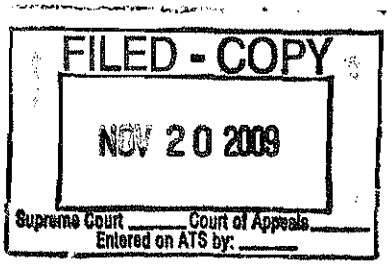
11-20-2009

In Re City of Shelley Appellant's Brief Dckt. 36481

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE: ANNEXATION TO THE CITY OF SHELLEY	Docket No. 36481-2009
ROGER STEELE, et. al. Petitioners/Appellants, vs.	
CITY OF SHELLEY, a Municipal Corporation, Respondents.	Bingham County No. 2008-2965



APPELLANTS' BRIEF

Appeal from the District Court of the Seventh Judicial District for Bingham County
Honorable Darren B. Simpson, District Judge, Presiding

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STATEMENT OF THE CASE

1. FACTUAL EVENTS

A. Planning and Zoning. The City of Shelley is a municipal corporation located in Bingham County, Idaho. The City of Shelley desired to annex and re-zone an area of land commonly known as Kelley Acres Subdivision. The City submitted an application for this process. (Administrative Record pp. 2-6). The residents of this subdivision desired to remain within the County of Bingham and opposed the annexation and re-zone. A Planning and Zoning meeting was held on October 15, 2008 with minutes being prepared to correspond with the proposed matter. (Administrative Record pp. 7-11).

At the Planning and Zoning hearing no one appeared in favor of the annexation. The residents of Kelley Acres appeared and unanimously voiced their objection to annexation and re-zone. Some of the concerns voiced were increased tax costs, lowering of re-sale values, animal restrictions, less economical sanitary removal systems, increased costs to place curb and gutter, etc. (Administrative Record, pp. 7-10).

The City Council had tried, unsuccessfully, to annex the property on prior occasions. (See, Steele testimony, Administrative Record, p. 8; See also, Administrative Record, pp. 58-59 of "Statement of Non-Consent to Annexation). The City of Shelley had tried on three (3) occasions since 1964 to annex the property without success.

Notwithstanding the objections and receiving no favorable input, the Planning and Zoning Commission recommended annexation and re-zone to the City Council of Shelley.

B. City Council. The City of Shelley conducted a hearing on November 25, 2008 to consider the recommendation of annexation and re-zone submitted by the Planning and

Zoning Commission. Minutes of that meeting are set forth in the Administrative record at pp. 19-24. No one testified in favor of the annexation. No evidence or input of any kind was presented at the hearing, from any source, in favor of annexation.

The residents of Kelley Acres withdrew any form of consent to annex that could be implied by water services. (See Administrative Record, pp. 58-59). Additionally, hundreds of residents of the City filed objections, by way of petition, to present to the City Council additional testimony that current residents did not want annexation. (Administrative Record, pp. 60-71). Not one iota of evidence supported the decision to annex the "Kelley Acres" land. The record is totally devoid of any evidence supporting the council decision.

Despite the objections and lack of any evidence in favor of annexation, the City Council approved the annexation and re-zone at the November 25, 2008 hearing. No written decision or notice was provided to the appellants.

A city ordinance (Ordinance No. 524) was passed by the council and mayor dated December 9, 2008. This ordinance was not provided to the petitioners and was unknown until the preparation of the administrative record. The ordinance was never published in any newspaper nor provided in any postings. This document reflects a recording date of December 10, 2008. (See Administrative Record, pp. 43-57). December 9, 2008 is the day that the appellants filed their petition for judicial review with the district court which was received on December 10, 2008. (Clerk's Record, pp. 3-6).

C. District Court. The district court heard this matter and, ultimately, dismissed the petition.

2. LEGAL EVENTS

The appellants appealed the decision of the Mayor and City Council by judicial

review, in timely fashion, which was received in Bingham County on December 10, 2008. (Record, pp. 3-6). After various motions and briefing, the District Court, via Hon. Darren B. Simpson, dismissed the appeal and judicial review petition. (Clerk's Record, pp. 44-52).

The appellants timely appealed this matter to the above-captioned court. (Clerk's Record, pp. 54-56).

ISSUES ON APPEAL

1. The respondents failed to notify the appellants, in written form, of its annexation decision-procedural.

2. The decision of the City Council was arbitrary and capricious.

3. No basis for the statutory requirements of contiguous and of following the comprehensive plan is present from the evidentiary hearing.

4. The annexation proposal by the City is not a Category A annexation but rather a potential Category B annexation.

ADDITIONAL ISSUES ON APPEAL

1. The Appellants request their costs and fees at trial.

2. The Appellants request their costs and fees on appeal.

ARGUMENT

1. INTRODUCTION.

The crux of the case before this court is the ability to classify and to decide upon annexation by a city entity. The classification of an annexation procedure is critical. The Idaho statutory scheme on annexation discusses this matter. However, procedural deficiencies exist which may moot the substantive issues before the court.

2. THE RESPONDENTS FAILED TO NOTIFY THE APPELLANTS IN WRITTEN FORM OF ITS ANNEXATION DECISION-PROCEDURAL

Subsequent to the hearing before the City Council of Shelley, no written decision was ever provided to the appellants to form a meaningful appeal to the district court. (See, Clerk's Record, p. 45, footnote 5). Additionally, after receiving the administrative record on appeal to this court, it was learned that the City Council had prepared an ordinance of annexation that was never published as required by law. The appellants had no way of determining the reasoning or decision of the City Council.

> The style of all ordinances shall be: "Be it ordained by the mayor and council of the city of ....." and all ordinances of a general nature, unless otherwise required by law, *shall*, before they take effect and within one (1) month after they are passed, *be published* in full or by summary as provided in > section 50-901A, Idaho Code, in at least one (1) issue of the official newspaper of the city, or mailed as provided in > section 60-109A, Idaho Code; (emphasis supplied).
>
> ID ST Sec. 50-901, Ordinances--Style--Publication--When effective--Immediate operation in emergencies
> ---------- Excerpt from page 40116.

See also,

> . . . appropriate district court no later than twenty-eight (28) days after the date of publication of the annexation ordinance.
> ID ST Sec. 50-222, Annexation by cities
> ---------- Excerpt from page 39770.

Additionally, see:

> . . . shall be concluded with the passage of an ordinance of annexation.
>
> ID ST Sec. 50-222, Annexation by cities
> ---------- Excerpt from page 39767.

The administrative record is very clear that the proposed ordinance was never published, posted or "published by mailing". Procedurally, the City has not complied and the annexation and re-zone is null and void. Further, the City did not opt to publish in summary form pursuant to I.C. § 50-901A. Nor did the City avail itself of publication by mailing. I.C. § 60-109A.

The appellants were unaware of any ordinance or other written decision. Due process was lacking.

> However, *specific findings* and notice of meetings--from which we infer the right to a reasonable opportunity to present and to rebut evidence--have been recognized as fundamental elements of procedural due process in a variety of contexts. See, e.g., > Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); > Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).
>
> *Gay v. County Com'rs of Bonneville County*, 651 P.2d 560, 103 Idaho 626, (Idaho App. 1982)
> ---------- Excerpt from page 651 P.2d 563.

The actions of the City Council are null and void. The City Council and Mayor failed to provide the appellants any written reasoning, knowing the appellants had counsel in this matter. Further, a complete failure of notification through publication methods occurred. The actions of the Council are procedurally defective and the decision to annex and re-zone should be declared null and void.

3. THE DECISION OF THE CITY COUNCIL WAS ARBITRARY AND CAPRICIOUS.

It only follows that if a total lack of evidence exists in the record to support a position or decision, then an administrative tribunal that does not follow the existing evidence is acting in an unauthorized manner. The City (and at the Planning and Zoning hearing)

failed to have any auditor, clerk, patron or other expert or lay person to testify, at any hearing, as to any need for annexation. Further, no studies, written evidence or exhibits were submitted in favor of the annexation. Some of the factors for production of evidence could have been financial, feasibility of adjoining lands, desire to expand the city boundaries, city infrastructure or the like. Not one of these or other factors was ever presented in the administrative hearing. Both the transcript of the proceeding and the administrative minutes/record show a lack of any evidence supporting the decision of the City.

Once again, the case cited above, which is the fundamental case in Idaho on administrative due process and of arbitrary actions is illustrative. (See, Gay, supra.).

> An action is capricious if it was done without a rational basis. > Enterprise, Inc. v. Nampa City, 96 Idaho 734, 536 P.2d 729 (1975). It is arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles. id.
>
> *American Lung Ass'n of Idaho/Nevada v. State, Dept. of Agriculture*, 130 P.3d 1082, 142 Idaho 544, (Idaho 2006)
> ---------- Excerpt from page 130 P.3d 1085.

Without any supporting factual basis in the record, the actions are arbitrary and without a rational basis. Therefore, the actions are also capricious.

> However, this Court defers to the agency's findings of fact unless those findings are clearly erroneous and unsupported by evidence in the record. > Lamar Corp. v. City of Twin Falls, 133 Idaho 36, 39, 981 P.2d 1146, 1149 (1999). Therefore, this Court may not substitute its judgment for that of the agency as to the weight of the evidence presented in the record. > Id.
>
> A strong presumption of validity favors an agency's actions. > Id. An agency's order must be upheld by the reviewing court unless its decision: (a) violates statutory or constitutional provisions; (b) exceeds the agency's statutory authority; (c) is made upon unlawful procedure; (d) is not supported by substantial evidence in the record; or (e) is arbitrary, capricious,

or an abuse of discretion. > I.C. § 67-5279(3). Finally, this Court will affirm an agency's action regardless of any errors unless a substantial right of the appellant has been prejudiced. > Lamar Corp., 133 Idaho at 39, 981 P.2d at 1149.

Rammell v. Idaho State Dept. of Agriculture, 210 P.3d 523, 147 Idaho 415, (Idaho 2009)
---------- Excerpt from page 210 P.3d 527.

No evidence is contained in the agency record that was presented at hearing. The transcript of the hearing before the City Council is devoid of any evidence supporting the annexation and re-zone. Further, no evidence is contained in the agency record that was submitted to the Planning and Zoning Commission.

Clearly, the decision is erroneous and unsupported by evidence in the record which makes the actions of the City arbitrary, capricious and an abuse of direction. The hearing before the City Council was "pre-decided" and amounted to a "sham" hearing for the appellants. Obviously, the City Council was going to annex regardless of the evidence.

4. NO BASIS FOR THE STATUTORY REQUIREMENTS OF CONTIGUOUS AND OF FOLLOWING THE COMPREHENSIVE PLAN IS PRESENT FROM THE EVIDENTIARY HEARING.

Annexation requires proof of land being contiguous and not "shoe-string" in nature. Also, the annexation process requires that the same is in accord with the Comprehensive Plan of the City. (See, I.C. § 50-222 Category A which the City relies upon for its annexation. Appellants believe that Category B should have been followed.) No proof of these factual and evidentiary concerns is present. A full evidentiary hearing was requested of the district court to address these concerns. The court denied the request of the appellants by granting the motion to dismiss.

The evidentiary hearing before the City shows numerous individuals testimony of the concerns on contiguous to City land and of compliance with a comprehensive plan. Counsel for the appellants pointed out these concerns to the City Council to consider before rendering a decision. (See, transcript, pp. 12-16). The City Council has none of these factual matters in the administrative hearing record. There are examples of direct testimony which show these points are lacking, see testimony of Mr. Christensen, transcript pp. 47-48 (not contiguous); and, Mr. Anderson, Tr. pp. 55-60 (no provisions in comprehensive plan for annexation of this area). The transcript and administrative record shows no evidence disputing these points.

At a prior attempt to annex in February of 2008, no council members would make such a motion [to annex]. This Council indicated nothing had changed since the February meeting. (Tr. pp. 55-56). These statements further support the arbitrary nature of the decision as discussed earlier. The Comprehensive Plan of Shelley makes no provisions and had not been updated to make such a provision of the area containing Kelly Acres Subdivision.

The testimony of appellants shows that it is not in the best interests of the appellants or of the City to annex. Counsel for the appellants summarized the ten (10) points which were supported by individual testimony at the administrative hearing before the City Council as follows:

1. Tax increase,
2. Snow removal by county instead of city,
3. Private garbage vs. city collection,
4. Right to have animals on property lots,
5. Lots not designed as city lots and primarily 5 acre lots,
6. Infrastructure already in place,
7. Rural setting for over 30 years,

8. Not Category A annexation,
9. Curb and gutter potential requirements, and
10. Sewer services. (Tr. pp. 17-20; see also Minutes, Administrative Record, pp. 19-20.)

These considerations were not discussed by the Council although the patrons testified on these points.

5. THE ANNEXATION PROPOSAL BY THE CITY IS NOT A CATEGORY A ANNEXATION BUT RATHER A POTENTIAL CATEGORY B ANNEXATION.

The crux of this case is the category of annexation. Idaho Code § 50-222 comes into play and is set forth in its entirety for referral hereafter:

> (1) Legislative intent. The legislature hereby declares and determines that it is the policy of the state of Idaho that cities of the state should be able to annex lands which are reasonably necessary to assure the orderly development of Idaho's cities in order to allow efficient and economically viable provision of tax-supported and fee-supported municipal services, to enable the orderly development of private lands which benefit from the cost-effective availability of municipal services in urbanizing areas and to equitably allocate the costs of public services in management of development on the urban fringe.
>
> (2) General authority. Cities have the authority to annex land into a city upon compliance with the procedures required in this section. In any annexation proceeding, all portions of highways lying wholly or partially within an area to be annexed shall be included within the area annexed unless expressly agreed between the annexing city and the governing board of the highway agency providing road maintenance at the time of annexation. Provided further, that said city council shall not have the power to declare such land, lots or blocks a part of said city if they will be connected to such city only by a shoestring or strip of land which comprises a railroad or highway right-of-way.
>
> (3) Annexation classifications. Annexations shall be classified and processed according to the standards for each respective category set forth herein. The three (3) categories of annexation are:
>
> (a) Category A: Annexations wherein:
>
> (i) All private landowners have consented to annexation. Annexation where all landowners have consented may extend beyond the city area of impact provided that the land is contiguous to the city and that the comprehensive plan includes the area of annexation;
>
> (ii) Any residential enclaved lands of less than one hundred (100)

privately-owned parcels, irrespective of surface area, which are surrounded on all sides by land within a city or which are bounded on all sides by lands within a city and by the boundary of the city's area of impact; or

(iii) The lands are those for which owner approval must be given pursuant to subsection (5)(b)(v) of this section.

(b) Category B: Annexations wherein:

(i) The subject lands contain less than one hundred (100) separate private ownerships and platted lots of record and where not all such landowners have consented to annexation; or

(ii) The subject lands contain more than one hundred (100) separate private ownerships and platted lots of record and where landowners owning more than fifty percent (50%) of the area of the subject private lands have consented to annexation prior to the commencement of the annexation process; or

(iii) The lands are the subject of a development moratorium or a water or sewer connection restriction imposed by state or local health or environmental agencies; provided such lands shall not be counted for purposes of determining the number of separate private ownerships and platted lots of record aggregated to determine the appropriate category.

(c) Category C: Annexations wherein the subject lands contain more than one hundred (100) separate private ownerships and platted lots of record and where landowners owning more than fifty percent (50%) of the area of the subject private lands have not consented to annexation prior to commencement of the annexation process.

(4) (a) Evidence of consent to annexation. For purposes of this section, and unless excepted in paragraph (b) of this subsection (4), consent to annex shall be valid only when evidenced by written instrument consenting to annexation executed by the owner or the owner's authorized agent. Written consent to annex lands must be recorded in the county recorder's office to be binding upon subsequent purchasers, heirs, or assigns of lands addressed in the consent. Lands need not be contiguous or adjacent to the city limits at the time the landowner consents to annexation for the property to be subject to a valid consent to annex; provided however, no annexation of lands shall occur, irrespective of consent, until such land becomes contiguous or adjacent to such city.

(b) Exceptions to the requirement of written consent to annexation. The following exceptions apply to the requirement of written consent to annexation provided for in subsection (4)(a) of this section:

(i) Enclaved lands: In category A annexations, no consent is necessary for enclaved lands meeting the requirements of subsection (3)(a)(ii) of this section;

(ii) Implied consent: In category B and C annexations, valid consent to annex is implied for the area of all lands connected to a water or wastewater collection system operated by the city if the connection was requested in writing by the owner, or the owner's authorized agent, or completed before July 1, 2008.

(5) Annexation procedures. Annexation of lands into a city shall follow the procedures applicable to the category of lands as established by this section. The implementation of any annexation proposal wherein the city council determines that

annexation is appropriate shall be concluded with the passage of an ordinance of annexation.

(a) Procedures for category A annexations: Lands lying contiguous or adjacent to any city in the state of Idaho may be annexed by the city if the proposed annexation meets the requirements of category A. Upon determining that a proposed annexation meets such requirements, a city may initiate the planning and zoning procedures set forth in chapter 65, title 67, Idaho Code, to establish the comprehensive planning policies, where necessary, and zoning classification of the lands to be annexed.

(b) Procedures for category B annexations: A city may annex lands that would qualify under the requirements of category B annexation if the following requirements are met:

(i) The lands are contiguous or adjacent to the city and lie within the city's area of city impact;

(ii) The land is laid off into lots or blocks containing not more than five (5) acres of land each, whether the same shall have been or shall be laid off, subdivided or platted in accordance with any statute of this state or otherwise, or whenever the owner or proprietor or any person by or with his authority has sold or begun to sell off such contiguous or adjacent lands by metes and bounds in tracts not exceeding five (5) acres, or whenever the land is surrounded by the city. Splits of ownership which occurred prior to January 1, 1975, and which were the result of placement of public utilities, public roads or highways, or railroad lines through the property shall not be considered as evidence of an intent to develop such land and shall not be sufficient evidence that the land has been laid off or subdivided in lots or blocks. A single sale after January 1, 1975, of five (5) acres or less to a family member of the owner for the purpose of constructing a residence shall not constitute a sale within the meaning of this section. For purposes of this section, "family member" means a natural person or the spouse of a natural person who is related to the owner by blood, adoption or marriage within the first degree of consanguinity;

(iii) Preparation and publication of a written annexation plan, appropriate to the scale of the annexation contemplated, which includes, at a minimum, the following elements:

(A) The manner of providing tax-supported municipal services to the lands proposed to be annexed;

(B) The changes in taxation and other costs, using examples, which would result if the subject lands were to be annexed;

(C) The means of providing fee-supported municipal services, if any, to the lands proposed to be annexed;

(D) A brief analysis of the potential effects of annexation upon other units of local government which currently provide tax-supported or fee-supported services to the lands proposed to be annexed; and

(E) The proposed future land use plan and zoning designation or designations, subject to public hearing, for the lands proposed to be annexed;

(iv) Compliance with the notice and hearing procedures governing a zoning district boundary change as set forth in > section 67-6511, Idaho Code, on the

question of whether the property should be annexed and, if annexed, the zoning designation to be applied thereto; provided however, the initial notice of public hearing concerning the question of annexation and zoning shall be published in the official newspaper of the city and mailed by first class mail to every property owner with lands included in such annexation proposal not less than twenty-eight (28) days prior to the initial public hearing. All public hearing notices shall establish a time and procedure by which comments concerning the proposed annexation may be received in writing and heard and, additionally, public hearing notices delivered by mail shall include a one (1) page summary of the contents of the city's proposed annexation plan and shall provide information regarding where the annexation plan may be obtained without charge by any property owner whose property would be subject to the annexation proposal.

(v) In addition to the standards set forth elsewhere in this section, annexation of the following lands must meet the following requirements:

(A) Property, owned by a county or any entity within the county, that is used as a fairgrounds area under the provisions of chapter 8, title 31, Idaho Code, or chapter 2, title 22, Idaho Code, must have the consent of a majority of the board of county commissioners of the county in which the property lies; and

(B) Property, owned by a nongovernmental entity, that is used to provide outdoor recreational activities to the public and that has been designated as a planned unit development of fifty (50) acres or more and does not require or utilize any city services must have the express written permission of the nongovernmental entity owner.

(vi) After considering the written and oral comments of property owners whose land would be annexed and other affected persons, the city council may proceed with the enactment of an ordinance of annexation and zoning. In the course of the consideration of any such ordinance, the city must make express findings, to be set forth in the minutes of the city council meeting at which the annexation is approved, as follows:

(A) The land to be annexed meets the applicable requirements of this section and does not fall within the exceptions or conditional exceptions contained in this section;

(B) The annexation would be consistent with the public purposes addressed in the annexation plan prepared by the city;

(C) The annexation is reasonably necessary for the orderly development of the city;

(vii) Notwithstanding any other provision of this section, railroad right-of-way property may be annexed pursuant to this section only when property within the city adjoins or will adjoin both sides of the right-of-way.

(c) Procedures for category C annexations: A city may annex lands that would qualify under the requirements of category C annexation if the following requirements are met:

(i) Compliance with the procedures governing category B annexations; and

(ii) Evidence of consent to annexation based upon the following

procedures:

(A) Following completion of all procedures required for consideration of a category B annexation, but prior to enactment of an annexation ordinance and upon an affirmative action by the city council, the city shall mail notice to all private landowners owning lands within the area to be annexed, exclusive of the owners of lands that are subject to a consent to annex which complies with subsection (4)(a) of this section defining consent. Such notice shall invite property owners to give written consent to the annexation, include a description of how that consent can be made and where it can be filed, and inform the landowners where the entire record of the subject annexation may be examined. Such mailed notice shall also include a legal description of the lands proposed for annexation and a simple map depicting the location of the subject lands.

(B) Each landowner desiring to consent to the proposed annexation must submit the consent in writing to the city clerk by a date specified in the notice, which date shall not be later than forty-five (45) days after the date of the mailing of such notice.

(C) After the date specified in the notice for receipt of written consent, the city clerk shall compile and present to the city council a report setting forth: (i) the total physical area sought to be annexed, and (ii) the total physical area of the lands, as expressed in acres or square feet, whose owners have newly consented in writing to the annexation, plus the area of all lands subject to a prior consent to annex which complies with subsection (4)(a) of this section defining consent. The clerk shall immediately report the results to the city council.

(D) Upon receiving such report, the city council shall review the results and may thereafter confirm whether consent was received from the owners of a majority of the land. The results of the report shall be reflected in the minutes of the city council. If the report as accepted by the city council confirms that owners of a majority of the land area have consented to annexation, the city council may enact an ordinance of annexation, which thereafter shall be published and become effective according to the terms of the ordinance. If the report confirms that owners of a majority of the land area have not consented to the annexation, the category C annexation shall not be authorized.

(6) The decision of a city council to annex and zone lands as a category B or category C annexation shall be subject to judicial review in accordance with the procedures provided in chapter 52, title 67, Idaho Code, and pursuant to the standards set forth in > section 67-5279, Idaho Code. Any such appeal shall be filed by an affected person in the appropriate district court no later than twenty-eight (28) days after the date of publication of the annexation ordinance. All cases in which there may arise a question of the validity of any annexation under this section shall be advanced as a matter of immediate public interest and concern, and shall be heard by the district court at the earliest practicable time.

(7) Annexation of noncontiguous municipal airfield. A city may annex land that is not contiguous to the city and is occupied by a municipally owned or operated airport or landing field. However, a city may not annex any other land adjacent to such noncontiguous facilities which is not otherwise annexable pursuant to this

section.

ID ST Sec. 50-222, Annexation by cities
---------- Excerpt from pages 39767-39771.

Clearly, judicial review is available for Category B and C annexations. The legislature made no provision, in this section, for judicial review of a Category A annexation. The City of Shelley has always believed and alleged that the instant annexation was performed under Category A. The appellants, even prior to any decision, always believed the proposed annexation was a Category B type. This position was brought to the attention of the City Council before any determination was ever announced.

The district court, without any evidence, determined that the City's determination controlled and the same was a Category A annexation. The court determined, however, that declaratory relief was an available option. (Court's Order Dismissing Appeal, Clerk's Record, pp. 44-53). Thus, the court determined that no right of appeal existed from a Category A annexation because the legislature did not provide the same. Appellants agree.

This Court has recently held in similar vein that unless a statute allows for appeal, no right exists. (See e.g., *Burns Holding LLC v. Madison County*, 147 Idaho 660-2009 WL 1959498; *Black Labrador Investing, LLC v. Kuna City Council*, 147 Idaho 92, 205 P.3d 1228 (2009)).

In the instant case, however, the battle is between Category A verses Category B. The district court considering the Rule 12(b)(6) motion specifically stated that "this court must consider the allegations made by Steele in the Petition as true." The petition alleged that this was a Category B procedure for annexation. Thus, the court could not contradict its own statement for the purpose of whether a claim for relief existed. (Clerk's Record at

47). Clearly, the petition states that the appellants considered this a Category B proposed annexation.

If the court desired to treat the matter as one for summary judgment, then affidavits, time schedules and briefing were necessary as provided in Rule 56. The court stated as such. (Clerk's Record at 46-47).

A category A classification requires the provisions of the statute to be followed. Category A annexations are designed for the routine and non-controversial annexations and "clean-ups" to City boundaries.

In the instant case, Category A does not apply for the following reasons which would have been more fully developed at an evidentiary hearing:

1. The private land owners did not consent.
2. The proposed land was not contiguous.
3. The proposed land was not included in the comprehensive plan as an area of annexation.

The appellants maintain that this proposal was a Category B attempt pursuant to 3(b)(i) of § 50-222. The relevance is a plan must be developed prior to annexation containing the requirements of 5(b)(iii) of § 50-222.

Category A annexation, in the instant case, is not possible for the reason that written consent was not given from the land owners. In fact, the land owners specifically withdrew and gave written notice of non-consent. (Agency Record, pp. 58-59, 73-74). Implied consent is only available to Category B and Category C annexations. (See 4(b)(ii) of §50-222). Thus, the City could not proceed under Category A.

Furthermore, the City did not follow the procedures contained in 5(a) for Category A annexation. Once again, the City's attempt to annex the subject property must fail.

ADDITIONAL ISSUES ON APPEAL

1. THE APPELLANTS REQUESTS THEIR COSTS AND FEES AT TRIAL.

Justice Jesse R. Walters, Jr. in his updated primer of the former Lon Davis manual on the award of attorney fees, *A Primer For Awarding Attorney Fees in Idaho,* Idaho Law Review, Volume 38, 2001, Number 1, indicates that the following steps are necessary for an award of fees and costs:

A. Prevailing party;

B. Statutory or contract basis for award of fees; and,

C. Compliance with Rule 54 of the Idaho Rules of Civil Procedure.

I.C. § 12-117 states:

> (1) Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.
> (2) If the prevailing party is awarded a partial judgment and the court finds the party against whom partial judgment is rendered acted without a reasonable basis in fact or law, the court shall allow the prevailing party's attorney's fees, witness fees and expenses in an amount which reflects the person's partial recovery.
>
> ID ST Sec. 12-117, Attorney's fees, witness fees and expenses awarded in certain instances
> ---------- Excerpt from page 5714.

The appellants relied upon and continue to rely upon I.C. § 12-117 for an award of fees at the district court level and at the administrative level. The dismissal by the district court could not be accomplished based upon the reasoning therein and as discussed above. The City, at the administrative level, acted arbitrarily and capricious. Fees should be awarded to appellants.

2. THE APPELLANTS REQUEST THEIR COSTS AND FEES ON APPEAL.

An award of attorney fees on appeal requires a statutory or contractual basis. Appellants rely upon Idaho Code § 12-117 and I.A.R., Rules 40 and 41 in their request for fees on appeal.

Fees are awarded on appeal as follows:

> Attorney fees can only be awarded under > I.C. § 12-117 if: (1) this Court finds in favor of a party and (2) the other party acted without a reasonable basis in fact or law.
> *Ada County Highway Dist. v. Total Success Investments, LLC*, 145 Idaho 360, 372, 179 P.3d 323, 335 (2008).

The City did not act with a reasonable basis in fact because it did not have consent of the land owners. Category A annexations cannot occur without written consent. Implied consent was not available. Thus, the City acted without a basis in fact or in law. Fees should be awarded to the appellants.

CONCLUSION

The appellants rely upon both procedural and substantive arguments for their relief as set forth above. The action of the district court should be reversed with the annexation being declared null and void.

Fees and costs should be awarded to the appellants.

DATED this 14 day of November, 2009.

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ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18 day of November, 2009, a true and correct copy of the foregoing was delivered to the following persons(s) by:

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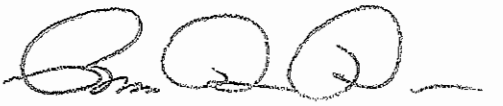

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