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Hehr v. City of McCall Appellant's Reply Brief Dckt. 39535

IN THE SUPREME COURT OF THE STATE OF IDAHO

RICHARD HEHR and GREYSTONE VILLAGE, LLC,

Plaintiffs/Appellants, Cross Respondents,

vs.

CITY OF McCALL,

Defendant/Respondent, Cross Appellant.

Supreme Court No. 39535-2012

District Court No. CV-2010-276C

APPELLANTS/CROSS-RESPONDENTS' REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT AND FOR THE COUNTY OF VALLEY

HONORABLE MICHAEL R. MCLAUGHLIN, DISTRICT JUDGE, PRESIDING

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INTRODUCTION

Pursuant to Idaho Appellate Rule 34(c) and 35(c), Appellants Richard Hehr and Greystone Village, LLC, (collectively "Greystone") submit this Reply Brief in rebuttal to the arguments and additional issues raised by Respondent City of McCall ("McCall" or the "City") in its Respondent's Brief filed on May 18, 2012. To the extent the City has raised cross issues on appeal as a Cross-Appellant within its Respondent's Brief, Greystone will respond to the cross-appeal herein pursuant to IAR 35(c).

Greystone incorporates its statement of the course of proceedings and facts in its opening brief here. This case involves Greystone's claims against the City for its taking of Greystone's property in the form of: (1) nine lots deeded to the City to cover inclusionary zoning fees; and (2) road and utility improvements the City required Greystone to construct to those nine lots after the City took them from Greystone.

In its Respondents Brief McCall raises several additional issues on appeal as well as additional defenses for its actions, some of which were not brought before or decided by the district court below. The City also goes to lengths to avoid addressing important issues in this case by: misstating Greystone's claims or positions on legal issues, and then offering self-serving arguments to defeat the misstated position; and by mischaracterizing the applicable legal standard and then offering legal arguments in support of the mischaracterized standard. As set forth in Greystone's opening brief and below, the district court erred in granting summary judgment. This matter should be remanded for further proceedings.

ARGUMENT

I. Greystone's Takings Claim for the Road and Utility Improvements Constructed to the Nine Lots is a Valid, Separate Takings Claim.

The issue with regard to Greystone's takings claim for the costs of constructing public improvements is whether McCall met its initial burden of proof on summary judgment to dismiss

that claim in Greystone's Complaint. McCall failed to do so and now misstates the applicable facts and allegations, and mischaracterizes the appropriate legal standard to deflect attention away from that issue.

Greystone's Complaint alleged two distinct and separate takings claims for: (1) the value of the nine lots McCall took from Greystone for inclusionary zoning; and (2) for the costs incurred by Greystone when McCall forced Greystone to shoulder the costs of constructing roadway and utility improvements to the nine lots now owned by McCall. R. Vol. I, p. 9, ¶¶ 22, 24. Greystone satisfied all necessary procedural requirements for pleading these separate claims as separate wrongs by McCall and a separate source of damages. *See Clark v. Olsen*, 110 Idaho 323, 715 P.2d 993 (1986) (a complaint meets pleading requirements by providing notice of the material facts of a claim; *see also* I.R.C.P. 8(a)(1), (e)(2), (f).

The City asserts that Greystone made this claim up after the fact and that since the City did not perceive it as a claim separate from its takings claim for the nine lots for summary judgment purposes, it cannot be a different claim. While the City is entitled to choose the claims on which it moves for summary judgment, it is not entitled to dictate what Greystone's claims are. Merely stating in a summary judgment motion that a party moves on "all" claims is not sufficient without factual and legal argument to support a motion for summary judgment. The City failed to meet its burden on summary judgment to establish a lack of genuine issues of material fact and that it was entitled to judgment as a matter of law on all claims, namely Greystone's second inverse condemnation claim for the costs to construct roadway and utility improvement to the nine lots.

In its briefing in support of its motion for summary judgment, the City failed to cite to any facts or make any legal argument that it was entitled to summary judgment on Greystone's second takings claim. Greystone did not "concoct" this claim after the fact. Greystone's motion

for reconsideration to the district court was based on the fact that the City did not meet its initial burden and that the district court erred in dismissing Greystone's entire complaint on summary judgment.

Once McCall became the owner of the nine lots there was no expectation on Greystone's part that Greystone was also obligated to construct public improvements to lots the City owned, nor was this even addressed in the applicable development agreement. In fact, even the City's staff questioned whether Greystone was responsible for building roads and running utilities to lots it did not own. R. Vol. II, p. 385. The later and separate act by the City to require Greystone to incur the costs of constructing public improvements to the nine lots constituted a separate taking and a separate accrual period. The plain language of Greystone's Complaint satisfies Idaho Rule of Civil Procedure 8 and the notice pleading standards under Idaho law. The fact that the City misperceived the claims on summary judgment is irrelevant. The City failed to meet its burden and the district court erred in dismissing this takings claim.

II. Greystone's State Law Claims are not Barred Under the Idaho Tort Claims Act.

McCall's passage of Resolution 08-11 created a new claim against the City for purposes of notice under the Idaho Tort Claims Act ("ITCA") and Greystone complied with the notice requirements, plain and simple. Under Resolution 08-11 the City committed itself to refund community housing fees paid pursuant Ordinance No. 820 after it was adjudicated unconstitutional. The City does not get the pleasure of dictating which parties are entitled to a refund of community housing fees paid to the City. The City's argument that Greystone did not actually pay community housing fees under Ordinance No. 820 is nothing short of silly. McCall took the lots in lieu of Greystone's payment of the fees; Greystone was subject to Ordinance No. 820 and was required to pay the fees. They were simply paid by McCall's taking of the nine lots.

Neither of the cases the City cites in support of its position, *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 108 P.3d 315 (2004) nor *Scott Beckstead Real Estate Co. v. City of Preston*, 147 Idaho 852, 216 P.3d 141 (2009), are applicable or analogous to this case. Unlike in *BHA* where it was alleged the takings claim arose from or was triggered by a previous court decision, Greystone's claims are not dependent upon nor arise from Judge Neville's decision in *Mountain Central*. McCall's own actions in creating a new claim for reimbursement of the fee created the cause of action. The case of *Scott Beckstead Real Estate Company* is likewise distinguishable. The underlying ordinance under which the plaintiff agreed to construct a larger sewer line did not entitle the plaintiff in that case to the reimbursement he sought in the first place. 147 Idaho 852, 854, 216 P.3d 141, 143.

In this case the Resolution itself created a new right to reimbursement and a new claims period under which to provide notice and assert the right to reimbursement. The City attempts to footnote an argument that, even assuming a new claim was established, Greystone can only be entitled to a few thousand dollars in fees it would have paid. This assertion is not supported by any evidence in the record and has no bearing on the substantive merits of Greystone's state law based claims against the City relative to recovering the fair market value for the lots it was required to deed to the City.

Lastly, the City also argues that Greystone's inverse condemnation claim related to its second cause of action seeking monies for the roadway improvements is untimely because Greystone did not provide written notice to the City within 180 days regarding this claim. See. Respondent's Brief pp. 24-25. There is nothing in the Clerk's Record on Appeal to support the City's position whether notice was given or not. Even if the City's assertion is correct, Greystone's inverse condemnation claim under the Fifth Amendment of the United States Constitution cannot be barred by a state tort notice statute. *See BHA Investments, Inc. v. City of*

Boise, 141 Idaho 168, 108 P.3d 315 (2004) (notice-of-claim requirements imposed by state law do not apply to federal claims, even if they are brought in state court).

III. Neither of Greystone's Takings Claims are Barred by the Four-Year Statute of Limitations.

The City argues that both of Greystone's takings claims based on federal law are barred by Idaho's four-year statute of limitations because both claims accrued past four years. Generally, in the absence of a federal statute of limitations, the analogous state statute is applied to the federal cause of action. *E.g.*, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462, 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295 (1975); *O'Sullivan v. Felix*, 233 U.S. 318, 322, 34 S.Ct. 596, 597, 58 L.Ed. 980 (1914). In this case, the most analogous state statute for Greystone's Fifth Amendment federal inverse claim is the four (4) year statute of limitations found in Idaho Code section 5-224.

A. Greystone's takings claim for the nine building lots accrued on the date the deed to the nine lots were conveyed to McCall.

The appropriate time for triggering accrual of the statute of limitations for purposes of Greystone's takings claim for the nine lots is the date Greystone conveyed the deeds. This is in-line with the long standing precedence of *Tibbs/McCuskey*. The district court wrongly set the accrual date at the date the development agreement was signed.

The City insists that the takings claim for the nine lots accrued on the date the development agreement was signed because that was when it merely became apparent under the *Tibbs/McCuskey* standard that the nine lots were subject to a taking. This is not the complete standard for determining accrual. Rather, accrual "is to be fixed at the point in time at which the impairment, of such a degree and kind as to constitute a substantial interference with plaintiffs' property interest, became apparent." *Tibbs v. City of Sandpoint,* 100 Idaho 667, 671, 603 P.2d 1001, 1005 (1979); *See also McCuskey v. Canyon County*, 128 Idaho 213, 217, 912 P.2d 100,

104 (1996). McCall completely divorces the requirement that the impairment must also "constitute a substantial interference" with the property right in addition to being apparent.

The City's position illustrates the very problem inherent with its argument. The fact that the government notifies a party that it may take property at some point in the future is not sufficient alone. There was no taking when the development agreement was signed, nor could there have been. Greystone still owned the deed to the nine lots. There are a myriad of reasons why the lots could have never been conveyed to the City, including had Greystone lost financing or decided not to proceed with development for any number of reasons. The City contends that the fact Greystone could have decided not to go forward with the development and not conveyed the lots is irrelevant simply because it was apparent to Greystone that it would have to convey the nine lots if Greystone went forward with the development. The City's position is incorrect. Had Greystone filed a takings claim at the time the development agreement was signed it would have been dismissed because Greystone still possessed title to the nine lots at that time and, therefore, such a claim by Greystone would not have been ripe. *See, e.g. KMST, LLC v. County of Ada*, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003) (a party cannot maintain an inverse condemnation action unless there has actually been a taking of property).

B. The district court made no findings when Greystone's inverse condemnation claim relative to the construction improvements accrued and therefore that issue must be remanded for further proceedings.

On the issue of Greystone's second takings claim arising from McCall forcing Greystone to construct public roadway and utility improvements to the nine lots, Greystone repeats its arguments made in its Appellant's Brief, p. 17. The City has not offered a sufficient explanation for how or why the utility improvements were contemplated at the time the Development Agreement was signed. The City simply responds to this takings claim by arguing it is not distinct from the takings claim for the nine lots. As addressed in Greystone's opening brief, it is

a separate and distinct claim. This is particularly apparent when considering the date of accrual that McCall argues for, i.e. the date the development agreement was signed. The development agreement is completely silent as to any obligation on Greystone's part to construct public improvements to the nine lots. There is nothing "apparent" to Greystone on the date the development agreement was signed that it was also responsible for incurring the costs of constructing public improvements to the nine lots to be owned by McCall.

C. Under the unique facts of this case, *C&G, Inc. v. Canyon Highway District No. 4* warrants a departure from the traditional *Tibbs/McCuskey* standard for accrual of an inverse condemnation claim.

Even if simply being "aware" that a government entity may take your property at some point in the future is sufficient under the *Tibbs/McCuskey* standard, without more, to trigger a takings claim, the unique facts of this case warrant a departure from that standard in order to set a date-specific accrual when property is taken by the conveyance of a deed. The principles and reasoning set forth in *C&G, Inc. v. Canyon Highway District No. 4*, 139 Idaho 140, 75 P.3d 194 (2003) warrant such a departure. McCall misstates Greystone's position with regard to *C&G* and its application to this case. McCall misrepresents that Greystone is calling for application of the project completion rule, as established in *C&G*, to this case.

Greystone has not argued for application of the project completion rule to this case. What Greystone has argued for is application of the same public policy reasons in this case as were set forth in *C&G* for a departure from the inherently arbitrary *Tibbs/McCuskey* standard. The policy reasons for setting a date specific accrual included to promote judicial economy and to create certainty and efficiency, particularly when the taking arose from the government entity acting beyond its designated authority. Thus, the *C&G* court established a date specific accrual standard for those policy reasons. The same policy reasons should apply in unique cases such as this where property is taken via conveyance of a deed to the property. In such cases the date of

conveyance is an easily discernible date upon which there can be no argument that a property owner was disposed of its property.

IV. Greystone was not Required to Seek Judicial Review.

For the first time on appeal the City raises a jurisdictional argument that Greystone's takings claims are apparently precluded because Greystone could only have sought judicial review pursuant to the Local Land Use Planning Act ("LLUPA") and the Idaho Administrative Procedures Act ("IAPA"). See. Respondent's Brief pp. 13-14. Greystone was exempted from any judicial review requirement because LLUPA exempts inverse condemnation claims from that process:

> (b) An affected person claiming "just compensation" for a perceived "taking," the basis of the claim being that a final action restricting private property development is actually a regulatory action by local government deemed "necessary to complete the development of the material resources of the state," or necessary for other public uses, may seek a judicial determination of whether the claim comes within defined provisions of section 14, article I, of the constitution of the state of Idaho relating to eminent domain. Under these circumstances, the affected person is exempt from the provisions of subsection (1) of this section and may seek judicial review through an inverse condemnation action specifying neglect by local government to provide "just compensation" under the provisions of section 14, article I, of the constitution of the state of Idaho and chapter 7, title 7, Idaho Code.

I.C. § 67-6521(2)(b).

Here, Greystone received all of the permits it sought in the land use approval process and therefore there was no "adverse zoning action" nor was the collection of community housing fees considered a "permit" authorizing development which either could have triggered the requirements to seek judicial review. The cases of *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1049 (1984) and *Curtis v. City of Ketchum*, 111 Idaho 27, 720 P.2d 210 (1986) cited by the City are distinguishable and inapplicable to this case because, unlike Greystone in this case,

those cases involved an actual adverse land use decision in the land use process; nothing of the sort occurred to Greystone in this case.

This Court has recognized that not all land use decisions are subject to judicial review under the IAPA. For example, in *Giltner Dairy, LLC v. Jerome County*, 145 Idaho 630, 181 P.3d 1238 (2008), this Court determined that there was no statutory right to judicial review of the county's decision to amend its comprehensive plan because "[a] request to change a comprehensive plan map is not an application for a permit." *Id.* at 633, 181 P.2d at 1241.

The takings claims raised by Greystone in this lawsuit likewise have nothing to do with a "permit" under LLUPA and therefore judicial review is inapplicable. Greystone is not challenging a denial of its land use permits. Rather, it is seeking just compensation for the lots that were taken, which can be properly brought as an inverse condemnation action. In fact, that is what the Idaho Legislature intended with Idaho Code Section 67-6521(2)(b).

It is important to note that judicial review could not have provided Greystone the type of relief sought in this action. Greystone's claims for inverse condemnation and request for declaratory relief cannot be combined with judicial review. A court sitting in an appellate capacity has no authority to award monetary damages or issue a declaratory order. Judicial review also would not have provided Greystone adequate judicial process to defend against the City's "voluntary payment" defense (addressed below), which required the ability to conduct discovery.

Finally, the Washington and Maine cases that McCall cites in a footnote in its brief regarding judicial review and the payment of fees have no application in this case. These out-of-state land use cases are not persuasive authority or even instructive of Idaho's LLUPA framework. Idaho's LLUPA and case law applying LLUPA, and the judicial review procedures of the IAPA, are unique to Idaho's legislative scheme for the land use process. The City has

provided absolutely no argument regarding how specific statutory land use laws in Washington or Maine relate to Idaho's LLUPA, or why the wording or nature of the laws of those states should dictate the construction and application of Idaho's LLUPA. As discussed above, not all land use decisions under LLUPA are subject to judicial review and not all conditions stated in a permit constitute a zoning regulation. Thus Idaho's LLUPA, unlike Washington or Maine law, does not allow for judicial review of illegally collected fees.

As set forth here and below, Greystone was either not required, or was excused from, any requirement to seek judicial review of McCall's imposition of the unconstitutional inclusionary zoning fees. Either way, the fact that Greystone did not seek judicial review does not dispossess the courts of jurisdiction to hear Greystone's claims.

V. Greystone was not Required to Exhaust Administrative Remedies.

Greystone was excused from exhausting any administrative remedy in this case under both of the express exceptions to the general exhaustion requirement: (a) when the interests of justice so require, or (b) when the agency acted outside its authority. *Regan v. Kootenai County*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004); *Park v. Banbury*, 143 Idaho 576, 580-81, 149 P.3d 851, 855-56 (2006). Greystone addressed this question in its opening brief and, for all of the reasons stated there, these exceptions apply to this case in addition to the following.

With regard to the interests of justice exception, McCall continues to take the untenable position that had Greystone just told McCall that it did not want to pay the community housing fee required under Ordinance No. 820, then the outcome would have been completely different. In other words, it is really Greystone's fault, not the City's, that McCall instituted an ordinance requiring the payment of a constitutionally invalid fee. The evidence in the record on this issue is to the contrary. *See, e.g.* R. Vol. II, p. 218, ¶¶ 1-4; R. Vol. III, p. 442. Here the interest of justice exception is satisfied because there was no administrative remedy. McCall did not issue a

permit to Greystone from which it could seek an administrative remedy, Greystone was not subjected to an adverse land use decision, and the administrative process would have been futile because it could not have provided the necessary relief.

Applicability of the exception to exhaust when a governmental body acts outside its authority is even more stark in this case. McCall devotes much of its argument on this exception to the inapplicable distinction between an "as applied" challenge versus a "facial" challenge to Ordinance No. 820. As Greystone set forth in its opening brief, this is a distinction not relevant to this case. It is McCall's invention. It is an adjudicated fact that McCall's Ordinance Nos. 819 and 820 were actions outside of McCall's constitutional authority to act.

VI. Genuine Issues of Material Fact Precluded Summary Judgment on the Issue of Voluntariness.

The district court improperly ruled that Greystone acted voluntarily. Greystone provided sufficient evidence at the summary judgment stage of these proceedings that created genuine issues of material fact under the standard of Idaho Rule of Civil Procedure 56. Additionally, the City's reliance on *KMST, LLC v. County of Ada*, 138 Idaho 577, 67 P.3d 56 (2003) for the proposition that Greystone acted "voluntarily" and that the conveyance of the nine lots was not a taking, as a matter of law, is misplaced.

The "voluntariness" defense of *KMST* that the City clings to was pure dicta in that case. Even assuming that *KMST* created some kind of "voluntariness" defense for governmental entities against inverse condemnation claims, the facts of *KMST* are distinguishable from this case. In *KMST* a representative of the land use applicant itself proposed the idea constructing and dedicating the roadway at issue in that case. Greystone made no such proposal in this case with regard to community housing. It was not part of Greystone's application. Greystone established in its opening brief that comments proposing community housing that the district court attributed to Greystone were actually made by the City. The development agreement

spelled out that the nine lots were conveyed to the City for the purpose of paying the community housing fee required by Ordinance No. 820. *See* Groenevelt Affidavit, Ex. R (exhibit to the Clerk's record). That is not, and cannot be under any stretch of the imagination, voluntary.

Greystone also submitted at least four affidavits establishing a genuine issue of material fact on the question of voluntariness. The City labels these affidavits "self serving." While that same label applies to the affidavits the City filed in support of its summary judgment motion, the City cannot make any credible argument that these affidavits fail to raise genuine issues of material fact. These affidavits include one from a former member of City Council testifying that, in her experience, payment of community housing fees was required to get a land use approval from the City. *See* R. Vol. II, p. 219, ¶¶ 2-4. Likewise, Greystone's accountant did not seek any kind of tax deduction for the value of the nine lots because it was not a contribution by Greystone and was not eligible for a deduction. *See* R. Vol. II, p. 223. In addition to never proposing conveyance of the nine lots, one of Greystone's developers and Greystone's engineer understood that conveyance of the lots was mandatory in order to obtain approvals from the City. *See* R. Vol. II, pp. 302-03, ¶¶ 5-8. This is credible evidence that Greystone did not act voluntarily.

Finally, the City's own internal policies establish that if the City did not feel an applicant had satisfactorily addressed community housing in an application, the application was simply returned to the applicant without further consideration. *See* R. Vol. III, p. 442. This goes well beyond what the City characterizes as a voluntary act where an applicant pays a fee even if the applicant does not like it. No applicant could act "voluntarily" under these circumstances. This evidence is more than sufficient to create genuine issues of material fact on the "voluntariness" of Greystone's actions. The district court erred in removing this question from a jury's consideration.

VII. Greystone's Federal Takings Claims Did Not Have To Be Brought As a Section 1983 Claim.

The City argues that Greystone's federal takings can only be brought as a 42 U.S.C. § 1983 claim. The City cites to Ninth Circuit cases and cases from other jurisdictions to support its position, but doesn't provide a compelling reason why this Court should depart from its previous holding in *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 108 P.3d 315 (2004) recognizing that an inverse condemnation claim can be brought directly under the Fifth Amendment.

The U.S. Supreme Court recognized in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, Cal. 482 U.S. 304, 314-315, (1987), that: "a landowner is entitled to bring an action in inverse condemnation as a result of 'the self executing nature...' of the Fifth Amendment." 482 U.S. 304, 314-315, (1987). This Court likewise recognized in *BHA Investments, Inc. v. City of Boise* that: "[t] he Takings Clause [of the Fifth Amendment] is self-executing, and a takings claim may be based solely upon it, *First Lutheran Church v. Los Angeles County*, or it may be brought as an action under 42 U.S.C. § 1983, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*" 141 Idaho 168, 176 n.2, 108 P.3d 315, 323 n.2 (2004) (internal citations omitted). Nothing more needs to be considered on this issue. A federal takings claim may be brought directly under the Fifth Amendment in Idaho courts.

The City attempts to tap dance around this issue by calling this Court's pronouncement in *BHA Investments* "dicta" and minimizing the impact of this statement because it appears in a footnote in the case. The fact that this Court addressed the self executing nature of the Fifth Amendment via footnote in *BHA Investments* does not diminish the force of that statement. The footnote was part of the Court's decision. More importantly, it was hardly a passing comment by this Court. A question about whether BHA Investments, Inc. was required to provide notice of its federal claims pursuant to the ITCA was squarely before this Court in *BHA Investments*. This

Court's footnote recognizing the self executing nature of the Fifth Amendment spoke directly to that issue.

The City's reliance on the Ninth Circuit's decision in *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704 (9th Cir. 1992) that a takings claim must be brought pursuant to Section 1983 is inapplicable. *Azul-Pacifico* preceded BHA Investments by twelve years. If *Azul-Pacifico* controlled the question in Idaho, this Court would have addressed it in *BHA Investments* because that could have settled, in part, the issue in that case of whether the lower court properly dismissed the plaintiff's claims. Instead, this Court recognized that it is bound by the pronouncements of the U.S. Supreme Court and *First Lutheran*, not the Ninth Circuit, on such matters. This is the law in Idaho. There is simply no Idaho precedent for the City's position that a federal takings claim must be brought in Idaho courts pursuant to Section 1983.

VIII. *Williamson County's* Ripeness Tests Do Not Bar Greystone's Federal Takings Claims.

The two ripeness tests of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) do not apply so as to prohibit Greystone's federal takings claims. These two tests require that: (1) the governmental entity reach a final decision; and (2) in federal court litigation involving regulatory takings, the property owner must "seek compensation through the procedures the State has provided for doing so." *Williamson County*, at 186, 194.

A. There was no process to result in a final decision available to Greystone.

With regard to the final decision test Greystone's argued in its opening brief that this case is not analogous to *Williamson County* because there was no variance for Greystone to seek similar to the variance the U.S. Supreme Court held the applicant should have sought in *Williamson County*. In response McCall asserts that *Williamson County* is not limited to variances and that it was Greystone's burden to find a different resolution. In other words,

McCall treats *Williamson County* like it is an exhaustion requirement. McCall suggests several different actions Greystone could have taken, including refusing to enter into a development agreement that provided for community housing, refused to address community housing in its application, and/or object to community housing requirements. This is likewise a misrepresentation of the scope of *Williamson County*. Nowhere does *Williamson County* require a land use applicant to voice an objection. The Framers did not state in the Fifth Amendment that just compensation for the taking of property must be paid so long as the property owner first objects to the taking.

Further, McCall's suggested action were not alternatives or solutions for Greystone. For example, Greystone's application did not "offer," address, or include community housing in its application. Thus, Greystone did undertake one of the options suggested by McCall. It made no difference. Evidence in the record demonstrates that such other actions as suggested by McCall simply would have resulted in McCall's refusal to go forward with the application, and would have created a dead end for Greystone. *See* R. Vol. II, p. 219, ¶¶ 2-4; R. Vol. III, p. 442. There was no method to obtain a final decision through these suggested actions, or any other action.

In response to Greystone's argument that a final decision has been reached because the City physically took the nine lots, the City chides Greystone for not understanding physical takings. The City states that takings that are an exaction must be analyzed as regulatory takings. The facts of this case are distinguishable from each of the exaction cases that the City relies on. In Greystone's case the City obtained deed to and literally owns the nine lots in fee simple absolute. The taking did not occur as a result of a regulation so onerous that it was a constructive taking of property. McCall literally took nine lots from Greystone and became the owner. Therefore, there has been a final decision. The City owns the lots. *See Daniel v. County of*

Santa Barbara, 288 F.3d 375, 382 (9th Cir. 2002) (The "first *Williamson County* requirement is automatically satisfied at the time of the physical taking.").

B. The second Williamson County test is inapplicable.

McCall's argues that the second prong of the *Williamson County* ripeness test, that a claimant must first pursue a state remedy and that a claimant cannot concurrently seek state and federal relief, hinges on its position that Greystone's takings claims are untimely. For all of the reasons set forth in Greystone's opening brief on appeal and elsewhere in this Reply Brief, Greystone's takings claims were asserted in a timely manner. The City even recognizes that when a state and federal takings claim are concurrently pursued in a timely manner, the second ripeness test of *Williamson County* does not apply.

IX. McCall's Equitable Defense Theories are not Properly Before this Court on Appeal and are, Nonetheless, Inapplicable.

The City claims that it was entitled to summary judgment against all of Greystone's claims based on certain equitable defenses. The district court specifically declined to rule on this issue, so there is no lower court decision for this Court to consider on appeal. *See* R. Vol. II, p. 370. Nonetheless, McCall's equitable defenses do not apply.

In asserting equitable defenses, McCall continues to take the questionable position that since its unconstitutional and invalid community housing ordinances did not apply to Greystone, Greystone is foreclosed from arguing against McCall's equitable defenses. The idea that Ordinance No. 820 did not apply to Greystone is a charade. Greystone was absolutely subject to Ordinance No. 820 and was required to pay McCall a constitutionally invalid community housing fee under that ordinance. The fact that McCall relied on national experts in affordable housing to form its community housing ordinance and allegedly acted in good faith in doing so is no further availing to the City. The City admits in relying on these experts no one bothered to determine how the Idaho Constitution might regulate such ordinances. Finally, the idea that had

Greystone simply refused to pay the fee the City may have gone a different direction is clearly refuted by the evidence in the record. *See* R. Vol. II, p. 218, ¶¶ 1-4; R. Vol. III, p. 442.

In short, The City's actions violated the law. The City comes to this Court with unclean hands. The doctrine of unclean hands allows "a court to deny equitable relief to a litigant on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue." *Sword v. Sweet,* 140 Idaho 242, 251, 92 P.3d 492, 501 (2004). Greystone's belief that the City's community housing policies and Ordinances complied with the law was reasonable. McCall has no basis to defend its actions on equitable grounds.

McCall also argues that Greystone was unjustly enriched because it enjoyed good will generated from publicity after the nine lots were conveyed to McCall. This is a sweeping and unsupportable generalization. The City cannot point to one shred of evidence in the record to support its bald assertion that Greystone benefited in any way from the publicity received after conveying the nine lots to McCall. Like any rational and reasonable person, Greystone's developers made the best they could of the situation. *See* R. Vol. II, p. 227, ¶ 8. That does not establish an unjust enrichment. The City's arguments regarding unjust enrichment are simply unsupportable.

The City argues that laches bar Greystone's claims because Greystone did not raise an objection to the City's illegal community housing policies and ordinances, and because the City would be burdened by paying back Greystone if Greystone prevails in this action. The City also makes the assertion that Greystone cannot survive a laches defense simply because Greystone assumed the Community Housing policies and ordinances were lawful. The record refutes McCall's position. It is clear from the evidence in the record that McCall would not have acted any differently had Greystone objected to the payment of community housing fees. *See* R. Vol. II, p. 218, ¶¶ 1-4; R. Vol. III, p. 442. The City fails to establish that laches favors its position in

the first place. Secondly, the magnitude of McCall's wrongful conduct and the violation of Greystone's constitutional right to just compensation for the taking of its property far outweighs any equities that may lie in the City's favor on the question of laches.

Finally, the City states that promissory estoppel and waiver may also apply as a defense. These equitable principles have no application to this case. Promissory estoppel is inapplicable. There is no consideration problem with regard to the formation of a contract. As for waiver, the City argues that had Greystone objected to the community housing fee the City would have reevaluated its position. As discussed above, the evidence in the record refutes this. *See* R. Vol. II, p. 218, ¶¶ 1-4; R. Vol. III, p. 442. McCall's estoppel and waiver defense miss the point. Greystone's claim is for inverse condemnation based on constitutional guarantees for the payment of just compensation upon the taking of property. Further, there is no evidence that Greystone ever waived any right to assert a claim for the taking of its property without just compensation. *See G&G, Inc. v. Canyon Highway Dist.*, 139 Idaho 140, 145, 75 P.3d 194, 199 (holding that not objecting to a taking of property does not reflect an intent not to seek compensation for the taken property).

X. The City is not Entitled to Attorney Fees on Appeal and was not Entitled to an Award of Attorney Fees Below.

The City's Respondent's Brief/Cross Appellant's Brief combines its request for attorney fees on appeal with its cross-appeal of the district court's denial of attorney fees below. The City's basis for combining each issue is because the applicable legal standard is the same. Greystone responds to both issues here.

The City claims attorney fees under Idaho Code section 12-117 and Idaho Code section 12-121 to the extent that provision may be applicable. The City is not entitled to an award of attorney fees on appeal under either statute. Idaho Code section 12-117 provides that in a judicial proceeding involving a governmental entity, the prevailing party is entitled to an award of

reasonable attorney fees if the Court finds that the other party acted without a reasonable basis in fact or law. I.C. § 12-117. The purpose of this statute is to: (1) deter arbitrary or groundless action by the government agency; and (2) provide a remedy for financial burdens attempting to correct mistakes made by the governmental agency. *Reardon v. Magic Valley Sand and Gravel, Inc.*, 140 Idaho 115, 118, 90 P.3d 340, 343 (2004). A party acts without a reasonable basis in fact or law only when the party's pursuit of its claims is frivolous, without foundation or unreasonable. *Karr v. Bermeosolo*, 142 Idaho 444, 449, 129 P.3d 88, 93 (2005).

In this case Greystone did not pursue its claims below or this appeal frivolously or without a reasonable foundation in fact or law. Specifically: (1) Greystone has demonstrated that genuine issues of material fact exist as to whether the nine lots were voluntarily conveyed to the City; (2) the City failed to meet its initial burden of proof on summary judgment as to Greystone's second inverse condemnation claim related to the costs to construct public roadway and utility improvements to the lots owned by McCall; (3) the district court misapplied the accrual standard for Greystone's takings claim; (4) Greystone has demonstrated that it was not required to exhaust administrative remedies nor was it required to seek judicial review in lieu of maintaining this inverse condemnation action; and (5) there is an issue of first impression whether a municipality creates a new claim and a new notice period under the ITCA by resolution.

As the district court recognized in its decision to deny attorney fees below: "...this litigation was not frivolously pursued considering the complex nature of the legal issues involved in this case. This case presented a number of challenging legal issues regarding which statute of limitations applied, when the cause of action accrued, and whether the Plaintiffs failed to exhaust their administrative remedies...." R. Vol. IV, p. 636. Moreover, this Court has held that the pursuit of issues of first impression on appeal are not frivolous. *See Saint Alphonsus Reg'l Med. Ctr. v. Ada County*, 146 Idaho 862, 863, 204 P.3d 502, 503 (2009). Further, the City also failed to support or

establish under the required standards in the Idaho Rules of Civil Procedure that it is entitled to the amount of attorney fees claimed below. *See* R. Vol. IV, pp. 608-613.

To the extent the City relies on Idaho Code section 12-121 to argue that it is entitled to an award of attorney fees below or on appeal, both requests should be denied for the same reasons stated above. Greystone respectfully requests that this Court deny the City's request for attorney fees on appeal and requests that this Court affirm the district court's denial of the City's request for attorney fees below.

CONCLUSION

For the reasons set forth above and in Greystone's opening brief, Greystone respectfully requests that this Court reverse the district court's decisions in its June 16, 2011, Memorandum Decision and its October 18, 2011, Memorandum Decision granting the City summary judgment, and remand this case to the district court for further proceedings.

DATED this 15 day of June, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15 day of June, 2012, a true and correct copy of the foregoing document was served by first-class mail, postage prepaid, and addressed to; by fax transmission to; by overnight delivery to; or by personally delivering to or leaving with a person in charge of the office as indicated below:

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