6-30-2008

Boise Tower Associates, LLC v. Hogland Appellant's Reply 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 REPLY BRIEF/CROSS-RESPONDENT'S 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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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Other Authorities:

COMES NOW, the Appellant, Boise Tower Associates, LLC (hereinafter "BTA"), by and through its attorney of record, Eric S. Rossman, and hereby submits Appellant's Reply Brief/Cross-Repondent's Brief on appeal.

I. INTRODUCTION.

On March 28, 2008, Plaintiff/Appellant Boise Tower Associates, LLC ("BTA") filed its Opening Brief on Appeal against the Defendants/Appellees, the City of Boise ("the City") and Timothy Hogland ("Hogland"), arguing that the district court erred in granting the Respondents' motion for summary judgment on the grounds of immunity. On May 16, 2008, Respondents filed their Respondent's Brief and Cross-Appellant's Brief asserting that the District Court properly granted the motion for summary judgment and further asserting that the District Court erred in denying the City's motion for attorney fees. BTA now submits this Reply Brief on Appeal and Cross-Respondent's Brief and respectfully requests 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, reserved to trial the determination of damages; (b) reverse the grant of summary judgment dismissing the other claims of BTA; and (c) affirm the District Court's decision denying an award of attorney fees to the City and deny the City's request for fees on appeal.

II. ARGUMENT.

A. BTA's Damage Claim is Not Within the Scope of this Appeal.

In the first seven pages of its responsive brief, the City argues that BTA could have mitigated its damages and that BTA allegedly failed to comply with its discovery obligations by "dumping" 109 pages of documents. There was no motion filed in the trial court, however, complaining about BTA's response to the City's discovery requests, much less an appeal of any ruling to this Court. Moreover, the City did not move to dismiss BTA's claim because of BTA's supposed failure to mitigate its damages but instead because of the City's purported immunity. As the trial court noted in its decision denying the City's motion for attorneys' fees:

> Boise City made a decision to pursue summary judgment based on immunity and not other grounds. This was a calculated risk taken by Boise City and the Court is unwilling to speculate on what could have happened had the other issues been raised. Moreover, hypothetically speaking, simply because a party is able to mitigate the damages or the damages were minimal does not nullify the alleged wrong by the governmental entity.

R. Vol. I, pp. 00132-00133.

B. The Stop Work Order Was Not Issued Because of Safety Concerns.

Throughout its brief, the City argues that the Stop Work Order issued by the Building Department on November 8, 2002, or one day after Mortenson's letter advising the Department of its intention to resume construction, was "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." City Brief, p. 9.

Although Hogland in his affidavit belatedly states that he was concerned about safety issues at the construction site (R. Vol. I, p. 142, Ex. 9 (Affidavit of Timothy J. Hogland), ¶ 10), there is no evidence in the record that any of those alleged concerns were ever communicated to BTA. In fact, at **no** time during the discussions between Hogland and Peterson was there ever any communication by Hogland about safety issues at the site. R. Vol. I, p. 143, Ex. 16 (Second Affidavit of Frederick 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), ¶ 2. In his deposition, Hogland admitted that he never gave BTA notice about any safety issues at the construction site that would have provided an independent ground for the revocation of the building permit.

> A: I think I could [revoke a building permit] if there was something extremely hazardous in the project and we felt like it wasn't going to be taken care of, we couldn't get anybody to remedy the problem, then we could have taken some action.
>
> Q: Before you would take an action like that though, of course, you would give notice of the extreme hazard; is that true?
>
> A: Yes.
>
> Q: And you would give them an opportunity to at least remedy the problem; true?
>
> A: True.

Q: To the best of you recollection, you didn't advise BTA of any extreme hazards which were existing in that 180-day period, did you?

A: No.

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. 134, Ll. 7-22.

Moreover, the fact that Hogland's safety concerns are only a recently fashioned pretext for Hogland's actions are confirmed by both the timing of the stop work order, the text of the Stipulation Agreement, and the letter from Hogland later terminating the permit. Even though Hogland was supposedly concerned about "an open construction pit in the downtown of Boise which had been sitting idle for many months" (City Brief, p. 30), he issued a stop work order one day after receiving notice from Mortenson that construction would resume to close the pit. The Stipulation Agreement nowhere addresses any safety issues or any conditions imposed on BTA to address any safety concerns.[1] Hogland's letter of February 11, 2003, terminating the permit states, as the only ground for the termination, the absence of an acceptable financing commitment. R. Vol. I, p. 142, Ex. 9, Ex. L. Indeed, as admitted by Hogland in his deposition, all conditions of the Stipulation Agreement had been satisfied by BTA except for the financing. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 209, LL. 2-14.

[1] The City incorrectly asserts in its brief, p. 19, that the Stipulation addressed "rusting of steel bars and beams, in addition to the lateral support for surrounding property." There are no provisions in the Stipulation on those issues. R. Vol. I, p. 142, Ex. 9, Ex. I.

C. The Stipulation Agreement is Void.

The City attempts to distinguish *Black v. City of Ketchum*, 122 Idaho 302, 834 P.2d 304 (1992), on the basis of footnote 3 in the court's decision. That footnote reads:

> The City of Ketchum commingles the Local Planning Act, title 67, chapter 65, Idaho Code, with the argument concerning the power to impose conditions upon the vacation of an alley. The Local Planning Act, however, deals with zoning powers. The situation we face is the vacation of an alley, to which the legislature has specifically spoken in I.C. § 50-311.

The City then argues that because the Local Planning Act authorizes the City to establish standards for the construction of buildings, Hogland had the authority to enter into the Stipulation Agreement to address safety concerns. The argument is specious. As in *Black*, the City, by adopting the UBC, has already spoken about when a building permit expires and when it can be revoked. There was no authority to attach other conditions to the building permit and accordingly the Stipulation Agreement was *ultra vires*. Moreover, as shown above, the alleged safety concerns were not the motivation for the Stipulation Agreement.

Nor was there any consideration for the Stipulation Agreement. The City argues that the consideration was the "City foregoing its right to take other actions to abate BTA's violations" (City Brief, p. 30). There is no evidence in the record of any violations by BTA under the building permit. The only purported quid pro quo was Hogland's rescission of a wrongfully issued stop work order and his concurrent threat to tell the City Council that the building permit had expired if the Stipulation Agreement was not signed.

D. An Issued Building Permit is a Protected Property Interest.

The City argues that a property interest does not exist where an applicant is applying for a permit or license and the issuing agency has discretion to deny the application. The City then argues, without any citation to or support of the record, that BTA in connection with its application for a permit:

> 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.

City Brief, p. 16.

The City's next step is to accordingly distinguish the clear holding of *3883 Connecticut LLC v. District of Columbia*, 336 F.2d 1068 (D.C. Cir. 2003), that an issued building permit is a protected property interest by arguing that

> 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 issued.

City Brief, p. 16, fn. 9.

The City's argument is frivolous. What discretion the City originally had to not issue the building permit to BTA is not relevant to this case. The building permit was, in fact, issued by the Department and is in the record. R. Vol. I, p. 142, Ex. 2, Ex. 51. Because the

building permit cannot now be suspended or revoked at the mere discretion of the City but only for the specific reasons stated in the UBC, it is a protected property interest.[2]

Nor is the building permit less of a protected property interest because the City has labeled it a "partial permit" and argues, without support, that not all the necessary plans for the permit were submitted by BTA. The building permit issued by the Department allows the construction of a "new 387,380 sq. ft. 25 story with 18,800 sq. ft basement shell and core building." The permit expressly excludes plumbing, electrical, mechanical, fire suppressions systems and tenant improvements, which would be reviewed and approved later by the Department. R. Vol. I, p. 142, Ex. 2, Ex. 51. To what extent the Department has the discretion to deny applications for those later permits is also not relevant to BTA's claim that the shell and core permit that was, in fact, issued by the Department was wrongfully revoked.

Nor were the plans that were submitted by BTA somehow less than what was required to obtain a shell and core permit. Hogland admitted that before the permit was issued, he was satisfied that the application, the plans, and all related documents conformed to code requirements, laws, and ordinances of the City. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 76, line 25 – p. 77, line 6.

E. BTA Was Not Provided with Due Process.

The City argues that it was not necessary to provide BTA with a pre-deprivation hearing before the stop work order was issued, citing *3883 Connecticut LLC v. District of*

[2] Under UBC Section 106.4.5, a building permit may only be suspended or revoked if the permit was issued in error or on the basis of incorrect information supplied or in violation of any ordinance or regulation.

Columbia, supra. In that case, however, the court expressly recognized that a stop work order without a pre-deprivation hearing was permissible because the District had a significant interest in acting swiftly to immediately halt construction work that poses a threat to public health and safety or to the environment. Secondly, the regulations provided for three levels of an expedited post-deprivation review.

As noted above, in the instant case, there was no threat to public health, safety, or the environment. There was also no need to act swiftly. Construction had ceased at the site on May 15, 2002; no action was taking by the Department until the day after notice was provided that construction would resume.

There was also no review provided in the UBC or any other applicable regulations. *See*, BTA's Opening Brief, p. 21-22 The City merely cites Section 105 of the UBC in arguing that BTA could have appealed to the City Council. Section 105.1, however, only provides a right of appeal to the Board of Appeals. The City moreover fails to address the fact that Section 105.3 expressly excludes a right of appeal even to the Board of Appeals on the administrative provisions of Chapter 1. The trial court below also recognized that "neither the Boise City Code nor the UBC provided for an immediate appeal following an expiration of a permit." R. Vol. I, p. 000089.

The court in *3883 Connecticut LLC* distinguished its prior decision in *Tri-County Industries v. District of Columbia*, 104 F.3d 455 (D.C. Cir. 1997), where a building permit was suspended because of public opposition to a decontamination facility and a government

official's incorrect representation that a public housing project would be constructed adjacent to the facility:

> We analogized that action to the issuance of a SWO because the two have similar effects, and held that the "oral order of suspension" violated due process because it was not based on "formal evidence" and the only review was by the Board of Appeals and Review – single step appeal process that did not guarantee prompt resolution.

3883 Connecticut LLC v. District of Columbia, *supra*, at 1074, fn. 5.

In *Tri-County*, the court had evaluated the procedures in the District of Columbia under the tripartite test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). The court held that the property interest, the suspended building permit, was substantial and that the risk of an erroneous deprivation was high. There was no formal evidence presented to the building official; it was a classic case of "shooting from the hip." Finally, the government interest in a swift action was negligible. There was sufficient time to permit the developer to challenge the building official's assumptions.

Both *Tri-County* and *3883 Connecticut LLC* make clear that even in the circumstances where a property interest can be deprived without a prior hearing because of the need for immediate governmental action, the courts will review the existing regulatory scheme to determine whether a prompt post-deprivation hearing is provided by applicable ordinances. It is not a sufficient post-deprivation remedy that a city council of a jurisdiction makes an ad hoc decision to hear an appeal. In this instant case, there is **both** the absence of any facts which would justify a suspension or termination of the building permit without a

prior hearing and the absence of any provision in the UBC or other ordinances establishing a prompt post-deprivation review.

The Ninth Circuit case of *Weinberg v. Whatcom County*, 241 F.3d 746 (9th Cir. 2001), cited in the City Brief at p. 18, is also instructive on the requirement for a pre-deprivation hearing. In that case, Weinberg, a developer, had received approval from the County for his short plats and had also received permits from the County for clearing, fill and grading of the property. On August 19, 2004, a dispute arose over Weinberg's removal of vegetation and right to place fill material in a buffer area. The County land use manager told Weinberg to desist from dumping fill or he would issue a stop work order. Weinberg continued his activities and, on August 25, 1994, a stop work order was issued prohibiting clearing, grading and filling in the buffer area. On September 14, 1994, another County official sent a letter to Weinberg stating that the County would vacate his short plats unless Weinberg paid fines, re-vegetated the buffer area, and took other erosion control measures. After Weinberg advised the County that he would not comply with the measures, the County revoked the short plats.

Weinberg filed suit and moved for summary judgment of liability for denial of his due process rights. The district court instead granted the County's concurrent motion for dismissal on the ground that Weinberg had presented no evidence of damages.

The Ninth Circuit Court of Appeals reversed, holding that, although Weinberg had no actual damages, a due process claim is still actionable for nominal damages. As to

Weinberg's summary judgment motion, the court held that the permits and short plat approvals were a protected property interest entitled to due process. As to the stop work order, the court ruled that questions of fact remained on whether swift action was needed due to Weinberg's alleged creation of a soil erosion and water contamination emergency. However, as to the revocation of the short plats, there was no question of fact and summary judgment in favor of Weinburg was appropriate:

> On the other hand, no such factual issues remain unresolved with respect to the County's vacation of Weinberg's approved plats. The *Mathews* factors clearly weigh in favor of a pre-deprivation hearing in these circumstances. Weinberg's private interest in his approved plats was considerable. By vacating the plats, the County effectively deprived Weinberg of the economic value of his property and rendered nugatory his prior efforts and expenses incurred to develop it. There was a marked absence of any alternative procedural safeguards, as well. Not only did the County's Technical Committee vacate Weinberg's short plats without providing him a prior opportunity to be heard, it did so without holding a Committee meeting of any kind. The attendant risk of an erroneous determination by the Committee was, accordingly, significant. With respect to the third *Mathews* factor, providing Weinberg an informal hearing prior to the deprivation would have entailed only minor administrative costs and burdens for the County.

Weinberg v. Whatcom County, supra, at 754.

The City also argues that BTA, in fact, had a hearing with Hogland shortly after the issuance of the stop work order. City Brief, p. 20. Even ignoring that the meetings occurred **after** the issuance of the stop work order, those meetings cannot in any event be considered any form of "due process" that considered the validity of the stop work order. BTA

requested in the meetings that Hogland investigate the City records to determine whether any records existed to show that work had been performed within the preceding 180 days. Hogland refused.[3] The only discussion by Hogland was that no work could resume until the Stipulation Agreement was signed and if it was not signed, he would publicly announce the expiration of the building permit. R. Vol. I, p. 142, Ex. 3 (Affidavit of Fredrick Peterson in Support of Boise Tower's Motion for Partial Summary Judgment), ¶ 10 and 11. Hogland candidly admits in his deposition that Peterson told him that he did not want to sign the Agreement on the advice of his counsel. Hogland also admits that Peterson signed the Agreement only after Hogland told him that if did not execute the Agreement, Hogland would tell the City Council that the building permit had expired. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 155, line 19 – p. 156, line 11.

The meetings were merely a coercive process for Hogland to obtain execution of the Stipulation Agreement. Based on the tripartite test of *Mathews v. Eldridge*, *supra*, the requirements of due process were clearly not satisfied by the meetings. Procedural due process requires instead that a governmental agency 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

[3] The City argues that "at the meeting, BTA failed to provide any documentation to refute the fact that the 180 day period had expired." City Brief, p. 20 There is no evidence in the record that suggests that BTA had possession of the May 15, 2002 MTI inspection report. Hogland admitted, however, in his deposition that **Hogland himself** had reviewed the report before he terminated the building permit on February 11, 2003. R. Vol. I, p. 142, Ex. 2, Ex. A, p. 212, line 4 – p. 213, line 14.

meaningful time and in a meaningful manner". *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 73 (2001); *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91 (1999).

The City argues nevertheless that "an informal meeting with the decision-maker is sufficient to satisfy due process," citing *Weinberg v. Whatcom County, supra,* at 753. City Brief, p. 18. However, the *Wienberg* statement relied upon by the City is a quote from *Memphis Light, Gas, and Water Div v. Craft*, 436 U.S. 1, 443, fn. 17 (1978), which states in full that "[t]he opportunity of informal consultation with designated personnel empowered to correct a mistaken determination constitutes a "due process hearing' in appropriate circumstances." The Supreme Court, in turn, cites *Goss v. Lopez*, 419 U.S. 565 (1974). In that case, the Court held that a short 10-day suspension of a student from school would require at least an informal hearing before the suspension took place and that the due process clause in that context would not require an opportunity to secure counsel, confront and cross examine witnesses and to call a student's own witnesses. The Court, however, expressly noted that its decision was limited to short suspensions not exceeding 10 days and that longer suspensions or expulsions may require more formal proceedings.

The City also ignores that, after the Stipulation Agreement was signed and prior to Hogland's letter of February 11, 2003 terminating the building permit, there was **no** meeting or any hearing of any kind even though BTA, in its letter of January 21, 2003, had requested Hogland for an opportunity to respond if Hogland disapproved any loan commitment. R. Vol. I, p. 142, Ex. 3, Ex. F. The City incorrectly asserts (City Brief, p. 21) that the parties

had conferred because Hogland on January 22, 2003 had entered into an addendum extending the timelines in the Stipulation Agreement. The addendum, however, was simply presented to Peterson for his signature. R. Vol. I, p. 142, Ex. 3, ¶ 14. There is no evidence in the record suggesting any meeting or hearing on Hogland's decision to terminate the permit because of inadequate financing.

F. Hogland Is Both the Final Decisionmaker and the Final Policymaker on Issues of Permit Expiration and Revocation.

The City argues that 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." City Brief, p. 25. The City does not respond to BTA's opening brief that it is necessary to analyze whether Hogland had final policymaking authority with respect to the particular issue of permit expiration and revocation. *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)).

All of Hogland's actions in this case were based on his authority to determine the expiration date of a building permit under Chapter 1 of the UBC. Section 3-05-02(M) 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". 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." Section 104.2 of the UBC, in turn, explicitly confers policymaking authority on the Building Official with respect to building code provisions. 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.*"

Because the provisions of Chapter 1 of the UBC are not subject to review and because Hogland had the express policymaking authority to adopt and enforce rules on permit expiration issues, Hogland is both the final decisionmaker and final policymaker, which subjects the City to liability for his actions. That liability is not based on the doctrine of *respondeat superior* but instead because the decisions of Hogland in this area were, in fact, the decisions of the City.

G. Hogland Is Not Entitled to Qualified Immunity.

Hogland argues that he is entitled to qualified immunity because the "the majority of courts, including the Ninth Circuit of Appeals, focus upon whether the enabling legislation gives the building official discretion to grant or deny the permit." City Brief, p. 27. Hogland then suggests that there is conflict among the circuits because the District Court of Appeals in *3883 Connecticut LLC, supra,* recognized that an issued building permit is a protected property right. As noted above, the question in this case is not whether Hogland had the

discretion not to issue the building permit to BTA. The building permit was in fact issued and could not be later revoked in the discretion of Hogland. Moreover, there is no conflict among the circuits that an issued permit is a protected property right. Hogland has not provided any citation of a case to the contrary. Indeed, the Ninth Circuit case, *Weinberg v. Whatcom County, supra*, cited by the City, also confirms that an issued permit is a protected property right. *See also, 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)(city official's claim of qualified immunity rejected, holding officials charged with enforcing the housing code should have known of the clearly established right to a pre-deprivation hearing).

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

The City argues that *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), precludes as a matter of law BTA's taking claim. In that case, the Court rejected a categorical rule that any temporary moratorium on development was a taking of property. The Court expressly noted that the result might have been different "if petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under the *Penn Central* analysis." *Tahoe-Sierra Pres. Council, supra* at 331.

The fact that a temporary interference by the state with property rights may constitute a taking was confirmed by the Supreme Court in *First Lutheran Church v. Los Angles*

County, 482 U.S. 304 (1987). In that case, the Court rejected the argument that compensation for a taking is not due for the interim loss of the right to develop property during the period of time preceding the date of the invalidation of an ordinance. Accordingly, the question of whether BTA has a viable taking claim during the period of time its building permit was suspended depends on the fact intensive inquiry required by *Penn Central* and accordingly, summary judgment in favor of the City on this claim was inappropriate.

The City cites *Intermountain West v. Boise City*, 111 Idaho 878, 728 P.2d 767 (1986), in support of its argument that the City's termination of BTA's building permit is not a temporary taking. However, the basis for the court's holding in *Intermountain West* was that "the circumstances in this case indicate the property retained residual value despite any damage that may have been done by respondent's actions." *Id.*, *supra* at 880. In this case, there were no facts presented by the City on its summary judgment motion indicating that there existed some residual interest in the property during the suspension of BTA's building permit.

The City also argues that BTA has no taking claim because BTA did not have a property interest in its building permit, there was no taking of physical property for public use, and the issue was not ripe. City Brief, p. 31. As argued above, the building permit issued to BTA is clearly a protected property interest. BTA's taking claim is not based on a physical taking, but instead a regulatory taking by the City; moreover, there is no need to

show a public use. "[N]either a physical appropriation nor a public use has ever been a necessary component of a 'regulatory taking'". *Tahoe-Sierra Pres. Council, supra* at 326 The doctrine of ripeness simply does not apply to this case. The building permit was issued, revoked and reinstated after City Council review.

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

1. BTA has provided evidence sufficient to demonstrate that genuine issues of material fact remain regarding whether Hogland acted with malice and is therefore not entitled to immunity pursuant to Idaho Code § 6-904(3).

The City argues that the District Court properly granted summary judgment to Hogland based on the immunity provided by Idaho Code § 6-904(3) because there was no evidence that Hogland acted with "ill-will" when he issued the Stop Work Order and ordered the revocation of BTA's building permit. However, as was fully set forth within BTA's opening brief on appeal, there was more than sufficient evidence presented to the District Court to establish at least an issue of fact regarding whether Hogland acted with ill-will towards BTA in this matter.

The City argues that Hogland did not have ill-will because he chose to grant an earlier extension of the building permit and because he chose to extend the permit under a stipulation agreement when he, allegedly, could have treated the open construction site as a public nuisance and abated the condition under the Dangerous Building Code. However, this argument completely ignores the fact that the UBC expressly allows one extension of a

building permit and, therefore, when Hogland granted the first extension, he was simply complying with the provisions of the UBC. UBC § 106.4.4. This argument further ignores the fact that it is not Hogland's intent at the time the original extension was granted that matters, it is his state of mind and intent at the time he revoked the building permit that is relevant to this lawsuit. Finally, the City's assertion that Hogland extended the permit under a stipulation when he could have treated the open construction site as a public nuisance ignores the fact that the stipulation was unlawful and the undisputed fact that BTA's building permit had expired at the time Hogland forced BTA to sign the stipulation. Finally, this argument does not take into account that Hogland revoked the BTA building permit despite his knowledge that the BTA permit had not expired when he issued the stop work order and, therefore, 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. Revoking a permit based upon the expiration of an unlawful stipulation which, in turn, was coerced as a result of a false assertion that the permit had expired and with knowledge that the permit had not, in fact, expired, is certainly sufficient evidence to show ill-will by Hogland towards BTA.

The City also argues that the rest of the evidence submitted simply shows a dedicated public official at work. While that may be one interpretation, it is certainly not the only one and 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 had not, in threatening BTA with public disclosure of the permit's expiration unless BTA executed the stipulation, advising BTA that the City would reinstate the building permit if BTA signed the stipulation, when it had no authority to do so if the permit had in fact expired, 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 and after he had actual knowledge that the permit had not expired, 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 malice and/or criminal intent[4] and the grant by the District Court of Hogland's motion for summary judgment on the state law immunity issue must be reversed.

2. Hogland is not entitled to immunity under Idaho Code § 6-904B(3).

The City asserts that Hogland is also entitled to immunity under Idaho Code § 6-904B(3) because BTA has not proven malice or criminal intent or reckless, willful and wanton conduct. As has been set forth previously, BTA can establish malice and/or criminal intent, therefore the issue of reckless, willful or wanton conduct is irrelevant. However, if BTA were required to prove recklessness, the evidence provided to the District Court clearly

[4] The City argues that BTA has asserted an incorrect standard for establishing criminal intent. However, Idaho Code § 6-904(3) does not require BTA demonstrate malice and criminal intent only one or the other. Therefore, because BTA has established malice ("ill-will"), criminal intent is irrelevant. Furthermore, BTA specifically asserts that the evidence set forth within its opening brief fully demonstrates that Hogland acted with specific intent to engage in activities he knew to be unlawful under the City building codes. As such, he did have the requisite criminal intent.

establishes at least a genuine issue of fact regarding whether Hogland's conduct was reckless, willful or wanton.

The City specifically asserts that Hogland's knowledge of the construction contract with Mortenson is irrelevant because it was not pled in the complaint. However, a review of the Complaint demonstrates that Paragraph 15 of the Complaint expressly states that Mortenson was the general contractor for the Boise Tower project and notified the City on November 7, 2002 that it was ready to begin work on the project. *See* R. Vol. I, p. 000013. Thus, knowledge of the construction contract between Mortenson and BTA was, in fact, pled in the complaint. Furthermore, even if the existence of that contract was not specifically pled in the complaint, Hogland's interference with contract and interference with a prospective economic advantage was certainly pled. Therefore, the evidence provided relates directly to an "issue" pled in the complaint. Contrary to the City's assertions, *Edmondson v. Shearer Lumber Products*, 139 Idaho 172, 176, 75 P.3d 733, 737 (2003) does not hold that every factual issue must be pled in the complaint to be a material issue of fact. Rather, *Edmonson* simply held that where an employee was clearly an at-will employee, issues related to the reasons for the plaintiff's discharge were irrelevant except to the extent they demonstrated that the employee had met the public policy exception to at-will employment which, in turn, was a question of law for the Court. *See id.* Therefore, the evidence regarding Hogland's knowledge of the Mortenson contract is certainly relevant.

Additionally, the City assets that the evidence of recklessness provided in relation to the attempts at obtaining financing from Marshall Investment Group does not demonstrate knowledge of specific harm because there is no evidence that Hogland knew the details of BTA's negotiations with Marshall. However, the evidence provided to the District Court demonstrates that Hogland knew BTA was working with Marshall Investment Group trying to obtain a loan to finance construction of the Project because 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. Further, the evidence demonstrates that when Hogland threatened BTA in November 2002 with public disclosure that BTA's building permit had expired, Rick Peterson told Hogland such an announcement would do serious damage to the project. Peterson also told Hogland at that time that canceling the building permit would jeopardize BTA's financing and cause it to lose condominium pre-sales. R. Vol. I, p. 142, Ex. 5, ¶ 21. Peterson firmly believed that public disclosure that the building permit had expired would cause the project to come to an abrupt end. *Id.*

Finally, the evidence clearly shows that Hogland's revocation of the building permit and the adverse publicity surrounding it, did in fact lead to cancellation of presale condominium agreements and withdrawal of financing efforts by Marshall. It also caused Mortenson and its subcontractors to cease further work on the Project. The Project could not recover from this action by Hogland, and came to an end. R. Vol. I, p. 142, Ex. 5, ¶ 34; R. Vol. I, p. 143, Ex. 16, ¶ 3. Thus, the evidence shows that Hogland had knowledge of the

Marshall financing, had knowledge of the affect that his actions would have on the project and the financing, and nevertheless unlawfully revoked the building permit. As such, these facts, and all inferences which must be drawn from them in BTA's favor, are sufficient to create factual disputes on the issue of whether Hogland's conduct outlined above was reckless, willful and wanton, and therefore whether the immunity afforded Hogland by I.C. § 6-904B(3) may be abrogated. Therefore, the District Court's decision granting summary judgment to Hogland based on the immunity provisions of the Idaho Torts Claim Act must be reversed.

3. Hogland was not entitled to summary judgment even without immunity.

Finally, the City asserts that, irrespective of immunity provided by the Idaho Tort Claims Act, Hogland was entitled to summary judgment because there was no evidence that Hogland intentionally interfered with BTA's contracts and its prospective economic advantage. First, it should be noted that the District Court never reached this issue because the District Court dismissed the claims solely on the grounds of immunity. *See* R. Vol. I, pp. 000094-000098. However, should the Court decide to address this issue, there are issues of fact remaining regarding whether Hogland intentionally interfered with BTA's contractual and prospective economic advantage rights. The evidence presented to the District Court demonstrates that:

a. Hogland knew and understood BTA was pre-selling condominium units to purchasers prior to obtaining construction financing for the Project. The Marshall loan

commitment furnished to Hogland by BTA on January 10, 2003, which Hogland and the City reviewed for approval, required BTA to pre-sell a certain number of condominium units as a condition of loan funding. Rick Peterson of BTA had conversations with Hogland prior to the revocation of the building permit revocation regarding the adverse effect a permit revocation would have on condominium pre-sales. R. Vol. I, p. 142, Ex. 5, ¶¶ 21, 24-26.

b. When Hogland threatened BTA in November 2002 with public disclosure that BTA's building permit had expired, Rick Peterson told Hogland such an announcement would do serious damage to the project. Peterson also told Hogland at that time that canceling the building permit would jeopardize BTA's financing and cause it to lose condominium pre-sales. R. Vol. I, p. 142, Ex. 5, ¶ 21. Peterson firmly believed that public disclosure that the building permit had expired would cause the project to come to an abrupt end. *Id.*

c. Hogland's revocation of the building permit and the adverse publicity surrounding it, did in fact lead to cancellation of presale condominium agreements and withdrawal of financing efforts by Marshall. It also caused Mortenson and its subcontractors to cease further work on the Project. The Project could not recover from this action by Hogland, and came to an end. R. Vol. I, p. 142, Ex. 5, ¶ 34; R. Vol. I, p. 143, Ex. 16, ¶ 3.

The evidence provided above demonstrates that Hogland had knowledge of the presale condominium contracts. Contrary to the City's arguments, there is no requirement that BTA prove that Hogland had knowledge of all of the details of the contracts, only that

Hogland had knowledge of the existence of the contracts, which he clearly did. The evidence further demonstrates that Hogland had knowledge of BTA's construction contract with Mortenson and its proposed financial arrangements with Marshall. The evidence also demonstrates that the revocation of the building permit and the adverse publicity surrounding the revocation did lead to the cancellation of a number of BTA's presale condominium agreements as well as the loss of financing from Marshall. Further, as has been set forth numerous times, there is evidence of intent by Hogland. At the time the building permit was revoked, Hogland knew that it had not expired due to lack of work on the project, but he revoked the permit anyway. The only intent was to prevent any further work on the project which, by necessity would result in the breach of the condominium presales agreements and, as Hogland was aware, the loss of financing. Thus, BTA has demonstrated intent by Hogland. As such, Hogland was not entitled to summary judgment on BTA's state law tort claims.

J. The Trial Court Properly Denied the City's Motion for an Award of Attorneys Fees.

1. Standard of Review.

The district court's decision to award attorney fees is a discretionary decision, subject to the abuse of discretion standard of review. *Bailey v. Sanford*, 139 Idaho 744, 753, 86 P.3d 458, 467 (2004). To determine whether the trial court abused its discretion, this Court considers (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently

with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Nampa Charter School, Inc. v. DeLaPaz*, 140 Idaho 23, 29, 89 P.3d 863, 869 (2004).

2. The City is not entitled to attorney fees in this matter.

a. Standard for an Award of Fees Under 42 U.S.C. § 1988.

42 U.S.C. § 1988 allows a court, in its discretion, to award the prevailing party, other than the U.S. Government, a reasonable attorneys fee as part of its costs in connection with Federal Civil Rights claims. The standard by which fees are awarded, however, differs significantly depending upon on whether a defendant or a plaintiff has prevailed. *White v. South Park Independent School District,* 693 Fed 2nd 1163 (5th Cir. 1982). "[A] prevailing plaintiff ordinarily is to be awarded attorneys fees in all but special circumstances." *Christians Berg Garment Company v. EEOC,* 434 U.S. 412, 416 (1978) (emphasis in original).

In contrast, a prevailing defendant may not be awarded attorneys fees under § 1988 unless the court finds that plaintiff's action was meritless in the sense that it was groundless or without foundation. *Hughes v. Rowe*, 449 U.S. 5, 14-15 (1980), *Christians Berg*, 434 U.S. at 416. "Plaintiff should not be assessed his opponents attorneys fees unless the court finds his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Instead, "[A] prevailing defendant may recover an attorney fee (under § 1988) only where the suit was vexatious, frivolous, or brought to harass or

embarrass the defendant." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees. *Hughes v. Rowe*, 449 U.S. at 14-15.

This standard imposed on prevailing defendants under § 1988 is meant to ensure that no "chilling effect" is imposed upon plaintiffs seeking to vindicate their civil rights who might otherwise be hesitant to file suit for fear of a large fee award against them. *Vandenplas v. City of Muskego*, 797 Fed 425, 429 (7th Cir. 1986).

b. Idaho Code § 6-918A Standard.

Idaho Code § 6-918A applies to claims made under the Idaho Tort Claims Act. It states in pertinent part: "at the time and in the manner provided for fixing costs and civil actions, and at the discretion of the trial court, appropriate and reasonable attorney fees may be awarded to the claimant, the government entity or the employee of such government entity, as costs, in actions under this act, upon petition therefor and a showing, 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". (emphasis added)

As the Idaho Court of Appeals stated in *Bissett v. Un-named Member of Political Compact,* 111 Idaho 1863, 865, 727 P.2d 1291, 1293 (Ct. App. 1986), this bad faith standard is an exceptionally rigorous standard. In *Bissett*, the appeals court ruled that even though it believed that the appeal was taken "on dubious grounds, we do not think it warrants a fee

award under the statute". *Bissett,* 111 Idaho at 865. Significantly, Idaho Code § 6-918A exclusively governs "any right to recover attorneys fees in an action for money damages under the Idaho Tort Claims Act". Tort claims asserted under the ITCA are not subject to "any other statute or rule of the court, except as expressly and specifically provided or authorized by duly enacted statute of the State of Idaho". *Kent v. Pence*, 116 Idaho 22, 24, 773 P. 2nd 290, 292 (Ct. App. 1989).

c. Idaho Code § 12-117 Standard.

Idaho Code § 12-117 which applies to non-tort civil proceedings against a state agency or city not otherwise covered by the Idaho Tort Claims Act, also sets a rigorous standard for entitlement for attorneys fees. It provides, in part, "the court shall award the prevailing party reasonable attorneys fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is entered acted without a reasonable basis in fact or law." *See Fischer v. City of Ketchum,* 141 Idaho 349, 355-56, 109 P. 3d 1091 (2005); *Packard v. Joint School District No. 171*, 104 Idaho 604, 661 P. 2d 770 (1983) (emphasis added) The purposes of IC § 12-117 are: 1) to serve as a deterrent to groundless or arbitrary actions; and 2) to provide a remedy to persons who have borne unfair and unjustified financial burdens defending against groundless (government) charges or attempting to correct mistakes (government) agencies should never have made." *State, Department of Finance v. Resource Service Company, Inc.*, 134 Idaho 282, 283, 1 P. 3rd 783, 784 (2000).

A defense or claim is not frivolous or groundless, for purposes of awarding attorneys fees, merely because a party loses. *Lowery v. Board of County Commissioners of Ada County,* 115 Idaho 64, 764 P.2d 431 (1988). Where questions of law are raised, attorneys fees should not be awarded unless the non-prevailing party advocates a plainly fallacious, and, therefore, not fairly debatable position. *Id.*

d. Idaho Code § 12-117 is Not Applicable to the Claims/Defenses at Issue in This Case.

Idaho Code § 12-117 is a general statute applicable to attorney fee awards in civil proceedings against cities and state agencies generally. In contrast, Idaho Code § 6-918A, and 42 USC § 1988, are specific attorney fees statutes applicable to claims under the Idaho Tort Claims Act and the U.S. Civil Rights Act, 42 USC § 1983, specifically. Idaho Code § 6-918A is the only attorney fees statute applicable to claims under the Idaho Tort Claims Act, *Kent v. Pence*, 116 Idaho at 124, 773 P.2d at 292, and 42 USC § 1988, being a specific statute governing claims under the U.S. Civil Rights Act, controls over other statutes of general application, such as IC § 12-117. *State v. Roderick,* 85 Idaho 80, 84, 375 P.2d 1005, 1007 (1962) ("Where there is a general statute, and a special or specific statute, dealing with the same subject, the provisions of the special or specific statute will control those of the general statute.")

Since the claims and defenses asserted by the parties in this case arise out of the U.S. Civil Rights Act, 42 U.S.C. § 1983 and the Idaho Tort Claims Act, I.C. § 6-901 et. seq., the only attorney fees statutes which are applicable to the City's petition for allowance of

attorneys fees are Idaho Code § 6-918A and 42 U.S.C. § 1988. Idaho Code § 12-117 does not apply.

e. Issues of Causation and Mitigation of Damages Were Never Litigated or Decided, and are not a Proper Basis for Defendants' Attorney Fee Claims.

In support of their claim for attorney fees, the City argues that BTA's allegation that Respondents' revocation of BTA's building permit caused loss of financing, and ultimately project failure, has no basis in fact. To support that argument, the City relies upon an affidavit executed by Rick Peterson and submitted in a case filed in federal district court against Washington Capital Management, Inc., a lender who had originally committed funds to build the Boise Tower project. In this affidavit, Mr. Peterson states that the project was not built and BTA suffered damages as result of WCM's breach of its loan commitment. However, as the District Court clearly determined, this argument is totally without merit. First, the issue of whether the Respondents' conduct caused project failure and BTA's damage, was never litigated before the District Court. It was not the subject of either BTA's or the Respondents' motions for summary judgment, and it was not considered or decided in the District Court's summary judgment ruling.

The issue of whether the Respondents' conduct caused project failure is extremely fact-intensive. BTA has never been afforded the opportunity to present the voluminous facts and testimony in support of its theory on this issue. Nevertheless, the fact that BTA has asserted damages against more than one defendant in different lawsuits does not mandate the

conclusion that BTA suffered no damage from the Respondents' actions. Idaho law specifically allows alternative pleadings and the same rationale applies to cases against different defendants. At best, the alternative claims go to mitigation of damages in either case. However, this case never reached that stage and BTA was never allowed to present its evidence on damages. This Court cannot possibly base its decision on the City's petition for attorneys' fees on a disputed fact-intensive issue which was never presented to the District Court, or considered or decided by it. As the District Court expressly held:

> Boise City made a decision to pursue summary judgment based on immunity and not other grounds. This was a calculated risk taken by Boise City and the Court is unwilling to speculate on what could have happened had the other issues been raised. Moreover, hypothetically speaking, simply because a party is able to mitigate the damages or the damages were minimal does not nullify the alleged wrong by the governmental entity.

R. Vol. I, pp. 000132-000133. As such, the Court should affirm the District Court's decision denying attorney fees to the City and the City's request for attorney fees from this Court must be denied.

Finally, as was set forth above, the standard of review for the grant or denial of an award of attorney fees is whether the District Court abused its discretion. In this case, the District Court's Memorandum Decision and Order clearly demonstrates that the Court recognized the issue as one for its discretion. Further, the Decision demonstrates that the District Court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it. Finally, the Decision clearly

demonstrates that the District court reached its decision by an exercise of reason. As such, the District Court's decision denying the City's claim for attorney fees must be affirmed.

III. 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; (b) reverse the grant of summary judgment dismissing the other claims of BTA; and (c) affirm the District Court's decision denying an award of attorney fees to the City and deny the City's request for fees on appeal.

RESPECTFULLY SUBMITTED this 30th day of June, 2008.

ROSSMAN LAW GROUP, PLLC

Erica S. Phillips

Erica S. Phillips
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 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 ____ Facsimile No. 384-4454	Scott B. Muir BOISE CITY ATTORNEY'S OFFICE Post Office Box 500 Boise, ID 83701-0500
✓ US Mail ____ Overnight Mail ____ Hand Delivery ____ Facsimile No. 344-5510	Phillip J. Collaer ANDERSON JULIAN & HULL, LLP Post Office Box 7426 Boise, ID 83707

Erica S. Phillips

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