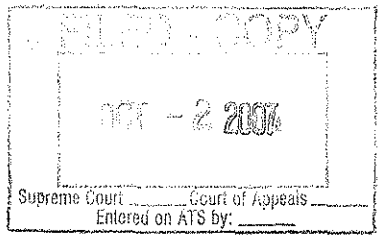
10-2-2007

Lochsa Falls v. Idaho State Dept. of Transportation Appellant's Brief Dckt. 34039

IN THE SUPREME COURT OF THE STATE OF IDAHO

LOCHSA FALLS, L.L.C., an Idaho limited liability company, Plaintiff-Appellant, v. STATE OF IDAHO, IDAHO TRANSPORTATION DEPARTMENT, Defendant-Respondent,	)	Docket No. 34039



BRIEF OF APPELLANT, LOCHSA FALLS, L.L.C.

Appeal from the District Court for the Fourth Judicial District for Ada County
Honorable Michael McLaughlin Presiding

Brian F. McColl
Wilson & McColl
420 W. Washington
P.O. Box 1544
Boise, Idaho 83701-1544
Attorney for Appellant

Steven M. Parry
Deputy Attorney General
Office of the Attorney General
3311 W. State Street
P.O. Box 7129
Boise, Idaho 83707-1129
Attorney for Defendant/Respondent

TABLE OF CONTENTS

I. STATEMENT OF THE CASE. 1
II. ADDITIONAL ISSUES PRESENTED ON APPEAL. 2
III. ATTORNEY FEES ON APPEAL. 2
IV. ARGUMENT. 3
A. ITD DID NOT HAVE AUTHORITY TO REQUIRE APPELLANT TO CONSTRUCT THE TRAFFIC SIGNAL. 3
1. The Encroachment Permit Fee is an Unconstitutional Tax. 3
2. The Encroachment Permit Fee is an Unconstitutional Taking. 11
B. LOCHSA FALLS SHOULD NOT BE REQUIRED TO EXHAUST ITS ADMINISTRATIVE REMEDIES. 15
V. CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Agins v. City of Tiburon, 447 U.S. 255 (1980) 12
Albany Area Builders Association et al v. Town of Guilderland, 534 N.Y.S.2d 791 (1988) 11
Arnzen v. State, 123 Idaho 899, 854 P.2d 242 (1993) 17
Aunt Hack Ridge Estates, Inc. v. Planning Comm'n of Danbury, 273 A.2d 880 (Conn. 1970) 9
BHA Investments, Inc. v. State, 138 Idaho 348 (2003) 7
BHA Investments, Inc. v. State, 138 Idaho 348, 352-353 (2003) 8
Brewster v. City of Pocatello, 115 Idaho 502 (1988) 6
Chapman v. Ada County, 48 Idaho 632 (1930) 5
Coronado Dev. Co. v. City of McPherson, 368 P.2d 51 (Kan. 1962) 9
Country Joe, Inc. v. City of Eagan, 560 N.W.2d 681 (1997) 10
Dolan v. City of Tigard, 512 U.S. 374 (1994) 11
Eastern Diversified Properties, Inc. v. Montgomery County, (Md. 1990) 9
Fairway Dev., 119 Idaho at 125, 804 P.2d at 298 18
Hillis Homes, Inc. v. Snohomish County, 650 P.2d 193 (Wash. 1982) 9
Id. at 504 7
Idaho Bldg. Contractors Ass'n v. City of Coeur D'Alene, 126 Idaho 740 (1995) 9
Isseo v. State, 140 Idaho 586, 597 (2004) 3
James v. Department of Transportation, 125 Idaho 892 (1994) 16
KMST, LLC v. County of Ada, 138 Idaho 577, 583 (2003) 18
Mayor and Board of Aldermen v. Homebuilders Association of Mississippi, Inc., 932 So.2d 44 (Miss. 2006) 10
Middlesex & Boston St. Ry. v. Board of Aldermen, 359 N.E.2d 1279 (Mass. 1977) 9
New Jersey Builders Ass'n v. Bernards Township, 528 A.2d 555 (N.J. 1987) 9
Owsley v. Nelson, 141 Idaho 129, 135-136 (2005) 19
Park v. Banbury, 149 P.3d 851, 857, 2006 Ida. LEXIS 159 (2006) 17
Penn Central Transp. Co. v. New York City, 438 U.S. 104, 127, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978) 12
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 67 L. Ed. 322, 43 S. Ct. 158 (1922) 12
Pennsylvania Coal, 260 U.S. at 416." Id. at 396 14
Regan, 140 Idaho at 726, 100 P.3d at 620 18
Roberts v. Reed, 121 Idaho 727, 732 (1991) 4
Sierra Life Ins. Co. v. Granata, 99 Idaho 624, 627 (1978) 18
State v. County of Minidoka, 50 Idaho 419, 426 (1931) 4
Wielepski v. Harford County, 635 A.2d 43 (Md.App. 1994) 10

Statutes

Idaho Code § 12-117 2
Idaho Code § 40-312(2) 4

Idaho Code § 40-320 8
Idaho Code § 40-502 8
Idaho Code § 40-701 9
Idaho Code § 67-8201 9
Idaho Code §§ 67-8201 9
Idaho Code §40-310(5) 5
Idaho Code §40-310(8) 5
Idaho Code §40-310(9) 5
Idaho Code §40-312(2) 5

Other Authorities

Idaho Const. Art. II, § 1 (2007) 3
Idaho Const. Art. VII, § 2 (2007) 3
IDAPA 39.03.42.003 16
IDAPA 39.03.42.700 ..... 8, 17, 19

I. STATEMENT OF THE CASE.

This appeal raises the issues of whether an "encroachment permit fee" imposed by the Idaho Transportation Department ("ITD") upon Lochsa Falls, LLC ("Lochsa Falls") is constitutional. Lochsa Falls developed a subdivision in Meridian, Idaho. The subdivision has an internal collector street that intersects with Chinden Boulevard. Because Chinden Boulevard is a state highway, the ITD would not allow Lochsa Falls to connect to Chinden Boulevard without obtaining an encroachment permit. The ITD conditioned receipt of Lochsa Falls' permit upon, among other things, constructing a traffic signal at its intersection with Chinden Boulevard. This cost Lochsa Falls approximately $180,000.00. R. 83-85.

Lochsa Falls filed suit contesting the requirement that it construct the traffic signal, complaining that the requirement was a (1) disguised and unconstitutional tax, (2) taking without just compensation, and (3) a violation of substantive due process and equal protection of the law. The District Court dismissed Lochsa Falls claim without prejudice, finding that Lochsa Falls had failed to exhaust its administrative remedies prior to filing suit. The District Court further found that the encroachment permit fee was constitutional. The Court reasoned that the fee was imposed pursuant to the police powers and was not a tax. The Court further found that the amount of the fee was directly related to Lochsa Fall's need to safely access Chinden Boulevard:

> Contrary to the Plaintiff's argument, the Court will find, premised upon the record currently before the Court, that the permit fee in this case is neither unreasonable nor arbitrary. The encroachment permit fee assessed to Lochsa Falls is reasonable and rationally related to the purpose of the Idaho Transportation Board's function of insuring normal and safe movement of traffic on controlled-access highways. The permit fee in this case cannot be viewed as a contribution by the public at

> large to meet public needs. Rather, the amount of the fee was directly related to the safe access of Chinden Boulevard to the developer in this case and those who purchased lots/homes from the developer. As such, the permit fee in this case is a fee and thus the Court will find the Defendant in this case was acting within its authority granted by the Legislature.

R. at 100-101.

The argument below will demonstrate that "the encroachment permit fee" is unconstitutional as it is an unconstitutional tax and is a taking without just compensation. The argument will further establish that Lochsa Falls did not need to exhaust its administrative remedies prior to filing suit.

II. ISSUES PRESENTED ON APPEAL.

The issues presented on appeal are as follows:

(1) Whether the District Court correctly dismissed Plaintiff's Complaint finding that it was required to exhaust its administrative remedies prior to filing suit in District Court.

(2) Whether the District Court correctly found that the Idaho Transportation Board had authority to require Plaintiff to pay all costs associated with the construction of a traffic signal on Chinden Boulevard.

(3) Whether Appellant is entitled to attorney fees on appeal.

III. ATTORNEY FEES ON APPEAL.

Appellant is claiming attorney fees on appeal pursuant to Idaho Code § 12-117.

IV. ARGUMENT.

Appellant's argument consists of two parts. First, appellant argues that ITD did not have authority to require Appellant to construct the traffic signal. Second, Appellant argues that it did not need to exhaust its administrative remedies prior to filing suit.

A. ITD DID NOT HAVE AUTHORITY TO REQUIRE APPELLANT TO CONSTRUCT THE TRAFFIC SIGNAL.

1. The Encroachment Permit Fee is an Unconstitutional Tax.

Fundamental to this case is an understanding of the constitutional powers given to the Legislative and Executive Branches of the Idaho state government. The Idaho Constitution clearly provides for a separation of powers:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Idaho Const. Art. II, § 1 (2007).

The Legislative Branch has been given the responsibility of raising revenue. Idaho Const. Art. VII, § 2 (2007) provides in part: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property, except as in this article hereinafter otherwise provided." "The power to tax, or to exempt from taxation, remains with the Legislature." Isseo v. State, 140 Idaho 586, 597 (2004). Administrative/executive agencies do not have the power

to tax, unless they have been delegated that power by the Legislature. "All the decisions recognize that the power of taxation is a sovereign power delegatory to local taxing districts to raise funds for one public purpose or another, but always in behalf of sovereignty for the public good." State v. County of Minidoka, 50 Idaho 419, 426 (1931).

The Legislature has delegated to ITD some legislative authority, for example the Legislature has given the Idaho Transportation Board the authority to establish rules for "the expenditure of all moneys appropriated or allowed by law to the department or the board." Idaho Code § 40-312(2). The Idaho Court of Appeals following a long line of legal precedent has found that the ITD, as an administrative agency is strictly limited by its statutory authority:

> An administrative agency is limited to the power and authority granted it by the legislature. Fahn v. Cowlitz County, 93 Wash.2d 368, 610 P.2d 857 (1980). *See also* Kopp v. State, 100 Idaho 160, 595 P.2d 309 (1979); Abbot v. State Tax Comm'n, 88 Idaho 200, 398 P.2d 221 (1965). Such delegated authority is primary and exclusive in the absence of a clearly manifested expression to the contrary. Fischer v. Sears, Roebuck and Co., 107 Idaho 197, 200, 687 P.2d 587, 590 (Ct.App.1984). 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 (1986). It may not exercise its sub-legislative powers to modify, alter, enlarge or diminish the provisions of the legislative act which is being administered. Cray v. Kennedy, 230 Kan. 663, 640 P.2d 1219 (1982); Harris v. Alcoholic Bev. Control Appeals Bd., 228 Cal.App.2d 1, 39 Cal.Rptr. 192 (1964). Thus, although the legislature delegated some rule-making authority to the Department to adopt specifications for a uniform system of traffic-control devices, the Department was not thereby permitted to institute rules or policies limiting its ability to achieve its express statutory duties to place signs on side roads. Such rules would be in excess of the Department's rule-making authority, and therefore invalid and unenforceable.

Roberts v. Reed, 121 Idaho 727, 732 (1991). The ITD has not thus far presented any argument that it has been delegated the authority to tax. And indeed looking through the Idaho Code there

is no express delegation of that authority to the ITD or the Idaho Transportation Board. Rather, as stated above, the ITD has only been given the responsibility of expending and accounting for funds. Idaho Code §40-312(2); Idaho Code §40-310(8).

The Legislature has granted the ITD authority to establish rules promoting safety and the general welfare of the public. For example, it has been given the responsibility of "*Establish[ing] standards for the location, design, construction, reconstruction, alteration,* extension, repair and maintenance of state highways, provided that standards of state highways through local highway jurisdictions shall be coordinated with the standards in use for the systems of the respective local highway jurisdictions." Idaho Code §40-310(5). The ITD has also been given the responsibility to: "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." Idaho Code §40-310(9).

These are policing powers. Courts have found that state agencies and local governments exercising police powers cannot impose and collect fees exceeding the costs of administering police regulations. For example, in Chapman v. Ada County, 48 Idaho 632 (1930), the Supreme Court held that a county court's fee for probating an estate was a disguised tax, because the fee was not related to the value of the services rendered. Instead the sole criterion for the amount of the fee was the money value of the estate being probated, "which in many cases would authorize a fee entirely out of proportion to the value of the services rendered. The authorities which have

had this precise question under consideration in connection with similar statutes conclude that such statutes impose a tax in the guise of a fee." Id. at 634.

In Brewster v. City of Pocatello, 115 Idaho 502 (1988), the Supreme Court similarly found that a fee imposed by the City of Pocatello that bore no relationship to the value of services being rendered by the City was a disguised tax. The fee was imposed by the city of Pocatello upon all owners or occupants of property in the city pursuant to a formula reflecting the traffic which was estimated to be generated by that particular property. The money collected was to be used to maintain and repair streets. The City argued that the fee was a valid exercise of the police power. This Court first noted:

> Admittedly, municipalities under art. 12, § 2 are empowered to enact regulations for the furtherance of the public health, safety or morals or welfare of its residents. See Caeser v. State, 101 Idaho 158, 610 P.2d 517 (1980); Rowe v. City of Pocatello, 70 Idaho 343, 218 P.2d 695 (1950). Such police power regulation may provide for the collection of revenue incidental to the enforcement of that regulation. State v. Nelson, 36 Idaho 713, 213 P. 358 (1923); Foster's, Inc. v. Boise City, 63 Idaho 201, 118 P.2d 721 (1941). Our decision in Greater Boise Auditorium District v. Royal Inn of Boise, 106 Idaho 884, 684 P.2d 286 (1984) overruled State v. Nelson, supra, only in part, which is not relevant herein. If municipal regulations are to be held validly enacted under the police power, funds generated thereby must bear some reasonable relationship to the cost of enforcing the regulation. State v. Nelson, supra; Foster's Inc. v. Boise City, supra.
>
> As stated in State v. Nelson, supra, municipal regulations enacted under the police power may provide revenue incidental to the enforcement of the regulation.
>
> > It is quite clear that the ordinance in question in the instant case was enacted for the purpose of raising revenue only, -- first, because by its terms it so provides, and secondly, it has no provisions of regulation. (citation omitted). A license that is imposed for revenue is not a police regulation, but a tax, and can only be upheld under the power of taxation. (citation omitted).

36 Idaho at 722, 213 Pac. at 361.

Id. at 504. The Court in Brewster then found as follows:

> In the instant case it is clear that the revenue to be collected from Pocatello's street fee has no necessary relationship to the regulation of travel over its streets, but rather is to generate funds for the non-regulatory function of repairing and maintaining streets. The maintenance and repair of streets is a non-regulatory function as the terms apply to the facts of the instant case. We view the essence of the charge at issue here as imposed on occupants or owners of property for the privilege of having a public street abut their property. In that respect it is not dissimilar from a tax imposed for the privilege of owning property within the municipal limits of Pocatello. The privilege of having the usage of city streets which abuts one's property, is in no respect different from the privilege shared by the general public in the usage of public streets. . . . In a general sense a fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs.
>
> While otherwise argued, we see it clear that the municipal ordinance in question is not designed for the regulation of traffic under the police power, but rather clearly a revenue raising measure. . . .
>
> We hold therefore, that the attempted imposition of the "fee" by the city of Pocatello is in reality the imposition of a tax.

Id. at 504-505.

Summarizing this line of cases, the Court in BHA Investments, Inc. v. State, 138 Idaho 348 (2003), stated:

> Fees and taxes are generally distinguished in that fees are for the purpose of regulation whereas taxes are solely for the purposes of raising revenue. See Brewster v. City of Pocatello, 115 Idaho 502, 504-505 (1988). . . . Generally, the amount of a fee must "bear some relation to the value of the services rendered." In Chapman, this Court held that a county court's probate fee was unconstitutional because the probate fee depended only upon the value of the estate, which had no necessary relation to the value of services rendered. Id. at 634. The Court in Chapman noted that the fee was not "imposed under the police power for purposes of regulation," suggesting that the holding would be otherwise if it were. Id. At 635. In Brewster, however, the Court made clear that even regulations under the police powers must meet a test of reasonableness: "If municipal regulations are to be held validly enacted under the police power, funds

> generated thereby must bear some reasonable relationship to the cost of enforcing the regulation." 115 Idaho at 504.

BHA Investments, Inc. v. State, 138 Idaho 348, 352-353 (2003).

In the instant case the regulatory scheme does provide for a fee reasonably related to the costs of services rendered, i.e., to the costs of issuing and granting an encroachment permit. IDAPA 39.03.42.700 states in relevant part: "Fee Administration. Fees for applications for permits shall be based on the Department's cost to produce the permit and administer the program." However, the administrative rule goes on to provide for collection of much more:

> Miscellaneous Costs. In addition to the application fee, the Department may require payment of costs associated with the following: . . . (e) Construction of highway modifications or improvements, including but not limited to signals, illumination, signs, pavement markings, delineation, guardrail and culverts; (f) Changes or adjustments made to highway features or fixtures . . . .

IDAPA 39.03.42.700.3. This is the part of "the encroachment permit fee" that Lochsa Falls is contesting, as it has the effect of shifting the burden of raising revenue to construct traffic signals from the State (from the public at large) to individual developers. The Legislature has clearly and strictly stated that it is the State that is to pay for traffic signals and other highway improvements. Idaho Code § 40-320 specifically provides: "All costs of constructing, reconstructing and acquiring rights-of-way for highways in the state highway system shall be born by the state." It does not say shall be borne by developers. Similarly, Idaho Code § 40-502, which establishes the Idaho Transportation Department, provides that the Department has the duty of maintaining the state highways at "state expense." It does not say at the expense of developers.

There is other money available for highway improvements, construction, repairs and maintenance. Those funding sources are generally taxes, in particular gasoline taxes, special fuel taxes, etc. Idaho Code § 40-701.

The Legislature, had it wanted developers to pay for the costs to improve highways, could have granted ITD along with local governments the power to assess impact fees in its "Idaho Development Impact Fee Act". Idaho Code §§ 67-8201 et seq. The Act allows local governments and only local governments to pass on the costs of providing new public facilities due to new growth onto those who benefit from new growth and development, e.g., developers. However, under this Act developers are to pay no more than their proportionate share of the cost of the new public facilities, so as to protect the developer's constitutional rights. Idaho Code § 67-8201. Nevertheless, the Legislature has not given the ITD the right to assess and collect impact fees. Impact fees are lawful only if such fees are authorized, or appropriately limited, by state enabling legislation. See Idaho Bldg. Contractors Ass'n v. City of Coeur D'Alene, 126 Idaho 740 (1995). Other jurisdictions have similarly held that impact fees are illegal without specific enabling legislation. See Aunt Hack Ridge Estates, Inc. v. Planning Comm'n of Danbury, 273 A.2d 880 (Conn. 1970); Coronado Dev. Co. v. City of McPherson, 368 P.2d 51 (Kan. 1962); Eastern Diversified Properties, Inc. v. Montgomery County, (Md. 1990); Middlesex & Boston St. Ry. v. Board of Aldermen, 359 N.E.2d 1279 (Mass. 1977); New Jersey Builders Ass'n v. Bernards Township, 528 A.2d 555 (N.J. 1987); Hillis Homes, Inc. v. Snohomish County, 650 P.2d 193 (Wash. 1982).

The ITD has taken it upon itself to assess and collect taxes (impact fees) from developers. It has decided that developers should pay for the privilege of having a state highway with a traffic signal abut their property, while the other traveling public who pass through and benefit from the signal and state highway do not have to pay for the traffic signal. Courts in other jurisdictions have found that such "fees" despite their names are unlawful taxes. Wielepski v. Harford County, 635 A.2d 43 (Md.App. 1994) (holding that a county ordinance imposing fees to construct road improvements directly fronting the developers property where there was a specific nexus between the amount of the fee and the actual cost to improve the one-half of the roadway fronting the property to County road standards was invalid as the County Council was without authority to enact taxes – "The sole purpose of the fee in the case *sub judice* is to generate revenue to finance, in whole, road improvements necessary as a consequence of land development. . . . the road improvements would benefit those other than the property owners" and were therefore a tax.); Country Joe, Inc. v. City of Eagan, 560 N.W.2d 681 (1997) (holding that a city could not lawfully impose a road unit connection charge as a condition of issuance of a building permit as the charge was a revenue measure, benefiting the public in general. "Because it is not a purely regulatory or license fee but instead a revenue measure, the road unit connection charge is a tax which must draw its authorization, if at all, from the city's powers of taxation."); Mayor and Board of Aldermen v. Homebuilders Association of Mississippi, Inc., 932 So.2d 44 (Miss. 2006) ("It is the opinion of this Court that the Circuit Court in the matter sub judice did not err in holding the City's impact fees constituted an illegal tax. Impact fees are not per se illegal; however, the authority to implement the fees rests with the Legislature.") Albany

Area Builders Association et al v. Town of Guilderland, 534 N.Y.S.2d 791 (1988) (holding a town did not have authority to enact a transportation impact fee law which provided that all applicants for building permits had to pay a fee based upon the additional traffic that would be generated by the proposed construction.)

For these reasons, Lochsa Falls respectfully requests that this Court find that "encroachment permit fee" is an unconstitutional and invalid tax.

2. The Encroachment Permit Fee is an Unconstitutional Taking.

In Dolan v. City of Tigard, 512 U.S. 374 (1994), the United States Supreme Court held that a city did not show the necessary "rough proportionality" between building permit conditions and the impact the development would have on the community. The case arose when the owner of retail store applied to the city for a building permit to build a bigger store, a paved and expanded parking area, and an additional structure for complementary businesses. The city granted the application, but subjected the owner to two conditions: (1) that she dedicate to the city a portion of her lot falling within a floodplain and; (2) that she dedicate an additional 15-foot strip of land to be used as a pedestrian/bicycle pathway. The owner eventually sued the city arguing that the required dedications constituted an unconstitutional taking without just compensation.

The Supreme Court first recited:

> The *Takings Clause of the Fifth Amendment of the United States Constitution*, made applicable to the States through the *Fourteenth Amendment*, Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 239, 17 S. Ct. 581, 41 L. Ed. 979 (1897), provides: 'Nor shall private property be taken for public use, without just

> compensation." One of the principal purposes of the *Takings Clause* is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960).

Id. at 384. Next the Supreme Court advised that not every diminishment in property value amounts to a constitutional violation. "'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.' Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 67 L. Ed. 322, 43 S. Ct. 158 (1922)." Id. at 384-385.

The Supreme Court then clarified the test that applied to determine whether a compensable taking has occurred. The first part of the test is to determine whether a land use regulation "substantially advances legitimate state interests". Id. citing Agins v. City of Tiburon, 447 U.S. 255 (1980). The Court found that in Dolan's case the dedication of the flood-plain and the pedestrian path served legitimate public purposes. The Court then stated: "The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development. Nollan, supra, at 834, quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 127, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978)." Id. at 388. The Supreme Court held that there must be a "rough proportionality" between the amount of the exaction and the impact of the proposed development. "We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the *Fifth Amendment*. No precise mathematical calculation is required, but the city must make some sort of individualized

determination that the required dedication is related both in nature and extent to the impact of the proposed development." Id. at 391.

After analyzing the city's findings, the Supreme Court found that there was not a reasonable relationship between the floodplain easement and the petitioner's proposed new building. The city had never said why a public greenway, as opposed to private one, was required in the interest of flood control. Similarly, with respect to the pedestrian/bicycle pathway, the Supreme Court found, that while the larger retail sales facility would increase traffic on the streets and that dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion, the city had not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably related to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway "could offset some of the traffic demand . . . and lessen the increase in traffic congestion." The Supreme Court held that the city needed to "make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated." Id. at 395-396.

The Supreme Court concluded its opinion with the following statement: "Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization, particularly in metropolitan areas such as Portland. The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but

there are outer limits to how this may be done. 'A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.' Pennsylvania Coal, 260 U.S. at 416." Id. at 396.

Looking to the test as set forth in Dolan, Lochsa Falls concedes that the required traffic signal substantially advances legitimate state interests. However, Lochsa Falls asserts that there is not a "rough proportionality" between the required traffic signal and Lochsa Fall's impact on Chinden Boulevard traffic. Keeping in mind that the State has the burden of proof per Dolan of proving rough proportionality, there has been no showing made in this case. To the contrary, the State failed to place into the record the Traffic Impact Study prepared by Washington Infrastructure Services. The Affidavit filed by the Chief Engineer for the Idaho Transportation Department filed in Support of the State's Motion for Summary Judgment refers to the study, but somehow that study has failed to make it into this Court's record. R. 38 ¶ 5. The missing traffic study establishes the amount of traffic that Lochsa Falls would be generating at the new intersection, and while not in the record, that study shows that the traffic generated by Lochsa Falls subdivision is small in comparison to an adjoining subdivision and background traffic on Chinden Boulevard. The IDAPA regulation simply ignored the necessary individualized determination that the taking's analysis requires – i.e., a finding that the entire cost of this traffic signal should be borne by this particular developer.

Because the State's regulation does not require and because the State has failed to establish the rough proportionality between the required traffic signal and Lochsa Fall's impact on Chinden Boulevard traffic, Lochsa Falls asks this Court to find that forcing the cost of constructing the traffic signal on Lochsa Falls constitutes an unconstitutional taking and/or asks this Court to remand this case to the District Court for further findings.

B. LOCHSA FALLS SHOULD NOT BE REQUIRED TO EXHAUST ITS ADMINISTRATIVE REMEDIES.

The primary basis for the District Court's dismissal of this matter was that Lochsa Fall's had allegedly failed to exhaust its administrative remedies. The District Court correctly recited the following:

> [T]he Defendant argued the Plaintiff must appeal through the Administrative Procedures Act and exhaust all administrative remedies prior to filing suit in this Court. The Defendant asserted IDAPA 39.03.42.003 provides the appropriate appeals process for the Plaintiff.
>
> 01. Commencement. Applicants may appeal denied permits in writing to the Department's District Traffic office within thirty (30) days of receipt of notification. The appeal process commences on the date the Department's District office receives notification of appeal from the applicant.
>
> 02. Process Hold. If at any time during the appeal process it is determined that insufficient documentation was submitted with the appeal, all parties shall be notified that the appeal process is placed on hold until the necessary documentation is supplied.
>
> 03. Initial Appeal Process. The District will have fourteen (14) working days to review the appeal. If the District does not overturn the original denial, the appeal shall be forwarded to

the State Traffic Engineer who will have fourteen (14) working days to review the appeal. The appellant shall be notified by certified mail within seven (7) working days of the Department's Chief Engineer's decision.

04. Secondary Appeal Process. If further arbitration is required, the appellant has thirty (30) days following denial notification to contact the Department's legal section and the appeal process will be initiated in accordance with the Idaho Administrative Procedure Act and IDAPA 04.11.01, "Idaho Rules of Administrative Procedure of the Attorney General."

IDAPA 39.03.42.003. "This is the forum ITD believes Plaintiff is required to use, if it wishes to contest the condition of the permit." Memorandum in Support of Summary Judgment, p.6. Furthermore, the Defendant pointed out that Idaho Code Section 67-5271(1) states, "[a] person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter."

R. 97-98. The Court went on to find that "the Administrative Procedures Act is the proper procedure and the Plaintiff has not exhausted those procedures and therefore the Court will GRANT the Defendant's Motion for Summary Judgment Dismissing Plaintiff's Complaint without prejudice." R. at 102.

Lochsa Falls first would note and argue that IDAPA 39.03.42.003 only provides an appeal process when encroachment permits are DENIED. Lochsa Falls permit was not denied. Rather, a temporary permit was issued with the condition that Lochsa Falls construct a traffic signal. R. at 38, ¶ 2, R. 43-44. See, James v. Department of Transportation, 125 Idaho 892 (1994) (holding terminated employee was not required to exhaust his administrative remedies when state statute did not allow probationary employees to appeal terminations.) Accordingly, since the appeal process set forth in IDAPA 39.03.42.003 does not apply to permits that are

granted with conditions attached, this Court should find that Lochsa Falls was not required to go through the administrative appeals process.

Second, In Park v. Banbury, 149 P.3d 851, 857, 2006 Ida. LEXIS 159 (2006) this Court recognized:

> Although facial challenges to the validity of a statute or ordinance need not proceed through administrative channels, as-applied challenges may be required to do so. In *McCuskey*, the Court recognized an exception where the property owner was challenging the validity of the zoning ordinance itself rather than a decision of the zoning authority. *123 Idaho at 660, 851 P.2d at 956*; *cf. Regan, 140 Idaho at 725, 100 P.3d at 619* (finding an adequate administrative remedy where the party was challenging the interpretation rather than the constitutionality of the statute at issue).

Id. at 857 (emphasis added). Lochsa Falls is arguing that IDAPA 39.03.42.700, the administrative rule requiring developers to pay for traffic signals, is invalid on its face, as ITD has not received authority from the Legislature to require such payments, and further the rule does not require the necessary "rough proportionality" between the fee imposed and the impact of the development. Accordingly, Lochsa Falls asks this Court to find that exhaustion is not required for this facial challenge of the administrative rule.

Finally, Lochsa Falls recognizes that "As a general rule, a party must exhaust administrative remedies before resorting to the courts to challenge the validity of administrative acts." Arnzen v. State, 123 Idaho 899, 854 P.2d 242 (1993). However, in addition to the arguments just made, there are other exceptions to the exhaustion rule that apply to this case. Two exceptions are as follows: "We have recognized exceptions to that rule in two instances: (a) when the interests of justice so require, and (b) when the agency acted outside its authority."

KMST, LLC v. County of Ada, 138 Idaho 577, 583 (2003). "Styled differently, courts will not require exhaustion 'when exhaustion will involve irreparable injury and when the agency is palpably without jurisdiction.' Sierra Life Ins. Co. v. Granata, 99 Idaho 624, 627 (1978); see also Regan, 140 Idaho at 726, 100 P.3d at 620; Fairway Dev., 119 Idaho at 125, 804 P.2d at 298." Park v. Banbury, 149 P.3d 851, 2006 Ida. LEXIS 159 (2006).

Lochsa Falls case falls within these exceptions. As argued above, ITD acted outside its authority. The Legislature has not given ITD the power to tax, and this action by ITD is a tax. Thus, Lochsa Falls should not have to exhaust its administrative remedies as ITD is palpably without jurisdiction to impose such taxes.

Furthermore, requiring Lochsa Falls to exhaust its administrative remedies would not be in the interest of justice. An administrative appeal makes no sense considering that the issues in this case are all legal and not factual, thus making it seem silly to appeal to an engineer instead of a judge. Further, the appeal would be to the State Traffic Engineer who has boldly stated that "To my knowledge the Idaho Transportation Department has never paid in full or in part for any highway improvements or traffic control devices associated with a property owner's Right of Way Encroachment Application for an Approach to a State Highway." R. at 39. Surely, Lochsa Falls would end up back in district court appealing the decision of this traffic engineer who believes developers should always pay for traffic signals. This Court has held:

> One such exception to the exhaustion requirement applies where bias or prejudgment by the decision maker can be demonstrated. Peterson v. City of Pocatello, 117 Idaho 234, 236, 786 P.2d 1136, 1138 (Ct. App. 1990); 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE, § 13.22(9) (2d ed. 1997); see Johnson v. Bonner Cty. Sch. Dist. No. 82, 126 Idaho

490, 493, 887 P.2d 35, 38 (1994). This is because "the *due process clause* entitles a person to an impartial and disinterested tribunal." Eacret v. Bonner Cty., 139 Idaho 780, 784, 86 P.3d 494, 498 (2004). Actual bias on the part of a decision maker is "constitutionally unacceptable." Johnson, 126 Idaho at 493, 887 P.2d at 38. The constitutional requirement that an adjudicator be free from bias applies equally to the courts and to state administrative agencies. Eacret, 139 Idaho at 784, 86 P.3d at 498. To require a litigant to exhaust his administrative remedies before a biased decision maker would also be futile. See Peterson, 117 Idaho at 236, 786 P.2d at 1138.

Owsley v. Nelson, 141 Idaho 129, 135-136 (2005).

Clearly, exhaustion of administrative remedies does not make sense in this matter.

V. CONCLUSION.

For the foregoing reasons, Appellant respectfully requests that this Court find that IDAPA 39.03.42.700 is facially invalid to the extent it requires a developer to pay all costs associated with construct traffic signals. Further, Appellant requests that this Court find that Appellant was not required to exhaust its administrative remedies.

DATED This 2nd day of October 2007.

WILSON & McCOLL

By _____
Brian F. McColl
Attorney for Appellant Lochsa Falls, L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October 2007, I caused to be served a true and correct copy of the foregoing instrument by the method indicated below, and addressed to the following:

Steven M. Parry
Deputy Attorney General
Office of the Attorney General
3311 W. State Street
Boise, Idaho 83707-1129

_____ U.S. Mail
_____ Overnight Mail
__✓__ Hand Delivery
_____ Fax

Brian P. McColl