5-16-2008

Boise Tower Associates, LLC v. Hogland Respondent'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,

vs.

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

RESPONDENT/CROSS-APPELLANTS' 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 District Judge

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I.
STATEMENT OF THE CASE

A. INTRODUCTION.

This suit was brought against the City of Boise ("the City") and its employee, Timothy Hogland ("Hogland") by Boise Tower Associates, LLC ("BTA"). The foundation of BTA's case rests on the fraudulent assertion that the City's "permit revocation caused the financing, and hence the entire project, to fail." (App. Brief at 31.) Frederick Peterson, the managing member of BTA,[1] swore this statement was true. (R. p. 142, Exh. 3, Peterson Aff. ¶ 19; *also see* R. p. 9, Complaint ¶ 28). BTA has repeated the falsehood that its project's financing failed due to the City's permit revocation.

These statements are fraudulent. Worse, the BTA's documents, which unequivocally prove these statements are false, were not disclosed to the City by BTA until *after* the City had filed its summary judgment and response to BTA's summary judgment. Simply put, the entire time the City was defending this lawsuit, BTA knew that any dispute concerning the permit did not cause Plaintiff's financing to fail. Indeed, BTA withheld the very documents which prove its revenue stream and funding prospects were available well after reinstatement of the building permit. By the time the documents were disclosed, it was too late for the City to challenge these matters through its pending Motion for Summary Judgment.

B. COURSE OF PROCEEDING BELOW.

BTA filed its complaint on November 2, 2004. Subsequently, the parties filed cross-motions for summary judgment. R. 46 and 54. After a hearing on April 26, 2007, the District Court filed its *Decision and Order on Cross Motions for Summary Judgment* on May 11, 2007, granting summary judgment in favor of the Defendants. Judgment was filed on May 15, 2007.

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[1] ***See*** R. 142, Ex. 2, "Aff. of Fredrick Peterson," ¶ 1.

R. 79. Defendants timely moved for attorney's fees and costs. R. 102. The District Court filed its *Memorandum Decision and Order on Defendant's* [sic] *Petition for Allowance of Attorneys* [sic] *Fees and Costs* on July 18, 2007, denying the Defendants' claims for fees, but awarding costs. R. 129. Plaintiff filed its *Notice of Appeal* on June 22, 2007. R. 120. A judgment awarding costs was filed on July 30, 2007. R. 135. Defendants filed their *Notice of Cross-Appeal* as to that judgment on July 31, 2007. R. 138.

C. STATEMENT OF FACTS

BTA filed its complaint in this case on November 2, 2004. On March 30, 2007 – *two and a half years after* filing the complaint and *four days after* the City's filing of its summary judgment motion and response – BTA dumped 109 pages of documents on the City which were *never* previously produced, although they had been requested in discovery (hereinafter referred to as the "Document Dump"). Those documents revealed BTA's substantial contacts with many lenders *willing to fund* the project *after* BTA's building permit was reinstated and nearly *two dozen witnesses never disclosed by BTA*. In the letter accompanying the Document Dump, BTA's counsel admits these documents "relate to some of [BTA's] contact with lenders in the time periods which are relevant to this case and to your discovery requests." (R. 143, Ex. 24, Muir Aff., Ex. F.)

1. Lenders Were At All Relevant Times Willing To Fund BTA's Project.

a. *Marshall Investments Corporation*.

According to BTA, Marshall Investments Corporation ("Marshall") was its "ace in the hole" for financing. BTA tells this Court – as it did the court below – that the revocation of the building permit led to "a withdrawal of further financing efforts on the Project *by Marshall*" and that BTA "was never thereafter able to obtain alternative financing." (App. Brief pp. 9, 18.)

(emphasis added.) This statement is false. The Document Dump revealed that Marshall continued financing efforts until at least 11 weeks *after revocation* and at least 21 days *after the April 8, 2003, reinstatement* of the permit. On April 30, 2003, Marshall wrote that it was willing to consider financing the project "under the same terms and conditions set forth in [its] commitment to [BTA] dated January 10, 2003" with the exception of five changes.[2] (R. 143, Ex. 12, Allen Aff., Ex. H, BTA 08780) (emphasis added).

b. *Document Dump Revealed Many Other Financial Groups Working with BTA Despite Revocation.*

After the revocation of the building permit, several streams of financing in addition to Marshall were readily available to BTA, provided Appellant would agree to pay a customary application fee and put down a certain amount of equity, which BTA refused to do. Without belaboring the point on each lender, the City limits its discussion to the following three: Owens Investment Fund ("Owens"), Commercial Mortgage Investment Company ("CMI"), and WS&O, Ltd ("WS&O").

(i) Owens Investment Fund

The City was aware of Owens prior to the Document Dump, but not until after it supplemented discovery did BTA disclose that Owens, like Marshall, was willing to wait until after the permit issues had been resolved. These records revealed that on March 28, 2003, Owens still "was very interested in providing [BTA] with a loan" and could fund the project within "30 days or less from approval of building permit and payment of application fee." (R. 143, Ex. 12, Allen Aff., Ex. H, BTA 09265.) Owens was ready to "fly to Boise and conduct [its] final

[2] Two of Marshall's changes were highly beneficial to BTA in that they called for a reduction of residential presales from "53 units to 45 units" and a reduction in parking sales. (R. 143, Ex. 12, Allen Aff., Ex. H, BTA 08780.)

underwriting." *Id.*[3]

(ii) Commercial Mortgage Investment Company

The Document Dump disclosed CMI, *a commercial lender never previously disclosed by BTA*. CMI was willing to fund BTA in April and May of 2003. Immediately after receiving the Document Dump, the City contacted CMI's loan officer which BTA had not disclosed. In 2003 J. Kim Powell, currently a principal at Summit Financial and Investment Group, LLC, worked for CMI as a loan officer. (R. 143, Ex. 14, Powell Aff. ¶ 2.) Powell has been in the commercial real estate lending business for 25 years and has funded over $4 billion worth of transactions. (*Id.* ¶ 1.)

At Peterson's request, Powell attempted to secure financing for BTA. (R. 143, Exh. 14, Powell Aff., ¶ 3). CMI was interested in the transaction and Peterson eventually signed a letter of intent (LOI). CMI was ready, willing, and able to fund the size of loan Peterson requested. *Id.* ¶ 5. On May 8, 2003, Powell and Peterson met in the CMI offices in South Jordan, Utah. Peterson attempted to renegotiate the terms of the application and wanted CMI to waive the $25,000 application fee, even though Peterson had previously agreed to the loan terms and payment of the fee. *Id.* ¶ ¶ 6-7. CMI agreed to spread the application fee out for Peterson by having $15,000 due at the time of execution of the application and $10,000 due when Peterson received a loan commitment acceptable to him in his sole discretion. *Id.* ¶ 9. Peterson never responded to Powell's final offer and concession. *Id.* CMI moved on to more fruitful projects. *Id.* ¶ 12.

Powell explained the circumstances surrounding the building permit were never an issue or a barrier to funding with CMI. (R. 143, Exh., 14, Powell Aff., ¶ 10). Rather, the "barriers to

[3] The City deposed Peterson about Owens without the benefit of this document. Peterson did not disclose Owens' offer to fund the loan after the building permit was reinstated.

financing through CMI included the failure of Mr. Peterson to provide [CMI] with any meaningful documentation supporting his loan application, his unwillingness to pay an application fee, sign and execute the Loan Application, and his untenable attitude." *Id.* ¶ 1. Powell found Peterson "difficult to work with." *Id.* ¶ 8. Peterson never provided evidence of adequate cash equity. *Id.* ¶ 11.

(iii) WS&O Ltd.

The Document Dump also revealed another lender willing to finance the project—WS&O. On April 29, 2003, BTA sent a 5-page fax to Tom White of WS&O, which included "Purchase and Sales Info requested." (R. 143, Ex. 12, Allen Aff., Ex. H, BTA 09775).[4] Several weeks later, a handwritten fax dated June 11, 2003,[5] from Thomas E. White of WS&O to BTA stated:

> We have a verbal subject to inspection and terms and conditions.
> Lender & insurance co's will [be] on site in next two weeks.
>
> Tom
>
> You will hear verbally [sic] in next few days direct from lender

(R. 143, Ex. 12, Allen Aff., Ex. H, BTA 09306.) It is evidence that in June 2003 – *more than three months after the revocation of the building permit* – BTA obtained a verbal commitment for a loan from a lender who was willing to visit the site within two weeks.

2. <u>The Status of the Building Permit Was Not A Factor to the Lenders</u>.

Marshall, Owens, CMI and WS&O all agreed to extend financing to BTA without regard to the state of the building permit. On April 12, 2007 – 12 days after the Document Dump – the

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[4] It should be noted that the late disclosure of this fax <u>only included the cover page and not the attached information on purchase and sales</u>. Te City has made two written requests for these pages, without success. (R. p. 143, Exh. 24, Muir Aff., Exh. II and KK.)

[5] Also not disclosed until March 30, 2007.

City brought the documents to the attention of the district court in the City's Response Brief to BTA's Motion for Partial Summary Judgment. (R. 143, Ex. 13.) The Court did not believe it was able to rule on it or otherwise take it into consideration. R. 132-133. The City also advised BTA's counsel by letter dated April 13, 2007, that the documents he had just produced showed without a doubt that BTA's allegations had no basis in fact or law and that the case was frivolous from the outset. (R. 143, Ex. 24, Muir Aff., Ex. H). Yet, BTA continues to pursue this case.

3. In a Separate Federal Case, BTA Sued For the Same Damages for Claims Arising over a Year Before Permit Revocation.

On March 5, 2003, BTA (using the same lawyers) filed a lawsuit in federal district court against lender Washington Capital Management, et. al. ("WCM").[6] By its own admission, the federal case involved claims which arose "over a year before" the permit revocation and the damages "arise from the failure of the project and are essentially the same as the damages sought in this case." (R. 142, Ex. 1, Mem. Supp. Mot. Stay, pp. 4, 6.)

In May of 1997, BTA and the Capital City Development Corporation ("CCDC") entered into a Disposition and Development Agreement ("DDA") for the development and construction of the Boise Tower Project. This project was located at 8th Street and Main Street in downtown Boise. (R. 9, Compl. ¶ 7.) Under the DDA, the project site would be conveyed to BTA upon submittal of financing commitments and proof of BTA's acceptance of a loan commitment. *Id.* at ¶ 9.

In 2001, BTA provided CCDC with a $29,000,000 construction financing loan commitment (dated October 10, 2001) from Washington Capital Management, Inc. (WCM). (R. 9, Compl. ¶ 10.) As a result, in November of 2001, CCDC conveyed fee simple title of the

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[6] *Boise Tower Associates v. Washington Capital, et al.*, No. 03-141-S-MHW (Dist. Idaho, Sept. 30, 2005).

Project Site to BTA. (R. 9, Compl. ¶ 11.) That same month, a major problem developed with the WCM loan commitment. (R. 142, Ex. 6, Bilyeu Aff. Ex. A p. 29, Ll 10-16.) The loan did not close. *Id.*

On September 30, 2005, in an affidavit filed in federal court, Peterson swore under oath, "As a result of WCM's refusal to close the construction loan on the terms of the Loan Commitment, the Project was never built and BTA suffered damages in excess of $19 million.... BTA, to date, has been unable to procure alternative financing." (R. 143, Ex. 8, Aff. of Counsel, Ex. B, ¶¶ 6-7.) The statement that BTA could not secure alternative financing is factually false. However, the Peterson affidavit proves that the dispute with the City of Boise concerning the permit did not cause the damages BTA sought in the present lawsuit. If Peterson's affidavit which was used to obtain relief in the federal litigation is accurate, these damages were caused by WCM.

4. PDS Director Hogland Assists BTA to Overcome Application and Permit Problems.

During the pendancy of the federal lawsuit against WCM, BTA filed the suit against the City of Boise and Boise City Planning and Development Services (PDS") Director Timothy Hogland, accusing him of causing BTA's financing to fail. BTA accuses him of having *criminal intent* in this dealings with Appellant. (App. Brief at 33, 35). The facts show that at all times Hogland was simply a public employee who went to considerable lengths to help BTA make its project work.

a. Hogland Extended the Building Permit Application at BTA's Request.

On November 27, 1998, BTA submitted a building permit application ("Application") to PDS. (R. 142, Ex. 9, Hogland Aff. ¶ 2.)

On December 17, 1999, a letter from PDS notified BTA that its Application had expired.

Id. ¶ 3. Pursuant to the 1994 U.B.C. § 107.4, applications expire after 180 days if no building permit is issued. (R. 142, Ex. 2, Burke Aff., Ex. A, Depo. Ex. 46.)

After the application had expired, BTA requested a meeting with Hogland and PDS staff members imploring Hogland to utilize "working days" rather than "calendar days" in order to extend the application. Hogland agreed to use "working days" to "recalculate" the Application's expiration date. This resulted in extending the Application through May 5, 2000. (R. 142, Ex. 9, Hogland Aff. ¶ 4.)

b. *Hogland Extended the Building Permit a Second Time.*

On May 3, 2000, two days prior to the *second* expiration deadline of the Application, BTA took out Building Permit No. BLD98-032705 ("Permit") for shell and core construction. *Id.* ¶ 5. Because no building or work started within 180 days of issuance of the Permit, as required by the UBC § 106.4.4, BTA asked for an extension of the Permit. *Id.* ¶ 6. On October 5, 2000, PDS extended the Permit through June 14, 2001. *Id.* On June 13, 2001, BTA requested and received inspection of work. *Id.* ¶ 7.

c. *The Correction Notice Addressed Safety Issues.*

All parties agree that sometime in May of 2002, work was halted at the site. PDS's records showed work on the site had halted on May 3, 2002 – the last time an inspector from the City had inspected work in progress. (R. 142, Ex. 9, Hogland Aff. ¶ 8.) According to PDS, the building permit expired November 3, 2002. Hogland was unaware that any further construction had taken place. *Id.*

On the afternoon of Thursday, November 7, 2002, Hogland received a letter from M.A. Mortenson, BTA's construction contractor, claiming that work would commence that day.[7] *Id.* ¶

[7] Peterson claims that he had an agreement with Mortenson on October 25, 2002. Mortenson,

9. The following day, the City's inspector, George Slane, issued a Correction Notice ("Notice") informing BTA that the site was to remain "as is" until PDS could meet with the owner and agree on a course of action. *Id.* at Ex. F.

As explained in paragraph 10 of Hogland's Affidavit, PDS was concerned about the safety of the BTA construction site because it was an open pit in middle of downtown Boise. PDS considered it a hazard. BTA again implored PDS to recalculate the expiration date based upon working days. Because there was an open site with hazardous conditions, PDS would not consider using working days. Hogland was concerned and took the action solely in response to the hazard that existed by reason of the open excavation site of the Boise Tower Project and the fact that BTA's permit had expired. His actions were intended to address the significant risk to the general public and the buildings adjacent to the site, given the width and depth of the excavated pit and exposed reinforcing bar, foundation, and concrete columns. (R. 142, Ex. 9, Hogland Aff. ¶ 10)

d. *Hogland Suggests a Stipulation As a Means To Keep the Project Alive.*

The following week, on November 13, 2003, Hogland met with BTA representatives relating to the expiration of the permit. (R. 142, Ex. 9, Hogland Aff. ¶ 11; Ex. 10, Burrows-Johnson Aff., Ex. A, p. 7, L. 24-29.) BTA insisted that an inspection had occurred on May 15, 2002, which would extend the permit to November 11, 2002. Hogland did not have verification of the inspection. Inexplicably, BTA did not supply the inspection to Hogland at that time.[8] (R. 142, Ex. 9, Hogland Aff. ¶ 11.)

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however, explained by way of letter to PDS that the agreement was as of the afternoon of November 7, 2002. (R. 142, Ex. 9, Hogland Aff., Ex. E.)

[8] Although PDS did receive the May 15, 2002, MTI inspection report on May 22, 2002, Hogland did not see it until after the stipulation was signed. (R. 142, Ex. 9, Hogland Aff., ¶ 14; Ex. 10, Burrows-Johnson Aff., Ex. A, p. 7, Ll. 23-24.)

As a way to resolve the disagreement over the expiration date, Hogland offered Peterson a stipulation on November 13, 2002, that would require BTA to take concrete steps to advance the construction. If work did not progress, the current permit would expire and Peterson would need to reapply for a permit. Peterson first signed and delivered the Stipulation to PDS on November 15, 2002. R. 142, Ex. 9, Hogland Aff. ¶ 12, Ex. H. After signing, Peterson met with his attorney. Communicating through counsel, he requested revisions to the Stipulation. *Id.* at ¶ 12; R. 142, Ex. 10, Burrows-Johnson Aff., Ex. A, p. 7, Ll. 40-41. Peterson spoke with his attorney several times regarding the stipulation during the final meeting with PDS. (R. 142, Ex. 10, Burrows-Johnson Aff., Ex. A, p. 18, Ll. 19-26.) As a result, the Stipulation was revised and again signed by Peterson and Hogland on November 19, 2002, (R. 142, Ex. 9, Hogland Aff., Ex. I.) It should be noted that Hogland had no reason, other than to be accommodating, to allow Peterson to change the Stipulation which Peterson had originally signed and delivered on November 15.

The final stipulation required, in the pertinent part:

> 1. That if <u>any</u> of the conditions listed below are not met and maintained as outlined in this agreement, the current Building Permit (BLD 98-03075) will be expired and a new application and construction documents will be required to be submitted and approved reflecting the applicable code requirements of the 2000 International Building Code. Or in the alternative, the property shall be restored to a status acceptable to the City.

(R. 142, Ex. 9, Hogland Aff., Ex. I, ¶ 1) (underline in original). The stipulation also required BTA to post a bond or irrevocable letter of credit sufficient to cover restoration of the project site to its original state in the event the project was abandoned; that BTA designate an engineer and architect of record who would confirm that the conditions of the site had not deteriorated and future development was possible. The Stipulation addressed the construction scheduled by

stating "this project shall be completed in approximately two years from the date that funding is obtained." *See Id.*, Hogland Aff. Ex. I, ¶¶ 2 – 7. In addition to the foregoing, the stipulation required the BTA to monitor structural issues on existing buildings adjacent to the site and report to the City and engage in other activities necessary to proceed with construction, including submitting final plans to the City. *See Id.*, Hogland Aff., Ex. I, ¶¶ 9 – 13. The Stipulation further provided:

> 8. The BTA must provide a letter from a lending institution indicating a commitment of full financing for this project less the equity of BTA in the project. This commitment letter shall meet the approval of the City. The commitment letter must be received within 60 days of the date of this Agreement.

Id., Hogland Aff., Ex. I, ¶ 8. Finally, the Stipulation provided that the terms and conditions of the Stipulation were in addition to any building code requirements; that BTA would hold the City harmless for any damages resulting from the Stipulation; and that the Stipulation would terminate once funding acceptable to the City was obtained by BTA. *See Id.*, Hogland Aff., Ex. I, ¶¶ 14 – 20.

The Stipulation kept the permit alive. Peterson has admitted that it enabled BTA to continue with "a lot of construction at that time." (R. 142, Ex. 8, Bilyeu Aff., Ex. A, p. 54, Ll. 3-11.) At no time during this period did Peterson or BTA's legal counsel complain to PDS that the stipulation was "illegal." (R. 142, Ex. 9, Hogland Aff., ¶ 13, Ex. E.)

e. *BTA Requests, and Hogland Agrees, to an Extension to the Stipulation.*

BTA did not meet the deadline in the Stipulation. *Id.* at ¶ 14. BTA requested Hogland give it an extension. In direct contrast to BTA's accusation that Peterson had "criminal intent," Peterson admitted Hogland "was willing" to agree to another extension. (R. 142, Ex. 8, Bilyeu Aff., Ex. A, p. 54, Ll. 13-17.) On January 22, 2003, Hogland and BTA agreed to an

addendum/extension of the Stipulation until February 4, 2003. (R. 142, Ex. 9, Hogland Aff., Ex. J.)

f. ***The Permit Expired Because BTA Failed to Meet Extension Deadline of the Stipulation.***

BTA failed to meet the two-week extension. *Id.* at ¶ 15. On February 11, 2003, Hogland sent BTA a letter confirming the expiration of the Permit in accordance with the Stipulation. (R. 142, Exh. 9, Hogland Aff., Ex. L).

g. ***Appeal and Hearings Before the City Council.***

BTA filed an appeal of the Permit's expiration. On April 1, 2003, less than 60 days after the permit expired, the City Council held a hearing to consider the BTA appeal. (R. 142, Ex. 10, Burrows-Johnson Aff., Ex. A.) BTA had an opportunity to present testimony and offer evidence. Peterson, his attorney, Eric Rossman, and Chuck Rowe (an M.A. Mortensen representative) testified. *Id.* PDS also presented testimony and evidence. BTA was provided opportunity to rebut. The City Council deferred its decision until the following week. *Id.* at Ex. B.

h. ***Permit Reinstated by Boise City of Council.***

On April 8, 2003, the City Council decided to reinstate BTA's Permit. (R. 142, Ex. 10, Burrows-Johnson Aff., Ex. B.) The development has been sold by Peterson to Charter House Group. (R. 142, Ex. 8, Aff. of Counsel, Ex. A, pp. 320-323.) The Permit is still active at this time.

II.
STANDARD OF REVIEW

The standard for this Court's review of a trial court's ruling on a motion for summary judgment is the same standard as used by the trial court in ruling on the original motion. ***Shawver v. Huckleberry Estates, L.L.C.,*** 140 Idaho 354, 360, 93 P.3d 685, 691 (2004). A party

is entitled to summary judgment "if the pleadings, depositions, and admissions 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." **I.R.C.P. 56(c)**. "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response . . . must set forth specific facts showing that there is a genuine issue for trial." **I.R.C.P. 56(e)**.

Should this Court find the decision of the lower court to be based on an erroneous theory, the Court will nonetheless uphold the lower court's decision if any alternative legal basis can be found to support it. ***Martel v. Bulotti,*** 138 Idaho 451, 454-55, 65 P.3d 192, 195-96 (2003). In doing so, "[t]his Court may apply the law to undisputed facts de novo." ***Id.***, 138 Idaho at 455.

III.
ADDITIONAL ISSUES ON APPEAL

F. WHETHER RESPONDENTS ARE ENTITLED TO ATTORNEY'S FEES PURSUANT TO IDAHO RULE OF CIVIL PROCEDURE 54(E)(1), 42 U.S.C. § 1988, AND/OR IDAHO CODE §§ 6-918A and 12-117.

G. WHETHER RESPONDENTS ARE ENTITLED TO ATTORNEY'S FEES ON APPEAL PURSUANT TO IDAHO APPELLATE RULES 41 AND 11.1, IDAHO RULE OF CIVIL PROCEDURE 54(E)(1), 42 U.S.C. § 1988, AND/OR IDAHO CODE §§ 6-918A AND 12-117.

IV.
ARGUMENT

A. THERE WAS NO PROCEDURAL DUE PROCESS VIOLATION.

In order to invoke § 1983, a plaintiff must show a violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law. ***See* 42 U.S.C. § 1983; *Aberdeen-Springfield Canal Co. v. Peiper,*** 133 Idaho 82, 92, 982 P.2d 917, 927 (1999).

In this case, BTA argues that "[t]he constitutional rights that were deprived by the City

and Hogland were BTA's rights to procedural due process." **Appellant's Brief** at 12. "In order to establish a procedural due process claim under § 1983, [the plaintiff] must allege first that it has a property interest as defined by state law, and, second, that the defendants, acting under color of state law, deprived it of that property interest without constitutionally adequate process." ***PFZ Properties, Inc. v. Rodriquez,*** 928 F.2d 28, 30 (1st Cir. 1991).

1. **Plaintiff Did Not Possess A Property Right in the Building Permit.**

Property interests are not created by the Constitution, but are created by and stem from, an independent source such as state law. ***Bd. of Regents v. Roth,*** 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." ***Id.*** A reasonable expectation of entitlement is determined largely by the language of the statute and the extent to which the entitlement is couched in mandatory terms. *See* ***Wedges/Ledges of Cal. v. City of Phoenix***, 24 F3d. 56 (9th Cir. 1994).

In the context of decisions relating to the application of zoning ordinances, including the approval of plats or the granting of permits, courts have held that federal courts, applying federal law such as **42 U.S.C. §1983,** should refrain from being involved in decisions concerning the approval or denial of local licenses or permits. ***See Gardner v. Baltimore Mayor and City Council, supra; Clark v. City of Hermosa Beach***, 48 Cal. App. 4th 1152, 56 Cal Rptr. 2d. 223 (1996). The Ninth Circuit Court of Appeals has addressed the issue of when an individual would possess a property right to a state-issued license or permit in a number of contexts. In ***Jacobson v. Hannifen***, 627 F2d. 177 (9th Cir. 1980), the court found the Plaintiff did not possess a protectable property interest in obtaining a new gaming license as the governing statute did not

contain mandatory language which restricted the regulatory agency's discretion to deny a license to someone who claimed to meet minimum eligibility criteria. ***Id.*** at 180. The focus upon the enabling legislation and the discretion granted governmental officials was applied in the context of a zoning application in ***Batteson v. Geisse***, 857 F2d. 1300 (9th Cir. 1988) with the court ruling that in the absence of any significant restrictions on the City Council's discretion and powers, a property interest did not arise in the approval or denial of a plat application.

Applying these principles, to determine whether an entitlement or a property interest exists, the focus must be upon whether the legislation which regulates the permitting process provides the government officials with discretion to attach condition to the permit or, alternatively, approve or deny the permit outright. As noted in ***Gardner,*** "whether a property holder possesses a claim of entitlement to a permit or approval turns on whether, under state and municipal law, the local agency lacks *all* discretion to deny issuance of the permit or to withhold its approval." ***See Gardner***, 969 F2d. at 68 (italics in original). "Even if in a particular case, objective observers would estimate that the probability of issuance was extremely high, the opportunity of the local agency to deny issuance suffices to defeat the existence of a federally protected property interest." ***Id.*** (Quoting ***RRI Realty Corp. v. Village of South Hampton***, 870 F2d. 911, 918 (2nd Cir. 1989). The focus is upon the enabling legislation and whether the relevant statute, ordinance, or building code provides the local authorities with the discretion to issue the permit. If substantial discretion exists, a property right does not arise.

The UBC requires, as part of the submission process, "[p]lans, specifications, engineering calculations, diagrams, soil investigation reports, special inspection and structural observations programs and other data ...." R. 142, Ex. 2 "Aff. of Christopher Burke," Ex. A, Ex. 46 ("UBC"), § 106.3.2. Thereafter:

> 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.

Id., UBC § 106.4.1. However:

> 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.

Id.

In this case, BTA did not submit all plans, calculations and drawings. Instead, BTA was operating under a partial permit. Because the UBC only provides that such permits "may" be issued, the decision to do so is discretionary. ***See Crown v. State,*** 127 Idaho 175, 898 P.2d 1086 (1995) ("the use of the term 'may' was dispositive in showing the discretionary nature of the decision."). As provided at UBC §106.4.1, "The holder of a partial permit (BTA) shall proceed without assurance that the permit for the entire building or structure will be granted." Simply stated, the UBC does not attempt to limit the City's discretion to issue a full permit or require conditions be met prior to the issuance of a permit to construct the building. Thus, under the circumstances of this case, BTA had no property right in the building permit. [9] For that reason,

[9] BTA relies on ***3883 Connecticut LLC v. District of Columbia***, 336 F.3d 1068 (D.C. Cir. 2003), in focusing on the revocation. However, that case is silent on whether a final permit would necessarily follow, or if there was discretion as to issuing a final permit. In this case, the UBC is clear that the partial permit is discretionary and there is no guarantee that a final permit will be

its constitutional claims fail.

2. **The City Did Not Infringe Upon Any Property Right That May Have Existed**

Even assuming that BTA had a property right in the limited building permit, there was no deprivation of that right under the facts of this case. Although there was a stop-work order (SWO) issued for a short time until additional safeguards were agreed upon concerning completion of the project and inspection of the foundation and lateral support of surrounding land, the building permit was never actually revoked. ***See Cathedral Church of the Intercessor v. Village of Melverne,*** 353 F. Supp. 2d 375, 386-87 (E.D.N.Y. 2005) (holding that SWOs were not property deprivations where they were "only temporary suspensions from which the Plaintiffs could get relief by satisfying the Village's conditions."). Here, the SWO issued by the City was a temporary action. For that reason, the Appellant's constitutional claims are without merit.

3. **BTA Was Given Sufficient Due Process**.

This court has stated that "[p]rocedural due process requires that there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions." ***Cowan v. Bd. of Comm'rs,*** 143 Idaho 501, 510, 148 P.3d 1247, 1256 (2006) (quoting ***Aberdeen-Springfield Canal Co., supra,*** 133 Idaho at 91). This requirement is met when a party is provided with notice and an opportunity to be heard. ***Aberdeen-Springfield Canal Co.,*** 133 Idaho at 91. "The opportunity to be heard must occur at a meaningful time and in a meaningful manner in order to satisfy the due process requirement." ***Id.***

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issued. Thus, this situation is similar to that of a teacher whose hiring is discretionary, but also lacks renewable contract status. A teacher in such circumstances has been held to not have a property right in his or her continued employment. ***See Smith v. Meridian Joint Sch. Dist. No. 2,*** 128 Idaho 714, 723, 918 P.2d 583, 592 (1996). Similarly, a builder that has a partial permit issued at the City's discretion and no guarantee of receiving a final permit should have not property rights attached to having a building permit.

(internal quotation marks omitted). Moreover, "[d]ue process is not a concept to be applied rigidly in every matter. Rather, it is a flexible concept calling for such procedural protections as are warranted by the particular situation." ***Id.*** (internal quotation marks omitted).

The United States Supreme Court has rejected the notion that a pre-deprivation hearing is required in all cases. ***Parratt v. Taylor,*** 451 U.S. 527, 540-41, (1981). Interim suspensions of licenses and temporary seizures of property may be undertaken without a pre-deprivation hearing, provided there is sufficient factual basis for the action and that prompt administrative or judicial review of the merits of the decision is available. ***See Barry v. Barchi,*** 443 U.S. 55, 64, (1979). Moreover, an informal meeting with the decision-maker is sufficient to satisfy due process. ***Weinberg v. Whatcom County,*** 241 F.3d 746, 753 (9th Cir. 2001).

BTA argues that a pre-deprivation process was required; i.e., that it should have been given a hearing prior to the issuance of the stop-work order (SWO). This issue was addressed in ***3883 Connecticut LLC v. District of Columbia***, 336 F.3d 1068 (D.C. Cir. 2003), a case heavily relied on in BTA's brief. ***See Appellant's Brief*** at 13-14. In that case, a developer obtained permits to begin construction work on an apartment building. The District of Columbia subsequently issued a SWO in the midst of the initial stages of construction without first providing a pre-deprivation hearing. The plaintiff argued that "the procedure to challenge a SWO is constitutionally infirm because it does not guarantee a hearing before the SWO can issue." ***3883 Connecticut LLC***, 336 F.3d at 1074. The court rejected that argument reasoning that the District of Columbia had a "significant interest in maintaining its capability to act swiftly to bring an immediate halt to construction work that poses a threat to public health and safety or to the environment." ***Id.*** The court also found that because "the regulations provide for expedited post-deprivation review before two District officials and then immediate appeal to the District

Board of Appeals and Review—a procedure that reduces the risk of protracted harm from a wrongly-issued order," "these protections meet the requirements of due process." ***Id. See also Licari v. Ferruzzi,*** 22 F.3d 344, 348 (1st Cir. 1994) (holding that in revocation of building permits, plaintiff's procedural due process rights were not violated because "postdeprivation remedies were available").

Under the UBC, Prmits automatically expire "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." **UBC § 106.4.4**. This period may be extended for up to 180 days "on written request by the permittee," but "[n]o permit shall be extended more than once." ***Id.***

Here, Hogland believed that no work had been done on the project for more than 180 days.[10] Thus, from Hogland's perspective, the building permit had automatically expired. ***See*** R. 142, Ex. 2 "Aff. of Christopher Burke," Ex. A, "Hogland Depo.," p. 133, Ll. 8-17; p. 138, Ll. 21-22; p. 141, Ll. 6-8. The expiration was not caused by any regulatory decision or action by the City. Instead, BTA had failed to advance the project. Moreover, there was a concern that because of the long period of time during which the project had sat idle, conditions at the construction site had deteriorated resulting in possible health and safety issues. As addressed in the Stipulation, these included rusting of steel bars and beams, in addition to the lateral support for surrounding property. ***See also*** R. 142, Ex. 9, Hogland Aff. ¶ 10 (discussing safety concerns with pit and exposed structural materials); R. 142, Ex. 2 "Aff. of Christopher Burke," Ex. A, "Hogland Depo.," p. 131, L. 15 – p. 132, L. 11 (discussing other public safety issues, including an incident where two women accidentally entered the work-site and were trapped).

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[10] Even then, the work performed was minimal—"equivalent to nailing a few nails on a house." ***See*** R. 142, Ex. 2 "Aff. of Christopher Burke," Ex. A, "Hogland Depo.," p. 127, Ll. 12-21.

In any event, BTA was given a prompt opportunity to be heard. The stop-work order[11] was issued on November 8, 2002, and directed BTA to cease work until there had been a meeting with Planning and Development. ***See*** R. 142, Ex. 2 "Aff. of Christopher Burke," Ex. A, "Hogland Depo.," Ex. 59. A meeting was held the following day—November 9, 2002. ***See*** R. 142, Ex. 2 "Aff. of Christopher Burke," Ex. A, "Hogland Depo.," p. 144, L. 19 – p. 145, L. 22. A proposed Stipulation was discussed, and a draft may have been prepared and presented to BTA. ***Id.***, p. 145, L. 20 – p. 146, L. 4. At the meeting, BTA failed to provide any documentation to refute the fact the 180-day period had expired. ***Id.***, p. 146, L. 5 – p. 147, L. 1. In short, there was only a 1-day delay between the time the SWO was issued and when BTA was given its first opportunity to be heard.

The BTA could have appealed the SWO to the building code committee or the City Council. ***See*** R. 142, Ex. 2 "Aff. of Christopher Burke," Ex. A, "Hogland Depo.", p. 155, Ll. 9 – 18 and Ex. 46, UBC § 105. Instead, BTA (with the assistance of legal counsel) proposed changes to the Stipulation and entered into a revised Stipulation on November 19, 2002. At that point, construction was allowed to resume. Thus, BTA negotiated and voluntarily entered into a modification of the terms and conditions of its building permit rather than use the procedure available to it to appeal the SWO. BTA cannot now complain of the lack of due process when it chose to forego the procedures that were available. ***See Ferguson v. Bd. of Trustees,*** 98 Idaho 359, 366, 564 P.2d 971, 978 (1977) (teacher waived right to due process hearing when he left the hearing early).

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[11] The City issued its directive to stop work via a "Correction Notice." ***See*** R. 142, Ex. 2 "Aff. of Christopher Burke," Ex. A, "Hogland Depo.," Ex. 59. Thus, that directive is variously referred to as a correction notice or stop-work order throughout the record.

Subsequently, BTA violated the terms of the Stipulation by not adhering to deadlines relating to financing. ***See*** R. 142, Ex. 9, Hogland Aff., ¶ 14. Although BTA argues that "[n]one of these meetings [i.e., those in November 2002] 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," ***Appellant's Brief*** at 16, the facts establish that the parties did confer and, on January 22, 2003, Hogland and the BTA agreed to an two-week extension. ***See*** R. 142, Ex. 9, Hogland Aff., Ex. J. After BTA failed to meet the new deadline, Hogland informed it the Permit had expired. ***Id.*** at ¶ 15 and Ex. L.

BTA also argues that had it "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." ***Appellant's Brief*** at 16. This argument fails for two reasons. First, as noted above, BTA had an "opportunity to be heard" and to request an extension. If BTA failed to raise its legal objection, that was a decision by BTA rather than the lack of an opportunity to be heard. Second, whether the UBC permitted a condition that required proof of financing was moot in January 2003 because BTA had waived its rights to appeal the SWO, choosing instead to enter into a Stipulation adding the condition requiring it to provide proof of financing.

BTA subsequently appealed Mr. Hogland's determination to the City Council. A hearing took place on April 1, 2003. BTA was represented by counsel at the hearing and was allowed to present evidence and argument to the Council. ***See*** R. 142, Ex. 10, Burrows-Johnson Aff., Ex. A. On April 8, 2003, the City Council reinstated BTA's Permit. ***See*** R. 142, Ex. 10, Burrows-Johnson Aff., Ex. B. In other words, BTA had a full and fair opportunity to be heard and, in fact,

prevailed. These facts show BTA was afforded all procedural due process required by the federal constitution. The district court correctly dismissed the due process claims.

4. BTA Did Not Suffer the Harm It Claims.

Throughout its briefing, BTA contends that the issuance of the SWO in November 2002 and subsequent hearings on whether the Permit had expired caused it to lose financing. For instance, in support of its argument for a pre-deprivation hearing, BTA contends that "[t]he 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." **Appellant's Brief** at 18. BTA further contends that because of this, it has suffered damages in excess of $12 million. ***Id.***

BTA's contention is pure fiction. Through the "Document Dump", BTA produced relevant materials from its lenders which showed that one lender, Marshall, continued financing efforts until at least 11 weeks *after revocation* and at least 21 days *after the April 8, 2003, reinstatement* of the permit. ***See*** R. 143, Ex. 12, Allen Aff. Ex. H, BTA 08780 (April 30, 2003, letter from Marshall Investments Corp. offering to move forward with a loan commitment of $40,600,000.00 with changes more favorable to BTA). In addition, BTA had other financers willing to provide the necessary financing. ***See, e.g., Id.***, Ex. H, Bates 08388 (March 26, 2003 letter from Unique Property Development offering to finance project as part of joint venture); Ex. H, Bates 09267 (May 7, 2003, letter from Storm Consultants reporting loan commitment for up to $30,000,000); Ex. H, Bates 09282 (May 9, 2003 letter from Unique Property Development revising the prior March offer to finance the project); Ex. H, Bates 09316 (June 2, 2003 letter from Unique Property Development expressing continued interest and wanting "to get to the point where we have an agreement in principle..."). Contrary to BTA's representations, the

Document Dump revealed that any financing problems BTA experienced were not caused by the SWO or the building permit but, instead, were caused by BTA's recalcitrant stance toward paying application and lending fees. ***See, e.g.,*** R. 143, Ex. 12, Allen Aff. Ex. H, BTA 08251 (April 24, 2003, letter from AMS Commercial, LLC, stating that "it appears that the conversation [with CMI] bogged down on the topic of the $25,000 fee"); Ex. H, BTA 08256 (May 14, 2003 letter from BTA asking for waiver of $25,000 fee); Ex. H, Bates 08324 (May 16, 2003 letter from AMS Commercial, LLC, noting that but for the dispute over the $25,000 fee, "the loan could have probably been closed by now."). In short, the business records and documents produced by BTA in discovery show that Marshall was still interested in financing the project as late as April 30, 2003; and that BTA had other financiers interested in the project months after the April 2003 City Council hearing. There is no evidence that the issues surrounding the building permit caused BTA to lose its financing.

B. BTA HAS WAIVED ANY ARGUMENTS AS TO SUBSTANTIVE DUE PROCESS.

As noted earlier, BTA argues that "[t]he constitutional rights that were deprived by the City and Hogland were BTA's rights to procedural due process." **Appellant's Brief** at 12. BTA has not made any arguments as to whether the Respondents violated its substantive due process rights. Accordingly, any such arguments are waived.[12] ***See Thomas v. Medical Ctr. Physicians, P.A.,*** 138 Idaho 200, 205-206, 61 P.3d 557, 562-63 (2002).

C. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE CITY WAS NOT LIABLE FOR HOGLAND'S ACTIONS UNDER A *RESPONDEAT SUPERIOR* THEORY.

The United States Supreme Court has held that, in enacting § 1983, "Congress did not

[12] In any event, the substantive due process claim would have been pre-empted because of the takings claim. ***See N. Pacifica, LLC v. City of Pacifica,*** 234 F. Supp. 2d 1053, 1063 (N.D. Cal. 2002) (citing cases).

intend municipalities to be held liable unless action pursuant to official policy of some nature caused a constitutional tort." ***Monell v. Dep't of Soc. Serv. of City of New York,*** 436 U.S. 658 (1978). Thus, "a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." ***Id.*** (italics in original). "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." ***Id.***, 436 U.S. at 694. ***See also Sprague v. City of Burley,*** 109 Idaho 656, 661, 710 P.2d 566, 571 (1985). ***See also Rosenbaum v. City & County of San Francisco,*** 484 F.3d 1142, 1155 (9th Cir. 2007).

BTA argues that Hogland was the final policy maker.[13] ***See Appellant's Brief*** at 20 – 26. BTA makes no argument that the actions complained of were long-term practices or policies adopted by the City, or that Hogland was a subordinate whose decisions were ratified by the final policy maker. ***Id.*** Thus, BTA has waived the latter arguments if they were ever applicable. ***See Thomas v. Medical Ctr. Physicians, P.A.,*** 138 Idaho 200, 205-206, 61 P.3d 557, 562-63 (2002). Consequently, the narrow issue before this Court is whether under state law, did Hogland possess final policymaking authority?

Whether a particular official has final policymaking authority is a question of state law and a legal question to be resolved by the trial judge. ***Jett v. Dallas Independent Sch. Dist.,*** 491 U.S. 701 (1989). "State law," in this context, includes valid local ordinances and regulations. ***St. Louis v. Praprotnik,*** 485 U.S. 112, 125 (1988).

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[13] This argument is at odds with BTA's opening argument which suggests Hogland exceeded his authority under the UBC. ***See Appellant's Brief*** at 11. Apparently, BTA is attempting to argue that Hogland was both a final policymaker, but also subject to limitations under a building code imposed on him by a higher authority.

When the decision of an official can be appealed to another, higher officer or body, that official is not a policymaker.

> When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies.

Praprotnik, 485 U.S. at 127 (emphasis added). ***See also, e.g., Arendale v. City of Memphis,*** 519 F.3d 587, 602 (6th Cir. 2008) (holding a police official that issued a charge of discipline against an officer was not a policy maker, because the discipline could and was appealed to the police chief). Moreover, the courts have been careful to distinguish between decision-making authority and policymaking authority. That an official may have been delegated decision-making authority does not mean that he or she had been delegated the status of policymaker, much less final policymaker. ***Gelin v. Hous. Auth. of New Orleans,*** 456 F.3d 525, 529-30 (5th Cir. 2006). "That a particular agent is the apex of a bureaucracy makes the decision 'final' but does not forge a link between 'finality' and 'policy.'" ***Auriemma v. Rice,*** 957 F.2d 397, 400 (7th Cir. 1992).

As noted by the District Court, the Plaintiff's sole evidence and argument for *respondeat superior* liability was that Hogland is employed by the City as the Director of Planning and Development Services and that duties were delegated to him relating to the enforcement of the Uniform Building Code ("UBC"). ***See*** Decision and Order, R. at 86. The duties and authority of the Director of PDS is set out in Boise City Code § 3-05-02. However, as the District Court pointed out in its Decision and Order, Boise City Code § 3-05-02 only grants the Director of PDS (i.e., Hogland) the authority to formulate and recommend policies, and to implement and enforce adopted policies and procedures, with the approval of the Mayor and City Council. ***See***

R. 90. Moreover, not only did Hogland lack final policymaking authority, but he also lacked final decision-making authority. As noted earlier, the BTA could appeal Hogland's decisions to the building code committee or the City Council. ***See*** R. 142, Ex. 2 "Aff. of Christopher Burke," Ex. A, "Hogland Depo.", p. 155, Ll. 9 – 18 and Ex. 46, UBC § 105. In this case, BTA actually did appeal Hogland's decision to the City Council, and was successful in having that decision reversed. Thus, the District Court correctly determined that while Hogland had supervisory and decision-making authority, he lacked the necessary final policymaking authority necessary to impute § 1983 liability to the City. Accordingly, the decision of the District Court should be affirmed.

D. THE DISTRICT COURT CORRECTLY DETERMINED THAT HOGLAND WAS ENTITLED TO QUALIFIED IMMUNITY.

Under § 1983 jurisprudence, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ***Harlow v. Fitzgerald,*** 457 U.S. 800, 818 (1982).

As an initial inquiry, the court must consider: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" ***Saucier v. Katz,*** 533 U.S. 194, 201 (2001). If the answer is in the negative, the inquiry ends. ***Id.*** "On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." ***Id.*** To be "clearly established," the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. ***Id.*** at 202. "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." ***Id.*** Moreover, "[i]f the officer's mistake as to what the law

requires is reasonable, however, the officer is entitled to the immunity defense." ***Id.*** at 205.

In ***Nation v. State***, __ Idaho __, 158 P3d. 953 (2007), this Court addressed the doctrine of qualified immunity in the context of whether IDOC employees were entitled to immunity where they had provided unredacted workers' compensation forms to the Ada County Sheriff in connection with a criminal investigation. The constitutional claim was the plaintiff's entitlement to "informational privacy". ***See*** 158 P3d. at 963. The Court recognized the contours of the constitutional right at issue were unclear, even in jurisdictions where the right to informational privacy had been recognized. Utilizing the most liberal interpretation of the Federal Constitution, the Court concluded the defendants had not violated the plaintiff's rights and were entitled to qualified immunity. ***Id.***

In this case, a similar conclusion is warranted. The constitutional right at issue is whether the BTA enjoyed a property right in its building permit. Absent a property right, the City was not required to afford any procedural protections in connection with the issuance of the SWO or the expiration of the permit. The majority of courts, including the Ninth Circuit Court of Appeals, focus upon whether the enabling legislation gives the building official discretion to grant or deny the permit. If discretion exists, a property right in the permit does not arise. ***See Jocobson v. Hannifen***, 627 F2d. 177 (9th Cir. 1980); ***Batteson v. Geisse, supra; Creative Environments, Inc. v. Estabrook, supra; Gardner v. Baltimore Mayor and City Council, supra; Clark v. City of Hermosa Beach, supra; Jacobs Visconsi & Jacobs v. City of Lawrence,*** 927 F2d. 1111 (10th Cir. 1991); ***Vista Partners v. County of Cansta Barbara***, 732 F. Supp. 1046 (C.D. Cal 1990). In contrast, the District of Columbia recognizes a property right in the possession of a building permit because it is not readily revocable. ***See 3883 Connecticut, LLC v. District of Columbia, supra.*** The different approaches demonstrates that at the time this

dispute arose, the law was not clearly established. This fact entitles Hogland to qualified immunity. ***See Lum v. Jenson***, 876 F2d. 1385 (9th Cir. 1986); cert. denied 493 U.S. 1057 (1990) (because individuals are not required to predict developments in the law, the lack of binding precedent in the circuit coupled with the existence of conflicting case authority from other jurisdictions, entitles the individual to qualified immunity).

Alternatively, and consistent with this Court's ruling in ***Nation v. State, supra***, if one accepted the approach taken by the District of Columbia, the BTA was afforded all the process it was entitled to receive by Mr. Hogland and the City. The BTA was allowed to appeal Hogland's decision to the City Council. ***See*** R.142, Exh. 10. After hearing the presentations of both sides, the Council found in favor of the BTA and reinstated the permit. In other words, procedural due process was afforded and utilized. ***Id.*** There is no evidence in this record indicating Mr. Hogland took any actions which prevented the BTA from exercising its procedural rights. For that reason, the district court correctly concluded that Hogland was entitled to qualified immunity.

Finally, even if one assumed a constitutional violation occurred, Mr. Hogland's actions must be viewed in the context of the unsettled law and the factual circumstances he faced. He is entitled to qualified immunity if he made a decision which, even through constitutionally deficient, reasonably misapprehended the law governing the circumstances he was confronted. ***See Saucier v. Katz***. 533 U.S. at 206; ***Brosseau v. Haugen***, 543 U.S. 194 (2004). Here, Mr. Hogland was reasonable in his belief and under the circumstances which were facing him concerning the BTA's failure to advance the project, that the permit had expired when he issued the SWO. In their subsequent meetings, the BTA did nothing to disabuse Hogland of this belief. These facts establish that Hogland is entitled to qualified immunity.

E. THE STIPULATION BETWEEN THE BTA AND THE CITY CURING THE APPELLANT'S VIOLATIONS WAS NOT VOID.

BTA argues the stipulation agreement which cured its prior violations of the building permit and allowed construction to resume was ultravires and void. Appellant erroneously relies upon ***Black v. Young***, 122 Idaho 302, 834 P2d. 304 (1992). In that case, the city imposed conditions upon its agreement to enact an ordinance vacating a public street. The Supreme Court found the ordinance invalid as the offending conditions exceeded the authority the city was granted through I.C. §50-311, which specifically governed the process whereby streets were vacated. The Court pointed out that the powers granted to local governments through the Local Planning Act were not applicable to the case as the ordinance in question did not involve zoning activities. ***See*** 122 Idaho at 308, note 3.

In this case, the conclusions in ***Black v. Young*** are inapplicable as the actions of Boise City clearly involved zoning activities surrounding the regulation of building construction. The Local Planning Act at I.C. §67-6511(1) authorizes governing boards, such as the Boise City Council, to regulate and establish standards for "...construction, recommendation, alteration, repair or use of buildings and structures." By virtue of I.C. §67-6503, the Act is applicable to municipal corporations, such as Boise City. The Idaho Building Code Act, at I.C. §39-4109(5) adopts the Uniform Building Code. The Act, at I.C. §39-4116 requires local governments enforcing building codes to utilize the codes adopted by the Act which include the UBC.

The UBC grants the local building official, in this case Mr. Hogland, the authority and discretion to address structures which are regulated by the Code and which are structurally unsafe. ***See*** Exhibit 9 (Hogland Aff., Exh. G, Section 102). As described in Mr. Hogland's affidavit, due to the open construction site created by the BTA, coupled with the Appellant's demonstrated failure to meet the conditions of its permit and proceed with work in a timely

fashion, he was faced with a situation where an open pit existed in the downtown of Boise which he felt created a hazard. ***See*** Exhibit 9 (Hogland Aff., ¶10). Under Section 102 of the UBC, Hogland could have abated the unsafe situation by utilizing the procedure set forth in the Dangerous Buildings Code. ***Id.*** Alternatively, the UBC provided: "...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." ***Id.***

Here, Mr. Hogland exercised the discretion which was afforded to him by the UBC. Rather than choose a harsh approach, he attempted to cure the BTA's violations by entering into a stipulation agreement whereby work would commence, the City could receive assurances the structure was safe and that work would progress in a timely fashion. The requirement that the BTA provide proof it had secured financing was reasonable and prudent in light of Appellant's past performance which had created an open construction pit in the downtown of Boise which had been sitting idle for many months. Hogland was not attempting to extract a benefit for the City or anyone else. Instead, in light of the BTA's past performance, he was seeking assurances that it would have sufficient funding to undertake and finish the project. His actions were reasonable and consistent with Section 102 of the UBC which provided a mechanism to correct the BTA's existing violation and consistent with state policy encouraging parties to use stipulations and agreements to settle disputes. ***See Goodman v. Lothrop***, 143 Idaho 622, 151 P3d. 818 (2007); ***Kohring v. Robertson***, 137 Idaho 94, 34 P3d. 1149 (2002). Here, the stipulation agreement was negotiated between BTA principles and the City. The BTA was represented by counsel during those negotiations. Exh. 9 (Hogland Aff., ¶¶11-13. The agreement is clearly supported by consideration as the City was foregoing its right to take other actions to abate the BTA's violations and conversely, the BTA is receiving a benefit as the

dispute concerning its permit was resolved. For these reasons, the agreement is valid.

F. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT AS TO BTA'S TAKING CLAIM.

Appellant contends it was entitled to compensation for a temporary "taking" of its property due to the temporary stoppage in construction. BTA's argument is flawed for three reasons: (1) it did not have a property right in the building permit; (2) there was no "taking" of the physical property for public use; and (3) the issue was not ripe.

Both the United States and Idaho Constitutions prohibit the taking of private property for public use without just compensation. ***See* U.S. CONST., amend. V; Idaho Const., Atr. I §14; *McCuskey v. Canyon County Comm'rs,*** 128 Idaho 213, 215, 912 P.2d 100, 102 (1996). Constitutional jurisprudence has extended this protection to governmental interference with an owner's use or enjoyment of his private property. ***McCuskey,*** 128 Idaho at 215. However, "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." ***Agins v. Tiburon,*** 447 U.S. 255, 263 n. 9, (1980) (internal quotation marks omitted).

In ***Intermountain West v. Boise City,*** 111 Idaho 878, 728 P.2d 767 (1986), this Court addressed the very issue of whether the revocation of building permits and issuance of SWOs constituted a taking. In that case, the City annexed land and issued stop-work orders against the construction of apartments by the builder pending the receipt of a city building permit. The SWO was ignored, and the City filed suit seeking an injunction barring further construction. The City obtained a temporary injunction on July 30, 1975. Later, at a hearing for a permanent injunction, the trial court found for the builder, and the injunction was lifted. The builder sued "for the City's wrongful issuance of stop-work orders and a temporary injunction against Intermountain's

continued construction of its apartment complex". The Court rejected the claim that the City's issuance of stop-work orders and refusal to issue a building permit amounted to inverse condemnation. ***See Intermountain West,*** 111 Idaho at 880. The Court also reasoned:

> A zoning ordinance which downgrades the economic value of property does not constitute a taking of property without compensation at least where some residual value remains in the property. [Citation omitted]. The circumstances in this case indicate the property retained residual value despite any damage that may have been caused by respondent's actions and, therefore, no compensable taking occurred.

Id. See also Concrete Pipe & Prods. Of California, Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602, 645 (1993) ("mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.").

Similarly, in ***Tahoe-Sierra Pres. Council, supra***, the court rejected a categorical rule that deprivation of economic use, not matter how brief, constitutes a compensable taking, because it "would apply to numerous 'normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like,' as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee." ***Id.***, 535 U.S. at 334-35 (citation omitted). "A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking." ***Id.*** at 335. ***See also Sunrise Corp. v. City of Myrtle Beach,*** 420 F.3d 322, 330 (4th Cir. 2005) ("As a general rule, a delay in obtaining a building permit is not a taking but a non-compensable incident of ownership.").

The court in ***Tahoe-Sierra Pres. Council*** also noted that strict ripeness must be recognized in takings cases: i.e., "a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the

reach of a challenged regulation." ***Id.*** at 339.

In this case, there was a substantial government interest in issuing a stop-work order—the enforcement of the UBC, and the health and safety concerns regarding the project. The impact on the BTA was minimal—in fact, *BTA has not proffered any evidence of a permanent loss of value of the property.* The Document Dump reveals that BTA's allegations of harm in obtaining financing, even if relevant, are false. There is no evidence of a taking. This is a case where the alleged "taking" was of a short duration during a process of governmental decision making. In short, there was no constitutional taking. The District Court was correct in granting summary judgment.

G. THE DISTRICT COURT CORRECTLY DISMISSED THE BTA'S STATE TORT CLAIMS.

BTA claims that the District Court erred in dismissing his claims against Hogland for "intentional interference with contract" and "intentional interference with prospective economic gain." The district court was correct because Respondents are immunized by the Idaho Tort Claims Act (ITCA). In determining whether a governmental entity is entitled to immunity under the ITCA, the trial court must go through three steps. ***Coonse v. Boise Sch. Dist.,*** 132 Idaho 803, 805, 979 P.2d 1161, 1163 (1999). First, the court must determine whether the plaintiff's allegations and supporting record generally state a cause of action for which a private person or entity would be liable for money damages under the laws of the state of Idaho. ***Id.*** Second, if there is a cause of action, the court must then determine whether an exception to liability under the ITCA shields the defendant's misconduct from liability. ***Id.*** Finally, if no exception to liability applies, the Court must be determined if the merits of the claim as presented for consideration on the motion for summary judgment entitle the moving party to dismissal.

1. Whether the Appellant Generally States a Cause of Action.

Idaho recognizes a cause of action for intentional interference with contract. ***See Bybee v. Isaac,*** __ Idaho __, 178 P.3d 616, 624 (2008). Idaho does not recognize a cause of action for intentional interference with economic gain, but does recognize a cause of action for intentional interference with a potential economic advantage. ***See Idaho First Nat'l Bank v. Bliss Valley Foods,*** 121 Idaho 266, 286, 824 P.2d 841, 861 (1991).

2. **Hogland is Shielded from Liability per Idaho Code § 6-904(3).**

Idaho Code § 6-904 provides that "[a] governmental 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 ... arises out of ... interference with contract rights." **I.C. § 6-904(3).** This immunity would, under the facts of this case, apply to the interference with prospective economic advantage claims. There is no allegation or evidence that Hogland acted outside the course and scope of his employment. Thus, to defeat the immunities, BTA must show that the defendants acted with malice or criminal intent.

(i) **There Is No Evidence of Malice.**

For purposes of the ITCA, "malice" means "the intentional commission of a wrongful or unlawful act, without legal justification or excuse and *with ill will*, whether or not injury was intended. ***Anderson v. City of Pocatello,*** 112 Idaho 176, 188, 731 P.2d 171, 183 (1986) (italics in original). BTA has failed to provide any evidence of "ill will." In fact, the only evidence presented to the District Court indicated that Hogland issued the November SWO only because of a mistake as to whether work had been performed in the preceding 180 days—an error compounded by BTA's failure to timely inform Hogland of the date of the last work. The subsequent suspension of the Permit was in accordance with the Stipulation. Thus, there is no showing that Hogland at any time attempted to act outside what was permitted under the law, or

that he was motivated by "ill will."

Ironically, BTA contends there was "ill will," in part, because Hogland should have known that if the Permit had expired, he could not extend the permit period. ***See Appellant's Brief*** at 39, ¶ (a). This argument ignores Hogland's earlier decision to grant an extension when the permit expired. It also ignores the fact Hogland chose to extend the permit under the stipulation agreement when he could have treated the open construction site as a public nuisance and abated the condition using the Dangerous Building Code. These are not the acts of someone with "ill will" towards the BTA.

BTA's other arguments to support "ill will" only illustrate that BTA lacked the wherewithal to complete its project. For instance, BTA complains that until the Boise Tower project, Hogland had never required review or approval of a loan commitment or closing of a construction loan as a condition of extending a building permit. This glosses over the fact that Hogland had never been presented with a developer digging a huge hole in the middle of downtown, not doing any work for nearly 6 months while posing a credible risk to the integrity of the surrounding land and structures, and lacking the financial means to move the project forward. This is not evidence of ill will contemplated by the ITCA. It reveals a city employee who was attempting to help BTA through its problems and, at the same time, protect the health and safety of the public. Simply stated, Hogland was attempting to protect the public from a scenario where BTA would construct a few floors, run out of money, and then abandon the project. His desire to obtain assurances that BTA had the financial resources for this project was prudent in light of the history of the project up to that time.

(ii) <u>There is No Evidence of Criminal Intent</u>.

Contrary to the Appellant's briefing, "criminal intent" was not discussed by the

Anderson court; in fact, the court specifically noted that "criminal intent" had not been alleged. ***Anderson,*** 112 Idaho at 187. However, in ***Doe v. Durtschi,*** 110 Idaho 466, 716 P.2d 1238 (1986), the Court noted that "[t]he 'criminal intent' provision 'is satisfied if it is shown that the defendant knowingly performed the proscribed acts...." ***Id.***, 110 Idaho at 470 (quoting ***State v. Gowin,*** 97 Idaho 766, 767-68, 554 P.2d 944, 945-46 (1976)). The court also quoted with approval a Utah case stating: "A person acts with intent when it is his conscious objective or desire to engage in the conduct or to cause the result." ***Id.*** (quoting ***State v. Sisneros,*** 631 P.2d 856, 858 (Utah 1981)). Thus, "criminal intent" requires "specific intent to commit a crime" on the part of the individual. ***See State v. Gowin,*** 97 Idaho at 767-68 (explaining "specific intent"). ***See also Doe v. Durtschi, supra*** (noting that the element was satisfied because the employee had confessed to committing the crimes). There is no allegation or evidence that Hogland committed a crime, or did so knowingly or with specific intent. Hogland is entitle to immunity under Idaho Code § 6-904(3).

3. **Hogland is Shielded from Liability Per Idaho Code § 6-904B(3).**

The ITCA also provides that "[a] governmental 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 ... shall not be liable for any claim which ... [a]rises out of the ... suspension or revocation of ... a permit...." **I.C. § 6-904B(3)**. Either "malice or criminal intent" or "reckless, willful and wanton conduct" must be established in order to defeat immunity." ***Hunter v. Dep't of Corrections,*** 138 Idaho 44, 47, 57 P.3d 755, 758 (2002). As discussed above, malice and criminal intent are absent. Thus, the issue is whether the record contains evidence of "reckless, willful and wanton" conduct.

For purposes of the ITCA, "reckless, willful and wanton" is "present only when a person

intentionally and knowingly does or fails to do an act creating an unreasonable risk of harm to another and which involves a high degree of probability that such harm will result." **I.C. § 6-904C**. The key element is knowledge, which implies foreseeability. ***Hunter,*** 138 Idaho at 49. For purposes of the ITCA, the requisite foreseeability is more than the mere possibility of harm. Rather, "[t]he **specific harm** ... must be manifest or ostensible, and highly likely to occur." ***Id.*** (quoting ***Harris v. State Dep't of Health and Welfare,*** 123 Idaho 295, 299, 847 P.2d 1156, 1160 (1992)) (emphasis added).

Appellant's argument is that the requisite foreseeabilty is established by (i) Hogland's knowledge of the construction contract with Mortenson; and (ii) that Hogland knew BTA was working with Marshall Investment Group trying to obtain a loan to finance construction of the Project. ***See Appellant's Brief*** at 41. The first point is irrelevant because it was not pled in the Complaint. ***See Edmondson v. Shearer Lumber Products***, 139 Idaho 172, 176, 75 P.3d 733, 737 (2003) ("No dispute of fact is 'material,' however, unless it relates to an issue that is disclosed by the pleadings."). The second point does not demonstrate knowledge of the specific harm; i.e., that if a SWO was issued or the Permit suspended, Marshall would withdraw its offer to finance the construction. In fact, there is no evidence that Hogland knew any of the details of BTA's negotiations with Marshall or the status of those negotiations. Contrary to BTA's arguments the materials produced through the Document Dump proves the SWO and any subsequent dispute concerning the permit had no impact on Appellant's efforts to get financing.

4. Irrespective of the ITCA, Hogland Was Entitled to Summary Judgment.

In its complaint, BTA alleged that Hogland interfered with its contracts with prospective buyers of condominium units by revoking the BTA's building permit. ***See*** R. at 19, "Complaint," ¶¶ 41-43. The elements of tortious interference with contract are: (1) the existence of a contract;

(2) knowledge of the contract on the part of the defendant; (3) intentional interference causing a breach of the contract; and (4) injury to the plaintiff resulting from the breach. ***Bybee v. Isaac,*** __ Idaho __, 178 P.3d 616, 624 (2008).

As noted, BTA had to show knowledge of the contract on the part of the defendant. BTA further had to show that the alleged interference caused a breach of contract. In response to the summary judgment motion by Respondents, BTA submitted the Affidavit of Frederick Peterson that stated: "[T]he revocation of the building permit, and the adverse publicity surrounding it, led to cancellation of a number of BTA's presale condominium agreements...." ***See*** R. 142, Ex. 3, "Affidavit of Fredrick Peterson," ¶ 19. Missing is any evidence that any of the persons canceling the presale condominium agreements breached those agreements or if a breach occurred, were motivated by the actions of the defendants. If perspective tenants simply chose to void the contracts by exercising their rights under the agreement that development cannot be blamed upon the Defendant. Even if it could, their decisions lack any evidence that the prospective tenants made their decisions because of the SWO.

BTA also had to show that the interference was intentional. Nowhere does BTA present evidence of intent; nor is the evidence such to permit an inference of intent. Rather, the evidence suggests that, at best, Hogland made an honest mistake concerning whether work had been performed within 180 days prior to the November 2002 SWO. The later suspension of the Permit was fully permissible under the terms of the Stipulation. Rhere is also no evidence that Hogland was actually aware of any particular contractual arrangement; BTA has only offered a conclusory statement that Hogland was aware that there had been presales of condominiums. Finally, there is a complete lack of evidence showing damage due to the alleged breach of the presale agreements; that is, while BTA claims it lost financing due the loss of the pre-sales of

condominiums, the Document Dump paints a very different picture of BTA simply being unwilling to work with potential financiers.

BTA also alleged that Hogland interfered with BTA's prospective economic relations and its economic expectancy in revenues from a completed Boise Tower Project. ***See*** R. 20, "Complaint," ¶ 49. The elements of the tort of intentional interference with a prospective economic advantage are: (1) the existence of a valid economic expectancy; (2) knowledge of the expectancy on the part of the interferer; (3) intentional interference inducing termination of the expectancy; (4) the interference was wrongful by some measure beyond the fact of the interference itself (i.e., that the defendant interfered for an improper purpose or improper means) and (5) resulting damage to the plaintiff whose expectancy has been disrupted. ***Highland Enters. V. Barker,*** 133 Idaho 330, 338, 986 P.2d 996, 1004 (1999). In showing that the interference was wrongful, plaintiff must show not only that the defendant interfered with his business relationship, but also that the defendant had a duty of non-interference. ***Idaho First Nat'l Bank v. Bliss Valley Foods,*** 121 Idaho 266, 286, 824 P.2d 841, 861 (1991).

As above, there is no evidence of intent, that Hogland had specific knowledge of the expectancy as to any specific financier, that any interference occurred or was wrongful, or that the damage allegedly suffered was caused by the temporary suspension of the Permit. Thus, summary judgment was appropriate.

H. RESPONDANTS ARE ENTITLED TO ATTORNEY'S FEES BOTH BELOW AND ON APPEAL.

Following the grant of summary judgment and entry of judgment, Respondents moved for costs and fees as the prevailing party under Idaho Rule Of Civil Procedure 54(E)(1), 42 U.S.C. § 1988, and Idaho Code §§ 6-918A and 12-117. The District Court erred by not granting attorney's fees to Respondents.

42 U.S.C. § 1988 provides that in any action or proceeding to enforce civil rights statutes, including § 1983, "the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs...." This Court has noted that prevailing defendants are entitled to attorney fees under § 1988 "only where the action is 'unreasonable, frivolous, meritless, or vexatious.'" ***Nation v. State,*** __ Idaho __, 158 P.3d 953, 969 (2007). This Court has, in the past, found that attorney's fees must be awarded if the moving party meets the applicable requirements. ***See, e.g., Farner v. Idaho Falls Sch. Dist. No. 91,*** 135 Idaho 337, 342, 17 P.3d 281, 286 (2000); ***Lowder v. Minidoka County Joint Sch. Dist. No. 331,*** 132 Idaho 834, 841, 979 P.2d 1192, 1199 (1999).

Idaho Code § 6-918A provides for the award of fees to the governmental entity or its employee where it is shown, "by clear and convincing evidence, that the party against whom or which such award is sought was guilty of bad faith in the commencement, conduct, maintenance or defense of the action." Idaho Code § 12-117 permits the award of attorney's fees to the prevailing party if the court determines the case was brought, pursued or defended frivolously, unreasonably, or without foundation. ***See Karr v. Bermeosolo,*** 142 Idaho 444, 449, 129 P.3d 88, 93 (2005).

As more fully set out in Respondents' Statement of Facts, *supra*, some 2 ½ years after suit was filed, and after it was too late to submit the evidence to the District Court in support of summary judgment, Appellant produced documents (the "Document Dump") showing that it continued negotiating for financing months after the City Council upheld BTA's Permit. Specifically, the Document Dump revealed that Marshall Investment Group continued financing efforts until at least 11 weeks *after revocation* and at least 21 days *after the April 8, 2003, reinstatement* of the permit; and on better terms to BTA. The Document Dump also revealed at

least three other potential financers—Owens Investment Fund ("Owens"), Commercial Mortgage Investment Company ("CMI"), and WS&O, Ltd ("WS&O")—who were willing to finance the project *after* the conclusion of the dispute with the City over the Permit. Marshall, Owens, CMI and WS&O all agreed to lend BTA the requisite financing without regard to the state of the building permit. ***See also*** Part III(A)(4), *supra* (describing BTA's negotiation with potential financers after the conclusion of the dispute with the City).

On March 5, 2003, BTA (using the same lawyers) filed a lawsuit in federal district court against lender Washington Capital Management, et. al. ("WCM"). On September 30, 2005, in an affidavit filed in federal court, Peterson testified "As a result of WCM's refusal to close the construction loan on the terms of the Loan Commitment, the Project was never built and BTA suffered damages in excess of $19 million.... BTA, to date, has been unable to procure alternative financing." ***See*** R. 143, Ex. 8, Aff. of Counsel, Ex. B, ¶¶ 6-7. This is the exact claim made against the City and Hogland.

In light of the foregoing, it is clear that as of November 2, 2004—the date this suit was filed—Appellant not only knew that the dispute concerning the Building Permit had not interfered with its financing, but had already sued another entity alleging the same injury. Moreover, 1 ½ years prior to the time the City filed its motion for summary judgment, Peterson—the managing member of BTA—had provided affidavit testimony that another entity—Washington Capital Management—was responsible for BTA's inability to obtain financing. Issues of judicial estoppel aside, this clearly demonstrates that BTA pursued its suit against Respondents knowing and believing that another entity was responsible for its damages. In short, it is clear that BTA filed and pursued this suit frivolously, unreasonably, and without foundation or merit. As such, Respondents are entitled to attorney's fees, and the Court should

reverse the District Court's decision denying said fees and remand for determination of the appropriate amount.

Inasmuch as the initial suit was brought and maintained frivolously, unreasonably, and without foundation or merit, Appellant has likewise brought the instant appeal frivolously, unreasonably, and without foundation or merit. Accordingly, Respondents are entitled to attorney's fees on appeal.

V.
CONCLUSION

For the reasons set forth above, the District Court's Decision and Order on Cross Motions for Summary Judgment should be affirmed. Additionally, the District Court's Order denying the Respondent/Cross-Appellant's attorney fees should be reversed.

DATED this 16th day of May, 2008.

ANDERSON, JULIAN & HULL LLP

By _____
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16 day of May 2008 I served a true and correct copy of the **RESPONDENTS' BRIEF** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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