3-28-2008

Boise Tower Associates, LLC v. Hogland Appellant's Brief Dckt. 34333

IN THE SUPREME COURT OF THE STATE OF IDAHO

BOISE TOWER ASSOCIATES, LLC, a Washington limited liability company, Plaintiff-Appellant-Cross Respondent, v. TIMOTHY J. HOGLAND, an individual acting under color of state law, and THE CITY OF BOISE, an Idaho municipality, Defendants-Respondents-Cross Appellants.	**Docket No. 34333**

APPELLANT'S OPENING BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, In and For the County of Ada

The Honorable Darla Williamson, Presiding

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I. STATEMENT OF THE CASE.

A. Nature of the Case.

In 2002, appellant Boise Tower Associates ("BTA") was constructing a 25-story condominium tower called the Boise Tower Project (the "Project") in downtown Boise, Idaho. On November 8, 2002, respondent Timothy J. Hogland ("Hogland"), as the director of the Boise Planning and Development Services Department (the "Building Department"), issued a stop work order that halted construction of the Project. On November 19, 2002, Hogland allowed construction of the Project to continue but only if the Building Department was granted the right to approve BTA's financing for the Project. On February 11, 2003, Hogland, without any hearing, rejected BTA's proposed financing for the Project and revoked BTA's building permit. Although the City Council of the City of Boise (the "City") reinstated the permit on April 9, 2003, the Project never recovered from the adverse publicity that followed Hogland's actions.

B. Course of Proceedings.

BTA filed suit against Hogland and the City under 42 U.S.C. §1983 and for the tortious interference with BTA's contractual relations. The Honorable Darla Williamson, Fourth Judicial District, granted the respondents' summary judgment motion and dismissed all of BTA's claims. The District Court also denied BTA's partial summary judgment motion that Hogland and the City were liable under 42 U.S.C.§1983 in depriving BTA of its procedural due process rights. BTA appeals the denial of its partial summary judgment and the dismissal of its claims under 42 U.S.C. §1983, its tort claims for interference with contractual relations, and its takings claim.

C. Statement of Facts.

i. *Issuance of the Building Permit.*

On November 27, 1998, BTA submitted an application to the Building Department for a building permit for the shell and core of the building on the Project. R. Vol. I, p. 142, Ex. 2 (Affidavit of Christopher Burke in Support of Boise Tower's Motion for Partial Summary Judgment), Ex. A (transcript of deposition of Timothy Hogland), p. 63, l. 12 – p. 65, l. 4 and Ex. 47. The Building Department approved BTA's application and issued a building permit on May 3, 2000. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 75, l. 25 – p. 78, l. 9 and Ex. 51. BTA requested, and the Building Department granted, a 180-day extension of its building permit until June 14, 2000. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 87, l. 13 – p. 90, l. 20; R. Vol. I, p. 142, Ex. 3 (Affidavit of Fredrick Peterson in Support of Boise Tower's Motion for Partial Summary Judgment), ¶ 4. Under Section 106.4.4 of the 1994 Uniform Building Code ("UBC")[1], a building permit expires if construction does not begin within 180 days after issuance of the permit or if the work is suspended or abandoned for a period of 180 days. R. Vol. I, p. 142, Ex. 2, Ex. A, Ex. 46, p. 1-6-1-7.

BTA commenced construction work on the Project prior to June 14, 2001, sufficient to keep its building permit in force and effect. R. Vol. I, p. 142, Ex. 2, Ex A., p. 92, ll. 4-20; R. Vol. I, p. 142, Ex. 3, ¶ 4. BTA continued with construction work on the Project between June 2001 and May 2002, at which time work was temporarily halted until construction financing could be arranged. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 110, ll. 7-10; R. Vol. I, p. 142, Ex. 3, ¶ 4.

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[1] A complete copy of the 1994 Uniform Building Code ("UBC") as adopted by the City was attached as Ex. 46 to the deposition of Timothy Hogland which was attached as Ex. A to the Affidavit of Christopher Burke in Support of Boise Tower's Motion for Partial Summary Judgment which is Ex. 2 to the Clerk's Record in this appeal. Timothy Hogland testified at his deposition that the 1994 UBC was the official building code for the City of Boise applicable to the building permit at issue in this matter. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 74, ll. 6-25. For the convenience of the Court, a copy of Chapter 1 of the UBC entitled "Administration" is attached as an Addendum to this brief.

On May 15, 2002, concrete was poured for the foundation of the Project. That work was reported in an inspection report prepared by Materials Testing and Inspection ("MTI"), dated May 15, 2002. MTI was an independent inspector contracted by the Building Department to inspect work on the Project. A copy of MTI's May 15th inspection report was sent by MTI to the Building Department and was contained in its business records. Hogland and the City do not now dispute that the work described in that report was performed on the Project on May 15, 2002. R. Vol. I, p. 142, Ex. 3, ¶ 6 and Ex. A; R. Vol. I, p. 142, Ex. 2, Ex. A, p. 113, l. 16-23, p. 117, l. 19 – p. 118, l. 4, p. 123, l. 13 – p. 125, l. 11, p. 126, l. 23 – p. 127, l. 16, and Ex. 57.

ii. *BTA's Finance and Construction Progress.*

During the summer of 2002, BTA was introduced to Marshall Investments Corporation ("Marshall"), a construction lender from Minneapolis, Minnesota, with which BTA's general contractor, Mortenson, had had significant prior experience. BTA and Mortenson had a number of meetings with Marshall, during which Marshall verbally committed to put together funding for the Project that would be constructed by Mortenson. On October 7, 2002, BTA received from Marshall a proposal for a construction loan in the amount of $39,350,000. A requirement to close that loan was that BTA have executed presales agreements with buyers for 63 residential units. At the time, BTA already had at least 60 presales agreements. R. Vol. I, p. 142, Ex. 3, ¶ 7 and Ex. B.

BTA and Mortenson were sufficiently optimistic about Marshall's funding proposal and commitment to fund the loan that they entered into a new construction contract on October 25, 2002. Mortenson also committed to restart construction on the Project immediately, pending funding of the loan by Marshall, and to pay the interim construction costs until Marshall closed the loan. Based on this commitment and execution of the new Mortenson/BTA general contract,

BTA authorized Mortenson to immediately resume construction work on the Project. R. Vol. I, p. 142, Ex. 3, ¶ 8.

On November 7, 2002, Mortenson delivered to Hogland a letter notifying the Building Department of Mortenson's intention to resume construction on the Project on November 7th. R. Vol. I, p. 142, Ex. 3, ¶ 8 and Ex. C. Hogland received the letter and understood from it that Mortenson was going to restart construction on the Project immediately. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 134, l. 23 – p. 135, l. 16.

Between May and November 2002, Hogland had received substantial pressure to do something about the Project. He testified in his deposition:

> Q. During that time period, May through November of 2002, did any representative of the City advocate or recommend that the building permit be canceled or revoked?
>
> A. There certainly was a lot of public opinion about this thing sitting there. It was causing all kinds of problems. There was newspaper stuff; there were people calling the city council. And at a city council meeting a council member indicated: What are you going to do about this? Something has to be done about this. This can't go on like this. They are getting lots of phone calls.

R. Vol. I, p. 142, Ex. 2, Ex. A, p. 130, ll. 5-17.

iii. *Stop Work Order*.

On November 8, 2002, the day following Mortenson's November 7th letter, the Building Department served upon BTA and Mortenson a notice directing BTA and Mortenson to stop all work on the Project "until a meeting with [the Building Department] has been completed and a course of action agreed upon." Neither Boise nor Hogland had any discussion with BTA, or provided BTA with any notice or an opportunity to be heard, before issuing the notice. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 137, l. 3 – p. 138; R. Vol. I, p. 142, Ex. 3, ¶ 9 and Ex. D.

Hogland admitted in his deposition that he issued the November 8th notice based upon the faulty assumption that work had last been performed on the Project on May 3, 2002, and that BTA's building permit had expired on November 8, 2002 because of the failure to do work within 180 days. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 138, 4 – p. 140, l. 11, p. 203, l. 21 – p. 204, l. 3. Hogland also admitted that if, in fact, work was performed on the Project on May 15, 2002, as indicated by the MTI inspection report, 180 days would not have run until November 11, 2002, and therefore, the building permit had not expired as of November 8th. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 224, l. 16 – p. 225, l. 17 and Ex. 57.

iv. *The Stipulation.*

After receiving the November 8th stop work notice, Rick Peterson of BTA and Chuck Rauch, project manager for Mortenson, had meetings with Hogland, during which Hogland first advised them that BTA's building permit had expired for lack of construction activity within 180 days. Hogland told them in those meetings that he would extend the building permit for another 60 days if BTA satisfied a number of conditions, including providing the Building Department with a loan commitment to finance construction of the Project. Peterson and Rauch told Hogland that the 180-day period had not lapsed, and that construction work had been performed within the 180-day period. R. Vol. I, p. 142, Ex. 3, ¶ 10; R. Vol. I, p. 142, Ex. 2, Ex. A, p. 146, ll. 5-17. Peterson requested that Hogland investigate his records further before making any final decision on the building permit. R. Vol. I, p. 142, Ex. 3, ¶ 10. Hogland refused. He told Peterson that BTA would have to sign a written stipulation establishing conditions under which BTA would be permitted to resume work under the building permit. He also told Peterson that the consequence for failing to meet those conditions by the deadline stated in the stipulation would be the expiration of the permit. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 142, l. 25 – p. 143, l. 25; R. Vol. I, p.

142, Ex. 3, ¶ 10. Hogland also refused to allow BTA to proceed with any work on the Project unless or until BTA agreed to the conditions of that stipulation. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 144, ll. 8-12; R. Vol. I, p. 142, Ex. 3, ¶ 10.

On November 19, 2002, Hogland presented Rick Peterson of BTA with a written stipulation. R. Vol. I, p. 142, Ex. 3, Ex. E. Hogland told Peterson on that date that if he did not sign the stipulation as drafted, Hogland would tell the City Council at that night's City Council meeting that BTA's building permit had expired. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 153, l. 15 – p. 154, l. 12; R. Vol. I, p. 142, Ex. 3, ¶ 11. Peterson protested. He told Hogland that Peterson's attorney had advised him not to sign the stipulation. Peterson further told Hogland that if Hogland or the City publicly announced that the building permit had expired, the adverse publicity would do serious damage to the Project. R. Vol. I, p. 142, Ex. 3, ¶ 11; R. Vol. I, p. 142, Ex. 2, Ex. A, p. 153, l. 15 – p. 155, l. 6. Peterson told Hogland that canceling the building permit would jeopardize his financing and cause BTA to lose condominium pre-sales. R. Vol. I, p. 142, Ex. 3, ¶ 11. Mr. Peterson firmly believed at that time that if Hogland or Boise publicly announced cancellation or expiration of the building permit, the Project would come to an abrupt end. *Id.* When Hogland continued to insist that Peterson sign the stipulation, Peterson did so on November 19, 2002, but only after Hogland told him that if he did not sign it, Hogland would tell the City Council the permit had expired. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 156, ll. 7-11; R. Vol., I, p. 142, Ex. 3, ¶ 11. The stipulation signed by Peterson and Hogland required BTA to provide a loan commitment, approved by the City, for full financing of the Project within 60 days from the date of the agreement, or the building permit would be deemed expired. R. Vol. I, p. 142, Ex. 3, Ex. E.

On January 22, 2003, Hogland and Rick Peterson signed a written addendum to the November 19, 2002 stipulation, purporting to extend until February 4, 2003, the time within which BTA had to furnish a loan commitment for full financing to Boise, and providing that a loan for full financing must close no later than March 4, 2003. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 183, l. 17 – p. 184, l. 12 and Ex. 68. The addendum also provided that the failure to satisfy these conditions would result in cancellation of the building permit. *Id.* Peterson believed that he had no choice but to sign the addendum to the stipulation, because if he did not, Boise would cancel the building permit and the Project would likely come to an end. R. Vol. I, p. 142, Ex. 3, ¶ 15.

On or about January 10, 2003, BTA delivered to the Building Department a signed loan commitment from Marshall to fund construction of the Project. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 162, l. 3 – p. 163, l. 18 and Ex. 63. On or about January 21, 2003, BTA delivered a letter to Hogland enclosing another copy of the Marshall loan commitment and a loan commitment from Washington Capital Management, Inc. ("Washington Capital"). In that letter, BTA indicated that Washington Capital was willing to renew the attached loan commitment depending upon the City's approval. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 177, ll. 10-18 and Ex. 66; R. Vol. I, p. 142, Ex. 3, ¶ 12 and Ex. F. The letter also stated:

> Please provide BTA with your written approval of one or both commitments. In the event, you do not approve a commitment, please detail the reasons for the lack of approval and provide BTA with an opportunity to respond.

R. Vol. I, p. 142, Ex. 3, Ex. F. On or about January 31, 2003, BTA furnished the Building Department with a new signed loan commitment from Washington Capital. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 188, ll. 3-23 and Ex. 70.

Hogland and the Building Department rejected the January 10th Marshall loan commitment. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 167, l. 11 – p. 168, l. 22; R. Vol. I, p. 142, Ex. 3,

¶ 13. The Building Department requested some changes in the Washington Capital loan commitment. While BTA, Washington Capital, and the City were discussing these changes, Washington Capital advised Hogland that it deemed the loan commitment expired and no longer in effect. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 191, ll. 8 – p. 194, l. 18; R. Vol. I, p. 142, Ex. 3, ¶ 16.

v. *Permit Revocation.*

On February 11, 2003, Hogland delivered to Rick Peterson a letter advising BTA that its building permit had been canceled, or deemed expired, because BTA had failed to satisfy the condition of the stipulation requiring a signed loan commitment for full funding within the specified time period. Boise did not give BTA any hearing before canceling BTA's permit on February 11, 2003. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 208, l. 9 – p. 209, l. 14 and Ex. 75; R. Vol. I, p. 142, Ex. 3, ¶ 17.

Before Hogland had given his letter to BTA, Rick Peterson had requested that Hogland provide BTA a hearing before canceling the building permit. Hogland told him that BTA did not have a right to a hearing. Hogland even pointed Peterson to the provisions of the UBC that he said precluded a hearing. R. Vol. I, p. 142, Ex. 3, ¶ 17.

Hogland admitted in his deposition that by the time he had notified BTA on February 22, 2003 that its building permit was cancelled, he had actually seen and reviewed the May 15, 2002 MTI inspection report. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 212, l. 4 – p. 213, L. 14.

vi. *Subsequent Appeal.*

On February 19, 2003, BTA requested an appeal before the Boise City Council of Hogland's decision. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 211, l. 25 – p. 212, l. 12 and Ex. 76; R. Vol. I., p. 142, Ex. 3, ¶ 18. The City Council accepted the appeal and conducted a hearing on

April 9, 2003, during which it decided to reinstate BTA's building permit. During that April 9, 2003 hearing, Council member Jordan stated:

> As I reviewed all of the information and all the testimony that we've had on this project, it really boiled down to one rather simple issue, and that is, how many days had gone on without work being done on the tower. We were provided with a document during the last week that showed that there had been a pour on May 15 which would mean that the permit had not in fact expired, and if the decision that we're talking about is whether or not 180 days had passed without work, and if, in fact, those 180 days had not passed, then it is difficult for me to find that that permit was in fact expired.

R. Vol. I, p. 142, Ex. 3, ¶ 18 and Ex. H.

The reinstatement of BTA's building permit came too late. As Mr. Peterson originally feared and forecasted in November 2002, the revocation of the building permit, and the adverse publicity surrounding it, led to cancellation of a number of pre-sale condominium purchase agreements and a withdrawal of further financing efforts on the Project by Marshall. BTA was never thereafter able to obtain alternative financing. The permit revocation and surrounding adverse publicity also caused Mortenson and its subcontractors to cease further work on the Project. The Project never recovered and came to an end. R. Vol. I, p. 142, Ex. 3, ¶ 19.

BTA's costs and investment in the Project is in excess of $12,000,000. When BTA purchased the Boise Tower site and obtained a building permit, BTA's expectations were that the development would result in a completed condominium tower and that the sales of units would recover BTA's costs and investment and also result in substantial profit. To date, BTA has not recovered its costs and investment from the property. R. Vol. I, p. 143, Ex. 16 (Second Affidavit of Fredrick Peterson in Support of Boise Tower's Memorandum in Opposition to Defendants' Motion for Summary Judgment and Reply in Support of Boise Tower's Motion for Summary Judgment), ¶ 3 and Ex. 16.

II. ISSUES ON APPEAL.

A. Whether the Stipulation Agreement is *ultra vires* and void because the conditions of the Agreement exceeded Hogland's authority under the Uniform Building Code?

B. Whether the Stipulation Agreement is void for lack of consideration?

C. Whether the City and Hogland violated BTA's Constitutional Rights and are liable under 42 U.S.C. §1983?

1. Whether a building permit is a protected property interest?

2. Whether a hearing was required before BTA's building permit could be revoked?

3. Whether Hogland had final policymaking authority on the particular issue of the expiration and revocation of building permits such that the City is liable for Hogland's decision?

4. Whether Hogland is entitled to qualified immunity?

D. Whether there are questions of fact which preclude the dismissal of BTA's taking claim by summary judgment?

E. Whether there are questions of fact which preclude the dismissal of BTA's tort claims against Hogland?

III. ARGUMENT AND AUTHORITIES.

A. Standard of Review.

This case is on appeal from the District Court's order granting summary judgment to the City and Hogland. "In an appeal from an order of summary judgment, this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment." *Lockheed Martin Corp. v. Idaho State Tax Comm.*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006).

Rule 56(c) of the Idaho Rules of Civil Procedure provides, in pertinent part, that summary judgment "shall be rendered forthwith if the pleadings, depositions, and admission on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . .." "All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Robert Comstock, LLC v. Keybank Nat'l Assoc.*, 142 Idaho 568, 130 P.3d 1106 (2006).

B. The Stipulation Agreement is Void.

The Stipulation Agreement and the requirement that Hogland had to approve financing for the Project plainly exceeded the authority granted to Hogland under the Uniform Building Code. A case remarkably similar to the facts of the instant case is *Black v. City of Ketchum*, 122 Idaho 302, 834 P.2d 304 (1992). In that case, the Supreme Court of Idaho reversed a trial court that had rejected the challenge of property owners to the conditions imposed by the City of Ketchum on the vacation of an alley that bisected their property. The property was intended by the owners to be developed as a motel. The City approved the vacation by an ordinance but required first that a building permit be issued for a motel that had been approved by the City and that a loan in the amount of at least $2,500,000 had been funded for the construction of the motel. The property owners also signed an estoppel affidavit that stated that the conditions of the ordinance were acceptable and would not be challenged by them.

In a later suit by the property owners against the City of Ketchum, the trial court granted summary judgment in favor of the City on a contract theory. The Idaho Supreme Court reversed, holding that the conditions imposed by the City were *ultra vires* and therefore void. The state statute governing vacations granted a city the right to vacate an alley only when it was deemed expedient for the public good and only with the proviso that there is no impairment of the right

of way, easements, and franchise rights of lot owners and public utilities. There was no authority by the City to impose additional conditions on the vacation of the alley.

Similarly in the instant case, the Uniform Building Code does not contain any provision authorizing or requiring a building official, such as Hogland, to condition the granting or extension of a building permit, or the performance or continued performance of work under an unexpired building permit, on the Building Department's approval of a loan commitment to finance construction of the work. The Stipulation Agreement was therefore *ultra vires* and void.

Even assuming that the Stipulation Agreement was somehow authorized by law, the Agreement would in any event be invalid for lack of consideration. *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 769, 979 P.2d 627, 642 (1999); *World Wide Lease, Inc. v. Woodworth*, 111 Idaho 880, 884, 728 P.2d 769, 774 (Ct. App. 1986). The purported consideration for the Agreement was the extension of the alleged expired building permit for the Project. However, it was clear that the building permit had not yet expired. There was accordingly no consideration for the stipulation.

C. Hogland and the City of Boise Violated BTA's Constitutional Rights and Are Liable under 42 U.S.C. §1983.

42 U.S.C. §1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.. ..

The constitutional rights that were deprived by the City and Hogland were BTA's rights to procedural due process. "The right to procedural due process is secured by Article 1, Section 13, of the Idaho Constitution and by the Fourteenth Amendment to the United States

Constitution." *Gay v. County Comm'rs*, 103 Idaho 626, 628, 651 P.2d 560, 562 (Ct. App. 1982). Procedural due process protects the minimum guarantees of notice and a hearing where deprivation of a property interest may occur. *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 72, 28 P.3d 1006, 1015-16 (2001).

i. *A Building Permit is a Protected Property Interest.*

A property interest exists if state and local law affords a person a "legitimate claim or entitlement to the asserted benefit." *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 72, 28 P.3d 1006, 1015-16 (2001); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Where the asserted right is not an *application* for a building permit but instead a permit that has *already been acquired*, the proper inquiry is whether local law affords a permit holder a legitimate claim or entitlement to the continued validity of the permit or whether it can be revoked at the unfettered discretion of the government. *See, 3883 Connecticut LLC v. District of Columbia*, 336 F.3d 1068, 1072 (D.C. Cir. 2003); *see also, Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005) (noting that "a state operating license that can be revoked only 'for cause' creates a property interest."); *cf. Doran v. Houle*, 721 F.2d 1182, 1185 (9th Cir. 1983) (finding no property interest in a permit to conduct federally owned tests where the government "retains unrestricted discretion over future enjoyment of the interest"). Under the UBC, neither Hogland nor the City can revoke BTA's permit at their unfettered discretion. Rather, a permit may be revoked only upon a limited number of conditions similar to a "good cause" standard: if it was issued in error, on the basis of incorrect or incomplete information, or in violation of an ordinance, regulation, or code provision. R. Vol. I, p. 142, Ex. 2, Ex. A, Ex. 46, pp. 1-7 (UBC §106.4.5).

When faced with nearly identical local law, the court in *3883 Connecticut LLC, supra*, found that an existing building permit was a property interest. District of Columbia law allowed a building permit to be revoked only if the permit was based on false statements, the construction did not conform to the permit or construction codes, citations had been issued for violations of the codes threatening health and safety, there had been non-compliance with two stop work orders, or the contractor's license was terminated. *3883 Connecticut LLC.*, 336 F.3d at 1073. The Court concluded that where revocation of a building permit "is limited to the five circumstances listed and . . . depends on whether work is being performed contrary to the provisions of the Construction Codes, or unsafely" the code "indicate[s] that [Plaintiff] has a property interest in the continued effect" of the permits. *Id.* Consequently, the standards for revocation in the UBC, as adopted by the City, confirms BTA's legitimate claim to its permit. See *id.*; *Thornton,* 425 F.3d at 1164; *cf. Doran*, 721 F.2d at 1185. A City building permit that has already been acquired is accordingly a property interest that cannot be taken without first providing due process. *See Bradbury*, 136 Idaho at 73, 28 P.3d at 1016 ("The procedural protection of property guaranteed by the Fourteenth Amendment 'is a safeguard of the security of interests that a person has already acquired in specific benefits.'" (quoting *Maresh v. State of Idaho Dep't of Health and Welfare*, 132 Idaho 221, 226, 970 P.2d 14, 19 (1998))); *3883 Conn.*, 336 F.3d at 1072; *Roth*, 408 U.S. at 577 (1972).

ii. <u>*No Hearing on the Final Decision to Revoke BTA's Building Permit was Provided Prior to Revocation.*</u>

Procedural due process requires that government seeking to deprive a person of a property interest must afford the holder of that interest notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 73, 28 P.3d 1006, 1015-16 (2001); *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91,

982 P.2d 917, 926 (1999); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 927, 950 P.2d 1262, 1266 (1998). Hogland provided no meaningful opportunity in which to demonstrate that the building permit had not expired or that there was no authority to revoke the permit.

BTA was not afforded an opportunity to be heard at a meaningful time. "In situations where the State feasibly can provide a pre-deprivation hearing before taking property, it generally must do so regardless of the adequacy of a post-deprivation tort remedy to compensate for the taking." *Zinermon v. Burch*, 494 U.S. 113, 127, 132 (1990); *Armendariz v. Penman*, 31 F.3d 860, 865 (9th Cir. 1994) rev'd in part on other grounds by *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc).

In *Honey v. Distelrath* 195 F.3d 531, 533 (9th Cir. 1999) (internal citation omitted), the Court concluded that pre-deprivation due process was required under *Zinermon* where "(1) the deprivation of [property] was predictable; (2) the creation of a pre-deprivation process was not impossible; and (3) the deprivation was the result of an official's abuse of his position and therefore was not random and unauthorized." Where the government delegates to an official the "power and authority to effect the very deprivation complained of," an act is not "unauthorized" simply because it was "not an act sanctioned by state law" or constituted "an official's abuse of his position." *Zinermon,* 494 U.S. at 138; see also *Honey*, 195 F.3d at 534; *Armendariz*, 31 F.3d at 866; *Piatt v. MacDougall*, 773 F.2d 1032, 1036 (9th Cir. 1985) (finding that pre-deprivation process is required where "the state has procedures, regulations or statutes designed to control the actions of state officials, and those officials charged with carrying out state policy act under the apparent authority of those directives."); *Haygood v. Younger*, 769 F.2d 1350, 1357 (9th Cir. 1985) ("Where the injury is the product of the operation of state law, regulation, or institutionalized practice, it is neither random nor unauthorized, but wholly predictable,

authorized, and within the power of the state to control."). Accordingly, the City was required to provide BTA with an opportunity to be heard before its building permit was revoked.

The City argued below that the meetings between Hogland and BTA prior to the execution of the Stipulation Agreement, and the Stipulation Agreement itself, are evidence of an informal opportunity to be heard. Even if these meetings were adequate process (which they were not, as discussed below) they only concerned the City's stop work order based on the allegation of 180 days of inactivity. None of these meetings provided BTA with an opportunity to oppose the ultimate revocation of its permit when Hogland concluded that the two loan commitments presented on January 21, 2003 were insufficient. Notably, in the letter accompanying the loan commitments, BTA specifically demanded that if Hogland or the City refused to approve either commitment, BTA be given notice of the reasons for that decision and an opportunity to respond. R. Vol. I, p. 142, Ex. 3, Ex. F. Subsequently, Mr. Peterson requested that the City provide BTA a hearing before revoking the building permit. R. Vol. I, p. 142, Ex. 3, ¶ 17. Even after being given these explicit reminders of their responsibility to provide a meaningful hearing before taking any adverse action, Hogland and the City refused to afford BTA an opportunity in which to dispute the ultimate decision to revoke the building permit. *Id.* Instead, on February 11, 2003, Hogland simply sent BTA a letter in which he concluded that BTA did not satisfy the loan commitment conditions of the stipulation agreement and revoked the building permit. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 208, l. 9 – p. 209, Ll. 14 and Ex. 75; R. Vol. I, p. 142, Ex. 3, ¶ 17.

Had BTA been given an opportunity to be heard prior to the revocation of its permit, it could have shown that the City's building code does not allow the building official to revoke an existing building permit for failure to present proof of financing. This statement of the law is not

in dispute. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 98, l. 1 – p. 99, l. 12. As this was the principal reason why Hogland revoked BTA's permit, according to his own letter, an opportunity to be heard on this matter was critical. Additionally, BTA could have, after many rebuffed attempts, shown that the permit had not expired due to 180 days of inactivity, a fact now conceded by both the City and Hogland himself. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 113, ll. 16-23, p. 117, l. 19 – p. 118, l. 4, p. 123, l. 13 – p. 125, l. 11, p. 126, l. 23 – p. 127, l. 16 and Ex. 57. Insofar as "expiration" was the legal hook on which Hogland hung the permit revocation, an opportunity to be heard on this issue was also critical. Because there was no opportunity, however informal, to make these or any other arguments against the final revocation, Hogland deprived BTA of its property without the required predeprivation due process. *See Tri County Indus., Inc. v. Dist. of Columbia*, 104 F.3d 455 (D.C. Cir. 1997) (holding that suspension of a building permit on the basis of inaccurate information without an opportunity to rebut afforded no meaningful opportunity to be heard before the suspension); *Aberdeen-Springfield Canal*, 133 Idaho at 91, 982 P.2d at 926; *Zinermon*, 494 U.S. at 132; *Cf. Licari v. Ferruzzi*, 22 F.3d 344, 347-348 (1st Cir. 1994) (finding that a developer's procedural due process rights were not violated when his building permits were revoked following a notice that he was not in compliance with a special use permit in which he was informed of a hearing on the matter and permitted to respond in writing).

Second, setting aside the fact that earlier meetings between BTA and Hogland before the execution of the Stipulation Agreement did not address Hogland's final decision to revoke the building permit, those meetings were not in any event an opportunity to be heard in any "meaningful manner". Whether an opportunity to be heard is meaningful depends on the particular circumstances, according to the Supreme Court's rule of balancing in *Matthews v.*

Eldridge. *Bradbury*, 136 Idaho at 73, 28 P.3d at 1016 (citing *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976)); *Aberdeen-Springfield Canal*, 133 Idaho at 91, 982 P.2d at 926. Under *Matthews*, meaningful process is measured by balancing the nature and significance of the property interest, the risk of an erroneous deprivation and the likelihood that additional process would have reduced that risk, and the government's interest in speedy and cost-effective administration. *See Matthews*, 424 U.S. at 335.

Under *Matthews* there can be little doubt that the one-sided and coercive "meetings" between Peterson and Hogland were not a meaningful opportunity to be heard. The importance and value of BTA's property interest are extraordinary. *See Tri County Indus., Inc. v. Dist. of Columbia*, 104 F.3d 455, 461 (D.C. Cir. 1997) ("The property interest here – the entitlement to continue construction without unfair interference – is substantial; any interruption of construction is likely to be very costly.") The revocation of the building permit and the adverse publicity surrounding it led to the cancellation of presale condominium agreements and the withdrawal of further financing efforts by the Marshall. R. Vol. I, p. 142, Ex. 3, ¶ 19. The damages attributable to the revocation of the building permit include the failure of BTA to recover its costs in the Project, which are in excess of $12,000,000. R. Vol. I, p. 143, Ex. 16, ¶ 3. The *Matthews* balancing test contemplates what the value and risk were when the deprivation occurred, and rightly so since, as discussed above, the meaningful time for the required process was before the deprivation. Second, as became clear, the harm of revocation occurred notwithstanding the delayed reinstatement.

The high risk that the permit would be revoked in error could have been entirely eliminated by additional process, at minimal burden to the City. If before the ultimate revocation, Hogland had acted as a neutral arbitrator, receiving all facts and arguments, the

permit would not have been revoked. This statement can be made with confidence, based on undisputed facts, because in its eventual review the City Council concluded that the permit had never expired and that the revocation was not lawful. R. Vol. I, p. 142, Ex. 3, ¶ 18 and Ex. H.

The facts of this case bear a remarkable similarity to those of *Haygood v. Younger, supra.* In that case, prison officials following the ordinary procedures of their office, which they incorrectly believed to represent the correct interpretation of the law, erroneously calculated a prisoner's release date. Although the prisoner vigorously attempted to protest the official's calculation of his release date, prison officials would not entertain his arguments. Instead he was forced to pursue a post-deprivation habeas corpus action. *Haygood*, 769 F.2d at 1352-53. The Court concluded that "[w]hether this behavior on the part of his keepers was negligent or intentional, Haygood's keepers knew that he was protesting his retention in custody. The officers believed that their understanding of the statutes was superior to his. Haygood's response was habeas corpus. This took time." *Id.* at 1358. Consequently, a "denial of due process occurred when state officers, through established interpretations of the regulations for setting release dates, without affording Haygood an opportunity to be heard, chose to extend his custodial period." *Id.*

As in *Haygood*, Hogland revoked BTA's building permit based on his incorrect interpretation of the building code's revocation provision and of a critical time period. Like the officers in *Haygood*, Hogland simply believed that his interpretation was correct and refused to listen when BTA protested or sought to present evidence and argument that the permit should not be revoked. In both cases, only a minimally burdensome hearing would have been required to avoid the risk of deprivation inherent in reliance on incorrect law and facts. Also, BTA's only

post-deprivation remedy, an appeal to the City Council, took time during which the BTA experienced significant injury. Consequently, a due process violation occurred.

iii. *The City is Responsible for Constitutional Violations Because Hogland, as the City's Building Official, Had Final Authority to Revoke Building Permits.*

In *Monell v. Dep't of Soc. Serv. of the City of New York*, 436 U.S. 658 (1978), the Supreme Court held that municipalities can be held liable under 42 U.S.C. § 1983 for violations of rights guaranteed by the Constitution. Although liability cannot be based solely on the doctrine of respondeat superior, acts of municipal agents are sufficient to impose liability if those acts fairly represent municipal policy. *Monell*, 436 U.S. at 694. Since *Monell*, courts have made clear that even a single unconstitutional act by a municipal official can be official policy. In *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), a Supreme Court held that a single act creates municipal liability if it is performed by an official who "possesses final authority to establish municipal policy with respect to the action ordered." *Id.* at 480-81. Consequently, if an official has general authority to make final policy with respect to the subject matter of his actions, the municipality is liable under §1983 for individual unconstitutional acts, even if they were not intended to establish a prospective policy. *See id.*; *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992); *Lubcke v. Boise City/ADA County Hous. Auth.*, 124 Idaho 450, 458-59, 860 P.2d 653, 661-62 (1993) (finding that decisions made by the county housing authority's board, which was the final policymaker for that agency, became official policy for which municipal liability could be imposed).

Whether a municipal official is a final policymaker is a question of state law. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989); *Lubcke*, 124 Idaho at 458, 860 P.2d at 661. Policymaking authority accrues to an official from several sources, the most important of which

is authority granted by state or local statute, regulation, or ordinance. *Pembaur*, 475 U.S. at 483; *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988).

The District Court, relying on *Praprotnik*, concluded that Hogland lacked final policy making authority because the City "retained the authority to measure the official's conduct for conformance with their policies." R. Vol. I, p. 88 (quoting *Parprotnik*, 485 U.S. at 127). The District Court also found the case of *Carr v. Town of Dewey*, 730 F. Supp. 591 (D. Del. 1990) instructive. In *Carr*, a town's building inspector and the mayor were found to lack final policymaking authority because their actions were appealable to the town's Board of Adjustment. Although the District Court correctly held in its decision that "neither the Boise City Code nor the UBC provided for an immediate appeal following an expiration of a permit", the Court nevertheless opined that:

> "However, it is clear that like the building inspector in *Carr*, Hogland's authority was limited and a builder who disagreed with the actions of Hogland had remedial options by seeking an appeal through the Boise City Council, which BTA did. Of course this was not specifically spelled out but it was a viable option for BTA."

R. Vol. I, p. 89.

The District Court also reasoned that Hogland did not possess final policy making authority because the City Code §3-05-02 provides that Hogland is responsible for recommending policies to the Mayor and the City Council. Although the City Council had granted Hogland discretion to implement and enforce the Building Code, "the adopted policy at issue here is the UBC [and] this policy was made a final policy by the City Council and the Mayor." R. Vol. I, p. 91.

The District Court erred. There was no right to appeal Hogland's decision before the revocation of the building permit. Although Section 105 of the Building Code provides for a Board of Appeals, Section 105.2 expressly provides that the Board has **no authority** to hear

appeals of administrative provisions of the code. Section 106 on the expiration and revocation of building permits is within Chapter 1 of the Building Code entitled "Administration".[2] R. Vol. I, p. 142, Ex. 2, Ex. A, Ex. 46, pp. 1-3 – 1-7.

The fact that the City Council provided a post-deprivation hearing can not shield Hogland and the City for the damages suffered by BTA before the reinstatement of the building permit. Because the Council's review was an ad-hoc exercise of its discretion, it is insufficient to negate Hogland's final policymaking authority. Neither law nor practice afforded the City Council any authority to review the Building Official's rules or policies in administrating the Building Code. Indeed, the Council itself admitted that "it's a little bit unusual for us to conduct such a hearing." R. Vol. I, p. 142, Ex. 10 (Affidavit of Wendy Burrows-Johnson Regarding Boise City Council Transcripts from April 1, 2003 and April 8, 2003), Ex. A, p. 1.

The District Court's analysis that the City Council and the Mayor were the final policy makers because they had adopted the UBC would effectively immunize any municipality from liability under §1983 for actions taken pursuant to authority delegated by an ordinance adopted by the municipality. That reasoning was specifically rejected by the Supreme Court.

> As the plurality in *Pembaur* recognized, special difficulties can arise when it is contended that a municipal policymaker has delegated his policymaking authority to another official. If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability. **If, however, a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking authority to others, §1983 could not serve its intended purpose.**

Parprotnik, 485 U.S. at 126 (emphasis added).

The delegation of final authority by the City to Hogland is clear. Hogland was the Director of the Building Department. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 11, ll. 6-16. The

[2] Indeed, Hogland specifically told Peterson that BTA did not have a right to a hearing and pointed Peterson to provisions of the code that he said precluded a hearing. R. Vol. I, p. 142, Ex. 3, ¶ 17.

Director is also the City's "Building Official", the officer responsible for implementing the City's building code. *See* R. Vol. I, p. 142, Ex. 7 (Affidavit of Annette P. Mooney Regarding Boise City Code and Ordinances), Ex. A. (Boise City Municipal Code §3-05-02(M), (Q)) (stating that the Director of the Building Department is "responsible for all functions assigned by law to the building official; to oversee the building plans review/inspection activities of the City, and to issue permits in conformity with the applicable building inspection laws and codes."); R. Vol. I, p. 142, Ex. 2, Ex. A, p. 12, ll. 8-11, p. 42, ll. 18-21.

Section 104.2 of the 1994 Building Code explicitly confers policymaking authority on the Building Official with respect to building code provisions. R. Vol. I, p. 142, Ex. 2, Ex. A, Ex. 46, p. 1-2. That section authorizes and directs the Building Official to enforce the code and grants the Building Official the power to "*render interpretations of this code and to adopt and enforce rules and supplemental regulations in order to clarify the application of its provisions.*" *Id.* Hogland testified that he had the authority to create policy to interpret and apply the code. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 43, ll. 4-15.

Among the code provisions the Building Official enforces are Sections 106.4.4 and 106.4.5, which describes when a building permit expires and describes the authority of the Building Official to suspend or revoke a building permit. R. Vol. I, p. 142, Ex. 2, Ex. A, Ex. 46, p. 1-7. Section 104.2 accordingly grants the Building Official the power to make policy and rules to enforce and interpret the provisions for the expiration and revocation of building permits. R. Vol. I, p. 142, Ex. 2, Ex. A, Ex. 46, p. 1-2. An example of that policy making authority was a decision by Hogland to revoke a building permit in the case of a house that was being constructed on Harrison Boulevard in Boise. Although the UBC did not define the quantity of work that would be sufficient to avoid the termination of a building permit if work was not done

in a 180 day period, Hogland determined that "pound[ing] a few nails every once in a while" was not sufficient. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 61, l. 8 – p. 63, l. 9. There is also no definition in the UBC of whether the 180 day period is calculated based on working or calendar days. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 60, ll. 9-25. Hogland interpreted the Code to require only working days to be used in the calculation. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 89, ll. 11-24

The District Court's reliance on portions of §3-05-02 of the Boise City Code, which set forth the general duties of Hogland's position, are not pertinent to the present action. The portions of the Code cited by the District Court describe the Director's duties in managing the Building Department and its programs, including the duty to recommend policies for achieving the mission of the Building Department, which policies must indeed be approved by either the Mayor or the City Counsel. However, Section 3-05-02(M) clearly provides that Hogland is "responsible for all functions assigned by law to the building official; to oversee the building plans review/inspection activities of the City, and to issue permits in conformity with the applicable building inspection laws and codes". R. Vol. I, p. 142, Ex. 7, Ex. A. Similarly, Section § 3-05-02(Q) provides that Hogland must "perform or cause to be performed all duties required by this code or other law of the building official and/or planning director." *Id.* Unlike policies related to the administration of the Building Department, the policies on interpreting and enforcing the building code do *not* require approval from the Mayor or City Council. The District Court's code citations are accordingly not relevant to determining whether Hogland had final policymaking authority **with respect to the particular issue of permit expiration and revocation**. *See, Lytle v. Carl*, 382 F.3d 978.983 (9th Cir. 2004)(When determining whether an individual has final policymaking authority, we ask whether he or she has authority in '*a*

particular area, or on a particular issue'", citing *McMillian v. Monroe County*, 520 U.S. 781 (1997)(emphasis in original)).[3]

In *Webb v. Sloan*, 330 F.3d 1158 (9th Cir. 2003), a Nevada deputy district attorney had offered to drop a questionable obstruction of justice charge against a defendant if the defendant signed a waiver of civil liability against Carson City. The defendant later was acquitted of the charge and filed suit against Carson City under 42 U.S.C. §1983. Because Nevada law provided that the prosecution of a criminal case was in the entire control of a district attorney, the Court held that the deputy district attorney was the final policymaker on the decision on whether to prosecute the defendant. The Court held the deputy district attorney was the final policymaker even though a state statute provided that the state attorney general "may exercise supervisory powers over all district attorneys of the state in all matters pertaining to the duties of their offices." The Court held that the discretionary and permissive nature of the supervisory authority of the state general attorney over the deputy district attorney did not usurp the control by the deputy district attorney of criminal prosecutions.

Hogland's final policymaking authority on the particular issue of the expiration or revocation of building permits under the UBC is stronger than the final authority exercised by the deputy district attorney in *Webb*. Unlike the statutory scheme in Nevada, there is no provision in the UBC or any other City ordinance that stated that the City or any other party may exercise "supervisory powers over [the Building Official] in all matters pertaining to the duties of [the building Official]." The authority over the administration provisions of the UBC had been delegated by the City to the Building Official, without rights of any appeal and without even supervisory control by the City.

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[3] Ironically, the District Court cites in footnote 4 of its decision an example of a County Sheriff provided by the Supreme Court in *Pembaur* which highlights that a municipal employee may be the official policymaker in some areas and not in other areas.

Lastly, the City by its pleadings in the case is estopped in any event from arguing that Hogland was not delegated authority by the City on matters concerning the issuance or revocation of building permits. In paragraph 4 of its complaint, BTA alleged that "[a]t all times relevant, the City of Boise had delegated to Defendant Hogland the authority to act on its behalf in matters concerning the issuance or revocation of building permits." R. Vol. I, p. 10. The City in its answer admitted that allegation. R. Vol. I, p. 30. This binding admission defeats any present claim that elected officials retained authority with respect to the revocation of building permits and is a sufficient ground, as a matter of law, for the Court to conclude that Hogland had final policymaking authority in this matter.

iv. *Hogland Is Not Entitled to Qualified Immunity; His Actions Violated Clearly Established Constitutional Rights.*

The District Court concluded that Hogland was not personally liable under 42 U.S.C. §1983 for his actions because of his qualified immunity. However, a city official is not entitled to qualified immunity if (1) his actions violated a constitutional right and (2) that right was clearly established such that a reasonable official would recognize that his conduct violated the law. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Kennedy v. Ridgefield City*, 439 F.3d 1055, 1065 (9th Cir. 2006); *Rosenberger v. Kootenai County Sheriff's Dep't*, 140 Idaho 853, 857, 103 P.3d 466, 470 (2004). As argued above, Hogland's revocation of BTA's building permit without a meaningful predeprivation opportunity to be heard violated BTA's right to procedural due process. This satisfies the first element against qualified immunity.

The City argued below that Hogland's actions were mere negligence and, therefore, not actionable under 42 U.S.C. §1983. However, Hogland's liability in this case is not based on negligence but instead his intentional actions. The actions at issue are Hogland's issuance of a stop work order and the revocation of BTA's building permit. These actions were done

consciously and purposefully, with the intent to achieve the desired results (suspension and revocation). In both *Daniels v. Williams*, 474 U.S. 327, 332-33 (1986); *Lundgren v. McCall*, 120 Idaho 556, 558, 817 P.2d 1080, 1082 (1991), cited by the City, the plaintiff alleged that the official conduct was negligent (carelessly leaving a pillow on stairs and negligence in enforcing a fireworks ban, respectively), not intentional actions that violated constitutional rights. In *Daniels,* the Supreme Court held that the negligent conduct alleged by the plaintiff did not state a cause of action under 42 U.S.C. §1983. However, the Court expressly distinguished the facts from an earlier case alleging that intentional conduct had violated the constitution. *See Daniels*, 474 U.S. at 333-34 (distinguishing a prior precedent because "the relevant action of the prison officials in that situation is their *deliberate decision* to deprive the inmate of good-time credit . . . ." (emphasis added)). Hogland's refusal to listen to BTA's position before revoking the permit most decidedly was an intentional act that deprived BTA of its constitutional right to due process.

To show that a right is clearly established, the law creating that right must be such that a reasonable city officer would be on notice that his conduct is unlawful. *Kennedy*, 439 F.3d at 1065; *Rosenberger*, 140 Idaho at 858, 103 P.3d at 470 ("The relevant inquiry in determining whether a right is clearly established is whether it is clear to a reasonable officer that his conduct was unlawful given the circumstances of the situation confronted."); *Lubcke*, 124 Idaho at 463. "[O]fficials are charged with the knowledge of the constitutional developments at the time of the alleged constitutional violations, including all available case law." *Lubcke*, 124 Idaho at 463, 860 P.2d at 666; *see also Kennedy*, 439 F.3d at 1066 ("We have explained before that the responsibility for keeping abreast of constitutional developments rests squarely on the shoulders of law enforcement officials." (internal quotation omitted)). Although the right at issue must be

examined based on the particular factual context, an official "is not entitled to qualified immunity simply because there is no case on all fours prohibiting this particular manifestation of unconstitutional conduct." *San Jose Chapter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 974-75 (9th Cir. 2005) (internal citation omitted). There need not be prior authority precisely on point, rather the law at the time the official acted must have provided "fair warning" that his conduct was unconstitutional. *Id.* at 975; *see also Kennedy*, 439 F.3d at 1065

The right at issue here is BTA's procedural due process right to not have its valid building permit revoked without being afforded a meaningful opportunity to voice its objections to that action before the revocation occurred. The existing case law provided Hogland with fair warning that this right was clearly established and that his actions infringed upon this right. The Ninth Circuit has held that it is clearly established that "the Fourteenth Amendment's due process clause guarantees the right to a pre-deprivation hearing except where exigent circumstances make such a hearing impracticable." *Armendariz*, 31 F.3d at 869 In *Armendariz*, city housing officials had closed rental properties for purported housing code violations when there was no emergency and without first providing the owner an opportunity to be heard. The Court rejected the city officials' claims of qualified immunity, holding that the officials charged with enforcing the housing code should have known of the clearly established right to a pre-deprivation hearing. *Id.* at 869-70; *see also Kennedy*, 439 F.3d at 1066; *Lubcke*, 124 Idaho at 463, 860 P.2d at 666.

D. Questions of Fact Exist on BTA's Taking Claim Which Preclude Summary Judgment.

Court Seven of BTA's complaint alleged that the City had taking a property interest of BTA without just compensation. Although the District Court dismissed this claim in its Judgment, there was no discussion of the dismissal in its decision.

To determine whether the City's revocation of the building permit constitutes a regulatory taking the court must consider (1) the character of the government action, (2) the economic impact of that action on the property owner, and (3) the extent to which reasonable investment-backed expectations of property use were destroyed. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *City of Coeur D'Alene v. Simpson*, 142 Idaho 839, 847, 136 P.3d 310, 318 (2006). While this inquiry is deliberately open-ended and fact specific, the proper focus is always on "the severity of the burden that government imposes upon private property rights." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); *Penn Cent. Transp.*, 438 U.S. at 124. The fact that the building permit was eventually reinstated does not mean that the initial revocation was not a compensable taking. *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 335 (2002) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)); *Cooley v. United States*, 324 F.3d 1297, 1306 (Fed. Cir. 2003). In fact, "[t]he Supreme Court has recognized that property owners should be compensated for temporary regulatory takings as well as permanent ones" because "[s]uch takings are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *Seiber v. United States*, 364 F.3d 1356, 1364 (Fed. Cir. 2004) (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987)). Temporary takings are analyzed under the same *Penn Central* framework as are permanent regulatory takings, and are compensable where the factors demonstrate that government action severely burdened a property interest. *Cooley*, 324 F.3d at 1305 ("In either the case of a permanent or a temporary regulatory taking, Penn Central will govern whether the initial denial of the permit actually took the property in question." (internal quotation omitted)); *see also Tahoe-Sierra Pres. Council*, 535 U.S. at 335.

BTA was deprived of two pieces of property by the permit revocation, the permit, which is a property interest under the City Code, as discussed above, and BTA's right to develop its property as a condominium tower pursuant to the permit. BTA was deprived of each of these rights from February 11, 2003 when the building permit was revoked until April 9, 2003 when the City Council reinstated BTA's building permit. Between these dates the building permit had no value and BTA was deprived of its development rights.

The first *Penn Central* factor, the nature of the government action, requires the court to evaluate the procedure by which the government reached its permitting decision and the reasons for that action. *Cooley*, 324 F.3d at 1305 (finding that the trial court must "consider both the nature of the permitting process and the reasons for delaying the . . . permit."). The process and reasoning employed by Hogland in revoking BTA's permit support a finding that the deprivation was severe. First, as discussed above, Hogland employed a constitutionally deficient process. BTA had no opportunity to influence the government action and, as a result, it was ill conceived and uninformed. Second, the government action was based upon an unlawful exercise of Hogland's power. Nowhere in the building code is the Building Official authorized to condition the use of a building permit on submission of financing commitments or to revoke a permit if those commitments were unilaterally deemed unacceptable. Third, the action was not based on a legitimate rationale. Hogland insisted at the time that the stop work order was necessary because the building permit had expired due to 180 days of activity. As is undisputed now, however, no such expiration ever occurred.

The second *Penn Central* factor, the economic impact, required the court to evaluate the severity of BTA's economic losses. The loss of the permit and the right to develop the land resulted in substantial losses, which favor a finding that the property deprivation was severe.

First, the permit revocation caused financing, and hence the entire project, to fail. This caused BTA to lose the portion of the land's value that derived from the owner's right to construct an urban residential and retail tower, assuredly a large value given the return on investment that BTA expected from the finished project. Second, BTA lost the value of the capital already sunk into the project. That investment exceeds $12,000,000. R. Vol. I, p. 143, Ex. 16, ¶ 3. Third, the building permit itself was valuable, representing the investment of substantial monies in preparing plans, specifications, and other necessary application materials.

The final *Penn Central* factor, whether the taking caused the loss of reasonable investment-backed expectations, requires the court to determine that BTA acquired its property interests "in reliance on a state of affairs that did not include the challenged [regulation]." *See Cienega Gardens v. United States*, 331 F.3d 1319, 1346 (Fed. Cir. 2003); *cf. Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) (finding that plaintiffs had no reasonable investment-backed expectations in the right to build a retirement home on property zoned forest use because state law limited development to structures necessary to forest use at the time they purchased the land). Here, BTA's expectation that it could use its land and building permit to construct a condominium were both investment-backed and reasonable, supporting a finding that the property deprivation was severe. As noted above, BTA invested in excess of $12,000,000 in securing the property from CCDC and a building permit from the City for the sole purpose of constructing a condominium tower. Moreover, the building code provided, and still provides, that a permit cannot be revoked except in specific circumstances, none of which occurred. Under this law, BTA reasonably assumed that the right to develop land would continue as long as the permit was valid. Hogland simply revoked the permit before it expired and without authority, events that no landowner could reasonably anticipate. Under the *Penn Central*

analysis, the deprivation of BTA's building permit and right to develop its property, though temporary, was severe. The court should find that the permit revocation was a taking for which just compensation is owed.

The cases cited by the City below do not detract from this conclusion. First, the holding of *Tahoe-Sierra Pres. Council* is inapposite. That court found that a temporary moratorium on development was not a *categorical* taking of *all* beneficial use of property. 535 U.S. at 332. However, BTA does not assert that it was deprived of *all* economically beneficial use of its land. The *Tahoe-Sierra* court specifically refused to consider whether the moratorium amounted to a *non-categorical* "regulatory taking" under *Penn Central*. *Id.* at 334. Furthermore, *City of Coeur D'Alene v. Simpson's* statement that takings result from "regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain" is consistent with these facts. *Simpson*, 142 Idaho at 847 n.5; *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). The City, through Hogland "appropriated" a building permit and accordingly obstructed BTA's development of its property. Therefore, it is correct to conclude that BTA has been "ousted" from its land.

The preceding discussion makes clear that the City was not entitled to judgment as a matter of law on BTA's constitutional taking claim. Moreover, as the *Penn Central* inquiry is fact intensive, to the extent that any of the facts supporting BTA's right to just compensation are in contest, summary judgment for the City was inappropriate. *See Anderson v. Spalding*, 137 Idaho 509, 513, 50 P.3d 1004, 1008 (2002).

E. Questions of Fact Exist on BTA's State Law Tort Claims Against Hogland which Preclude Summary Judgment.

The District Court dismissed Counts Two and Three of BTA's complaint, which alleged claims against Hogland for intentional interference with contract and prospective economic

advantage on grounds. The District Court did not discuss in its decision the grounds for that dismissal. The City below had argued that Hogland was immune from liability under Idaho Code §§ 6-904(3) and 6-904B(3). BTA contends that material disputes of fact exist on the issues of whether Hogland acted with criminal intent, malice or reckless, willful and wanton conduct, and therefore that summary judgment on Hogland's immunity defenses is inappropriate and should be denied.

i. *Applicable Law.*

The Idaho Tort Claims Act ("ITCA") sets out the general rule that government employees may be held liable for damages arising out of their negligent or otherwise wrongful acts where the employees were acting within the course and scope of their employment. I.C.§ 6-903(a); *Brook v. Logan*, 127 Idaho 484, 488, 903 P.2d 73, 77 (1995); *Grant v. City of Twin Falls*, 120 Idaho 69, 76, 813 P.2d 880, 887 (1991). Under the ITCA, liability is the rule and immunity is the exception. *Rees v. State, Dept. of Health and Welfare*, 143 Idaho 10, 137 P.3d 397 (2006), rehearing denied.

The ITCA creates exceptions to governmental liability for certain types of claims, thereby establishing conditional immunity for governmental agencies and their employees with respect to those claims. See I.C. § 6-904, 6-904A, 6-904B, 6-904C; *Nelson v. Anderson Lumber Company*, 140 Idaho 702, 99 P.3d 1092 (Idaho App. 2004).

Idaho Code § 6-904(3) provides:

> A government entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which: . . . (3) arises out of assault, battery... malicious prosecution... or interference with contract rights.

A government employee loses the conditional immunity created by I.C. § 6-904, and therefore is subject to liability for claims arising out of intentional interference with contract,

where the employee acts maliciously or with criminal intent. *Limbert v. County of Twin Falls,* 131 Idaho 344, 346, 955 P.2d 1123, 1125 (1998). *Sprague v. City of Burley*, 109 Idaho 656, 710 P.2d 566 (1985).

The Idaho Supreme Court has defined "malice" for purposes of the ITCA as "actual malice," or "the intentional commission of a wrongful or unlawful act, without legal justification or excuse and with ill will, whether or not injury was intended." (Emphasis added). *Anderson v. City of Pocatello*, 112 Idaho 176, 188, 731 P.2d 171, 183 (1986). The Supreme Court has defined "criminal intent" for purposes of the ITCA, as being "legal malice," or "the intentional commission of a wrongful or unlawful act, without legal justification or excuse, whether or not the injury was intended." *Anderson v. City of Pocatello*, 112 Idaho 176, 187-88, 731 P.2d 171, 181-83 (1986). Thus, except for the element of "ill will" in malice, the terms "criminal intent" and "malice" have been defined under the ITCA to mean the same thing.

Idaho Code § 6-904B(3) also affords government employees conditional immunity, providing:

> A government entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without gross negligence or reckless, willful and wanton conduct, as defined in Section 6-904(C), Idaho Code, shall not be liable for any claim which: ... arises out of issuance, denial, suspension or revocation of, or failure or refusal to issue, deny, suspend or revoke a permit ....

A plaintiff may prove liability under I.C. § 6-904B(3) by showing that the government employee acted with either malice **or** criminal intent **or** that the city's action was reckless, willful and wanton or grossly negligent. *C.f. Hunter v. State Dept. of Corrections, Div. of Probation and Parole*, 138 Idaho 44, 57 P.3d 755 (2002) (interpreting I.C. § 6-904A). Idaho Code § 6-904C(2) defines "reckless, willful and wanton conduct" as being present "when a person intentionally and

knowing does or fails to do an act creating unreasonable risk or harm to another, and which involves a high degree of probability that such harm will result."

Since BTA's state law claims against Hogland seek to recover for intentional interference with contract, and the related intentional interference with prospective business advantage, and since they arise, in part, out of the City's revocation of BTA's building permit, the conditional immunities created by I.C. §§ 6-904(3) and 6-904B(3) are potentially applicable. So, too, is the rebuttable presumption created by I.C. § 6-903(e), which provides, "for the purposes of this act and not otherwise, it shall be a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment and without malice or criminal intent."

If a presumption is created by statute, and the statute creating the presumption expressly provides the force that presumption will carry, the statute shall govern. *Idaho County Nursing Home v. Idaho Dept. of Health and Welfare*, 120 Idaho 933, 938, 821 P.2d 988, 993 (1991). If, on the other hand, as in this case, the statute does not state how the presumption is to be applied, Idaho Rule of Evidence 301 shall apply, and the presumption is deemed not to operate as evidence, and it disappears from the case upon introduction of evidence as to the matter presumed. *Bongiovi v. Jamison*, 110 Idaho 734, 718 P.2d 1172 (1986); *State v. Hagerman Water Rights Owners, Inc.*, 130 Idaho 736, 745-46, 947 P.2d 409, 418-19 (1997). Thus, under these rules, once BTA offers evidence that Hogland acted with criminal intent or malice, the presumption of I.C. § 6-903(e) that Hogland acted without malice or criminal intent disappears.

ii. *A Fact Dispute Exists as to Whether Hogland Acted with Criminal Intent.*

To establish that Hogland acted with criminal intent in interfering with BTA's contracts and prospective economic advantage, and to rebut the presumption that Hogland did not act with

criminal intent, BTA must present evidence to support a conclusion that Hogland intentionally committed wrongful or unlawful acts without legal justification or excuse. The following facts support this conclusion and raise disputes of fact which preclude summary judgment:

a. Hogland intentionally directed BTA to stop work on the project on November 8, 2002, and intentionally forced or coerced BTA to sign a stipulation requiring it to provide a loan commitment for financing of the project within 60 days or it would lose its building permit. R. Vol. I, p. 142, Ex. 5 (Boise Tower's Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment), ¶¶ 16-17, 20-22.

b. Hogland used an invalid excuse that BTA's building permit had expired because of the failure of BTA to do any construction within 180 days, as a pretext to coerce BTA into signing an unlawful Stipulation. R. Vol. I, p. 142, Ex. 5, ¶¶ 17-18. Hogland made an unlawful offer, to extend or reinstate BTA's building permit on the condition that it provide the City with a signed loan commitment for full project financing within 60 days. R. Vol. I, p. 142, Ex. 5, ¶¶ 6-9, 17, 18, 20. Hogland also threatened to disclose to the public at a city council meeting that BTA's permit had expired if it did not sign the stipulation. R. Vol. I, p. 142, Ex. 5, ¶ 21.

c. Since the City had previously given BTA one 180-day extension of its building permit, BTA was not entitled to another extension under the Uniform Building Code. UBC § 106.4.4; R. Vol. I, p. 142, Ex. 2, Ex. A, Ex. 46, p. 1-6-1-7. Had BTA's building permit expired, as Hogland advocated, he, as the building official, had no legal authority to extend or reinstate it. *Id.* Using the excuse that the building permit had expired, along with the threat to publicly disclose such expiration, in order to coerce BTA into signing the stipulation agreement, was therefore without lawful authority.

d. As was set forth in the Statement of Facts, the building permit had not expired by November 8, 2002, when Hogland directed that work stop. UBC § 104.2.4 only allows the building official to stop work where it is being done contrary to provisions of the building code. Since BTA had performed work on the project within 180 days, it was not performing work contrary to any UBC provision, and therefore Hogland had no lawful authority to stop work in the first place.

e. Not only did Hogland stop the work, but he refused to let BTA continue any work under BTA's valid, unexpired permit, unless or until it signed the stipulation agreeing to furnish the City with a loan commitment for full project financing within 60 days. R. Vol. I, p. 142, Ex. 5, ¶20. No provision of the building code grants authority to Hogland, the building official, to stop or interfere with work under a valid, unexpired building permit where such work is not being done contrary to provisions of the code. Similarly, there is no code provision permitting or authorizing the building official to review or approve loan commitments on projects that are the subject of valid, unexpired building permits, as a condition of extending, or permitting work to continue under such building permits. Hogland admitted these facts. R. Vol. I, p. 142, Ex. 5, ¶¶ 6, 18, 23.

f. Hogland revoked BTA's unexpired building permit on February 11, 2003, on grounds that BTA did not timely satisfy Hogland's unlawfully imposed condition that BTA furnish a loan commitment for full project financing. R. Vol. I, p. 142, Ex. 5, ¶ 30. The UBC only permits revocation of a valid, unexpired building permit in two very specific and limited circumstances: (i) where the permit is issued in error or on the basis of incorrect information supplied; and (ii) where the permit is issued in violation of any ordinance, regulation or UBC provision. (UBC § 106.4.5; R. Vol. I, p. 142, Ex. 5, ¶ 6). None of these circumstances apply to

Hogland's revocation of BTA's building permit, and the UBC does not, for good reason, permit a building official to revoke a valid, unexpired building permit for any other reason. *Id.*

Considering these facts as a whole, a jury could reasonably conclude that Hogland's acts in stopping work on the project without legal authority, in declaring that BTA's building permit had expired, when it hadn't, in advising BTA that the City would reinstate the building permit if BTA signed the stipulation, when it had no authority to do so, in unlawfully refusing to let BTA proceed with work under a valid, unexpired permit until it signed the stipulation, and in revoking BTA's valid, unexpired permit for failing to satisfy conditions which Hogland had no legal authority to impose in the first place, were wrongful and unlawful, and committed without legal justification or excuse. For these reasons, material disputes of fact exist on the issue of whether Hogland was acting with criminal intent, and Hogland's motion for summary judgment on this immunity issue must be denied.

iii. *A Fact Dispute Exists as to Whether Hogland Acted with Malice.*

To overcome the conditional immunity created by I.C. §§ 6-904(3) and 6-904B(3), it is not necessary to establish that the government employee acted both with criminal intent and malice. Evidence that the government employee acted with either criminal intent or malice is sufficient to abrogate the conditional immunity and to overcome the rebuttable presumption created by I.C. § 6-903(e). *Hunter v. State Dept. of Corrections, Div. of Probation and Parole,* 138 Idaho 44, 57 P.3d 755 (2002).

Under Idaho law, the proof necessary to establish criminal intent under the TCA is the same as the proof necessary to establish malice, except that proof of malice also requires the additional element of ill-will. *Anderson v. City of Pocatello,* 112 Idaho 176, 731 P.2d 171 (1986). Even though BTA does not have to establish that Hogland acted with both criminal intent

and malice, a jury could reasonably infer from the following facts that Hogland committed the acts outlined above with ill-will and, therefore, malice:

a. Between May 2002 and November 2002, Hogland received substantial pressure from the Boise Mayor, City Council and members of the public to do something about the Boise Tower project. R. Vol. I, p. 142, Ex. 5, ¶ 19. Hogland was aware in 2002/2003 that under the UBC, once a building permit has expired for failure to do construction within 180 days, it is no longer valid and enforceable, and that he, as the building official, would not have any authority to reinstate it. R. Vol. I, p. 142, Ex. 5, ¶ 9.

b. Hogland understood and was aware in 2002/2003 that under the UBC, so long as some work authorized under a building permit is performed within 180 days, the building permit may not be deemed expired. *Id.* Hogland knew and understood in 2002/2003 that no UBC provision gave him as the building official authority to review and approve loan commitments for projects which were the subject of existing building permits, as conditions of extending or continuing work under those building permits. R. Vol. I, p. 142, Ex. 5, ¶ 23.

c. Until the Boise Tower project, Hogland had never required review or approval of a loan commitment as a condition of granting or extending a building permit, or permitting construction to proceed under an unexpired building permit. Neither had he previously made closing of a construction loan a condition of extending a building permit or continuing work under an unexpired building permit. *Id.*

d. Hogland ignored protests of both BTA and Mortenson that the 180-day period had not lapsed by November 8, 2002, the date Hogland stopped work on the project, and Hogland refused requests by BTA and Mortenson to investigate City records on BTA's construction work,

which showed that work was performed within 180 days, to verify that fact. R. Vol. I, p. 142, Ex. 5, ¶ 20.

e. Hogland threatened BTA with public disclosure at a City Council meeting that the building permit had expired if BTA did not sign the stipulation agreement, even though BTA's building permit had not expired. R. Vol. I, p. 142, Ex. 5, ¶ 21. Hogland refused to allow BTA to continue construction unless or until BTA signed the stipulation agreement, even though BTA's building permit was valid and had not expired. R. Vol. I, p. 142, Ex. 5, ¶18, 20. Hogland refused to give BTA a hearing before formally canceling its building permit, even though BTA requested a hearing before the building permit was canceled. R. Vol. I, p. 142, Ex. 5, ¶¶ 25, 32.

f. Hogland revoked BTA's building permit even though he had previously seen and reviewed the May 15, 2002 MTI inspection report and even though he previously knew and understood that his pretext for stopping work and coercing BTA into signing the stipulation agreement was wrong and without legal authority. R. Vol. I, p. 142, Ex. 5, ¶ 31.

Even though BTA does not have to prove actual malice to defeat the conditional immunities established by I. C. §§ 6-904(3) and 6-904B(3), the foregoing facts are sufficient to raise an inference that Hogland's acts were committed with ill-will. At the very least, they create a dispute of material fact on the issue of actual malice, which precludes summary judgment. For these reasons, the grant by the District Court of Hogland's motion for summary judgment on the state law immunity issue must be reversed.

iv. *A Fact Dispute Exists as to Whether Hogland Acted with Reckless. Willful and Wanton Conduct.*

Under I.C. § 6-904B, the conditional immunity afforded a government employee may be abrogated where the employee acts with malice or criminal intent or reckless, willful and wanton conduct. *Hunter v. State Dept. of Corrections, Div. of Probation and Parole, supra.* Therefore,

BTA may overcome the immunity afforded Hogland by I.C. § 6-904B(3) by establishing that Hogland acted either with malice or criminal intent, or with reckless, willful and wanton conduct. Like proof of criminal intent and malice, proof of reckless, willful and wanton conduct requires a showing of intentional and knowing acts. In addition, it requires a showing that such acts created an unreasonable risk of harm to another, and involved a high degree of probability that such harm will result. I.C. § 6-904C(2).

Even though BTA does not have to prove reckless, willful and wanton conduct, in addition to criminal intent or malice, to overcome the conditional immunity set forth in I.C. § 6-904B(3), a jury could infer from the following facts that the intentional and knowing conduct of Hogland, outlined in sections E(ii) and (iii) above, created an unreasonable risk of harm to BTA, and involved a high degree of probability that such harm could occur:

a. Hogland was aware that BTA had a construction contract with Mortenson, and that Mortenson was the general contractor of the project, performing work even though construction financing was not yet firm. Mortenson delivered a letter to Hogland on November 7, 2002 advising of its intention to resume project construction. Mortenson representative Chuck Rauch joined BTA in trying to convince Hogland, without success, that Mortenson had performed work on the project within 180 days from the November 8, 2002 stop work order. R. Vol. I, p. 142, Ex. 5, ¶¶ 15, 20.

b. Hogland knew BTA was working with Marshall Investment Group trying to obtain a loan to finance construction of the Project. BTA furnished Hogland with a written loan commitment from Marshall on January 10, 2003 for the City's review. R. Vol. I, p. 142, Ex. 5, ¶¶ 24-26.

IV. CONCLUSION.

BTA request that the Court (a) reverse the denial by the District Court of its summary judgment motion and direct that partial summary judgment be entered that Hogland and the City are liable under 42 U.S.C.§1983 in depriving BTA of its procedural due process rights, reserving to trial the determination of the damages and (b) reverse the grant of summary judgment dismissing the other claims of BTA.

RESPECTFULLY SUBMITTED this 28th day of March, 2008.

ROSSMAN LAW GROUP, PLLC

Erica S. Phillips
Erica S. Phillips
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2008, I caused to be served a true and correct copy of the foregoing document by the method indicated below to the following:

✓ US Mail
____ Overnight Mail
____ Hand Delivery
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ADDENDUM

1994

UNIFORM BUILDING CODE™

VOLUME 1

ADMINISTRATIVE, FIRE- AND LIFE-SAFETY, AND FIELD INSPECTION PROVISIONS

Volume 1

Chapter 1
ADMINISTRATION

SECTION 101 — TITLE, PURPOSE AND SCOPE

101.1 Title. These regulations shall be known as the *Uniform Building Code*, may be cited as such and will be referred to herein as "this code."

101.2 Purpose. The purpose of this code is to provide minimum standards to safeguard life or limb, health, property and public welfare by regulating and controlling the design, construction, quality of materials, use and occupancy, location and maintenance of all buildings and structures within this jurisdiction and certain equipment specifically regulated herein.

The purpose of this code is not to create or otherwise establish or designate any particular class or group of persons who will or should be especially protected or benefited by the terms of this code.

101.3 Scope. The provisions of this code shall apply to the construction, alteration, moving, demolition, repair, maintenance and use of any building or structure within this jurisdiction, except work located primarily in a public way, public utility towers and poles, mechanical equipment not specifically regulated in this code, and hydraulic flood control structures.

For additions, alterations, moving and maintenance of buildings and structures, see Chapter 34. For temporary buildings and structures see Section 3103 and Appendix Chapter 31.

Where, in any specific case, different sections of this code specify different materials, methods of construction or other requirements, the most restrictive shall govern. Where there is a conflict between a general requirement and a specific requirement, the specific requirement shall be applicable.

Wherever in this code reference is made to the appendix, the provisions in the appendix shall not apply unless specifically adopted.

SECTION 102 — UNSAFE BUILDINGS OR STRUCTURES

All buildings or structures regulated by this code which are structurally unsafe or not provided with adequate egress, or which constitute a fire hazard, or are otherwise dangerous to human life are, for the purpose of this section, unsafe. Any use of buildings or structures constituting a hazard to safety, health or public welfare by reason of inadequate maintenance, dilapidation, obsolescence, fire hazard, disaster, damage or abandonment is, for the purpose of this section, an unsafe use. Parapet walls, cornices, spires, towers, tanks, statuary and other appendages or structural members which are supported by, attached to, or a part of a building and which are in deteriorated condition or otherwise unable to sustain the design loads which are specified in this code are hereby designated as unsafe building appendages.

All such unsafe buildings, structures or appendages are hereby declared to be public nuisances and shall be abated by repair, rehabilitation, demolition or removal in accordance with the procedures set forth in the Dangerous Buildings Code or such alternate procedures as may have been or as may be adopted by this jurisdiction. As an alternative, the building official, or other employee or official of this jurisdiction as designated by the governing body, may institute any other appropriate action to prevent, restrain, correct or abate the violation.

SECTION 103 — VIOLATIONS

It shall be unlawful for any person, firm or corporation to erect, construct, enlarge, alter, repair, move, improve, remove, convert or demolish, equip, use, occupy or maintain any building or structure or cause or permit the same to be done in violation of this code.

SECTION 104 — ORGANIZATION AND ENFORCEMENT

104.1 Creation of Enforcement Agency. There is hereby established in this jurisdiction a code enforcement agency which shall be under the administrative and operational control of the building official.

104.2 Powers and Duties of Building Official.

104.2.1 General. The building official is hereby authorized and directed to enforce all the provisions of this code. For such purposes, the building official shall have the powers of a law enforcement officer.

The building official shall have the power to render interpretations of this code and to adopt and enforce rules and supplemental regulations in order to clarify the application of its provisions. Such interpretations, rules and regulations shall be in conformance with the intent and purpose of this code.

104.2.2 Deputies. In accordance with prescribed procedures and with the approval of the appointing authority, the building official may appoint such number of technical officers and inspectors and other employees as shall be authorized from time to time. The building official may deputize such inspectors or employees as may be necessary to carry out the functions of the code enforcement agency.

104.2.3 Right of entry. When it is necessary to make an inspection to enforce the provisions of this code, or when the building official has reasonable cause to believe that there exists in a building or upon a premises a condition which is contrary to or in violation of this code which makes the building or premises unsafe, dangerous or hazardous, the building official may enter the building or premises at reasonable times to inspect or to perform the duties imposed by this code, provided that if such building or premises be occupied that credentials be presented to the occupant and entry requested. If such building or premises be unoccupied, the building official shall first make a reasonable effort to locate the owner or other person having charge or control of the building or premises and request entry. If entry is refused, the building official shall have recourse to the remedies provided by law to secure entry.

104.2.4 Stop orders. Whenever any work is being done contrary to the provisions of this code, or other pertinent laws or ordinances implemented through the enforcement of this code, the building official may order the work stopped by notice in writing served on any persons engaged in the doing or causing such work to be done, and any such persons shall forthwith stop such work until authorized by the building official to proceed with the work.

104.2.5 Occupancy violations. Whenever any building or structure or equipment therein regulated by this code is being used contrary to the provisions of this code, the building official may order such use discontinued and the structure, or portion thereof, vacated by notice served on any person causing such use to be continued. Such person shall discontinue the use within the time prescribed by the building official after receipt of such notice to make the structure, or portion thereof, comply with the requirements of this code.

104.2.6 Liability. The building official charged with the enforcement of this code, acting in good faith and without malice in the discharge of the duties required by this code or other pertinent law or ordinance shall not thereby be rendered personally liable for damages that may accrue to persons or property as a result of an act or by reason of an act or omission in the discharge of such duties. A suit brought against the building official or employee because of such act or omission performed by the building official or employee in the enforcement of any provision of such codes or other pertinent laws or ordinances implemented through the enforcement of this code or enforced by the code enforcement agency shall be defended by this jurisdiction until final termination of such proceedings, and any judgment resulting therefrom shall be assumed by this jurisdiction.

This code shall not be construed to relieve from or lessen the responsibility of any person owning, operating or controlling any building or structure for any damages to persons or property caused by

defects, nor shall the code enforcement agency or its parent jurisdiction be held as assuming any such liability by reason of the inspections authorized by this code or any permits or certificates issued under this code.

104.2.7 Modifications. When there are practical difficulties involved in carrying out the provisions of this code, the building official may grant modifications for individual cases. The building official shall first find that a special individual reason makes the strict letter of this code impractical and that the modification is in conformance with the intent and purpose of this code and that such modification does not lessen any fire-protection requirements or any degree of structural integrity. The details of any action granting modifications shall be recorded and entered in the files of the code enforcement agency.

104.2.8 Alternate materials, alternate design and methods of construction. The provisions of this code are not intended to prevent the use of any material, alternate design or method of construction not specifically prescribed by this code, provided any alternate has been approved and its use authorized by the building official.

The building official may approve any such alternate, provided the building official finds that the proposed design is satisfactory and complies with the provisions of this code and that the material, method or work offered is, for the purpose intended, at least the equivalent of that prescribed in this code in suitability, strength, effectiveness, fire resistance, durability, safety and sanitation.

The building official shall require that sufficient evidence or proof be submitted to substantiate any claims that may be made regarding its use. The details of any action granting approval of an alternate shall be recorded and entered in the files of the code enforcement agency.

104.2.9 Tests. Whenever there is insufficient evidence of compliance with any of the provisions of this code or evidence that any material or construction does not conform to the requirements of this code, the building official may require tests as proof of compliance to be made at no expense to this jurisdiction.

Test methods shall be as specified by this code or by other recognized test standards. If there are no recognized and accepted test methods for the proposed alternate, the building official shall determine test procedures.

All tests shall be made by an approved agency. Reports of such tests shall be retained by the building official for the period required for the retention of public records.

104.2.10 Cooperation of other officials and officers. The building official may request, and shall receive, the assistance and cooperation of other officials of this jurisdiction so far as is required in the discharge of the duties required by this code or other pertinent law or ordinance.

SECTION 105 — BOARD OF APPEALS

105.1 General. In order to hear and decide appeals of orders, decisions or determinations made by the building official relative to the application and interpretation of this code, there shall be and is hereby created a board of appeals consisting of members who are qualified by experience and training to pass on matters pertaining to building construction and who are not employees of the jurisdiction. The building official shall be an ex officio member of and shall act as secretary to said board but shall have no vote on any matter before the board. The board of appeals shall be appointed by the governing body and shall hold office at its pleasure. The board shall adopt rules of procedure for conducting its business, and shall render all decisions and findings in writing to the appellant with a duplicate copy to the building official.

105.2 Limitations of Authority. The board of appeals shall have no authority relative to interpretation of the administrative provisions of this code nor shall the board be empowered to waive requirements of this code.

SECTION 106 — PERMITS

106.1 Permits Required. Except as specified in Section 106.2 of this section, no building or structure regulated by this code shall be erected, constructed, enlarged, altered, repaired, moved, improved, removed, converted or demolished unless a separate permit for each building or structure has first been obtained from the building official.

106.2 Work Exempt from Permit. A building permit shall not be required for the following:

1. One-story detached accessory buildings used as tool and storage sheds, playhouses and similar uses, provided the projected roof area does not exceed 120 square feet (11.15 m^2).

2. Fences not over 6 feet (1829 mm) high.

3. Oil derricks.

4. Movable cases, counters and partitions not over 5 feet 9 inches (1753 mm) high.

5. Retaining walls which are not over 4 feet (1219 mm) in height measured from the bottom of the footing to the top of the wall, unless supporting a surcharge or impounding Class I, II or III-A liquids.

6. Water tanks supported directly upon grade if the capacity does not exceed 5,000 gallons (18 927 L) and the ratio of height to diameter or width does not exceed 2 to 1.

7. Platforms, walks and driveways not more than 30 inches (762 mm) above grade and not over any basement or story below.

8. Painting, papering and similar finish work.

9. Temporary motion picture, television and theater stage sets and scenery.

10. Window awnings supported by an exterior wall of Group R, Division 3, and Group U Occupancies when projecting not more than 54 inches (1372 mm).

11. Prefabricated swimming pools accessory to a Group R, Division 3 Occupancy in which the pool walls are entirely above the adjacent grade and if the capacity does not exceed 5,000 gallons (18 927 L).

Unless otherwise exempted, separate plumbing, electrical and mechanical permits will be required for the above-exempted items.

Exemption from the permit requirements of this code shall not be deemed to grant authorization for any work to be done in any manner in violation of the provisions of this code or any other laws or ordinances of this jurisdiction.

106.3 Application for Permit.

106.3.1 Application. To obtain a permit, the applicant shall first file an application therefor in writing on a form furnished by the code enforcement agency for that purpose. Every such application shall:

1. Identify and describe the work to be covered by the permit for which application is made.

2. Describe the land on which the proposed work is to be done by legal description, street address or similar description that will readily identify and definitely locate the proposed building or work.

3. Indicate the use or occupancy for which the proposed work is intended.

4. Be accompanied by plans, diagrams, computations and specifications and other data as required in Section 106.3.2.

5. State the valuation of any new building or structure or any addition, remodeling or alteration to an existing building.

6. Be signed by the applicant, or the applicant's authorized agent.

7. Give such other data and information as may be required by the building official.

106.3.2 Submittal documents. Plans, specifications, engineering calculations, diagrams, soil investigation reports, special inspection and structural observation programs and other data shall constitute the submittal documents and shall be submitted in one or more sets with each application for a permit. When such plans are not prepared by an architect or engineer, the building official may require the applicant submitting such plans or other data to demonstrate that state law does not require that the plans be prepared by a licensed architect or engineer. The building official may require plans, computations and specifications to be prepared and designed by an engineer or architect licensed by the state to practice as such even if not required by state law.

EXCEPTION: The building official may waive the submission of plans, calculations, construction inspection requirements and other data if it is found that the nature of the work applied for is such that reviewing of plans is not necessary to obtain compliance with this code.

106.3.3 Information on plans and specifications. Plans and specifications shall be drawn to scale upon substantial paper or cloth and shall be of sufficient clarity to indicate the location, nature and extent of the work proposed and show in detail that it will conform to the provisions of this code and all relevant laws, ordinances, rules and regulations.

Plans for buildings more than two stories in height of other than Group R, Division 3 and Group U Occupancies shall indicate how required structural and fire-resistive integrity will be maintained where penetrations will be made for electrical, mechanical, plumbing and communication conduits, pipes and similar systems.

106.3.4 Architect or engineer of record.

106.3.4.1 General. When it is required that documents be prepared by an architect or engineer, the building official may require the owner to engage and designate on the building permit application an architect or engineer who shall act as the architect or engineer of record. If the circumstances require, the owner may designate a substitute architect or engineer of record who shall perform all of the duties required of the original architect or engineer of record. The building official shall be notified in writing by the owner if the architect or engineer of record is changed or is unable to continue to perform the duties.

The architect or engineer of record shall be responsible for reviewing and coordinating all submittal documents prepared by others, including deferred submittal items, for compatibility with the design of the building.

106.3.4.2 Deferred submittals. For the purposes of this section, deferred submittals are defined as those portions of the design which are not submitted at the time of the application and which are to be submitted to the building official within a specified period.

Deferral of any submittal items shall have prior approval of the building official. The architect or engineer of record shall list the deferred submittals on the plans and shall submit the deferred submittal documents for review by the building official.

Submittal documents for deferred submittal items shall be submitted to the architect or engineer of record who shall review them and forward them to the building official with a notation indicating that the deferred submittal documents have been reviewed and that they have been found to be in general conformance with the design of the building. The deferred submittal items shall not be installed until their design and submittal documents have been approved by the building official.

106.3.5 Inspection and observation program. When special inspection is required by Section 1701, the architect or engineer of record shall prepare an inspection program which shall be submitted to the building official for approval prior to issuance of the building permit. The inspection program shall designate the portions of the work that require special inspection and the name or names of the individuals or firms who are to perform the special inspections, and indicate the duties of the special inspectors.

The special inspector shall be employed by the owner, the engineer or architect of record, or an agent of the owner, but not the contractor or any other person responsible for the work.

When structural observation is required by Section 1702, the inspection program shall name the individuals or firms who are to perform structural observation and describe the stages of construction at which structural observation is to occur.

The inspection program shall include samples of inspection reports and provide time limits for submission of reports.

106.4 Permits Issuance.

106.4.1 Issuance. The application, plans, specifications, computations and other data filed by an applicant for a permit shall be reviewed by the building official. Such plans may be reviewed by other departments of this jurisdiction to verify compliance with any applicable laws under their jurisdiction. If the building official finds that the work described in an application for a permit and the plans, specifications and other data filed therewith conform to the requirements of this code and other pertinent laws and ordinances, and that the fees specified in Section 107 have been paid, the building official shall issue a permit therefor to the applicant.

When the building official issues the permit where plans are required, the building official shall endorse in writing or stamp the plans and specifications APPROVED. Such approved plans and specifications shall not be changed, modified or altered without authorizations from the building official, and all work regulated by this code shall be done in accordance with the approved plans.

The building official may issue a permit for the construction of part of a building or structure before the entire plans and specifications for the whole building or structure have been submitted or approved, provided adequate information and detailed statements have been filed complying with all pertinent requirements of this code. The holder of a partial permit shall proceed without assurance that the permit for the entire building or structure will be granted.

106.4.2 Retention of plans. One set of approved plans, specifications and computations shall be retained by the building official for a period of not less than 90 days from date of completion of the work covered therein; and one set of approved plans and specifications shall be returned to the applicant, and said set shall be kept on the site of the building or work at all times during which the work authorized thereby is in progress.

106.4.3 Validity of permit. The issuance or granting of a permit or approval of plans, specifications and computations shall not be construed to be a permit for, or an approval of, any violation of any of the provisions of this code or of any other ordinance of the jurisdiction. Permits presuming to give authority to violate or cancel the provisions of this code or other ordinances of the jurisdiction shall not be valid.

The issuance of a permit based on plans, specifications and other data shall not prevent the building official from thereafter requiring the correction of errors in said plans, specifications and other data, or from preventing building operations being carried on thereunder when in violation of this code or of any other ordinances of this jurisdiction.

106.4.4 Expiration. Every permit issued by the building official under the provisions of this code shall expire by limitation and become null and void if the building or work authorized by such permit is not commenced within 180 days from the date of such permit, or if the building or work authorized by such permit is suspended or abandoned at any time after the work is commenced for a period of 180 days. Before such work can be recommenced, a new permit shall be first obtained to do so, and the fee therefor shall be one half the amount required for a new permit for such work, provided no changes have been made or will be made in the original plans and specifications for such work; and provided further that such suspension or abandonment has not exceeded one year. In order to renew action on a permit after expiration, the permittee shall pay a new full permit fee.

Any permittee holding an unexpired permit may apply for an extension of the time within which work may commence under that permit when the permittee is unable to commence work within the

time required by this section for good and satisfactory reasons. The building official may extend the time for action by the permittee for a period not exceeding 180 days on written request by the permittee showing that circumstances beyond the control of the permittee have prevented action from being taken. No permit shall be extended more than once.

106.4.5 Suspension or revocation. The building official may, in writing, suspend or revoke a permit issued under the provisions of this code whenever the permit is issued in error or on the basis of incorrect information supplied, or in violation of any ordinance or regulation or any of the provisions of this code.

SECTION 107 — FEES

107.1 General. Fees shall be assessed in accordance with the provisions of this section or shall be as set forth in the fee schedule adopted by the jurisdiction.

107.2 Permit Fees. The fee for each permit shall be as set forth in Table 1-A.

The determination of value or valuation under any of the provisions of this code shall be made by the building official. The value to be used in computing the building permit and building plan review fees shall be the total value of all construction work for which the permit is issued, as well as all finish work, painting, roofing, electrical, plumbing, heating, air conditioning, elevators, fire-extinguishing systems and any other permanent equipment.

107.3 Plan Review Fees. When submittal documents are required by Section 106.3.2, a plan review fee shall be paid at the time of submitting the submittal documents for plan review. Said plan review fee shall be 65 percent of the building permit fee as shown in Table 1-A.

The plan review fees specified in this subsection are separate fees from the permit fees specified in Section 107.2 and are in addition to the permit fees.

When submittal documents are incomplete or changed so as to require additional plan review or when the project involves deferred submittal items as defined in Section 106.3.4.2, an additional plan review fee shall be charged at the rate shown in Table 1-A.

107.4 Expiration of Plan Review. Applications for which no permit is issued within 180 days following the date of application shall expire by limitation, and plans and other data submitted for review may thereafter be returned to the applicant or destroyed by the building official. The building official may extend the time for action by the applicant for a period not exceeding 180 days on request by the applicant showing that circumstances beyond the control of the applicant have prevented action from being taken. No application shall be extended more than once. In order to renew action on an application after expiration, the applicant shall resubmit plans and pay a new plan review fee.

107.5 Investigation Fees: Work without a Permit.

107.5.1 Investigation. Whenever any work for which a permit is required by this code has been commenced without first obtaining said permit, a special investigation shall be made before a permit may be issued for such work.

107.5.2 Fee. An investigation fee, in addition to the permit fee, shall be collected whether or not a permit is then or subsequently issued. The investigation fee shall be equal to the amount of the permit fee required by this code. The minimum investigation fee shall be the same as the minimum fee set forth in Table 1-A. The payment of such investigation fee shall not exempt any person from compliance with all other provisions of this code nor from any penalty prescribed by law.

107.6 Fee Refunds. The building official may authorize refunding of any fee paid hereunder which was erroneously paid or collected.

The building official may authorize refunding of not more than 80 percent of the permit fee paid when no work has been done under a permit issued in accordance with this code.

The building official may authorize refunding of not more than 80 percent of the plan review fee paid when an application for a permit for which a plan review fee has been paid is withdrawn or canceled before any plan reviewing is done.

The building official shall not authorize refunding of any fee paid except on written application filed by the original permittee not later than 180 days after the date of fee payment.

SECTION 108 — INSPECTIONS

108.1 General. All construction or work for which a permit is required shall be subject to inspection by the building official and all such construction or work shall remain accessible and exposed for inspection purposes until approved by the building official. In addition, certain types of construction shall have continuous inspection as specified in Section 1701.5.

Approval as a result of an inspection shall not be construed to be an approval of a violation of the provisions of this code or of other ordinances of the jurisdiction. Inspections presuming to give authority to violate or cancel the provisions of this code or of other ordinances of the jurisdiction shall not be valid.

It shall be the duty of the permit applicant to cause the work to remain accessible and exposed for inspection purposes. Neither the building official nor the jurisdiction shall be liable for expense entailed in the removal or replacement of any material required to allow inspection.

A survey of the lot may be required by the building official to verify that the structure is located in accordance with the approved plans.

108.2 Inspection Record Card. Work requiring a permit shall not be commenced until the permit holder or an agent of the permit holder shall have posted or otherwise made available an inspection record card such as to allow the building official to conveniently make the required entries thereon regarding inspection of the work. This card shall be maintained available by the permit holder until final approval has been granted by the building official.

108.3 Inspection Requests. It shall be the duty of the person doing the work authorized by a permit to notify the building official that such work is ready for inspection. The building official may require that every request for inspection be filed at least one working day before such inspection is desired. Such request may be in writing or by telephone at the option of the building official.

It shall be the duty of the person requesting any inspections required by this code to provide access to and means for inspection of such work.

108.4 Approval Required. Work shall not be done beyond the point indicated in each successive inspection without first obtaining the approval of the building official. The building official, upon notification, shall make the requested inspections and shall either indicate that portion of the construction is satisfactory as completed, or shall notify the permit holder or an agent of the permit holder wherein the same fails to comply with this code. Any portions which do not comply shall be corrected and such portion shall not be covered or concealed until authorized by the building official.

There shall be a final inspection and approval of all buildings and structures when completed and ready for occupancy and use.

108.5 Required Inspections.

108.5.1 General. Reinforcing steel or structural framework of any part of any building or structure shall not be covered or concealed without first obtaining the approval of the building official.

The building official, upon notification, shall make the inspections set forth in the following subsections.

108.5.2 Foundation inspection. To be made after excavations for footings are complete and any required reinforcing steel is in place. For concrete foundations, any required forms shall be in place

prior to inspection. All materials for the foundation shall be on the job, except where concrete is ready mixed in accordance with U.B.C. Standard 19-3, the concrete need not be on the job. Where the foundation is to be constructed of approved treated wood, additional inspections may be required by the building official.

109.5.3 Concrete slab or under-floor inspection. To be made after all in-slab or under-floor building service equipment, conduit, piping accessories and other ancillary equipment items are in place, but before any concrete is placed or floor sheathing installed, including the subfloor.

109.5.4 Frame inspection. To be made after the roof, all framing, fire blocking and bracing are in place and all pipes, chimneys and vents are complete and the rough electrical, plumbing, and heating wires, pipes and ducts are approved.

109.5.5 Lath or gypsum board inspection. To be made after all lathing and gypsum board, interior and exterior, is in place, but before any plastering is applied or before gypsum board joints and fasteners are taped and finished.

109.5.6 Final inspection. To be made after finish grading and the building is completed and ready for occupancy.

109.6 Special Inspections. For special inspections, see Chapter 17.

109.7 Other Inspections. In addition to the called inspections specified above, the building official may make or require other inspections of any construction work to ascertain compliance with the provisions of this code and other laws which are enforced by the code enforcement agency.

109.8 Reinspections. A reinspection fee may be assessed for each inspection or reinspection when such portion of work for which inspection is called is not complete or when corrections called for are not made.

This subsection is not to be interpreted as requiring reinspection fees the first time a job is rejected for failure to comply with the requirements of this code, but as controlling the practice of calling for inspections before the job is ready for such inspection or reinspection.

Reinspection fees may be assessed when the inspection record card is not posted or otherwise available on the work site, the approved plans are not readily available to the inspector, for failure to provide access on the date for which inspection is requested, or for deviating from plans requiring the approval of the building official.

To obtain a reinspection, the applicant shall file an application therefor in writing on a form furnished for that purpose and pay the reinspection fee in accordance with Table 1-A or as set forth in the fee schedule adopted by the jurisdiction.

In instances where reinspection fees have been assessed, no additional inspection of the work will be performed until the required fees have been paid.

SECTION 109 — CERTIFICATE OF OCCUPANCY

109.1 Use and Occupancy. No building or structure shall be used or occupied, and no change in the existing occupancy classification of a building or structure or portion thereof shall be made until the building official has issued a certificate of occupancy therefor as provided herein.

EXCEPTION: Group R, Division 3 and Group U Occupancies.

Issuance of a certificate of occupancy shall not be construed as an approval of a violation of the provisions of this code or of other ordinances of the jurisdiction. Certificates presuming to give authority to violate or cancel the provisions of this code or other ordinances of the jurisdiction shall not be valid.

109.2 Change in Use. Changes in the character or use of a building shall not be made except as specified in Section 3405 of this code.

109.3 Certificate Issued. After the building official inspects the building or structure and finds no violations of the provisions of this code or other laws which are enforced by the code enforcement agency, the building official shall issue a certificate of occupancy which shall contain the following:

1. The building permit number.
2. The address of the building.
3. The name and address of the owner.
4. A description of that portion of the building for which the certificate is issued.
5. A statement that the described portion of the building has been inspected for compliance with the requirements of this code for the group and division of occupancy and the use for which the proposed occupancy is classified.
6. The name of the building official.

109.4 Temporary Certificate. If the building official finds that no substantial hazard will result from occupancy of any building or portion thereof before the same is completed, a temporary certificate of occupancy may be issued for the use of a portion or portions of a building or structure prior to the completion of the entire building or structure.

109.5 Posting. The certificate of occupancy shall be posted in a conspicuous place on the premises and shall not be removed except by the building official.

109.6 Revocation. The building official may, in writing, suspend or revoke a certificate of occupancy issued under the provisions of this code whenever the certificate is issued in error, or on the basis of incorrect information supplied, or when it is determined that the building or structure or portion thereof is in violation of any ordinance or regulation or any of the provisions of this code.

TABLE 1-A—BUILDING PERMIT FEES

TOTAL VALUATION	FEE
$1.00 to $500.00	$21.00
$501.00 to $2,000.00	$21.00 for the first $500.00 plus $2.75 for each additional $100.00, or fraction thereof, to and including $2,000.00
$2,001.00 to $25,000.00	$62.75 for the first $2,000.00 plus $12.50 for each additional $1,000.00, or fraction thereof, to and including $25,000.00
$25,001.00 to $50,000.00	$349.75 for the first $25,000.00 plus $9.00 for each additional $1,000.00, or fraction thereof, to and including $50,000.00
$50,001.00 to $100,000.00	$574.75 for the first $50,000.00 plus $6.25 for each additional $1,000.00, or fraction thereof, to and including $100,000.00
$100,001.00 to $500,000.00	$887.25 for the first $100,000.00 plus $5.00 for each additional $1,000.00, or fraction thereof, to and including $500,000.00
$500,001.00 to $1,000,000.00	$2,887.25 for the first $500,000.00 plus $4.25 for each additional $1,000.00, or fraction thereof, to and including $1,000,000.00
$1,000,001.00 and up	$5,012.25 for the first $1,000,000.00 plus $2.75 for each additional $1,000.00, or fraction thereof

Other Inspections and Fees:

1. Inspections outside of normal business hours ..... $42.00 per hour* (minimum charge—two hours)
2. Reinspection fees assessed under provisions of Section 108.8 ..... $42.00 per hour*
3. Inspections for which no fee is specifically indicated ..... $42.00 per hour* (minimum charge—one-half hour)
4. Additional plan review required by changes, additions or revisions to plans ..... $42.00 per hour* (minimum charge—one-half hour)
5. For use of outside consultants for plan checking and inspections, or both ..... Actual costs**

*Or the total hourly cost to the jurisdiction, whichever is the greatest. This cost shall include supervision, overhead, equipment, hourly wages and fringe benefits of the employees involved.

**Actual costs include administrative and overhead costs.