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IN THE SUPREME COURT OF THE STATE OF IDAHO

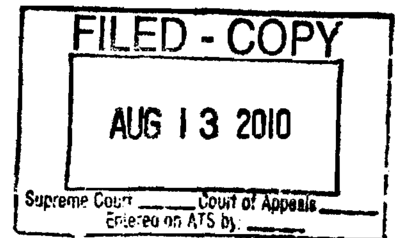
JAMES R. WYLIE, Plaintiff-Appellant, vs. STATE OF IDAHO, IDAHO TRANSPORTATION BOARD, and, THE CITY OF MERIDIAN, Defendants-Respondents.	)))))))))))))))))	Supreme Court No. 37279

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial
District of the State of Idaho, in and for the County of Ada

Honorable Timothy Hansen
District Judge, Presiding

E Don Copple Heather Cunningham Ed Guerricabeitia Davison Copple, Copple & Copple 199 North Capitol Blvd, Ste. 600 P.O. Box 1583 Boise, Idaho 83701-1583	Chris Kronberg Karl Vogt Deputy Attorney General Idaho Transportation Department 3311 W. State Street P.O. Box 7129 Boise, ID 83707	William Nary Emily Kane Meridian City Attny 33 E. Idaho Ave. Meridian, ID 83642
Attorneys for Appellant	Attorneys for ITD	Attorney for City of Meridian



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II. ARGUMENT

A. A justiciable controversy exists

The State asserts that Wylie did not address the issue of justiciability. However, the majority of the opening brief directly supports Wylie's position that he has presented a justicable issue. The District Court ruled that the Development Agreement precluded Wylie's ability to seek access independently of the City Ordinance, so deeming it invalid would provide Wylie no relief, i.e. the issue was moot. Wylie's position on appeal directly challenges the validity of the Development Agreement for three independent reasons. If Wylie prevails on any one of those theories (set forth below) then the case is justiciable:

1) There was no waiver or conveyance of the ability to seek access;[1]

2) The theory of field preemption makes the alleged waiver in the contract and the reference to the City Ordinance void, and therefore severable from the contract; and

3) The theory of ultra vires makes the case justiciable for the same reasons as field preemption.

1. Declaratory actions can be used to challenge municipal ordinances.

Declaratory judgments are governed by I.C. § 10-1201, which states:

> 10-1202. PERSON INTERESTED OR AFFECTED MAY HAVE DECLARATION. Any person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. (emphasis added).

In the context of the LLUPA, a party has standing if the zoning regulation adversely impacts their property. *See Evans v. Teton County*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003).

> LLUPA confers standing to seek judicial review of a local land use decision to an "affected person" aggrieved by the decision. I.C. § 67-6521(d). This Court notes that while it recognizes the underlying policy of I.C. § 67-6521(d) conferring standing to

[1] Appellant's Brief, pp 28-31 addresses these three points.

affected persons, the legislature cannot, by statute, relieve a party from meeting the fundamental constitutional requirements for standing. *See Noh v. Cenarrusa,* 137 Idaho 798, 53 P.3d 1217 (2002). An affected person is "one having an interest in real property which may be *adversely affected* by the issuance or denial of a permit authorizing the development." I.C. § 67-6521(a) (emphasis added).

Wylie owns property directly abutting SH 20/26, which creates a general right of access to SH 20/26, which is an interest in real property. Wylie applied for a zoning variance application and was denied based on City Ordinance 05-1171. This is functionally a denial of an access permit to SH 20/26 which adversely affects Wylie's real property interest.

Wyle disagrees that the Development Agreement, or any of the extrinsic evidence pointed out by ITD and the City, function as a waiver. Absent the Development Agreement, only City Ordinance 05-1171 is preventing Wylie from seeking access, and that was the only material reason the City denied his variance request for direct access to SH 20/26.

2. The Development Agreement is irrelevant because the alleged waiver is void.

Even if it is determined that Wylie is contractually bound from seeking access, there is a justiciable controversy because, as argued throughout the proceedings below, the provisions in the contracts which prevent Wylie from seeking access are void. They are void as ultra vires because the City has no power to restrict access to state highways. Contracts entered into with an entity that cannot control the subject matter of the contract are void. See *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006). They are also void because only ITD can regulate access to state highways. All of the Idaho case law cited to indicates that the law of contracts cannot be used to circumvent the express will of the Idaho Legislature.

The issues before this Court are not moot or hypothetical. If City Ordinance 05-1171 is deemed void, then the provisions in the contract created under its power or auspicious are void as well. Since the development agreement has a severance clause, then those illegal or

unenforceable portions of the contract are severed from the contract and all the valid provision remain.[2]

3. Hypothetical facts cannot be used to deny the justiciability of an actual controversy.

ITD has also asserted that ITD will deny access in the event the City cannot.[3] However, this is a mere assertion by counsel. Even though ITD initially denied Wylie's access permit, Wylie still has an administrative appeal pending. If after that appeal is taken, if Wylie has his agency appeal denied, he can still seek a judicial review from that denial. Moreover, if access is still denied, then Wylie will have perfected an inverse condemnation claim against the State by exhausting his administrative remedies. Counsel for ITD cannot speak for his client and assert that his client will deny the appeal. Moreover, Counsel for ITD cannot predict the result of a judicial review, in the event ITD denies the administrative appeal. Therefore, it is premature to deem this appeal moot based on mere assertions of counsel regarding future proceedings. No case or controversy exists when the alleged facts are hypothetical. An action cannot be dismissed as moot based on speculative and hypothetical facts or any other bold statements from State's Counsel.

4. An abutter's right of access is a property right.

Every owner of real property that abuts an existing roadway has an abutter's right of access.[4] Despite the line of authority cited by Wylie in his opening brief, the City has argued that the right of access is not a vested property right.[5] This court has held, "[t]he Idaho Constitution also guarantees its citizens the right of due process if <u>private property is taken for a public use</u>, pursuant to Article I, § 13, and provides for <u>just compensation for such a taking</u>, pursuant to

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[2] R. Vol. I, p. 198
[3] Brief of Respondent State of Idaho Idaho Transportation Department, p. 30.
[4] Appellants' Brief. p. 15.
[5] Respondent City of Meridian's Brief, pp. 24-30.

Article I, § 14." (emphasis added) *Moon v. North Idaho Farmers Ass'n*, 140 Idaho 536, 642, 96 P.3d 637, 541(2004). All the cases cited in Wylie's opening brief are condemnation cases. In those cases the issue being addressed was under what circumstances the taking of the property right of access is compensable. The general rule in all those cases is that an abutter's right of access is a cognizable real property interest which must be compensated for when appropriated by a governing entity.

The City argues that these cases predated the LLUPA and the creation of the ITD's Board.[6] The City points to no code provision or any other authority indicating that either of these two events were intended to alter the basic real property law in Idaho. Just because the State[7] has the ability to regulate a private citizen's ability to exercise their property right of access, does not mean that the creation of ITD has destroyed previously existing property rights.

The basic rules of statutory construction cut against the City's assertion. "Statutes are construed under the assumption that the legislature was aware of all other statutes and legal precedence at the time the statute was passed." *McCann v. McCann,* 138 Idaho 228, 236, 61 P.3d 585, 593 (2002) (internal citation omitted); *See also Ahles v. Tabor,* 136 Idaho 393, 396, 34 P.3d 1076, 1079 (2001) ("In utilizing specific terms in a statute, it must be presumed, unless indicated otherwise, that the legislature intended those terms to be interpreted in accordance with existing judicial decisions.") (internal citation omitted). "The legislature is presumed not to intend to overturn long established principles of law unless an intention to do so plainly appears by express declaration or the language employed admits of no other reasonable construction." *McCann v. McCann,* 138 Idaho 228, 236, 61 P.3d 585, 593 (2002) (internal citation omitted).

[6] Respondent City of Meridian's Brief, p. 26.
[7] Wylie contests that the LLUPA is even a statute dealing with property rights or highways.

What the City is asserting would require an amendment to the Idaho Constitution. Article I, § 14 of the Idaho Constitution states that property cannot be taken without just compensation. *See City of Pocatello v. Anderton*, 106 Idaho 370, 374-75, 679 P.2d 647, 651-52 (1984) ("[...A]n eminent domain proceeding is a *constitutional action,* and not one created by the legislature, or by the courts. So postured, it is beyond the power of the courts or of the legislature to deprive a property owner of his property without paying a fair and just compensation [...]") (original emphasis) (internal citations omitted). There is absolutory no authority whereby the State can redefine real property to avoid the requirements of Article I, § 14 of the Idaho Constitution. There is no difference between this argument and asserting that the legislature can define real property to not include attached structures, to avoid paying just compensation for the condemnation of people's homes.

The definition of real property as contained in I.C. § 55-101 was not amended when the LLUPA was passed and ITD was created. I.C. § 55-101(3) states:

> REAL PROPERTY DEFINED. Real property or real estate consists of:
> 3. That which is appurtenant to land.

That which is appurtenant to the land are property rights, and access easements, by their very nature, constitute appurtenant easements. *See Killinger v. Twin Falls Highway Dist.*, 135 Idaho 322, 325, 17 P.3d 266, 269 (2000) ("This Court has recognized the right of a property owner to access a public way is a vested property right appurtenant to the land abutting the public way in question, and that an unreasonable limitation upon such a right may constitute a taking requiring compensation.") (emphasis added) (*citing to Brown v. City of Twin Falls,* 124 Idaho 39, 41, 855 P.2d 876, 878 (1993) (citing *Johnston v. Boise City,* 87 Idaho 44, 390 P.2d 291 (1964); *Farris v. City of Twin Falls,* 81 Idaho 583, 347 P.2d 996 (1959); *Hughes v. State,* 80

Idaho 286, 328 P.2d 397 (1958)); *see also Bare v. Dept. of Highways,* 88 Idaho 467, 471, 401 P.2d 552, 554 (1965)).

5. The government's ability to regulate access does not alter its nature as a property interest.

The City has pointed to cases that stand for the proposition that when the government regulates access, as opposed to directly condemning it, then sometimes the government does not have to pay just compensation for the that impairment of a property right. *See Mabe v. State ex rel. Rich*, 83 Idaho 222, 360 P.2d 799 (1961), etc....[8] However, the very fact that the State compensates property owners for condemning their access presupposes they are property rights because just compensation is only paid when property is condemned.

Further, the City asserts that access must be a vested property right and Wylie's access rights are not vested.[9] The City cited no authority for this proposition. The property right of access is not created by ITD's decision to grant an access permit, nor does the existence of LLUPA affect the existence of access rights in Idaho property law. The property right of access is vested when an individual obtains an ownership interest a free hold or lease hold estate. Ownership of an access right exists outside of any government regulation. It is only upon the property owner's decision to exercise that property right that the government enters the equation, and may reasonably regulate the right. If ITD decides to deny an access permit, then the property owner has a cause of action in inverse condemnation, for the regulatory condemnation of a property right. At that point in time, the case law dealing with a regulation of access becomes relevant.

Since the right of access is a real property interest, absent a deed conveying access rights, or a court order condemning access rights, they were not conveyed, and can still be exercised by

[8] Respondent City of Meridian's Brief, pp. 25-26.
[9] Respondent City of Meridian's Brief, pp. 25-27.

Wylie. Any statement made by Wylie or his predecessor in interest that they were not intending to seek access does not mean they conveyed or deeded their property rights to the City.

The manner in which the City uses the word vested implies that access rights must be perfected or recognized by a government entity before they become a legally cognizable interest. However, the City does not cite to, nor is Wylie is aware of, any authority which supports this position. An access permit merely guarantees access at a specific location, but it is not a condition precedent to the creation of the property interest referred to as a right of access. As stated above, access easements are appurtenant rights which are part of an estate in land. An ownership or leasehold interest in real estate is all that is needed to have a vested access right.

6. Neither Wylie nor his predecessor in interest waived the ability to seek access to SH 20/26.

In the proceedings below, the only evidence in support of the issue of waiver was the statement used by the Trial Court, which follows:

> The subject property does have frontage along Chinden Boulevard (State Highway 20-26) but is not proposing direct access to that facility.[10]

Wylie's opening brief sets forth his position that this does not evince a contractual waiver of Wylie's ability to seek access to SH 20/26.[11]

In the City's and ITD's briefs they argue waiver far more extensively than they did below, where only passing references to facts no apparently relied upon are made, in support of their waiver theory.[12] These are addressed below.

[10] R. Vol. II, p. 210.
[11] Appellant's Brief, pp. 28-31.
[12] Brief of Respondent, State of Idaho Idaho Transportation Department, pp 4-8 and Respondent City of Meridian's Brief, pp. 7-12

7. Extrinsic evidence is barred by the parol evidence rule.

The State points out that Wylie's predecessor in interest made several representations that the Subdivision would not request a variance from the Meridian Zoning ordinance.[13]

Idaho adheres to the parol evidence rule. "The parol evidence rule is a rule of contract interpretation which forbids the admission of evidence concerning prior or contemporaneous agreements for the purpose of varying or contradicting a later writing. Thus, in the case of a fully integrated and executed written contract, the intent of the parties must be determined by reference to the writing and not to prior or contemporaneous agreements." *Miller Const. Co. v. Stresstek, a Div. of L.R. Yegge, Co.*, 108 Idaho 187, 190, 697 P.2d 1201, 1204(Ct. App. 1985). "A written contract that contains a merger clause is complete upon its face." (internal citation omitted) *Howard v. Perry*, 141 Idaho 139, 142, 106 P.3d 465, 468 (2005).

Section 21 of the development agreement contains a merger or integration clause.[14] In accordance with *Howard, supra*, the existence of this clause indicates that the Development Agreement is a complete and final agreement. Therefore, any prior or contemporaneous evidence used by the either the State or the City to add a term of waiver into the Development Agreement must be rejected. *See Miller Const., supra.*

The State cites no authority that Wylie is bound by negotiations that were not part of the Development Agreement, which is also barred by the parol evidence rule. More importantly, one portion of the record relied on by the State provides that the only reason direct access was not sought by Wylie's predecessor in interest was the existence of the City's zoning ordinance being challenged in this appeal. "The enclosed applications have been submitted in accordance with the requirements of the Meridian Zoning Ordinance. As a result, this application does not

[13] Brief of Respondent, State of Idaho Idaho Transportation Department, p. 4.
[14] R. Vol. I, pp 198-199.

include a request for variance or deviation from the ordinance."[15] Again, this language does not indicate any intention to forego the ability to seek access in the future.

8. The statute of frauds prevents oral conveyances of access rights.

The State also points out that the Development Agreements reference representations made by Wylie's predecessor in interest at public meetings.[16] These representations are not contractually binding, and if oral are within the statute of frauds.

In *Hughes v. State*, 80 Idaho 286, 295, 328 P.2d 397, 402 (1958), this Court pointed out that an abutters right of access is an interest in real property. The specific language used follows:

> Our review of Idaho's Constitution, statutes and decisions, clearly shows that the power of eminent domain extends to every kind of property taken for public use, including the **right of access to public streets, such being an estate or interest in and appurtenant to real property**; and since such right of access constitutes an interest in**, by virtue of being an easement appurtenant to, a larger parcel**, the court, jury or referee *must ascertain and assess* the damages which will accrue to the portion not sought to be condemned by reason of the severance of the portion-the right of access-sought to be condemned, and the construction of the improvement. (citation omitted).

Idaho also adheres to the statute of frauds as contained in I.C. § 9-503 which states:

> 9-503. TRANSFERS OF REAL PROPERTY TO BE IN WRITING. No estate or interest in real property, other than for leases for a term not exceeding one (1) year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing. (emphasis added)[17]

Easements are interests in property which fall under the protections of Idaho's statute of frauds. "The alleged easement in question constituted an interest in real property within the meaning of the statute and required a writing subscribed by the grantor in order to be created." *Fajen v. Powlus*, 96 Idaho 625, 628, 533 P.2d 746, 749 (1975) (citing to *McReynolds v.*

[15] R. Vol. I, p. 157.
[16] Brief of Respondent, State of Idaho Idaho Transportation Department, p. 5.
[17] Wylie is aware that the Statute of Frauds was not argued in the hearings below, but new emphasis by City and ITD on the oral representations warrants this argument.

Harrigfeld, 26 Idaho 26, 140 P. 1096 (1914)). *See also Bob Daniels and Sons v. Weaver*, 106 Idaho 535, 541-42, 681 P.2d 1010, 1016-17 (Ct. App. 1984) ("Moreover, easements are interests in real property. Idaho Code § 9-505(5) (the "statute of frauds") provides, with exceptions not applicable here, that interests in real property must be transferred by written instrument. An oral agreement must be evidenced by a written memorandum. No such memorandum appears in this record. Failure to comply with the statute renders an oral agreement unenforceable both in law and in equity. *E.g., Hoffman v. S V Co.*, 102 Idaho 187, 628 P.2d 218 (1981). An easement established by unwritten agreement is merely a license, revocable by the licensor. *Howes v. Barmon*, 11 Idaho 64, 81 P. 48 (1905)).

According to the preceding authority, rights of access are easements, which are real property interests. These interests are subject to the statute of frauds, which requires that a writing must be used to prove that a real property interest was surrendered. Absent a writing, any oral agreement to surrender a real property interest is void in law and equity.

The State also asserts that in the application stages for Wylie's April of 2008 plat proposal to the City there were prior written statements concerning Wylie's intent to not seek direct access.[18] Again this is parol evidence and not binding. Moreover, these statements do not indicate that Wylie was conveying his access rights to the City, which would require a writing to comport with the requirements of the statute of frauds.

9. The extrinsic evidence indicates there was no waiver.

ITD directly points out for the first time on appeal that in the staff report attached to the City's approval of Wylie's 2008 plat revision, contained the same sentence that was in the staff

[18] Brief of Respondent, State of Idaho Idaho Transportation Department, p. 6.

report in the Development Agreement signed by Wylie's predecessor in interest.[19] That language follows:

> The subject property does have frontage along Chinden Boulevard (State Highway 20-26) but is not proposing direct access to that facility.[20]

This language appears in both the 2006 staff report and the 2008 staff report.

The use of this language in 2008 indicates that the City did not interpret it to mean that access was waived in the 2006 Development Agreement. If it was truly a waiver the first time it appeared, the 2008 staff report would have indicated that Wylie's processor in interest had frontage to SH 20/26 but had conveyed those access rights to the City in the previous contract. There is no reference to a waiver of access rights in the 2008 staff report. The language used in the 2008 staff report appears to indicate the City recognized Wylie could still seek access in 2008 despite the 2006 Development Agreement.

This argument applies to any waiver positions advocated by the City or the ITD which is derived from the 2006 Development Agreement. If that document contained anything which the City thought was a waiver of Wylie's access rights why did the City not bring that up in the 2008? Moreover, in 2009 when Wylie sought direct access, the City did not raise waiver, the City only denied Wylie's request based on the City Ordinance.[21] Again, if the City truly thought that the Development Agreement expressly waived his right to seek access, the City would have probably pointed it out. Further, the actual body of the Development Agreement does not contain any language indicating a waiver or conveyance of Wylie's access rights.

However, Section 15 of the Development Agreement states that the owner of the Subdivision has to adhere to all City Ordinances in effect at the time the Development

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[19] Brief of Respondent, State of Idaho Idaho Transportation Department, p. 6.
[20] R. Vol. II, p. 285.
[21] R. Vol. II, p 335.

Agreement is executed.[22] That provision is clearly in the body of the Development Agreement. That is the very reason used by the City to deny Wylie's request for direct access. Up until litigation ensued, the conduct of the parties did not indicate a waiver. Wylie's predecessor in interest did not seek direct access because of the City Ordinance.[23] When Wylie sought direct access he was denied access not based on contractual waiver, but based on the City Ordinance

In the event of an ambiguity, "...court may consider the objective and purpose of the agreement and the conduct of the parties to the agreement." *Bischoff v. Quong-Watkins Properties*, 113 Idaho 826, 829, 748 P.2d 410, 413 (Ct. App. 1987). "In determining the parties' intent under an ambiguous contract, the trier of fact may consider the objective and purpose of the agreement, as well as the conduct of the parties to the agreement." *George v. University of Idaho*, 121 Idaho 30, 35-36, 822 P.2d 549, 554-55 (Ct. App. 1991). According to the parties' conduct, prior to this litigation, there was not a waiver.

10. Wylie did not need to seek declaratory judgment on the Development Agreement.

ITD has argued that Wylie did not seek declaratory relief from the development agreement and therefore his pleadings fail for alleging a case or controversy.[24] In Wylie's Amended Complaint he alleged that he had a property interest, that the actions of the City based on the City Ordinance adversely affected his property right. That is enough to establish a justicable case or controversy under Idaho law.

The issue of waiver contained in the Development Agreement was functionally an affirmative defense asserted by the City and ITD. Wylie is not aware of, nor has the City or ITD cited to any authority, requiring that the plaintiff, in a declaratory relief action must affirmatively

[22] R. Vol. I, p. 197.
[23] R. Vol. I, p 157.
[24] Brief of Respondent, State of Idaho Idaho Transportation Department, pp. 14-15.

plead facts of the Defendant's affirmative defenses. The section of the case cited by ITD,[25] *MedImmune, Inc. v. Genetech, Inc.* 549 U.S. 118, 125 (2007), was the second section of the case dealing with the nature of the dispute, not justicability, which was dealt with by the Supreme Court in section one of *MedImmune* opinion.

B. Only ITD can regulate access to State Highways

ITD and the City both cite to I.C. § 67-6508, I.C. § 67-6511A, and IDAPA § 39.03.48.001 for the proposition that the City can make recommendations on access and that ITD and the City can collaborate on access issues.[26] Wylie does not contest these assertions, but he does contest that they enable the City to control access.

These issues were addressed by this Court in *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 207 P.3d 963 (2009). In that case, a developer Lochsa Falls was in the process of building a development in the City of Meridian, which abuts SH 20/26. In 2003 the City was the party which approved the preliminary plat of the development. However, "[b]ecause Chinden Boulevard is designated as a controlled-access highway, ITD required the Lochsa Falls obtain an encroachment permit." *Lochsa Falls*, 147 Idaho at 235, 207 P.2d at 966. While the main issues in *Lochsa Falls* are not relevant to this appeal, this Court's analysis in coming to its conclusion that ITD issues encroachment permits bares directly to the issues at hand.

After listing the provisions in the Idaho Code which establish that ITD has the exclusive authority to control access to state highways. This Court stated:

> Clearly, the legislature has empowered ITD and its Board to make rules and regulations controlling rights of access and the safe use of state highways. (emphasis added) *Lochsa Falls*, 147 Idaho at 238, 207 P.2d at 969.

[25] Brief of Respondent, State of Idaho Idaho Transportation Department, pp. 14-15.
[26] Brief of Respondent, State of Idaho Idaho Transportation Department, pp. 15-20; Respondent City of Meridian's Brief pp. 16-24.

This Court went on to hold:

> In appreciation of the specific **IDAPA rules** and provisions of the **Idaho Code** as set forth above, we conclude that the power to impose certain specific conditions upon an application for an encroachment permit, including, but not limited to, provision of bonds and construction of traffic signals, is within the scope of the legislature's grant of authority to ITD to regulate the safe use of and **access to** controlled access highways.
>
> [...]Because the ITD's **denial or approval** of an encroachment permit application determines the legal rights and interests of a property owner in accessing their property from a state highway[...]. (emphasis added) *Lochsa Falls*, 147 Idaho at 239, 207 P.2d at 970.

The following points can be distilled from the foregoing. First, only ITD and its Board are empowered by the Idaho legislature to make rules and regulations controlling access to state highways. Second, this power includes the ability to approve access or deny access to a state highway.

This Court has made another ruling which sheds light on the statutes contested in this appeal. In *City of Sandpoint v. Sandpoint Ind. Highway Dist.*, 126 Idaho 145, 879 P.2d 1078 (1994), the issues raised dealt with which entity, the City of Sandpoint or the Sand Point Highway District, could control highways within the common boundaries and which entity was required to maintain the highways. The first point made by this Court was that:

> In a persuasive dissent, Judge Burnett pointed out that the purposes of the two sets of statutes are different. The Local Planning Act "dealt primarily with land use regulation, not highways." *Worley,* 104 Idaho at 838, 663 P.2d at 1140. Thus while there may be some overlap in the authority given to the county and the highway district, the general provisions regarding land use regulation do not control over the specific authority given to highway districts to supervise and control those highways within their boundaries. We have held that when there are specific statutes addressing an issue, those statutes control over more general statutes. *E.g., Walker v. Shoshone County,* 112 Idaho 991, 739 P.2d 290 (1987). Thus, the municipal corporation statutes (title 50), and highway district statutes (title 40), control as to the issue of street maintenance, over the more general provisions of thc Local Planning Act. *City of Sandpoint*, 126 Idaho at 149, 879 P.2d at 1082.

In resolving the dispute between the City and the Highway District, this Court went on to point out that under I.C. § 50-1330 and I.C. § 40-1323, only cities with functioning street departments can have jurisdiction over streets when the city is located in a county with a highway district. The specific holding follows:

> [...W]e hold that the Highway District has exclusive general supervisory authority to maintain the streets within the Highway District absent a showing by the City that it has a functioning street department."

The following can therefore be derived. First, the LLUPA I.C. § 67-6501 *et. seq*, deals with land use regulations not highways regulations. Second, since I.C. § 40-101 *et seq*, is specific to highways in an instances where the LLUPA conflicts with Title 40 of the I.C., Title 40 of the I.C. trumps LLUPA concerning highway issues.

In *City of Sandpoint*, this Court also adopted a portion of Appellate Judge Burnett's dissent in *Worley Highway District v. Kootenai County*, 104 Idaho 833, 663 P.2d 1135 (Ct.App. 1983). The full paragraph containing the sentence this Court cited to in *City of Sandpoint* follows:

> In 1975 the Legislature passed the Local Planning Act. This legislation dealt primarily with land use regulation, not highways; but it contained language authorizing cities and counties to include "recommendations on ... street naming and numbering" in their comprehensive plans, and to establish standards for "street numbers and names." I.C. §§ 67-6508(g), 6518. The bill embodying the Local Planning Act contained no provision for repeal of any prior, inconsistent laws. *See* 1975 Idaho Sess.Laws, ch. 188. Moreover, at § 67-6528, the Legislature directed special purpose districts to "comply with allplans and ordinances adopted under this chapter *unless otherwise provided by law* [emphasis supplied]. (emphasis added) *Worley Highway District*, 104 Idaho at 838, 663 P.2d at 1140.

The following paragraph states:

> In my view, the message from these statutes is clear. A highway district has 'exclusive' authority over public streets within its jurisdiction. The subject matter of this authority extends not only to powers expressly granted by the highway district, but also to powers that would be exercised by the county commissioners had the highway district not been organized. *Id.*

Judge Burnett then goes on to clearly articulate the very interpretation of these statues advocated by the Wylie throughout this action.

> In the present case, I believe that all the statutes, taken together, reflect two legislative policies-the recent policy of encouraging planning, and the historical policy of preserving the authority of highway districts within their boundaries. In my view, the statutes can be harmonized by recognizing that they embody a balance of these competing legislative concerns. Planning with respect to highways is not the sole province of counties. (emphasis added) *Worley Highway District*, 104 Idaho at 839, 663 P.2d at 1141.

The very language "make recommendations on...control of access..." contained in I.C. § 67-6508, which ITD and the City rely on to support their argument that the City has concurrent authority over state highways, was analyzed by Judge Burnett. He concluded that this language allows Cities and Counties to participate in the planning process. However, the ability to make recommendations is limited to just that, the planning process. The LLUPA does not alter a highway district's 'exclusive' authority over the final determination of street naming and numbering, or in this matter access control.

Unlike *City of Sandpoint* and *Worley Highway District* this matter does not involve a highway district, it deals with the State of Idaho and the City of Meridian's respective powers concerning access control to state highways. Despite this difference, there is no reason why these facts would lead to a different result than those contained in *City of Sandpoint* and *Worley Highway District*. Moreover, in the context of the States' power to control access to state highways there is even more direction provided by the legislature. As pointed out in Wylie's opening brief, I.C. 40-301(9) states:

POWERS AND DUTIES – STATE HIGHWAY SYSTEM. The board shall[27]:

(9) Designate state highways, or parts of them, as controlled-access facilities and **regulate, restrict or prohibit access to those highways** to serve the traffic for which the facility is intended. (emphasis added).

IDAPA § 39.03.48.001 states:

001 TITLE AND SCOPE. – [...] The intent of this legislative provision is to **prevent local control** over improvements to transportation systems of statewide importance. (emphasis added) .

I.C. § 67-6528 states:

The provisions of plans and ordinances enacted pursuant to this chapter shall not apply to transportation systems of statewide importance as may be determined by the Idaho transportation board. (emphasis added).

Title 40 of the Idaho Code, which according to *City of Sandpoint* governs highways, only allocates power to ITD to control access to state highways. Contrary to ITD's assertion that both the City and ITD share the ability to deny access, I.C. § 40-301(9) expressly states that the Board of ITD can prohibit access. ITD in its IDAPA regulations indicated that its express policy is against local control over state highways.[28] The LLUPA expressly excepts state highways from the land use powers granted to Counties and Cities under its provisions.

The City points out that IDAPA § 39.03.48.001 also states that:

The intent of this legislative provision is to prevent local control over improvements to transportation systems of statewide importance. However, it is recognized by the Idaho Transportation Board that local regulations are necessary to achieve the future location, relocation, realignment and other improvements to the state highway system in accord with the Idaho Transportation Board's plans.

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[27] Use of the word shall, in a statute, is a mandatory legislative directive. *Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995) ("When used in a statute, the word 'may' is permissive rather than the imperative or mandatory meaning of 'must' or 'shall'"); *See also Paolini v. Albertson's Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006); *Goff v. H.J.H. Co.*, 95 Idaho 837, 839, 521 P.2d 661, 663 (1974).

[28] IDAPA § 39.03.48.001

Both sentences read together indicate the same two policy goals expressed by Judge Burnett. First, the State, not municipalities has the ultimate authority to make decisions concerning decisions over state highways. Second, ITD recognizes that localities have the ability to regulate in their sphere of power and these entities need to work together. Despite this cooperative relationship, ultimate and exclusive authority resides in the State when regulating state highways. Moreover, the local regulations referred to in IDAPA § 39.03.48.001 are, in accordance with *City of Sandpoint*, deal with land use not highways. The City can decide how a plat will be zoned, while the State decides where to put the access points to its highways.

1. ITD cannot delegate its powers to the City.

When an agency is delegated a power it must exercise that power it cannot diminish its responsibilities. *Roberts v. Transportation Dept.*, 121 Idaho 727, 732, 827 P.2d 1178, 1183 (Ct. App. 1991) ("An agency must exercise any authority granted by statute within the framework of that statutory grant. *Adams v. Industrial Comm'n,* 26 Ariz.App. 289, 547 P.2d 1089 (1976). It may not exercise its sub-legislative powers to modify, alter, enlarge or diminish the provisions of the legislative act which is being administered") (internal citations omitted).

On numerous occasions ITD and the City assert that they drafted City Ordinance 05-1171 together and therefore it is enforceable, and not an usurpation of ITDs delegated authorities.[29] For one, these are admissions by both the State and the City that they are working under an express agreement whereby they collectively have denied access to SH 20/26. However, it does not matter if ITD was cooperating with the City or even if they were operating under an express agreement whereby ITD agreed to allow the City to control access to state highways. Only ITD has been delegated the authority to control access to state highways and ITD cannot delegate this

[29] Brief of Respondent, State of Idaho Idaho Transportation Department, p. 2; Respondent City of Meridian's Brief, pp. 8-9.

authority to the City. It is fine if the City decides to zone a property for residential use and the State provides access adequate for residential purposes. However, the City cannot control access.

2. ITD and the City do not share control over access easements.

ITD and the City both contend that decisions over access are divided between the State and the City.[30] Specifically, the City can control a private property owner's ability to leave or enter private property. At the same time, the State controls the property owner's ability to enter and leave the state right of way. ITD takes the position even further by stating that ITD can grant and deny access permits, while the City only has the power to deny access permits.

Wylie agrees with both the City and ITD that ITD has the power to grant or deny access permits to state highways. However, Wylie contends that ITD and the City have provided no authority for their assertion that the City can regulate or deny access to State highways. This assertion runs contrary to the Idaho Code, IDAPA, and the holdings in *Lochsa Falls*, *City of Sandpoint,* and Judge Burnett's dissent in *Worley Highway District*, which was adopted in *City of Sandpoint, infra or supra. Lochsa Falls* specifically sets forth the rule that only ITD can grant or deny access to state highways.

a. Access easements are not dual in their nature.

The very nature of the property interest commonly referred to as an access easement does not support ITD and the City's position. The City and ITD both state that the right of access has two components. According to their view, a right of access is split down the property line one side is controlled by the City and the other part of the right is controlled by ITD. However, the law of easements does not support this dual nature of an access easement.

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[30] Brief of Respondent, State of Idaho Idaho Transportation Department, pp. 16-20; Respondent City of Meridian's Brief, pp. 16-24.

This Court has described the nature of an access easement in *Hughes v. State*, 80 Idaho 286, 293, 328 P.2d 397, 400-01 (1958)[31], which follows:

> Real property includes 'that which is appurtenant to the land.' I.C. sec. 55-101. It includes all easements **attached** to the land. I.C. sec. 55-603. It includes hereditaments, whether corporeal or incorporeal, such as easements, and every interest in lands. 73 C.J.S. Property § 7, p. 159. (emphasis added).
>
> Easements are included in the classification of estates and rights in lands which may be taken for public use. I.C. sec. 7-702.
>
> In 29 C.J.S. Eminent Domain § 105, p. 910, is to be found the following rule:
>
> > 'An easement is an interest in land for which the owner is entitled to compensation, as much so as if the land to which the easement is appurtenant were taken or injured. Thus the owner of land abutting on a street or highway has a private right **in** such street or highway[...]. (emphasis added).

According to *Hughes*, the ability to leave one's property and enter onto an abutting street is an easement of access. This easement of access does not "begin" on the property owner's land and "end" in the public right of way, as the City and ITD contend. Rather, it is a property right in the public right of way, which is attached to the abutter's land. An appurtenant easement exits outside of the land to which it is attached. Therefore, there is nothing which begins on an abutter's land the City can regulate. Only ITD can regulate state highways and access easements, which by their very nature exist in state highways. Quite literally, an access easement in a state highway exists outside of a municipality's jurisdiction.

The City and ITD cite no authority which holds that a private property owner must get permission from a municipality or any other government entity to leave their own property.

C. Public policy limits the ability for government entities to contract

When compared to private individuals, government entities are much more constrained in their ability to enter into binding contracts. Generally, private individuals cannot contract to

[31] Partially overruled on other grounds.

perform illegal acts. ITD cites to *Quiring v. Quiring*, 130 Idaho 560, 944 P.2d 695 (1997) and *Morrison v. Young*, 136 Idaho 316, 32 P.3d 1116 (2001), as examples of contracts which require performances that are so vile this Court has referred to the subject matter as evil.[32] This is the general limitation which applies to all contracts.

While this public policy limitation also applies to government contracts, limitations on the government's ability to contract based on public policy grounds is much more confined than private individuals. In the context of a government contract, if the contracting entity does not have the authority to regulate a subject matter it cannot enter into contracts which deal with that subject matter.[33] Even in instances where the subject matter itself is rather benign or even arguably good for society, these contracts are still void. The public policy offended by these contracts is not the actual subject matter but the allocation of government powers.

An example of this can be found in *Black v. Young*, 122 Idaho 302, 834 P.2d 304 (1992). In that case, the City of Ketchum conveyed an alley to private property owners. The subject matter of that transaction was not an evil or *malum in se*. This was merely a common place transfer of real property. However, the City of Ketchum did not abandon the alley in accordance with the applicable laws governing a municipalities' ability to convey property. The contract was voided under the doctrine of ultra vires. Even though the property owners signed an estoppel affidavit, precluding them from challenging the ordinance, they were still able to challenge the City Ketchum because the agreements were all ultra vires. Wylie did not sign any agreement expressly saying that he would not seek access to SH 20/26. Even if he did, the waiver and the contractual obligation to not seek access would be ultra vires, and therefore void.

[32] Brief of Respondent, State of Idaho Idaho Transportation Department, p. 21.
[33] *See Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006).

Two examples of these limitations on the government's ability to contract have been argued by Wylie. One of the most fundamental public policies in our system of government is limited government. The doctrine of ultra vires is the means by which courts void government contracts which are entered into without any power and are in violation of the public policy of limited government.

Another strong policy is that of subordination of inferior government entities, which facilitates a uniform system of laws. This is embodied in the Federal Supremacy Clause, and in Idaho's doctrine of field preemption. The law of contracts cannot be used by inferior government entities to usurp a superior government entity's power.

In the context of field preemption, this public policy was articulated by the 9th Circuit in *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006). In that case, the public policy of uniform application of laws, as embodied in the doctrine of field preemption, was used to void a contract whereby private parties agreed with the City of Seattle to adhere to safety standards which were higher than the standards required by a federal law.[34]

ITD has argued that this case is inapposite because the City and the State can both control access on their respective "turfs."[35] Again by enabling the City to control access on "its turf" would require this Court to rule that an access easement is bifurcated in its nature and controlled by two separate entities. There is no authority for this position. More importantly, this outcome would destroy the State's control over its own highways. In instances where a municipal government disagrees with the State's decision to locate a highway, the municipality could pressure the State with its ability to deny all access to the highway. The "inferior" municipalities

[34] For a full discussion of this case see Appellants brief pp. 31-32; 37-38.
[35] Brief of Respondent, State of Idaho Idaho Transportation Department, p. 22.

could functionally control the "superior" State concerning new access to state highways through the use development agreements.

ITD also argues that the waiver issue contained in *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006) is distinguishable from this case. However, ITD uses no material reason to distinguish *Olympic Pipe Line* from the facts of this case. In both cases, a city government required private parties agree to adhere to a safety regulation.[36] In both cases, authority to promulgate the safety regulations where controlled by a superior government entity. In *Olympic Pipe Line*, the 9th Circuit held that contract was not void because the subject matter was evil, it was void because preemption cannot be waived. In other words, government entities cannot use the law of contracts to usurp another entities power. All actions which are preempted are void; they cannot be waived.

ITD cites to *American Energy Corp. v. Texas Eastern Transmission, LP,* 2010 WL 1253920 (S.D. Ohio), for the proposition that preemption does not apply when the alleged preempted act does not deal with the subject matter of the controlling statute. However, this distinction does not apply, because as pointed out by in the *City of Sandpoint, supra*., the LLUPA deals with land use planning and Title 40 of the Idaho Code deals with highways. Wylie is claiming that the City's attempt to use the LLUPA to control his access is expressly preempted by Title 40 of the Idaho Code. Just like *Olympic Pipe Line,* where the City of Seattle could not pass a safety regulation in contravention of the PSA, here the City cannot use the LLUPA in contravention of Title 40 of the Idaho Code.

[36] One of the City's rationales for denying Wylie access was based on health and safety concerns. See R. Vol. 2, p. 328

ITD draws various distinctions between the cases cited by Wylie used to support his contention that ultra vires and field preemption can void otherwise enforceable contracts.[37] ITD argues that some cases are factually distinguishable because under those fact patterns improper procedure was followed. However, the only argument made is that the City is not acting outside its authority. That argument again rests on the conclusion of what entity controls access to SH 20/26. In the event it is deemed that the City Ordinance 05-1171 is either ultra vires and/or preempted, ITD has provided no argument that those cases cannot be used to void the portions of the Development Agreement which were made in reliance on the Ordinance.

Olympic Pipe Line is a key case because it rebuts both the City and ITD's arguments on justiciability.

1. The City cannot contract in the same capacity as an individual.

Wylie does not dispute that the City has the power to contract under I.C. § 50-301, and the ability to enter into development agreements under I.C. § 67-6511A. However, the ability to contract is still limited by all the rules advocated by Wylie in this brief and in his opening brief, i.e. ultra vires and field preemption. For example, I.C. § 50-301does not proved the City with the same powers to contract as private individuals. The relevant portion of I.C. § 50-301 states:

> 50-301. CORPORATE AND LOCAL SELF-GOVERNMENT POWERS. Cities governed by this act shall [...] contract and be contracted with [...] and exercise all powers and perform all functions of local self-government in city affairs <u>as are not specifically</u>**<u>prohibited by or in conflict</u>**<u> with the general laws or the constitution of the state of Idaho.</u> (emphasis added).

This limitation on the City's ability to contract is the very limitation proffered by Wylie in his opening brief. Specifically, Wylie argued that municipalities cannot pass ordinances which conflict with the general laws. The general laws of the State are legislation passed by the

[37] Brief of Respondent, State of Idaho Idaho Transportation Department, pp 23-24.

state legislature.[38] Preemption and ultra vires doctrines are two means by which the judiciary enforces this restriction on the powers of municipalities.

D. ITD should be judicially estopped from asserting the City can control access to state highways

ITD accurately points out that judicially estoppel's preclusive effect only applies on the same transaction.[39] At the very least, ITD's statements in previous litigation undercut its assertion that municipal governments can control access to state highways. They also function as statements against interest and admissions.

In *Moody v. ITD*, as stated by ITD, Judge McKee ruled that municipalities cannot control access to state-highways. Wylie's Counsel was advocating a different position than they are now. However, Counsel lost and is not advocating a position consistent with Judge McKee's ruling. One the other hand, ITD advocated an inconsistent position, won that action, and is now advocating a contrary position. ITD was the party that gained an advantage concerning one position and is now contradicting that position. Moreover, ITD is the same party in both actions. Wylie's Counsel is private and represents different clients in different actions. Therefore, the policy of inconsistent positions is more applicable to ITD.

As pointed out by ITD "[Judge McKee...] noted that ITD has the discretion to determine whether such ordinances are beneficial to the state highway system."[40] This is consistent with Wylie's position that the City can make recommendations concerning access to state highways located within their boundaries. But it is ITD which untimely decides to adhere to these decisions.

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[38] Appellant's Brief, pp. 16-17.
[39] Brief of Respondent, State of Idaho Idaho Transportation Department, p. 25.

[40] Brief of Respondent, State of Idaho Idaho Transportation Department, p. 26.

ITD distinguishes *Willowbrook Development v. State of Idaho, et al.*, on the basis that it does not involve LLUPA.[41] However, and in accordance with the *City of Sandpoint*, the LLUPA does not deal with highways, therefore the justification in this case that the City has authority of over access based on LLUPA is inapposite. *Willowbrook* represents another example of ITD being inconsistent.

ITD argues that its position *In the Matter of the City of Eagle* has not changed because ITD was arguing that a municipality could not grant access it could only deny access.[42] This distinction hinges on the State's argument that control of access is bifurcated. However this argument was not proposed in *City of Eagle.* ITD was advocating that only ITD controlled access to state highways which is inconsistent with its current bifurcation argument.

In the previous cases, ITD has asserted that it controls access to state highways. In none of these proceedings has it advocated that municipalities can deny access and only the State can grant access. This current permutation from the previous monolithic assertion that only ITD can control access is inconsistent and ITD should be estopped. As mentioned above, a key distinction between ITD and Wylie's Counsel is that ITD was the same client and private counsel represents a wide variety of clients.

III. CONCLUSION

This case centers on the issues of field preemption and ultra vires. The effort by the City and the State to convince this Court that there is a genuine issue of waiver is nothing more than an attempt to divert attention away from these two critical issues. They have cited no legal authority that contradicts either the Idaho or foreign case law cited by Wylie regarding ultra vires or field preemption because there isn't any. It does not matter how the City and State have

[41] Brief of Respondent, State of Idaho Idaho Transportation Department, p. 27 .
[42] Brief of Respondent, State of Idaho Idaho Transportation Department, p. 27.

attempted to enable the City to control state highways. Any means by which the City has asserted control over a state highway, either by contract or ordinance, is utterly void and has no force of law.

ITD and the City have proposed a novel theory which would enable both entities to control access to state highways. That theory is that ITD controls the right of access with the State's right of way and the City controls the right of access outside of the state's right of way. Being a novel theory, nether entity can cite to any authority supporting their contention. This is really an invitation to create new rules governing real property.

From a policy perspective, this argument threatens the ability of private property owners to receive the protections provided in Article I, § 14 of the Idaho Constitution. Under the foregoing section of the Idaho Constitution, private property cannot be condemned by the government without payment of just compensation. However clear the previous statement is made, proving liability in some contexts can be difficult. If two entities can deny the ability to exercise the same property right, a condemning authority will always be able to point the finger at the other entity when facing liability. Ultimate authority to grant or deny access should (and Wylie contends, does) lie with only one entity.

In Idaho, property can be regulated and it can be condemned. In the context of regulation, a private property owner can receive compensation when property is regulated to the point that it has lost almost all its economic value. In the specific context of access rights, when those rights are regulated the property owner must prove that access has been substantially impaired. *See Mabe*, *supra*. This is a high threshold and accordingly it is difficult to prove.

Another important issue is that access is one of the most valuable property rights. The same property in the same location can be worthless or worth millions depending on access. So

when access rights are condemned, the severance damages for the loss of access can be one of the most expensive components in an eminent domain case.

With that background, it makes sense why two governing entities would want to be able to bifurcate the control of access. The City could regulate access rights and incur no liability and the State could condemn right of way and not pay just compensation for the condemnation of access rights because the City regulated access away before the condemnation of access. Although there is no expression of motive in this case, both the City and ITD have admitted they are working together to deny access to state highways in the City of Meridian.[43] The record indicates that the reason behind this is corridor preservation, which follows:

PURPOSE: ...2) to preserve right-of-way for future highway expansion. [44]

The admission is that that both ITD and the City have worked together to develop the City Ordinance which has the express goal to preserve corridor for future highway expansions. In other words, the goal behind this City Ordinance is to make it less expensive for the State to condemn right-of-way in the future. A means by which the State and City are working together to avoid paying the full market value of private property the State condemns should not be sanctioned. This plan, if not in direct contravention of the Idaho Constitution, is at least contrary to the spirit of private property rights and due process of law.

There is a difference between coordination and input, as envisioned by LLUPA, and power sharing, as now argued in a novel way by the City and the State. The State has attempted to get the City to assist it in "preserving corridors" for future condemnation by enacting Ordinance 05-1170. The City has gone along with this idea and has used the ordinance to deny

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[43] Brief of Respondent, State of Idaho Idaho Transportation Department, p. 2; Respondent City of Meridian's Brief, pp. 8-9.
[44] R. Vol. I, p 131.

access to property owners like Wylie, who have abutter's rights of access which may be reasonably regulated only by the entity with legal authority and control over the public right of way.

The City doesn't share access control over Linder with ACHD and access control over Chinden (SH20/26) with the State. The City controls land use, density and related issues, not access.

The ordinance, and the goal of "corridor preservation," is to prevent property owners from fully enjoying their property rights and fully developing their property so that it is cheaper for the government to acquire later. This is fundamentally wrong and in direct contradiction to the constitution.

The government can option land, or purchase development rights, or acquire land now that will not be needed for new construction until a few years from now. The government cannot prevent owners from fully using land that the government envisions condemning later. This appeal deals with academic issues of ultra vires and field preemption, but the heart of the matter is a concerted, and very real, effort to avoid paying just compensation for property rights acquired in condemnation, which is effecting the rights of Idaho citizens like Wylie every day.

DATED this 13th day of August, 2010.

DAVISON, COPPLE, COPPLE & COPPLE

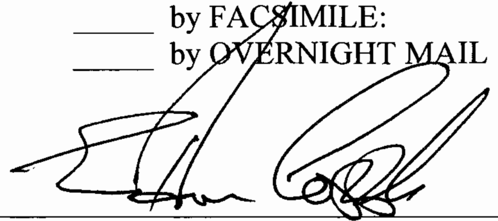
By______________________________

E DON COPPLE, of the firm
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of August, 2010 a true and correct copy of the foregoing was served upon the following:

Karl D. Vogt Deputy Attorney General Idaho Transportation Department 3311 West State Street P.O. Box 7129 Boise, Idaho 83707-1129	_____ U.S. MAIL __✓__ Hand Delivery _____ Facsimile Transmission _____ Overnight Mail
William Nary Meridian City Attorney 33 E. Idaho Ave. Meridian, Idaho 83642	__✓__ by U.S. MAIL _____ by HAND DELIVERY _____ by FACSIMILE: _____ by OVERNIGHT MAIL



E Don Copple