the authors are not aware of any law speaking directly to this question), using an executive session for the purpose of negotiation has its risks—legal and political. It may be viewed as inconsistent with the spirit of the open meeting law.

A completely different approach would be to conduct the negotiation or mediation in a public working session. This approach would allow members of the public to watch and listen, but not to speak during the course of the negotiation/mediation discussion. This is, of course, more transparent. But it can also make the discussions more difficult, because they are conducted in a fishbowl.

Another approach is to appoint just one member of the governing board to participate in the negotiation or mediation. Since that is not a quorum, it does not trigger the open meeting act. The downside to this, obviously, is that that person may not have buy-in from the other officials, who must ultimately approve any settlement.

Yet another alternative would be to engage in "shuttle diplomacy." For example, a city council could meet in executive session in one room while an applicant or other party could meet in another room. Counsel for the city could then meet with the other party to hear their proposal for settlement, and then return to the executive session to share it with the city. The city's counsel could then shuttle back to the applicant to share concerns and questions raised by the city, perhaps resulting further shuttling sessions. Given that all communications from the applicant (or other party) are through the city's counsel, and not directly to city officials, this arguably does not violate *ex parte* communication rules. Nevertheless, the better approach would be to fully document the communications and disclose them sufficiently in advance of any public hearing to enable all parties to meaningfully respond.

37. CONFLICTS OF INTEREST (LIMITED TO FINANCIAL CONFLICTS)

Another section of this Handbook (section 26.B at page 62) explores the prohibition on bias rooted in the due process clause. This section addresses the statutory prohibition on "conflicts of interest." This sounds like the same subject, but it is not. Bias embodies the policy perspective, viewpoints, and prejudices of the decision-maker.

Note: See the *Idaho Ethics Handbook* by Christopher H. Meyer for a more extensive discussion of conflicts of interest.

The statutory provision discussed here is narrower in that it is limited to the economic interests. In other respects, it is broader. For example, it applies not just to decision-makers, but to staff. Also, it applies to all types of proceedings, not just to quasi-judicial proceedings. (This is because it is based on statute (as opposed to the due process clause of the Constitution), and the statute says it applies to "any proceeding.")

LLUPA expressly prohibits certain conflicts of interest by members of P&Z commissions as well as city councils and county commissions when acting in zoning matters. Idaho Code § 67-6506. The conflict prohibition is rather narrowly drawn, however, prohibiting only conflicts based the commissioner having "an economic interest" in the matter:

> A governing board creating a planning, zoning, or planning and zoning commission, or joint commission shall provide that the area and interests within its jurisdiction are broadly represented on the commission. A member or employee of a governing board, commission, or joint commission shall not participate in any proceeding or action when the member or employee or his employer, business partner, business associate, or any person related to him by affinity or consanguinity within the second degree has an economic interest in the procedure or action. Any actual or potential interest in any proceeding shall be disclosed at or before any meeting at which the action is being heard or considered. For purposes of this section the term " participation" means engaging in activities which constitute deliberations pursuant to the open meeting act. No member of a governing board or a planning and zoning commission with a conflict of interest shall participate in any aspect of the decision-making process concerning a

> matter involving the conflict of interest. A knowing violation of this section shall be a misdemeanor.

Idaho Code § 67-6506 (emphasis supplied).

The statute specifically requires advance disclosure.[355] Note that, in contrast to the law governing *ex parte* communications, disclosure does not cure the conflict. If a conflict is disclosed, the affected member must not participate in any aspect of the decision-making process.[356] Finally, the act provides criminal penalties for violations.[357]

Also see Ethics in Government Act, Idaho Code §§ 74-401 to 74-406 (formerly codified to Idaho Code §§ 59-701 to 59-705). This is a stand-alone statute, not part of LLUPA. It applies to a broad class of elected and appointed public officials and legislators.[358] This definition includes, for example, appointed members of a planning and zoning commission, as well as the planning and zoning staff.

Idaho Code § 74-403(4) broadly defines "Conflict of interest" in terms of pecuniary interest, but includes a number of exceptions allowing, for example, elected officials to vote on taxes and other measures that affect a broad class of people. Idaho Code § 74-404 requires disclosure of conflicts of interest, but does not prohibit those with such conflicts from voting on matters. This section includes an extensive discussion with respect to an official seeking legal advice as to a conflict of interest. The section may be read to suggest that the official is expected to follow that advice, but the statute is less than clear on the subject.

See also Idaho Code § 18-1359 entitled "Using public position for personal gain." It provides, in part: "No public servant shall: (a) Without the specific

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[355] "Any actual or potential interest in any proceeding shall be disclosed at or before any meeting at which the action is being heard or considered." Idaho Code § 67-6506.

[356] "No member of a governing board or a planning or zoning commission with a conflict of interest shall participate in any aspect of the decision-making process concerning a matter involving the conflict of interest." Idaho Code § 67-6506. Prior to 2006, a planning and zoning commissioner with a conflict was allowed to testify before the commission, so long as the conflict was disclosed. That portion of Idaho Code § 67-6506 was repealed by H.B. 724, 2006 Idaho Sess. Laws, ch. 213. Now commissioners with conflicts may neither testify nor participate in the consideration of the matter giving rise to the conflict.

[357] "A knowing violation of this section shall be a misdemeanor." Idaho Code § 67-6506.

[358] Idaho Code §§ 74-403(9) & (10) (defining "public official" as "(a) any person holding public office of a governmental entity by virtue of an elected process, including persons appointed to a vacant elected office of a governmental entity, excluding members of the judiciary . . . .; (b) . . . a legislator . . .; (c) . . . any person holding public office of a governmental entity by virtue of formal appointment required by law; or (d) . . . any person holding public office of a governmental entity by virtue of employment, or . . . on a consultative basis.").

authorization of the governmental entity for which he serves, use public funds or property to obtain a pecuniary benefit for himself." Idaho Code § 18-1359(1)(a).

Also see Idaho Code § 31-807A, which requires county commissioners to be financially disinterested in transactions involving county property.

Note that each of these statutory provisions describe conflict of interest in terms of a financial interest in the matter. None of them appear to address conflicts based on a personal interest or bias with respect to the issue or matter. Thus, it appears that it would not be a conflict of interest, for example, to campaign for city council on a platform of supporting public housing, and then consistently vote in support of public housing. It would be, however, a conflict of interest to vote for a public housing proposal that financially benefited that city council member.

38. PUBLIC RECORDS ACT

Note: The Public Records Act was recodified in 2015 to Idaho Code §§ 74-101 to 74-126. It was formerly codified to Idaho Code §§ 9-337 to 9-347.

Idaho's Public Records Act is the state law equivalent of the federal Freedom of Information Act, 5 U.S.C. § 552.

Idaho's Office of the Attorney General issued the *Idaho Public Records Law Manual* on July 2019. It is available online at www.ag.idaho.gov.

In many cases, the person making the request for documents will ask that copies be made by the custodian of the records. However, the Act also allows a person to peruse the records and make copies. In that case, the government may not inquire into what records have been copied. "The custodian shall not review, examine or scrutinize any copy, photograph or memoranda in the possession of any such person and shall extend to the person all reasonable comfort and facility for the full exercise of the right granted under this act." Idaho Code § 74-102(6).

The Public Records Act contains a number of exemptions from disclosure: Idaho Code §§ 74-104 to 74-111, and 74-124. In addition, the section dealing with proceedings to enforce the act provides that the act is not "available to supplement, augment, substitute or supplant discovery procedures in any other federal, civil or administrative proceeding." Idaho Code § 74-115(3) (formerly codified to Idaho Code § 9-3433)). In other words, if a matter is in judicial or administrative litigation where discovery is provided, the litigants are limited to what may be obtained through discovery and my not use public records requests as an alternative means of obtaining information in connection with the litigation. This is discussed in "Question No. 31" in the *Idaho Public Records Law Manual* (July 2019).

Curiously, the statute does not contain, within the list of exemptions, an express exemption from disclosure of documents protected by the attorney-client communication or work product privileges.[359] However, there is an exception to the exception to the exemptions found in a different part of the statute, Idaho Code § 74-113(3)(b), which provides a basis for denying a public records request for documents protected by these privileges.

[359] The protection of these privileges is mentioned, however, in the context of an exemption for self-insurance matters. Idaho Code § 74-107(11).

39. WHEN IS RULEMAKING REQUIRED? (*ASARCO* AND *PIZZUTO*)

A. Overview

The question of when executive agencies are required to undertake rulemaking is governed in Idaho by:

- the Idaho Administrative Procedure Act, Idaho Code §§ 67-5201 to 67-5292 ("IAPA")[360]
- the agency's organic act or other governing statute, and
- two cases: *Asarco Inc. v. State*, 138 Idaho 719, 69 P.3d 139 (2003) (Trout, C.J.) and *Pizzuto v. Idaho Dep't of Correction*, 2022 WL 775584 (Mar. 15, 2022) (Brody, J.) (abrogating *Asarco* in part).

At the outset of its decision, the *Pizzuto* Court noted that executive agencies may act in any or all of three capacities (the issuance of guidance, contested case orders, and rules):

> They may act in (1) a purely executive capacity by carrying out statutory directives; or (2) a quasi-judicial capacity by defining the rights and duties of individuals through deciding contested cases and issuing orders; or (3) a quasi-legislative capacity by defining the rights and duties of the public through rulemaking.

Pizzuto at *2.

That is a good summary, so long as it is understood that the first category (purely executive capacity) includes the issuance of informal guidance.[361]

Agency guidance is similar to rules in that it is often broadly applicable and forward-looking. But it is different than rulemaking in that guidance does not have the force and effect of law. *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 263, 715 P.2d 927, 933 (1985) (Bistline, J.). In other words, both agencies and the public are bound by lawfully adopted rules just as they are bound by statutes. Accordingly, an agency may rely on its rules to defend its actions and decisions. In contrast,

[360] Rules issued under the Idaho' APA are published in a compilation which, for no good reason, is commonly referred to as "IDAPA." This presumably stands for Idaho Administrative Procedure Act; why the compilation of rules would be referred to by an acronym referring to the statute is a mystery.

[361] The "purely executive capacity" may also be understood to include all manner of other agency actions including informal or one-off actions that do not entail the issuance of guidance, orders, or rules.

guidance is not binding on anyone—it is just an expression of what the agency thinks is the law or good policy. Accordingly, an agency may not rely on its guidance alone to defend its actions and decisions.

Most notably, guidance is issued without public notice and comment or compliance with other rulemaking procedures. Hence we have the recurring debate over whether an agency should have proceeded by rule when it chose another path.

Generally speaking, agencies have broad latitude in choosing adjudication versus rulemaking.

> [P]revailing background principles of administrative law . . . recognize substantial agency discretion over procedural matters. One such principle holds that "[a]gencies have discretion to choose between adjudication and rulemaking as a means of setting policy." At a more granular level, agencies also have substantial discretion to define the procedures they will use to conduct specific kinds of proceedings. This discretion is limited only by the requirement that agencies observe the minimum (and minimal) requirements imposed by the APA and the Constitution's guarantee of due process.

Emily S. Bremer, *The Agency Declaratory Judgment*, 78 Ohio St. L.J. 1169, 1188-89 (2017) (footnotes omitted).[362]

The same ought to be said with respect to the broad discretion an agency has in choosing between issuing formal rules and informal guidance. The key difference between the two is that only rules have the force and effect of law. Thus, if an agency wishes to make its regulatory statement enforceable, it must promulgate it as a rule. But agencies are not obligated to turn every guidance document into a rule. The very fact that guidance documents exist proves this point. Indeed, guidance documents are useful (both to the agency and to the public) and should be encouraged.

However, there are two relatively rare instances in which the agency may be compelled to issue a rule, rather than guidance or proceeding on a case-by-case basis via contested cases.

[362] Professor Bremer's article was originally commissioned and published as a report, in October 2015, by the Administrative Conference of the United States. The Administrative Conference adopted recommendation 2015-13 based on the report. *See* 80 Fed. Reg. 78,161, 78,163 (Dec. 4, 2015).

1. The first is where a statute expressly (or by unmistakable implication) instructs an agency to issue rules on a particular subject. This was the key issue in *Pizzuto*.

2. The second is where the guidance effectively operates with the same force and effect as a rule.[363] This was the key issue in *Asarco*.

The first category is easy. One must simply read the statute. If it does not contain a discernable mandate to issue rules, then the agency retains its inherent discretion to proceed by rule, guidance, or case-by-case decision making as it sees fit.

The second category is harder to resolve. An article describing Wisconsin's APA captures the idea well (quoted at length, because it is such a good explanation):

> Although agencies do not often make procedural mistakes when promulgating a rule, lawyers have invalidated rules based on an agency's failure to adhere to statutory rulemaking procedures showing that the agency did not go through any rulemaking procedures and instead, administered statutory provisions through the issuance of "guidance documents."
>
> As regulatory and compliance lawyers know, a guidance document is "regulatory material" that an agency may use "to manage internal operations and to communicate with outside parties." A guidance document may set forth an agency's interpretations of existing rules, outline how an agency intends to regulate a developing policy area, or take the form of a training manual or compliance document for agency staff or the public.
>
> In general, guidance documents do not have the force of law; however, they might have the effect of imposing general standards of policy on a class of individuals or entities that creates the same practical effect of a fully promulgated rule. If that is the case, then the guidance document is, in essence, a rule in disguise, and courts will permit a party to challenge the guidance document's validity based on the agency's failure to follow statutory rulemaking procedures.

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[363] "In analyzing this question [whether a guidance is masquerading as a rule], courts ask whether a rule has a 'legally binding effect.' If so, agencies are required to issue a legislative rule." Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 Yale L.J. 782 (2010) (footnote omitted). See also, William Funk, *A Primer on Nonlegislative Rules*, 53 Admin. L. Rev. 1321, 1326 (2001).

> . . . Invalidating a guidance document requires the challenger to demonstrate that the guidance fits the definition of a "rule" in the Administrative Procedure Act. The guidance must 1) be a regulation, standard, statement of policy, or general order; 2) be of general application; 3) have the effect of law; 4) be issued by an agency; and 5) implement, interpret, or make specific legislation enforced or administered by such agency. Courts have given the most attention to the "effect of law" and "general application" elements.
>
> To show that an agency guidance document has the "effect of law," lawyers should search for language in the document in which the agency speaks with an "official voice intended to have the effect of law" rather than in an advisory, informational, discretionary, or descriptive manner. A lawyer can further bolster her argument that an agency guidance document has the effect of law if she can demonstrate that enforcement of the guidance could result in 1) criminal or civil sanctions, 2) denial or revocation of licensure, or 3) a detrimental impact on a class of individuals or entities. A guidance document is of "general application" if the class of individuals or entities subject to the guidance "is described in general terms and new members can be added to the class."

J. Wesley Webendorfer, *Challenging a State Agency Regulation*, 90 Wisconsin Lawyer 30, 32 (2017).

Here's the rub. The definition of "rule" in Wisconsin's APA is more carefully crafted that the Idaho version,[364] or the federal APA[365] for that matter. Notably, Wisconsin's statute describes a rule as "a regulation, standard, statement of policy, or general order of general application that has the force of law . . . ." Wisconsin Stat. § 227.01(13) (emphasis added).

The absence of similar language in Idaho's APA is a problem, but one that the Idaho Court has overcome. In two landmark decisions, *Asarco* and *Pizzuto*, the

[364] Idaho Code § 67-5201(19).

[365] 5 U.S.C. § 551(4).

Idaho Supreme Court has looked to the "force and effect of law" component in determining what is and what is not a rule.[366]

B. *Asarco* (2003) – TMDLs are rules because they have the practical force and effect of law.

In *Asarco Inc. v. State*, 138 Idaho 719, 69 P.3d 139 (2003) (Trout, C.J.), mining companies challenged TMDLs (short for total maximum daily load) issued by the Idaho Department of Environmental Quality ("IDEQ"). "TMDLs establish the maximum amount of a pollutant a waterbody can handle without violating the state's water quality standards." *Asarco*, 138 Idaho at 722, 69 P.3d 142. TMDLs, in turn, drive individual permitting decisions under the Clean Water Act.

The Idaho Supreme Court held that the TMDLs established by IDEQ were void because the agency failed to follow formal rulemaking requirements. Professor Goble provided this summary:

> *ASARCO* arose out of the establishment by the Department of Environmental Quality (DEQ) of Total Maximum Daily Loads (TMDL) for three pollutants in the Coeur d'Alene River Basin. A TMDL specifies the maximum amount of a pollutant that can be added to a water body from all sources. In establishing the TMDLs, DEQ "provided some notice to interested parties and took some testimony" but did not follow the IDAPA procedures necessary to promulgate a rule. Three mining companies challenged the legality of the TMDLs, contending that they were "rules" and hence invalid for want of the statutory procedure.

Dale D. Goble, *Not-Quite Ad Law: The Rule of Law Takes Another Hit*, 29 Admin. & Regulatory L. News, 25, 26 (2003).[367]

The Court declared that the TMDLs constitute a rule because the fit the definition of rule in the IAPA. To get there, however, the Court found it necessary to adopt a six-part test describing these "characteristics" of a rule:

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[366] The *Asarco* and *Pizzuto* cases can be difficult to understand. Rather than simply explaining that the Court is called upon to fill in the interstices of the IAPA, the Court has grounded its analysis and holding in the literal words of the statutes. That is a challenge, because the words of the IAPA simply do not answer the question of when an agency has discretion to issue rules and when it does not. Fortunately, both decision recognize and turn on the critical role played by the "force and effect of law" aspect of rules.

[367] The "hit" Professor Goble was referring to was not the *Asarco* decision (with which he agreed), but the Legislative response to it.

> Thus, under the statutory definition, an agency action is a rule if it (1) is a statement of general applicability and (2) implements, interprets, or prescribes existing law. Nonetheless, this definition of a rule is too broad to be workable. Under such a definition, virtually every agency action would constitute a rule requiring rulemaking procedures. Therefore, in order to provide further guidance in determining when agency action requires rulemaking, this Court adopts the reasoning of the district court and considers the following characteristics of agency action indicative of a rule: (1) wide coverage, (2) applied generally and uniformly, (3) operates only in future cases, (4) prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) expresses agency policy not previously expressed, and (6) is an interpretation of law or general policy. The district court correctly applied these factors to the facts, ultimately holding the TMDL constitutes a rule requiring rulemaking in order to be valid.

Asarco, 138 Idaho at 723, 69 P.3d 143 (citations omitted).

A key factor in holding that the TMDL is a rule is the Court's finding (with respect to the fourth characteristic) that "EPA considers these numbers binding and has already used the TMDL in order to reduce the discharge limits reflected in several of the Mining Companies' NPDES permits. Thus, the TMDL in fact contains quantitative legal standards not provided by either the Clean Water Act or the Idaho Water Quality Act." *Asarco*, 138 Idaho at 724, 69 P.3d 144. In other words, the TMDL did not operate as mere guidance that the agency might weigh but which could be effectively challenged by the permittee. As a practical matter, the adoption of the TMDL by IDEQ was definitive, final, and determinative as to subsequent permitting actions by the EPA. In short, the TMDL had the force and effect of law.

As Professor Goble noted:

> First, the TMDLs changed the legal status of the mining companies by modifying the amount of pollutants that they were permitted to discharge; thus they were obviously "enforceable." Second the agency action fell within the statutory definition of "rule" in I.C. § 67-5201(19). The TMDLs were statements of "general applicability" (so they were not adjudicatory) and they "implement, interpret, or prescribe . . . law or policy" by

> prescribing "quantitative legal standards" not contained in the applicable statutes. This was a clear application of standard administrative law: an agency can prospectively change the legal status of entities only by promulgating rules after notice and an opportunity for comment.

Goble at 26.

Finally, relying on Idaho Code §§ 67-5278(1), (3), the Court ruled that the mining companies were not required to exhaust administrative remedies before seeking a declaratory judgment that a rule is void.

The Legislature responded quickly:

> The legislative response was swift. H.R. 458 was quickly introduced, specifying that the rulemaking provisions of IDAPA "shall not apply to TMDLs." The Governor signed the bill on May 7 — less than two weeks after the decision in ASARCO. 2003 Idaho Sess. Laws 938. While the legislature undid the decision in ASARCO, it did not undermine the court's recognition of the importance of consistent procedural safeguards.

Goble at 26.

C. *Pizzuto* (2022) – SOP protocol not a rule because the statute did not require rulemaking.

In *Pizzuto v. Idaho Dep't of Correction*, 2022 WL 775584 (Mar. 15, 2022) (Brody, J.), a death row inmate challenged the Department's execution protocol for lethal injection known as an SOP (standard operating procedure) on the basis that it should have been issued as a rule.

The Court held the SOP need not be issued as a rule because the statute addressing lethal injection does not require the agency to issue a rule.

The operative provision in the statute reads: "The director of the department of correction shall determine the procedures to be used in any execution." Idaho Code § 19-2716. The Court found that the absence of an express reference to rulemaking was not dispositive. "[N]othing in the APA or our case law suggests that such 'magic words' are necessary." *Pizzuto* at *3. Instead, said the Court, rulemaking will be required if and only if "a statute requires an agency to produce something that fits the APA's definition of a rule . . . ." *Id*.

The Court then examined the definition of "rule" in the IAPA, which speaks in terms of their "general applicability." The Court said, "The general applicability of a rule is, perhaps, the most salient characteristic distinguishing quasi-legislative

rulemaking from a purely executive or quasi-judicial agency action." *Pizzuto* at *3. It then concluded that the legislative instruction to "determine the procedures to be used in any execution" does not fit that description of a rule.

In defining "rule," the IAPA employs the words "general applicability" but does not use the words "force and effect of law." It is important to note that the Court nevertheless managed to weave the latter concept into the definition of "rule." The Court found that "general applicability" encompasses the concept of "force and effect of law."[368] In the author's view, this is critical to understanding the *Pizzuto* case.

The Court reinforced its conclusion that the lethal injection statute contains no rulemaking mandate by focusing on the statute's use of the word "any" (rather than "every"). The Court said this "connotes case-by-case decision-making." *Pizzuto* at *3. In the author's view, this misses the point. The SOP was not a case-by-case determination; it is a "standard operating procedure" applicable to all death row inmates. The reason the SOP is not a rule is not that it is a case-by-case determination.[369] It is not a rule because (1) it does not have the force and effect of law and (2) the lethal injection statute does not otherwise mandate issuance of a rule.

The *Pizzuto* Court then took the unexpected step of "abrogating" the *Asarco* Court's adoption of the six factor test (which it had borrowed from the New Jersey Supreme Court).[370] Recall that the *Asarco* Court found the six factor test necessary because the definition of rule in the IAPA is "too broad to be workable. *Asarco*, 138 Idaho at 723, 69 P.3d at 143. The *Pizzuto* Court concluded that the "decision in

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[368] "The second way in which rules are generally applicable is that they must be applied uniformly by the agency. Because rules have the force and effect of law, they are binding both on the public and on the agency. See *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 263, 715 P.2d 927, 933 (1985) (holding that an agency 'must[ ] observe and be bound by its own rules'). Thus, although an agency may have the discretion to change its rules from time to time (complying with the rulemaking procedures of the APA, of course), it does not have discretion to depart from its rules while they are in effect. This distinguishes rulemaking from purely executive actions, in which an agency (or officer) enjoys discretion so long its actions are not contrary to express law." *Pizzuto* at *3.

[369] The Court asserted that the SOP was not generally applicable (like a rule) because "the Director may modify the procedures used at any time." *Pizzuto* at *4. That is not a particularly helpful observation. All guidance may be changed at any time.

[370] The *Pizzuto* Court did not clarify what is left of the *Asarco* precedent today. As noted, that case is now moot, because the Legislature changed the law (exempting TMDLs from rulemaking). Clearly, if an *Asarco*-like case arose today, it would not be decided on the basis the six-factor test. Instead, presumably, it would be decided on the basis of what *Pizzuto* called the key component of the definition of "rule," i.e., whether the standard, guidance, or protocol issued by the agency is of general applicability, taking into account an examination of whether the standard has the force an effect of law. Thus, the outcome in *Asarco* probably would have been the same, given the unusual nature of the TMDL in controlling future permitting decisions.

Asarco was manifestly wrong," the IAPA's definition of rule is just fine as is, and no additional factors are needed to understand the definition. *Pizzuto* at *6.

> It is simply not true that "virtually every agency action would constitute a rule" under section 67-5201(19) because the definition of "rule" contains an exception for matters of internal agency management. See I.C. § 67-5201(19)(b) (providing that "statements concerning only the internal management or internal personnel policies of an agency and not affecting private rights of the public" are not rules). Thus, the *Asarco* Court adopted the six factors to fix a problem with its incomplete definition of "rule," not a problem in the statutory definition itself.

Pizzuto at *6.[371]

Accordingly, the *Pizzuto* Court has scrapped the six-factor test and returned us to the words of the IAPA definition itself. In doing so, the *Pizzuto* Court has wisely incorporated into that statutory language the key concept of rules having "the force and effect of law." *Pizzuto* at *3. That concept is critical to making sense of all this. As the Court said, the force and effect of law and the fact that an agency is bound by its own rules is what "distinguishes rulemaking from purely executive actions, in which an agency (or officer) enjoys discretion so long its actions are not contrary to express law." *Pizzuto* at *3.

In sum, the *Pizzuto* case and what is left of the *Asarco* case each recognize that, by and large, agencies may choose to act by rule, by guidance, or by contested case. However, that discretion is curtailed and rules are required where either (1) the organic act or other statute governing the agency action mandates rulemaking on the subject at hand and/or (2) the effect of the guidance or contest-case action is to establish a regulatory standards of general applicability that, as a practical effect, has the force and effect of law.

It bears emphasis that these conditions are rare. The TMDLs in *Asarco* are an odd beast. They set standards that are then determinative of the outcome in subsequent permitting actions. Hence, they operated like rules and should have been promulgated as rules. (Until the Legislature changed the law in response to *Asarco*.)

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[371] The *Pizzuto* Court's criticism of *Asarco* is difficult to understand. The exclusion of "internal agency management" from the definition of "rule" is very narrow. The *Asarco* Court was correct in stating that the definition of rule is quite broad. That description remains true even if matters of internal agency management are excluded from the definition. The reason the definition is quite broad is that it is poorly drafted, ambiguous, and in need of judicial interpretation. The six factor test might not be the best way of judicially filling in the statutory interstices, but it wasn't an altogether bad or unnecessary approach.

The situation in *Pizzuto* will be the more common experience. Where the guidance document is not legally determinative of other outcomes (i.e., it does not have the force and effect of law) and where the applicable statute does not mandate rulemaking, agencies retain broad discretion in choosing among the three categories of agency action outlined in *Pizzuto*.

40. OVERVIEW OF REGIONAL PLANNING AND PUBLIC TRANSPORTATION LAW

A. Introduction to regional planning and public transportation

Regional planning and public transportation are emerging issues in Idaho, particularly in the rapidly urbanizing Treasure Valley. The following sections discuss these issues, using as examples the regional planning and public transportation entities existing in the Treasure Valley.

B. Metropolitan planning agencies and COMPASS

The Community Planning Association of Southwest Idaho (COMPASS) is the Metropolitan Planning Organization (MPO) [372] for the Treasure Valley.[373] COMPASS is a non-profit association of local governments in Ada County. COMPASS' members include Ada County, the cities of Boise, Eagle, Garden City, Kuna, Meridian, and Star, the Ada County Highway District, ValleyRide, Boise Independent School District, Meridian School District, the Greater Boise Auditorium District, Boise State University, Canyon County, the cities of Caldwell, Greenleaf, Melba, Middleton, Nampa, Notus, Parma, and Wilder, Canyon Highway District, Golden Gate Highway District, Nampa Highway District, and Notus-Parma Highway District. COMPASS' board consists of elected officials or members from each organization.

As the MPO for the Treasure Valley, COMPASS has several obligations. First, it must annually develop a Unified Planning Work Program and Budget showing how local and state agencies plan to utilize federal planning funds to accomplish metropolitan planning goals. Second, it must prepare a Long-Range Transportation Plan for the Treasure Valley for the next 20-plus years encompassing all modes of transportation including roadways and public transportation. Third, it must prepare and annually update a Transportation Improvement Program describing how local and state agencies will use federal funds to augment transportation systems in the short-term future. Fourth, it must develop a Congestion Management System to help local governments evaluate how best to accommodate the increased congestion in the Treasure Valley. A copy of these reports can be found on COMPASS' website located at www.compassidaho.org.

To generate the data necessary to estimate the present and future transportation needs in the Treasure Valley, COMPASS conducts traffic studies,

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[372] Pursuant to federal law, urbanized areas larger than 50,000 people must designate an MPO which sets priorities for expending US Department of Transportation funds for highways and public transportation throughout a metropolitan region.

[373] The Treasure Valley includes the Metropolitan Region covering Ada and Canyon Counties.

household travel characteristics surveys, and tracks building permit information and automobile ownership rates. The data collected from these studies is then utilized to develop the reports discussed *supra*.

On July 15, 2002, COMPASS adopted *Destination 2025, the Long-Range Transportation Plan for Ada County* In this plan, COMPASS addresses several topics including: general transportation issues, the function of COMPASS' travel demand forecast model, major roadway projects, public transportation services and needs, transportation enhancement needs, and environmental concerns in Ada County.

COMPASS also recently adopted *Moving People 2025, the Long Range Transportation Plan for Canyon County* in February of 2003. Like Destination 2025, this Plan discusses current transportation problems and forecasts future transportation demands based on growth assumptions estimated from data collected by COMPASS. Both reports are available on COMPASS' website.

In addition to the Ada County and Canyon County Long-Range Transportation Plans, COMPASS is also in the process of developing Idaho's first *regional* long-range transportation plan for the Treasure Valley, *Communities in Motion*. This plan is being generated with the view that transportation planning should encompass a regional rather than solely a local view because commuting in the Treasure Valley often involves traveling through more than one town. This multi-modal[374] Plan outlines all *regional* transportation improvements that will be needed over the next 20-plus years in the Treasure Valley. More information regarding Communities in Motion is available at www.communitiesinmotion.org.

C. Regional transportation agencies and ValleyRide

The bus system in the Treasure Valley is managed and operated by ValleyRide, the Treasure Valley's Regional Public Transportation Agency. ValleyRide has been working cooperatively with COMPASS in preparing the Regional Long-Range Transportation Plan for the Treasure Valley.[375] Additionally, ValleyRide and COMPASS, along with other affected transportation service providers, have cooperatively developed a Transportation Improvement Program (TIP) that satisfies air quality standards in the Treasure Valley.[376]

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[374] Multi-modal transportation planning refers to planning involving several different transportation choices including: roadways, public transit, carpooling, etc.

[375] This plan outlines all regional transportation improvements that will be needed over the next 20-plus years in Ada and Canyon Counties.

[376] This plan outlines how local and state agencies will use federal funds to augment transportation systems in the short-term future.

The Treasure Valley's bus system has played an important role in correcting and maintaining the Treasure Valley's air quality. Under the Clean Air Act Amendments of 1990, 42 U.S.C. § 7401 Et. Seq., Congress gave the Environmental Protection Agency (the "EPA") the authority to set limits on the allowable levels of air pollutants, including those pollutants discharged by motor vehicles. The Environmental Health Center: A Division of the National Safety Council, *Background on Air Pollution*, at http://www.nsc.org/ehc/mobile/acback.htm at pg. 4. Areas that exceed the EPA's standards are called non-attainment areas. Once a county or city is in non-attainment, the state's Department of Environmental Quality (DEQ) must submit a State Implementation Plan (SIP) laying out how the state plans to reach attainment. State of Idaho Department of Air Quality, *Transportation and Air Quality Planning*, at http://www.deq.state.id.us/air/monitoring/transportation.htm at pg. 1.

In 1978, Northern Ada County was designated as a non-attainment area for carbon monoxide (CO). Community Planning Association of Southwest Idaho, Air Quality, at http://www.compassidaho.org/airquality.html at 2. To remedy this violation, the Idaho Department of Environmental Quality developed an SIP that included transportation conformity measures to reduce CO emissions to reach attainment. *See* 40 C.F.R. Part 52, *available at* http://www.epa.gov/fedrgstr/EPA-AIR/1994/December/Day-01/pr-178.html. As part of these conformity measures, Boise Urban Stages replaced its entire fleet of buses with compressed natural gas buses; increased their fleet size from 26 to 30 buses; and enhanced its marketing efforts to promote transit use. By 2002, due in part to these measures, the Treasure Valley had reduced its CO emissions to acceptable levels and EPA redesignated northern Ada County as a maintenance area. *See* 40 CFR Parts 52 and 81, *available at* http://www.epa.gov/EPA-AIR/2002/October/Day-28/a27237.htm.

In addition to helping resolve air pollution problems in the Treasure Valley, ValleyRide has also been instrumental in providing transportation options to the disabled and elderly who are unable to utilize the regular bus system. More information about ValleyRide is available on its website located at www.valleyride.org.

D. Funding for public transportation in Idaho

The Idaho Legislature's piecemeal approach to solving public transportation needs has created non-uniform public transportation services throughout the state. While counties and cities have been granted express statutory authority to establish and operate public transportation services, the statutes conferring this authority are void of any explanation as to how the transportation services are to be funded. In an attempt to resolve these incongruities and to increase the effectiveness of Idaho's public transportation system, the legislature enacted the Regional Public Transportation Authority Act (the "Act") in 1994.

The Act, codified in Title 40, Chapter 21 of the Idaho Code, allows people in all or contiguous parts of one or more counties to vote for the creation a *single* government entity that is "oriented entirely towards public transportation needs within each county or region." Pursuant to Section 40-2109, once a Regional Public Transportation Agency (RPTA) is created it "will have exclusive jurisdiction over all publicly funded or publicly subsidized services and programs except those transportation services and programs under the jurisdiction of public school districts and law enforcement agencies." Today, there are two RPTA's in Idaho – one in Bonneville County (approved by voters in 1995) and one in Ada and Canyon Counties (approved by voters in 1997). The Act, however, does not include a mechanism to fund RPTA's. As a result, the effectiveness of RPTA's has been severely limited.

Since the enactment of the Act, there have been numerous proposals before the legislature to raise revenue to fund public transportation in Idaho. In 1995, The Community Transportation Association of Idaho (CTAI), the Public Transportation Advisory Council (PTAC) and the Idaho Transportation Department (ITD), among others, proposed that an effort be made to increase the vehicle title transfer fee from $8 to $10, with the additional $2 going towards public transportation. This additional fee would have raised approximately $870,000 per year statewide. This bill, however, failed to get out of the House Transportation Committee.

In 1997, a funding proposal specifically directed to funding RPTA's was proposed. This bill, which became H.B. 348, authorized voters in an established RPTA region to vote on an up to $5 per year fee on all vehicles of 8,700 pounds or less gross weight registered within the region. The bill passed the House, but died in the Senate Transportation Committee without a hearing.

In 1998, legislation was again proposed to increase the vehicle title transfer tax. This time, however, the increase was by $2.50 and the proposal referred to the increased tax as a "surcharge." This proposal, which became H.B. 646, was reported out of the House Transportation Committee with a "do pass" recommendation. The bill, however, was defeated on the House floor by a vote of 38-30.

Today, Idaho remains one of only seven states that offer no state funding for public transportation.[377] In 2003, the Idaho Task Force on Public Transportation (the "Task Force") was established to identify and analyze various public transportation systems and to devise mechanisms to fund these systems. In a 2004 Report to the State Legislature (the "Report"), the Task Force summarized its state-wide research concerning public transportation demands throughout the state. In its report, the Task Force proposed two primary options to fund public transportation in the state. The

[377] The other six states that do not receive state funds for public transportation are Alabama, Colorado, Mississippi, Hawaii, New Mexico and Utah.

first option it proposed involves imposing a personal property tax on vehicles with the method of taxation to be based on the age and value of the vehicle.[378] Under this proposal, a standard tax percentage would be established based on the vehicle's original cost and current age. The percent tax would then decrease by 10 percent each year as the vehicle ages until it reaches a $15 per year minimum. Under this proposal, trucks and other commercial vehicles would be addressed separately.

The second option proposed by the Task Force involves a return to an increase in the title transfer fee. The report, however, did not provide a detailed explanation as to how or the way in which this fee would be increased.

A bill authorizing the Idaho Transportation Department and county-wide highway districts to construct and own light rail systems passed both houses of the Idaho Legislature in 2004, only to fall to Governor Kempthorne's veto. S.B. 1269A, Idaho Legislature, 2004 Session. While this bill did not create a funding mechanism for public transit, it was considered an important step in that direction. Effective public transportation systems probably will not exist in Idaho until the funding issue is addressed.

In the summer of 2004, Ada County, the six cities within the county, and the Ada County Highway District ("ACHD") signed a cooperative agreement to retain expert assistance to revise the comprehensive plans and zoning ordinances for the cities and the county. The purpose of this exercise is to adopt plans and ordinances that will create a more compact development pattern in Ada County. The motivation for this move was ACHD's recognition that traditional development patterns are badly straining ACHD's maintenance budgets. That is, ACHD discovered that the tax revenue generated by new development is insufficient to maintain the roads that development necessitates. We will update this section as this project develops.

[378] The use of a personal property tax on vehicles to fund public transportation is a common method used in other states.

41. FEDERAL LAWS AFFECTING IDAHO LAND USE

Federal claims may be raised in state court. "Also, it is well-established that state courts are fully competent to hear federal claims, including constitutional challenges to land-use regulations." *Adam Bros. Farming, Inc. v. Cnty. of Santa Barbara*, 604 F.3d 1142, 1148 (9th Cir. 2010).

Federal constitutional claims (notably takings) are frequently raised state court. In addition, developers and property owners should be aware of various federal statutory laws affecting land use. These federal laws may affect the decision to construct or purchase a building because they contain guidelines with which buildings must comply, and failure to comply with those guidelines could result in costly remedial measures or litigation.

A. The Fair Housing Act[379]

Title VIII of the Civil Rights Act of 1968, known as the Fair Housing Act (FHA), prohibits discrimination in the sale, rental, and financing of dwellings based on race, color, religion, sex, and national origin. 42 U.S.C. § 3603 (West 2003). In 1988, Congress passed the FHA amendments, which expanded coverage of Title VIII to protect individuals from discrimination in housing practices based on handicap or familial status. 42 U.S.C. §§ 3603, 3604. The FHA provides equal opportunities in the housing market for protected individuals regardless of whether the housing is publicly funded or not. This includes the sale, rental, and financing of housing, in addition to the physical design of new multifamily housing. 42 U.S.C. §§ 3603, 3604.

(1) Design and construction requirements

To prevent discrimination against protected individuals, the FHA provides design and construction requirements that apply to buildings built for first occupancy after March 13, 1991 that are covered multifamily dwellings. Prohibition Against Discrimination Because of Handicap, 24 C.F.R. § 100.205 (1991). A covered multifamily dwelling is (1) a dwelling unit in a building with four or more dwelling units if the building has one or more elevators, and (2) all ground floor dwelling units in other buildings with four or more units. 42 U.S.C. § 3604. These dwelling units must meet design requirements for public and common use spaces and must be accessible to people with handicaps. 24 C.F.R. § 100.205. The interior of dwelling units covered by the FHA must also meet certain accessibility requirements. 24 C.F.R. § 100.205. The design requirements for new buildings and dwelling units are: (1) accessible building entrance on an accessible route; (2) accessible and usable

[379] Information on the Fair Housing Act was obtained from 42 U.S.C. § 3601 et seq. (2003), 24 CFR ch. 1, as well as from the U.S. Department of Housing and Urban Development's Fair Housing Act Design Manual.

public and common use areas; (3) usable doors; (4) accessible route into and through the covered dwelling unit; (5) light switches, electrical outlets, thermostats and other environmental controls in accessible locations; (6) reinforced walls for grab bars; (7) usable kitchens and bathrooms. 24 C.F.R. § 100.205.

(2) Renovations

The FHA does not require renovations to existing buildings, and it does not apply to buildings occupied before March 13, 1991. 24 C.F.R. § 100.205. In addition, a building is not subject to the design requirements of the FHA if a state, county, or local government on or before June 15, 1990 issued the last building permit or renewal. 24 C.F.R. § 100.205.

(3) Reasonable accommodations and reasonable modifications

The FHA contains two provisions to ensure that people with disabilities have full use and enjoyment of dwellings. The first provision states that it is unlawful to refuse to make reasonable accommodations when necessary to provide a disabled person an equal opportunity to use the property. 24 C.F.R. § 100.204. The second provision states that it is unlawful to refuse to permit individuals with disabilities, at their own cost, to make reasonable modifications to their dwelling unit or to the public or common areas. 24 C.F.R. § 100.203. For example, buildings that provide parking spaces must provide reserved parking spaces if requested by a disabled resident who needs them. U.S. Department of Housing and Urban Development's Fair Housing Act Design Manual.

The cost of reasonable modifications in new construction is the responsibility of the builder or landlord to the extent they must meet the design requirements specified by the FHA. U.S. Department of Housing and Urban Development's Fair Housing Act Design Manual. If a resident would like to buy a unit but needs additional modifications to accommodate his or her disability, the resident may ask for the modification and the builder may not refuse. U.S. Department of Housing and Urban Development's Fair Housing Act Design Manual. However, the resident must pay for the modification to the extent it is more expensive than the cost of the original design. U.S. Department of Housing and Urban Development's Fair Housing Act Design Manual.

(4) Exceptions

In some circumstances, the FHA exempts single-family housing with no more than four units, single-family housing sold or rented without the use of a broker, and housing operated by organizations and private clubs that limit occupancy to members only. 42 U.S.C. § 3603 (West 2003).

(5) Enforcement

An aggrieved person may file a complaint with the Secretary of Housing and Urban Development (Secretary) and may also commence a civil action in a United States district court or State court. 42 U.S.C. §§ 3607, 3613. The Secretary may also file a complaint on its own initiative. 42 U.S.C. § 3607.

B. The Americans with Disabilities Act[380]

Many Americans have one or more physical or mental disabilities, and society has "tended to isolate and segregate" those individuals. 42 U.S.C. § 12101 (West 1995). Thus, Congress enacted the Americans with Disabilities Act (ADA) to eliminate discrimination against disabled individuals and to provide enforceable standards for addressing this type of discrimination. 42 U.S.C. § 12101.

(1) Subchapter II-public services

Subchapter II of the ADA applies to programs, activities, and services of public entities. A public entity is defined as "any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; and the National Railroad Passenger Corporation, and any commuter authority." 42 U.S.C. § 12131.[381] Most of the requirements in this subchapter are based on section 504 of the Rehabilitation Act of 1973, which prohibits discrimination based on handicap in federally assisted programs and activities. Hummel Architects, P.A. Accessibility Guidelines and Technical Assistance Manual. The ADA extends section 504's prohibition on discrimination to all activities of State and local governments, not only those receiving federal financial assistance. Hummel Architects, P.A. Accessibility Guidelines and Technical Assistance Manual. Thus, under the ADA, the requirements for public entities under Subchapter II are consistent with, and sometimes identical to, section 504 of the Rehabilitation Act. Hummel Architects, P.A. Accessibility Guidelines and Technical Assistance Manual.

(a) Accessibility

The ADA prohibits public entities from denying the benefits of its programs, activities, and services to disabled individuals because its facilities are not accessible. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. § 35.149-35.150 (1992). A public entity's services, programs, or activities must be accessible to and usable by disabled individuals. 28 C.F.R. § 35.149-35.150. This standard is known as "program accessibility," and it

[380] Information on the Americans with Disabilities Act was obtained from 42 U.S.C. § 12101 *et seq.*, as well as from the Hummel Architects, P.A. Accessibility Guidelines and Technical Assistance Manual.

[381] This subchapter does not apply to private entities, which are covered by Subchapter III.

applies to all existing facilities of a public entity. 28 C.F.R. § 35.149-35.150. Program accessibility may be achieved by various methods, including providing access to facilities through structural methods, such as altering existing facilities or acquisition or construction of additional facilities. 28 C.F.R. § 35.149-35.150.

(b) Construction and alteration

All facilities designed, constructed, or altered by, on behalf of, or for the use of a public entity must be accessible to and usable by disabled individuals if the construction or alteration is begun after January 26, 1992. 28 C.F.R. § 35.151. "Readily accessible and usable" means that the facility must be designed, constructed, or altered in compliance with a design standard. 28 C.F.R. § 35.151. The regulation provides a choice of two standards that may be used: (1) the Uniform Federal Accessibility Standards (UFAS), or (2) the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG), which is the standard that must be used for public accommodations and commercial facilities under Subchapter III of the ADA. 28 C.F.R. § 35.151.

(2) Subchapter III-public accommodations and services operated by private entities

For land use purposes, this subchapter applies to places of public accommodation and commercial facilities, and private entities primarily engaged in transporting people (the Department of Transportation has issued regulations implementing that section of this subchapter). 42 U.S.C. § 12181 (West 1995).[382]

(a) Places of public accommodation

Places of public accommodation and commercial facilities are both subject to Subchapter III's requirements, but places of public accommodation must also comply with Subchapter II requirements, such as nondiscriminatory eligibility criteria, reasonable modifications in policies, practices, and procedures, and removal of barriers in existing facilities. 28 C.F.R. § 36.102-36.104. However, if the public accommodation can demonstrate that a modification would fundamentally alter the nature of the goods, services, or facilities it provides, it is not required to make the modification. 28 C.F.R. § 36.102-36.104. Public accommodations are also required to remove barriers if it is "readily achievable" to do so. 28 C.F.R. § 36.102-36.104. This means that it must be easily accomplishable and able to be done without much difficulty or expense. 28 C.F.R. § 36.102-36.104. This obligation to remove barriers is continuing, so over time, barrier removal that initially was not readily achievable may later be required because of changed circumstances. 28 C.F.R. § 36.102-36.104.

[382] This subchapter does not apply to state and local government entities, which are covered by Subchapter II.

To be a public accommodation with Subchapter III obligations, the entity must be private and it must own, lease, lease to, or operate a place of public accommodation. 28 C.F.R. § 36.102-36.104. In addition, a place of public accommodation is a facility whose operations affect commerce and fall within at least one of the following twelve categories:

> (1) Places of lodging (*e.g.*, inns, hotels, motels) (except for owner-occupied establishments renting fewer than six rooms);
> (2) Establishments serving food or drink (*e.g.*, restaurants and bars);
> (3) Places of exhibition or entertainment (*e.g.*, motion picture houses, theaters, concert halls, stadiums);
> (4) Places of public gathering (*e.g.*, auditoriums, convention centers, lecture halls);
> (5) Sales or rental establishments (*e.g.*, bakeries, grocery stores, hardware stores, shopping centers);
> (6) Service establishments (*e.g.*, laundromats, dry-cleaners, banks, barber shops, beauty shops, travel services, shoe repair services, funeral parlors, gas stations, offices of accountants or lawyers, pharmacies, insurance offices, professional offices of health care providers, hospitals);
> (7) Public transportation terminals, depots, or stations (not including facilities relating to air transportation);
> (8) Places of public display or collection (*e.g.*, museums, libraries, galleries);
> (9) Places of recreation (*e.g.*, parks, zoos, amusement parks);
> (10) Places of education (*e.g.*, nursery schools, elementary, secondary, undergraduate, or post-graduate private schools);
> (11) Social service center establishments (*e.g.*, day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies); and
> (12) Places of exercise or recreation (*e.g.*, gymnasiums, health spas, bowling alleys, golf courses).

42 U.S.C. § 12181 (West 1995); Hummel Architects, P.A. Accessibility Guidelines and Technical Assistance Manual.

Both the ADA and FHA can cover public accommodations, and the analysis for determining whether a facility is covered by the ADA is separate from the analysis for determining whether the FHA covers it. For example, a facility could be

a residential dwelling under the FHA but still be covered by one of the twelve categories of places of public accommodation. Hummel Architects, P.A. Accessibility Guidelines and Technical Assistance Manual.

(b) Commercial facilities

Subchapter III requirements for new construction and alterations cover commercial facilities, which are defined as nonresidential facilities, such as office buildings, factories, and warehouses, whose operations affect commerce. 28 C.F.R. § 36.102-36.104. This covers many potential places of employment not covered as places of public accommodation. 28 C.F.R. § 36.102-36.104. For example, a building may contain both commercial facilities and places of public accommodation. Hummel Architects, P.A. Accessibility Guidelines and Technical Assistance Manual. Commercial facilities do not include facilities covered by the FHA, so residential dwelling units, for example, are not commercial facilities. 28 C.F.R. § 36.102-36.104. In addition, facilities expressly exempt from the FHA are not commercial facilities. 28 C.F.R. § 36.102-36.104. For example, owner-occupied rooming houses with living quarters for four or fewer families are not commercial facilities. Hummel Architects, P.A. Accessibility Guidelines and Technical Assistance Manual.

(3) New construction

Newly constructed places of public accommodation and commercial facilities must be readily accessible to and usable by disabled individuals to the extent it is not structurally impracticable. This requirement, as well as the requirement for accessible alterations, is the only requirement applicable to commercial facilities. 28 C.F.R. § 36.401; 36.406. Readily accessible means that the facility must be built in compliance with the ADAAG and there is no cost defense to these requirements. 28 C.F.R. § 36.401; 36.406.

New construction requirements apply to facilities first occupied after January 26, 1993, "for which the last application for a building permit or permit extension is certified as complete after January 26, 1992." 28 C.F.R. § 36.401; 36.406.

(4) Alterations

An alteration to a place of public accommodation or commercial facility begun after January 26, 1992 must be readily accessible to and usable by disabled individuals in accordance with ADAAG to the extent feasible. 28 C.F.R. § 3.402-36.406.[383] An alteration includes changes that affect usability, such as remodeling, renovation, etc. Hummel Architects, P.A. Accessibility Guidelines and Technical Assistance Manual.

[383] The fact that alterations may increase costs does not mean compliance is not feasible.

(5) Enforcement

The ADA establishes two ways the requirements of Subchapter III may be enforced: (1) private suits by individuals who are discriminated against or have reasonable grounds for believing they are about to be discriminated against; (2) suits by the Attorney General, whenever it has reasonable cause to believe a pattern or practice of discrimination exists. 42 U.S.C. § 12181 (West 1995).

C. The Interstate Land Sales Full Disclosure Act

(1) Potential liability

Developers should be aware of potential liability under the Interstate Land Sales Full Disclosure Act (Act), 15 U.S.C. § 1701 *et seq.* (West 1998), which was enacted to prohibit and punish fraud in land development enterprises. *McCown v. Heidler*, 527 F.2d 204 (Okla. 1975). It insures that a buyer, prior to purchasing certain kinds of real estate, is informed of facts that will enable him to make an informed decision about purchasing the property. *Law v. Royal Palm Beach Colony, Inc.*, 578 F.2d 98 (Fla. 1978). To fulfill this goal, the Act establishes rigorous disclosure provisions and requirements. *Konopisos v. Phillips*, 226 S.E.2d 522 (N.C. Ct. App. 1976). It prevents abuse by real estate developers through interstate commerce and the use of mail in the promotion and sale of properties offered as part of a common promotional plan. *Nargiz v. Henlopen Developers*, 380 A.2d 1361 (Del. Super. Ct. 1977).

The Act applies when, through interstate commerce, subdivided property is offered for sale or lease. Kennedy, E. Richard, *Litigation Involving the Developer, Homeowners' Associations, and Lenders*, 39 Real Prop. Prob. & Tr. J. 1 (2004). "Subdivision" is defined as "any land which is located in any State or in a foreign country and is divided or is proposed to be divided into lots, whether contiguous or not, for the purpose of sale or lease as part of a common promotional plan." 15 U.S.C. § 1701 (1998). The Act applies to unimproved lots, and generally imposes three duties upon a developer selling property through interstate commerce: (1) the developer is required to register the property with the Department of Housing and Urban Development, Kennedy, *supra* note 61; (2) the developer cannot distribute information to prospective purchasers that is inconsistent with the registered materials, Kennedy, 39 Real Prop. Prob. & Tr. J. 1 (2004) (citing 15 U.S.C. § 1703(a)(2)); and (3) the developer may not use any device, scheme, or artifice to defraud or make a false statement of a material fact regarding the sale or lease of the property. Kennedy, 39 Real Prop. Prob. & Tr. J. 1 (2004) (citing 15 U.S.C. § 1703(a)(1)(D)).

(2) Enforcement

An individual may pursue a private cause of action against a developer if a property sale or lease violates provisions of the Act. Kennedy, 39 Real Prop. Prob. &

Tr. J. 1 (2004). In addition, it is unnecessary for an individual to establish the developer's intent to violate the act, but must only establish a material omission or misrepresentation, however innocent or unintentional. Kennedy, 39 Real Prop. Prob. & Tr. J. 1 (2004).

42. BASICS OF URBAN RENEWAL LAW FOR DEVELOPERS

The Idaho Urban Renewal Law of 1965, Idaho Code §50-2001 (Michie 2000), grants cities and counties the authority to create urban renewal agencies to improve "deteriorated and deteriorating areas. . . which constitute a serious and growing menace, [and are] injurious to the public health, safety, morals and welfare of the residents of the state." Idaho Code §50-2002. Under this law, a municipality may create a program for utilizing private and public resources to eliminate and prevent slums and urban blight, "to encourage needed urban rehabilitation, or to undertake such aforesaid activities or other feasible municipal activities as may be suitably employed to achieve the objectives of such. . . program." Idaho Code §50-2004.

A. Urban renewal agencies

Urban renewal agencies execute urban renewal projects, which by definition includes activities relating to the improvement of structures and acquisition of property. Idaho Code § 50-2018(j). This seems to indicate that the purpose of urban renewal agencies is to improve buildings and structural issues affecting the health, safety, morals and welfare of residents of the municipality. Idaho Code § 50-2018(j).

B. Creation and operation of urban renewal agencies in Idaho

To create an urban renewal agency, a municipality (an incorporated city or town or county in Idaho) must adopt a resolution finding that a deteriorated[384] or deteriorating[385] area exists in the municipality, the rehabilitation, conservation, or redevelopment of the area is necessary for public health, safety, morals or welfare of

[384] "Deteriorated area" is defined as "an area in which there is a predominance of buildings or improvements, whether residential or nonresidential, which by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, or crime, and is detrimental to the public health, safety, morals or welfare." Idaho Code § 50-2018(h).

[385] "Deteriorating area" is defined as "an area which by reason of the presence of a substantial number of deteriorated or deteriorating structures, predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility or usefulness, insanitary or unsafe conditions, deterioration of site or other improvements, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions of title, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs or arrests the sound growth of a municipality, retards the provision of housing accommodations or constitutes an economic or social liability and is a menace to the public health, safety, morals or welfare in its present condition and use; provided, that if such deteriorating area consists of open land the conditions contained in the proviso in section 50-2008(d), Idaho Code, shall apply; and provided further, that any disaster area referred to in section 50-2008(g), Idaho Code, shall constitute a deteriorating area." Idaho Code § 50-2018(i).

the residents of the municipality, and an urban renewal agency is needed in the municipality. Idaho Code § 50-2005.

If the local governing body has made the findings required under section 50-2005, an urban renewal agency is created for the municipality and has the powers necessary to execute urban renewal projects. Idaho Code §§ 50-2006, 50-2007. An urban renewal agency itself or any person or agency may create an urban renewal plan, which the local governing body submits to the planning commission of the municipality for review. Idaho Code § 50-2008. The planning commission then submits its written recommendations to the local governing body, and a public hearing is held on the proposed urban renewal project. Idaho Code § 50-2008. After the public hearing, the local governing body may approve the project if it finds that (1) a feasible method is available for the location of families who will be displaced from the area, (2) the urban renewal plan conforms to the general plan of the municipality, (3) the urban renewal plan gives adequate consideration to the provision of adequate park and recreational areas and facilities that are desirable for neighborhood improvement, and (4) the urban renewal plan will provide maximum opportunity for the rehabilitation or redevelopment of the urban renewal area by private enterprise. Idaho Code § 50-2008.

Urban renewal agencies may prepare a renewal plan for urban renewal areas for a period of time up to ten years. Idaho Code § 50-2009. An agency may also acquire interests in real property by negotiation or condemnation if the property is needed for an urban renewal project. Idaho Code § 50-2010. In addition, urban renewal agencies may "sell, lease, or otherwise transfer real property or any interest therein acquired by it for an urban renewal project, and may enter into contracts with respect thereto." Idaho Code § 50-2011. To finance an urban renewal project, urban renewal agencies have the power to issue bonds, "including. . . the payment of principal and interest upon any advances for surveys and plans or preliminary loans, and. . . to issue refunding bonds for the payment or retirement of such bonds previously issued by it." Idaho Code § 50-2012.

C. Capital City Development Corporation[386]

An example of a redevelopment agency in Idaho is the Capital City Development Corporation (CCDC), which focuses on improving various urban areas in Boise, both independently and collaboratively with public agencies and private entities. More specifically, CCDC prepares and implements master plans adopted by the Boise City Council within certain urban districts. The redevelopment activities in the urban renewal districts include both private and public projects, and the public projects are primarily funded by tax increment financing, which utilizes the taxes

[386] Information obtained from http://ccdcboise.com.

generated by increasing property values in an urban renewal district to pay for the public improvements.

43. COMMON LAW DEDICATION AND IMPLIED EASEMENTS

Real estate developments invariably include many restrictions on property rights: deeds; conditions, covenants, and restrictions; easements; plats; entitlement conditions; and so on. Many of these restrictions are voluntary; others are required as conditions of government development approvals.

In addition to formal, statutory dedications, these restrictions may come in the form (1) implied easements and (2) common law dedication.

Implied easements are created by written or spoken representations made by the property owner. Most developers expect that easements can be created only by the express recordation of an easement document in the public record. However, there are circumstances where easements can be implied from a property owner's words or conduct without any document ever being made of record. This form of implied easement is potentially a significant trap for the unwary.

In the section above regarding subdivisions, we discussed the process of statutory dedication whereby roads, parks, open space, and so on may be dedicated to the public in a subdivision plat. Courts have traditionally invoked the doctrine of common law dedication for plats created pre-statute and to address technically deficient plats (*e.g.*, a signature is missing or the plat is not recorded). However, common law dedication may sometimes extend beyond this purpose based on the facts of the case.

These important topics are addressed in the *Idaho Road Law Handbook*. Although they often apply to roads, they apply in many other contexts as well.

44. STATE ENDOWMENT LANDS (E.G., SCHOOL LANDS)

A. History and special status

Note: See *Idaho Road Law Handbook* for additional background information on endowment lands, particularly with respect to the date of "reservation" for R.S. 2477 road purposes.

Idaho's endowment lands can be traced to 1863 when the U.S. Congress created the Territory of Idaho and designated sections numbered 16 and 36 in each township for school purposes.[387] This constituted 1/18 of the State's total land base.

The grant of these so-called "school lands" (sections 16 and 36) was confirmed and became effective when the State was admitted to the Union on July 3, 1890.[388] In

[387] "Sec. 14. And be it further enacted, That when the lands in the territory shall be surveyed, under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby reserved for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same." Organic Act of the Territory of Idaho, 12 Stat. 808, 814, § 14 (Mar. 3, 1863) (emphasis added).

Another pre-statehood act granted 72 sections of land to each of five territories, including Idaho. 21 Stat. 326 (Feb. 18, 1881) (see *State v. Peterson*, 61 Idaho 50, 97 P.2d 603, 604 n.3 (1939) (Givens, J.)).

[388] The Idaho Admissions Act (aka Idaho Admissions Bill) provides:

> Sec. 4. That sections numbered sixteen and thirty-six in every township of said State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior.
>
> Sec. 5. That all lands herein granted for educational purposes shall be disposed of only at public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislature shall prescribe, be leased for periods of not more than five years, and such lands shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

Idaho Admission Act, ch. 656, 26 Stat. 215, 215-16 §§ 4 & 5 (July 3, 1890), amended by 56 Stat. 48 (1942). Section 5 has been further amended to authorize exchanges. The provision allowing exchanges (initially section 5(b), now section 5(c)) was not added until 1974, nearly a century after the enactment of the Idaho Admissions Act. Pub. L. No. 93-562, 88 Stat. 1821 (Dec. 30, 1974). It was further amended in 1998, Pub. L. No. 105-296, 112 Stat. 2822 (Oct. 27, 1998).

addition to setting aside sections 16 and 36 as school lands, section 11 of the Idaho Admissions Act granted hundreds of thousands of additional acres to Idaho as additional endowment lands to be held in trust for specific beneficiaries including the University of Idaho, the "insane asylum" in Blackfoot, the state penitentiary, and various others. Idaho Admission Act, ch. 656, 26 Stat. 215, 217, § 11 (July 3, 1890). See, e.g., Idaho Code § 66-1101 (Mental Hospital Permanent Endowment Fund). Altogether, at Statehood, Idaho acquired 3,650,763 acres of federal land (known as endowment land) to be held in trust by the State for the sole purpose of funding specified beneficiaries (primarily schools and hospitals). After selling off over a million acres of endowment lands, there are now nearly 2.5 million acres of endowment lands still held by the State.

Section 4 of the Idaho Admissions Act also authorized the State to select "lieu land" in lieu of land that had already been sold or otherwise disposed of prior to Admission (for example, by prior patent or reservation). The State's right to select lieu lands was further codified in Revised Statutes §§ 2275 and 2276 (Feb. 28, 1891) (codified at 43 U.S.C. §§ 851 and 852). Idaho's implementing legislation for lieu lands (dating to 1911) is codified at Idaho Code §§ 58-201 to 58-206.

Section 5 of the Idaho Admissions Act was amended in 1974—nearly a century after its adoption—to allow land to be added to Idaho's endowment land by land exchange. See footnote 388 on page 414.

The Idaho Admission Act, when first enacted, provided that endowment lands "shall be disposed of only at public sale." Idaho Admission Act, ch. 656, 26 Stat. 215, 216, § 5 (July 3, 1890). It was later amended to add an exception for land exchanges: "Except as provided in subsection (c) [allowing exchanges], all land granted under this Act for educational purposes shall be sold only at public sale."[389]

Idaho's Constitution repeated and broadened the restriction that lands may be sold only at auction, while adding other mandates respecting the management of endowment lands. Idaho Const. art. IX, § 8.[390] Notably, these provisions are <u>not</u>

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[389] The exception allowing exchanges (initially section 5(b), now section 5(c)) was added in 1974, nearly a century after the enactment of the Idaho Admissions Act. Pub. L. No. 93-562, 88 Stat. 1821 (Dec. 30, 1974). It was further amended in 1998, Pub. L. No. 105-296, 112 Stat. 2822 (Oct. 27, 1998).

[390] Our Supreme Court has noted this interplay between the Idaho Admission Act and our Constitution.

> We note that the subject mining claims are located on school endowment lands. Both the Idaho Admission Act and the Idaho Constitution provide that school endowment lands, such as the subject property in this case, may be disposed of only "at public sale." Idaho Const. art. IX, § 8; Idaho Admission Act § 5; 26 Stat. 215, 216.

limited to lands granted for education purposes. They apply to "all the lands heretofore, or which may hereafter be granted to or acquired by the state by or from the general government."[391] *Id*.

The Land Board and its lawyers provided this useful summary of this framework.

> As it was deliberating the Idaho Admissions Act in 1889, the United States Congress displayed uncommon wisdom by granting what would become the Union's 43rd member approximately 3,600,000 acres of land for the sole purpose of funding specified beneficiaries.
>
> The Idaho Constitution was crafted to include Article IX, Section 8, which mandates that the lands will be managed "…in such manner as will secure the maximum long-term financial return to the institution to which [it is] granted."

Idaho Department of Lands, Brief History of Idaho's Endowment Trust Lands (www.idl.idaho.gov/land-board/lb/documents-long-term/history-endowment-lands.pdf).

Two constitutional provisions are pertinent. First is the provision that endowment lands shall be "held in trust, subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made." Idaho Const. art. IX, § 8. The second is that the Land Board "shall provide for the location, protection, sale or rental of all the lands . . . in such manner as will secure the maximum long-term financial return to the institution [for whose benefit the land was] granted."[392] *Id*.

Silver Eagle Mining Co. v. State, 153 Idaho 176, 182 n.5, 280 P.3d 579, 685, n.5 (2012) (Horton, J.).

[391] Idaho was admitted to the Union on July 3, 1890. Idaho's Constitution predates admission and was approved upon admission. Idaho's Constitutional Convention was held in Boise City, in the Territory of Idaho between July 4, 1889 and August 6, 1889. Idaho's Constitution was adopted by the Framers on the final day of the Constitutional Convention, August 6, 1889. It was ratified by the people of Idaho in November 4, 1889, and it was approved by Congress on July 3, 1890 in the Idaho Admission Act, ch. 656, 26 Stat. 215, 216, § 1 (July 3, 1890) (which had the effect of admitting Idaho to the Union). Idaho was not the subject of a federal enabling act, as other statehood-seeking territories usually were before holding a constitutional convention.

[392] The words in brackets are substituted for the words "to which." This conforms to the generally understood meaning of this oddly phrasing provision.

B. Endowment lands are exempt from LLUPA control

Under LLUPA, local land use ordinances apply to the State of Idaho. The Idaho Transportation Board is required to consult with local land use agencies on site plans and design of transportation systems. But certain activities, including mining leases, on state endowment lands are exempt by statute. *State ex rel. Kempthorne v. Blaine Cnty.*, 139 Idaho 348, 79 P.3d 707 (2003); OAG 91-3. It is an open question whether other income-generating activities on state endowment lands are exempt based on the state's constitutional obligation to maximize income on those lands. Idaho Const. art. IX, § 8. The Attorney General offers that local agencies are urged to work closely with state agencies on land use matters. OAG 92-5. Idaho Code § 67-6528.

45. WATER RIGHTS AND LAND USE PLANNING

The following topics are covered more extensively in the *Water Law Handbook*, available from Givens Pursley.

A. H.B. 281 – mandating non-potable water irrigation systems

In 2005, the Idaho Legislature enacted House Bill 281, a law requiring planning and zoning commissions to require developers to fully utilize available surface water before making any use of ground water.[393] In other words, land developers are required to employ separate, non-potable water lawn irrigation systems using available surface water. The bill is not directed to the Idaho Department of Water Resources ("IDWR"). Instead, it amended the Local Land Use Planning Act, Idaho Code §§ 67-6501 to 67-6538, to require that a land use applicant use surface water as the primary source of supply if it is "reasonably available."

B. S.B. 1353 – exclusive authority of IDWR

In 2006, the Idaho Legislature enacted S.B. 1353. 2006 Idaho Sess. Laws, ch. 256 (codified at Idaho Code § 42-201(4)). The bill delegates to IDWR "exclusive authority over the appropriation of the public surface and ground waters of the state" and prohibits any other agency from taking any "action to prohibit, restrict or regulate the appropriation" of water.

[393] 2005 Idaho Sess. Laws, ch. 338 (codified at Idaho Code § 67-6537(1) and (2)). See discussion in *Water Law Handbook*.

46. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

A myriad of state and federal laws regulate environmental conditions and activities on private lands. Whether certain property is subject to any of these laws depends on a wide variety of factors, including: (1) the presence of wetlands, endangered species, hazardous substances, or petroleum; (2) the impact of construction activities on wetlands, endangered species, air quality, or water quality; and (3) the actual use of the property once developed and whether that use will emit pollutants affecting air or water quality or will involve hazardous materials. This section provides an overview of state and federal environmental laws that may affect private land use and suggests practices for limiting liability under such laws.

A. Clean Water Act: regulation of property with streams, wetlands, irrigation ditches, and storm water discharges

The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 - 1387, enacted in 1972, prohibits the discharge of a pollutant from a point source into navigable waters without a permit issued under Section 402 of the CWA (National Pollutant Discharge Elimination System, or NPDES, permit) or under Section 404 of the CWA (for discharge of dredged or fill material). 33 U.S.C. §§ 1311(a), 1362(12). In 1987, Congress enacted Section 402(p) of the CWA, establishing a program to regulate municipal, industrial, and construction storm water discharges. 33 U.S.C. § 1342(p).

(1) Discharges of dredged or fill material into streams, wetlands, and irrigation ditches

Any person intending to discharge dredged or fill material into navigable waters must first obtain a permit from the United States Army Corps of Engineers ("Corps") under Section 404 of the CWA, 33 U.S.C. § 1344. The Corps broadly defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). Precisely what constitutes "waters of the United States" is a hotly contested issue, as indicated in the discussion *infra* regarding the *SWANCC* decision and its progeny.

Under Section 404, the Corps may issue two kinds of permits authorizing discharge activities: individual and general. 33 U.S.C. § 1344(a), (e). Individual permits are issued on a case-by-case basis and apply to specific proposals to discharge material into navigable waters. 33 U.S.C. § 1344(a). General permits are issued on a state, regional, or nationwide basis for categories of activities the Corps determines "are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e)(1).

(a) When is a Section 404 permit required?

The CWA expressly exempts the following activities from the mandate of Section 404, unless the express purpose of those activities is to affect wetlands:

> (A) … normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
> (B) … maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;
> (C) … construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;
> (D) … construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;
> (E) … construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized….

33 U.S.C. § 1344(f).

Additionally, land-clearing and excavation activities that cause a de minimis redeposit of dredged material (or "incidental fallback") into navigable waters do not constitute a "discharge of dredged or fill material" and thus do not require a Section 404 permit. The 1998 decision in *Nat'l Mining Congress v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), answered a decade-long debate over the validity of regulations, collectively known as the "Tulloch Rule," in which the Corps asserted Section 404 jurisdiction over activities that caused incidental fallback. The D.C. Circuit invalidated the Tulloch Rule on the basis that the CWA regulates only the discharge of pollutants that are added, not withdrawn, from navigable waters. The conflict has been revived by a new regulation, referred to as Tulloch II, which "regards" the use of mechanized earth-moving equipment as resulting in a discharge

of dredged or fill material unless "project specific evidence shows that the activity results in only incidental fallback." The National Association of Home Builders and National Stone Sand and Gravel Association challenged the new regulation, arguing it improperly regulates activities that are not "discharges" under the CWA because they do not result in an "addition" of dredged material to waters of the United States. *Nat'l Ass'n of Homebuilders v. U.S. Army Corps of Engineers,* 311 F. Supp. 2d 91 (D.D.C. 2004). The court dismissed the challenge as not ripe, and the case in now on appeal to the D.C. Circuit.

The big question in determining whether a Section 404 permit is required is whether or not the water body one is discharging into constitutes "navigable waters" (i.e. "waters of the United States"). Initially, the Corps construed the CWA to cover only waters that were navigable in fact. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). However, Corps regulations and a series of court decisions eventually expanded the term to include waters that are tributary or adjacent to navigable waters and, then, to any waters having some nexus with interstate commerce—even intrastate isolated wetlands so long as they were used by migratory birds. *See e.g., United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (Corps has Section 404 jurisdiction over wetlands that are adjacent to a navigable waterway); 51 Fed. Reg. 41217 (1986) (announcing Corps regulation dubbed the "Migratory Bird Rule").

After decades of progressive expansion of the Corps' jurisdiction, a 2001 decision by the United States Supreme Court invalidated the migratory bird justification for jurisdiction and called into question the Corps' jurisdiction over all isolated wetlands. In *Solid Waste Agency of Northern Cook Cnty. v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), the Court considered whether the Corps had jurisdiction over an abandoned sand and gravel pit that was isolated from other navigable waters but that provided habitat for migratory birds. The Supreme Court ruled that the use of a water body by migratory birds does not in and of itself constitute a basis for Corps Section 404 jurisdiction over that water body. In reaching this holding, the Court questioned but did not absolutely resolve whether regulatory authority under the CWA generally extends to isolated wetlands or other waters that are not adjacent to navigable waters.

Courts interpreting *SWANCC* have been split as to the decision's effect. A minority of courts have held that *SWANCC* limits jurisdiction under the CWA to waters that are actually navigable or immediately adjacent to open bodies of navigable water. *See, e.g., In re Needham*, 354 F.3d 340 (5th Cir. 2003) (holding that a hydrological connection between tributaries and navigable waters is not itself sufficient to bestow Corps jurisdiction over tributaries that are not themselves navigable or truly adjacent to navigable waters); *FD & P Enters., Inc. v. United States Army Corps of Engineers*, 239 F. Supp. 2d 509, 516 (D.N.J. 2003) (finding that *SWANCC* barred the argument that hydrological connection alone can form the

basis for Corps jurisdiction); *United States v. RGM Corp.*, 222 F. Supp. 2d 780, 785-86 (E.D. Va. 2002) (similar).

Other courts, including the Ninth Circuit, have held that *SWANCC* applies only to truly isolated waters and does not otherwise alter the jurisdiction of the CWA. In others words, these courts generally held that Corps jurisdiction extends to any waters that have a surface hydrological connection to waters that are actually navigable. *See, e.g., Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (finding irrigation canals to be tributaries subject to Corps jurisdiction and not isolated waters as in *SWANCC*) (discussed in more detail below); *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003) (asserting Corps jurisdiction over wetlands that "are adjacent to, and drain into, a roadside ditch whose waters eventually flow into the navigable Wicomico River and Chesapeake Bay"); *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003) (finding that a sufficient nexus existed between particular wetlands and navigable-in-fact waters for the Corps to have jurisdiction, where water flowed intermittently from the wetlands through a series of natural and manmade waterways, crossing under an interstate highway, and eventually finding its way 2.4 miles later to traditional navigable waters); *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003) (asserting Corps jurisdiction over wetlands that flow into a man-made drain, which in turn flows into a creek, which in turn flows into a navigable river); *United States v. Buday*, 138 F. Supp. 2d 1282, 1292 (D. Mont. 2001) (finding Corps had jurisdiction to prosecute landowner for discharging pollutants during unauthorized excavation adjacent to a tributary, even though the tributary itself and wetlands surrounding it were not navigable in fact and did not connect with a navigable waterway for at least 235 miles).

Recently, the United States Supreme Court has denied three petitions for certiorari addressing this issue of whether Corps jurisdiction covers only navigable and immediately adjacent waters or any waters that have some surface level hydrological connection to navigable waters. *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), cert. denied, 124 S. Ct. 1874 (2004); *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003), cert. denied, 124 S. Ct. 1874 (2004); *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003), *cert. denied*, 124 S. Ct. 1875 (2004).

Of particular importance for Idaho land use activities is the 2001 decision in *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001). In deciding whether an NPDES permit was required to discharge a toxic herbicide into an irrigation canal, the Ninth Circuit held that irrigation canals were "tributaries" to waters of the United States and subject to CWA jurisdiction where the canals

exchanged water with a natural stream or lake.[394] The court expressly distinguished *SWANCC*:

> The irrigation canals in this case are not "isolated waters" such as those that the [*SWANCC*] Court concluded were outside the jurisdiction of the Clean Water Act. Because the canals receive water from natural streams and lakes, and divert water to streams and creeks, they are connected as tributaries to other "waters of the United States."

Headwaters, 243 F.3d at 533. The Ninth Circuit further held that the connection between the canal and a natural stream need not be continuous but could be intermittent (*e.g.*, flowing only during the irrigation season). *Headwaters*, 243 F.3d at 534. Thus, where an aquatic herbicide was applied to irrigation canals and evidence showed that the herbicide reached a natural stream, the canal also was deemed a water of the United States and an NPDES permit was required to apply the herbicide to the canal.

A threatened lawsuit and resulting settlement forced the Corps to incorporate the *Talent* decision into its *permitting* regulations.[395] The April 6, 2004 Settlement Agreement resolves a threatened lawsuit by the National Wildlife Federation (and other environmental groups) ("NWF") against Costco Wholesale Corporation (and related business entities) ("Costco") and the Corps. NWF claimed the Corps violated the CWA when they allowed Costco to fill 7.4 acres of wetlands that were directly adjacent to an agricultural drain ditch that flowed into a tributary of the Columbia River. The Corps had determined the wetlands were "isolated wetlands" and, therefore, were not deemed to be "waters of the United States" or subject to the Corps' Section 404 jurisdiction. As a result of the settlement, the Corps agreed, among other things, to post on its website a statement to the effect that "irrigation canals that receive water from natural streams and lakes, and divert water to streams and creeks, are connected as 'tributaries' to those other waters. . . . As tributaries, the canals are 'waters of the United States,' and are subject to the CWA and its permit requirements." Additionally, the Corps is in the process of developing a regional "general" permit to cover work within irrigation and drainage districts.

Discrepancies as to which wetlands and are waters are subject to the Corps' Section 404 jurisdiction are apparent not just among judicial districts, but also among

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[394] An NPDES permit, or National Pollutant Discharge Elimination System permit is required under Section 401 of the CWA for the discharge of a pollutant into "navigable water." 33 U.S.C. § 1311(a). Although the *Talent* Court interpreted the term "navigable water" in the context of Section 401 of the CWA, such interpretation presumably applies in the Section 404 context because the term usage and meaning is the same.

[395] The CWA has a citizen suit provision at 33 U.S.C. § 1365.

Corps and EPA district offices. In March 2004, the United States General Accounting Office released a report entitled *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, which found the criteria used to determine jurisdiction under the CWA are unevenly interpreted and applied. The report urged the Corps and EPA to survey their 38 district offices, determine the extent of the problem, and develop a plan to coordinate the varied jurisdictional determinations.

The *SWANCC* decision and its progeny of case law and administrative actions are significant for landowners and users. If Corps jurisdiction no longer applies to a wetlands-fill project, numerous other environmental laws that apply only where there is a federal action—including the Endangered Species Act, National Environmental Policy Act, National Historic Preservation Act, and state water quality certification—no longer come into play. However, in light of the *Talent* decision and the expected outfall from the NWF settlement (i.e., a new regional permit), Idaho land users likely can expect a more limited interpretation of *SWANNC* and thus broader Corps jurisdiction. Specifically, Section 404 permits may be required for discharging into (1) arguably isolated wetlands, even if their only connection to navigability is that they are adjacent to a man-made irrigation ditch, and (2) the irrigation ditch itself. Before proceeding with any fill activities, a developer should obtain the opinion of a competent consulting engineer that a wetland, irrigation ditch, or drain does not have a hydrologic connection to a natural stream or lake. If it does, the developer will need to obtain from the Corps either a non-jurisdictional determination or a Section 404 permit.

(b) How to obtain a Section 404 permit

(i) General permits

General permits are issued when the Corps adopts them after publishing them in the federal register and taking public comment. 33 U.S.C. § 1344(a), (e). Once adopted, the general permit authorizes the specified category of activity without the need for a proponent to secure an individual permit. The Corps has implemented its general permit authority by adopting a regulatory program, codified in 33 C.F.R. Part 330, which governs the issuance and applicability of general permits for certain categories of discharge activities on a nationwide basis. In accordance with these regulations, the Corps has issued several nationwide permits and several general conditions applicable to all nationwide permits.

While the nationwide permit program is designed to "regulate with little, if any, delay or paperwork certain activities having minimal impacts," 33 C.F.R. § 330.1(b), some proponents seeking coverage under a nationwide permit must notify the Corps of the proposed project through a pre-construction notice ("PCN") that describes the project and carefully delineates each of the proposed fills. 33 C.F.R. §

330.1(e). Most often, it is the size of the proposed fill that triggers the requirement for a PCN.

The purpose of this case-by-case inter-agency review of PCNs is to determine whether the fills indeed will cause no more than "minimal adverse environmental effects" as mandated by the CWA. 33 U.S.C. § 1344(e)(1), 33 C.F.R. § 330.1(e)(2). In the PCN review process, as in the individual permit process, the Corps must verify that the state in which the fill is proposed believes the project will not violate state water quality standards, 33 C.F.R. § 330.4(c), and the Corps must ensure the proposed fills will not jeopardize the continued existence of any listed species under the Endangered Species Act, 33 C.F.R. § 330.4(f). As a result of the PCN review, the Corps may require project amendments or add conditions, including, among other things, the implementation of a mitigation plan, to ensure compliance with a nationwide permit or to minimize adverse effects. 33 C.F.R. § 330.1(e)(2), (3).

In March 2000, the Corps announced a revised nationwide permit program eliminating Nationwide Permit 26 and making other changes. 65 Fed. Reg. 12,818-99. Nationwide Permit 26—the most widely used and controversial nationwide permit—allowed any activity to occur as long as the wetlands impacted were less than a certain acreage and occurred in isolated areas. The Corps proposed five new nationwide permits and modified six existing nationwide permits to replace Nationwide Permit 26. The new and modified nationwide permits generally limit allowed impacts to one-half acre, provide additional instances where an applicant must notify the Corps prior to undertaking an activity, and require mitigation in more instances than previously. In 2002, the Corps renewed these nationwide permits, which remain valid until March 2007. 67 Fed. Reg. 2020-01 (2002). The Headquarters Regulatory Staff will begin revising the existing permits during the winter of 2004-2005.

(ii) Individual permits

If you do not qualify for a general permit, then you need an individual permit. An applicant for an individual Section 404 permit must meet the following criteria: (1) no practical alternative is available; (2) no significant adverse impacts will occur; (3) all reasonable mitigation measures will be used; and (4) other statutory requirements are met. 40 C.F.R. § 230.10(a)-(d). To assess whether the applicant satisfies these criteria, the agency considers: (1) the characteristics of the receiving waters; (2) the source and composition of the material discharged; and (3) the characteristics of the discharge activity. 33 C.F.R. §§ 230.6(a), 230.11.

Additionally, the Corps considers the effect of proposed activities on the broad public interest. 33 C.F.R. § 320.4(a). This means that the Corps may prohibit the filling of wetlands, or any other activity requiring a Section 404 permit, if it determines the project's site-specific and cumulative impacts are not in the public

interest. Courts tend to defer to the Corps' public interest determinations, making it difficult to challenge Corps decisions.

Finally, the Corps is obligated to consider whether the application satisfies a handful of other laws, including the Endangered Species Act's prohibition against jeopardizing listed species, the appropriate state's water quality certification standards, and the National Historic Preservation Act's protection of historically-significant artifacts. 33 C.F.R. § 320.4.

(2) Storm water discharges

The federal EPA and state IDEQ regulate discharges of storm water[396] under Section 402(p) of the CWA and applicable regulations. 33 U.S.C. § 1342(p); 40 C.F.R. §§ 122.26 through 122.28. The primary impact of these requirements on property development is on construction activities, but there might also be requirements imposed on the final development. Municipalities and industrial sites also are subject to storm water permit requirements.

For all construction activities (i.e. "clearing, grading, and excavating," 40 CFR § 122.26(b)(15)(i)) that disturb greater than one acre, a developer must comply with the construction general storm water permit proposed by EPA and certified by IDEQ. Construction activities disturbing less than one acre but that are part of a "larger common plan of development or sale" also are subject to the construction general permit requirements.

To obtain coverage under the construction general permit, an applicant must: (1) develop and implement a storm water pollution prevention plan ("SWPPP"), (2) submit a notice of intent to EPA before commencing construction, and (3) comply with the terms of the general permit. The general permit contains extensive guidance about the contents of the SWPPP, which normally is prepared by the project engineer or contractor. Essentially, the SWPPP guidance requires that the operator of a construction site use best management and engineering practices to contain storm water runoff and prevent erosion at the construction site. Examples of best management practices, or BMPs, include silt fences, hay bales, gravel bags, and track pads. Once construction has commenced, implementation of the SWPPP requires record-keeping, ongoing inspections, reporting releases, and updating the SWPPP with any modifications. If the operator of a construction site changes during the construction activities, then certain procedures must be followed, including filing a notice of termination and a new notice of intent.

[396] EPA regulations define "storm water" to mean storm water runoff, snow melt runoff, and surface runoff and drainage. 40 CFR § 122.26(b)(13). The term is not defined in the CWA.

Idaho is one of only a handful of states which do not have delegated authority to issue storm water permits. Under Idaho Code § 39-118, however, IDEQ does have authority to review the plans and specifications for certain SWPPPs.

The construction general permit and associated materials are available on EPA's website at http://cfpub1.epa.gov/npdes/stormwater/const.cfm. Any person wishing to be covered by the general permit must file the notice of intent form available on the EPA website at least 48 hours before construction begins. The current version of the construction general permit was issued in 2003 and expires on July 1, 2008. 68 Fed. Reg. 39087 (July 1, 2003).

Regulated storm water discharges that are not eligible for coverage under a general permit must obtain an individual permit from EPA. Developments in areas that could have particularly large impacts on the environment might not be able to use the general permit and instead must apply for an individual permit from EPA.

Storm water requirements also can apply to a completed development. In Boise and some other communities, this might not be an issue, as municipal ordinances might require that all storm water from new developments be retained on site. *See* City of Boise Stormwater Management and Discharge Control Ordinance, Chapter 8-15 of the Boise Municipal Code. These requirements have resulted in certain design requirements for developments, including the inclusion in many developments of storm water swales to allow storm water to percolate back into the ground. However, these systems are beginning to get a closer look from IDEQ because of potential ground water impacts.

If the municipality in which a development is located has a separate storm water system, the permitting requirement would fall on the municipality, although it might impose design or maintenance requirements on the developer as a condition to connecting to the system. As of December 1999, storm water control requirements apply not only to communities with a population greater than 100,000, but also to certain smaller "urbanized areas." 64 Fed. Reg. 68,723.

If a discharger fails to obtain a permit or fails to comply with the terms of a permit, then it could be subject to an administrative, civil, or criminal enforcement action by EPA or pursuant to a citizen suit. 33 U.S.C. §§ 1319, 1365. Monetary penalties are available to EPA if it pursues permit violations. 40 CFR § 19.4. EPA has filed complaints against construction sites for failure to obtain a permit, failure to implement or maintain BMPs, failure to prevent excessive runoff, and failure to adequately train on-site personnel, among other violations. Penalties have ranged from $15,000 for single violations at small sites to $3.1 million for multiple violations at a large site. Recently, EPA has stepped up its efforts to enforce its storm water regulations, primarily against two types of large scale construction operations: (1) commercial development of "big box" stores and their associated developers and (2) large national residential developers.

B. Endangered Species Act: regulation of property with endangered and threatened species

Private property owners and developers need to be aware of applicable laws protecting endangered and threatened species if their development or other land use activities require federal permitting (such as a permit to fill wetlands), are taking place within the designated critical habitat of a listed species, or might harm or kill a listed species.

(1) Overview of the Endangered Species Act

Passed in 1973, the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* ("ESA"), has been described as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). The ESA applies to fish, wildlife, and plants. This includes insects but excludes microbes.

The ESA serves three principal functions: (1) Section 4 of the Act establishes a process for identifying threatened and endangered species, 16 U.S.C. § 1532; (2) Section 7 of the Act requires federal agencies to avoid actions that would jeopardize listed species and directs them to use their authorities to promote species recovery, 16 U.S.C. § 1536; and (3) Section 9 of the Act prohibits all persons from taking (harming) listed species, 16 U.S.C. § 1538. Each of these functions of the Act may impact private property development.

The ESA is administered by two federal agencies. The United States Fish and Wildlife Service ("USFWS"), in the Department of Interior, administers terrestrial (i.e. land) species and inland water species (*e.g.*, bull trout). The National Marine Fisheries Service ("NMFS"), in the Department of Commerce, administers marine and anadromous species (*e.g.*, salmon and steelhead).

The ESA provides for both civil and criminal penalties for violations of the Act. 16 U.S.C. § 1540(a)(1). The federal Administrative Procedure Act, 5 U.S.C. § 706(a)(2) ("APA"), governs judicial review of USFWS and NMFS decisions implementing the ESA. Under the APA, actions may be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(a)(2).

(2) ESA § 4 – listing decisions and designation of critical habitat

Section 4 of the ESA and associated regulations set forth the process and criteria for listing a species as endangered or threatened and for designating a listed species' critical habitat area. Private landowners are affected by listing decisions and critical habitat designations because these decisions form the basis for the Act's

major provisions in Sections 7 and 9, discussed *infra*, which apply to actions that affect listed species or critical habitat.

A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A species is listed as "threatened" if it is likely to become an endangered species in the foreseeable future. 16 U.S.C. § 1532(20). One of the factors that triggers listing a species as endangered or threatened is the present or threatened destruction, modification, or curtailment of the species' habitat or range. 16 U.S.C. § 1533(a)(1)(A).

Anyone who presents adequate evidence of the endangered status of a species may propose additions or deletions to the list of endangered or threatened species.[397] The criteria for listing a species as endangered or threatened must be based solely on biological evidence and the best scientific and/or commercial data available. Economic considerations are expressly excluded from the listing decision. Distinct population segments of a species may be listed even if that species is abundant in other portions of its range.

Once a species is listed, the listing agency designates as "critical habitat" any habitat generally occupied by the species or habitat that is "essential to the conservation of the species" based on the best scientific data available, 16 U.S.C. § 1532(5)(A), *and* based on the economic impact of the designation, 16 U.S.C. § 1533(b)(2). Thus, unlike the listing decision, economic considerations play a role in the agency's decision about which habitat area to designate as critical.

(3) ESA § 7 – consultation on federal actions

A federal agency must consult with USFWS or NMFS before undertaking any action that may jeopardize an endangered or threatened species "or result in the destruction or modification of critical habitat." 16 U.S.C. § 1536(a)(2). This requirement could impact a private landowner any time they engage in a federal permitting action. For example, certain development activities that impact wetlands require a permit from the Army Corps of Engineers pursuant to Section 404 of the Clean Water Act. If the Corps-permitted wetlands activity might jeopardize a listed species or modify its critical habitat, then the Corps must "consult" with either USFWS or NMFS (depending on the type of species impacted) before the wetlands permit may be issued.

The consultation process between an action agency (i.e., the Corps, in the wetlands permitting example) and an administering agency (i.e. USFWS or NMFS) is briefly summarized here. To assess potential impacts of the proposed federal

[397] A current index of terrestrial and inland water species listed by USFWS can be found at http://endangered.fws.gov/wildlife.html#Species. A current index of marine and anadromous species listed by NMFS can be found at www.nmfs.noaa.gov/prot_res/species/ESA_species.html.

action, the action agency prepares a Biological Assessment. 50 C.F.R. § 402.12. If the Biological Assessment reveals evidence of an adverse impact on a listed species, then formal consultation begins, 50 C.F.R. § 402.14, and the administering agency must prepare a Biological Opinion to evaluate whether the proposed action is likely to jeopardize the continued existence of the species. 16 U.S.C. § 1536(b). If the proposed action is likely to jeopardize the species, the administering agency must suggest any "reasonable and prudent alternatives" that will allow the action to proceed without jeopardizing listed species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14. The administering agency must also specify whether the action will cause an "incidental taking" of the species in violation of Section 9 of the ESA, discussed *infra*. An Incidental Take Statement must accompany any finding of incidental taking in the Biological Opinion.

Although the consultation decision is made by a federal agency, the public (including private landowners whose development projects are at stake) may play a role in the process through public comment and, ultimately, through judicial review if someone wants to challenge the final agency decision. Local land use permitting decisions contingent upon compliance with state and federal laws could be delayed by the ESA consultation process. Local land use decision-makers may require proof of such compliance (*e.g.*, a Section 404 permit under the CWA to fill wetlands) before allowing a final plat to be filed for a subdivision or PUD.

(4) ESA § 9 – ban against "taking" any listed species

Section 9 of the ESA prohibits the "take" of endangered species of fish and wildlife. 16 U.S.C. § 1538(a)(1). This ban does not apply to plants, though a separate prohibition makes it unlawful to remove from federal jurisdiction or to maliciously damage endangered plants. 16 U.S.C. § 1538(a)(2). Although Section 9 only bans the taking of endangered species, listing decisions under Section 4(d) regularly include regulations extending the ban to threatened fish and wildlife species. *See* 50 C.F.R. § 17.31(a); 50 C.F.R. § 223.203.

Because the prohibition on taking listed species is broadly defined ("harming" species is enough) and applies to everyone's actions (not just federal agencies), it could have a significant impact on land uses that impact a listed species or a listed species' critical habitat.

The ESA defines "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (emphasis added). Regulations promulgated by USFWS and NMFS define the term "harm" as an act that kills or injures a species or significantly modifies habitat such that essential behavior patterns (breeding, spawning, rearing, migrating, feeding, or sheltering) are impaired. 50 C.F.R. § 17.84; 50 C.F.R. § 222.102. Habitat degradation in and of itself is not necessarily a take, without some reasonable certainty that the modification will actually kill or injure a listed species.

Such injury may be caused by habitat modification that significantly impairs essential behavior patterns of the species. Habitat modification that merely impedes recovery of a species, but does not actually bring a species closer to extinction, does not constitute "harm" under the Act.

Exemptions to Section 9's take prohibition may be obtained in certain circumstances. USFWS or NMFS may grant an Incidental Take Permit to an individual if their taking is incidental, the impacts are mitigated, funding is provided for the mitigation, and "the taking will not appreciably reduce the likelihood of the survival and recovery of the species." 16 U.S.C. § 1539(a)(2)(B). To apply for an Incidental Take Permit, an individual must submit a Habitat Conservation Plan describing the likely impact and planned mitigation to minimize the impact. 16 U.S.C. § 1539(a)(2)(A).

Private citizens or government agencies may bring suit to enjoin violations of Section 9. 16 U.S.C. § 1540(a), (b), (e), and (g). If a take enforcement case is brought against a land user, the plaintiffs will bear the burden of proving that a habitat-modifying action is reasonably certain to significantly impair an essential behavioral pattern of a listed species. Difficult questions of proximity (i.e. what is "reasonably certain"?) and degree (i.e. what is "significantly impair"?) will have to be addressed on a case-by-case basis. In some circumstances, cooperation and mitigation may be a better avenue for landowners than litigation. If a landowner's development or other land use activities are taking place within the critical habitat area of a listed species, they may need to seek an Incidental Take Permit through development of a Habitat Conservation Plan or other settlement options to avoid potential Section 9 enforcement litigation and resulting penalties.

Examples of the ESA's impact on private development include the following:

Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987): 440-room hotel and convention center and high-rise residential buildings on San Diego Bay; highway and flood control project (species = California Least Tern and Light-Footed Clapper Rail);

Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 876 (9th Cir. 1985): 2,235 residential unit development on San Bruno Mountain (species = Mission Blue Butterfly); and

Maine Audubon Society v. Purslow, 672 F. Supp. 528 (S. Maine 1987), *aff'd* 907 F.2d 265 (1st Cir. 1990): 17-lot residential subdivision (species = Bald Eagle).

(5) Citizen suits under the ESA

The ESA contains a citizen suit provision requiring the plaintiff to provide 60 days advance notice to the Department of the Interior and to the alleged violator. 16 U.S.C. § 1540(g)(1). It authorized suits in three contexts:

To enjoin any person (including the government) from violations of the ESA.

To compel the Secretary of the Interior to take action to enforce takings prohibitions.

Against the Secretary of the Interior where there is alleged a failure of the Secretary to undertake a nondiscretionary listing action.

The third category of citizen suit is appropriate for actions challenging the government's failure to meet fixed deadlines and other procedural requirements, which sometimes blend over to substantive requirements (such as the requirement to perform an economic analysis). However, listing decisions and other action involving the exercise of discretion may be challenged under the Administrative Procedure Act, which does not contain a 60 day notice requirement. In *Bennett v. Spear*, 540 U.S. 154, 171-74 (1997) (Scalia, J.), the Supreme Court ruled that the plaintiff properly challenged the failure of the U.S. Fish and Wildlife Service to consider economic factors in its listing decision (as specifically mandated by the ESA), but that a challenge to the Service's Biological Opinion can only be brought under the APA.

C. Air pollution and land use

The federal Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, is the primary law governing air pollution control in the United States. However, the focus of the CAA is large industrial facilities emitting, generally speaking, over 100 tons per year of regulated air pollutants or smaller thresholds of designated hazardous air pollutants. The federal requirements are unlikely to impact real property developments.

Certain state air regulations, however, might impact real property development. IDEQ regulations require a permit for the construction of an emissions unit emitting regulated air pollutants, such as heating, ventilating and air conditioning units in office buildings and permanent emergency generators. IDAPA 58.01.01.201. The Idaho air pollution rules offer some exemptions for these types of sources. IDAPA 58.01.01.220 through 58.01.01.225. The primary exemptions are for (1) sources with very small potential emissions, IDAPA 58.01.01.220; (2) heating equipment using natural gas, propane gas, or liquefied petroleum gas exclusively with a capacity of less than 50 million btu's per hour input, IDAPA 58.01.01.223.03.c.; (3) other fuel burning equipment for indirect heating with a capacity of less than one million btu's per hour input, IDAPA 58.01.01.223.03.d.; and (4) small emergency generators, IDAPA 58.01.01.221.04.c.

There is some likelihood that, in the future, local ordinances will impose air pollution controls on property development activities, particularly in areas that are not in attainment with federal air quality requirements (known as "non-attainment areas"). The main pollutant of concern for property development is particulate matter. Local governments may be required to adopt transportation control measures

in non-attainment areas, or the local transportation agency may be prohibited from spending federal highway funds in the area except for certain very narrow categories of projects. Transportation control measures in Ada County currently include emissions testing on automobiles and controls on wood stoves. These control measures likely will be implemented in Canyon County as well. In addition, both counties might adopt construction dust control measures in the not-too-distant future. These measures could impose dust control conditions as part of a development approval or at least as part of a grading permit. Finally, in light of numerous recent ozone exceedances in Ada and Canyon Counties, developers may see additional future controls on ozone-related activities.

D. Landowner liability for hazardous wastes

Under federal and state law, current and former owners of contaminated property may be liable for cleanup costs even if they did not cause the contamination. The cleanup costs, as well as the potential civil and criminal liabilities for failing to comply with laws regulating cleanup, can be substantial. Recent amendments to federal hazardous waste laws seek to soften this regulatory hammer somewhat, but a prospective landowner/developer still needs to proceed cautiously when dealing with any potentially contaminated property. The following sections discuss the potential liability of owners and other parties associated with real property under federal and state law.

(1) Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): liability for property contaminated with hazardous waste

(a) Overview of CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"),[398] is the primary statute used by the federal government to undertake or order cleanup of, and to allocate liability for, environmentally contaminated property. CERCLA requires a person in charge of a facility or vessel that causes an unpermitted release of a hazardous substance into the environment to report that release to the National Response Center. 42 U.S.C. § 9603. Exceptions include federally-permitted releases, such as releases permitted under the Clean Water Act, the Clean Air Act, or the Resource Conservation and Recovery Act. Failure to report such a release may result in penalties. 42 U.S.C. § 9603(b).

[398] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, *amended by* the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended primarily at 42 U.S.C. §§ 9601-9675, but also scattered sections of the Internal Revenue Code and Titles 10, 29 and 33).

CERCLA gives the federal government authority to undertake remediation (i.e., cleanup) when improper releases are discovered. Under Section 9604 of the Act, the United States Environmental Protection Agency ("EPA") may pursue either a removal action or a remedial action. In general, a removal action is a short-term solution and a remedial action is a longer-term and more permanent solution. EPA may also seek reimbursement of its own cleanup costs from any responsible party under Section 9607 of the Act. Or, rather than do the dirty work itself, EPA may order responsible parties to remediate the site under Section 9606 of the Act. CERCLA also has a citizen suit provision that allows citizens to sue to force the government to perform non-discretionary duties under the Act. 42 U.S.C. § 9659(a)(2).

CERCLA is a strict liability statute. If an improper release has occurred and a person fits within the definition of a responsible party, then they are liable unless a specific statutory defense applies, regardless of whether or not they caused the release. Responsible parties include: (1) current owners and operators of the facility or vessel at which an actual or threatened release of a hazardous substance is present; (2) owners and operators of facilities at the time of disposal of a hazardous substance (i.e. former owners and operators); (3) persons who own or possess a hazardous substance for which they contracted transportation, disposal, or treatment at any facility not owned or possessed by them (i.e. arrangers for disposal of a hazardous substance); and (4) persons who transport a hazardous substance to a site at which an improper release occurs. 42 U.S.C. § 9607(a)(1)-(4).

Statutory defenses to liability apply if the release results *solely* from: (1) an act of God (i.e. natural disaster); (2) an act of war; or (3) an act or omission of a third party. 42 U.S.C. § 9607(b). The key issue that can make these defenses difficult to utilize is the requirement that the listed events be the *sole* cause of the release. An additional defense, added to CERCLA in the 1986 amendments to the Act, is the "innocent purchaser defense." This defense exempts from liability persons who unknowingly buy property where a release has occurred, after taking appropriate steps to determine the property's condition. Year 2002 amendments to the Act, discussed *infra* regarding Brownfields, help to clarify exactly what due diligence is required to satisfy this defense.

(b) Present owners and operators

CERCLA imposes hazardous waste cleanup liability on an "owner or operator" of a "facility." 42 U.S.C. § 9607(a)(1). CERCLA's definition of "facility" is very broad and means any building, structure, installation, equipment, pipe or pipeline, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, aircraft, or site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. 42

U.S.C. § 9601(9). Vacant land can qualify as a "facility," so long as a hazardous substance has come to be located on the land.

The concept of "owner or operator" is similarly broad. An "owner or operator" is basically any person with any ownership in the facility or who exercises any control over the facility. Thus, an "owner" may include (1) a tenant-in-common or joint tenant with only a small percentage ownership interest in the property; (2) a partner in a general partnership owning the property; (3) a condominium unit owner with respect to common areas of the condominium project; (4) (possibly) a trustee of a contaminated property; (5) a mortgagee or deed of trust beneficiary under certain circumstances; (6) corporate officers; and (7) parent corporations.

An "operator" may include (1) a tenant, subtenant, contractor or licensee who has the right to enter upon and use the property; (2) a mortgagee or deed of trust beneficiary that assumes the business decisions of the facility or otherwise operates the facility; (3) condominium associations and homeowners' associations responsible for maintaining common areas; (4) a court-appointed receiver or the secured party for whose benefit the receiver is appointed; (5) property managers if they exercise "control" over the property; and (6) general contractors and subcontractors who perform work at the property and exercise "control" over the site.

(c) Past owners and operators

The owners and operators of a facility at the time of a release of a hazardous substance are also liable under CERCLA. If a person owned or operated a facility at the time of a release of a hazardous substance onto the property, that person will continue to be liable indefinitely even after transfer of the property. 42 U.S.C. § 9607(a)(2). The mere passage of time or transfer away of the property will not shield a former owner or operator of the facility.

Liability for intermediate landowners is not as clear. These are persons who buy contaminated property, do not add additional hazardous substances, and then sell the property. If the prior contamination (i.e. release of a hazardous substance) truly ended before the intermediate owner purchased the property, then the intermediate owner is off the hook. It is less clear, however, whether EPA can go after a prior owner who did not cause the release but who owned the property while the release was still occurring (*e.g.*, because it was still leaking from a tank or migrating through the ground). The Circuits are split on this issue of whether "passive migration" constitutes disposal (and thus a release) under the Act or whether it has to be active disposal. However, recent decisions by the Ninth Circuit and the U.S. District Court in Idaho offer some direction for landowners in Idaho.

In *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001), the Ninth Circuit ruled that the gradual passive migration of contamination through soil that allegedly took place during a former owner's ownership of the property was

not a release under CERCLA. In a nutshell, the court ruled that if the release were still occurring (i.e. still leaking from a tank) during a person's ownership, then that person would be liable even if they did not cause the leaking; but, if the release were simply seeping into or migrating through the ground, then the owner at that time would not be liable. As a result, the inquiry in each case presented will be very fact-specific. Indeed, in an unpublished decision, the U.S. District Court in Idaho relied on *Carson Harbor* to note that an ongoing leak from an artificially-created mound (as opposed to a tank or barrel) may not be enough to impose CERCLA liability on a former owner because this is more akin to seepage through the ground. *Monarch Greenback LLC v. The Doe Run Resources Corp.*, Case No. CV 98-0354-S-EJL (Sept. 30, 2002) (Judgment at page 11).

Another recent decision by the U.S. District Court in Idaho considers the passive migration issue from the perspective of prior owners who did cause the release but who caused the release before the enactment of CERCLA in 1980. *Coeur d'Alene v. Arsarco Inc.*, 280 F. Supp. 2d 1094 (D. Idaho 2003). Because damages cannot be sought based on a release that occurred wholly before CERCLA was passed, 42 U.S.C. § 9607(f)(1), the court had to consider whether a pre-1980 release was still occurring after the law's enactment. The court ruled that the passive water migration of hazardous substances, even though unaided by human contact and not actually "leaking" from any container, constituted a "release" under CERCLA and thus the pre-1980 releasers were liable for damages.

Although *Arsarco* did not involve intermediate owners, its broader interpretation of the level of passive migration that constitutes a release (seeping through ground water) could be problematic for them. The *Carson Harbor* limitation on a former landowner's liability for passive migration (that migration through natural earth is not enough) is certainly more favorable to intermediate landowners.

A person who contributed little contamination (*e.g.*, possibly an intermediate owner), may be able to reach an accommodation with EPA under Section 9622(g) of CERCLA, which provides for expedited settlement procedures with so-called "de minimis" contributors. To qualify for a de minimis settlement, the past owner or operator or a present owner or operator must show that the amount and/or toxicity or other hazardous effects of the substances contributed by that party to the facility were minimal.

(d) Arrangers & transporters – liability for moving contaminated dirt

Both CERCLA and the federal Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* ("RCRA"), which regulates the transportation and disposal of hazardous waste, impose liability on "persons" who "arrange for disposal" or "contribute to disposal" of hazardous wastes. CERCLA, 42 U.S.C. § 9607(a)(3); RCRA, 42 U.S.C. § 6973. Some grading and other contractors have been held liable

for "arranging" for the disposal of hazardous substances where the contractors disturb, knowingly or unknowingly, contaminated soil on a site. The courts have relied on the theory that, if the contractor exercised sufficient control over excavation activities, the contractor thereby arranged to move the contaminated material from its location and dispose of it elsewhere on site. *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988) (finding potential arranger liability); *City of North Miami v. Berger*, 828 F. Supp. 401 (E.D. Va. 1993) (imposing arranger liability on a demolition company but refusing to impose arranger liability on an engineering firm).

Some courts, including the Ninth Circuit, have upheld the potential of transporter liability under CERCLA Section 9607(a)(4) on similar theories. *Kaiser Aluminum & Chem. Corp. v. Catellus Development Corp.*, 976 F.2d 1338 (9th Cir. 1992) (finding that excavator who extracted contaminated soil from excavation site and spread it over uncontaminated areas of property could be liable under CERCLA as an operator and a transporter); *Danella Southwest, Inc. v. Southwestern Bell Telephone Co.*, 775 F. Supp. 1227 (E.D. Mo. 1991) (affirmed in unpublished decision, 978 F.2d 1263 (8th Cir. 1992)) (imposing transporter liability on the contractor, but, after an analysis of equitable factors, determining the contractor was not responsible for contribution for any of the cleanup costs).

(2) Resource Conservation and Recovery Act (RCRA): landowner liability and corrective action

(a) Landowner liability

Congress enacted the Resource Conservation and Recovery Act (RCRA) in 1976 to regulate hazardous *waste* handling and disposal. In 1984, Congress enacted the Hazardous and Solid Waste Amendments (HSWA), which significantly expanded the scope and requirements of RCRA.

Section 7003 of RCRA authorizes EPA to bring an action in federal court against any person who has contributed or is contributing an imminent and substantial endangerment to health or the environment by their handling, storage, treatment, transportation, or disposal of solid or hazardous waste. RCRA § 7003(a), 42 U.S.C. § 6973(a). In other words, RCRA applies to past or present generators and transporters of solid or hazardous waste, as well as past or present owners and operators of facilities that handle such waste. Specifically, EPA might require a liable person to take actions such as: constructing barriers to prevent leakage of waste from the property and to restrict access to the property; paying to assess and, possibly, remediate the site by treating or removing the contaminated soils; and providing an alternate drinking water source for nearby users.

Section 7002(a)(1)(B) of RCRA provides a citizen suit provision for any person to bring an action in federal court against the same parties and for the same

cause as in Section 7003. RCRA § 7002, 42 U.S.C. § 6972(a)(1)(B). This citizen suit provision potentially could be significant because, as more defenses become available under CERCLA (innocent purchaser, bona fide prospective purchaser, contiguous property owner), private parties seeking to force remediation of contaminated sites might increasingly rely on RCRA claims, which are not subject to these defenses. As a practical matter, however, it is unlikely a court would find RCRA liability for the same situation in which an owner qualifies for a CERCLA liability defense.

There is limited legal precedent for RCRA liability to apply to passive owners and operators who did not themselves engage in waste handling activities at a site. In *United States v. Price*, 688 F.2d 204 (3d Cir. 1982), the EPA sued site owners who bought contaminated property several years after the waste disposal activities had stopped. The court found that the present owners were "sophisticated investors" with a duty to investigate the actual conditions that existed on the property and, further, that upon discovery of the past disposal, the present owners did not attempt to abate the hazardous conditions. However, these facts are fairly severe. In all likelihood, if an innocent purchaser of contaminated property did take appropriate action to abate a discovered problem and met the other criteria to qualify for a defense under CERCLA, then also EPA would not assert and a court would not find RCRA liability.

In light of the potential double-enforcement hit under CERCLA and RCRA, EPA presently is working to develop a "One Cleanup Program" to harmonize all of the agency's remediation authorities in a single remediation program that will satisfy all federal legal requirements applicable to a site. Also, under the proposed program, all federal authorities regulating contaminated properties would agree not to pursue an enforcement action where a property owner has complied with a state response program. If this comes to fruition, it will be a positive step for landowners and users. Until then, landowners should understand their potential liability exposure under both statutory schemes.

(b) Corrective action program

Activities at facilities that treat, store or dispose of hazardous wastes have sometimes led to the release of hazardous waste or hazardous constituents into soil, ground water, surface water, or air. Owners or operators of treatment, storage or disposal (TSD) facilities are responsible for investigating and, as necessary, cleaning up releases at or from their facilities, regardless of when the releases occurred. EPA refers to this cleanup of TSD facilities under these statutory authorities as RCRA Corrective Action.

When a TSD facility is obtaining a permit, or when a facility has an existing permit, EPA may incorporate corrective action into the permit requirements under various RCRA authorities:

Section 3004(u), which addresses releases from solid waste management units (SWMUs) in a facility's permit. An SWMU is any unit where solid or hazardous wastes have been placed at any time, or any area where solid wastes have been routinely and systematically released.

Section 2004(v), which addresses releases that have migrated beyond the facility boundary.

Section 3005(c)(3), which allows EPA or an authorized state agency to include any requirements deemed necessary in a permit, including the requirement to perform corrective action.

Additional authorities under which EPA may order corrective action include:

Section 3008(h), which is an administrative enforcement order or lawsuit that addresses releases at interim status facilities.

Section 7003, which applies to all facilities, whether or not they have a RCRA permit, that may present an imminent and substantial endangerment to health or the environment. Under this provision, EPA can waive other RCRA requirements (*e.g.*, a permit) to expedite the cleanup process.

Cleanup at a RCRA-regulated facility depends on site-specific conditions. The six components of the corrective action process are:

RCRA Facility Assessment (RFA), to compile existing information on environmental conditions at a given facility, including information on actual or potential releases.

Phase I RCRA Facility Investigations (RFIs) also known as Release Assessment (RA), to confirm or reduce uncertainty about areas of concern or potential releases identified during the RFA.

RCRA Facility Investigation (RFI), to assess the nature and extent of contamination of releases identified during the RFA or Phase I RFI.

Interim Measures (IM), short-term actions to control ongoing risks while site characterization is underway or before a final remedy is selected.

Corrective Measures Study (CMS), to identify and evaluate different alternative measures to remediate the site.

Corrective Measures Implementation (CMI), includes detailed design, construction, operation, maintenance, and monitoring of the chosen remedy.

On February 14, 2003, EPA released a guidance document entitled EPA Guidance on Completion of Corrective Action Activities at RCRA Facilities, 68 Fed. Reg. 8757 (Feb. 25, 2003). This guidance document establishes standards and

procedures for EPA completeness determinations with respect to RCRA corrective action requirements.

(3) Idaho laws imposing cleanup and liability for contaminated property

Idaho does not have a general environmental liability law equivalent to the federal CERCLA. However, IDEQ does assert broad authority under its statutes and rules to require responsible parties, including owners who did not cause contamination, to clean up contaminated properties.

(a) The Environmental Protection and Health Act (EPHA): Idaho's "organic" environmental enforcement authority

Idaho's environmental enforcement program is premised largely on the Idaho Environmental Protection and Health Act ("EPHA"). Idaho Code §§ 39-101 to 39-119. This is IDEQ's organic statute. It contains several broad grants of environmental rulemaking authority to the agency:

> The director shall ... formulate ... rules as may be necessary to deal with problems related to water pollution, air pollution, solid waste disposal, and licensure and certification requirements pertinent thereto ....

Idaho Code § 39-105(2).

> The board ... may adopt, amend or repeal rules codes and standards of the department, that are necessary and feasible in order to carry out the purposes and provisions of this act and to enforce the laws of the state.

Idaho Code § 39-107(7).

> The director of the department of environmental quality may develop and recommend for approval by the board through rulemaking, ambient ground water quality standards....

Idaho Code § 39-120 (4).

The statute's expansive rulemaking authority is coupled with equally broad enforcement authority. EPHA, Idaho Code §§ 39-108, 39-109, and 39-116 provide for administrative and civil enforcement of violations of EPHA and its implementing rules. The authority under this broad mandate, however, is entirely inchoate. The EPHA itself imposes no obligation or liability; it simply authorizes IDEQ to

promulgate rules and creates enforcement tools and procedures.[399] Under Idaho law, administrative rules must be approved by the state legislature before they become effective. For this reason, the various enforcement programs adopted pursuant to this authority find all their specifics (standards, procedures, deadlines, etc.) in the rules, not in the statute.[400]

Finally, the EPHA contains no express private cause of action for citizen suits and, apparently, may only be enforced by the state. However, EPHA expressly preserves all common law claims. Idaho Code § 39-108(7).

(b) Hazardous Waste Management Act (HWMA): Idaho's version of RCRA

Idaho has received authorization from the federal Environmental Protection Agency (EPA) (57 Fed. Reg. 24,757 (June 11, 1992)[401] to administer its own hazardous waste program under the Hazardous Waste Management Act of 1983 (HWMA), Idaho Code §§ 39-4401 to 39-4432, in lieu of the federal hazardous waste program under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901 *et seq.* HWMA and its implementing rules, IDAPA 58.01.05, rely in large part on the adoption by reference of the RCRA Subtitle C rules, Idaho Code § 39-4404. Thus, a waste will be hazardous under the Idaho program only if it is hazardous under RCRA.

The purpose of HWMA is to protect public health and safety and the environment through management of hazardous wastes from the time they are generated through transportation, treatment, storage, and disposal. Idaho Code § 39-4402(2). Under HWMA, a person must obtain a permit from IDEQ to store, handle, or dispose of hazardous waste. Idaho Code § 39-4408(1).

Like RCRA upon which it is modeled, HWMA is focused primarily on governmental regulation of ongoing hazardous waste handling and disposal operations, rather than cleanup of existing sites. However, the state operating

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[399] Idaho Code §§ 67-5291 to 67-5292; *Mead v. Arnell*, 117 Idaho 660, 791 P.2d 410 (1990); Phillip M. Barber, *Mead v. Arnell: The Legislative Veto and Too Much Separation of Powers*, 27 Idaho L. Rev. 157 (1991); Dale D. Goble, *Through the Looking-Glass and What the Idaho Supreme Court Found There*, 27 Idaho L. Rev. 81 (1990). See discussion in section 47 on page 460 of this Handbook.

[400] Of particular note are the following rules adopted pursuant to EPHA: The rules governing discharges to surface waters are found in the Water Quality Standards and Wastewater Treatment Requirements Rule, IDAPA 58.01.02. This rule includes within it (1) the Hazardous Material Spills Rule, IDAPA 58.01.02.850, and (2) the Petroleum Storage Tank (PST) rules, IDAPA 58.01.02.851 – .852.

The Ground Water Quality Rule, IDAPA 58.01.11, was adopted in 1997 and is limited to groundwater contamination. Ground water quality standards are set out in IDAPA 58.01.11.200.a.

[401] Authorization does not include Indian lands, which remain under EPA jurisdiction.

through HWMA may exercise control over contaminated sites through corrective action requirements imposed in HWMA permits. Idaho Code § 39-4409(5). Additionally, IDEQ asserts authority under HWMA to impose corrective action requirements against property owners of sites that are *de facto* disposal facilities—for example, where a dry cleaner operator improperly disposes of hazardous waste on site instead of sending it to a HWMA-permitted facility.

Note also that HWMA (unlike EPHA) has a citizen suit provision.[402]

(c) IDEQ Uses the hazardous material spills rule to impose remediation liability on owners

The Hazardous Material Spills rule, IDAPA 58.01.02.850—along with the Petroleum Storage Tank (PST) rules, IDAPA 58.01.02.851-851—are contained within the Water Quality Standards,[403] which were developed pursuant to the EPHA. The Hazardous Material Spills rule provided, in full, as follows:

> 850. HAZARDOUS MATERIAL SPILLS.
> In the case of an unauthorized release of hazardous materials to state waters or to land such that there is a likelihood that it will enter state waters, responsible persons in charge must:
> 01. *Stop Continuing Spills*. Make every reasonable effort to abate and stop a continuing spill.
> 02. *Contain Material*. Make every reasonable effort to contain spilled material in such a manner that it will not reach surface or groundwaters of the state.
> 03. *Department Notification Required*. Immediately notify the Department or designated agent of the spills.

[402] HWMA specifically authorizes "any person who has been injured or damaged by an alleged violation of any permit" to bring suit or intervene in an ongoing enforcement action. Idaho Code §§ 39-4416(1) and (2). The Act does not specify what relief may be sought. This might be read to leave the door open for any related claims against the permit violator, including response cost recovery. If that is the case, HWMA's citizen suit provision is broader than RCRA's. This is curious in that the Idaho Legislature has specifically provided that IDEQ "may not promulgate any rule or regulation that would impose conditions or requirements more stringent or broader in scope than RCRA." Idaho Code § 39-4404. But it was the Legislature, not IDEQ, which provided the citizen suit provision, so there is no violation of the "no more stringent" standard. On the other hand, HWMA's failure to specifically authorize cost recovery actions against other responsible parties may be read to preclude such actions, in much the same way that some courts have read RCRA. The paucity of case law under HWMA makes it difficult to say how this provision will be interpreted.

[403] IDAPA 58.01.02. The Hazardous Material Spills rules predate the PST rules. The former was originally termed "Hazardous Material and Petroleum Product Spills" and was first adopted on January 1, 1980. On December 6, 1982, the petroleum component was broken out into its own section and the new PST rules were created.

> 04. *Collect, Remove and Dispose*. Collect, remove, and dispose of the spilled material in a manner approved by the Department.

IDAPA 58.01.02.850 (emphasis added).

"Hazardous materials" are broadly defined to include any material which, when discharged in any quantity into state waters, presents a potential hazard to human health or the environment. IDAPA 58.01.02.003.49. This definition is broader than under the federal CERCLA. "Responsible persons in charge" includes any person who:

> a. By any acts or omissions, caused, contributed to or exacerbated an unauthorized release of hazardous materials;
> b. Owns or owned the facility from which the unauthorized release occurred and the current owner of the property where the facility is or was located; or
> c. Presently or who was at any time during an unauthorized release in control of, or had responsibility for, the daily operation of the facility from which an unauthorized release occurred.

IDAPA 58.01.02.003.101.

Like the federal CERCLA, this rule imposes cleanup responsibility on owners, regardless of whether or not the owner generated or otherwise caused the contamination. IDEQ has adopted a policy of not enforcing against landowners where it is demonstrated that the contamination originated offsite. *Policy Toward Owners of Property Containing Contamination*, IDEQ Policy No. PM95-4 (1995).

(d) Ground water quality rule imposes broad liability, allows cleanup to site-specific standards

Since its adoption in 1996, IDEQ only minimally has used the Ground Water Quality Rule to require hazardous waste cleanups. The Rule's under-utilization is indicative of the state's fairly recent focus on ground water quality. Indeed, the agency does not yet have a specific ground water quality program.

The language of the Ground Water Quality Rule, however, is far-reaching. The operative language provides:

> No person shall cause or allow the release, spilling, leaking, emission, discharge, escape, leaching, or disposal of a contaminant into the environment in a manner that:

> (a) Causes a ground water quality standard to be exceeded; (b) Injures a beneficial use of ground water; or (c) Is not in accordance with a permit, consent order or applicable best management practice, best available method or best practical method.

IDAPA 58.01.11.400.01.

"Contaminant" is broadly defined as any material that does not occur naturally in ground water. IDAPA 58.01.11.007.10. The enforcement and remediation language of the Rule provides:

> The discovery of any contamination exceeding a ground water standard that poses a threat to existing or projected future beneficial uses of ground water shall require appropriate actions, as determined by the Department, to prevent further contamination. These actions may consist of investigation and evaluation, or enforcement actions if necessary to stop further contamination or clean up existing contamination, as required under the Environmental Protection and Health Act, Section 39-108, Idaho Code.

IDAPA 58.01.11.400.03. This language is modeled on the Ground Water Quality Protection Act of 1989, Idaho Code § 39-102(3)(b) (an amendment to the EPHA).

Under this Rule, landowners who did not themselves release any contamination could be held liable for "causing" or "allowing" a release, for instance, by allowing a tenant to operate a dry cleaning operation. Likewise, a purchaser of contaminated property may be held liable for "causing" or "allowing" the land to continue to leach contaminants.

The Rule provides some flexibility as to what standard contaminated ground water quality must be remediated. The general (and, typically, stricter) cleanup standard is the maximum contaminant level (MCL) set by the federal EPA under the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-11, and adopted by IDEQ in the Ground Water Quality Rule, IDAPA 58.01.11.200.01.a. As with other EPHA programs, there does not appear to be a private cause of action for enforcement of MCLs.

The site-specific (and, typically, more lenient) cleanup standard under the Ground Water Rule is determined by a site-specific risk-based assessment. IDAPA 58.01.11.400.05. IDEQ initially developed the risk-based assessment program for remediation of petroleum releases from PSTs. *See, Risk Based Corrective Action: Guidance Document for Petroleum Releases*, IDEQ, Remediation Bureau (Aug. 1996). As of August 1, 2004, the risk-based program is being expanded to apply to

approximately 185 chemicals. *See, Risk Evaluation Manual*, IDEQ, Remediation Bureau (Aug. 2004).

(e) IDEQ relies on nuisance statute to force remediation

IDEQ has relied on a 1976 nuisance statute to force landowners to clean up contaminated properties. The statute provides in full: "Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property, created by a former owner, is liable therefore in the same manner as the one (1) who first created it." Idaho Code § 52-109.

The statute falls outside the ambit of the agency's organic legislation, and IDEQ's official enforcement manual does not list the nuisance statute among its enforcement authorities. *Enforcement Procedures Manual*, IDEQ §§ 1.2, 1.5, 1.6, 1.7 (May 2000). The only statutes it lists are EPHA and HWMA. Nonetheless, IDEQ has used the statute successfully in civil action to abate ground water pollution.

(4) Federal versus state enforcement

Generally speaking, if a state and/or federal enforcement action for a release of a hazardous substance is imminent, a landowner may be well advised to negotiate a consent decree with the state IDEQ in the hopes that the federal EPA's role will be limited to approving the state's action. Enforcement under federal authorities (CERCLA and its regulations) involves more rigid requirements, higher penalties, and more stringent oversight than enforcement by the state. The state is more likely to accept a longer timeframe for compliance and, given the state's more limited resources and authorities, may exercise less oversight and impose less rigid controls on the cleanup.[404]

E. Petroleum and other contaminants

(1) Petroleum underground storage tanks

Discovering leaking underground storage tanks is a distressingly common occurrence in real property development. While abandoned tanks are not required to be permitted, they may require removal and remediation at the property owner's expense, regardless of who actually operated the tanks. The current owner of property where an underground storage tank is or was located is responsible for the investigation into and remediation of any release of petroleum.

[404] Idaho's authority for entering consent decrees is in Idaho Code § 39-108. The IDEQ Enforcement Procedures Manual, available on IDEQ's website at http://www.deq.state.id.us/pubs/epm/epm.htm, describes the agency's authorities, procedures, and penalty matrixes for enforcement actions and consent decrees.

The federal government, through EPA, regulates the installation, operation, maintenance, and closure of underground storage tanks ("USTs") containing petroleum. 40 C.F.R. Part 280. Unlike most other states, Idaho has not adopted a set of comprehensive rules to regulate USTs.[405]

Idaho, through IDEQ, does regulate the release, reporting, and cleanup requirements for leaking petroleum underground storage tanks. IDAPA 58.01.02. Idaho's Leaking Underground Storage Tank ("LUST") rules regulate releases from both above- and below-ground storage tanks. The first part of the regulatory program governs "petroleum release reporting, investigating and confirmation." IDAPA 58.01.02.851. The second part addresses "petroleum release response and corrective action." IDAPA 58.01.02.852. This program generates a significant amount of regulatory activity in Idaho for properties on which service stations are currently or formerly located.

To remediate petroleum releases, liable parties may either clean up to IDEQ's water quality standards or utilize IDEQ's Risk-Based Corrective Action guidance,[406] which allows parties to cleanup to a lesser standard when site-specific investigation shows that a lesser cleanup is still protective of human health and the environment. It is important for liable landowners to hire a professional consultant familiar with IDEQ's Risk-Based guidance to help evaluate whether costly site-specific investigation will or will not result in a lesser cleanup standard.

(2) Idaho considers asbestos a special waste but does not regulate its use or removal

Under Idaho law, asbestos is considered a "special waste" requiring special treatment and handling at an approved disposal site. *See* Idaho Code § 39-7402. Builders of residential buildings must provide owners or occupants with written notice of potential indoor air contaminants, including asbestos. Idaho Code § 44-2301. However, Idaho does not provide comprehensive regulations for the removal or abatement of asbestos in buildings.[407]

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[405] IDEQ proposed legislation to accomplish such regulation during the 2003 legislative session, but the Idaho Legislature rejected the legislation in whole.

[406] *See, Risk Based Corrective Action: Guidance Document for Petroleum Releases*, IDEQ, Remediation Bureau (Aug. 1996), available online at www.deq.state.id.us/waste/RBCA/rbca.htm. IDEQ currently is developing a Risk Evaluation Manual, to be implemented by the end of 2004, to expand application of the risk-based approach beyond petroleum to 185 chemicals. *See, Risk Evaluation Manual*, IDEQ, Remediation Bureau (Aug. 2004).

[407] The Idaho Department of Labor and Industrial Services has adopted rules regarding asbestos abatement workers, contractors, supervisors and designers. IDAPA 17.07, ch. A.

(3) Idaho has registration requirements that apply to remediation professionals

Environmental professionals engaged in site investigation or remediation activities are subject to the registration requirements for professional geologists and engineers.[408]

F. Spills of hazardous substances must be reported

(1) Spills must be reported to the state and federal governments

Under Idaho's Hazardous Substance Emergency Response Act, Idaho Code §§ 39-7101 to 39-7115, any person responsible for reporting a hazardous substance release under Section 103 of CERCLA, 42 U.S.C. § 9603, or the federal Emergency Planning and Community Right-to-Know Act of 1986 (SARA Title III) (EPCRA), Pub. L. No. 99-499, Title III, 100 Stat. 1728 (codified at 42 U.S.C. §§ 11001, 11001 note, 11002 to 11005, 11021 to 11023, 11041 to 11050 (1986), must also notify the Emergency Response Commission of a reportable release as soon as practicable.

Rules implementing Idaho's Hazardous Waste Management Act (HWMA) also mandate reporting of releases of hazardous wastes to the State Communications Center (1-800-632-8000). IDAPA 58.01.05.006.02. These rules also reference the federal reporting requirements under RCRA, which have been incorporated by reference into Idaho's hazardous waste rules.

In addition, any release of "hazardous materials" (under the Idaho definition, included in IDAPA 58.01.02.850) reaching or likely to reach state waters must be reported "immediately" to IDEQ. Hazardous Material Spills Rule (part of the Water Quality Standards and Wastewater Treatment Requirements Rule), IDAPA 58.01.02.850. Idaho's definition of "hazardous materials," IDAPA 58.01.02.003.44, is broader than the more tightly defined concept under CERCLA of listed or characteristic hazardous wastes. The Idaho definition of "hazardous materials" encompasses any material that is a "potential hazard to human health, public health, or the environment."

Finally, note that the rule governing releases is different and stricter for owners and operators of petroleum storage tanks. They must report any releases, or unusual operating conditions and monitoring results indicating a release, to IDEQ within 24 hours and must undertake action to investigate, confirm and abate the petroleum release. IDAPA 58.01.02.851.01.

[408] Idaho Code §§ 54-1201 *et seq.* and 54-2801 *et. seq.*

Practice Tip. Any verbal report of a release should be followed up promptly with written notification to document when the report was made.

The 24-hour hotline for the State Communication Center is 800-632-8000.

The federal government's National Response Center may be reached at 800-424-8802.

Transportation incidents should be reported to 911.

Releases from Petroleum Storage Tanks are to be reported to the appropriate regional office of IDEQ. The state headquarters' number is 208-373-0502.

Releases of hazardous materials into state waters are to be reported to the appropriate regional office of IDEQ. The state headquarters' number is 208-373-0502.

Any failure to report to IDEQ is viewed by the agency as a violation of its rules, subjecting the party to a potential administrative or civil enforcement action under the Environmental Protection and Health Act (EPHA). Idaho Code § 39-108(3)(a).

(2) Parties responsible for a spill are liable to the state for emergency response costs

State emergency response teams and local emergency response authorities that assist in responding to a spill may submit a claim for reimbursement to the Idaho Bureau of Hazardous Materials. Idaho Code § 39-7109. Cities and Counties also designate local emergency response authorities. Idaho Code § 39-7105. Any person who owns, controls, transports, or causes a release of a hazardous substance is strictly liable for the costs of responding to the incident, except that there is no liability for the acts or omissions of a third party where the potentially liable person exercised reasonable care with respect to the hazardous substance and took precautions against the foreseeable acts of the third person and against foreseeable consequences. Idaho Code § 39-7111. The state Attorney General may bring a cost recovery action for expenses incurred in responding to the incident against any party responsible for the spill. Idaho Code § 39-7112.

Significantly, the state's emergency response program applies only to hazardous substance incidents, defined as emergency circumstances requiring containment or confinement but not including any necessary follow-up site

remediation or cleanup. Idaho Code § 39-7103(3). Therefore, this law does not provide the state with authority to order site cleanups, to undertake its own site remediation or to recover costs other than those incurred strictly in responding to an emergency situation.

G. Idaho's pre-transfer disclosure law applies only to residential properties

Idaho has no general pre-transfer disclosure law applicable to commercial properties. However, the Idaho Property Condition Disclosure Act, Idaho Code §§ 55-2501 to 55-2518, mandates disclosure of defects in residential properties offered for sale.

> **Practice Tip.** The Idaho Property Condition Disclosure Act requires disclosure of environmental defects only on residential properties. However, "residential real property" is defined to include properties with mixed residential and commercial use. Consequently, the seller would be subject to the act for the sale of an otherwise commercial property if it also contains an apartment, supervisor's residence, or the like. The Disclosure Act excludes apartment complexes and other multiple unit residences of over four units.

The Disclosure Act requires disclosure of all defects in the property known to the seller. The act mandates use of a *Seller Property Disclosure Form* (which is set out in the statute). The form contains a question about "hazardous materials" and another catch-all question about other legal or physical "problems" with the property.

H. Environmental due diligence for developers

To discover whether problematic environmental conditions exist on a particular piece of property, preferably *before* purchasing the property, a potential developer should undertake an environmental assessment of the property as part of their due diligence investigation. This assessment should be conducted by professional environmental consultants and supervised by knowledgeable legal counsel and in-house staff. If performed in stages, the scope of the assessment will depend on the extent of damaging environmental conditions discovered at each phase. The American Society for Testing and Materials has developed guidelines for environmental assessments, entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process (ASTM E1527-97) and Transaction Screen Process (ASTM E1528-96)."

In addition to a professional environmental assessment of the property, other sources of information may be helpful in determining a property's environmental

condition, including: (1) the seller of the property, who may offer environmental information through warranties or other disclosures; (2) title company reports regarding chain of title and, if possible, a history of the property's prior uses; (3) state, federal, and local agency records, which may include building and operation permits, construction documents, inspection reports, enforcement actions, aerial photographs, and maps; (4) physical inspection of property, which may offer clues of environmental contamination such as stained soils, discolored waters, unusual odors, or depressions in the land; and (5) neighbors of the property and employees of prior owners of the property, who may have noticed these same clues or who may have information about past uses.

The Idaho Department of Environmental Quality ("IDEQ") has a program to help small businesses—who often lack the time and resources—navigate the various environmental standards, permits and procedures that may apply to their operations. The phone number for IDEQ's Small Business Environmental Assistance Program is (208) 373-0472.

If environmental contamination is discovered, then a prospective buyer/developer of the property should be wary. However, landowners or prospective landowners of contaminated property may want to explore opportunities to work with their local governments to obtain funding for clean-up and redevelopment through new federal and state Brownfields programs, discussed in the following section.

(1) Developing contaminated properties – Brownfields initiatives

As discussed *supra*, CERCLA holds the current owner of a contaminated property liable even if they did not cause or contribute to the contamination. 42 U.S.C. § 9607. This strict liability has made prospective buyers/developers reluctant to buy contaminated property because the potential cleanup costs are unknown and could easily exceed the fair market value of the property. As a result, buyers/developers increasingly have opted to buy undeveloped or "greenfields" properties, and the contaminated or "brownfields" properties—often located in the center of a community—increasingly have been abandoned.

To encourage redevelopment of these brownfields properties, federal and state governments have initiated various programs to limit liability for prospective purchasers of the properties (who are not otherwise liable for the contamination) and to provide some funding for the cleanup of the properties. This section addresses the current federal and Idaho brownfields initiatives.

(a) Federal Brownfields Program – Federal Small Business Liability Relief and Brownfields Revitalization Act

On January 11, 2002, President Bush signed the Federal Small Business Liability Relief and Brownfields Revitalization Act, Public Law 107-118 ("Brownfields Revitalization Act"), which significantly expanded EPA's brownfields program. The Brownfields Revitalization Act authorizes new and increased funding for cleanup of brownfields properties. Further, the Act amends key CERCLA provisions that affect private landowner liability by creating new liability exemptions for bona fide prospective purchasers and contiguous property owners and by clarifying the innocent landowner defense. Although not discussed here, the Act also created new liability exemptions for *de micromis* contributors of hazardous substances and certain generators of municipal solid waste.

Section 211(a) of the Brownfields Revitalization Act amends Section 101 of CERCLA to add a definition of "brownfield site." In general, a "brownfield site" includes "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." The definition identifies certain contaminated facilities—such as those that are subject to a planned or ongoing cleanup action—that do not qualify as brownfield sites.

Section 221 of the Brownfields Revitalization Act exempts from CERCLA's strict liability current owners who own land contaminated solely by a release from contiguous property owned by someone else if such persons can demonstrate they: (1) did not cause or contribute to the release or threatened release; (2) are not potentially liable or affiliated with any other person potentially liable; (3) exercised appropriate care in respect to the release; (4) provided full cooperation, assistance, and access to persons authorized to undertake a response action; (5) complied with all land use controls and did not impede the performance of any institutional controls; (6) complied with all information requests; (7) provided all legally required notices regarding releases of hazardous substances; and (8) conducted all appropriate inquiry at the time of purchase and did not know or have reason to know of the contamination. Persons who do not qualify for this exemption may still qualify for either the bona fide prospective purchaser exemption or innocent landowner defense, discussed below.

Perhaps the most significant of the Brownfields Revitalization Act's changes to CERCLA is in Section 222. Section 222 of the Act exempts from CERCLA's strict liability for current owners persons who are bona fide prospective purchasers (and their tenants). The exemption applies to purchases of property after January 11, 2002. A bona fide prospective purchaser is a person who can show they: (1) purchased the property after all disposal took place; (2) made all appropriate inquiry;

(3) exercised appropriate care with respect to any release; (4) provided full cooperation, assistance and access to persons authorized to take response actions; (5) complied with all land use restrictions and did not impede the performance of any institutional controls; (6) complied with all information requests; (7) provided all legally required notices regarding releases of hazardous substances; and (8) are not potentially liable or affiliated with any other person potentially liable.

The Act does impose a financial limitation on properties falling within the bona fide prospective purchaser exemption so that the purchaser—although not liable for the expense of cleaning up the contamination—does not receive any windfall from the United States' cleanup efforts. Where the United States has unrecovered response costs for a site and the response action increases the fair market value of the property, the Act imposes a lien against the property in favor of the United States. The lien allows the United States to recover the property's increase in value up to the amount of unrecovered response costs.

Finally, Section 223 of the Brownfields Revitalization Act clarifies what actions landowners must take to satisfy the "all appropriate inquiries" standard of CERCLA's innocent landowner defense. Added to CERCLA in 1986, the innocent landowner defense has provided a narrow exception to liability if the purchaser can prove he or she did not know or have reason to know of the contamination despite undertaking "all appropriate inquiries." The Brownfields Revitalization Act attempts to end a fifteen-plus year debate as to what exactly satisfies the "all appropriate inquiries" standard by requiring EPA to promulgate regulations setting forth standards and practices for when a landowner has "reason to know" of prior contamination. For property purchased before EPA adopts these new regulations but after May 31, 1997, the Act provides that a purchaser can satisfy the "appropriate inquiries" standard by following environmental site assessment procedures developed (in May 1997) by the American Society for Testing and Materials. If undertaking the appropriate inquiries causes a prospective purchaser to know of contamination, then they are not protected by the innocent landowner defense and may want to try to qualify as a bona fide prospective purchaser. The Act also adds a new requirement to the due diligence required for the innocent landowner defense: the purchaser must take reasonable steps to stop any continuing release and to prevent future contamination.

(b) State Brownfields programs

(i) Idaho Brownfields funding program

Each year since 2003, IDEQ has received grant funds under CERCLA Section 128, to establish its own brownfields program. The ultimate goal of this state program is to facilitate reuse and redevelopment of properties that are contaminated or perceived as contaminated. The program encourages reuse and redevelopment by offering state-funded assessments, implementing a risk-based approach to cleanup,

inventorying and marketing Idaho's brownfield sites, and developing additional IDEQ authorities and policies aimed at streamlining IDEQ oversight of site assessments and cleanups.

This program also assists Idaho's "eligible entities" when applying to EPA for a piece of the $50 million in federal brownfield grant funds annually available through EPA under the federal Brownfields Revitalization Act. These grant funds are available for assessments, cleanups, or to set up a Revolving Loan Fund. Under the Brownfields Revitalization Act, "eligible applicants" for these federal grants include governments, tribes, and certain non-profit entities.

In 2004, EPA awarded four Idaho applicants a total of $600,000 in assessment and cleanup grant funds. In 2005, EPA awarded $3 million in grant funds to a coalition of the state program and Idaho's six Economic Development Districts to capitalize a "Brownfield Cleanup Revolving Loan Fund" ("RLF"). The coalition will use the grant money to provide low-to-no interest loans and limited sub-grants to fund brownfield cleanups. In 2006, EPA awarded $200,000 in assessment grant funds to the Capital City Development Corporation (Boise's urban renewal agency) to help spur redevelopment of underutilized properties, and $200,000 in cleanup grant funds to the Idaho Department of Parks and Recreation to help develop park sites on former mine properties in the Historic Bayhorse Mining District in Custer County, Idaho.

Though not eligible as direct recipients of EPA's grant funding, private individuals may still benefit from brownfields programs. For example, private parties may obtain loans through the RLF. Additionally, developers interested in a city-owned brownfield site could work with the city to apply for funding to assess the site. If the assessment identifies environmental liabilities, the city could apply to EPA for a cleanup grant. If the assessment shows the property is environmentally safe, the developer could then purchase the "clean" site. In addition, private individuals who redevelop brownfields properties benefit from the state program's efforts to streamline IDEQ oversight of site assessments and cleanups.

Parties who own or would like to redevelop contaminated properties should explore opportunities to obtain federal funds and, possibly, liability protection through this state program.

(ii) Idaho Land Remediation Act

The 1996 Idaho Land Remediation Act, Idaho Code §§ 39-7201 *et seq.*, together with associated IDEQ rules, IDAPA 58.01.18, is aimed at promoting the remediation of brownfields. However, the Act provides limited protections for owner liability. Consequently, since its adoption in 1996, only a handful of individuals have utilized the Act's Voluntary Remediation Program, making it difficult to assess the actual benefits of the program.

The Act generally consists of two parts. The first part, administered by IDEQ, provides regulatory flexibility and protection from environmental enforcement actions for persons entering into approved agreements under the Voluntary Remediation Program. This part also contains some lender liability protections. The second part, administered by the Idaho State Tax Commission, contains a limited property tax break for properties cleaned up under the program. IDAPA 35.01.03.628.

The Act applies to almost any type of contamination, including petroleum or hazardous substances. Idaho Code §§ 39-7202, 39-7203, 39-7204(4)(b). IDEQ has discretion under the Act to limit eligibility if contaminated sites (1) are subject to remediation requirements under another statute, or (2) pose an imminent and substantial threat to human health or the environment. Idaho Code § 39-7204(4). For example, where a property owner or potential purchaser has just discovered (and reported to IDEQ) contamination, no enforcement action will yet be ongoing; so long as the contamination is not so severe as to pose an imminent public threat, IDEQ is likely to accept a voluntary cleanup proposal from the owner in lieu of beginning an enforcement action.

Once IDEQ determines a project is eligible for the Voluntary Remediation Program, the applicant submits a proposed Work Plan and negotiates a Voluntary Remediation Agreement (VRA) with IDEQ. Idaho Code § 39-7205. Upon satisfactory completion of the agreed-upon terms of assessment and cleanup of the site, the participant will receive a Certificate of Completion and may request a Covenant Not To Sue. Idaho Code § 39-7207; IDAPA 58.01.18.024.04. The Covenant Not To Sue protects current and future owners and operators who did not cause, aggravate or contribute to the contamination. Idaho Code § 39-7207; IDAPA 58.01.18.025.[409]

The Act's tax exemption entitles the owner to a fifty percent reduction in local property taxes on the "remediated land value." This term is defined as the difference (i.e. increase) in the assessed value of the land before and after the remediation. Idaho Code § 63-602BB(2); IDAPA 35.01.03.628.01.f. Because improvements to the property are not considered in the increased value, the amount of the tax exemption is unlikely to amount to much. This tax incentive is rendered even more marginal by the Act's provision that the exemption does not apply if the property is sold. Idaho Code § 63-602BB(4)(b); IDAPA 35.01.03.628.04.b.

Aside from the minimal tax incentive offered under the Act, it is not clear whether a landowner gains anything by using the Act's Voluntary Remediation Program that they could not already obtain by negotiating a consent order with

[409] IDEQ puts a similar provision in all of its consent orders. *See* Idaho Code 39-108(3)(a)(r).

IDEQ. However, it might fit the bill for the right situation. An example of this could be when an important potential lender for a redevelopment project demands the more certain protection from liability that the Idaho Land Remediation Act can provide. In such a case, the tax advantages, if not enough to independently tip the balance, might at least cover the transaction costs entailed in providing the required up-front certainty.

(2) Developing contaminated properties – transactional issues

Below is a laundry list of potential issues that may arise in the context of structuring a real estate transaction around potential environmental problems. The presence of contamination need not kill a transaction if the property has sufficient equity for the transaction to make economic sense and the environmental problems can be quantified and the risk of liability allocated among the parties.

1. Representations and warranties about what is known.
    a. Environmental reports and audits.
    b. Permits, notices of violation, and correspondence with agencies.
    c. Compliance with law.
    d. The presence of hazardous substances, asbestos, underground storage tanks, etc.
2. Investigation (finding out what is not known).
    a. Phase One, Phase Two and Phase Three Assessments.
    b. Control of investigation.
        (1) Right to review scope of work.
        (2) Right to see data and drafts.
        (3) Right to obtain split samples.
        (4) Right to review notice of when work is to be performed.
        (5) Indemnity from contractor.
        (6) Right to control end product of investigation.
        (7) Will recommendation be made?
    c. Confidentiality.
        (1) Termination on close of escrow.
        (2) Relation to financing or permits.
        (3) Disclosure as required by law.
3. Indemnities and warranties (allocating the risk).
    a. Burden of proof (e.g., buyer takes risk of all contamination except that occurring before the close of escrow).
    b. Establish a baseline.
    c. Who pays for investigation?
    d. Controlling the scope of clean up.
        (1) Dollar cap.
        (2) Trigger of clean up obligation.

e. When is it finished?
f. The right to control the cleanup negotiations with agencies.
g. Duration of indemnity (sunset clause).
h. Does the indemnity or release run to successors in interest? Does the indemnity run with the land?
i. Insurance subrogation.
j. Responsibility for legal costs.
k. Survival of Indemnity Through Subdivision of Parcel.
l. Availability of Insurance.

4. Inducing enforcement and negotiating with responsible (non-contracting) parties.

I. Irrigation and drainage ditches

Numerous properties in Idaho are subject to an irrigation or drainage ditch right-of-way or easement held by a water delivery entity.[410] As new residential subdivisions and other developments occur on former agricultural lands served by irrigation districts, conflicts between landowners and ditch owners are becoming more common. It is important for landowners and developers to understand their rights vis-à-vis the right-of-way or easement holder's rights. A synopsis of these rights and applicable law follows:

Right-of-way and to right to enter. Under Idaho Code § 42-1102, owners or claimants of water rights are entitled to enter the lands of another for irrigation purposes. This right-of-way includes the right to enter upon the land to maintain the ditch, canal, pipe or other conduit.

Landowner's right to move or cross ditch. Under Idaho Code § 42-1207, a landowner has the right to move an irrigation or drain ditch so long as they cause no harm; however, in light of recent amendments to the statute, the landowner first must obtain written permission from easement holder (ditch owner). Under Idaho Code § 42-1108, anyone has the right to cross a ditch so long as they cause no harm. Citing concerns with providing an uninterrupted supply of irrigation water and retaining sufficient access to maintain ditches, water delivery entities are increasingly demanding more conditions up front before they agree to let a developer, or even the county highway district, relocate or cross an irrigation or drain ditch.

Size of easement. An easement may not encompass more than is necessary to fulfill the easement. *Villager Condominium Assoc. v. Idaho Power Co.*, 121 Idaho

[410] For a detailed description of the powers of water delivery and management entities and for other information relating to water law and administration, see the *Water Law Handbook: The Acquisition, Use, Transfer, Administration and Management Of Water Rights in Idaho* by Jeffrey C. Fereday, Christopher H. Meyer, and Michael C. Creamer, all attorneys at Givens Pursley LLP.

986, 988, 829 P.2d 1335, 1337 (1992) (quoting *Abbott v. Nampa Sch. Dist. No. 131*, 119 Idaho 544, 548, 808 P.2d 1289, 1293 (1991)).

Exclusivity. An easement is not an exclusive right:

> There is not the same necessity for exclusive possession of a right of way by canal companies as by railroads. The reasons for according to railroads the right to the exclusive possession are not applicable to canal companies. [citation omitted]. The use of right of way for a ditch or canal does not require the exclusive possession of, or complete dominion over, the entire tract which is subject to the 'secondary' as well as the principal easements.

Abbott v. Nampa Sch. Dist. No. 131, 119 Idaho 544, 549, 808 P.2d 1289, 1294 (1991) (quoting *Coulsen v. Aberdeen-Springfield Canal Co.*, 47 Idaho 619, 627, 277 P. 542, 544-45 (1929)).

Duty to maintain. The ditch owner must maintain the ditch (or buried pipe) in good repair and could be held liable for any damage caused to the property as a result of any failure to do so. Idaho Code §§ 42-1102, 42-1202, 42-1204, and 42-1303. This is true even when the servient landowner uses the ditch. *Sellers v. Powell*, 120 Idaho 250, 251, 815 P.2d 448, 449 (1991). If the servient landowner's use of the easement increased the cost of repairs and maintenance, then the landowner is responsible for the increased portion of the costs.

Secondary easement. A secondary easement is implied giving the ditch owner sufficient access to maintain the ditch. Courts recognize that canal owners need a secondary easement in order to "repair and maintain their primary easement," the canal itself, but such secondary easements "cannot be used to enlarge the burden to the servient estate." *Abbott v. Nampa Sch. Dist. No. 131*, 119 Idaho 544, 549, 808 P.2d 1289, 1294 (1991). Courts especially demand that a "grant indefinite as to width and location must impose no greater burden than is necessary." *Conley v. Whittlesey*, 133 Idaho 265 (1999) (quoting *Coulsen v. Aberdeen-Springfield Canal Co.*, 47 Idaho 619, 628, 277 P. 542, 544-45 (1929)).

Landowner's rights to use servient estate. A landowner is entitled to make other uses of the property that do not unreasonably interfere with the use and enjoyment of the easement. *Nampa & Meridian Irrigation Dist. v. Washington Fed. Savings*, 135 Idaho 518, 522, 20 P.3d 702, 706 (2001) (Walters, J.); *Carson v. Elliott*, 111 Idaho 889, 890, 728 P.2d 778, 779 (Ct. App. 1986). Whether a particular use of the land by the landowner is a reasonable use is a question of fact. *Carson*, 111 Idaho at 890, 728 P.2d at 779; *City of Pasadena v. California-Michigan Land & Water Co.*, 110 P.2d 983 (1941). In *Nampa & Meridian*, the Idaho Supreme Court

held that a sidewalk and proposed fence alongside an irrigation canal (and within the irrigation entity's easement) did not interfere with the irrigation district's use of its easement. A landowner is entitled to make reasonable regulations concerning the use of the easement. *See Marshall v. Blair*, 130 Idaho 675, 682, 946 P.2d 975, 982 (1997) (allowing servient estate to construct gate on road, allowing in only easement holders; "There is nothing in this Court's case law that prohibits a servient estate from limiting the use of the easement to authorized users.")

Third parties' rights to use ditch. "[A] third party may obtain a license from an easement holder to use the easement without the notice to and consent from the servient estate owner so long as, and expressly provided that, the use of the easement is consistent with and does not unreasonably increase the burden to the servient estate." *Abbott v. Nampa Sch. Dist. No. 131*, 119 Idaho 544, 551, 808 P.2d 1289, 1296 (1991) (upholding the irrigation district's right to enter into a license agreement with the school district to install a concrete inlet structure and safety screen on a ditch located on Abbott's property). The *Abbott* Court reasoned that the licensed improvements were consistent with the nature of the ditch use and did not constitute an enlargement of the easement or the burden on the servient estate. *Abbott*, 119 Idaho 544, 551, 808 P.2d 1289, 1296 (1991). The Court noted, however, "The irrigation district obviously could not allow a utility company to use its easement for a power line or a cable television firm to utilize the ditch easement because the addition of power lines and poles would certainly not be within the scope of the easement." *Id.*

Irrigation entities' right to approve development. Idaho Code § 31-3805 requires cities and counties to act with the advice of the irrigation entity when considering the delivery of water to subdivisions. However, advice does not equal veto power. Zoning decisions rest solely in the hands of city and county officials and cannot be delegated. *Gumprecht v. City of Coeur D'Alene*, 104 Idaho 615, 618 (1983), *overruled on other grounds by City of Boise City v. Keep the Commandments Coalition*, 143 Idaho 254, 257, 141 P.3d 1123, 1126 (2006). Improper delegation of zoning authority would violate the due process clause of the 14th Amendment of the U.S. Constitution. *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928). The distinction between a local government seeking the advice of an irrigation district and delegating veto power to that district over a land use proposal is not always clear. For example, the City of Caldwell Subdivision Ordinance provides that an "[i]rrigation system must be approved by the appropriate district and must be installed in accordance with the standards of that district." 11-04-05(9).

Pressurized irrigation. Idaho Code § 43-330A allows an irrigation district to contract with a subdivision developer to supply pressurized irrigation. Section 43-330B sets forth specific conditions that must be included in such a contract, including the grant of an easement to the irrigation district for maintenance, repair, etc. Section 43-330D requires the contract to be recorded. Section 43-330E directs that the

pressurized irrigation system constructed pursuant to such a contract shall be owned by the district. Section 43-330F provides that the district shall operate and maintain the system and may assess costs against lot owners. Numerous city ordinances regulate the specifications of and water requirements for pressurized irrigation system.

47. LEGISLATIVE VETO AND SUNSET OF ADMINISTRATIVE RULES

A. Introduction

The term "legislative veto" is shorthand for the power of a legislative body to overrule rules adopted by executive agencies. The term "sunset" is shorthand for the automatic termination of laws, ordinances, or rules. In this context, sunset provisions are used to require annual legislative re-approval of agency or public health district rules.

The Idaho Administrative Procedure Act, Idaho Code §§ 67-5201 to 67-5292 ("IAPA" or "Idaho's APA"), is the statute that sets out procedures governing Idaho state agencies. The IAPA includes both a legislative veto provision and a sunset provision for agency rules.[411]

Idaho's legislative veto statute dates to 1969.[412] The sunset provision was added in 1990.[413] Both have been amended on a number of occasions.

B. Constitutionality

Statutes authorizing legislative vetoes have been challenged as being violative of the separation of powers (interference by the legislature with executive branch agencies) and of the presentment clause (where the veto mechanism does not require presentment of a bill to the Governor or President).

A legislative veto was struck down by the U.S. Supreme Court in *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (Burger, C.J.). In contrast, Idaho's legislative veto was upheld by the Idaho Supreme Court a few years later. *Mead v. Arnell*, 117 Idaho 660, 791 P.2d 410 (1990) (dealing with a rule promulgated by the Board of Health and Welfare that was vetoed by the Legislature in 1989).[414]

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[411] These statutory provisions are discussed in Florence A. Heffron, *Legislative Review of Administrative Rules Under the Idaho Administrative Procedure Act*, 30 Idaho L. Rev. 369 (1993/94). This article provides a good overview of the procedures. Note, however, the statute has been amended since the article was written, so some material in the article is out-of-date.

[412] The IAPA was enacted in 1965. 1965 Idaho Sess. Laws, ch. 273. Four years later, it was amended to add the legislative veto authority. 1969 Idaho Sess. Laws, ch. 185 (initially codified to Idaho Code § 67-5218, now codified to Idaho Code § 67-5291).

[413] This sunset provision was first enacted by 1990 Idaho Sess. Laws, ch. 22 (initially codified to Idaho Code § 67-5219, now codified at Idaho Code § 67-5292).

[414] The *Chadha* and *Mead* cases are discussed in Phillip M. Barber, *Mead v. Arnell: The Legislative Veto and Too Much Separation of Powers*, 27 Idaho L. Rev. 157 (1991); Dale D. Goble, *Through the Looking-Glass and What the Idaho Supreme Court Found There*, 27 Idaho L. Rev. 81 (1990).

Mead v. Arnell was a 3-2 decision. There had been some concern in the Legislature that it might someday be overruled. To prevent that possibility, the Idaho Constitution was amended in 2016 (after earlier failed attempts) to add Article III, section 29.[415] That provision constitutionalizes the Legislature's legislative veto authority.

The constitutionality of sunset provisions for administrative rules has not been questioned.

C. Why both veto and sunset provisions?

One might ask: If the Legislature has the power to reject rules at any time (both pending rules and previously adopted final rules), what is the need to sunset the rules each year? Isn't that redundant?

Yes, it is largely redundant.[416] But there is an historical reason for its adoption. Shortly after the *Chadha* decision in 1983, several state legislative veto statutes were declared unconstitutional. Idaho's Legislature grew fearful that its legislative veto statute would meet the same fate. Accordingly, in 1990 (while *Mead v. Arnell* was being litigated), the Legislature preemptively adopted the sunset provision (which did not suffer the same risk of being found unconstitutional). The sunset provision was a "belt-and-suspenders" means of assuring legislative oversight over rulemaking. If the legislative veto were eliminated, the sunset provision would fill the gap by requiring affirmative legislative action to extend the life of every stage agency rule every year. Indeed, as noted in footnote 416, the sunset requirement is more "powerful" than the veto in that an extension of the rules is easier to block.

To the Legislature's surprise, *Mead v. Arnell* upheld Idaho's legislative veto provision. And, as noted above, the legislative veto is now enshrined in Idaho's Constitution. Yet the largely redundant sunset provision has remained on the books ever since. The result is that rules promulgated by Idaho executive agencies are now subject to both the legislative veto and sunset requirements. This entails a substantial commitment of administrative resources—which many consider a wasteful and pointless expenditure of tax dollars—to re-promulgate every rule every year. Add to

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[415] "The legislature may review any administrative rule to ensure it is consistent with the legislative intent of the statute that the rule was written to interpret, prescribe, implement or enforce. After that review, the legislature may approve or reject, in whole or in part, any rule as provided by law. Legislative approval or rejection of a rule is not subject to gubernatorial veto under section 10, article IV, of the constitution of the state of Idaho." Idaho Const. art. III, § 29 (added by 2016 Idaho Sess. Laws, H.J.R. No. 5, § 1).

[416] The sunset provision is not perfectly redundant. It differs from the legislative veto in that it requires a legislative act (including presentment to the Governor) to extend the rules. Thus, either house acting alone may prevent the extension. In contrast, the legislative veto requires both houses to approve a concurrent resolution in order to rescind a rule, and there is no presentment to the Governor.

that the uncertainty imposed on the regulated community which is unable to know until the end of each legislative session what rules are in place.

Meanwhile, a number of other states have jettisoned or limited the once-popular annual sunset provisions, finding them "an expensive, cumbersome and disappointing method for enhancing legislative control." Florence A. Heffron, *Legislative Review of Administrative Rules under the Idaho Administrative Procedure Act*, 30 Idaho L. Rev. 369, 370 (1993/1994).

D. Idaho APA provisions on veto and sunset

(1) APA terminology

We use the term "regular rules" to describe rules adopted in the ordinary course of rulemaking. The Idaho APA also authorizes "temporary rules" which may be fast tracked and are of limited duration.

In the regular rulemaking process, agencies are required to publish "proposed rules" and solicit public comment on them prior to their promulgation. Idaho Code §§ 67-5201(16), 67-5221, 67-5222, and 67-5224(1).[417] When a rule is adopted by the agency, it becomes a "pending rule" as it awaits legislative review. Idaho Code §§ 67-5201(14) and 67-5224.

If the pending rule survives the legislative veto process and becomes effective, it is called a "final rule." Idaho Code § 67-5201(9).

Rules imposing a fee or charge (which we refer to here as "fee rules") are treated differently than rules that do not involve a fee or charge (which we refer to here as "non-fee rules").

Idaho Code § 67-5202 establishes the office of "rules coordinator." This is the state official responsible for managing the bulletin and administrative code, in which notices and rules are published. The Office of Administrative Rules Coordinator is currently housed within the Division of Financial Management (within the Governor's Office). It was previously housed within the Department of Administration.

(2) Legislative veto

(a) Regular rules

The first step in the legislative veto process is to get proposed rules (rules that have not yet been adopted by the agency) before the Legislature. Idaho Code § 67-5223 requires the rules coordinator to forward to the Legislature notice of each

[417] This process is required only for regular rulemaking. For "temporary rules," in contrast, the agency is required only to "proceed with such notice as is practicable." Idaho Code § 67-5226(1)

proposed rule.[418] The agency is also required to provide a statement of economic impact and other information. Idaho Code § 67-454 creates a procedure whereby specially created subcommittees of each germane committee may provide feedback on all proposed rules.

The second step is to delay the effectiveness of pending rules (rules that have been adopted by the agency) until the Legislature has an opportunity to review them.

- Idaho Code §§ 67-5224(5)(a) and (b) provide that pending non-fee rules (other than temporary rules and error corrections) do not become effective until the end of the legislative session in which they were submitted or upon legislative approval, whichever comes first. If the Legislature does adopt a concurrent resolution rejecting the pending non-fee rule (in whole or in part), it will go into effect at the end of the session. Idaho Code §§ 67-5224(5)(a) and 67-5291.[419] In other words, while the Legislature may choose to approve a non-fee rule, approval is not required for the rule to become effective.

- Pending fee rules, in contrast, do not go into effect unless the Legislature approves them by concurrent resolution. Idaho Code § 67-5224(5)(c).

- This delay in effectiveness applies only to regular rules,[420] not to temporary rules. Idaho Code § 67-5226(1) provides that an agency is authorized to make temporary rules immediately effective. This is so notwithstanding the fact that temporary rules are subject to legislative veto, Idaho Code § 67-5291(1).

The legislative veto process applies not only to pending rules, but also to final rules (rules that have survived legislative veto and are now in effect) and to temporary rules. Thus, the Legislature may not only block a new rule from going into effect, it may also reach back to reject a previously adopted rule that has been in effect for some time.

The Legislature may veto a rule, but it is not authorized to modify the text of a rule. Its only options are (1) to approve the rule in whole or in part or (2) to reject the

[418] The requirements in section 67-5223 do not apply to temporary rules, so long as the rules coordinator sends a copy of the temporary rules to the director of the legislative services office. Idaho Code § 5226(5).

[419] Section 67-5224(5) is referenced in the last sentence of section 67-5291(1).

[420] The delay in effectiveness provided in Idaho Code § 67-5224 applies only to pending rules. Pending rules are defined as rules adopted in the regular rulemaking process. Idaho Code § 67-5201(14).

rule in whole or in part.[421] Approval or rejection of a rule is undertaken by concurrent resolution (which requires adoption by both houses of the Legislature but does not include presentment to the Governor).

In sum, if the Legislature is silent with respect to a pending non-fee rule, it goes into effect at the end of the session in which it was presented. A pending fee rule goes into effect if and only if it is approved by a concurrent resolution. If affirmatively approved, fee rules and non-fee rules go into effect immediately upon approval.

(b) Temporary rules

Idaho Code § 67-5226(1) authorizes the Governor, upon making certain findings, to allow agencies to adopt temporary rules that become effective immediately (before they have been submitted to the Legislature). Even temporary rules involving a fee or charge may go into effect immediately, so long as the Governor makes a finding that this is necessary to avoid immediate danger. Idaho Code § 67-5226(2). Temporary rules, like pending or final rules, may be rejected by legislative veto. Idaho Code § 67-5291(1). The key difference is that temporary rules go into effect without delay.

When an agency promulgates temporary rules, it must also commence promulgation of a proposed regular rule on the same subject (unless the temporary rule will expire before the proposed rule could become final). Idaho Code § 67-5226(6).

Temporary rules have their own sunset provision resulting in their expiration at the end of "the next succeeding regular session of the legislature." Idaho Code § 67-5226(3). Temporary rules that will remain in effect for the following year are typically adopted near the end of the legislative session (in case there is no "going home bill" as discussed in section 47.E below). If so, they expire in the spring of the following year when the next session ends.

(c) Correction of errors

Idaho Code § 67-5228 allows agencies to correct typographical and other errors in rules without going through rulemaking procedures. Idaho Code § 67-5224(5)(a) allows these corrections to go into effect immediately.

(3) Sunset provisions for final rules

The sunset statute states that all agency rules adopted after 1990 "shall automatically expire on July 1 of the following year unless the rule is extended by

[421] The meaning of rejecting a rule "in part" is addressed in Idaho Code § 67-5291(2). The explanation is obscure, but it appears to be saying that the Legislature may not freely edit out words, but may only reject entire sections.

statute." Idaho Code § 67-5292(1). Note that this requires full statutory enactment (including presentment to the Governor), not just a concurring resolution.

Thus, all final rules remain in force in subsequent years if and only if the Legislature enacts a statute each year extending them until July 1 of the following year. Final rules that are extended by legislative act "continue to expire annually on July 1 of each succeeding year." Idaho Code § 67-5292(1).

The expiration language states that every rule "shall automatically expire on July 1 of the following year." For rules previously extended by statute, the new extension keeps the rule in effect until July 1 of the year following the extension. For new rules that survive legislative veto and go into effect for the first time during or at the end of a legislative session, they, too, would remain in effect until July 1 of the following year.[422]

E. The legislative failure to enact a "going home bill" beginning in 2019

For nearly two decades following the enactment of the sunset statute in 1990, the Legislature routinely enacted one-year extensions of most rules each year. This was done by way of something commonly referred to as the "going home bill" (since it was commonly adopted at or near the end of the session).[423]

Beginning in 2019, the Idaho Legislature failed to enact a going home bill.[424] As a result, all rules expired on July 1, 2019. As a result, state agencies have been put through a costly annual exercise involving both the adoption of temporary rules and the re-promulgation of new pending rules.

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[422] The language in Idaho Code § 67-5292(1) saying that rules "expire on July 1 of the following year" can be confusing if not understood in context. What year does this refer to? The only sensible reading is that it expires on July 1 of the calendar year following the year that it went into effect or was extended. This conclusion is reinforced by Idaho Code § 67-5292(2) which provides that rules adopted prior to June 30, 1990 shall expire on July 1, 1991. Thus, a rule that went into effect during the 1990 legislative session would have a full year—until July 1 of the next year—before expiring. The referenced "year" cannot sensibly refer to the year in which the rule was promulgated by the agency. If that were the case, a pending rule that survives legislative veto would expire on July 1 just a couple of months later.

[423] An example of a going home bill is H.B. 666 (2018).

[424] The Legislature's refusal to extend the rules is said to reflect the view of some influential legislators that the legislative veto provision is not strong enough. Instead of requiring a concurrent resolution of both houses to reject a rule, some legislators believe that either house, acting alone, should have the power to veto a rule. Note that authority to veto by concurrent resolution means that one house may not act alone. But a requirement to approve a rule (as found in the sunset provision) means that either house can block the approval. Of course, failure to enact a going home bill does not solve this perceived shortcoming in the veto provision. But, apparently, it has the effect of "making a point" of some sort.

The first step, pursuant to Idaho Code § 67-5226(1), is for the Governor to authorize agencies to adopt temporary rules to replace the existing rules set to expire on July 1 following the legislative session. As noted above, the Governor may authorize temporary rules that go into effect immediately to replace both fee rules and non-fee rules. Idaho Code § 5226(2). Agencies must then move swiftly to adopt temporary rules prior to July 1.

As discussed above, temporary rules must be accompanied by promulgation of proposed replacement rules. Idaho Code § 5226(6). Accordingly, each year when there is no "going home bill," agencies are required to promulgate many thousands of pages of rules—both temporary rules and identical replacement proposed rules (which will be pending rules at the time of the next session).[425]

So long as the Legislature does not affirmatively reject the temporary rules by concurrent resolution (under Idaho Code § 67-5291), the temporary rules remain in effect until the end of the following legislative session (under Idaho Code § 67-5226(3). To the extent any of the new pending rules survived legislative review during that year (by approval or inaction, depending on whether they were fee-bills or non-fee bills), they would remain in effect until July 1 of the following year. But if there continued to be no "going home bill," the temporary rule and pending rule process would need to be repeated in subsequent years for any bills not approved in that session.

From the 2019 session to the 2021 session, the Legislature by and large did not veto the temporary rules, thus allowing them to operate until the end of the current session. However, the Legislature did not approve any of the pending fee rules. Nor did not enact any going home bills. Thus, each year, the cycle described above was repeated.

In 2022, the Legislature again failed to enact a "going home bill." However, it did adopt a series of so-called "omnibus" concurrent resolutions that approved many (but not all) pending rules. For those bills, there will be a one-year reprieve under the sunset provision—remaining in effect until July 1 of 2023. Thus, the massive set of temporary rules adopted by the agencies in 2022 were unnecessary (at least as to those rules included in the "omnibus" approval resolutions). However, if there is no "going home bill" in 2023, a new round of temporary rules and proposed rules will be required. In anticipation of that possibility, agencies will be required to prepare temporary rules again in 2022. Thus, the omnibus approval resolutions accomplished virtually nothing, except to give the agencies a few extra months to promulgate a new batch of temporary rules and proposed rules in time for the 2023 legislative session.

[425] Agencies must re-publish the full text of these rules. They are prohibited from merely incorporating by reference into a temporary rule the text of an expiring rule. Idaho Code § 67-5229(1)(d).

F. Legislative review and sunset provisions applicable to public health districts

On occasion, Idaho public health districts ("PHDs") adopt rules that affect land development. In at least one case, this includes requirements limiting the density of homes that rely on septic systems.[426] The practical effect of these rules is to encourage new residential developments to be connected to a public sewer system. Beginning in 2019, these rules became enmeshed in the Legislature's failure to annually re-authorize agency rules (by enactment of a "going home bill," as discussed above).

In order to sort this out, the first step is to identify which statutes govern PHD rulemaking. Idaho's APA applies only to state agencies. PHDs are not state agencies.[427] PHDs have their own organic statute, which provides them rulemaking authority. Idaho Code § 39-416. The statute is difficult to decipher, but it appears that PHD rules are subject to legislative veto in some form—either by its reference to the APA or under its own terms (under a 2010 amendment). There is a strong argument, however, that PHD rules adopted prior to 2010 are not subject to sunsetting. Hence, if they were lawfully promulgated prior to 2010 and have not thereafter been affirmatively vetoed by the Legislature, they remain in effect.

PHDs derive their rulemaking authority from Idaho Code § 39-416(1) which authorizes public health districts to "adopt, amend, or rescind rules and standards" to carry out their statutory responsibilities. However, Idaho Code § 39-416(2) requires that the adoption, amendment, or rescission of PHD rules "shall be done in a manner conforming to the provisions of chapter 52, title 67, Idaho Code [the Idaho APA]."

Given that submission of pending rules to the Legislature is part of the rule promulgation process set out in the APA, it appears that PHD rules must comply with the legislative submission process and are subject to legislative veto. This conclusion is reinforced by a provision in the PHD statute that describes other procedural review requirements and then says that those steps shall occur "[a]t the same time that proposed rules are transmitted to the director of legislative services." Idaho Code § 39-416(3). (This language was part of the PHD statute prior to the 2010 amendment discussed below. So it must be referring to the legislative veto process under the APA, not the post-2010 process in section 39-416(5).)

By the same reasoning, it appears that section 39-416(2) requires that PHD rules should be published in IDAPA in a manner conforming to the APA. Likewise,

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[426] IDAPA 41.01.01 (rules of the Panhandle Public Health District #1) (allowing one septic system per five acres of land).

[427] In addition to not meeting the definition of "agency" in Idaho's APA (Idaho Code § 67-5201(2), the PHD statute expressly states that PHDs are not state agencies (Idaho Code § 67-401).

the APA's provisions regarding the adoption of temporary rules should also be applicable to PHDs. In other words, despite the fact that PHDs are not state agencies, their organic statute (Idaho Code § 39-416(2)) instructs and authorizes them to adopt rules in the same manner as state agencies.

In any event, the question of whether the APA legislative veto provisions apply to PHD rules via Idaho Code § 39-416(2) is now academic, due to a 2010 amendment to the PHD statute. In that year, the Legislature added a new subsection expressly subjecting PHD rules to a special form of legislative veto and sunset. H.B. 667a, 2010 Idaho Sess. Laws, ch. 310 (codified at Idaho Code § 39-416(5)). It states:

> Public health districts shall have all proposed rules regarding environmental protection or programs administered by the department of environmental quality submitted for review and comment to the state board of environmental quality and such rules must be approved by adoption of a concurrent resolution by both houses of the legislature or such rules shall expire at the conclusion of a regular session of the legislature. It is the intent of the legislature that standards and rules relating to subsurface sewage systems, wastewater treatment, sewage systems and water quality be consistent statewide.

Idaho Code § 39-416(5) (emphasis added).

Thus, under the 2010 amendment, all proposed PHD rules dealing with the environment must be affirmatively approved by concurrent resolution. If not so approved, these proposed rules expire at the end of the next legislative session. Saying that unapproved proposed rules "shall expire at the conclusion of a regular session of the legislature" indicates that the rules go into effect immediately upon promulgation by the agency, but quickly expire if not approved.[428]

In any event, only proposed rules (i.e., new rules) are required to be submitted to the Legislature for review. And only "such rules" are subject to sunset. Section 39-416 has no requirement that existing PHD rules be submitted to the Legislature for review and approval. Hence, existing PHD rules (promulgated prior to 2010) are not subject to the sunset provision contained within section 39-416(5).

[428] This is different from state agency rules under the APA legislative veto provision. Section 39-416(5) is not a "veto" provision, it is an "approval" provision. No veto is necessary because PHD rules promulgated after 2010 expire automatically if not approved. It is also different from how both fee rules and non-fee rules are treated under the APA. As discussed in section 47.D(2)(a) at page 462, fee rules do not go into effect until the end of the session; non-fee rules do not go into effect unless affirmatively approved.

This conclusion is reinforced by the legislative history of the 2010 amendment adding Idaho Code § 39-416(5). As initially proposed, H.B. 667 would have voided all PHD rules dealing with septic systems and other water quality requirements.[429] (Indeed, a statement to that effect is included in the "Statement of Purpose" for the bill.[430]) But that that provision was stricken from the bill before it was enacted. The resulting bill, as enacted, provides only that proposed rules (new rules) are subject to legislative approval and sunset.

As discussed above, section 39-416(2) requires that PHD rules be promulgated in a manner conforming to the APA. That provision probably sweeps in the APA's veto provision because legislative review is part of the APA's rule promulgation process. However, there is a strong argument that PHD rules are not subject to the APA's sunset provision. This is because the requirement in section 39-416(2) only requires that the "adoption, amendment, or rescission" of PHD rules be done "in a manner conforming to" the APA. It says nothing about those rules expiring in a manner conforming to the APA.

At the end of the day, the statute remains difficult to apply and the analysis provided here might not be the one adopted by a court. At best, the "no sunset" argument applies only to PHD rules that were promulgated prior to the 2010 enactment of section 39-416(5). And there is no doubt that rules promulgated after 2010 survive no longer than the end of the legislative session following their promulgation.

Since 2019, PHDs (like executive agencies) have engaged in the process of re-promulgating temporary rules and proposed rules each year. In 2022, the Governor once again authorized PHDs to adopt temporary rules. Given the uncertainty over how the statutes work, compounded by current legislative conditions, PHDs are well advised to take advantage of that opportunity and continue the process of promulgating temporary and proposed rules.

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[429] As introduced, H.B. 667 began with this provision: "Notwithstanding the foregoing or any other provision of law, all rules of public health districts relating to subsurface sewage systems, wastewater treatment, sewage systems and water quality shall be null, void and of no force and effect at the conclusion of the first regular session of the sixty-first Idaho legislature."

[430] The Statement of Purpose for H.B. 667 read in part: "This bill would make all existing district rules null, void, and of no force and effect. Thereafter public health districts shall have the approval of the Board of Environmental Quality to promulgate rules relating to subsurface sewage systems, wastewater treatment, sewage systems and water quality and such rules must be approved by both houses of the legislature."

48. CONVEYANCING AND THE STATUTE OF FRAUDS

In the case of *Lexington Heights v. Crandlemire*, 140 Idaho 276, 92 P.3d 526 (2004) (Eismann, J.), the Idaho Supreme Court imposed a rigorous standard for specificity of the lands to be conveyed. (Although the case dealt with the sale of land, presumably it would apply equally to water right deeds.) The Court invalidated a real estate contract that identified 95 acres of land for sale, but excluded 5 acres around a house "the precise boundaries of which to be mutually agreed by the parties after a survey." The Court said this violated the statue of frauds, because it left a critical aspect of the contract undecided.

In agreements conveying a portion of a water right, it is often contemplated that the parties will designate, at a subsequent time, exactly which acres of land within the farm property are to be dried up. Although the Court did not offer such an example, it may be that such a subsequent designation would meet the *Lexington Heights* test so long as the seller (or the buyer) may unilaterally select the acres. In this way, there is a definitive mechanism – described within the four corners of the conveyance document – to define this essential term.

On the other hand, a niggardly reading of *Lexington Heights* might throw even this arrangement into question. Consequently, the safer approach may be to build in an additional back-up mechanism, such that, if the designated party fails to specify the land and water rights by a specified time, some previously designated description will apply by default.

In any event, an agreement calling for the acres to be selected pursuant to a subsequent mutual agreement plainly would run afoul of *Lexington Heights*, rendering the contract unenforceable under the statute of frauds.

Today, *Lexington Heights* is but one of many cases addressing this issue.[431]

[431] The courts' long-held standard requires a writing to "contain a description of the property, either in terms or by reference, so that the property can be identified without resort to parol evidence." *Ray v. Frasure*, 200 P.3d 1174, 1177 (Idaho 2009) (finding that a street address was not an adequate property description because "[t]he physical address gives no indication of the quantity, identity, or boundaries of the real property." *Id.* at 1179). *See also, Allen v. Kitchen*, 100 P. 1052 (Idaho 1909) (ruling that a description failed to satisfy the Statute of Frauds where it stated "Lots 11, 12, and 13, in block 13, Lemp's addition" and "Lot 27, Syringa Park addition, consisting of 5 acres" yet failed to indicate "the city, county, state, or other civil or political division or district in which any of the property is located." *Id.* at 1053); *White v. Rehn*, 103 Idaho 1 (1982) (striking down as inadequate an agreement describing the land to be conveyed as "all land west of road running south to the Rehn farmstead containing 960 acres. Exact acreage to be determined by survey." *Id.* at 3); *Garner v. Bartschi*, 139 Idaho 430 (2003) (finding that the reference to three tax notices and a county plat was not an adequate property description because "one cannot tell exactly what property was being conveyed by the Bartschis merely by the descriptions contained in those referenced documents" and "there is not a copy of the "Bear River County Plat" in the record." *Id.* at 435-36).

In *616 Inc. v. Mae Properties*, 2023 WL 1807737 (Feb. 2, 2023, Idaho) (Brody, J.), the Court doubled down on *Lexington Heights*. In this case, the owner of a commercial property (a print shop) within a multi-unit building entered into a contract (the "APA") for sale of the business assets (including such things as shop equipment, raw materials, customer lists, etc.) for $150,000. The APA referenced an Asset List enumerating the various items of business assets to be included in the sale, but that document was not finalized until a few months after the sale was consummated. In section 6 of the APA, the seller of the business assets "hereby agrees to lease the Business Premises to Buyer" for a renewable term of five years, specifying the monthly rent and other terms. Apparently, the parties contemplated that the lease itself would be negotiated thereafter. After the APA was executed, the buyer moved into Suite 100 of the subject property and began paying rent. However, after 18 months, they failed to agree on lease terms, whereupon the buyer sued the seller seeking a declaratory judgment (and other relief) to the effect that the APA itself created a lease. The seller counter-claimed.

Relying on *Lexington Heights*, *Ray*, and other precedent, the Court found that the terms of section 6 of the APA fell short of meeting the standards under the statute of frauds applicable to leases of one year or more. Notably, the property was inadequately described and the term and manner of lease payments were not sufficiently specific.

In 2009, the United States District Court for the District of Idaho concluded, "this requirement is exacting." *Magnolia Enterprises, LLC v. Schons*, 2009 WL 1658022, *4 (D. Idaho 2009) (unpublished). The District Court went on to invalidate two agreements regarding the sale of a particular property. *Id.* at *5 ("While the parties' agreements provided for a survey of the conveyed property to be conducted after the contracts had been signed, there is no explicit provision as to how the conveyed property was to be distinguished from the retained property. As such, the agreements did not make a clear and unambiguous reference to an extrinsic document containing a precise legal description of the "Seller's retained property.")