

9-16-2008

Goodman Oil Co. v. Scotty's Duro-Bilt Generator Clerk's Record v. 1 Dckt. 34797

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LAW CLERK

Vol. 1 of 4

(VOLUME I)

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

GOODMAN OIL COMPANY,

Plaintiff-Appellant,

-vs-

SCOTTY'S DURO-BILT GENERATOR, INC.,
an Idaho corporation; BART and ALANE
MCKNIGHT, husband and wife; and DOES
I through V,

Defendants-Respondents.

Appealed from the District of the Third Judicial District
for the State of Idaho, in and for Canyon County

Honorable RENAE J. HOFF, District Judge

Jon M. Steele and Karl J. Runft
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Maint St, Suite 400
Boise, ID 83702

Attorneys for Appellant

Susan E. Buxton and Tammy A. Zokan
MOORE SMITH BUXTON &
TURCKE, CHARTERED
950 W. Bannock St, Suite 520
Boise, ID 83702

Attorneys for Respondents

FILED - COPY
SEP 16 2008
Supreme Court _____ Court of Appeals _____ Entered on ATS by: _____

34797

IN THE SUPREME COURT OF THE
STATE OF IDAHO

GOODMAN OIL COMPANY,)	
)	
Plaintiff-Appellant,)	
	)	Supreme Court No. 34797
-vs-)	
)	
SCOTTY'S DURO-BILT GENERATOR, INC.,)	
an Idaho corporation; BART and ALANE)	
MCKNIGHT, husband and wife; and DOES I)	
through V,)	
)	
Defendants-Respondents.)	

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE RENAE J. HOFF, Presiding

Jon M. Steele and Karl J. Runft, RUNFT & STEELE LAW OFFICES, PLLC,
1020 W. Main St., Suite 400, Boise, ID 83702

Attorneys for Appellant

Susan E. Buxton and Tammy A. Zokan, MOORE SMITH BUXTON & TURCKE,
CHARTERED, 950 W. Bannock St., Suite 520, Boise, ID 83702

Attorneys for Respondents

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	Summons Issued (3)	Renae J. Hoff
	Filing: A1 - Civil Complaint, More Than \$1000 No Prior Appearance Paid by: Steele, Jon M (attorney for Goodman Oil Company) Receipt number: 0137672 Dated: 9/19/2005 Amount: \$82.00 (Check)	Renae J. Hoff
9/27/2005	Acceptance of service (fax)	Renae J. Hoff
10/3/2005	Acceptance of Service	Renae J. Hoff
10/12/2005	Answer	Renae J. Hoff
	Filing: I2A - Civil Answer Or Appear. > \$300, Not > \$1000 No Prior Appearance Paid by: Moore Smith Buxton & Turcke Receipt number: 0141827 Dated: 10/12/2005 Amount: \$52.00 (Check)	Renae J. Hoff
10/24/2005	Notice Of Service of responses to pltf. first set of interrogatories request for production of documents and request for admissions to scotty's duro-bilt and Bart McKnight	Renae J. Hoff
12/15/2005	Notice Of Service (fax)	Renae J. Hoff
1/17/2006	Notice Of Service	Renae J. Hoff
3/20/2006	Pltf's first supplemental responses	Renae J. Hoff
	Notice Of Service	Renae J. Hoff
6/16/2006	Notice of change of address	Renae J. Hoff
	Lodged memorandum in support of defendants' motion for summary judgment and motion to dismiss	Renae J. Hoff
	Affidavit of Christopher Yorgason in support of defendants motion for summary judgment and motion to dismiss	Renae J. Hoff
6/29/2006	Defendants' Motion for summary judgment and motion to dismiss	Renae J. Hoff
	Notice Of Hearing	Renae J. Hoff
	Hearing Scheduled (Motion Hearing 08/03/2006 09:00 AM)	Renae J. Hoff
7/6/2006	Amended Notice Of Hearing 9-5-06	Renae J. Hoff
	Hearing Scheduled (Motion Hearing 09/05/2006 03:00 PM) sum judg	Renae J. Hoff
8/22/2006	Request For Trial Setting	Renae J. Hoff
	Motion for summary judgment on issues of liability	Renae J. Hoff
	Brief in reponse to def mo for summary judgment & mo to Dismiss	Renae J. Hoff
	Affidavit of Jon M Steele in support of mo sum judgment	Renae J. Hoff
	Notice Of Hearing 10-2-06 9:00	Renae J. Hoff
	Hearing Scheduled (Motion Hearing 10/02/2006 09:00 AM) Plt sum judgment	Renae J. Hoff
8/25/2006	Amended Notice Of Hearing 10-24-06	Renae J. Hoff
	Hearing result for Motion Hearing held on 10/02/2006 09:00 AM: Hearing Vacated Plt sum judgment	Renae J. Hoff
	Hearing Scheduled (Motion Hearing 10/24/2006 11:00 AM) sum judg	Renae J. Hoff
8/28/2006	Response To Request For Trial Setting	Renae J. Hoff
8/29/2006	Affidavit of tammy a zokan in support of defendants motion for summary judgment and motion to dismiss	Renae J. Hoff

Case: CV-2005-0009800-C Current Judge: Renae J. Hoff

Goodman Oil Company vs. Scottys Duro Built Generator, etal.

Goodman Oil Company vs. Scottys Duro Built Generator, Bart Mcknight, Alane Mcknight

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	of carl j withroe in support of defendants motion for summary judgment and motion to dismiss	Renae J. Hoff
9/1/2006	Affidavit of Jon M Steele in support of Goddmans Motion to strike the affidavit of Carl J Withroe in support of defendants motion for summary judgment and motion to dismiss	Renae J. Hoff
	Motion to strike the affidavit of Carl J Withroe in support of defendants motion for summary judgment and motion to dismiss	Renae J. Hoff
9/5/2006	Hearing result for Motion Hearing held on 09/05/2006 03:00 PM: Interim Hearing Held Motion to Dismiss Def McKnights Granted	Renae J. Hoff
	Hearing Scheduled (Motion Hearing 10/24/2006 10:30 AM) sum judg (CHANGED FROM 11:00 AM TO 10:30 AM)	Renae J. Hoff
9/19/2006	Affidavit of Tammy Zokan in support of McKnights' motion for attorney fees and costs	Renae J. Hoff
	Bart and Alane McKnight's memorandum of costs and attorney fees	Renae J. Hoff
	Bart and Alane McKnight's brief in support of memorandum of costs and attorney fees	Renae J. Hoff
	Order for Expedited Transcript	Renae J. Hoff
9/20/2006	Order of Dismissal of Bart And Alane MckNight	Renae J. Hoff
	Case Status Changed: closed pending clerk action	Renae J. Hoff
10/4/2006	Goodmans Motion for reconsideration of order Dismissing BArt & Alane Mcknight Individually	Renae J. Hoff
	Affidavit of Jon M Steele in support of Goodmans Mo for reconsideration	Renae J. Hoff
	Goodmans Objection to def BArt & Alane McKnights memo of cost & atty fee	Renae J. Hoff
	Brief in support of Goodmans mo for reconsideration of Order Dismissing BArt & Alane Mcknight	Renae J. Hoff
	Brief in support of Goodmans objection to def BArt & Alane Mcknights memo of costs & fees	Renae J. Hoff
10/10/2006	Notice Of Hearing 10-24-06 10:30	Renae J. Hoff
	Defednant's response in objection to plaintiff's motion for summary judgment	Renae J. Hoff
	Second Affidavit of Tammy Zokan	Renae J. Hoff
10/16/2006	Goodman's reply brief	Renae J. Hoff
	Second Affidavit of Tammy Zokan in support of the McKnight's memorandum of costs and fees	Renae J. Hoff
	Bart and Alane McKnight's reply in support of memorandum of costs and attorney fees	Renae J. Hoff
	Defenant's response in objection to plaintiff's motion for reconsideration	Renae J. Hoff
10/24/2006	Hearing result for Motion Hearing held on 10/24/2006 10:30 AM: Interim Hearing Held sum judg	Renae J. Hoff
11/7/2006	Order (Plt mo reconsider denied)	Renae J. Hoff
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Case: CV-2005-0009800-C Current Judge: Renae J. Hoff

Goodman Oil Company vs. Scottys Duro Built Generator, etal.

Goodman Oil Company vs. Scottys Duro Built Generator, Bart Mcknight, Alane Mcknight

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12/26/2006	Affidavit of Tammy A. Zokan in Support of Defendant's Second Motion for Summary Judgment	Renae J. Hoff
	Memorandum in Support of Defendant' s Second Motion for Summary Judgment	Renae J. Hoff
	Notice Of Hearing	Renae J. Hoff
	Hearing Scheduled (Motion Hearing 01/25/2007 09:00 AM) Summary Judgment	Renae J. Hoff
1/12/2007	Brief in Response to Def Second motion for summary Judgment (fax	Renae J. Hoff
1/18/2007	Defendant's Reply Brief in Support of Defendant's Second Motion for Summary Judgment	Renae J. Hoff
1/22/2007	Affidavit of Tammy A. Zokan Regarding Notice of Errata	Renae J. Hoff
	Defendant's Notice of Errata	Renae J. Hoff
1/25/2007	Motion Granted - D's Second Motion for Summary Judgment	Renae J. Hoff
2/7/2007	Affidavit of Tammy A Zokan in support of Mcknight amended memo of atty fees & costs	Renae J. Hoff
	BArt & Alane Mcknights amended memo of Costs and atty Fees	Renae J. Hoff
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	Duro Bilts Memorandum of costs & atty fees	Renae J. Hoff
	Duro Bilts Brief in support of memo of costs and atty fees	Renae J. Hoff
	Notice Of Hearing 3-22-07 10:00	Renae J. Hoff
	Hearing Scheduled (Motion Hearing 03/22/2007 10:00 AM) memo of costs	Renae J. Hoff
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2/23/2007	Brief in support of goodman's objection to defendant' memorandum of costs and attorney fees	Renae J. Hoff
	Goodman's motion for reconsideration of order granting defendant's second motion for summary judgment	Renae J. Hoff
	Brief in support of Goodman's motion for reconsideration of order granting defendant's second motion for summary judgment	Renae J. Hoff
	Affidavit of Jon Steele in support of goodman's motion for reconsideration of order granting defendant's second motion for summary judgment	Renae J. Hoff
3/2/2007	Defs response in objection to plaintiffs feb 23 2007 motion for reconsideration	Renae J. Hoff
	Defs motion to strike	Renae J. Hoff
	Affidavit of Christina Fenner in support of defendants motion to strike	Renae J. Hoff
	Affidavit of Tammy A Zokan in support of defs motion to strike and defs reply in supp of memo of costs/atty fees	Renae J. Hoff
	DuroBilts and the Mcknights reply in supp of memo of costs/atty fees	Renae J. Hoff
	Notice Of Hearing on Defs Motion to Strike	Renae J. Hoff
3/12/2007	Objection to motion to strike and reply memo to defs response memo in supp of memo of atty fees/costs and replys to defs response in obj to plaintiffs 02-23-07 motion for reconsideration	Renae J. Hoff
	Affidavit/Jon M Steele in support of objection	Renae J. Hoff

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3/16/2007	Defendants' reply in support of motion to strike	Renae J. Hoff
3/20/2007	Motion to Deem Goodman's amended renewed objection to def. Bart and Alane McKnights' memorandum of cost	Renae J. Hoff
	Affidavit of Jon Steele in support of motion to Deem Goodman's amended renewed objection to defendants Bart and Alane McKnights' memorandum of costs	Renae J. Hoff
	Motion to shorten time	Renae J. Hoff
	Notice Of Hearing 3-22-07	Renae J. Hoff
3/22/2007	Hearing result for Motion Hearing held on 03/22/2007 10:00 AM: Hearing Held/mo for reconsideration denied/costs & fees graned	Renae J. Hoff
4/2/2007	Order (Plt mo for reconsideration denied	Renae J. Hoff
4/6/2007	Duro Bilts Amended Memorandum of Costs and Fees	Renae J. Hoff
	Affidavit of Tammy Zokan in support of the Mcknights second amended memo of costs	Renae J. Hoff
	Mcknights Second Amended Memorandum of Costs and Fees	Renae J. Hoff
	Affidavit of Tammy A Zokan in support of Duro-Bilts amended memo of costs & atty fees	Renae J. Hoff
4/17/2007	Goodman's Renewed Objection to Defendants Bart and Alane McKnights' Second Amended Memorandum of Costs and Attorney Fees Dated April 5, 2007, and Objection to Duro-Bilt's Amended Memorandum of Costs and Attorney Fees Dated April 5, 2007	Renae J. Hoff
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	Affidavit of Jon M Steele in support of goodman's second motion for reconsideration of order granting defendant's second motion for summary judgment	Renae J. Hoff
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	Notice Of Hearing on defendants' motion for entry of judgment 7-26-07	Renae J. Hoff
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7/6/2007	Defs Memorandum of costs and Attys fees for costs and fees difinding against Plts second Motion for Reconsideration	Renae J. Hoff
	Affidavit of Tammy A Zokan in support of Defs memorandum of Atty fees and costs	Renae J. Hoff

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Case: CV-2005-0009800-C Current Judge: Renae J. Hoff

Goodman Oil Company vs. Scottys Duro Built Generator, etal.

Goodman Oil Company vs. Scottys Duro Built Generator, Bart Mcknight, Alane Mcknight

Other Claims

Date		Judge
7/6/2007	Defs brief in support of memorandum of costs and atty fees	Renae J. Hoff
	Notice Of Hearing on Defs Memo of costs and atty fees	Renae J. Hoff
7/26/2007	Hearing result for Motion Hearing held on 07/26/2007 09:00 AM: Motion Granted reconsideration/motn to strike	Renae J. Hoff
8/7/2007	Order for atty fees & Costs\$23,674.14	Renae J. Hoff
10/16/2007	Brief in support of Plt Motn for entry of Judg	Renae J. Hoff
	Motion for entry of Judg	Renae J. Hoff
	Affidavit of Jon M. Steele in support of Motn for entry of judgment	Renae J. Hoff
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10/30/2007	Defendants' reply to plaintiff's response/reply filed october 29, 2007	Renae J. Hoff
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11/1/2007	Hearing Scheduled (Motion Hearing 11/05/2007 11:00 AM) mo for entry of judgment	Renae J. Hoff
11/5/2007	Hearing result for Motion Hearing held on 11/05/2007 11:00 AM: Hearing Vacated motion to strike - WITHDRAWN	Renae J. Hoff
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11/15/2007	Order(judgment is denied)	Renae J. Hoff
11/23/2007	Appealed To The Supreme Court	Renae J. Hoff
	Notice of appeal	Renae J. Hoff
	Filing: T - Civil Appeals To The Supreme Court (\$86.00 Directly to Supreme Court Plus this amount to the District Court) Paid by: Steele, Jon M (attorney for Goodman Oil Company) Receipt number: 0279159 Dated: 11/26/2007 Amount: \$15.00 (Check) For: Goodman Oil Company (plaintiff)	Renae J. Hoff
	Bond Posted - Cash (Receipt 279166 Dated 11/26/2007 for 100.00)(For Clerk's Record)	Renae J. Hoff
2/12/2008	S C - Order Denying Motion to Consolidate	Renae J. Hoff
	S C - Order Granting Motion to Dismiss Appeal	Renae J. Hoff
4/22/2008	S C - Order Granting Motion for Reconsideration	Renae J. Hoff
5/16/2008	Bond Posted - Cash (Receipt 313198 Dated 5/16/2008 for 450.00)(for Court Reporters Transcript)	Renae J. Hoff

000005

FILED
A.M. 3:15 P.M.

SEP 19 2005

CANYON COUNTY CLERK
Franklin, DEPUTY

JON M. STEELE (ISB # 1911)
KARL J. F. RUNFT (ISB # 6640)
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main St., Suite 400
Boise, ID 83702
Telephone: 208 333-8506
Facsimile: 208-343-3246
Email: jmsteele@runftlaw.com

Attorney for Goodman Oil Company

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GOODMAN OIL COMPANY,)	
)	
Plaintiff,	)	Case No. <i>CN05-9800</i>
)	
vs.	)	COMPLAINT AND DEMAND FOR
	)	JURY TRIAL
SCOTTY'S DURO-BILT GENERATOR,)	
INC., an Idaho corporation; BART and)	
ALANE MCKNIGHT, husband and wife;)	
and DOES I through V.)	
)	
Defendants.)	
)	

COMES NOW the above named Plaintiff, by and through its attorneys of record, Jon M. Steele and Karl J. Runft, and for causes of action against Defendants, complains and alleges as follows:

I. PARTIES

1. Plaintiff is informed and believes that at the time of the incident which is the subject matter

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ORIGINAL

of this litigation that Defendant Scotty's Duro-Bilt, Inc., ("Duro-Bilt"), was and is an Idaho corporation with its principal place of business in the County of Canyon, State of Idaho.

2. Plaintiff is informed and believes that at the time of the incident which is the subject matter of this litigation that Defendants Bart and Alane McKnight, ("McKnight"), husband and wife, were and are residents of the County of Canyon, State of Idaho.
3. Plaintiff is informed and believes that at the time of the incident which is the subject matter of this litigation that Defendants McKnight, were the alter egos of Defendant Duro-Bilt.
4. The true names of Does I through V are unknown. Each Doe Defendant is or may be responsible in some manner for the acts and omissions of their agent or employee or have some statutory or vicarious liability to Plaintiff. Plaintiff will move this Court to allow amendments when the identities and roles of Doe Defendants become known.

II. JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to and by virtue of Idaho Code § 1-705 and other applicable laws and rules. The damages herein exceed \$10,000.
6. This Court has personal jurisdiction over the above named Defendants pursuant to and by virtue of Idaho Code § 5-514 and other applicable laws and rules.
7. Venue is proper in Canyon County pursuant to and by virtue of Idaho Code § 5-404 and other applicable laws and rules.

III. STATEMENT OF FACTS

8. On August 2, 1995, Defendant Duro-Bilt, the Blamires Family Trust, T.J. Forest, Inc., and the Plaintiff, Goodman Oil Company ("Goodman"), entered into a Property Owner Street Vacation Agreement ("Vacation Agreement") whereby the parties consented to the City of Nampa's vacation as public right-of-way of First Avenue South located between Blocks 16 and 19 of Pleasants Addition to the City of Nampa, Canyon County, Idaho.
9. A true and accurate copy of the Vacation Agreement is attached to this Complaint as Exhibit A.
10. Pursuant to the Vacation Agreement, the parties granted and conveyed among themselves a perpetual easement upon the vacated property for the purpose of access to and from their property.
11. The parties also agreed to fully cooperate to ensure that the purpose and intent of the Vacation Agreement was accomplished, and to equally share in the maintenance of the easement in proportion to the amount of property they owned that adjoins First Avenue South.
12. Defendant McKnight, President of Duro-Bilt, executed the Vacation Agreement on behalf of Duro-Bilt.
13. On August 3, 1995, Goodman submitted an application to the City for vacation of First Avenue South between 2nd Street South and 3rd Street South.
14. On July 28, 2004, Goodman entered into a Purchase and Sale Agreement with James R. Wylie ("Wylie") whereby Goodman agreed to sell and Wylie agreed to purchase Goodman's property adjoining First Avenue South.

15. A true and correct copy of the Purchase and Sale Agreement is attached to this Complaint as Exhibit B.
16. Closing of the Purchase and Sale Agreement was contingent upon the City completing the vacation of First Avenue South.
17. The Purchase and Sale Agreement provided for a purchase price of Six Hundred Thousand (\$600,000.00) Dollars.
18. Duro-Bilt had knowledge of the Purchase and Sale Agreement between Goodman and Wylie.
19. McKnight had knowledge of the Purchase and Sale Agreement between Goodman and Wylie.
20. The existing constructed portion of First Avenue South to be vacated is 40 feet in width back of curb to back of curb.
21. The entire portion of First Avenue South to be vacated is 80 feet in width and is 300 feet in length.
22. The area of First Avenue South to be vacated consists of approximately 24,000 sq. ft.
23. Upon vacation each adjoining property owner will acquire title to an area one-half the width of First Avenue South (40 feet) for the length of their lot.
24. Title to the vacated property will be subject to an easement reserved by the City for utilities.
25. On August 16, 2004, the Vacation Ordinance ("Ordinance No. 3374") was approved by the Council and the Mayor.

26. At the Council meeting held August 16, 2004, the Mayor declared Ordinance No. 3374 passed and directed the City Clerk to record it as required by law.
27. The Mayor, after signing Ordinance No. 3374 delivered the Ordinance to the City Clerk, surrendering possession and control of the Ordinance to the City Clerk on August 16, 2004.
28. On or about August 17, 2004, the City Clerk delivered Ordinance No. 3374 to the Idaho Press Tribune with instructions that the Ordinance be published on August 23, 2004.
29. Sometime after August 17, 2004, but prior to August 23, 2004, Defendant McKnight contacted the City and attempted to verbally withdraw Duro-Bilt's consent to the vacation of First Avenue South.
30. McKnight is a friend of the Mayor.
31. McKnight phoned the Mayor, and the Mayor agreed to veto Ordinance No. 3374.
32. Sometime after August 17, 2004, but prior to August 23, 2004, the City Clerk, at the Mayor's direction, contacted the Idaho Press Tribune and cancelled the request to publish Ordinance No. 3374.
33. On September 2, 2004, the Mayor vetoed Ordinance No. 3374.
34. A true and accurate copy of Ordinance No. 3374, showing that it was approved by the Council, signed by the Mayor and City Clerk on August 16, 2004, and then vetoed by the Mayor on September 2, 2004, is attached to this Complaint as Exhibit C.
35. On September 3, 2004, one day after the Mayor's veto, Defendants sent a letter to the City attempting to withdraw Defendants' consent to the vacation of First Avenue South.

36. Defendants did not inform Goodman that Duro-Bilt had attempted to withdraw its consent to the vacation.
37. A true and accurate copy of Duro-Bilt's letter is attached to this Complaint as Exhibit D.
38. At no time prior to the Mayor's veto of Ordinance No. 3374, did Defendants give Goodman notice of Duro-Bilt's attempt to withdraw its consent to the vacation of First Avenue South.
39. As a result of the "veto" of Ordinance No. 3374, the Purchase and Sale Agreement between Goodman and Wylie failed to close.
40. Goodman has yet to sell its property adjoining First Avenue South.
41. Goodman has instituted proceedings against the City of Nampa to have First Avenue South vacated by Writ of Mandamus.
42. The Preemptory Writ of Mandamus was granted on August 7, 2005, in case 04-10007, *Goodman Oil Company v. City of Nampa*, in the Third Judicial District. .
43. A true and correct copy of the Preemptory Writ of Mandamus is attached to this Complaint as Exhibit E.

IV. COUNT ONE – BREACH OF CONTRACT

44. Goodman re-alleges all prior allegations set forth in this Complaint.
45. The Vacation Agreement is a contract between Goodman and Duro-Bilt.
46. Duro-Bilt breached the Vacation Agreement.
47. The attempted withdrawal of consent to the vacation of First Avenue South is a breach of Defendants' obligations set forth in the Vacation Agreement.

48. Defendants' have breached the Vacation Agreement in the following manner:

- a. Their obligation to consent to the vacation of First Avenue South;
- b. Their obligation to grant and convey a perpetual easement upon the vacated street for the purpose of access to and from the parties' properties;
- c. Their obligation to fully cooperate to ensure that the purpose and intent of the Vacation Agreement is accomplished;
- d. Their obligation to execute a formal agreement recognizing the parties' rights and obligations;
- e. Their obligation to share equally in the maintenance of the easement in proportion to the amount of property each party owns; and
- f. Their promise that the Agreement shall be binding upon and inure to the benefit of the parties and their respective successors, assigns heirs, and personal representatives.
- g. Their obligation and covenant of good faith and fair dealing.

49. Defendants' breach of the Vacation Agreement caused Goodman to lose the sale of its property to Wylie.

50. Defendants' breach of the Vacation Agreement has resulted in a reduced fair market value of Goodman's property.

51. Goodman has been damaged by Defendants' breach of the Vacation Agreement in an amount to be proven at trial.

**V. COUNT TWO – TORTIOUS INTERFERENCE WITH
PURCHASE AND SALE AGREEMENT**

52. Goodman re-alleges all prior allegations set forth in this Complaint.
53. A contract existed between Goodman and Wylie for the purchase and sale of Goodman's property adjoining First Avenue South.
54. Defendants had knowledge of the contract between Goodman and Wylie.
55. By attempting to withdraw its consent to the Vacation Agreement, Defendants interfered with the contract between Goodman and Wylie.
56. Goodman has suffered injury resulting from the Defendants' intentional interference in an amount to be proven at trial.

**VI. COUNT THREE – NEGLIGENT INTERFERENCE WITH
PROSPECTIVE ECONOMIC ADVANTAGE**

57. Goodman re-alleges all prior allegations set forth in this Complaint.
58. Goodman had an economic relationship with Wylie that would have resulted in an economic advantage by the sale of Goodman's property on First Avenue South after First Avenue South had been vacated.
59. The Defendants knew or should have known of the existence of this economic relationship.
60. By notifying the City of Nampa of the withdrawal of their consent to the vacation of First Avenue South, the Defendants disrupted Goodman's relationship with Wylie causing the sale to fail.
61. The Defendants' failed to act with reasonable care.

62. Goodman has suffered injury resulting from the Defendants' disruption with Goodman's economic relationship in an amount to be proven at trial.

**VII. COUNT FOUR – INTENTIONAL INTERFERENCE WITH
PROSPECTIVE ECONOMIC ADVANTAGE**

63. Goodman re-alleges all prior allegations set forth in this Complaint.
64. Goodman had an economic relationship with Wiley that would have resulted in an economic advantage by the sale of Goodman's property on First Avenue South after First Avenue South had been vacated.
65. The Defendants knew of the existence of this economic relationship.
66. By notifying the City of Nampa of the withdrawal of their consent to the vacation of First Avenue South, the Defendants disrupted Goodman's relationship with Wiley causing the sale to fail.
67. The Defendants' intended to and did disrupt this relationship.
68. Goodman has suffered injury resulting from the Defendants' disruption with Goodman's economic relationship in an amount to be proven at trial.

VIII. DEMAND FOR JURY TRIAL

69. Goodman hereby demands a jury trial on all issues triable to a jury. Goodman does not stipulate to a six (6) person jury or a jury consisting of any number of persons less than twelve (12).

WHEREFORE, Plaintiff Goodman requests the following relief:

1. Entry of a Judgment against Duro-Bilt in an amount to be proven at trial;
2. Entry of a decree requiring Duro-Bilt to specifically perform all of its contractual obligations set forth in the Vacation Agreement;
3. For an award of costs and attorneys fees against Duro-Bilt pursuant to the Vacation Agreement and pursuant to Idaho Code §§ 12-120(3) and 12-121, or other applicable law; and
4. For such other and further relief as the Court deems just and proper.

DATED this 15 day of September, 2005.

RUNFT & STEELE LAW OFFICES, PLLC

By JM Steele
Jon M. Steele,
Attorney for Petitioner

By KJF Runft
Karl J. F. Runft,
Attorney for Petitioner

VERIFICATION

STATE OF IDAHO)

:SS

County of Ada)

CHARLES CONLEY, after being duly sworn, deposes and says as follows:

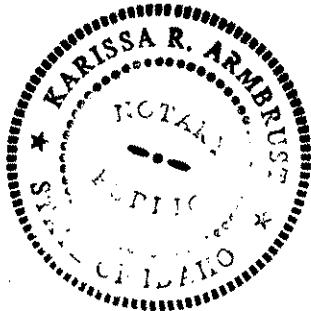
That he is the President of Goodman Oil Company the Petitioner/Plaintiff in the foregoing COMPLAINT AND DEMAND FOR JURY TRIAL, that he has read the foregoing, and that he believes and avers that the facts stated therein are true based upon his own information and belief.

IN WITNESS WHEREOF, said Petitioner/Plaintiff has set his hand and seal the day and year first above written.

GOODMAN OIL COMPANY

By: Charles Conley
CHARLES CONLEY
President

SUBSCRIBED AND SWORN to before me this 13th day of September 2005.



Karissa R. Armbush
Notary Public for Idaho
Residing at: Nampa
Commission expires 3-16-07

INSTRUMENT NO.
200451127

**PROPERTY OWNER
STREET VACATION AGREEMENT**

This Agreement is entered into by and between SCOTTY'S DURO-BUILT GENERATOR, INC.; BLAMIRES FAMILY TRUST; T.J. FOREST, INC.; and GOODMAN OIL COMPANY, an Idaho corporation, collectively referred to herein as "the parties."

WITNESSETH:

WHEREAS, SCOTTY'S DURO-BUILT GENERATOR, INC. owns real property described as Lot 10, Block 19, Pleasants Addition to the City of Nampa, County of Canyon, State of Idaho, as designated on the official plat filed within the office of the Canyon County Recorder;

WHEREAS, BLAMIRES FAMILY TRUST owns real property described as a portion of Lots 1, 2, and 3, Block 16, Pleasants Addition to the City of Nampa, County of Canyon, State of Idaho, as designated on the official plat filed within the office of the Canyon County Recorder;

WHEREAS, T.J. FOREST, INC. owns real property described as a portion of Lots 1 and 2, Block 16, Pleasants Addition to the City of Nampa, County of Canyon, State of Idaho, as designated on the official plat filed within the office of the Canyon County Recorder;

WHEREAS, GOODMAN OIL COMPANY owns the real property located at Lots 4, 5, and 6 of Block 16, Pleasants Addition, and Lots 7, 8, 9, 11, and 12 of Block 19, Pleasants

REQUEST Naylor, Hayes, & McCready
TYPE B+A FEE 18
CANYON COUNTY RECORDER
G NOEL HILES
[Signature]

2004 SEP 14 AM 10 46

RECORDED

200451127

PROPERTY OWNER STREET VACATION AGREEMENT

000017

EXHIBIT A

Addition, all in the City of Nampa, County of Canyon, State of Idaho, as designated on the official plat filed within the office of the Canyon County Recorder; and

WHEREAS, the parties' property above-described surrounds and adjoins First Avenue South as it divides Blocks 16 and 19 of the Pleasants Addition in the City of Nampa, County of Canyon, State of Idaho.

NOW THEREFORE, the parties, for good and valuable consideration the receipt of which is hereby acknowledged, agree as follows:

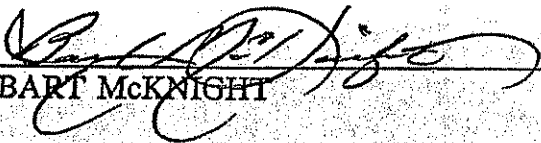
1. That the parties consent to the City of Nampa's vacation of First Avenue South, located between Blocks 16 and 19 of Pleasants Addition above-described, as a public right-of-way as depicted on Exhibit "A" attached hereto.
2. That the parties grant and convey among themselves, their agents, licensees, and assignees a perpetual easement upon vacated First Avenue South for the purpose of access to and from their property from both Second and Third Street located in Nampa, Canyon County, Idaho. The actual location of the easement shall be at the discretion of the legal owner of the vacated property upon the City's vacation of First Avenue South as described herein.
3. That the parties shall fully cooperate to ensure that the purpose and intent of this Agreement shall be accomplished. The parties shall execute a formalized agreement recognizing the rights and obligations of the parties upon the City of Nampa's vacation of First Avenue South as described herein. The parties shall equally share in the maintenance of said easement in proportion to the amount of property they own which adjoins First Avenue South as described herein.

4. That the parties shall hold each other harmless and indemnify the other parties from their negligent acts and that of their agents in maintaining and using said access easement.

5. This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors, assigns, heirs, and personal representatives.

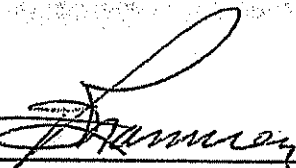
SCOTTY'S DURO-BUILT GENERATOR, INC.

31 July 95
Date


BART MCKNIGHT

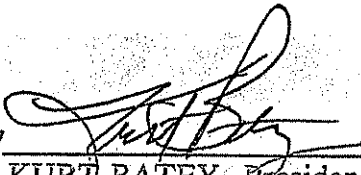
BLAMIRES FAMILY TRUST

August 2 '95
Date

By 
FLOYD BLAMIRES, Trustee

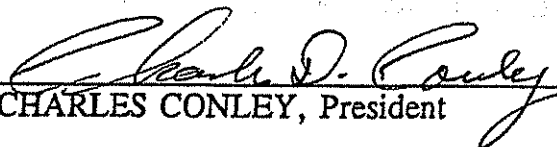
T.J. FOREST, INC.

July 31st
Date

By 
KURT BATEY, President

GOODMAN OIL COMPANY

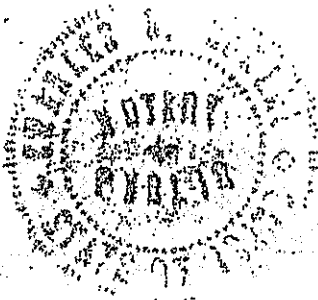
July 31st
Date

By 
CHARLES CONLEY, President

STATE OF IDAHO)
) ss.
County of ADA)

On this 31st day of July, 1995, before me, the undersigned, a Notary Public in and for said state, personally appeared BART McKNIGHT, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

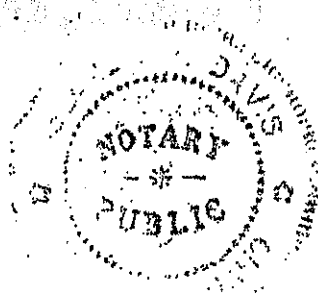


Charles D. Conley
Notary Public for Idaho
Residing at Beise, Idaho
Commission Expires: March 17, 1999

STATE OF IDAHO)
) ss.
County of ADA)

On this 2nd day of AUGUST, 1995, before me, the undersigned, a Notary Public in and for said state, personally appeared FLOYD BLAMIRES, known to me to be the Trustee of the BLAMIRES FAMILY TRUST, which is the trust that executes this instrument and the person who executed the instrument on behalf of said trust, and acknowledged to me that such trust executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



Alexander F. Davis
Notary Public for Idaho
Residing at MERIDIAN, Idaho
Commission Expires: AUGUST, 1999

STATE OF IDAHO)
) ss.
County of Ada)

On this 31ST day of July, 1995, before me, the undersigned, a Notary Public in and for said state, personally appeared KURT BATEY, known to me to be the President of T.J. FOREST, INC., which is the corporation that executes this instrument and the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

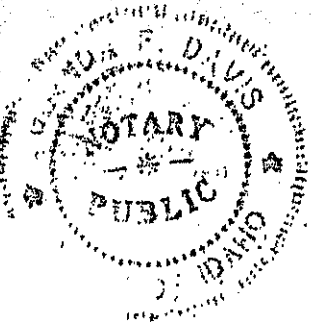


Charles D. Conley
Notary Public for Idaho
Residing at Boise, Idaho
Commission Expires: March 17, 1999

STATE OF IDAHO)
) ss.
County of ADA)

On this 31ST day of JULY, 1995, before me, the undersigned, a Notary Public in and for said state, personally appeared CHARLES CONLEY, known to me to be the President of GOODMAN OIL COMPANY, which is the corporation that executes this instrument and the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



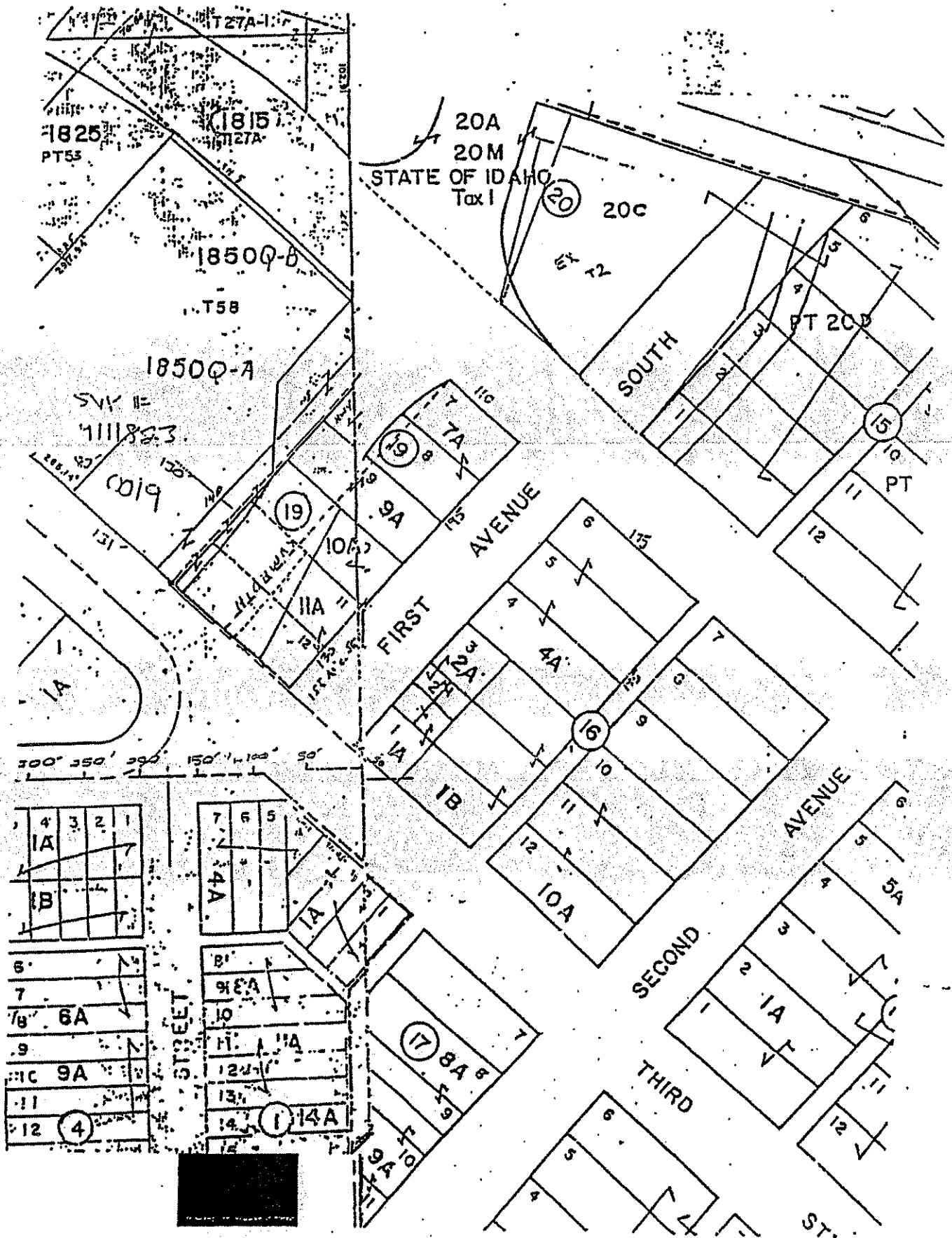
Glenda F. Davis
Notary Public for Idaho
Residing at MERIDIAN, Idaho
Commission Expires: AUGUST, 1999

2432E*02.A28

PROPERTY OWNER STREET VACATION AGREEMENT - 5.

000021

EXHIBIT A
STREET VACATION



Attn: Wally Lee



COMMERCIAL/INVESTMENT REAL ESTATE PURCHASE AND SALE AGREEMENT

THIS IS A LEGALLY BINDING CONTRACT. BEFORE SIGNING, READ THE ENTIRE DOCUMENT, INCLUDING THE GENERAL PRINTED PROVISIONS AND ATTACHMENTS. IF YOU HAVE ANY QUESTIONS BEFORE SIGNING, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT.



ID # 04-071

DATE July 28, 2004

1. REAL ESTATE OFFICES:

Listing Agency RFR Properties

Selling Agency Michener Investments, LLP

Listing Agent Ramona Hildebran Phone: 343-4080

Selling Agent Hoyt Michener Phone: 336-3202

2. REPRESENTATION CONFIRMATION:

Check one (1) box in Section 1 below and one (1) box in Section 2 below to confirm that in this transaction, the brokerage(s) involved had the following relationship(s) with the BUYER(S) and SELLER(S).

Section 1:

- A. The broker working with the BUYER(S) is acting as an AGENT for the BUYER(S).
B. The broker working with the BUYER(S) is acting as a LIMITED DUAL AGENT for the BUYER(S).
C. The broker working with the BUYER(S) is acting as a NONAGENT for the BUYER(S).

Section 2:

- A. The broker working with the SELLER(S) is acting as an AGENT for the SELLER(S).
B. The broker working with the SELLER(S) is acting as a LIMITED DUAL AGENT for the SELLER(S).
C. The broker working with the SELLER(S) is acting as a NONAGENT for the SELLER(S).

Each party signing this document confirms that he or she has received, read and understood the Agency Disclosure Brochure and has elected the relationship confirmed above. In addition, each party confirms that the broker's agency office policy was made available for inspection and review. EACH PARTY UNDERSTANDS THAT HE OR SHE IS A "CUSTOMER" AND IS NOT REPRESENTED BY A BROKER UNLESS THERE IS A SIGNED WRITTEN AGREEMENT FOR AGENCY REPRESENTATION.

3. BUYER: James R. Wylie or Assigns

(Hereinafter called "Buyer" agrees to purchase and the undersigned Seller agrees to sell the following described real estate hereinafter referred to as "Property."

4. PROPERTY ADDRESS AND LEGAL DESCRIPTION: The property commonly known as TBD Second Street South and Nampa Blvd (+/- 1.22 acres) City of Nampa County of Canyon, Idaho legally described as: To be attached by Seller

5. PRICE/TERMS: Total Purchase Price is Six Hundred Thousand Dollars Dollars (\$600,000)

- a) \$1,000 (One Thousand Dollars) cash down payment, including Earnest Money deposit.
b) \$599,000 (Five Hundred Ninety-Nine Thousand Dollars) Balance of the purchase price to be paid as follows: Cash

6. EARNEST MONEY:

- a) Buyer hereby deposits as Earnest Money and a receipt is hereby acknowledged of One Thousand Dollars (\$1,000) evidenced by: Cash [X] Check [] Cashier's Check [] Note or []
b) Earnest Money to be deposited in trust account within 3 days of acceptance and shall be held by Michener Investments Trust for the benefit of the parties hereto. The responsible broker is Hoyt Michener.

7. INCLUDED ITEMS: All attached floor coverings, attached television antennae, satellite dish(es) and receiving equipment, attached plumbing, bathroom and lighting fixtures, window screens, screen doors, storm windows, storm doors, window coverings, exterior trees, plants or shrubbery, water heating apparatus and fixtures, attached fireplace equipment, awnings, ventilating, cooling and heating systems, built-in and "drop-in" ranges (but excepting all other ranges), fuel tanks and irrigation fixtures and equipment, and any and all, if any, water and water rights, and any and all, if any, ditches and ditch rights that are appurtenant thereto that are now on or used in connection with the premises shall be included in the sale unless otherwise provided herein.

Other items specifically included in this sale: See #8 and #26

Items specifically excluded in the sale: See #8 and #26

Buyer and Seller acknowledge receipt of copy of this page, which constitutes Page 1 of 4 Pages.

Buyer's Initials (AW) Seller's Initials (Hoyt Michener)

This form is printed and distributed by the Idaho Association of REALTORS® / Ada County Association of REALTORS® and. This form has been designed for and is provided only for use by real estate professionals licensed by the Idaho Real Estate Commission who are also members of the National Association of REALTORS®.

PROPERTY ADDRESS: TBD Second Street South & Nampa Blvd, Nampa, Idaho ID #04-071

8. **ADDITIONAL TERMS, CONDITIONS, AND/OR CONTINGENCIES:** The closing of this transaction is contingent upon written satisfaction or waiver of the following conditions:

Contingent upon:

1. Environmental Report, provided by Seller and by MTI.

2. Title Report, provided by Seller.

3. Buyer's ability to develop as desired, including access, locations, and vacation of alley street

Buyer will have until 45 days after acceptance to satisfy or waive all conditions and/or contingencies.

9. **TITLE COMPANY/CLOSING AGENCY:** a) The parties agree that Land America Transnation Title Company shall provide any required Title Policy and preliminary report of commitment. b) The Closing Agency for this transaction shall be Land America Transnation Title.

Each party agrees to pay one-half of the Closing Agency's fee.

10. **TITLE INSURANCE:** Seller to pay for a standard Owner's or Purchaser's Title Policy premium in this transaction. Purchaser's Extended Coverage Title Policy requested Yes No. Additional Premium to be paid by N/A. Title Company to provide all parties to this Agreement with a preliminary Title Report on or before 15 days from acceptance. Buyer shall have until 5 days to object in writing to the condition of the title as set forth in the report. In the event Buyer makes written objection to the title, Seller shall have a reasonable time, not to exceed 5 business day(s), to cure any defects of title or provide affirmative Title Insurance coverage. Buyer may elect, as its sole remedy, to either terminate this Agreement or cure the defects at Buyer's expense, or proceed to closing, taking title subject to such defects. If Buyer does not so object, Buyer shall be deemed to have accepted the condition of the title. In the event Buyer elects to terminate the Agreement due to unsatisfactory title conditions, Buyer shall be entitled to the return of all refundable deposits made by him but that such return of deposits shall not constitute a waiver of other remedies available to Buyer. The Title Company shall deliver the final Title Insurance policy to Buyer as soon as possible after closing.

11. **ESCROW/COLLECTION:** If a long-term escrow/collection is involved, then the escrow/collection holder shall be N/A. Each party agrees to pay one-half of escrow/collection fees.

12. **CLOSING DATE:** On or before the closing date. Buyer and Seller shall deposit with the Closing Agency all funds and instruments necessary to complete the sale. The closing date shall be no later than 7 days from removal of contingencies "Closing Date" means the date on which all documents are either recorded or accepted by an escrow/collection agency and the sale proceeds are available to Seller.

13. **POSSESSION/PRORATION:** Buyer shall be entitled to possession on the day of closing or _____. Taxes and water assessments (using the last available assessment as a basis), rents, insurance premiums, interest and reserve on liens, encumbrances or obligations assumed and utilities shall be prorated as of the day of closing or _____.

Any tenant deposits held by Seller shall be credited to Buyer at closing.

14. **DEFAULT:** If Buyer defaults in the performance of this Agreement, Seller has the option: (1) accepting the Earnest Money as liquidated damages or (2) pursuing any other lawful right or remedy to which Seller may be entitled. If Seller elects to proceed under (1), Seller shall make demand upon the holder of the Earnest Money, upon which demand said holder shall pay from the Earnest Money the costs incurred by Seller's Broker on behalf of Seller and Buyer related to the transaction, including, without limitation, the costs of title insurance, escrow fees, credit report fees, inspection fees and attorney's fees; and said holder shall pay any balance of the Earnest Money, one-half to Seller and one-half to Seller's Broker, provided that the amount to be paid to Seller's Broker shall not exceed the Broker's agreed to commission. Seller and Buyer specifically acknowledge and agree that if Seller elects to accept the Earnest Money as liquidated damages, such shall be Seller's sole and exclusive remedy, and such shall not be considered a penalty or forfeiture. If Seller elects to proceed under (2), the holder of the Earnest Money shall be entitled to pay the costs incurred by Seller's Broker on behalf of Seller and Buyer related to the transaction, including, without limitation, the costs of brokerage fees, title insurance, escrow fees, credit report fees, inspection fees and attorney's fees, with any balance of the Earnest Money to be held pending resolution of the matter. If Seller defaults, having approved said sale and fails to consummate the same as herein agreed, Buyer's Earnest Money deposit shall be returned to him/her and Seller shall pay for the costs of title insurance, escrow fees, credit report fees, inspection fees, brokerage fees and attorney's fees, if any. This shall not be considered as a waiver by Buyer of any other lawful right or remedy to which Buyer may be entitled.

Buyer and Seller acknowledge receipt of copy of this page, which constitutes Page 2 of 4 Pages.

Buyer's Initials (MTI) (_____) Seller's Initials (_____) (Charles D. Coyle)

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PROPERTY ADDRESS: 122 N. 2000th Street, Boise, Idaho 83704 Phone: (208) 333-0271

13. ATTORNEY'S FEES: If either party initiates or defends any arbitration or legal action or proceedings, which are in any way connected with this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party reasonable costs and attorney's fees, including such costs and fees on appeal.

16. EARNEST MONEY DISPUTE/INTERPLEADER: Notwithstanding any termination of this contract, Buyer and Seller agree that in the event of any controversy regarding the Earnest Money and things of value held by Broker or closing agency, unless mutual written instructions are received by the holder of the Earnest Money and things of value, Broker or closing agency shall not be required to take any action but may await any proceeding, or at Broker's or closing agency's option and sole discretion, may interplead all parties and deposit any moneys or things of value into a court of competent jurisdiction and shall recover court costs and reasonable attorney's fees.

17. TITLE CONVEYANCE: Title of Seller is to be conveyed by warranty deed or _____ deed, and is to be marketable and insurable except for rights reserved in federal patents, building or use restrictions, building and zoning regulations and ordinances of any governmental unit, rights of way and easements established or of record and any other liens, encumbrances or defects approved by Buyer.

18. RISK OF LOSS: Should the Property be materially damaged by fire or other cause prior to closing, unless Buyer has taken possession prior to closing by Agreement, this Agreement shall be voidable at the option of Buyer.

19. CONDITION OF PROPERTY AT CLOSING: Buyer agrees to purchase the Property in as is condition, where is, with all faults. Buyer will assume all obligations with respect to the Property. Seller shall maintain the Property until the closing in its present condition, ordinary wear and tear excepted, and loss by casualty. The heating, ventilating, air conditioning, plumbing, elevators, loading doors and electrical systems shall be in present operating order and condition at the time of closing, unless otherwise agreed to in writing.

20. INSPECTION: Buyer hereby acknowledges further that Buyer has not received or relied upon any statements or representations by the Broker or Broker's representatives or by Seller, which are not herein expressed. Buyer has entered into this Agreement relying upon information and knowledge obtained from Buyer's own investigation or personal inspection of the Property.

21. ADDITIONAL PROVISIONS: Additional provisions of this Real Estate Purchase and Sale Agreement, if any, are attached hereto by an Addendum consisting of N/A page(s).

22. NOTARY PUBLIC: It is recommended signatures be notarized with a notary statement attached hereto.

23. ENTIRE AGREEMENT: This Agreement, including any Addendums or exhibits, constitutes the entire Agreement between the parties and no warranties, including any warranty of habitability, Agreements or representations have been made or shall be binding upon either party unless herein set forth.

24. TIME IS OF THE ESSENCE IN THIS AGREEMENT.

25. ACCEPTANCE: Buyer's offer is made subject to the acceptance of Seller on or before (Date) Wednesday, July 28, 2004 and (Time) 5:00 pm. If Seller does not accept this Agreement within the time specified, the entire Earnest Money shall be refunded to Buyer on demand.

26. OTHER TERMS:
1. This may be part of a 1031 Exchange for both Buyer and Seller, both to cooperate.
 2. Ramona Hildebran and Hoyt Michener to split the real estate fee 50/50, paid by Seller, due at closing.
 3. Signed lease agreement for Hotel sign to be given to Buyer from Seller for review during contingency period. (Buyer is aware this lease is month to month) EDC/Jan
 4. Auto sales lease agreement to be given to Buyer from Seller for review during contingency period. Buyer is aware this lease is month to month. EDC/Jan
 5. All street and alley vacation paperwork to be given to Buyer from Seller for review, within one day of acceptance.
 6. Seller to remove all oil and fuel tanks from site at Seller's cost, and to be completed prior to closing.
 7. Survey provided by Buyer at Buyer's cost.
 8. Storage shed to be removed by buyer at Buyer's cost.

27. BUYER'S SIGNATURES: BUYER'S SIGNATURES SUBJECT TO ATTACHED BUYER'S ADDENDUM (S): _____ (Specify number of Buyer Addendum(s) attached.)

Buyer Signature _____
 Buyer (Print Name) James R. Wylie
 Date _____ Time _____ Phone# _____
 Address _____
 City _____ State _____ Zip _____

Buyer Signature _____
 Buyer (Print Name) _____
 Date _____ Time _____ Phone# _____
 Address _____
 City _____ State _____ Zip _____

Buyer and Seller acknowledge receipt of copy of this page, which constitutes Page 3 of 4 Pages.
Buyer's Initials (JRW) (AW) Seller's Initials (AW)

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PROPERTY ADDRESS: TBD Second Street South & Nampa Blvd, Nampa, Idaho ID # 04-071

28. SELLER'S SIGNATURES.

On this date, I/We hereby approve and accept the transaction set forth in the above Agreement and agree to carry out all the terms thereof on the part of the Seller. I/We further acknowledge receipt of a true copy of this Agreement signed by both parties.

- SELLER'S SIGNATURES SUBJECT TO ATTACHED COUNTER OFFER SEE ATTACHED COUNTER OFFER
- SELLER'S SIGNATURES SUBJECT TO SELLER ADDENDUM/AMENDMENT SEE ATTACHED ADDENDUM
- SELLER'S SIGNATURES SUBJECT TO ATTACHED "SELLERS RIGHT TO CONTINUE TO MARKET PREMISES" ADDENDUM

Seller Signature *Goodman Dilts, Jr*
 Seller (Print Name) Goodman Dilts, Jr
 Date 7-28 Time 3:55 P.M.
 Address _____
 City _____ State _____ Zip _____
 Hm. Ph. _____ Bus. Ph. _____

Seller Signature *Goodman Dilts, Jr*
 Seller (Print Name) Goodman Dilts, Jr
 Date 7-28 Time 3:55 P.M.
 Address _____
 City _____ State _____ Zip _____
 Hm. Ph. _____ Bus. Ph. _____

A true copy of the foregoing Agreement, signed by Seller and containing the full and complete description of the premises, is hereby received on this _____ Day of _____, 20____ Buyer's Initials (_____) (_____)

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VETO

ORDINANCE NO. 3374

AN ORDINANCE OF THE CITY OF NAMPA, IDAHO, VACATING 1ST AVENUE SOUTH BETWEEN 2ND STREET SOUTH AND 3RD STREET SOUTH IN THE CITY OF NAMPA, CANYON COUNTY, IDAHO, SUBJECT TO AN ACCESS AND UTILITY EASEMENT RESERVED THEREON, AND DIRECTING THE CITY ENGINEER TO ALTER THE USE AND AREA MAP ACCORDINGLY.

WHEREAS, on September 5, 1995, a public hearing on vacating 1st Avenue South between 2nd Street South and 3rd Street South in the City of Nampa was held before the City Council; and

WHEREAS, the City Council approved the vacation; and

WHEREAS, on September 18, 1995, the First Reading of the Ordinance Vacating 1st Avenue South between 2nd Street South and 3rd Street South in the City of Nampa was read before the City Council; and

WHEREAS, on October 2, 1995, the Second Reading of the above described vacation Ordinance was read before the City Council; and

WHEREAS, on October 16, 1995, the Third Reading of the above described vacation Ordinance was tabled by the City Council because the necessary approval of fire access through the area by the Fire Department had not been obtained; and

WHEREAS, the Fire Department has recently reviewed development plans for the area and has provided its written, conditional approval of the vacation Ordinance if an access and utility easement is retained through the property to be vacated; and

WHEREAS, the City of Nampa has created a legal description for an access and utility easement to be retained through the property to be vacated; and

WHEREAS, the access and utility easement is acceptable to the Fire Department as to location and dimension.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF NAMPA, IDAHO:

Section 1: That 1st Avenue South between 2nd Street South and 3rd Street South in the City of Nampa, Idaho be and the same is hereby vacated, such vacation subject to the following described access and utility easement which is hereby reserved on the vacated property, to-wit:

See Exhibit A attached hereto and, by this reference, incorporated herein as if set forth in full.

Section 2: That the City Engineer is hereby instructed and directed to alter the Use and Area Map in accordance with the above Ordinance.

PASSED BY THE COUNCIL OF THE CITY OF NAMPA, IDAHO, THIS 16th DAY OF August, 2004.

APPROVED BY THE MAYOR OF THE CITY OF NAMPA, IDAHO, THIS 16th DAY OF August, 2004.

Approved:

By *Tom Dale*
Mayor

Attest:

By *Deana Lambing*

City Clerk

VETO
Sept 2, 2004
Tom Dale

State of Idaho)

Canyon County)

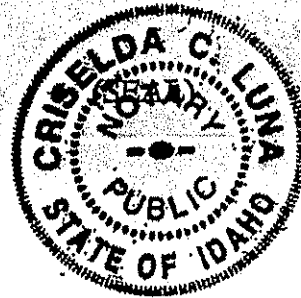
On this 16th day of August, in the year 2004, before me, Criselda C. Luna
a Notary Public, personally appeared TOM DYE and DANA Lambing known
or identified to me to be the Mayor and City Clerk, respectively, of The City of Nampa, who
executed the instrument or the person that executed the instrument on behalf of said corporation,
and acknowledge to me that such corporation executed the same.

Criselda C. Luna

Criselda C. Luna

Residing at: Nampa, Canyon County, Idaho

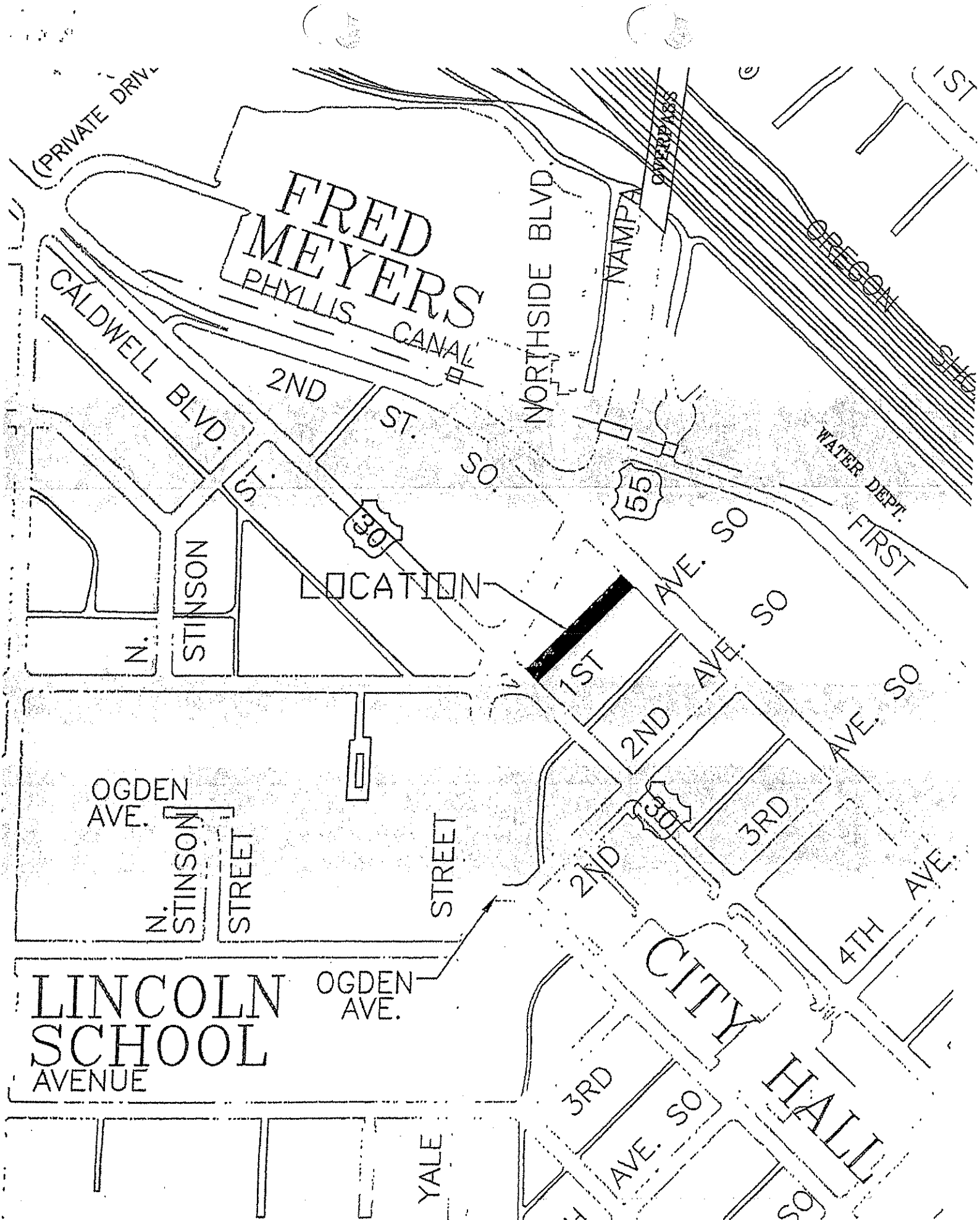
My Commission Expires: 10/02/07



LEGAL DESCRIPTION FOR
VACATION OF FIRST AVENUE SOUTH

That portion of First Avenue South between Second Street South and Third Street South within the NW ¼, Section 22, and the NE ¼, Section 21, Township 3 North, Range 2 West, Boise Meridian, City of Nampa, Canyon County, Idaho, as shown on the plat of PLEASANTS ADDITION on file with Canyon County Book 4, Page 10.

Maintaining the westerly fifty feet (50') for an Ingress/Egress and utility easement.



(PRIVATE DRIVE)

FRED MEYERS
PHYLLIS CANAL

NORTHSIDE BLVD.

NAMPA

OVERPASS

OREGON ST.

1ST

CALDWELL BLVD.

2ND ST.

ST. SO

WATER DEPT. FIRST

30

55

LOCATION

N. STINSON

AVE. SO

AVE. SO

AVE. SO

1ST

2ND

AVE. SO

3RD

OGDEN AVE.

N. STINSON

STREET

STREET

2ND

30

AVE. SO

4TH AVE.

LINCOLN SCHOOL AVENUE

OGDEN AVE.

CITY HALL

3RD

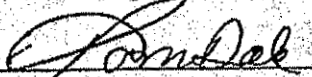
AVE. SO

HALL

YALE

000031

I, Mayor Tom Dale do hereby VETO Ordinance number 3374 for Vacation of 1st Avenue South between 2nd Street South and 3rd Street South pursuant to Nampa City Code 2-2-3-5 due to the objection by an adjoining property owner.



Tom Dale
Mayor
City of Nampa

DUROBILT

STARTERS • ALTERNATORS • REGULATORS • BATTERIES

5 1st Ave. South • P.O. Box 904 • Nampa, Idaho 83653-0904 • FAX 208 / 466-7023 • TEL 208 / 466-7814

City of Nampa, Office of the Mayor
311 3rd Street South
Nampa, ID 83651

September 3, 2004

Attention: All Nampa City Officials

To Whom It May Concern:

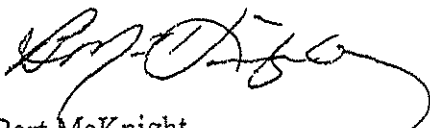
RE: Vacating 1st Avenue South Application

In 1995 an application was sought to vacate 1st Avenue South in Nampa, Idaho for development of the surrounding area. Property owners were contacted and an agreement was signed clearing the way for development of the area. The original idea behind the agreement was to transplant property owners to other properties opening this block for future development. The idea was cleared to a certain point and then drop without being finalized.

Nine years later, a developer wants to resurrect the issue of vacating 1st Avenue South, but development plans have changed dramatically. No longer are all property owners affected fairly.

Being a property owner in the middle of 1st Avenue South let it be known: I am not in agreement to the action of vacating 1st Avenue South at this present time. My business has grown to where it has the need of access through the whole block from both sides for industrial & agricultural vehicles, eighteen wheelers, commercial vehicles and general traffic.

Once again, I am not in favor of vacating 1st Avenue South. To restrict this street would cripple my business, frustrate customers and become a traffic hazard. It is my understanding that all property owners must be in agreement on such action. I am not in agreement. Please dismiss action on vacating 1st Avenue South.


Bart McKnight
President / Owner

000033

EXHIBIT D

JON M. STEELE (ISB # 1911)
KARL J. F. RUNFT (ISB # 6640)
RUNFT & STEELE LAW OFFICES, PLLC
 1020 W. Main Street, Suite 400
 Boise, Idaho 83702
 Phone: (208) 333-9496
 Fax: (208) 343-3246
 Email: jmsteele@runftlaw.com

Attorneys for Petitioner

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

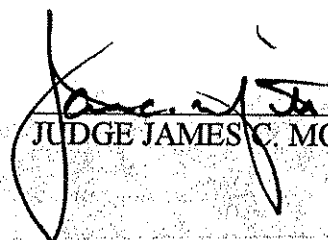
GOODMAN OIL COMPANY,)	
)	
Petitioner,	)	CASE NO. CV 04-10007
)	
vs.)	
	)	PEREMPTORY WRIT OF
CITY OF NAMPA, a corporate body politic;	)	MANDAMUS
THE CITY COUNCIL of the CITY OF)	
NAMPA; MAYOR TOM DALE, in his)	
capacity as Mayor of the City of Nampa;)	
DIANA LAMBING, in her capacity as City)	
Clerk; and SCOTTY'S DURO-BILT)	
GENERATOR, INC., an Idaho corporation,)	
)	
Respondents.)	
)	

This Court has duly found and adjudged that Petitioner is entitled to this Peremptory Writ of Mandamus compelling Nampa Respondents in the above case to publish Ordinance #3374.

Now, therefore I command that you, City of Nampa, Mayor Tom Dale and Diana Lambing, in her capacity as City Clerk, publish Ordinance #3374 in accordance with the

applicable law and do also command that you make known to me on or before fourteen days after the service of this writ, that you have executed this Peremptory Writ of Mandamus.

DATED this 7TH day of ^{AUGUST} July, 2005.



JUDGE JAMES C. MORFITT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 8 day of ^{August}~~July~~ 2005, a true and correct copy of the foregoing PEREMPTORY WRIT OF MANDAMUS was served upon opposing counsel as follows:

Christopher E. Yorgason
Moore Smith
225 N. 9th, Suite 420
Boise ID 83702

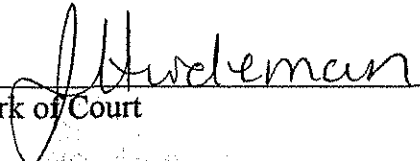
US Mail
 Personal Delivery
 Facsimile

T. Guy Hallam
White Peterson, P.A.
5700 East Franklin Road, Suite 200
Nampa ID 83687-7901

US Mail
 Personal Delivery
 Facsimile

Jon M. Steele
Runft & Steele Law Offices, PLLC
1020 W. Main St. Suite 400
Boise, ID 83702

US Mail
 Personal Delivery
 Facsimile


Clerk of Court

OCT 12 2005

CANYON COUNTY CLERK
G USOG, DEPUTY

CHRISTOPHER E. YORGASON # 5844
MOORE SMITH BUXTON & TURCKE, CHARTERED
Attorneys at Law
225 North 9th Street, Suite 420
Boise, Idaho 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202
Email: cey@msbtlaw.com

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)	
)	
Plaintiff,	)	Case No. CV 05-9800
)	
v.)	
	)	ANSWER
SCOTTY'S DURO-BILT GENERATOR,)	
INC., and Idaho corporation; BART and)	
ALANE MCKNIGHT, husband and wife; and)	
DOES I through V.)	
)	
Defendants.)	

COMES NOW, Defendants Scotty's Duro-Bilt Generator, Inc., and Bart and Alane McKnight (collectively "Duro-Bilt"), by an through their attorneys of record, Moore, Smith, Buxton & Turcke, Chartered, and by way of Answer to Plaintiff's Complaint and Demand for Jury Trial ("Complaint"), admit, deny and allege as follows:

INTRODUCTION

The following defenses are not stated separately as to each claim for relief or allegation of the Complaint. Nevertheless, the following defenses are applicable, where appropriate, to any

ANSWER - 1

000037
ORIGINAL

and all of Plaintiff's claims for relief. Duro-Bilt, in asserting the following defenses, does not admit that the burden of proving the allegations or denials contained in the defenses is upon it, but, to the contrary, asserts that by reason of said denials, and by reason of relevant statutory and judicial authority, the burden of proving the facts relevant to many, if not all of the defenses and affirmative defenses and the burden of proving the inverse of the allegations contained in many, if not all, of the defenses and affirmative defenses is upon Plaintiff in this action.

I. FIRST DEFENSE

Plaintiff's Complaint fails to state a claim against Duro-Bilt upon which relief can be granted.

II. SECOND DEFENSE

Duro-Bilt denies each and every allegation contained in Plaintiff's Complaint not specifically admitted in this Answer.

III. PARTIES

1. Duro-Bilt admits the allegations contained in Paragraph 1 of the Complaint.
2. Duro-Bilt admits the allegations contained in Paragraph 2 of the Complaint.
3. Duro-Bilt denies the allegations contained in Paragraph 3 of the Complaint.
4. In answer to paragraph 4 of the Complaint, Duro-Bilt is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies the same.

IV. JURISDICTION AND VENUE

5. In answer to paragraph 5 of the Complaint, Duro-Bilt admits this Court has subject matter jurisdiction over this action.

6. In answer to paragraph 6 of the Complaint, Duro-Bilt admits that this Court has personal jurisdiction over the Defendants in this action.

7. In answer to paragraph 7 of the Complaint, Duro-Bilt admits that venue is proper in Canyon County.

V. STATEMENT OF FACTS

8. In answer to paragraph 8 of the Complaint, Duro-Bilt admits only that it entered into a Property Owner Street Vacation Agreement and that the terms of the Agreement speak for themselves.

9. Duro-Bilt admits the allegations contained in Paragraph 9 of the Complaint.

10. In answer to paragraph 10 of the Complaint, Duro-Bilt admits only that the Vacation Agreement speaks for itself.

11. In answer to paragraph 11 of the Complaint, Duro-Bilt admits only that the Vacation Agreement speaks for itself.

12. Duro-Bilt admits the allegations contained in Paragraph 12 of the Complaint.

13. In answer to paragraph 13 of the Complaint, Duro-Bilt is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies the same.

14. In answer to paragraph 14 of the Complaint, Duro-Bilt is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies the same.

15. In answer to paragraph 15 of the Complaint, Duro-Bilt is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies the same.

16. In answer to paragraph 16 of the Complaint, Duro-Bilt admits only that the Purchase and Sale Agreement speaks for itself.

17. In answer to paragraph 17 of the Complaint, Duro-Bilt admits only that the Purchase and Sale Agreement speaks for itself.

18. Duro-Bilt denies the allegations contained in paragraph 18 of the Complaint.

19. Duro-Bilt denies the allegations contained in paragraph 19 of the Complaint.

20. In answer to paragraph 20 of the Complaint, Duro-Bilt is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies the same.

21. Duro-Bilt admits the allegations contained in paragraph 21 of the Complaint.

22. Duro-Bilt admits the allegations contained in paragraph 22 of the Complaint.

23. Duro-Bilt admits the allegations contained in paragraph 23 of the Complaint.

24. Duro-Bilt denies the allegations contained in paragraph 24 of the Complaint.

25. In answer to paragraph 25 of the Complaint, Duro-Bilt is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies the same.

26. In answer to paragraph 26 of the Complaint, Duro-Bilt is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies the same.

27. In answer to paragraph 27 of the Complaint, Duro-Bilt is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies the same.

28. In answer to paragraph 28 of the Complaint, Duro-Bilt is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies the same.

29. In answer to paragraph 29 of the Complaint, Duro-Bilt admits that McKnight contacted the City and attempted to verbally withdraw Duro-Bilt's consent to the vacation of First Avenue South. Duro-Bilt cannot verify the remainder of the allegations contained in paragraph 29 of the Complaint.

30. Duro-Bilt denies the allegations contained in paragraph 30 of the Complaint.

31. In answer to paragraph 31 of the Complaint, Duro-Bilt admits only that it phoned the Mayor.

32. In answer to paragraph 32 of the Complaint, Duro-Bilt is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies the same.

33. In answer to paragraph 33 of the Complaint, Duro-Bilt is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies the same.

34. In answer to paragraph 34 of the Complaint, Duro-Bilt is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies the same.

35. Duro-Bilt denies the allegations contained in paragraph 35 of the Complaint.

36. In answer to paragraph 36 of the Complaint, Duro-Bilt admits that it had no discussions with Goodman regarding the vacation for several years.

37. Duro-Bilt admits the allegations contained in paragraph 37 of the Complaint.

38. In answer to paragraph 38 of the Complaint, Duro-Bilt admits that it had no discussions with Goodman regarding the vacation for several years.

39. In answer to paragraph 39 of the Complaint, Duro-Bilt is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies the same.

40. In answer to paragraph 40 of the Complaint, Duro-Bilt is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies the same.

41. Duro-Bilt admits the allegations contained in paragraph 41 of the Complaint.

42. In answer to paragraph 42 of the Complaint, Duro-Bilt is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies the same.

43. In answer to paragraph 43 of the Complaint, Duro-Bilt admits only that the document speaks for itself.

VI. COUNT ONE – BREACH OF CONTRACT

44. Duro-Bilt realleges its answers to all prior allegations set forth in the Complaint.

45. In answer to paragraph 45 of the Complaint, Duro-Bilt denies that the Vacation Agreement is a valid contract between Goodman and Duro-Bilt.

46. Duro-Bilt denies the allegations contained in paragraph 46 of the Complaint.

47. Duro-Bilt denies the allegations contained in paragraph 47 of the Complaint.

48. Duro-Bilt denies the allegations contained in paragraph 48, including subparts (a) through (g), of the Complaint.

49. Duro-Bilt denies the allegations contained in paragraph 49 of the Complaint.

50. Duro-Bilt denies the allegations contained in paragraph 50 of the Complaint.

51. Duro-Bilt denies the allegations contained in paragraph 51 of the Complaint.

VII. COUNT TWO – TORTIOUS INTERFERENCE WITH
PURCHASE AND SALE AGREEMENT

52. Duro-Bilt realleges its answers to all prior allegations set forth in the Complaint.

53. In answer to paragraph 53 of the Complaint, Duro-Bilt is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies the same.

54. Duro-Bilt denies the allegations contained in paragraph 54 of the Complaint.

55. Duro-Bilt denies the allegations contained in paragraph 55 of the Complaint.

56. Duro-Bilt denies the allegations contained in paragraph 56 of the Complaint.

VIII. COUNT THREE – NEGLIGENT INTERFERENCE WITH
PROSPECTIVE ECONOMIC ADVANTAGE

57. Duro-Bilt realleges its answers to all prior allegations set forth in the Complaint.

58. Duro-Bilt denies the allegations contained in paragraph 58 of the Complaint.

59. Duro-Bilt denies the allegations contained in paragraph 59 of the Complaint.

60. Duro-Bilt denies the allegations contained in paragraph 60 of the Complaint.

61. Duro-Bilt denies the allegations contained in paragraph 61 of the Complaint.

62. Duro-Bilt denies the allegations contained in paragraph 62 of the Complaint.

IX. COUNT FOUR – INTENTIONAL INTERFERENCE WITH

PROSPECTIVE ECONOMIC ADVANTAGE

63. Duro-Bilt realleges its answers to all prior allegations set forth in the Complaint.

64. Duro-Bilt denies the allegations contained in paragraph 64 of the Complaint.

65. Duro-Bilt denies the allegations contained in paragraph 65 of the Complaint.

66. Duro-Bilt denies the allegations contained in paragraph 66 of the Complaint.

67. Duro-Bilt denies the allegations contained in paragraph 67 of the Complaint.

68. Duro-Bilt denies the allegations contained in paragraph 68 of the Complaint.

X. AFFIRMATIVE DEFENSES

69. Goodman is estopped from raising claims for breach of contract, tortious interference with purchase and sale agreement, negligent interference with prospective economic advantage and intentional interference with prospective economic advantage.

70. Goodman's claim for breach of contract is barred for lack of consideration.

71. Goodman has waived its right to claim damages under this Complaint.

X. RESERVATION OF RIGHT TO AMEND

Duro-Bilt reserves the right, after further discovery, to amend this Answer to add or delete affirmative defenses supported by the facts, and a failure to include all such defenses in this Answer shall not be deemed a waiver of any right to further amend this Answer.


XI. REQUEST FOR ATTORNEY FEES AND COSTS

Duro-Bilt hereby requests that it be awarded attorney fees and costs incurred herein pursuant to all applicable Idaho law, including Sections 12-120 and 12-121 of the Idaho Code, and Rule 54 of the Idaho Rules of Civil Procedure.

WHEREFORE, having answered Plaintiff's Complaint and Demand for jury Trial, Duro-Bilt prays that Plaintiff takes nothing by its Complaint, that the same be dismissed with prejudice, and that Duro-Bilt be awarded its reasonable attorney fees and costs incurred in defending this matter.

DATED this 12th day of October, 2005.

MOORE SMITH BUXTON & TURCKE, CHTD.


By: 
Christopher E. Yorgason
Attorneys for Defendants

CERTIFICATE OF SERVICE

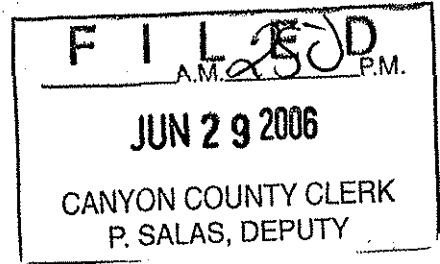
I HEREBY CERTIFY that on this 12th day of October, 2005, I caused a true and correct copy of the foregoing ANSWER by the method indicated below, and addressed to the following:

Jon M. Steele
Karl J. F. Runft
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Facsimile (208) 343-3246
Email: jmsteele@runftlaw.com

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile


Christopher E. Yorgason

CHRISTOPHER E. YORGASON # 5844
TAMMY A. ZOKAN # 5450
MOORE SMITH BUXTON & TURCKE, CHARTERED
Attorneys at Law
950 W. Bannock Street, Suite 520
Boise, Idaho 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202
Email: taz@msbtlaw.com



Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)	
)	
Plaintiff,	)	Case No. CV 05-9800
)	
v.)	
	)	DEFENDANTS' MOTION FOR
SCOTTY'S DURO-BILT GENERATOR,	)	SUMMARY JUDGMENT AND
INC., and Idaho corporation; BART and	)	MOTION TO DISMISS
ALANE MCKNIGHT, husband and wife; and)	
DOES I through V.)	
)	
Defendants.)	
)	

COME NOW, Defendants Scotty's Duro-Bilt Generator, Inc., and Bart and Alane McKnight (collectively "Duro-Bilt"), by an through their attorneys of record, Moore, Smith, Buxton & Turcke, Chartered, and hereby move this Court for summary judgment in accordance with Rule 56 of the Idaho Rules of Civil Procedure and move this Court to dismiss Plaintiff's claims against Bart and Alane McKnight in accordance with Rule 12(b)(6) of the Idaho Rules of Civil Procedure. The pleadings on file and to be presented before decision hereon demonstrate that there is no genuine


DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS - 1

issue as to any material fact and that Defendants are entitled to judgment as a matter of law and that Plaintiff has failed to state a claim upon which relief can be granted against the McKnights as individuals. This Motion is supported by the memorandum of law and Affidavit of Christopher E. Yorgason lodged on June 16, 2006, and the pleadings on file and any argument presented before decision hereon. Defendants request attorney fees and costs pursuant to Idaho Code §§ 12-120 and 12-121 and any other reimbursement and relief deemed appropriate by the Court.

Defendants request oral argument.

DATED this 29th day of June, 2006.

MOORE SMITH BUXTON & TURCKE, CHTD.

By: 
Tammy A. Zokan
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2006, I caused a true and correct copy of the foregoing MOTION by the method indicated below, and addressed to the following:

Jon M. Steele
Karl J. F. Runft
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Facsimile (208) 343-3246
Email: jmsteele@runftlaw.com

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile


Tammy A. Zokan

JON M. STEELE (ISB # 1911)
KARL J. RUNFT (ISB # 6640)
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Phone: (208) 333-9495
Fax: (208) 343-3246
Email: jmsteele@runftlaw.com

Attorneys for Plaintiff

F I L E D
A.M. 2:40 P.M.

AUG 22 2006

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GOODMAN OIL COMPANY,)

Plaintiff,)

vs.)

SCOTTY'S DURO-BILT GENERATOR,)
INC., an Idaho corporation; BART and)
ALANE MCKNIGHT, husband and wife;)
and DOES I through V.)

Defendants.)

CASE NO. CV 05-9800

**MOTION FOR SUMMARY
JUDGMENT ON ISSUES OF
LIABILITY**

COMES NOW Plaintiffs, Goodman Oil Company ("Goodman") by and through their attorney, Jon M. Steele, and pursuant to IRCP 56 moves for summary judgment on the issues of liability of Defendants in regards to the following:

1. Count One – Breach of Contract (the "Vacation Agreement") as to Defendant Duro-Bilt.

MOTION FOR SUMMARY JUDGMENT ON ISSUES OF LIABILITY, P. 1

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ORIGINAL

2. Count Two – Tortious Interference with the Goodman/Wylie Purchase and Sale Agreement as to all Defendants.
3. Count Three – Negligent Interference with Prospective Economic Advantage (the “Goodman/Wylie” sale) as to all Defendants.

Plaintiff requests a separate trial on the issue of damages.

This Motion for Summary Judgment is based upon the verified pleadings, supporting affidavits, Memorandums and Exhibits previously filed in this case and in the case of *Goodman v. City of Nampa, a corporate body politic; The City Council of the City Of Nampa; Mayor Tom Dale, Diana Lambing, and Scotty's Duro-Bilt Generator, Inc.*, Case No. CV 04-10007.

The issues of liability on each of the three causes of action are fully briefed in the Plaintiff's Brief in Response to Defendant's Motion for Summary Judgment and Motion to Dismiss and In Support of Plaintiff's Motion for Summary Judgment on Issues of Liability filed with this Motion.

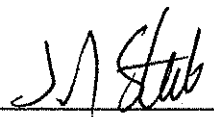
Plaintiffs move for summary judgment as there is no genuine issue of material fact and Plaintiffs are entitled to judgment on the liability issues as a matter of law.

Plaintiffs request a hearing and oral argument on this Motion.

DATED this 22 day of August 2006.

RUNFT & STEELE LAW OFFICES, PLLC

By: _____


JON M. STEELE
Attorney for Plaintiff

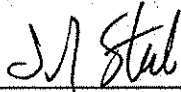
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22 day of August 2006, a true and correct copy of the foregoing MOTION FOR SUMMARY JUDGMENT ON ISSUES OF LIABILITY was served upon opposing counsel as follows:

Christopher Yorgason
Moore Smith Buxton & Turke, Chtd.
950 W. Bannock, Suite 520
Boise, ID 83702

US Mail
 Personal Delivery
 Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: 
JON M. STEELE
Attorney for Plaintiff

JON M. STEELE (ISB # 1911)
KARL J. RUNFT (ISB # 6640)
RUNFT & STEELE LAW OFFICES, PLLC
 1020 W. Main Street, Suite 400
 Boise, Idaho 83702
 Phone: (208) 333-9495
 Fax: (208) 343-3246
 Email: jmsteele@runftlaw.com

FILED
 AUG 22 2006
 A.M. 2:45 P.M.

AUG 22 2006

CANYON COUNTY CLERK
 T. CRAWFORD, DEPUTY

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GOODMAN OIL COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 SCOTTY'S DURO-BILT GENERATOR,)
 INC., an Idaho corporation; BART and)
 ALANE MCKNIGHT, husband and wife;)
 and DOES I through V.)
)
 Defendants.)
)

CASE NO. CV 05-9800

**BRIEF IN RESPONSE TO
 DEFENDANT'S MOTION FOR
 SUMMARY JUDGMENT AND
 MOTION TO DISMISS AND IN
 SUPPORT OF PLAINTIFF'S MOTION
 FOR SUMMARY JUDGMENT ON
 ISSUES OF LIABILITY**

COMES NOW Plaintiff Goodman Oil Company ("Goodman") and responds to Defendant's Motion for Summary Judgment and Motion to Dismiss. For the reasons set forth below, Defendant's Motions should be summarily denied. For the reasons set forth below, Plaintiff's Motion for Partial Summary Judgment on Issues of Liability should be granted.

BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ISSUES OF LIABILITY, P. 1

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ORIGINAL

I.

INTRODUCTION

This dispute arises out of proceedings to vacate the public right-of-way known as First Avenue South between 2nd Street South and 3rd Street South in Nampa.

This litigation is a spin-off of mandamus and judicial review litigation before Judge Morfitt. *See, Goodman Oil Company v. City of Nampa, The City Council of the City of Nampa, Mayor Tom Dale and Diana Lambing and Scotty's Duro-Bilt Generator, Inc.*, Case No. CV 04-10007, 3rd Judicial District, Canyon County, Idaho (hereafter referred to as the "*Goodman Mandamus Proceeding*").

On August 8, 2005, Judge Morfitt, in the *Goodman Mandamus Proceeding*, entered his Peremptory Writ of Mandamus (with an IRCP 54(b) certificate) ordering Nampa to publish Ordinance No. 3374 vacating First Avenue South. *See, Affidavit of Jon M. Steele in Support of Motion for Summary Judgment on Issues of Liability, Bates Nos. 000001-000011.* This Affidavit is hereafter referred to as "*See, Bates Nos.*"

The *Goodman Mandamus Proceeding* also seeks judicial review of the fifty (50') foot wide easement reserved in Ordinance No. 3374. Goodman has asked Judge Morfitt to strike the easement.

It is Goodman's contention in the *Goodman Mandamus Proceeding* that: (1) The easement reserved in Ordinance No. 3374 is redundant to the cross easements granted in the Vacation Agreement; (2) the vacation statute itself (Idaho Code § 50-311) reverses the appropriate easements; (3) the easement reserved in Ordinance No. 3374 is wholly out of proportion to anyone's interpretation of reasonable access; and, (4) the building review process (i.e. obtaining a building permit) will provide Nampa the opportunity to review development plans and at that time require, if

necessary, an appropriate easement providing access to the property owners adjoining vacate First Avenue South. *See*, Bates Nos. 000012-000054.

The issues have been fully briefed and oral argument is scheduled before Judge Morfitt on September 1, 2006 at 1: 30 p.m. *See*, Bates Nos. 000012-000168.

The vacated street is now owned by the adjoining property owners, subject to the reserved easement in Ordinance No. 3374.

Defendants contention that the “vacation is mired in litigation” (*See*, Defendants’ Memorandum, p. 12) conveniently ignores the fact that the *Goodman Mandamus Proceeding* and this litigation are the result of Defendants’ breach of contract, Defendant’s interference with contract and Defendant’s role as the instigator of an illegal veto by Nampa’s Mayor. This entire dispute would never have occurred if Duro-Bilt had complied with its contractual obligations. Defendants’ contention also ignores the fact that First Avenue South is now vacated.

The real issue in this litigation is whether the tail will be allowed to wag the dog. Duro-Bilt, the owner of a 2800 square foot lot, has torpedoed a 43,000 square foot development that would have enhanced the gateway to, and a major corridor of, the City of Nampa.

Defendants’ complaints boil down to nothing more than that Goodman, the adjoining property owners, potential developers and the City of Nampa have all failed to concede to their demands. *See*, Defendants’ Memorandum, p. 6.

Goodman, nor anyone else, has any intention or desire to deny Duro-Bilt access. This entire dispute would never have occurred if Duro-Bilt had abided by the contractual terms it agreed to in the Property Owner Street Vacation Agreement (hereafter “Vacation Agreement”).

BRIEF IN RESPONSE TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT AND
MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFF’S MOTION FOR SUMMARY
JUDGMENT ON ISSUES OF LIABILITY, P. 3

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II.

FACTS

On August 2, 1995, Goodman entered into the Vacation Agreement with Defendant Scotty's Duro-Bilt Generator, Inc. (hereafter "Duro-Bilt"), the Blamires Family Trust (hereafter "Blamires"), and T. J. Forest, Inc. (hereafter "Forest"). Goodman, Duro-Bilt, the Blamires and Forest were the owners of all property adjacent to that portion of First Avenue South between 2nd Street South and 3rd Street South.

In the Vacation Agreement, the parties exchanged mutual promises consenting to Nampa's vacation of First Avenue South. The parties granted and conveyed among themselves a perpetual easement upon the vacated property for the purpose of access to and from their property. The parties agreed to fully cooperate to ensure that the purpose and intent of the Vacation Agreement was accomplished, and to equally share in the maintenance of the easement in proportion to the amount of property they owned which adjoins First Avenue South. *See*, Bates Nos. 000038-000043.

Prior to vacation, Goodman's property consisted of over 36,800 square feet. Blamires' property consisted of over 17,250 square feet. Forest owned 3,750 square feet. Duro-Bilt owned a single lot of 2,850 square feet. The building on Duro-Bilt's lot covers almost the entire lot.

First Avenue South, prior to its vacation, ran north and south and was a street of eighty (80') feet in width and three hundred (300') feet in length. The actual constructed roadway is forty (40') feet in width, back of curb to back of curb. The easement reserved in Ordinance No. 3374 is over the westerly fifty (50') feet of the vacated property. The reserved easement in Ordinance No. 3374 is ten (10') feet greater than the constructed roadway. This leaves only thirty (30') feet of the original eighty (80') feet of street width unencumbered by the reserved easement and all of that unencumbered

property is located on the west side of the vacated street.

In other words, that portion of the vacated street to the east is partially encumbered by the easement reserved in Ordinance No. 3374 and that portion of the vacated street to the west is completely encumbered by the easement reserved in Ordinance No. 3374. This encumbrance renders 15,000 square feet now owned by Goodman, Blamires, Forest and Duro-Bilt unbuildable and of little value. *See*, Bates No. 000246.

Goodman owns property on both sides of the vacated street. Lots 7, 8, 9, 11 and 12 (each fifty (50') feet in width) are located on the west side of the vacated street. Lots 4, 5 and 6 (each fifty (50') feet in width) are located on the east side of the vacated street.

Duro-Bilt is the owner of Lot 10 located on the west side of the vacated street. Lot 10 is bordered by Goodman property to the north (Lot 11) to the south (Lot 9), and following vacation of First Avenue South, to the east.

Defendant Bart McKnight is the president and owner of Duro-Bilt. Defendant Alane McKnight is Bart McKnight's wife. Defendants Bart and Alane McKnight will hereafter be referred to as "McKnight".

On August 3, 1995, Goodman submitted an application to Nampa for vacation of First Avenue South. *See*, Bates No. 000044. On August 24, 1995, Mr. Holm, Nampa Planning Director, prepared a Staff Report. The Staff Report lists the applicant as the adjoining property owners, Goodman, Duro-Bilt, Blamires, and Forest. *See*, Bates No. 000045. On September 5, 1995, a public hearing was held and the Nampa City Council (hereafter "Council") approved the vacation of First Avenue South between 2nd Street South and 3rd Street South. *See*, Bates No. 000098. On September 18, 1995, the first reading of the Ordinance vacating First Avenue South was completed by

**BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND
MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT ON ISSUES OF LIABILITY, P. 5**

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the Council. *See*, Bates Nos. 000101-000102. On October 2, 1995, the second reading of the Ordinance was completed by the Council. *See*, Bates No. 000110. On October 16, 1995, the third reading of the Ordinance was tabled because the issue of fire department access had not been resolved. *See*, Bates No. 000117. This Ordinance did not reserve an easement. *See*, Bates No. 000126.

In this Ordinance the legal description of the property to be vacated read as follows:

The portion of 1st Avenue South between Blocks 16 and 19 of Pleasants Addition to Nampa as shown on the official plat thereof on file in the office of the Canyon County Recorder in Book 4 of Plats at Page 10, located from the Southwesterly right-of-way of 2nd Street South to the Northeasterly right-of-way of 3rd Street South.

In 1999 and 2001, Goodman inquired of Nampa regarding the status of the vacation of First Avenue South. Planning Director Holm confirmed that the vacation of First Avenue South had been approved by the Council on September 5, 1995.

In letters dated September 6, 1995, March 1, 1999, and May 29, 2001, Planning Director Holm stated that "once a plan for development of the site has been prepared, presented to, and approved by the Fire [D]epartment I will request the City Council take the matter of the street vacation off the table and complete their action vacating the street." *See*, Bates Nos. 000240-242. The vacation application never lapsed.

On July 28, 2004, Goodman and James R. Wylie (Wylie) signed a Purchase and Sale Agreement whereby Goodman agreed to sell its property. The sale price was Six Hundred Thousand (\$600,000) Dollars to be paid in cash at closing. The only contingency was completing the vacation of First Avenue South in a manner acceptable to Goodman and Wylie. *See*, Bates Nos. 000203-000206.

BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ISSUES OF LIABILITY, P. 6

In August of 2004, Goodman and Wylie informed Defendants of this sale and that the sale was contingent upon the successful vacation of First Avenue South. *See*, Bates No. 000178.

On August 4, 2004, the Nampa Fire Department provided written conditional approval of development plans for the vacated property and the property owned by Goodman. *See*, Bates Nos. 000046 and 000179. The development plans had been submitted by Wylie. The Nampa Fire Department approved the vacation of First Avenue South subject to a dedicated twenty (20) foot wide fire apparatus access road. The Fire Department also requested Wylie to obtain the consent, once again, of the adjoining property owners. *See*, Bates No. 000046.

Both Goodman and Wiley informed Duro-Bilt and McKnight of the pending sale. Prior to entering into the Purchase and Sale Agreement with Wylie, Goodman through Mr. Conley, its president (hereafter "Conley") called McKnight at his place of business and offered to sell the Goodman property to McKnight on the exact same terms as made available to Wylie. After signing the Goodman/Wylie Purchase and Sale Agreement, Wylie visited McKnight 3 or 4 times during July and August of 2004. Wylie told McKnight about the pending sale and the need to complete the street vacation. Both Conley and Wylie will testify that Defendants had knowledge of the Goodman/Wylie Purchase and Sale Agreement and that Defendants knew that the transaction was contingent upon the successful vacation of First Avenue South. Wylie asked Duro-Bilt to sign the consent requested by the Fire Department. Wylie will testify that McKnight agreed to sign the consent form presented to him after the other property owners signed. After Wylie obtained the consent of the other property owners, he returned to McKnight's place of business to obtain his consent. McKnight and Duro-Bilt then refused their consent. *See*, Bates Nos. 000178-000179.

On August 16, 2004, the vacation ordinance (“Ordinance No. 3374”) was approved by the Council and the Mayor. *See*, Bates Nos. 000207-000208. However, this was not the Ordinance passed by the Council in 1995. At the August 16, 2004 Council meeting, with no prior notice the Council was presented and passed an entirely new ordinance after suspending the rules. The new Ordinance reserved a fifty (50’) foot wide easement that had not been included in the original Ordinance. *See*, Bates Nos. 000207-000208. The Ordinance reserved a fifty (50’) foot easement despite the fact that the Nampa Fire Department had only requested a twenty (20’) foot wide easement.

Ordinance No. 3374 was identical to the Ordinance passed by the Council in 1995 except the phrase “...SUBJECT TO AN ACCESS AND UTILITY EASEMENT RESERVED THEREON...” had been added to the title and the reserved easement was added to the legal description. *See*, Bates No. 000207.

In discovery, Goodman was surprised to learn that Defendants had instigated the veto through *ex parte* contacts with the Mayor.

McKnight’s efforts to interdict Ordinance No. 3374 began with speaking to a Nampa City Clerk and telling the City Clerk he no longer consented to the vacation of First Avenue South and wished to prevent Ordinance No. 3374 from going into effect. The City Clerk directed McKnight to call the City Attorney, Mr. White. McKnight called the City Attorney that same day and voiced his objections to Ordinance No. 3374. McKnight was told by Mr. White that, “they could withdraw this if I talked to the mayor.” McKnight then, again that same day, called Nampa City Hall, spoke to Mayor Dale, and explained his objection to the vacation. Mayor Dale agreed to veto Ordinance No. 3374. McKnight specifically recalled this exchange in his deposition testimony: “I asked him [the

Mayor] if there was a way to pull this off of being published, and he said, 'Yes, I can veto it.'" *See*, Bates Nos. 000180-000181.

An e-mail dated August 19, 2004, from the City Clerk, Diana Lambing, had the following message to Cris Luna and Deborah Bishop, deputy clerks at the Nampa City Clerks office:

Hi Kids!

Just a little note to let you know that at the Mayor and Terry White's direction, I pulled this Ordinance for Vacation of First Avenue South from being published. One of the property owners is not in agreement anymore. So it is on hold until further notice.

Thanks.

See, Bates Nos. 000179-000180.

On September 2nd, Mayor Dale vetoed Ordinance No. 3374. *See*, Bates Nos. 000180-000181.

It was Mayor Dale's only veto since the beginning of his term. This is the only veto seen by Planning Director Holm in his 27 years with the City. *See*, Bates No. 000180. The veto was instigated by Defendants.

McKnight's objection to Ordinance No. 3374 was aided by the fact he is a friend of Mayor Dale. McKnight and the Mayor have participated in civic activities and events. McKnight and the Mayor have mutual friends, specifically Council member Thorne. It was Thorne who at the August 14, 2005 Council meeting, moved that Ordinance No. 3374 be passed under suspension of the rules. *See*, Bates No. 000180.

McKnight, Thorne and the Mayor had been on a ski trip together to Sun Valley in March of 2004. Mayor Dale describes McKnight as a friend. *See*, Bates No. 000180.

In his deposition, Mayor Dale confirmed McKnight's material, *ex parte* contact, recalling that "he [McKnight] conveyed to me that, as a property owner on that street, he did not agree to the

vacation at this time.” Concerning his decision to veto Ordinance No. 3374, the Mayor stated:

[O]ne of the ways of dealing with this was with a veto. Another way was to bring it back before city council. Because, since the ordinance had not been published, it had not become law at this time. And the city council could have brought it back and reconsidered it and voted on it. It was my decision that the most expedient way to do it was through the veto.

See, Bates No. 000181.

Once learning of Mayor Dale’s veto, Conley visited McKnight at his place of business. McKnight said he didn’t like Wylie and that he (McKnight) wanted to purchase the Goodman lots which adjoined his property to the south, the one with the car lot. Goodman immediately wrote to the Mayor and Council in an effort to save the transaction with Wylie. The sale closing date was extended to October 1, 2004. *See*, Bates No. 000217. Goodman argued to the Mayor and Council on September 20th that the Mayor did not have authority to veto Ordinance No. 3374. Goodman wrote to the Mayor and Council on three (3) separate occasions, explaining that the Mayor’s veto would seriously jeopardize Goodman’s transaction with Wylie. Goodman told the Mayor and Council that it would file a Petition for Writ of Mandate if the City refused to amend and publish Ordinance No. 3374. The Mayor and Council refused to override the Mayor’s veto. *See*, Bates Nos. 000181-000182.

Goodman’s transaction with Wylie failed by reason that the vacation had not been completed in an acceptable manner. *See*, Bates No. 000182.

Goodman then filed its Petition for a Writ of Mandamus and for Judicial Review of Ordinance No. 3374. *See*, Bates No. 000182.

Planning Director Holm stated in his deposition, that all that was required from the adjoining owners to effect a vacation was a simple note establishing that all adjoining landowners had consented. Holm also testified that the Vacation Agreement, signed by Duro-Bilt, was more formal

and detailed than the usual consents received for street vacations. *See*, Bates No. 000177.

Holm knows of no source of authority allowing the Nampa Fire Department to request an access easement be reserved in a street vacation ordinance. *See*, Bates No. 000178.

Holm also has no expectation that a detailed easement would be submitted to the City of Nampa until such time as the property owner or developer seeks a building permit. *See*, Bates No. 000178.

This is standard practice in the development of a commercial site. The actual description of an easement is not finalized until such time as the site requirements are determined. The owner and designer must have some flexibility in designing buildings and providing for access, but yet comply with local standards. The building review process provides the City of Nampa with the opportunity to review development plans and at that time to establish, if necessary, appropriate easements. The Nampa Fire Department, as a consulting agency, has the opportunity to review and comment on development plans when they are submitted. But they have no statutory authority over a street vacation or the issuance of a building permit.

This Complaint alleging breach of the Vacation Agreement by Duro-Bilt, tortious interference with the Goodman/Wylie Purchase and Sale Agreement by all Defendants, negligent interference with prospective economic advantage (the Goodman/Wylie Purchase and Sale Agreement) by all Defendants and intentional interference with prospective economic advantage (the Goodman/Wylie Purchase and Sale Agreement) by all Defendants was filed on September 19, 2005.

Goodman's damages include, but are not limited to, the difference between the value of Goodman's real property in August 2004 and the now reduced fair market value of the Goodman property. *See*, Bates No. 000246. The Goodman/Wylie Purchase and Sale Agreement would have

closed absent Duro-Bilt's breach of the Vacation Agreement and Defendant's interference. Goodman's damages also include attorney fees and costs incurred. *See, Rayl v. Shull Enterprises, Inc.*, 108 Idaho 524, 700 P.2d 567 (1984) (attorney fees allowed as special damages)

The damages incurred by Goodman are dependent upon the result of judicial review proceedings before Judge Morfitt.

III.

STANDARD OF REVIEW

Upon a motion for summary judgment, the court must liberally construe the facts in the existing record in favor of the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 887 P.2d 1034 (1994). Summary judgment is appropriate 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." *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). If there are conflicting inferences arising from the record or reasonable minds might reach different conclusions, summary judgment must be denied on those points of difference. *Bonz v. Sudweeks*, 119 Idaho 539, 808 P.2d 876 (1991).

IV.

AS A MATTER OF LAW DEFENDANT'S MOTION

FOR SUMMARY JUDGMENT FAILS

Duro-Bilt contends (a) that there is no valid contract between the parties (p. 12 Defendants'

BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND
MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT ON ISSUES OF LIABILITY, P. 12

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Memorandum in Support of Defendants' Motion for Summary Judgment); (b) that the Vacation Agreement lapsed due to failure of the vacation (page 12, Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment); (c) that the Vacation Agreement did not contain a contract term and therefore should be deemed to have lapsed (page 13, Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment); (d) that the Vacation Agreement is invalid for lack of consideration (page 15, Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment); (e) that even if the Vacation Agreement is valid, Duro-Bilt is excused from performance (page 17, Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment); (f) that Duro-Bilt has acted fairly and in good faith (page 17, Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment); and (g) that Goodman has breached its duty of good faith and fair dealing (page 19, Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment).

As a matter of law, each of these contentions fails. "The objective in interpreting contracts is to ascertain and give effect to the intent of the parties." *Twin Lakes Village Property Ass'n v. Aune*, 124 Idaho 132, 135, 857 P.2d 611, 614 (1993). The intent of the parties should, if possible, be ascertained from the language of the contract. *Id.* See also, *Hogan v. Blakney*, 73 Idaho 274, 279, 251 P.2d 209, 213 (1952). "The scope of ...[the court's] inquiry into the parties' intent is limited however, by the general rule that if a deed is plain and unambiguous the parties intent must be ascertained only from the deed itself, parol evidence being inadmissible for that purpose." *Phillips Industries, Inc. v. Firkins*, 121 Idaho 693, 697, 827 P.2d 706, 710 (1992) (citing *Gardner v. Fleigel*, 92 Idaho 767, 770-71, 450 P.2d 990, 993-94 (1969)).

Questions of contract interpretation and enforcement are normally the sole province of the

courts. *See, Afton Energy, Inc. v. Idaho Power Co.*, 122 Idaho 333, 337, 834 P.2d 850 854 (1992). Interpretation and legal effect of an unambiguous contract are questions of law over which this Court exercises free review. *See, Hanks v. Sawtelle Rentals, Inc.*, 133 Idaho 199, 202-03, 984 P.2d 122, 125-26 (1999); *First Security Bank of Idaho, N.A. v. Murphy*, 131 Idaho 787, 791, 964 P.2d 654, 658 (1998). In construing a written instrument, this Court must consider it as a whole and give meaning to all provisions of the writing to the extent possible. *See, Magic Valley Radiology Assoc., P.A. v. Prfl Business Servs.*, 119 Idaho 558, 565, 808 P.2d 1303, 1310 (1991).

Both Goodman and Duro-Bilt agree that the interpretation of the Vacation Agreement is a matter of law (page 12, Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment). Each of Duro-Bilt's contentions are addressed below.

a. The Vacation Agreement is a Valid Contract.

Defendants' various contentions concede the existence of a contract between Goodman and Duro-Bilt. There must first be a contract before it can lapse or be otherwise unenforceable.

The plain language of the Vacation Agreement establishes a contract between Goodman and Duro-Bilt.

The Vacation Agreement provides the following:

...the parties, for good and valuable consideration the receipt of which is hereby acknowledged, agree as follows:

1. That the parties consent to the City of Nampa's vacation of First Avenue South, located between Blocks 16 and 19 of Pleasants Addition above-described, as a public right-of-way as depicted on exhibit "A" attached hereto.
2. That the parties grant and convey among themselves, their agents, licensees, and assignees a perpetual easement upon vacated First Avenue South for the purpose of access to and from their property from both Second

and Third Street located in Nampa, Canyon County, Idaho. The actual location of the easement shall be at the discretion of the legal owner of the vacated property upon the City's vacation of First Avenue South as described herein.

3. That the parties shall fully cooperate to ensure that the purpose and intent of this Agreement shall be accomplished. The parties shall execute a formalized agreement recognizing the rights and obligations of the parties upon the City of Nampa's vacation of First Avenue South as described herein. The parties shall equally share in the maintenance of said easement in proportion to the amount of property they own which adjoins First Avenue South as described herein.

4. That the parties shall hold each other harmless and indemnify the other parties from their negligent act and that of their agents in maintaining and using said access easement.

5. This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors, assigns, heirs, and personal representatives.

See, Bates Nos. 000038-000040.

The burden of proving the existence of a contract and fact of its breach is upon the plaintiff, and once those facts are established, the defendant has burden of pleading and proving affirmative defenses which legally excuse performance. *See, O'Dell v. Basabe*, 119 Idaho 796, 813, 810 P.2d 1082, 1099 (1991).

The existence of a contract between Goodman and Duro-Bilt cannot be seriously disputed.

b. The Vacation Agreement did not Lapse due to Failure of the Vacation.

Defendant's contention is that without a street vacation, there is no contract. *See*, p. 12, Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment. This contention ignores the fact that First Avenue South is now vacated. Judge Morfitt's Order Granting Writ of Mandamus was a final appealable Order and included a 54(b) certificate. *See, Bates Nos.*

000001-000002. Neither the City of Nampa nor Duro-Bilt appealed.

Consent of all adjoining property owner's is a pre-requisite to a vacation proceeding. Idaho Code § 50-1321. The only Duro-Bilt consent provided to the Nampa Planning Director, to the Nampa Council and to Judge Morfitt was the Vacation Agreement. No one but Defendants believes consent is an issue.

The issue of Duro-Bilt's consent has been judicially resolved by Judge Morfitt and Duro-Bilt is estopped from contending otherwise.

Duro-Bilt was named as a Respondent in the *Goodman Mandamus Proceeding*. Despite Goodman's contention that Duro-Bilt was an indispensable party, Judge Morfitt granted Duro-Bilt's Motion to Dismiss.

In the *Goodman Mandamus Proceeding*, Goodman, in opposing Duro-Bilt's dismissal, contended that Duro-Bilt had a significant property interest to protect. Duro-Bilt acquired ownership of an additional 2,000 square feet upon vacation of First Avenue South. Duro-Bilt also had an interest in preserving its existing utility and access easements or participating in revising the description of access and utility easements as reserved in the Ordinance. *See*, Bates No. 000255 to 000265.

Duro-Bilt elected to abandon the opportunity to contest its consent and the enforceability of the Vacation Agreement.

The doctrine of claim preclusion bars Duro-Bilt from now raising the issue of consent and the enforceability of the Vacation Agreement. The rule of claim preclusion is that "in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to

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every matter which might and should have been litigated in the first suit.” *Wolfe v. Farm Bureau Insurance Co.*, 128 Idaho 398, 402, 913 P.2d 1168, 1172 (1996), citing *Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 436-37, 849 P.2d 107, 109-110 (1993).

Duro-Bilt’s claims concerning consent and the validity of the Vacation Agreement were resolved by the vacation of First Avenue South. Claim preclusion serves three fundamental purposes. “First, it [preserves] the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same manner were litigated to inconsistent results. Second, it serves the public interest in protecting the courts against the burdens of repetitious litigation; and third, it advances the private interest in repose from the harassment of repetitive claims.” *Aldape v. Akins*, 105 Idaho 254, 257, 668 P.2d 130, 133 (1983) (internal citation omitted).

Quasi-estoppel also precludes Duro-Bilt from asserting the failure of the Vacation Agreement and absence of consent.

The doctrine of quasi-estoppel is properly invoked against a person asserting a right inconsistent with a position previously taken by him, with knowledge of the facts and his rights, to the detriment of the person seeking to apply the doctrine. *Treasure Valley Bank v. Butcher*, 121 Idaho 531, 826 P.2d 492 (1992). The applicability of quasi-estoppel turns upon the specific facts and circumstances of the case under consideration. *See, KTVB, Inc. v. Boise City*, 94 Idaho 279, 486 P.2d 992 (1971). Quasi-estoppel does not require misrepresentation by one party or actual reliance by the other. *Lunders v. Estate of Snyder*, 131 Idaho 689, 695, 963 P.2d 372, 378 (1998). Duro-Bilt is estopped to deny its consent to vacation and the validity of the Vacation Agreement.

c. The Vacation Agreement has not Lapsed for Failure to Include a Term for Performance.

Defendants' contention ignores the self executing language of the Vacation Agreement. The parties to the Vacation Agreement "...grant and convey among themselves...a perpetual easement upon the vacated First Avenue South for the purpose of access to and from their property from both Second and Third Street located in Nampa, Canyon County, Idaho."

A grant of a perpetual easement is not unusual. *See, Ponderosa Home Site Lot Owners, et al v. Garfield Bay Resort, Inc.*, 139 Idaho 699, 701, 85 P.3d 675, 677 (2004) ("...the owner intended to grant a perpetual easement..."); *Mountainview Landowners Cooperative Association, Inc., et al v. Cool*, 136 P.3d 332, 334 (2006) ("...[a] perpetual easement is granted to the grantees...") on rehearing ("the grant in this case was only of a perpetual easement.")

The Vacation Agreement is a conveyance of an interest in real property. *See, Idaho Code § 55-601.*

The use of the word "grant" in the Vacation Agreement has significant legal effect. The word "grant" carries with it statutory covenants. Idaho Code § 55-612 states in relevant part that:

From the use of the word 'grant' in any conveyance... the following covenants... are implied, unless restrained by express terms contained in such conveyance:

1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title or interest therein, to any person other than the grantee.
2. That such estate is at the time of the execution... free from encumbrances done, made or suffered by the grantor, or any person claiming under him. Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance.

Idaho Code § 55-606 provides that "[e]very grant or conveyance of an estate in real property is conclusive against the grantor."

Duro-Bilt is conclusively bound by the Vacation Agreement. The term of the Vacation Agreement is perpetual.

d. Defendant's Contention That the Vacation Agreement is Invalid for Lack of Consideration Fails as a Matter of Law.

Duro-Bilt's contention that the Vacation Agreement fails for lack of consideration is based upon Duro-Bilt's expectation of a development incentive. *See*, p. 14 Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment.

This contention fails as a matter of law. Duro-Bilt bears the burden of proof in showing a want of consideration. Idaho Code § 29-104.

In interpreting a contract, the primary function of the court is to seek and carry out the intent of the parties. *See, Hogan v. Blakney*, 73 Idaho 274, 279, 251 P.2d 209, 213 (1952). "The scope of ...[the court's] inquiry into the parties' intent is limited, however, by the general rule that if a deed is plain and unambiguous the parties' intent must be ascertained only from the deed itself, parol evidence being inadmissible for that purpose." *Phillips Industries, Inc. v. Firkins*, 121 Idaho 693, 697, 827 P.2d 706, 710 (1992) (citing *Gardner v. Fleigel*, 92 Idaho 767, 450 P.2d 990 (1969)).

The consideration clause of the Vacation Agreement binds Duro-Bilt. *Hall v. Hall*, 116 Idaho 483, 484, 777 P.2d 255, 265 (1989) ("Where as here, the consideration clause clearly recites that the transfer was made 'For Value Received', parol evidence is not admissible to contradict the deed....").

Defendants contend that they received no consideration for entering into the Vacation Agreement. In fact, Defendants received the substantial consideration and benefit of a perpetual access easement from three adjoining property owners.

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The term "easement" may be said broadly to be a privilege which the owner of one tenement has a right to enjoy over the tenement of another; a right which one person has to use the land of another for a specific purpose, or a servitude imposed as a burden upon land. 17A Am. Jur. 616, § 1. The following definition is contained in Black's Law Dictionary, Fourth Edition, p. 599:

Easement. A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner. *Hollomon v. Board of Education of Stewart County*, 168 Ga. 359, 147 S.E. 882, 884; *Frye v. Sibbitt*, 145 Neb. 600, 17 N.W.2d 617, 621.

Sinnett v. Werelus, 83 Idaho 514, 520, 365 P.2d 952, 955 (1961).

The consideration clause of the Agreement bars Defendants' contentions that they received no consideration for entering into the Vacation Agreement. Additionally, the granting of cross easements for access is real and substantial consideration.

e. Duro-Bilt is not Excused From Performance.

Duro-Bilt fails to cite any legal authority for this contention. Duro-Bilt's argument is that Goodman has been unwilling to consider other options and enter into a discussion. Essentially Duro-Bilt's complaints are that no one has volunteered to give Duro-Bilt a new building and to move the Duro-Bilt business at no cost. In his deposition, McKnight testified as follows:

Q. Just to sort of sum things up, is it fair to say that the street vacation agreement is satisfactory to you if a developer were to come in and give you a new building at no cost and move you to that new location?

A. It was –

MR. HALLAM: Object to the form.

THE WITNESS: It was in 1995.

Q. BY MR. STEELE: Is it different now?

A. Yes.

Q. How is it different now?

A. Well, my business has grown. I now would just have to weigh the options. I'm nine years older.

Q. So if a developer came to you now and said, "Mr. McKnight, we're going to move you at no cost to you and give you a new building," you wouldn't agree to that?

MR. HALLAM: Objection, incomplete hypothetical.

MR. YORGASON: Objection.

THE WITNESS: I would entertain the option.

Q. So you can't really give me any conditions or terms under which you would agree to vacation of the street in front of your building - - in front of your business?

A. If you laid a proposal in front of me, I would take some time to look at it.

See, Bates No. 000253. See also, Yorgason Affidavit, p. 2.

f. Duro-Bilt Contends That it has Acted Fairly and in Good Faith and That Goodman has Breached its Duty of Good Faith and Fair Dealing.

The implied covenant of good faith and fair dealing is a covenant implied by law in the Vacation Agreement. *See, First Security Bank of Idaho v. Gaige*, 115 Idaho 172, 176, 765 P.2d 683, 687 (1988); *Clement v. Farmers Ins. Exchange*, 115 Idaho 298, 300, 766 P.2d 768, 770 (1988) (The covenant requires that the parties perform, in good faith, the obligations imposed by their agreement, and a violation of the covenant occurs when either party violates, nullifies or significantly impairs any benefit of the contract. *See, Idaho First Nat. Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 289, 824 P.2d 841, 863 (1991). *See also, Metcalf v. Intermountain Gas. Co.*, 116 Idaho 622, 627,

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778 P.2d 744, 749 (1989).

Defendants fail to cite the Court to any facts that Goodman has violated the covenant of good faith and fair dealing. Defendant's contention that it has acted fairly and in good faith finds no support in the facts of this case.

V.

**GOODMAN IS ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF
DURO-BILT'S LIABILITY FOR BREACH OF THE VACATION AGREEMENT**

Duro-Bilt has breached the Vacation Agreement's covenants by withdrawing its consent and improperly instigating the veto (a breach of para. 1 of the Vacation Agreement); by denying the grant of the perpetual easement (a breach of para. 2 of the Vacation Agreement); by failing to fully cooperate to ensure that the purpose and intent of the Agreement is accomplished (a breach of para. 3 of the Vacation Agreement); by its contentions that the Vacation Agreement has failed (a breach of para. 5 of the Vacation Agreement); and by its breach of the covenant of good faith and fair dealings.

A breach of contract is non-performance of a contractual duty. *See, Enterprise, Inc. v. Nampa City*, 96 Idaho 734, 740, 536 P.2d 729, 735 (1975) (quoting Restatement of the Law of Contracts § 312 (1932)). It is a failure, without legal excuse, to perform any promise, which forms the whole or part of a contract. *See, Hughes v. Idaho State University*, 122 Idaho 435, 437, 835 P.2d 670, 672 (Ct. App. 1992) (quoting Black's Law Dictionary 188 (6th ed. 1990)).

The existence of the contract (*see*, page 14 above) and Duro-Bilt's breach are established beyond dispute. It is an undisputed fact that Defendants intended to stop the progress of the vacation. McKnight testified as follows: "Well, if it's stopping progress of the vacation, then that's

okay with me.” *See*, Bates No. 000251.

Duro-Bilt’s conduct not only breached its duties under the Vacation Agreement but the same conduct resulted in killing the Goodman/Wylie Purchase and Sale Agreement.

The facts of Duro-Bilt’s breach of the Vacation Agreement are amply set forth above. There is no genuine issue as to these essential and uncontroverted facts:

1. The Vacation Agreement is valid and enforceable.
2. In July and August 2004, Duro-Bilt refused to cooperate and consent to the vacation procedure in breach of the Vacation Agreement covenants.
3. Despite Duro-Bilt’s refusal to consent and cooperate, Ordinance No. 3374 vacating the street was passed and approved.
4. Duro-Bilt (through McKnight) was the instigator of the illegal veto of Ordinance No. 3374.
5. Duro-Bilt, to this day, contends it has not consented, still refuses to cooperate in the vacation of the street, and refuses to recognize the validity of the Vacation Agreement.

Both parties agree that the Vacation Agreement is not ambiguous and that its interpretation is a matter of law.

The language of the Vacation Agreement is plain and clear. Duro-Bilt’s various contentions are without merit. Duro-Bilt’s unsubstantiated allegations of developer promises are nowhere mentioned in the Vacation Agreement and are inadmissible by reason of the parol evidence rule. *See*, page 19 above. Duro-Bilt’s contention that the Vacation Agreement lacks consideration is without merit as a matter of law. *See*, page 19 above. Finally, Duro-Bilt is estopped, as a matter of law, from contesting its consent and the validity of the Vacation Agreement. *See*, page 16 and 17

above.

Duro-Bilt's conduct, in addition to a breach of the express covenants of the Vacation Agreement, also breaches the covenant of good faith and fair dealing. This duty obligated Duro-Bilt to cooperate with the other parties to the Vacation Agreement so that each could obtain the full benefit of performance.

A violation of the covenant occurs when a party violates, nullifies or significantly impairs any benefit of the contract. *Sorensen v. Comm. Tels, Inc.*, 118 Idaho 664, 669, 799 P.2d 70, 75 (1990).

The duty and breach of this covenant have been established.

Considering the entirety of the Vacation Agreement, giving meaning to all provisions of the Agreement, considering the undisputed facts and the application of law, Goodman is entitled to Summary Judgment on the issue of Duro-Bilt's breach of the Vacation Agreement.

VI.

GOODMAN IS ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY OF DEFENDANTS FOR TORTIOUS INTERFERENCE WITH THE GOODMAN/WYLIE PURCHASE AND SALE AGREEMENT

A prima facie case of tortious interference with a contract exists where a plaintiff establishes: (a) the existence of a contract, (b) knowledge of the contract on part of the defendant, (c) intentional interference causing breach of the contract and (d) injury to the plaintiff resulting from the breach. *Barlow v. Int'l Harvester Co.*, 95 Idaho 881, 893, 522 P.2d 1102, 1115 (1974). *See also, Thirsty's LLC v. Tolerico*, 137 P.3d 435 (2006).

Goodman contends that it is an undisputed fact that the Goodman/Wylie Purchase and Sale

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Agreement existed. It is also an undisputed fact that this contract had a single contingency – the vacation of First Avenue South in an acceptable manner. Prior to entering into the Purchase and Sale Agreement with Wylie, Goodman offered to sell its property to Defendants on the same exact terms. *See*, Bates Nos. 000178.

It is an undisputed fact that Duro-Bilt and McKnight knew of the sale of the Goodman property to Wylie. Both Conley and Wylie will testify that they told Duro-Bilt and McKnight of the sale and of the contingency. *See*, Bates Nos. 000178-000179.

Both Duro-Bilt and McKnight admit that they met with Wylie and were asked to sign a consent to the vacation. *See*, Bates Nos. 000250-000251. According to McKnight, Wylie visited him at his business 3 or 4 times. *See*, Bates Nos. 000250-000251. Wylie asked Duro-Bilt/McKnight to sign the consent form requested by the Nampa Fire Department. *See*, Bates No. 000251. McKnight learned of the sale in August of 2004. *See*, Bates No. 000251. Wylie left Conceptual Site Plans with McKnight/Duro-Bilt. *See*, Bates No. 000252.

It is an undisputed fact that McKnight/Duro-Bilt intended to stop the progress of the vacation which resulted in the failure of the Goodman/Wylie transaction. *See*, Bates No. 000251.

After the Ordinance had been vetoed, McKnight told Goodman that he wished to purchase Goodman's property where the car lot is located. *See*, Bates No. 000181. These lots are # 11 and 12 and are located to the south of Duro-Bilt's lot.

It is also an undisputed fact that Goodman has suffered an injury as a result of the reduced value of the Goodman property. *See*, Bates Nos. 000246-000247.

The knowledge element of the tort is "satisfied by actual knowledge of the prospective [economic advantage] or by knowledge of facts which would lead a reasonable person to believe that

such interest exists.” *Kutcher v. Zimmerman*, 87 Haw. 394, 957 P.2d 1076, 1088 n.16 (Haw. Ct. App. 1998) (quoting W. P. Keeton, D. Dobbs, R. Keeton and P. Owen, *Prosser and Keeton on the Law of Torts* § 129 at 982 (5th ed. 1984) cited in, *Highland Enterprises, Inc. v. Barker*, 133 Idaho 330, 338, 986 P.2d 996, 1004 (Idaho 1999).

Proof of actual knowledge is not required. It cannot be disputed that Defendants had either actual knowledge of the sale or had knowledge of sufficient facts which would lead a reasonable person to believe the Goodman/Wylie sale existed.

Goodman is entitled to summary judgment on the issue of liability of Defendants for tortious interference with the Goodman/Wylie Purchase and Sale Agreement.

Defendants have asserted no defense of privilege or justification. *See, Walker v. Idaho First National Bank*, 121 Idaho 255, 824 P.2d 841 (1991).

VII.

GOODMAN IS ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF DEFENDANTS’ LIABILITY FOR INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

Under Idaho law, tortious interference with contractual relations is a distinct and independent tort from tortious interference with prospective economic advantage, and each has its own elements. *Barlow v. Int’l Harvester Co.* 95 Idaho 881, 893-95, 522 P.2d 1102, 1114-16 (1974). *Idaho First Nat’l Bank v. Bliss Valley Foods*, 121 Idaho 266, 283-84, 824 P.2d 841 (1991). For discussion of these tort claims, *see, Downey Clinic v. Nampa Restaurant Corp.*, 127 Idaho 283, 285-86, 900 P.2d 191, 193-94 (1995).

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The tort of interference with prospective economic advantage was adopted by the Idaho Supreme Court in *Idaho First National Bank v. Bliss Valley*, 121 Idaho 266, 824 P.2d 841 (1991).

The elements of the tort 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 of improper means) and (5) resulting damage to the plaintiff whose expectancy has been disrupted.

Highland Enterprises, Inc. v. Barker, 133 Idaho 330, 986 P.2d 996 (1999).

The torts of intentional interference with a prospective economic advantage and intentional interference with contract are very similar, differing only in the type of economic relationship with which the defendant has interfered. *See, Highland Enterprises, Inc. v. Barker*, 133 Idaho 330, 339, 986 P.2d 996, 1005 (1999).

Goodman's burden of proof is to show that the interference was wrong. "Wrongfulness" of the Defendants actions can be shown by either:

1. That the Defendants had an improper objective or purpose to harm Goodman.
2. That the Defendants used a wrongful means to cause injury to the prospective business relationship.

See, Please v. City of Seattle, 112 Wash.2d 794, 774 P.2d 1158 (1989) and, *Top Service Body Shop, Inc. v. Allstate Ins. Co.*, 283 Ore. 201, 582 P.2d 1365 (1978), cited in *Walker v. The Idaho First National Bank*, 121 Idaho 266, 824 P.2d 841 (1991).

The undisputed facts in this case satisfy both definitions of "wrongfulness." Defendants own testimony is that McKnight intended to stop the progress of the vacation (*See, Bates No. 000251*),

an improper objective, considering Duro-Bilt's consent and agreement to the vacation. Defendant's conduct in refusing his cooperation, withdrawing consent and breaching the Vacation Agreement all constitute "wrongful means." Defendant's instigation of an illegal veto by the Nampa Mayor is also a "wrongful means."

Goodman is entitled to summary judgment on the issue of liability of Defendants for interference with prospective economic advantage.

Defendants have neither pled nor alleged a defense of privilege or justification. *See, Barlow v. International Harvester Co.*, 95 Idaho 884, 893, 522 P.2d 1102, 1114 (1974) (quoting Restatement of Torts § 767 cmt. (a) (1939)).

VIII.

CONCLUSION

In August of 2004 a unique opportunity was presented to the City of Nampa and the property owners adjoining First Avenue South. An experienced developer was willing to invest his time, effort and capital into a development that would have enhanced the gateway to Nampa. Duro-Bilt and McKnight killed that opportunity. It may be years before that opportunity presents itself again.

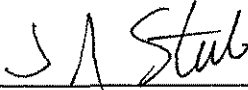
Duro-Bilt, although contractually bound to cooperate and having already consented to the street vacation, broke its promises. The result is the one Defendants intended and had hoped to achieve. Defendants are directly responsible for torpedoing a development that would have enhanced the gateway to Nampa.

Defendants now must bear responsibility for their ill conceived choices and conduct of August 2004. Defendant's motions should be summarily denied.

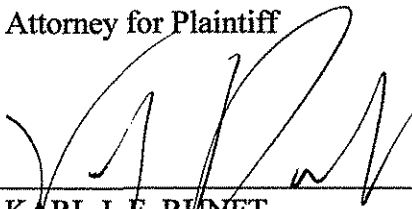
Goodman is entitled to summary judgment on the issues of liability. The issue of damages will be addressed at trial.

DATED this _____ day of August 2006.

RUNFT & STEELE LAW OFFICES, PLLC

By: 

JON M. STEELE
Attorney for Plaintiff

By: 

KARL J. F. RUNFT
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of August 2006, a true and correct copy of the foregoing BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ISSUES OF LIABILITY was served upon opposing counsel as follows:

Christopher Yorgason
Moore Smith Buxton & Turke, Chtd.
950 W. Bannock, Suite 520
Boise, ID 83702

US Mail
 Personal Delivery
 Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: JA Steele
JON M. STEELE
Attorney for Plaintiff

H 1/2

SUSAN E. BUXTON # 4041
TAMMY A. ZOKAN # 5450
MOORE SMITH BUXTON & TURCKE, CHARTERED
Attorneys at Law
950 W. Bannock Street, Suite 520
Boise, Idaho 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202
Email: taz@msbtlaw.com

FILED
A.M. 3:50 P.M.
SEP 20 2006
CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)	
)	
Plaintiff,	)	Case No. CV 05-9800
)	
v.)	
	)	ORDER OF DISMISSAL OF BART
SCOTTY'S DURO-BILT GENERATOR,	)	AND ALANE MCKNIGHT
INC., and Idaho corporation; BART and)	
ALANE MCKNIGHT, husband and wife; and)	
DOES I through V.)	
)	
Defendants.)	
)	

Before the Court is Defendants' Motion to Dismiss Bart and Alane McKnight pursuant to Idaho Rule of Civil Procedure 12(b)(6), and having reviewed the relevant pleadings, briefs and memoranda, and having considered oral argument, and good cause appearing therefore:

It is hereby ORDERED that Plaintiff has not shown that the Court should pierce the corporate veil and hold Bart and Alane McKnight personally liable for Plaintiff's allegations against Scotty's Duro-Bilt Generator, Inc.; and, therefore Plaintiff has not stated a claim upon

which relief can be granted against Bart and Alane McKnight; and

It is further ORDERED that Plaintiff's Complaint and Demand for a Jury Trial against Bart and Alane McKnight, is hereby dismissed with prejudice, with costs and attorneys fees to be addressed separately.

SEP 19 2006

DATED this ___ day of September, 2006.

By: _____


Judge Renae J. Hoff
District Judge, Third Judicial District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of September, 2006, I caused a true and correct copy of the foregoing ORDER OF DISMISSAL by the method indicated below, and addressed to the following:

Jon M. Steele
Karl J. F. Runft
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Facsimile (208) 343-3246
Email: jmsteele@runftlaw.com

____ U.S. Mail
____ Hand Delivery
____ Overnight Mail
____ Facsimile

*No copies
or Envelopes
sent*

Tammy A. Zokan
MOORE SMITH BUXTON & TURCKE
950 W. Bannock, Suite 520
Boise, Idaho 83702
Facsimile (208) 331-1202
Email: taz@msbtlaw.com

____ U.S. Mail
____ Hand Delivery
____ Overnight Mail
____ Facsimile

T. Crawford

JON M. STEELE (ISB # 1911)
KARL J. RUNFT (ISB # 6640)
RUNFT & STEELE LAW OFFICES, PLLC
 1020 W. Main Street, Suite 400
 Boise, Idaho 83702
 Phone: (208) 333-9495
 Fax: (208) 343-3246
 Email: jmsteele@runftlaw.com

F I L E D
 A.M. 2:15 P.M.

OCT 04 2006

CANYON COUNTY CLERK
 T. CRAWFORD, DEPUTY

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GOODMAN OIL COMPANY,)	
)	
Plaintiff,	)	CASE NO. CV 05-9800
)	
vs.	)	GOODMAN'S MOTION FOR
	)	RECONSIDERATION OF ORDER
SCOTTY'S DURO-BILT GENERATOR,	)	DISMISSING BART AND ALANE
INC., an Idaho corporation; BART and	)	MCKNIGHT INDIVIDUALLY
ALANE MCKNIGHT, husband and wife;)	
and DOES I through V.)	
)	
Defendants.)	
)	

COMES NOW, Plaintiff Goodman Oil Company by and through its counsel of record, Runft & Steele Law Offices, PLLC, and pursuant to I.R.C.P. 11(a)(2)(B) moves this Court to reconsider its rulings that Defendants Bart and Alane McKnight are entitled to dismissal pursuant to I.R.C.P. 12(b)6.

This Motion is based upon a Brief in Support of this Motion and Affidavit of Jon M. Steele.

Oral argument is requested.

DATED this 4th day of October, 2006.

RUNFT & STEELE LAW OFFICES, PLLC

By: J M Steele
JON M. STEELE
Attorney for Plaintiff

JON M. STEELE (ISB # 1911)
KARL J. RUNFT (ISB # 6640)
RUNFT & STEELE LAW OFFICES, PLLC
 1020 W. Main Street, Suite 400
 Boise, Idaho 83702
 Phone: (208) 333-9495
 Fax: (208) 343-3246
 Email: jmsteele@runftlaw.com

FILED
 A.M. 2:15 P.M.

OCT 04 2006

CANYON COUNTY CLERK
 T. CRAWFORD, DEPUTY

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GOODMAN OIL COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 SCOTTY'S DURO-BILT GENERATOR,)
 INC., an Idaho corporation; BART and)
 ALANE MCKNIGHT, husband and wife;)
 and DOES I through V.)
)
 Defendants.)
)

CASE NO. CV 05-9800

**BRIEF IN SUPPORT OF
 GOODMAN'S MOTION FOR
 RECONSIDERATION OF ORDER
 DISMISSING BART AND ALANE
 MCKNIGHT INDIVIDUALLY**

Goodman respectfully request this Court to reconsider its Order dismissing McKnight individually. Goodman's Complaint alleges breach of the Property Owner's Vacation Agreement by Duro-Bilt; tortious interference with the Goodman/ Wylie Purchase and Sale Agreement by all Defendants; negligent interference with prospective economic advantage (the Goodman/ Wylie Purchase and Sale Agreement) by all

Defendants; and intentional interference with prospective economic advantage (the Goodman/ Wylie Purchase and Sale Agreement) by all Defendants.

Paragraph 3 of Goodman's Complaint alleges that "...Defendant's McKnight were the alter egos of Defendant Duro-Bilt". This allegation was denied by Defendants.

The Court's order dismissing McKnights individually was based upon the Courts belief that Goodman had failed to present evidence which would justify "piercing the corporate veil" of Defendant Duro-Bilt. The only count that the theory of "piercing the corporate veil" could apply to is Count I of Goodman's Complaint.

Count I alleges a breach of the Property Owner's Vacation Agreement dated August 2, 1995 between Goodman and Defendant Duro-Bilt. McKnight was not a party to this agreement.

The other three counts of Goodman's Complaint are tort theories of recovery alleging interference with contract. This contract is not the Property Owner's Vacation Agreement referred to in Count I. This contract is the Goodman/ Wylie Purchase and Sale Agreement dated July 28, 2004. The allegations of Counts II, III and IV are made against all Defendants. These tortious theories of recovery have their own elements and do not include "piercing the corporate veil".

The allegations of Goodman's Complaint clearly allege separate and distinct counts of breach of contract and tortious interference. In a case dealing with similar issues, *Davis v. Professional Business Servs.*, 109 Idaho 810, 813, 712 P.2d 511, 514 (Idaho 1985), substituted opinion at, *Magic Valley Radiology Assoc., P.A. v. Professional Business Servs.*, 119 Idaho 558, 808 P.2d 1303 (Idaho 1991), the Idaho Supreme Court stated the following:

All things considered, we view the trial court's characterization of plaintiff's claim as one sounding in contract. Hence, judgment entered against Helen Kolouch, president of defendant, for the reconstruction costs must be reversed, for an officer of a corporation is not liable for a breach of a contract made in the corporation's name unless it can be shown that the "corporate veil should be pierced to avoid unjust consequences inconsistent with the corporation concept." *Barlow's, Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 315, 647 P.2d 766, 771 (Ct.App.1982); *See also, Paloukos v. Intermountain Chev. Co.*, 99 Idaho 740, 742, 588 P.2d 939 (1978). Here, there is no evidence to support **piercing the corporate veil**; thus, we adhere to the general rule stated above and reverse the district court's judgment entered against Helen Kolouch.

Plaintiff alternatively argues that Kolouch is liable for the reconstruction costs it incurred because her acts constituted a **tortious interference of the contracts** between plaintiff and its patients. We are not persuaded. Nothing in plaintiff's Second Amended Complaint alleges any such tort. Also, the only damages found at trial were those [***15] relating to the reconstruction costs of plaintiff's ledger accounts. These damages are in no way related to any injury suffered by plaintiff as a result of any alleged interference with contracts between plaintiff and its patients. Accordingly, no tort liability is assessable against Kolouch for her part in breaching the contract entered into by plaintiff and defendant.

In otherwords, the plaintiff failed to include tort allegations in his complaint. Such is not the case here.

Goodman contends that both Defendant Duro-Bilt and Defendant McKnight are liable to it for the following torts:

1. Tortious interference with the Goodman/ Wylie Purchase and Sale Agreement
2. Negligent interference with the Goodman/ Wylie Purchase and Sale Agreement

3. Intentional interference with the Goodman/ Wylie Purchase and Sale Agreement

The Court's ruling dismissing McKnight individually fails to recognize the difference between Goodman's single contract theory of recovery against Duro-Bilt and Goodman's three tort theories of recovery against both Duro-Bilt and McKnight.

The Court is also directed to the Defendant's Answer filed October 12, 2005. The Answer refers to Scotty's Duro-Bilt Generator, Inc. and Bart and Alane McKnight collectively as Duro-Bilt. Defendants own attorney makes no distinction between the corporate defendant and individual defendants.

This litigation is the result of Defendant Duro-Bilt's breach of contract. That is the starting point. Duro-Bilt's breach of the Property Owner's Vacation Agreement led to Duro-Bilt's and McKnight's interference with the Goodman/ Wylie Purchase and Sale Agreement.

This entire dispute would never have occurred if Duro-Bilt had abided by the contractual terms it agreed to in the Property Owner Street Vacation Agreement. But for the breach of that agreement and McKnight's interdiction of Ordinance No. 3374 the Goodman/ Wylie Purchase and Sale Agreement would have closed.

It is an undisputed fact that the Goodman/ Wylie Purchase and Sale Agreement existed. It is also an undisputed fact that the Goodman/ Wylie Purchase and Sale Agreement had a single contingency – the vacation of First Avenue South in an acceptable manner. Prior to entering into the Purchase and Sale Agreement with Wylie, Goodman had offered to sell its property to Defendants on the same exact terms as

offered to Wylie. *See*, Bates Nos. 000178. It is undisputed that Defendants had knowledge of the Goodman/ Wylie Purchase and Sale Agreement

It is an undisputed fact that Duro-Bilt and McKnight knew of the sale of the Goodman property to Wylie. Both Conley and Wylie will testify that they told Duro-Bilt and McKnight of the sale and of the contingency. *See*, Bates Nos. 000178-000179.

Both Duro-Bilt and McKnight admit that they met with Wylie and were asked to sign a consent to the vacation. *See*, Bates Nos. 000250-000251. According to McKnight, Wylie visited him at his business 3 or 4 times. *See*, Bates Nos. 000250-000251. Wylie asked Duro-Bilt/ McKnight to sign the consent form requested by the Nampa Fire Department. *See*, Bates No. 000251. Wylie left Conceptual Site Plans with Duro-Bilt/ McKnight. *See*, Bates No. 000252.

McKnight, Thorne and the Mayor had been on a ski trip together to Sun Valley in March of 2004. Mayor Dale describes McKnight as a friend. *See*, Bates No. 000180.

In his deposition, Mayor Dale confirmed McKnight's material, *ex parte* contact, recalling that "he [McKnight] conveyed to me that, as a property owner on that street, he did not agree to the vacation at this time. *See*, Bates No. 000181.

After Ordinance No. 3374 had been vetoed, McKnight told Goodman that he wished to purchase Goodman's property where the car lot is located. *See*, Bates No. 000181. These lots are #11 and 12 and are located to the south of Duro-Bilt's lot.

It is also an undisputed fact that Goodman has suffered an injury as a result of the reduced value of the Goodman property. *See*, Bates Nos. 000246-000247.

A *prima facie* case of tortious interference with a contract exists where a plaintiff has established: (a) the existence of a contract, (b) knowledge of the contract on part of

the defendant, (c) intentional interference causing breach of the contract and (d) injury to the plaintiff resulting from the breach. *Barlow v. Int'l Harvester Co.*, 95 Idaho 881, 893, 522 P.2d 1102, 1115 (1974). *See also, Thirsty's LLC v. Tolerico*, 137 P.3d 435 (2006).

The knowledge element of the tort is "satisfied by actual knowledge of the prospective [economic advantage] or by knowledge of facts which would lead a reasonable person to believe that such interest exists." *Kutcher v. Zimmerman*, 87 Haw. 394, 957 P.2d 1076, 1088 n. 16 (Haw. Ct. App. 1998) (quoting W. P. Keeton, D. Dobbs, R. Keeton and P. Owen, *Prosser and Keeton on the Law of Torts* § 129 at 982 (5th ed. 1984) cited in, *Highland Enterprises, Inc. v. Barker*, 133 Idaho 330, 338, 986 P.2d 996, 1004 (Idaho 1999).

Although proof of actual knowledge is not required, it cannot be disputed that Defendants had either actual knowledge of the Goodman/ Wylie sale or had knowledge of sufficient facts which would lead a reasonable person to believe that the Goodman/ Wylie sale existed.

Once the elements of Goodman's claim are established the burden shifts to the Defendants to prove a privilege or justification. McKnight and Duro-Bilt have completely failed to assert any defense of privilege or justification to Goodman's tort claims. *See*, Brief pages 26 and 28. Goodman contends that rather than dismissal of McKnight, judgment as to his liability and Duro-Bilt's liability should be entered in Goodman's favor.

In the case of *Idaho First Nat'l Bank v. Bliss Valley Foods*, 121 Idaho 266, 824 P.2d 841, 859 (Idaho 1991), The Idaho Supreme Court stated that:

“ . . . after the plaintiff has established a *prima facie* case, "the burden is on the defendant to prove justification." Footnote 15 ¹

¹ Footnote 15: With regard to justification for an interference, the *Barlow* case noted:

"Unlike the law of defamation, this branch of the law [interference with contract] has not crystallized a complete set of definite rules as to the existence or non-existence of privilege. * * * The issue in each case is whether the actor's conduct is justifiable under the circumstances; whether, upon a consideration of the relative significance of the factors involved, his conduct should be permitted despite its expected effect of harm to another." Restatement of Torts § 767, comment a at 63 (1939). 'What is "unwarranted" interference depends on the facts of each case.' *Watson v. Settlemyer*, 150 Colo. 326, 372 P.2d 453, 456 (1962). *See also*, *Freed v. Manchester Service*, *supra*, 331 P.2d at 691-692. When an action involving interference with contract is tried to a jury, it is ordinarily for the jury to determine whether the interference of the defendant was justified. *Mitchell v. Aldrich*, *supra*, 163 A.2d at 837; *Jackson v. O'Neill*, 181 Kan. 930, 317 P.2d 440, 443 (1957).

"Otherwise justifiable conduct is rendered unjustified where improper means, such as defamation, are employed by the defendant. W.L. Prosser, Handbook of the Law of Torts § 129, pp. 936-37 (4th ed. 1971). *See Calbom v. Knudtson*, *supra*, 396 P.2d at 151." *Barlow v. Int'l Harvester Co.*, 95 Idaho 881 at 893, 522 P.2d 1102 at 1114 (1974).

Duro-Bilt, although contractually bound to cooperate and having already consented to the street vacation, broke its promises. This conduct was not only a breach of the Property Owner's Vacation Agreement, but also was an interference with the Goodman/ Wylie Purchase and Sale Agreement. McKnight's undisputed role as instigator of Duro-Bilt's refusal to cooperate and of an illegal veto by the Nampa Mayor are more than sufficient to withstand McKnight's Motion for Summary Judgment or dismissal under IRCP 12(b)6.

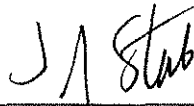
The Defendants Duro-Bilt and McKnight, now bear the burden of proving justification. None has been alleged by either Defendant.

Goodman respectfully requests the Court to reconsider its Order.

DATED this 4th day of October, 2006.

RUNFT & STEELE LAW OFFICES, PLLC

By: _____


JON M. STEELE
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of October 2006, a true and correct copy of the foregoing **BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DISMISSING BART AND ALANE MCKNIGHT INDIVIDUALLY** was served upon opposing counsel as follows:

Tammy Zokan
Moore Smith Buxton & Turke, Chtd.
950 W. Bannock, Suite 520
Boise, ID 83702

US Mail
 Personal Delivery
 Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: 
JON M. STEELE
Attorney for Plaintiff

F I L E D
A.M. 2:15 P.M.

OCT 04 2006

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

JON M. STEELE (ISB # 1911)
KARL J. RUNFT (ISB # 6640)
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Phone: (208) 333-9495
Fax: (208) 343-3246
Email: jmsteele@runftlaw.com

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GOODMAN OIL COMPANY,)
)
)
 Plaintiff,)
)
 vs.)
)
 SCOTTY'S DURO-BILT GENERATOR,)
 INC., an Idaho corporation; BART and)
 ALANE McKNIGHT, husband and wife;)
 and DOES I through V,)
)
 Defendants.)
)

CASE NO. CV 05-9800
**AFFIDAVIT OF JON M. STEELE IN
SUPPORT OF GOODMAN'S
MOTION FOR
RECONSIDERATION OF ORDER
DISMISSING BART AND ALANE
MCKNIGHT INDIVIDUALLY**

STATE OF IDAHO)
 :ss
County of Ada)

COMES NOW, Jon M. Steele, being over the age of eighteen years and
competent to make this Affidavit, after first being duly sworn, and upon his own
information and belief, states as follows:

1. That I am an attorney in good standing with the Idaho State Bar and counsel for the Plaintiff herein.
2. That I make this affidavit in support of Goodman's Motion for Reconsideration of Order Dismissing Bart and Alane McKnight Individually.
3. That this Court's Order was premised upon the fact that Goodman had failed to provide the Court with facts justifying "piercing of the corporate veil".
4. That Goodman's Complaint has a single contract count (Count I) to which this theory could apply.
5. That Goodman's Complaint has three tort counts (Counts II, III, and IV) to which the theory of piercing the corporate veil has absolutely no application.
6. The elements of proof of Goodman's tort counts do not include "piercing the corporate veil". Goodman's claim is a direct action against McKnight, individually.

Further, your affiant sayeth naught.

DATED this 4th day of October 2006.

RUNFT & STEELE LAW OFFICES, PLLC

By: JA Steele
JON M. STEELE
Attorney for Plaintiff


CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 4th day of October 2006, a true and correct copy of the **AFFIDAVIT OF JON M. STEELE IN SUPPORT OF GOODMAN'S MOTION FOR RECONSIDERATION OF ORDER DISMISSING BART AND ALANE MCKNIGHT INDIVIDUALLY** was served upon opposing counsel as follows:

Tammy Zokan
Moore Smith
225 N. 9th, Suite 420
Boise ID 83702

US Mail
 Personal Delivery
 Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: 

JON M. STEELE
Attorney for Plaintiff

SUSAN E. BUXTON # 4041
 TAMMY A. ZOKAN # 5450
 MOORE SMITH BUXTON & TURCKE, CHARTERED
 Attorneys at Law
 950 West Bannock, Suite 520
 Boise, Idaho 83702
 Telephone: (208) 331-1800
 Facsimile: (208) 331-1202
 Email: taz@msbtlaw.com

FILED
 A.M. 3:30 P.M.
OCT 10 2006
 CANYON COUNTY CLERK
 P. SALAS, DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)	
)	
Plaintiff,	)	Case No. CV 05-9800
)	
v.)	
	)	DEFENDANT'S RESPONSE IN
SCOTTY'S DURO-BILT GENERATOR,	)	OBJECTION TO PLAINTIFF'S
INC., and Idaho corporation; and DOES I	)	MOTION FOR SUMMARY
through V.	)	JUDGMENT
)	
Defendant.)	
)	

COME NOW, Defendant Scotty's Duro-Bilt Generator, Inc. ("Duro-Bilt" or "Defendant"), by an through their attorneys of record, Moore, Smith, Buxton & Turcke, Chartered, and submit their Response in Objection to Plaintiff's Motion for Summary Judgment filed on August 22, 2006. Defendant's Response is supported by this Response and Second Affidavit of Tammy A. Zokan, Defendant's Motions, Memorandum and Affidavits filed on June 16, 2006 and June 29, 2006, and Defendant's Reply and Affidavit of Tammy A. Zokan filed on August 29, 2006.

I. SUMMARY OF UNDISPUTED FACTS

On July 31, 1995, Plaintiff, Duro-Bilt, the Blamires Family Trust and T.J. Forest, Inc. entered into a Property Owner Street Vacation Agreement (the "Agreement" or "Vacation Agreement"), whereby the parties to the Agreement agreed to the City of Nampa's vacation of First Avenue South between Blocks 16 and 19 of Pleasants Addition and the execution of subsequent agreements upon the happening of the following conditions:

1. City action approving the vacation of 1st Ave. S;
2. The parties' grant among them themselves a perpetual easement on the vacated property for access to and from each party's property, which access is to be at the discretion of property owners;
3. The parties' execution of an agreement defining their rights and obligations after the City vacated the street;
4. The parties' sharing of maintenance of the vacated property in proportion to the amount of property they each own.

Complaint, Ex. A, ¶¶ 1-3.

Plaintiff filed an application for vacation on August 3, 1995. Plf 000044. The application identified the reason for the applications as (1) so adjacent properties owners may more fully utilize their properties; and, (2) the construction of a bank building. *Id.* On September 6, 1995, the City notified Plaintiff that an ordinance approving the vacation would be prepared and approved upon Plaintiff satisfying three (3) conditions:

1. Provision for storm drainage and public utilities.

2. Closure in a manner acceptable to the City Engineer.
3. Provision for emergency access.

Plf 000098, 000240. No ordinance related to the vacation was adopted in 1995 or anytime thereafter prior to 2004. Plaintiff does not provide any evidence that it attempted to satisfy the City's conditions for vacation after the vacation was tabled in October 1995 and before 2004. See Plf 000241-242, 000233.

The matter did not come up again until Mr. Ralph Wylie sought to purchase Plaintiff's property in 2004. Plf 000203-206. On August 4, 2004, the Nampa Fire Department issued a letter stating its terms of agreement regarding the vacation. Plf 000046. The requirements included: (1) a twenty foot (20') access easement, and (2) written approval of the Nampa Fire Department's access requirement by all affected property owners. *Id.* The 20' access did not exist as a condition to vacation prior to August 4, 2004, hence the Fire Department's requirement for owner approval. *See Id.*, Plf 000046.

In the summer of 2004, Mr. Wylie approached Duro-Bilt and asked that it sign a new document signifying its agreement to the Nampa Fire Department's August 4, 2004, 20' access requirement. See Plf 000233, 000250; Affidavit of Chris E. Yorgason in Support of Defendant's Motions filed on June 16, 2006 (hereinafter "Yorgason Aff."), Ex. B (Conley Tr.) pp. 47-51, Ex. 6. After review, Duro-Bilt refused to sign the document because the 20' easement did not provide adequate access to Duro-Bilt's property and would injure Duro-Bilt's business. Plf 000250-251, 253; Yorgason Aff., Ex. A (McKnight Tr.) p. 45, l. 25, p. 46, ll. 1-7; p. 85, ll. 24-25, p. 86, ll. 1-14, p. 90, ll. 11-25, p. 91, ll. 1-22.

Despite Duro-Bilt's objection, Mr. Wylie proceeded with the vacation application and the Nampa City Council approved the vacation of First Avenue South by Ordinance No. 3374. Plf 000251; Yorgason Aff., Ex. B (Conley Tr.) p. 99, ll. 10-13. The Ordinance pursued by Mr. Wylie, Ordinance No. 3374, was adopted by the City Council on August 16, 2004. Complaint, Ex. C.

Ordinance No. 3374 conditions the vacation on a certain fifty-foot (50') access and utility easement. *Id.* Duro-Bilt was not aware that Ordinance No. 3374 approving the vacation was before the City Council nor did Duro-Bilt have any knowledge of the contents of any such Ordinance until after the Ordinance was adopted on August 16, 2004. Plf 000213, 000253; Yorgason Aff., Ex. A (McKnight Tr.) p. 63 l. 10-25, p. 64 l. 1-11, p. 87 l. 1-11, p. 88 l. 5-20, p. 89 l. 8-25, p. 90 l. 1-3, p. 100 l. 2-24.

After learning that the City adopted an ordinance approving the vacation, Duro-Bilt contacted the City to express its disagreement with the vacation. Duro-Bilt expressed its objection verbally on or about August 19, 2004 and by letter dated September 3, 2004. Complaint, Ex. D; Plf 000253. The basis for that objection was that 20' would not provide adequate access to Defendant's property and Defendant's business "has grown to where it has need of access through the whole block from both sides for industrial & agricultural vehicles, eighteen wheelers, commercial vehicles and general traffic. . . . To restrict this street would cripple [Duro-Bilt's] business, frustrate customers and become a traffic hazard." Complaint, Ex. D.¹ These concerns were based on the 20' easement

¹ Defendant did not know the Ordinance imposed a 50' access and utility easement rather than the proposed 20' access easement. Defendant does not know whether a 50' easement would provide adequate access to Defendant's business. Yorgason Aff. Ex. A (McKnight Tr.) p. 100 l. 2-25.

required by the Nampa Fire Department and presented to Defendant by Wylie prior to the City's adoption of Ordinance No. 3374. Yorgason Aff., Ex. A (McKnight Tr.) p. 63 l. 10-25, p. 64 l. 1-11, p. 87 l. 1-11, p. 88 l. 5-20, p. 89 l. 8-25, p. 90 l. 1-3, p. 100 l. 2-24.

According to Plaintiff, the 50' access and utility easement imposed by the City spoiled Plaintiff's sale of its property to Wylie and devalued Plaintiff's property. Plf 000246, 000184. According to Plaintiff, the value of the property was further reduced by twenty percent (20%) due to the City's rezone of Plaintiff's property. *Id.*

The Vacation Agreement was not recorded until September 14, 2004. Plf 000038.

On October 5, 2004, Plaintiff sued the City and Duro-Bilt seeking a writ of mandamus for publication of the Ordinance and a petition for judicial review challenging the City's reservation of fifty-foot (50') access and utility easement. Petition for Writ of Mandate and Petition for Judicial Review, *Goodman Oil Company v. City of Nampa, et al and Scotty's Duro-Bilt Generator, Inc.*, Case No. CV 04-10007. On June 29, 2005, the Court dismissed Plaintiff's claims against Duro-Bilt with prejudice for the reason that Plaintiff failed to state a claim against Duro-Bilt upon which relief could be granted. Zokan Aff., Ex. A. The Court also awarded Duro-Bilt costs and attorney fees in the amount of \$9,332.49. *Id.*, Ex. D.

After dismissing Plaintiff's claims against Defendant with prejudice, the Court granted Plaintiff's request for Preemptory Writ of Mandamus and issued its Order on August 8, 2005, compelling the City to publish Ordinance No. 3374. Plf 000001-2, 000004-5. Judge Morfitt found and concluded that the act of publishing the Ordinance No. 3374 was a non-discretionary ministerial function because:

1. The City Council passed Ordinance No. 3374; and
2. The Mayor approved Ordinance No. 3374; and
3. The Mayor relinquished possession and control of Ordinance No. 3374.

Second Zokan Aff., Ex. A, *Goodman Oil Co. v. City of Nampa*, Case No. CV04-10007, Hrg. Tr. pp. 38-39 (July 15, 2005). Ordinance No. 3374 as adopted and subsequently published in accordance with Court Order, provides for a 50' emergency and utility access easement. Plf 000011.

Even though Ordinance was adopted and then was published upon Plaintiff's demand, Plaintiff continues to object to the City's requirement for adequate emergency and utility access and the vacation is subject to ongoing litigation. *See* Plf 000012-54.

II. ARGUMENT

A. Defendant did not Breach the Vacation Agreement

There is no dispute that the 1995 Agreement was contingent upon the occurrence of specific conditions, including vacation by the City of Nampa. Complaint, Ex. A, ¶ 1. Once vacated, the parties were to grant themselves a perpetual easement on the vacated property for access to and from each parties' property -- said access to be at the discretion of property owners. *Id.* at ¶ 2. Then the parties would execute an agreement defining their rights and obligations after the City vacated the street. *Id.* at ¶ 3. The parties would then be responsible for maintenance in proportion to the amount of property they own. *Id.*

There is no perpetual easement at issue in this case. There was not and could not be a perpetual easement under the terms of the Agreement until there was a vacation by the City of Nampa. Plaintiff did not attempt to fulfill the conditions for the vacation until 2004 and there was no

vacation until 2005 and that vacation is tied up in litigation brought by Plaintiff against the City of Nampa. Plaintiff filed a vacation application on August 3, 1995, and the City of Nampa advised Plaintiff that the vacation would be approved upon Plaintiff fulfilling three (3) conditions. Plf 000044, 000098, 000240. The only thing Plaintiff did was file the application; Plaintiff did not fulfill or attempt to fulfill the required conditions until 2004. *Id.*, Plf 000241-242. The conditions and the grant was therefore defeated or never occurred as the result of Plaintiff's nonperformance. Idaho Code §§ 55-608, 55-609.

The failure of Plaintiff to meet the conditions imposed by the City in 1995 and achieve the vacation of the street in accordance with the Agreement, or within a reasonable time, resulted in an impossibility, impracticality and frustration of the contract such that performance under the contract was excused as a matter of law. As shown by the undisputed evidence in this case, Duro-Bilt has acted fairly and in good faith under the terms of the Agreement. *See Idaho Power Company v. Cogeneration, Inc.*, 134 Idaho 738, 746, 9 P.3d 1204 (2000); *Jenkins v. Boise Cascade Corporation*, 141 Idaho 233, 243, 108 P.3d 380 (2005). Defendant did not fail to perform any contractual duty owed to Plaintiff. *Id.* Even if Defendant arguably had some contractual duty it failed to perform, Defendant are legally excused from performance. *Id.*

If this Court determines that the parties are still bound by the Vacation Agreement, Defendant has not breached the conditions of the Agreement, because:

1. Performance of subsequent conditions is not due;

2. The vacation is tied up in litigation because Plaintiff disagrees with the terms of the vacation and without resolution of the scope and conditions of vacation, the matter is not ripe for grant of a perpetual easement;

3. There is no perpetual easement in the record and the Plaintiff has not proposed such easement. Plaintiff admits that no perpetual easement has been drafted or granted and that any perpetual easement would be conditioned on agreement by all parties, Yorgason Aff., Ex. B, p 64;

4. There is no evidence that Defendant has refused to discuss or cooperate with the parties to the Agreement regarding the grant of a perpetual easement for each party to access each party's property.

There is no evidence that Plaintiff and/or all the parties to the Vacation Agreement have attempted to fulfill their obligation to grant and convey a perpetual easement providing for access to each of their properties. Likewise, there is no evidence that Plaintiff and/or the parties to the Vacation Agreement have presented a formal agreement regarding the parties rights and obligations; no evidence that it is time to perform any of obligations Plaintiff alleges have been breached. Once the City took final action on the vacation ordinance, Plaintiff commenced litigation against the City and Defendant. The scope and conditions of the vacation then are currently unknown and cannot be known until the matter is finally decided by the Court.

B. Defendant is not Liable in Tort

The undisputed evidence shows Defendant has not intentionally or negligently interfered with Plaintiff's contract. Defendant did not cause injury to the contractual relationship or any economic

damage to Plaintiff. See *Thirsty's L.L.C. v. Tolerico*, ---Idaho---, 2006 Opinion No. 62 (May 26, 2006). According to Plaintiff, the *veto* of Ordinance No. 3374, adopted on August 16, 2004, caused the sale of the property to Mr. Wylie to fall through. Complaint at ¶ 39. Plaintiff and Mr. Wylie also identify the City's *adoption* of the Ordinance No. 3374 with the 50' access and utility easement (along with the rezoning of the property by the City) as causing the sale to fail and decrease the value of Plaintiff's property. Plf 000246-247. Defendant did not adopt and has no authority to adopt the Ordinance that is the basis of Plaintiff's complaint. Likewise, Defendant did not impose and has no authority to impose the 50' emergency and utility easement on the vacated property. Moreover, Defendant did not veto nor does it have the authority to veto an Ordinance of the City. Finally, Defendant did not play any part in the rezone of Plaintiff's property. The conduct framing Plaintiff's Complaint is the conduct of the City of Nampa, not Defendant.

Defendant acted reasonably and its actions were justified. *Barlow v. International Harvest Co.*, 95 Idaho, 881, 893, 522 p. 2d 1102 (1974).²

The issue in each case is whether the actor's conduct is justifiable under the circumstances; whether upon a consideration of significance of the factors involved, his conduct should be permitted despite its expected effect of harm to another. What is "unwanted" interference depends on the facts of each case.

Id. (internal citations omitted).

In 2004, Plaintiff asked Defendant to agree to a 20' access easement which width is not

² Plaintiff falsely asserts that Defendant has not argued that its actions were justified. See Plf's Br. at p. 28 and Plf's Brief in Support of Reconsideration at p. 6. Plaintiff's assertions are untrue. Defendant has repeatedly argued and the undisputed evidence in the record shows, that Defendant has acted in good faith and its actions were justified. Def's Memo in Support of Motion for Summary Judgment at p. 20 and Def's Reply at pp. 14-15.

adequate to access Defendant's property and is not sufficient to accommodate Duro-Bilt's customers and suppliers. When Defendant later learned the Ordinance was adopted, it understood the vacation was limited to the 20' proposed by Wylie.³ The evidence shows that Duro-Built contacted the City government due to its concern about City action on what Duro-Bilt understood to be a vacation with a much too small access easement. Because the 20' access did not provide adequate access to Duro-Bilt's property as expressly provided for in the Vacation Agreement; and, because the inadequate access would negatively impact Duro-Bilt's property, Duro-Bilt inquired into the status of any such action and asked how Duro-Bilt could participate in the process. Clearly, Duro-Bilt's actions were reasonable and justified under the circumstances.

The undisputed evidence shows Duro-Bilt had no objective other than to protect access to its property, which access is expressly provided for under the Vacation Agreement. Duro-Bilt had no objective to harm Plaintiff nor did Duro-Bilt employ wrongful means to cause injury to the prospective business relationship. *See Idaho First National Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 285-286, 824 P.2d 841 (1991). There is no allegation or evidence that Defendant engaged in "conduct that violates the law, violence, threats, intimidation, deceit, misrepresentation, bribery or disparaging falsehoods. *Id.* at 286 fn. 16. Likewise, there is no evidence Defendant used "improper means, such as defamation" in contacting the City. *See Barlow v. International Harvester Co.*, 95 Idaho at 893. Contrary to Plaintiff's assertions, the evidence indisputably shows that Defendant merely wanted to ensure access to its property. Defendant have advised Plaintiff of their

³ The evidence shows that Defendant did not know that the Ordinance adopted a 50' access and utility easement rather than a 20' access easement. It is unknown whether 50' access easement is sufficient for Defendant's customers and suppliers.

access needs and told Plaintiff that Defendant would entertain ideas to address Defendant's needs. Plf 000251-254; Yorgason Aff. ¶2. Defendants have acted reasonably and in accordance with the Vacation Agreement.

If any alleged injury occurred to the contractual relationship, property value or any other interest of Plaintiff, that injury was directly caused by *Plaintiff and Plaintiff's purchaser's* own actions. As explained above, Ordinance No. 3374, adopted on August 16, 2004, specifically conditions the vacation of First Avenue South on a certain 50' emergency and utility access easement. The Ordinance was *adopted upon Plaintiff's request*; Defendant knew nothing about it. The Ordinance was published and therefore became law *at the behest of Plaintiff*, who sued the City and obtained a Writ of Mandamus compelling publication of said Ordinance. Plaintiff says it is the size of the easement that resulted in the cancellation of the sale agreement. Finally, any alleged decrease in the value of Plaintiff's property due to rezoning by the City is an issue between Plaintiff and the City, not Plaintiff and Duro-Bilt.

The actual undisputed evidence of record shows that the 1995 Vacation Agreement was based on a number of conditions, which conditions have not occurred and cannot occur until Plaintiff's litigation over the vacation is resolved in the *City of Nampa* case; and, which Agreement arguably has expired because the conditions were not fulfilled within a reasonable time. The undisputed evidence further shows that the Agreement expressly provided each party thereto access to each party's property with said access to be at the discretion of each party after the vacation was approved by the City.

The undisputed evidence also shows that between 1995 and 2004 no one contacted Defendant about the Agreement or vacation; that in 2004 Wylie asked Defendant to sign an agreement to the Nampa Fire Department's 2004, 20' access easement, which access is not adequate to provide access to Defendant's property. It is undisputed that Defendant did not know the vacation was back before City Council; did not know Ordinance No. 3374 was pending before City Council; and did not know the contents of Ordinance No. 3374. The undisputed evidence further shows that when Defendant learned Ordinance No. 3374 had been adopted, Defendant immediately contacted their City government because of Defendant's concerns about adequate access to its property. The undisputed evidence shows there was no intentional or negligent interference by Defendant to cause a breach of contract, no wrongful means employed by Defendant, no duty owed to Plaintiff or breach thereof and no a causal connection between the Defendant's conduct and the Plaintiff's injury and actual loss or damage and that Defendant's actions were justified under the circumstances. The complained-of conduct: (1) adoption of the Ordinance with the 50' easement, and (2) veto of the same Ordinance, was entirely within the purview of the City, not Defendant.

There are no genuine issues of material fact on Plaintiff's contract and tort claims against Defendant and Defendant, not Plaintiff, is entitled to judgment as a matter of law.

C. Defendant is not Estopped from Contesting the Vacation Agreement

The Transcript of the July 15, 2005, hearing in the matter of *Goodman Oil Co. v. City of Nampa* makes clear that the validity of the Vacation Agreement was not resolved in that matter.

First, the Court determined that Plaintiff raised no issues or claims for Duro-Bilt in the *City of Nampa* case before entering its Order mandating publication of the Ordinance. Zokan Aff. Ex. A,

D, E. The Court held that Plaintiff stated no claim against Duro-Bilt and dismissed all of Plaintiff's claims against Duro-Bilt with prejudice. Zokan Aff., Ex. A. Second, the validity of the Vacation Agreement was not decided in the prior proceeding. Second Zokan Aff., Ex. A, Hrg. Tr. pp 38-39. As explained by Plaintiff's counsel, Mr. Steele, that the *City of Nampa* case "is a veto case...[o]ur summary judgment is based upon the veto power of the mayor." *Id.* at p. 16, l. 3-4. The Court was concerned only with the question of whether, as a matter of law, the Mayor had the authority to veto the Ordinance after the City Council adopted it and the Mayor relinquished control over it and directed the clerk to publish it. *Id.* at pp. 38-39. The Court noted specifically that it was undisputed that the Ordinance was passed in the manner according to law. *Id.* at p. 37. The duty to publish the Ordinance then became ministerial and there was thus a clear duty to act. *Id.* at p. 39. There was no inquiry into or discussion of the underlying vacation or Vacation Agreement. *See id.* at p. 37-39.

The Judge did note the Mayor's asserted justification for the veto: the requirement for landowner consent under Idaho Code § 50-1321. *Id.* at p. 37, l. 9-13. However, it is clear from the Judge's ruling in that case that the issue of landowner consent played no role in, and was unnecessary to, the Judge's decision. *See id.* at p. 37-39. The validity of the Vacation Agreement was not resolved in the other proceeding. *Id.*


The issue decided by Judge Morfitt is not identical to the issues in this litigation, the parties are not the same, and the issues in this litigation are not and were not necessary to support the outcome in the case before Judge Morfitt. *Western Indus & Env't'l Servs., Inc. v. Kaldveer Assocs., Inc.*, 126 Idaho 541, 887 P.2d 1048 (1994).

III. CONCLUSION

Summary judgment in favor of Defendant, not Plaintiff, is appropriate in this case. The undisputed facts show that Defendant is not in breach of any Agreement with Plaintiff and Defendant have not intentionally or negligently interfered with any contractual relationship of Plaintiff nor caused any damage to Plaintiff and Defendant's actions were justified. Plaintiff's Motion for Summary Judgment should be denied and Defendant's Motion should be granted.

DATED this 10th day of October, 2006.

MOORE SMITH BUXTON & TURCKE, CHTD.

By: 

Tammy A. Zokan
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of October, 2006, I caused a true and correct copy of the foregoing RESPONSE by the method indicated below, and addressed to the following:

Jon M. Steele
Karl J. F. Runft
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Facsimile (208) 343-3246
Email: jmsteele@runftlaw.com

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile



Tammy A. Zokan

Oct 10 2006 Hall

F I L E D
A.M. 3:25 P.M.
OCT 10 2006
CANYON COUNTY CLERK
P. SALAS, DEPUTY

SUSAN E. BUXTON, ISB #4041
TAMMY A. ZOKAN, ISB # 5450
MOORE SMITH BUXTON & TURCKE, CHARTERED
Attorneys at Law
950 W. Bannock Street, Suite 520
Boise, Idaho 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202
Email: taz@msbtlaw.com

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)	
)	
Plaintiff,	)	Case No. CV 05-9800
)	
v.	)	SECOND AFFIDAVIT OF TAMMY A.
	)	ZOKAN
SCOTTY'S DURO-BILT GENERATOR,)	
INC., and Idaho corporation; and DOES I)	
through V.)	
)	
Defendants.)	
)	

STATE OF IDAHO)
)ss.
County of Ada)


TAMMY A. ZOKAN, being first duly sworn upon oath, deposes and says:

1. I am one of the attorneys of record for Defendant Scotty's Duro-Bilt in the above-entitled matter and make this affidavit upon my own personal knowledge.

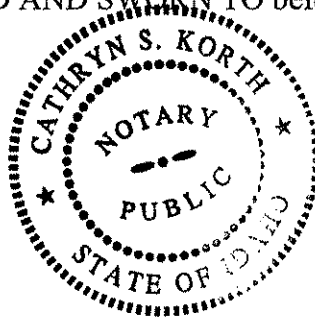
2. Attached hereto as Exhibit A is a true and correct copy of the Transcript of the July 15, 2005, hearing before the Honorable James C. Morfitt, District Judge, in *Goodman Oil Company v. City of Nampa*, Case No. CV-04-10007, that I received from Plaintiff's counsel via email on


September 11, 2006.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

By 
Tammy A. Zokan, Of the Firm
Attorneys for Defendants

SUBSCRIBED AND SWORN TO before me this 10th day of October, 2006.





NOTARY PUBLIC FOR IDAHO
Residing at: Nampa ID
My Commission Expires: 3-6-2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of October, 2006, I caused a true and correct copy of the foregoing **SECOND AFFIDAVIT OF TAMMY A. ZOKAN** by the method indicated below, and addressed to the following:

John M. Steele
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Facsimile (208) 343-3246

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile



Tammy A. Zokan

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)
)
Petitioner,)
)
vs.) Case No. CV 04-10007
)

CITY OF NAMPA, a corporate body)
politic; THE CITY COUNCIL of)
the CITY OF NAMPA; MAYOR TOM)
DALE, in his capacity as Mayor)
of the City of Nampa; DIANA)
LAMBING, in her capacity as)
City Clerk; and SCOTTY'S)
DURO-BILT GENERATOR, INC.,)
an Idaho corporation,)
)
Respondents.)
)

REPORTER'S TRANSCRIPT

BE IT REMEMBERED, that the above-entitled matter came on
regularly for a hearing on Motions to Strike and Writ of
Mandate on Friday July 15, 2005, Caldwell, Idaho, before
the Honorable James C. Morfitt, District Judge.

Andrea L. Chandler, RPR

1 CALDWELL, IDAHO, FRIDAY, JULY 15TH, 2005

2
3 PROCEEDINGS

4
5 THE COURT: Okay. We're now ready to move on to
6 the City of Nampa -- Goodman Oil versus the City of
7 Nampa.

8 MR. KORMANIK: Good afternoon, Judge.

9 THE COURT: Good afternoon.

10 MR. STEELE: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 Mr. Steele and Mr. Runft appear on behalf of
13 the plaintiffs. And Mr. Kormanik appears on behalf of
14 the City of Nampa. Mr. Jorgenson on behalf of Scotty
15 Duro-Bilt is not appearing. And I guess that answers my
16 question as to whether or not their motion -- or the
17 objection on attorney's fees has been noticed. I did
18 not find that it had been. So apparently it has not.

19 Is that your understanding?

20 MR. STEELE: That's correct.

21 MR. KORMANIK: I believe that's correct, Judge.

22 THE COURT: This case is before the Court today.

23 The City of Nampa has filed a motion to strike and have
24 filed a second motion to strike. And the plaintiffs
25 have filed a motion for summary judgment on the Writ of

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APPEARANCES

For the Petitioner: RUNFT & STEELE

By: Jon M. Steele, Esq.
By: Karl J. Runft, Esq.
1020 West Main Street, Suite 400
Boise, Idaho 83702
Telephone: (208) 333-8506
Facsimile: (208) 343-3246
jmsteele@runftlaw.com

For the Respondents: WHITE PETERSON

By: John R. Kormanik, Esq.
5700 East Franklin Road, Suite 200
Nampa, Idaho 83687-7901
Telephone: (208) 466-9272
Facsimile: (208) 466-4405
jkormanik@whitepeterson.com

1 Mandate issued.

2 Are those the three matters that we have
3 before us today?

4 MR. KORMANIK: That's correct, Judge.

5 THE COURT: Okay. Probably, we need to take up
6 the motions to strike first, and then we'll take up the
7 plaintiff's motion for summary judgment. I'll hear --
8 can we take both of these up together?

9 MR. KORMANIK: Yes, Judge.

10 THE COURT: They're somewhat related.

11 MR. KORMANIK: Yes.

12 THE COURT: Very well, you may proceed.

13 MR. KORMANIK: The initial motion to strike filed
14 by Mr. Hallam deals with some statements in the brief in
15 support of the motion for summary judgment that allude
16 to Mayor Dale's veracity. And I believe that's why
17 Mr. Hallam moved to strike them. I understand that --

18 THE COURT: It doesn't actually allude to his
19 veracity. Doesn't it allude to the fact that the Court
20 might be called upon to --

21 MR. KORMANIK: To weigh.

22 THE COURT: -- to weigh veracity if there is
23 conflicting testimony on an issue?

24 MR. KORMANIK: Yes, Judge, it does.

25 THE COURT: And isn't that what the triers of fact,

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DEFENDANT'S
EXHIBIT

A

Page 2

000118

1 (Pages 1 to 4)

1 be it the Court in the court trial, or the jury in a
2 jury trial always have to do?
3 MR. KORMANIK: Yes, Judge, it is.
4 THE COURT: Okay. But, also, isn't that some of
5 the language in that California case, Polscamp?
6 MR. KORMANIK: I hate to say three yeses in a row,
7 but, yes, Judge, it is. Other than what Mr. Hallam has
8 filed, and with the questions of the Court, we will
9 simply rest on what he filed for that first motion.
10 The second motion to strike, however, deals
11 with a supplemental affidavit filed by the petitioner in
12 this matter. The petitioner filed a supplemental
13 affidavit along with their responsive briefing. Under
14 Rule 56, the move in for summary judgment must file
15 their motion, along with supporting affidavits, no later
16 than 28 days before the hearing date, which, in this
17 case, initially was done.
18 The supplemental affidavit doesn't comply with
19 Rule 56, so we would request the Court strike it and not
20 consider its contents.
21 THE COURT: I believe that was filed in support of
22 both summary judgment and in opposition of the motion to
23 strike, is the way it's headed.
24 MR. KORMANIK: But I don't believe anything in any
25 of the contents -- and, again, this would require the

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1 Court to review it -- any of the contents of the
2 attachments to that supplemental affidavit deal with the
3 legal question of whether or not the Court is ultimately
4 going to be tasked with determining and weighing the
5 evidence before it.
6 And so notwithstanding the title of the
7 supplemental affidavit, I think the substance of it
8 deals with the summary judgment motion.
9 THE COURT: Let me ask you one question on your
10 first motion to strike. Normally I see motions to
11 strike, affidavits, and exhibits, and the like. Seldom
12 do I see motions to strike statements in memoranda. And
13 I was -- I'm a little intrigued if you have any
14 authority for that?
15 I am well aware that opposite parties
16 generally disagree with many statements that are made in
17 memoranda.
18 MR. KORMANIK: So back to the Court's question
19 whether or not Mr. Hallam -- who unfortunately isn't
20 here.
21 Again, Judge, I think it was just simply to
22 bring to the Court's attention the concern of the Nampa
23 respondents with regard to whether or not Goodman Oil
24 was calling into question the Mayor's veracity,
25 especially given some other statements in the summary

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1 judgment briefing dealing with a supposed friendship
2 between the Mayor and the president of Scotty's
3 Duro-Bilt, and things along those lines.
4 It was simply to bring to the Court's
5 attention the fact that if the petitioner was calling
6 into question the Mayor's veracity, then that's not a
7 proper -- a motion for summary judgment before the Court
8 is certainly not a proper avenue for that.
9 THE COURT: Okay.
10 MR. KORMANIK: Thank you.
11 THE COURT: Thank you. I appreciate that.
12 Anything from the plaintiff's on that matter,
13 Mr. Steele?
14 MR. STEELE: Yes, Your Honor.
15 The motion to strike the statement concerning
16 Mayor Dale's veracity points out the problem presented
17 to the case -- to the Court in this case. The
18 inconsistency of a mayor's veto being invoked in this
19 situation places the Court in an unusual situation of
20 having to potentially rule upon the veracity of the
21 Mayor's testimony.
22 In this case --
23 THE COURT: But, again, isn't that -- I think
24 that's what I have to do in case after case, or the jury
25 has to do if it goes to jury trial.

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1 MR. STEELE: Should we have a jury trial, the jury
2 would be presented with that situation, yes.
3 And, Your Honor, we found the Mayor to be
4 entirely truthful in this case. There's no allegation
5 that he did not tell the truth. He was entirely
6 forthcoming about his friendship with Mr. McKnight, and
7 the ski trip that he took with Mr. McKnight to Sun
8 Valley. There was no allegation that he was dishonest
9 in any way. I believe the motion to strike should be
10 summarily denied.
11 In regard to the second motion to strike,
12 concerning my affidavit, which I filed seven days ago,
13 I'd like to point out to the Court that the City of
14 Nampa has, in their brief, asked this Court to enter
15 summary judgment on their behalf. And that authority --
16 under the authority of the case of Harwood versus
17 Talbert, this Court is empowered to grant summary
18 judgment to the Nampa respondents, even if the Nampa
19 respondents have not filed their own motion with the
20 Court.
21 Your Honor, I had to read the brief two or
22 three times to actually catch that statement. But once
23 I caught it, I felt obligated to submit an affidavit in
24 opposition to the summary judgment motion submitted on
25 behalf of the Nampa respondents.

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1 THE COURT: But that affidavit has to be filed,
 2 under the rule, within 14 days of an affidavit in
 3 opposition; does it not?
 4 MR. KORMANIK: That's correct, Your Honor.
 5 MR. STEELE: That's correct.
 6 THE COURT: At least 14 days.
 7 MR. STEELE: At least 14 days.
 8 And should the Nampa respondents feel at a
 9 disadvantage in any way, we're very agreeable to coming
 10 back in 14 days. All those matters contained in my
 11 affidavit are already part of the court record. There
 12 have been extensive affidavits filed in this case
 13 already. I submitted the affidavit in order to make it
 14 easier for the Court to follow the testimony in this
 15 case. And I believe that motion should also be denied.
 16 THE COURT: Okay. Thank you.
 17 Any response on either issue?
 18 MR. KORMANIK: Not unless you have any questions
 19 for me, Judge?
 20 THE COURT: I don't believe that I do.
 21 I have reviewed this. The Court will deny
 22 Nampa's motion to strike the portions of the
 23 petitioner's -- I'm sorry. The Court will grant the
 24 motion to strike that portion of the petitioner's brief.
 25 I will also grant the motion to strike the affidavit.

1 a vacation of a section of 1st Avenue South in the city
 2 of Nampa. My client, Goodman Oil, owns property on both
 3 sides of 1st Avenue South. There are several other
 4 property owners adjoining 1st Avenue South. And in the
 5 summer of 1995, those property owners joined together
 6 and executed a property/owner vacation agreement,
 7 agreeing to vacate 1st Avenue South in front of their
 8 adjoining properties.
 9 That agreement, Your Honor, is very clear.
 10 The first paragraph in the agreement states: "We
 11 consent to the vacation of 1st Avenue South." The
 12 application for vacation was filed with the City of
 13 Nampa, proceeded to public hearing, a staff report was
 14 prepared. The report recommended approval of the
 15 vacation of 1st Avenue South.
 16 The ordinance was prepared, the ordinance was
 17 read at two Council meetings, and then tabled. That
 18 ordinance sat on the table until the summer of 2004, at
 19 which time it was brought back before the Council, and
 20 it was asked that it be acted upon. The third reading
 21 of the ordinance was completed. It was completed on
 22 August 16th of last year.
 23 The ordinance was presented to the mayor,
 24 Mayor Dale. At that Council meeting on August 16th, the
 25 Mayor signed the ordinance indicating his approval. He

1 It was not filed timely. If it is a brief -- or an
 2 affidavit in opposition of summary judgment, so I will
 3 order both of those stricken.
 4 If you'd prepare an order on both of these,
 5 please?
 6 MR. KORMANIK: I will, Judge. Thank you.
 7 THE COURT: Now, moving on to the plaintiff's
 8 motion for summary judgment on the Writ of Mandate
 9 issue.
 10 Mr. Steele?
 11 MR. STEELE: Yes, Your Honor. Thank you for the
 12 opportunity to appear before you today on this important
 13 case. This case is one of first impression of the State
 14 of Idaho. It deals with the veto power of the executive
 15 of a city in the state of Idaho. The veto power, as
 16 you're aware, is a legislative function. It's an
 17 exercise of the legislative branch.
 18 And it is inappropriate that it be exercised
 19 in connection with a quasi-judicial proceeding. The
 20 facts of this case are, for the most part, undisputed.
 21 The only disputed facts that the City of Nampa lists are
 22 in their memorandum at pages 8 and 9. None of those
 23 facts relate to the exercise of the Mayor of his veto
 24 power.
 25 Your Honor, if you recall, this case involves

1 handed the ordinance to the clerk, the clerk testified
 2 his signature by executing the ordinance, and the clerk
 3 left the Council meeting with that ordinance. The clerk
 4 then sent the ordinance to the newspaper to be
 5 published.
 6 Before the ordinance was published, on August
 7 19th, Mr. McKnight, the president of Scotty's Duro-Bilt
 8 and adjoining property owner, called Mr. White, the city
 9 attorney, and indicated that he had a problem with the
 10 street vacation ordinance. Mr. White referred
 11 Mr. McKnight to Mr. Holm. Mr. Holm is the planning
 12 director of the City of Nampa and has been for the last
 13 26 years.
 14 Mr. Holm is the one who made the decision that
 15 the street vacation should proceed, that the proper
 16 consents had been obtained, and that the ordinance was
 17 ready to be approved. On August 19th, or thereabout,
 18 when he spoke to Mr. McKnight, he advised Mr. Mcknight
 19 that if he no longer consented, he needed to somehow get
 20 that back before the City Council.
 21 Mr. McKnight took it upon himself to phone the
 22 Mayor. The exact date that he talked to the Mayor, I
 23 don't know. But in that phone conversation, the Mayor
 24 recognized Mr. McKnight as his friend, as a man who had
 25 -- excuse me -- the Mayor as a man who had taught

1 Mr. McKnight's children. The Mayor also recognized
2 Mr. McKnight as the fellow he had taken a ski vacation
3 to Sun Valley with the previous year.

4 According to Mr. McKnight, the Mayor
5 unilaterally volunteered to veto the ordinance. When he
6 volunteered to veto the ordinance, he had not reviewed
7 the file in any way. He'd not seen the property owner's
8 vacation agreement. He'd not seen the correspondence
9 from the City of Nampa to my client, Goodman Oil,
10 reaffirming the fact that the application was still
11 pending. He'd not talked to Mr. White or to Mr. Holm.
12 He simply volunteered to veto.

13 Your Honor, the ordinance was vetoed. It was
14 vetoed on September 2nd, just last fall. The following
15 day, September 3rd, the City received Mr. McKnight's
16 written objection withdrawing his consent to the
17 property owner vacation agreement to the vacation of 1st
18 Avenue South. My client immediately went to the City
19 Council and asked that that be remedied.

20 The City Council refused to -- the City
21 refused to reconsider the Mayor's veto that led to this
22 action. Your Honor, the reason this is an important
23 case is, that it presents you with a fundamental
24 question in the separation of powers. We have the City
25 Council, who, in this situation, is acting as a

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1 officials, also; isn't that true?

2 MR. STEELE: The city councilmen are elected
3 officials, also. But at some point, Your Honor, the
4 record is set. There is no more fact gathering to be
5 done. And that is the due process requirement.

6 MR. KORMANIK: Judge, I hate to interrupt. But if
7 I may, Counsel's argument with regard to whether or not
8 Mayor Dale has the authority under the statutes or the
9 Nampa City Code to veto a street vacation, I don't
10 think, is relevant to the issue of whether or not this
11 Court should issue a Writ of Mandate.

12 The statutes are what the statutes are. If
13 this Court determines that Goodman has a legal right to
14 have the ordinance published, and that Goodman Oil also
15 satisfies the other requirements for a Writ of Mandate,
16 then under the writ statute, the Court will issue the
17 writ. Whether or not the constitutional issue of
18 whether the Mayor has the authority to veto a street
19 vacation ordinance, I don't think, is relevant to this
20 summary judgment, or the writ proceeding.

21 Thank you.

22 THE COURT: Okay. I'll note that. I'm going to
23 hear the arguments from both sides.

24 MR. KORMANIK: Thank you.

25 THE COURT: Each side will have their say.

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1 quasi-judicial body. And there's no doubt about that.

2 The cases are clear, when the City acts in a
3 quasi-judicial body, they are bound by the same
4 standards as you're bound by in this situation we're
5 presenting here today. We're bound by due process
6 requirements. The City admits this proceeding was a
7 quasi-judicial proceeding. The end result, Your Honor,
8 is that a veto is simply inconsistent with a
9 quasi-judicial proceeding.

10 The cases, particularly the case of Tombs
11 versus King County, are very definite on this point. In
12 that case it was a zoning case, Your Honor. A similar
13 case, but the application of a general ordinance to a
14 specific piece of property. That's what we have here:
15 A general ordinance dealing with street vacations and
16 its application at 1st Avenue South.

17 In that case, the court was very clear. It
18 recognized that the veto power is inconsistent with a
19 proceeding under -- for a quasi-judicial body. The
20 reason they're inconsistent, is that, in that case, the
21 executive, and in our case, the Mayor, is an elected
22 official. It's impossible to insulate him against
23 contact. And in this case, the Mayor was quite frank.
24 He takes calls from all constituents.

25 THE COURT: The city councilmen are elected

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1 You may continue, Mr. Steele.

2 MR. STEELE: Thanks, Your Honor.

3 Your Honor, this is a veto case. Our summary
4 judgment is based upon the veto power of the mayor. The
5 exercise of a veto is inconsistent with the
6 quasi-judicial nature of these proceedings that were
7 before the City Council. In addition, street vacation
8 is a very specific procedure.

9 In the case of Black versus Young, Judge
10 McDevitt was very clear, street vacation proceedings are
11 governed by 50-311 and those several other statutes
12 found in chapter 50. The powers of the city are found
13 in that section. And the city has no powers beyond what
14 are found in that section. And there is no veto power
15 found in the section dealing with street vacations.

16 Your Honor, the third reason why we're
17 entitled to summary judgment is that Mayor Dale believes
18 he has the power to both veto and approve an ordinance.
19 The statute granting the mayor the power of veto is very
20 specific. The mayor has the power to approve or to
21 veto. He does not have the power to approve and to
22 veto. Mayor Dale believes that he has the power to do
23 both. I believe he's incorrect. The statute is very
24 clear; it is one or the other. He cannot do both.

25 Your Honor, the fourth reason we're entitled

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1 to summary judgment in this case is that when Mayor Dale
2 approved the ordinance and parted with possession and
3 control of the ordinance on August 16th -- excuse me.
4 August 16th, yes. When he handed it to the city clerk,
5 and the city clerk left with the statute, he lost the
6 right to veto that ordinance. That's the Polscamp case
7 that's cited in our brief, Your Honor. When he parted
8 with possession and control, he lost whatever veto power
9 he had.

10 In summary, Your Honor, there simply is no
11 veto power that exists in the mayor of the city of Nampa
12 to veto a street vacation proceeding. It's a power that
13 is inconsistent with a quasi-judicial proceeding. It's
14 inappropriate and a violation of due process that he
15 exercised in this case.

16 THE COURT: Okay. Thank you. Let's hear from the
17 City of Nampa on the issue.

18 MR. KORMANIK: Thank you, Your Honor.

19 At the outset, I feel compelled, on behalf of
20 the Mayor and the City, to take issue with some of
21 Counsel's statements with regard to the relationship
22 between the Mayor and Mr. McKnight, the president of
23 Scotty's Duro-Bilt.

24 Counsel alluded to the fact that the Mayor
25 instantly recognized Mr. McKnight as a friend. Well,

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1 Council. Now, there's evidence in the record that the
2 landowners in 2004 are not all the same landowners that
3 signed the street vacation agreement. And that's
4 important, because under the street vacation statute,
5 each adjoining landowner must consent to the vacation,
6 otherwise, as a matter of law, it cannot happen,
7 regardless of what the City Council does.

8 The City Council can approve it, but it would
9 be contrary to law. And that's important in this case,
10 because Goodman represents to the Court, and their
11 entire argument appears to be based on the fact that
12 everybody agreed in 1995, so everything in 2004 was
13 proper. And that's just not the case, Judge. There are
14 other property owners involved.

15 And there's evidence in the record before the
16 Court that those property owners do not agree to
17 vacating that street. Additional businesses have been
18 located there. The property owners who located those
19 additional businesses, specifically Blazen Burgers, I
20 think is the name of the business, say that they need
21 that street for customer access.

22 And those owners, the Blamires, were never
23 parties to the original street vacation agreement. And
24 Goodman never obtained their consent to vacate the
25 street in 2004, which is when, presumably, the street

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1 Judge, there's nothing in the record about that. In
2 fact, I believe if you look in Mr. McKnight's testimony,
3 he'll tell you that he and the Mayor aren't friends.
4 They know each other, they're acquaintances, they run
5 into each other, but they're not friends.

6 Counsel also alluded to the fact that the
7 Mayor taught Mr. McKnight's children band in school.
8 Well, if you look at the affidavit submitted --
9 Mr. Runft's affidavit submitted in support of summary
10 judgment, Mr. McKnight's specific testimony is: "Did
11 your children have the Mayor as their band instructor?"
12 And the answer was, "No, sir." So I just -- on behalf
13 of the Mayor, I feel compelled to respond to those
14 statements.

15 Now, the undisputed facts in this case are:
16 In 1995 Goodman obtained a street vacation agreement by
17 the adjoining landowners of 1st Avenue South. And the
18 Nampa City Council first considered whether or not to
19 vacate 1st Avenue South. Also, in 1995, Goodman was
20 required to communicate with the Nampa fire marshal with
21 regard to access for ingress and egress. It didn't do
22 so. And that's evidenced in Exhibit C, page 2 to
23 Mr. Runft's affidavit.

24 Nine years later Mr. Goodman wants to sell the
25 property and puts the issue back before the City

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1 would have been vacated when the City Council acted on
2 the ordinance finally.

3 And that's very important, because, I think,
4 at the end of the day, what Goodman is asking this Court
5 to do would be contrary to law. If the Court issues a
6 writ forcing the City to publish an ordinance vacating
7 1st Avenue South, and all of the landowners along 1st
8 Avenue South do not agree to that street vacation, it's
9 contrary to law.

10 THE COURT: Doesn't the statute provide that any
11 agreed person may appeal after publication?

12 MR. KORMANIK: Yes, it does, Judge.

13 THE COURT: And publication triggers the time for
14 appeal?

15 MR. KORMANIK: Yes, it does. Absolutely. And I
16 was going to raise that in regard to whether or not a
17 writ is even appropriate in this circumstance. But,
18 yes, the landowners affected along the street would have
19 the avenue of appeal under 15-1322, I believe is the
20 statutory provision. That's correct, 15-1322.

21 But I ask myself, does it make sense for the
22 Court to publish -- to order published an ordinance that
23 there's evidence in the record is going to be challenged
24 on appeal because not all the landowners consent, and
25 not all of the landowners' consent was sought by the

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1 applicant? So it's contrary to 50-1321, which requires
2 all the consent of the adjoining landowners.
3 Also important, I think, and the undisputed
4 fact is, the ordinance was never published. And I think
5 that takes us out of the ambit of the California case
6 relied on -- the Polscamp case relied on by Goodman. In
7 that case, Mayor Bradley signed the ordinance, it was
8 taken out of his control, and it was published in the
9 manner which the statute required in Los Angeles. Then
10 the Mayor attempted to veto it.

11 Well, the Polscamp court said, no, you can't
12 do that, because it's already been -- it's left your
13 control. It's been published. All the statutory
14 requirements have been satisfied. So you can't now go
15 back and change your mind, or attempt to veto a properly
16 passed and enacted ordinance.

17 In this case, the ordinance was never enacted.
18 And there's a difference. Although, it's a highly
19 technical difference, I think. The Mayor signed it, the
20 clerk had it, but it was never published. So it was
21 never effective.

22 THE COURT: It never became effective under the
23 statute, but is publication a ministerial function as
24 opposed to some kind of discretionary function?

25 MR. KORMANIK: Well, Judge, I think in most cases
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1 it's ministerial. But I think, in this case, it is not,
2 because of the specific requirements that all of the
3 landowners along the street grant their consent. And,
4 also, given the facts and circumstances of this case
5 with nine years passing between the first time it was
6 brought before the City and Goodman sought to vacate the
7 street, and then the action in 2004. I think there may
8 be a difference.

9 I don't think that in this case it was purely
10 ministerial, given the facts and circumstances known at
11 the time that the ordinance was vetoed. A Writ of
12 Mandate is only appropriate, as the Court is aware, if
13 the applicant demonstrates it has a clear legal right
14 and does not have a speedy, just, and adequate remedy of
15 law.

16 The Nampa respondents argue that there's no
17 clear legal right, and there is a plain, adequate,
18 speedy remedy at law. And I'm going to address those in
19 reverse order just for my argument's sake.

20 Interestingly, 50-1322 specifically provides
21 for an appeal from the refusal of an application of a
22 street vacation. Now, if the application is refused,
23 then it goes without saying that it's never going to be
24 published. So the refusal -- the time period begins
25 when it's refused, and the parties become aware of that.

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1 Goodman, interestingly, in its reply brief
2 says, no, wait a second -- pages 10 and 11 says, no,
3 wait a second, 50-1322 may say what it says, the
4 procedure is no longer valid. Judge, that simply is not
5 founded in the law. The statute 50-1322 gives an
6 applicant, or any other effected party the legal right
7 to appeal. The procedure for that appeal is irrelevant.
8 The right is established in 50-1322.

9 The procedure is set forth now in Idaho Rules
10 of Civil Procedure 84, and the specific provisions of
11 that. And we've been before the Court before on this,
12 that the Rules of Civil Procedure apply in writ
13 proceedings. So there is a plain, speedy, adequate
14 remedy at law.

15 There is no impending sale of the property.
16 There is no evidence in the record, whatsoever, that the
17 normal appellate process that Goodman had available to
18 it would not have satisfied the requirements of a plain,
19 speedy, and adequate remedy.

20 Interestingly, also, Goodman has included in
21 its filings with the Court its notice of tort claim. I
22 think that goes along in conjunction with the appeal
23 process. If they had a problem with or a concern about
24 the process that was utilized by the City of Nampa
25 between -- any time between, really, 1995 and September

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1 of 2004, they had an appeals process to deal with it.
2 So a writ is not appropriate, because there is a plain,
3 speedy, and adequate remedy.

4 Also, a writ is not appropriate because
5 Goodman cannot demonstrate a clear legal right to the
6 relief it seeks. Goodman contends that the Mayor has
7 absolutely no right to veto a street vacation ordinance.
8 That just goes contrary to Idaho Code and the Nampa City
9 Code. Idaho Code Section 50-6.1 specifically states
10 that the mayor shall have the power to veto or sign any
11 ordinance passed by the city council. It doesn't say,
12 except for street vacation ordinances.

13 And it's important to note that -- although we
14 didn't brief this, the Court is well aware that statutes
15 are presumed constitutional. So there's no reason to
16 think that 50-611 is not a constitutional grant of
17 authority to mayors of the cities of this state, whether
18 they be for other ordinances, or with regard to city
19 street vacation agreements.

20 The Nampa City Code Section 2-2-2-5 also
21 grants the mayor the power to veto any ordinance.
22 That's presumed constitutional as well. So the question
23 of whether or not the mayor actually has the authority
24 to veto a street vacation agreement, I think, has been
25 answered by the statutes, which are presumed

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1 constitutional.
2 Whether or not the veto was appropriate,
3 again, I've distinguished Polscamp, I believe, for the
4 Court. Here the ordinance was never published. Here
5 the Mayor became aware of facts and circumstances, which
6 indicated that the ordinance was not in compliance with
7 the Idaho Code, which requires consent of all the
8 adjoining landowners. So Polscamp, I think, is
9 distinguishable. The same standard that a general
10 ordinance of a general nature, unless otherwise required
11 by law, before they take effect must be published.

12 That's also set forth in the Nampa City Code, 2-2-3-7.
13 There is a plain, speedy, adequate remedy at
14 law, which Goodman has made allusion -- alluded to --
15 not allusion, I'm sorry -- in it's filing, saying it
16 would be useless to file an appeal because the City's
17 position is already stated. Well, the City's position
18 is stated, because Goodman needs to procure the consent
19 of all the adjoining landowners.

20 It's not the City's job to get the consent of
21 everyone along 1st Avenue South to vacate that street.
22 It's Goodman's job, because they're the applicant. They
23 have not been able to do that, so they are seeking
24 resort in the extraordinary remedy of a Writ of Mandate
25 because they can't now get the present adjoining

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1 landowners to agree to vacate the street.
2 I think, under the circumstances, issuance of
3 a Writ of Mandate is not appropriate in this matter.
4 And, in fact, it's not available to Goodman Oil.
5 And, finally, Judge, as I've stated previously
6 in my argument, I think what Goodman is asking the Court
7 to do, is to publish an ordinance that is contrary to
8 statute. The Court has evidence in the record that all
9 of the landowners do not consent to the vacation of that
10 street. And if the Court were ordered to order the City
11 of Nampa to publish the ordinance, it would be ordering
12 it to publish an ordinance that violates 50-1312 of the
13 Idaho Code.

14 Judge, that's all I have. We'll rely on our
15 briefing. If you have any questions, I'd be happy to
16 take them.

17 THE COURT: Now, Nampa's ordinance 2-2-3-7 talks
18 about the effective date of an ordinance. And it
19 clearly -- and this goes along with the prior sections.
20 There's passage of the ordinance by the city council,
21 there is approval by the mayor, and followed by
22 publication.

23 MR. KORMANIK: Correct.

24 THE COURT: Okay. And I asked you a minute ago
25 whether or not publication was strictly a ministerial

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1 function rather than a discretionary function. And I
2 think somewhere there's a requirement that it be
3 published within a certain number of days.

4 MR. KORMANIK: Judge, I believe that --

5 THE COURT: I'm trying to find that in here.

6 MR. KORMANIK: That might be in 50-901. If that's
7 what the Court is referring to. It says --

8 THE COURT: Published within 30 days?

9 MR. KORMANIK: "Shall before they take effect and
10 within one month after they are passed" --

11 THE COURT: Okay. Yes.

12 MR. KORMANIK: -- "be published in full."

13 THE COURT: Okay. So that's a statutory
14 requirement?

15 MR. KORMANIK: Yes.

16 THE COURT: Okay. Thanks. I think that's all I
17 had.

18 MR. KORMANIK: Thank you, Judge.

19 THE COURT: Mr. Steele, anything further?

20 MR. STEELE: Your Honor, just a couple of items.

21 The Nampa City Code granting the mayor the
22 power of veto does not trump the Constitution of the
23 United States, or the Constitution of the State of
24 Idaho, the due process requirements, the pronouncements
25 of the Idaho Supreme Court dealing with how to conduct

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1 public hearings, providing appropriate notice,
2 conducting fact finding, cutting off fact finding, and
3 then rendering findings of fact and conclusions of law.

4 The exercise of a veto power by the mayor is
5 simply inconsistent with the subject matter that we're
6 dealing with in this case. The veto is inconsistent
7 with the proceeding -- a quasi-judicial proceeding. The
8 veto power of the mayor is not found in the street
9 vacation sections of the Idaho code. And the veto power
10 given to the mayor does not include the power to do
11 both, approve and veto. It's one or the other.

12 Your Honor, I believe that the legal arguments
13 are simply overpowering. The veto was simply
14 inappropriately exercised in this case. We're entitled
15 to a Writ of Mandate. The possible appeal that is
16 mentioned by the City of Nampa is certainly no reason to
17 delay the entry of judgment in this case.

18 There is a difference between a remedy and a
19 procedure. A possible appeal that is mentioned is a
20 procedural item, not a remedy. We're entitled to the
21 remedy of publication of this ordinance. And I believe
22 it's very clear.

23 Thank you, Your Honor.

24 THE COURT: What about the issue raised by counsel
25 that there was not consent of all the adjoining

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1 landowners?
2 MR. STEELE: Consent's a threshold issue, Your
3 Honor. The consent issue was addressed by Mr. Holm when
4 he determined that the proceeding should go forward,
5 that the street vacation proceeding was entitled to its
6 third reading or final reading, and that the ordinance
7 was entitled to be passed by the city ordinance, and was
8 entitled to be approved by the mayor.
9 That's Mr. Holm's function. That's what he
10 does. That's his job. He's the expert in this area.
11 He's the one that recommended that the proceedings go
12 forward.
13 THE COURT: Now, procedurally, the request when it
14 was first filed in, what, 1995?
15 MR. STEELE: The summer of 1995.
16 THE COURT: Yeah. What happened in 1995?
17 MR. STEELE: A hearing was held, a staff report was
18 prepared. At the hearing the staff report was presented
19 to the City Council. The staff report recommended that
20 the street be vacated. No one appeared in opposition at
21 the hearing. The fact finding process was closed. The
22 ordinance was read at the next two council meetings.
23 And at that point it was tabled.
24 THE COURT: And in 2004 it was taken off the table?
25 MR. STEELE: It was taken off the table for its

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1 final reading. Thank you.
2 THE COURT: Thank you. Anything further in light
3 of that, Mr. Kormanik?
4 MR. KORMANIK: No, Judge.
5 THE COURT: I have spent a considerable amount of
6 time looking at this matter. This is before the Court
7 on the issue of summary judgment on the claim for an
8 application for a Writ of Mandate. It seeks an order
9 compelling the City of Nampa to publish Ordinance No.
10 3374 vacating 1st Avenue South between 2nd Street South
11 and 3rd Street South in Nampa.
12 Again, as I noted in the preceding case, that
13 summary judgment is appropriate where the pleadings,
14 depositions, admissions, and affidavits on file show
15 that there are no genuine issues of material fact, and
16 the moving party is entitled to judgment as a matter of
17 law.
18 The burden, at all times, of proving the
19 absence of a genuine issue of material fact rests upon
20 the moving party. That's G&M Farms versus Funk
21 Irrigation Company at 119 Idaho 514.
22 In considering a motion for summary judgment,
23 the Court must liberally construe the facts and
24 inferences contained in the existing record in favor of
25 the party opposing the motion. That's Bonds versus

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1 Sedwicks 119 Idaho 539.
2 To withstand the motion for summary judgment,
3 the nonmoving parties' case must be anchored in
4 something more solid than speculation. A mere scintilla
5 of evidence is not enough to create a genuine issue of
6 material fact. That's Edwards versus Chemco, Inc. at
7 111 Idaho 851.
8 In reviewing this, this is an application for
9 a Writ of Mandate. Rule 74 of the Idaho Rules of Civil
10 Procedure deals with Writs of Mandate. It provides
11 that, "Any party wishing to contest an application for a
12 peremptory Writ of Mandate must file a responsive
13 pleading to the complaint or petition in the same manner
14 as an answer to any other civil complaint or any other
15 complaint in a civil action. The plaintiff or
16 petitioner may then proceed against such responsive
17 pleading in the same manner as any other civil action."
18 Clearly, summary judgment is an appropriate
19 method for the petitioners to proceed against -- for the
20 City to proceed against -- the petitioners to proceed
21 against the responsive pleading filed by the City.
22 Rule 74 (d) deals with judgment -- trial and
23 judgment in the matter. Idaho Code Chapter 3 Title 7
24 also deals with Writs of Mandamus. It provides, "The
25 district court may issue such to compel performance of

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1 an act which the law specially joins as a duty resulting
2 from an office, trust, or station." 7-303 requires
3 that, "A writ must be issued in all cases where there is
4 not a plain, speedy, and adequate remedy in the ordinary
5 course of law."
6 In this case we have proceeded through this
7 matter. The petition has been filed, the response to
8 the pleadings have been filed, discovery has been
9 engaged in, and we're now before the Court on the
10 petitioner's motion for summary judgment. Appropriate
11 notice has been given to the parties.
12 This is an issue arising from the
13 consideration by the Nampa City Council of an ordinance
14 to vacate a street. Idaho Code 5311 specifically
15 empowers cities to both "create, open, widen, or extend
16 any street, avenue, alley, or lane, as well as to vacate
17 the same whenever deemed expedient for the public good."
18 It provides for the reversion of any vacated
19 land. Idaho Code Section 50-1321 provides for the
20 necessity for the consent of adjoining property owners.
21 Specifically, it provides that, "No vacation of a public
22 street shall take place unless the consent of the
23 adjoining owners be obtained in writing and delivered to
24 the public highway agency having jurisdiction over the
25 public street or right of way."

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1 50-1322 provides for an appeal by any person
2 aggrieved. It requires that it be made within 20 days
3 after the first publication or posting of the statement
4 as it required. Idaho Code 50-901 deals with the
5 effective dates of ordinances and requires that, "They
6 shall, before they take effect, and within one month
7 after they are passed, be published in full or in
8 summary as provided in the other code sections."

9 Idaho Code 50-902 provides for the procedure
10 for the passage of ordinances. 50-611 provides that,
11 "The mayor shall have the power to veto or sign any
12 ordinance passed by the city council." And provides for
13 an override of any veto, which is not in issue in this
14 particular case.

15 Idaho Code 67-5279 provides for a judicial
16 review, along with Rule 84 of the Rules of Civil
17 Procedure. The type of relief available in judicial
18 review is specified in 67-5279, which provides that, "If
19 the agency action is not affirmed, it shall be set aside
20 in whole or part and remanded for further proceedings as
21 necessary."

22 The Nampa City Code deals with the passage of
23 ordinances. Section 2-2-3-3 provides for how an
24 ordinance is passed. Nampa City Code 2-2-3-4 provides
25 that, "When an ordinance is passed, the city clerk shall

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1 sign it, and the date of passage by the council shall be
2 added thereto, and it shall, within three days
3 thereafter, be presented to the mayor for his approval.
4 If he approves the same, he shall attach his signature
5 thereto."

6 2-2-3-5 provides for basically a veto and an
7 override of that veto, and also for the effect of the
8 mayor's neglect or refusal to sign the ordinance where
9 he returns it with his objections in writing.

10 The date of passage of an ordinance is set out
11 in Nampa City Code 2-2-3-6. Considered passed on one of
12 the following dates, the date of approval by the mayor.
13 Nampa Code Section 2-2-3-7 provides that, "An ordinance
14 shall take effect and be enforced from and after its
15 passage, approval, and publication." It further
16 provides that, "An ordinance shall be deemed published
17 when it appears in one issue of the official newspaper
18 published within the city."

19 That is the framework that this case is
20 presented in. The standard of review of a district
21 court's failure to issue a Writ of Mandamus is the same
22 as that required of the district court. The party
23 seeking a Writ of Mandate must establish a clear legal
24 right to the relief sought.

25 Additionally, the writ will not issue where

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1 the petitioner has a claim to speedy and adequate remedy
2 in the ordinary course of law. That's *Almagren versus*
3 *Idaho Department of Lands* at 136 Idaho 180.

4 "A Writ of Mandamus will lie if the officer
5 against whom the writ is brought has a clear legal duty
6 to perform, and if the desired act sought to be
7 compelled is ministerial or executive in nature and does
8 not require the exercise of discretion." Again, that's
9 the *Almagren* case.

10 "Proceedings for a Writ of Mandamus are not
11 available to review. The acts in respect to matters as
12 to which they are vested with discretion unless it
13 clearly appears that they have acted arbitrarily and
14 unjustly and in abuse of the discretion vested in them."
15 That's *Brady versus The City of Homedale* at 130 Idaho
16 569.

17 Again, also holding that a Writ of Mandamus
18 will not lie unless the party seeking the writ has a
19 clear right to have it done -- to have done that which
20 the petitioner seeks, and unless it is the clear legal
21 duty of the officer to so act.

22 A Writ of Mandate will not issue to compel the
23 performance of a discretionary act. Our Supreme Court
24 has previously held that -- this Court has repeatedly
25 held that mandamus is not a writ of right. The

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1 allowance or refusal of such a risk is a matter of
2 discretion with the court before whom the application is
3 heard. That's *Hunky versus Foot* at 84 Idaho 391.

4 The Supreme Court has held that, "Mandamus
5 will lie if the officer against whom the writ is sought
6 has a clear legal duty to perform the desired act, and
7 if the act sought to be compelled is ministerial or
8 executive in nature." That's *Idaho Falls Redevelopment*
9 *Agency versus Countrymen* at 118 Idaho 43.

10 The existence of an adequate remedy in the
11 ordinary course of law, either legal or equitable in
12 nature, will prevent the issuance of a writ. And the
13 party seeking the writ must prove that no such remedy
14 exists.

15 The Court has examined *Polscamp versus*
16 *Martinez*, the California case cited by the petitioners
17 in this matter. That's 2 California Appellate 4th at
18 854. In that case there is somewhat of a difference
19 between the factual scenario there and the factual
20 scenario in this case; in that, in that case the
21 ordinance was published.

22 The California appellate court concluded that
23 under the Los Angeles city charter, the ordinance was
24 still in the process of being adopted, although, it was
25 still in the possession of the mayor. Therefore, the

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1 court held that during the time the legislation was
2 under his custody and control, there is nothing to
3 prevent the mayor from reconsidering any action as to
4 his approval or disapproval of the ordinance.

5 The notes say, "However, it must be concluded
6 that once the chief executive has relinquished
7 possession of the legislation with his signature and
8 transmitted it to the appropriate depository agent" --
9 in this case, presumably, the city clerk -- "the
10 measures' character as a properly enacted law becomes
11 immutable," the City of Palm Springs versus Ringwald at
12 52 California 2nd 620.

13 The California Supreme Court has also held
14 that a mandamus is the proper remedy to compel the city
15 clerk to publish an ordinance, so long as the proposed
16 ordinance meets the requirements of law, and the act
17 demanded is a ministerial duty.

18 In this case, I think the issue presented is
19 one of first impression. I don't think there is any
20 factual dispute, but that the Nampa City Council passed
21 the ordinance in question. That's ordinance 3374. They
22 passed it on August 16th in the manner required by law
23 and by Nampa ordinances.

24 On that date, the Mayor -- again, I don't
25 think there's any factual dispute at all that the Mayor

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1 and concludes that the act of publishing the ordinance
2 is strictly a ministerial function. It is not a
3 discretionary function. The City Council had already
4 enacted -- had passed the ordinance in the manner
5 required by law. The Mayor had approved the ordinance.
6 The Mayor released it from his possession and control.
7 And the act of publication is strictly a ministerial
8 act. It's not a discretionary act.

9 The Court finds that the Nampa city clerk had
10 a clear legal duty to perform the desired act, and that
11 the act that is sought to be compelled is ministerial
12 and not discretionary. The Court further finds that the
13 petitioner's have established that they do not have an
14 adequate remedy in the ordinary course of law, either
15 legal or equitable in nature such as will prevent the
16 issuance of a writ.

17 Specifically, the appeal right given is
18 triggered by publication or posting the ordinance
19 approved in the publication or posting. The judicial
20 review, if they were successful, simply remands it to
21 the Nampa City Council for further action.

22 The Court finds that the ordinance was
23 previously passed by the Nampa City Council, approved by
24 the Mayor, and that there is no adequate remedy in the
25 ordinary course of law.

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1 signed and approved that ordinance on the same date.
2 The Mayor then declared the ordinance be passed, and
3 directed the city clerk to report it as required by law.

4 The city clerk delivered the ordinance to the
5 Idaho Press Tribune on August 17th with instructions
6 that it be published. Prior to publication, the city
7 clerk contacted the Press Tribune and canceled the
8 publication request.

9 And on September 2nd the Mayor then vetoed the
10 ordinance, asserting that one of the property owners
11 adjacent to 1st Avenue South had withdrawn its consent
12 to the vacation. And that's the factual scenario that
13 leads to this case.

14 The statutes and ordinances of the City of
15 Nampa set forth the procedure for the city council to
16 pass an ordinance, set forth a procedure for the
17 ordinance that is passed to be transmitted to the mayor,
18 and for the mayor to approve the ordinance.

19 In this case, the Mayor did approve the
20 ordinance, he relinquished control of the ordinance to
21 the clerk with the direction that it be published, and
22 subsequently withdrew it from the -- had the clerk
23 withdraw it from the Idaho Press Tribune, and then
24 vetoed it.

25 The Court, in reviewing the case law, finds

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1 The Court so finds and concludes, and I will
2 issue the Writ of Mandate for the publication of the
3 ordinance.

4 If you would prepare an appropriate order and
5 writ please and submit it to me, Mr. Steele.

6 MR. STEELE: Yes, Your Honor, I will.

7 THE COURT: Now, we still have pending the petition
8 for judicial review. If the City -- I will -- I don't
9 know. The City of Nampa might desire to, since it's the
10 question of first impression, appeal -- if it will take
11 an interlocutory appeal on this matter or not. I will
12 not sign the order or the writ for a period of five days
13 so you can make any motions that you may want to stay
14 the action or to appeal interlocutory.

15 MR. KORMANIK: Judge, I would simply ask that
16 Counsel prepare the order with a 54 (b) certificate, and
17 then I can consult with the City of Nampa about what
18 action to take. But if the 54 (b) certificate is
19 included, then we have that action available without
20 further action of the Court.

21 THE COURT: I would ask that you do that, please,
22 Mr. Steele. With respect to that, if there is an
23 interlocutory appeal, as I understand the law, I would
24 be the vested jurisdiction on the remaining issues in
25 this case until that appeal is decided. So I'll just

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10 (Pages 37 to 40)

1 throw that out so that both parties are aware that there
2 is also that issue. I think I'm limited to doing only
3 the things I can do while the case is on appeal.

4 MR. KORMANIK: Judge, that's correct. And I've had
5 some recent experience with 54 (b), and there may be
6 some circumstances where you could potentially proceed
7 with the decision on the judicial review of the
8 ordinance.

9 Especially in this case, because I think
10 publication of the ordinance is wholly separate. And a
11 judicial review of the procedure and the decision of the
12 city council with regard to the width of easements is
13 sufficiently different from that. But, of course, that
14 would be up to the Supreme Court and yourself.

15 THE COURT: Okay. And that can be addressed
16 depending on what happens. I'm just throwing that issue
17 out because I know it's there.

18 MR. KORMANIK: Thank you, Judge.

19 THE COURT: Is there anything else that we need to
20 address, Counsel?

21 MR. STEELE: Not at this time, Your Honor.

22 THE COURT: Very well. Thank you both very much.
23 Your briefing and arguments were very enlightening. And
24 it was very helpful in understanding the whole matter.

25 MR. STEELE: Thank you very much, Your Honor.

THE COURT: And we'll be in recess.

MR. KORMANIK: Thank you.

(The proceedings were concluded.)

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1 REPORTER'S CERTIFICATE
2 STATE OF IDAHO)

3) ss.
4 County of Ada)

5 I, ANDREA L. CHANDLER, Pro Tem Reporter,
6 Certified Shorthand Reporter and Notary Public in and
7 for the State of Idaho, do hereby certify:

8 That I am the reporter who took the proceedings had
9 in the above-entitled action in machine shorthand and
10 thereafter the same was reduced into typewriting under
11 my direct supervision; and

12 That the foregoing reporter's transcript contains a
13 full, true, and accurate record of the proceedings had
14 in the above and foregoing cause, which was heard at
15 Boise, Idaho.

16 IN WITNESS WHEREOF, I have hereunto set my hand
17 this 11th day of September, 2006.

18

19 ANDREA L. CHANDLER
20 Pro Tem Reporter, RPR,
21 and Notary Public in and
22 for the State of Idaho.

23

24

25

My Commission Expires: 7-20-10

24 My Commission Expires: 7-20-10

25

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11 (Pages 41 to 42)

SUSAN E. BUXTON # 4041
 TAMMY A. ZOKAN # 5450
 MOORE SMITH BUXTON & TURCKE, CHARTERED
 Attorneys at Law
 950 West Bannock, Suite 520
 Boise, Idaho 83702
 Telephone: (208) 331-1800
 Facsimile: (208) 331-1202
 Email: taz@msbtlaw.com

Ord 10-24-06 HOF
FILED
 A.M. *3:00* P.M.
OCT 16 2006
 CANYON COUNTY CLERK
 P. SALAS, DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)	
)	
)	
Plaintiff,	)	Case No. CV 05-9800
)	
v.)	
	)	DEFENDANT'S RESPONSE IN
SCOTTY'S DURO-BILT GENERATOR,	)	OBJECTION TO PLAINTIFF'S
INC., and Idaho corporation; and DOES I	)	MOTION FOR RECONSIDERATION
through V.)	
)	
Defendant.)	
)	

COME NOW, Defendants Scotty's Duro-Bilt Generator, Inc. and dismissed Defendants Bart and Alane McKnight ("Duro-Bilt" or "Defendants"), by an through their attorneys of record, Moore, Smith, Buxton & Turcke, Chartered, and submit their Response in Objection to Plaintiff's Motion for Reconsideration received on October 4, 2006. Defendants' Response is supported by this Response and the pleadings and supporting documents filed by Defendants in this matter.

I. SUMMARY

Plaintiff's Complaint named Defendants Duro-Bilt Bart, Inc. and Bart and Alane McKnight as defendants, alleging that Bart and Alane McKnight were the "alter egos" of Defendant Duro-Bilt. Complaint at ¶¶ 2-3. Plaintiff's Complaint alleged the named "Defendants" breached "their" obligations under the Vacation Agreement and "their" actions caused various torts against Plaintiff. Complaint, Counts 1-4. Plaintiff's Complaint prays for relief against "Duro-Bilt," requests judgment be entered "against Duro-Bilt," requests "a decree requiring Duro-Bilt to specifically perform," and requests an award of costs and fees "against Duro-Bilt." Complaint at p. 10, ¶¶ 1-3.

Defendants moved to dismiss Plaintiff's Complaint in its entirety against Bart and Alane McKnight because Plaintiff did not plead or make any showing that Bart or Alane McKnight are alter egos of Duro-Bilt and should be held to be personally liable for the obligations of Duro-Bilt. See Def's Motion to Dismiss and Motion for Summary Judgment and Memorandum in Support (filed on June 16, 2006); see *Hutchison v. Anderson*, 130 Idaho 936, 940, 950 P.2d 1275 (Ct. App. 1997). Plaintiff filed its response to Defendants' Motion for Summary Judgment and Motion to dismiss on August 22, 2006, but failed to object to Defendants' Motion to Dismiss, or provide any support for its theory that the McKnights were the alter egos of Duro-Bilt and should be held individually liable, or otherwise address Defendants' Motion to Dismiss. Plf's Br. in Response to Def's Motion for Summary Judgment and Motion to Dismiss (Aug. 22, 2006).

The Court dismissed Plaintiff's Complaint against the McKnights on September 5, 2006, and entered its written Order of Dismissal on September 19, 2006.

On October 4, 2006, Plaintiff served its Motion for Reconsideration on Defendants. The Motion asserts a new legal theory for Plaintiff's claims against Defendants; it does not assert new facts to provide a basis for this Court's reconsideration of its Order dismissing Bart and Alane McKnight. Plaintiff did not previously offer any legal theory to support its claims against Bart or Alane McKnight individually nor any defense against Defendants' Motion to Dismiss. Furthermore, at hearing on September 5, 2006, Defendant failed to assert any position remotely resembling the position asserted in its Motion for Reconsideration received on October 4, 2006. Plaintiff's having failed to present any defense to Defendants Motion to Dismiss when it had the opportunity, should not be allowed to craft its theory for the first time, or re-craft its theory, after the Court has rendered its decision.

II. ARGUMENT

A. Plaintiff's Attempt at a Second Bite of the Apple Must Fail.

Plaintiff is not entitled to raise new legal theories at this late date. Plaintiff has submitted, for the first time, the legal theory that "piercing the corporate veil" is not a requirement to hold Bart or Alane McKnight individually liable for alleged torts. While neither Plaintiff's theory nor any alleged legal basis therefore is clear, Plaintiff's delinquent attempt to withstand dismissal should fail. Plaintiff does not allege that its new theory has resulted from new facts, a change in the law, or otherwise was unavailable to it during litigation of the issue. Plaintiff could have and should have raised any defense to Defendants' Motion in its briefing and at argument. It did not. Plaintiff should not be allowed to raise new theories or switch theories and re-litigate old issues when said theories were available to Plaintiff at the appropriate time.

The Ninth Circuit's treatment of motions for reconsideration is instructive: "A motion for reconsideration ... should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or where there is an intervening change in the law." *McDowell v. Caleron*, 197 F.3d 1253 (9th Cir. 1999) (citations omitted). (In federal court there is no specific rule motions for reconsideration and such motions may be evaluated under Fed. R.Civ. Pro. 59(e) motion to alter or amend, or 60(b) motion for relief from judgment.) There are no highly unusual circumstances warranting reconsideration of the Order of Dismissal entered in this case.

B. There is no Basis to Reconsider the Court's Order of Dismissal.

Plaintiff has not submitted new evidence in support of its Motion for Reconsideration. "When considering a motion [pursuant to I.R.C.P. 11(a)(2)(B)], the trial court should take into account any new facts presented by the moving party that bear on the correctness of the interlocutory order. The burden is on the moving party to bring the trial court's attention to the new facts." *Coeur D'Alene Mining Co. v. First National Bank of North Idaho*, 118 Idaho 812821, 800 P.2d 1026 (1990); *Jensen v. State*, 139 Idaho 57, 64, 72 P.3d 897 (2003) (without supporting affidavits, there was no basis for asking the trial court to reconsider its earlier decision"). The Affidavit of Jon M. Steele in Support of Goodman's Motion for Reconsideration does not present new facts. Mr. Steele's Affidavit merely restates portions of Plaintiff's Complaint, Affidavit at ¶¶ 4-5, and asserts Plaintiff's new legal theory that "piercing the corporate veil" is not required to hold an individual liable for alleged torts, Affidavit at ¶¶ 5-6.

Even if this Court were to consider Plaintiff's new legal theory, Plaintiff has cited no

authority for its new theory. The case cited by Plaintiff, *Davis v. Professional Business Servs.*, 109 Idaho 810, 813, 712 P.2d 511, 514 (1985), did not hold that a plaintiff need not meet the elements for piercing the corporate veil when a plaintiff has alleged tort. Plf's Br. in Support of Motion for Reconsideration at pp. 2-3. In *Davis*, the plaintiff failed to allege tort violations and the court determined that it could not assess any tort liability against the individual defendant. *Id.* at p. 3; *Davis* at 815. The court did not issue a holding on the elements of the tort claims in that case.


Furthermore, Plaintiff's Complaint was filed against Bart and Alane McKnight "*as alter egos*" of Duro-Bilt, Inc., alleging "*their*" actions and they as "*Defendants*" breached their obligations and committed various torts. Indeed, Plaintiff's prayer for relief seeks relief only as against the corporation. While Plaintiff attempts to re-craft is allegations against Bart McKnight, Plaintiff still has not presented any facts related to Alane McKnight individually. In any event, Plaintiff has not requested any relief against Bart or Alane McKnight, made no attempt to meet the standard for piercing the corporate veil, and still has not alleged a claim against Bart or Alane McKnight upon which relief can be granted.

III. CONCLUSION

Plaintiff's Motion for Reconsideration should be denied, the Court's Order of Dismissal under Idaho Rule of Civil Procedure 12(b)(6) affirmed, and Defendants should be awarded attorney fees and costs incurred in responding to Plaintiff's Motion Idaho in accordance with Code §§ 12-120 and 12-121.

DATED this 16th day of October, 2006.

MOORE SMITH BUXTON & TURCKE, CHTD.

By: 

Tammy A. Zokan
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of October, 2006, I caused a true and correct copy of the foregoing RESPONSE by the method indicated below, and addressed to the following:

Jon M. Steele
Karl J. F. Runft
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Facsimile (208) 343-3246
Email: jmsteele@runftlaw.com

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile



Tammy A. Zokan

I.

**GOODMAN SEEKS SUMMARY JUDGMENT ON THIS ISSUE OF
DEFENDANT DURO-BILT'S LIABILITY FOR BREACH OF THE PROPERTY
OWNERS VACATION AGREEMENT.**

a. Duro-Bilt Consented to the Vacation of First Avenue South.

The Vacation Agreement executed by Duro-Bilt in 1995 contains Duro-Bilt's consent to the vacation of First Avenue South. Consent is a prerequisite to the vacation of any street. Idaho Code § 50-1321.

The only Duro-Bilt consent provided to the Nampa Planning Director, to the Nampa City Council and to Judge Morfitt was the Vacation Agreement executed by Duro-Bilt in 1995. No one but Duro-Bilt believes consent is an issue in this case.

The issue of Duro-Bilt's consent was administratively resolved by the Nampa Planning Director and has been judicially resolved by Judge Morfitt.

b. Duro-Bilt Failed to Contest the Vacation Ordinance.

The City of Nampa in the *Goodman Mandamus Proceeding* made the same exact argument; that is, Duro-Bilt did not consent to the vacation. *See*, Reporter's Transcript of July 15, 2005 before Judge Morfitt, pp. 19-42. Goodman delivered the original Reporter's Transcript to Judge Hoff on September 12, 2006.

In the *Goodman Mandamus Proceeding* Judge Morfitt addressed this issue by pointing out to the City that Idaho Code § 50-1322 entitled, Appeal from Order Granting or Denying Application to Vacate, provides that any "aggrieved" person may appeal the grant or denial of an application for vacation.

However, the appeal must be made within 20 days after the first publication of the vacation ordinance. The City's vacation ordinance was published on September 5, 2005. See, Notice of Compliance with Peremptory Writ of Mandamus, attached as Exhibit A.

Duro-Bilt's consent was required for the vacation of First Avenue South. If Duro-Bilt objected its only remedy was to appeal within 20 days of September 5, 2005. Duro-Bilt, despite being a party to the *Goodman Mandamus Proceeding* and despite receiving the Notice of Compliance with Peremptory Writ failed to appeal. Duro-Bilt's failure to appeal binds it to Judge Morfitt's resolution of this issue. Judge Morfitt's ruling was accompanied by an I.R.C.P. 54(b) certificate. Neither Duro-Bilt, McKnight nor the City of Nampa appealed his decision.

c. Duro-Bilt is Estopped From Contesting its Consent and the Validity of the Vacation Agreement.

Duro-Bilt's claims concerning its consent and the validity of the Vacation Agreement were resolved in the *Goodman Mandamus Proceeding*. Duro-Bilt is estopped from raising those issues, again, in this litigation. See, Goodman's Brief in Response to Defendant's Motion for Summary Judgment and Motion to Dismiss and in Support of Plaintiff's Motion for Summary Judgment on Issues of Liability, pp. 15-18.

As the Idaho Supreme Court stated in *Lohman v. Flynn*, 139 Idaho 312, 319-320, 78 P.3d 379, 386-387 (2003):

Whether res judicata or collateral estoppel bars the relitigation of issues adjudicated in prior litigation between the same parties is a question of law upon which this Court exercises free review. *Mastrangelo v. Sandstrom, Inc.*, 137 Idaho 844, 846, 55 P.3d 298, 300 (2002). There are five factors that must be considered in determining whether collateral estoppel will act as a bar:

1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; 2) the issue decided in the prior litigation was identical to the issue presented in the present action; 3) the issue sought to be precluded was actually decided in the prior litigation; 4) there was a final judgment on the merits in the prior litigation; and 5) the party against whom the issue is asserted was a party or in privity with a party to the prior litigation.

Western Indus. and Environmental Services, Inc. v. Kaldveer Associates, Inc., 126 Idaho 541, 544, 887 P.2d 1048, 1051 (1994).

Res judicata is comprised of claim preclusion (true res judicata) and issue preclusion (collateral estoppel). Under principles of claim preclusion, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim. The three fundamental purposes served by res judicata are:

First, it "[preserves] the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results." Second, it serves the public interest in protecting the courts against the burdens of repetitious litigation; and third, it advances the private interest in repose from the harassment of repetitive claims.

The doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made.

Hindmarsh v. Mock, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002) (citations omitted).

Goodman has been in litigation concerning the vacation ordinance for two and a half years. Duro-Bilt had the opportunity to contest its consent in the *Goodman Mandamus Proceeding*. It failed to do so. Despite Duro-Bilt's failure to contest the issue of consent, the City of Nampa contested the issue. The *Goodman Mandamus Proceeding* bars Duro-Bilt from raising the issue of consent to the Vacation Agreement. Goodman should not have to relitigate the same exact issues in this case.

II.

DURO-BILT BREACHED THE VACATION AGREEMENT

AS A MATTER OF LAW

The Property Vacation Agreement is an enforceable contract. The Agreement did not lapse. The Agreement includes all necessary terms for its enforcement. The Agreement provided consideration. Neither is Duro-Bilt excused from performance. *See, Goodman's Brief in Response to Defendant's Motion for Summary Judgment and Motion to Dismiss and in Support of Plaintiff's Motion for Summary Judgment on Issues of Liability, pp. 14-22.*

The Vacation Agreement is an enforceable contract. That issue is resolved. *See, I (a), (b) and (c) above.* The breach of the Vacation Agreement as a result of Duro-Bilt's conduct is also established as a matter of law. Duro-Bilt's breach consists of the following:

1. In July and August 2004, Duro-Bilt refused to cooperate and consent to the vacation procedure in breach of the Vacation Agreement covenants.
2. Despite Duro-Bilt's refusal to consent and cooperate, Ordinance No. 3374 vacating the street was passed and approved.
3. Duro-Bilt (through McKnight) was the instigator of the illegal veto of Ordinance No. 3374.
4. Duro-Bilt, to this day, contends it has not consented, still refuses to cooperate in the vacation of the street, and refuses to recognize the validity of the Vacation Agreement.

Both parties agree that the Vacation Agreement is not ambiguous and that its

interpretation is a matter of law.

The language of the Vacation Agreement is plain and clear. Duro-Bilt's various contentions are without merit.

III.

BOTH DEFENDANT DURO-BILT AND DEFENDANT MCKNIGHT INTERFERED WITH GOODMAN'S SALE TO WYLIE

Goodman's action for interference with the Goodman/Wylie Sale Agreement is a direct action against both Defendant Duro-Bilt (a corporation) and against Defendant McKnight (an individual). Goodman need not pierce the corporate veil to establish liability on behalf of Defendant Duro-Bilt or Defendant McKnight. *See*, Goodman's Brief in Support of Motion for Reconsideration of Order Dismissing Bart & Alane McKnight Individually.

It is ordinarily for the jury to determine whether the interference of the Defendant was justified. *See, Idaho 1st National Bank v. Bliss Valley Foods*, 121 Idaho 266, ____, 824 P.2d 841, 859 (Idaho 1991) ft note 15.

However in this case, once the Court determines the validity and breach of the Vacation Agreement, as a matter of law Goodman is entitled to summary judgment on the issue of liability of both Defendants for their interference with the Goodman/Wylie Sale Agreement. Should the Court not agree with Goodman this issue is one for determination by the jury.

In regards to the Defendants defense, the only affirmative defenses raised in their Answer are estoppel, lack of consideration and waiver. *See*, Answer, p. 8, paras. 69, 70 and 71.

Defendants fail to assert a defense of privilege or justification. This Court could interpret Duro-Bilt's contention that the Vacation Agreement is unenforceable as an affirmative defense. But once the Vacation Agreement is found enforceable under any or all of the legal theories advanced above by Goodman, the Defendant's only affirmative defense fails.

IV.

CONCLUSION

In August of 2004 a unique opportunity was presented to the City of Nampa and the property owners adjoining First Avenue South. An experienced developer was willing to invest his time, effort and capital into a development that would have enhanced the gateway to Nampa. Duro-Bilt and McKnight killed that opportunity. It may be years before that opportunity presents itself again.

Duro-Bilt, although contractually bound to cooperate and having already consented to the street vacation, broke its promises. The result is the one Defendants intended and had hoped to achieve. Defendants are directly responsible for torpedoing a development that would have enhanced the gateway to Nampa.

Defendants now must bear responsibility for their ill conceived choices and conduct of August 2004. Defendant's motions should be summarily denied.

Goodman is entitled to summary judgment on the issues of liability. The issue of damages will be addressed at trial.

DATED this 16th day of October, 2006.

RUNFT & STEELE LAW OFFICES, PLLC

By: J M Steele
JON M. STEELE
Attorney for Plaintiff

By: K J F Runft
KARL J. F. RUNFT
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of October 2006, a true and correct copy of the foregoing **GOODMAN'S REPLY BRIEF** was served upon opposing counsel as follows:

Tammy Zokan
Moore Smith Buxton & Turke, Chtd.
950 W. Bannock, Suite 520
Boise, ID 83702

US Mail
 Personal Delivery
 Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: 
JON M. STEELE
Attorney for Plaintiff

F I L E D
A.M. (15) P.M.

SEP 23 2005

CANYON COUNTY CLERK
G USOG, DEPUTY

Terrence R. White
T. Guy Hallam, Jr.
John R. Kormanik
WHITE PETERSON, P.A.
5700 East Franklin Road, Suite 200
Nampa, Idaho 83687-7901
Telephone: (208) 466-9272
Facsimile: (208) 466-4405
ISB Nos.: 1351, 6101, 5850
trw@whitepeterson.com
tgh@whitepeterson.com
jkormanik@whitepeterson.com

Attorneys for Respondents.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,

Petitioner,

vs.

CITY OF NAMPA, a corporate body politic;
THE CITY COUNCIL of the CITY OF
NAMPA; MAYOR TOM DALE, in his
capacity as Mayor of the City of Nampa;
DIANA LAMBING, in her capacity as City
Clerk; and SCOTTY'S DURO-BILT
GENERATOR, INC., an Idaho corporation,

Respondents.

Case No.: CV 04-10007

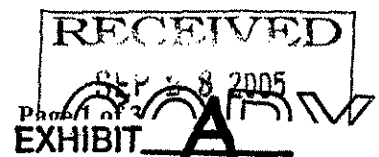
**NOTICE OF COMPLIANCE WITH
PEREMPTORY WRIT OF MANDAMUS**

COME NOW, the City of Nampa, the City Council of the City of Nampa, Mayor Tom

Dale, in his capacity as Mayor of the City of Nampa, and Diana Lambing, in her capacity as the

NOTICE OF COMPLIANCE WITH PEREMPTORY WRIT OF MANDAMUS

000145



City Clerk (hereinafter "Nampa Respondents"), by and through their attorneys of record, the law firm of White Peterson, P.A., pursuant to Court Order, and hereby file this *Notice of Compliance with Peremptory Writ of Mandamus*.

On or about September 5, 2005, the Ordinance at issue in this case was published, pursuant to and in accord with Court order, by the City Respondents. Attached hereto as Exhibit "A" is a copy of the Affidavit of Publication.

DATED this 22d day of September, 2005.

~~WHITE PETERSON, P.A.~~

By:

T. Guy Hallam, Jr. for the Firm
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing instrument was served upon the following by the method indicated:

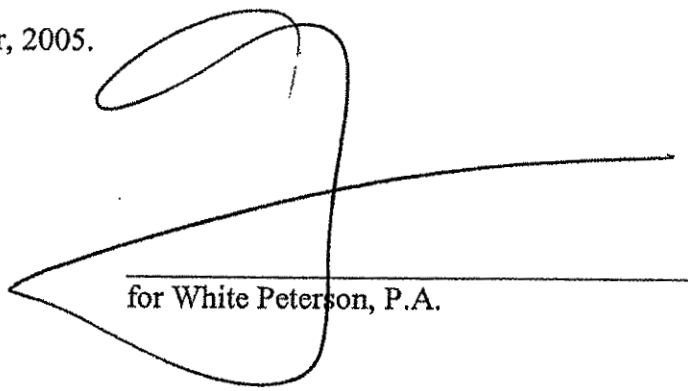
Jon M. Steele
RUNFT & STEEL LAW OFFICES, PLLC
1020 W. Main St., Ste. #400
Boise, ID 83702

Hand Delivered
 Mailed
 Faxed
208.343.3246

Christopher E. Yorgason
MOORE, SMITH, BUXTON & TURCKE
225 N. 9th St., Ste. #420
Boise, ID 83702

Hand Delivered
 Mailed
 Faxed
208.331.1202

DATED this 22 day of September, 2005.



for White Peterson, P.A.

W:\Work\NNampa City\Goodman Oil Co\Pleadings\pld notice of compliance with writ of mandamus 09-22-05.doc

Jan

AFFIDAVIT OF PUBLICATION

STATE OF IDAHO)
) SS.
County of Canyon)

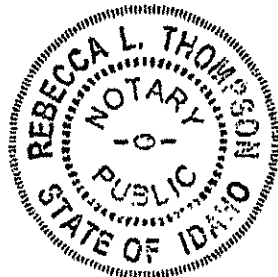
Amanda K. Anderson
of Nampa, Canyon County, Idaho, being
first duly sworn, deposes and says:

d0100232 04524686
1 Nampa, City Of
Legal Account
224 11th Ave. So.
Nampa ID 83651

1. That I am a citizen of the United States, and at all times hereinafter mentioned was over the age of eighteen years, and not a party to the above entitled action.
2. That I am the Principal Clerk of the Idaho Press-Tribune, a daily newspaper published in the City of Nampa, in the County of Canyon, State of Idaho; that the said newspaper is in general circulation in the said County of Canyon, and in the vicinity of Nampa and Caldwell, and has been uninterruptedly published in said County during a period of seventy-eight consecutive weeks prior to the first publication of this notice, a copy of which is hereto attached.
3. That the notice, of which the annexed is a printed copy, was published in said newspaper 1 time(s) in the regular and entire issue of said paper, and was printed in the newspaper proper, and not in a supplement.
4. That said notice was published the following:
09/05/2005

Amanda K. Anderson
STATE OF IDAHO)
County of Canyon)

On the 5th day of September in the year of 2005
before me, a Notary Public, personally appeared
Amanda K. Anderson,
known or identified to me to be the person
whose name is subscribed to the within
instrument, and being by me first duly sworn,
declared that the statements therein are true, and
acknowledge to me that he/she executed the same.



Rebecca L. Thompson
Notary Public for Idaho
Residing at Nampa
My commission expires April 19, 2008



ORDINANCE NO. 274

AN ORDINANCE OF THE CITY OF NAMPA, IDAHO, VACATING 1ST AVENUE SOUTH BETWEEN 2ND STREET SOUTH AND 3RD STREET SOUTH IN THE CITY OF NAMPA, CANYON COUNTY, IDAHO, SUBJECT TO AN ACCESS AND UTILITY EASEMENT, RESERVE THEREON AND DIRECTING THE CITY ENGINEER TO ALTER THE USE AND AREA MAP ACCORDINGLY.

WHEREAS, the City Council has adopted Ordinance No. 274, vacating 1st Avenue South between 2nd Street South and 3rd Street South in the City of Nampa, Canyon County, Idaho, before the City Council and

WHEREAS, the City Council approved the vacancy and

WHEREAS, on February 18, 1998, the first Reading of the Ordinance vacating 1st Avenue South between 2nd Street South and 3rd Street South in the City of Nampa was read before the City Council and

WHEREAS, on October 1, 1998, the second Reading of the above described Ordinance was read before the City Council and

WHEREAS, on October 16, 1998, the third Reading of the above described Ordinance was read before the City Council and the necessary approval of the necessary through the City of Nampa Fire Department has been obtained and

WHEREAS, the Fire Department has received a written development plan for the site and has provided a written conditional approval of the proposed access and utility easement through the proposed vacated street

WHEREAS, the City of Nampa has received a written description for an access and utility easement to be retained on the property to be vacated

WHEREAS, the access and utility easement is acceptable to the City of Nampa and is vacated and approved

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF NAMPA, IDAHO:

Section 1. That 1st Avenue South between 2nd Street South and 3rd Street South in the City of Nampa, Idaho, be and the same is hereby vacated, such vacations subject to the following described access and utility easement, which is hereby reserved on the vacated property to

See Exhibit attached hereto and by reference incorporated hereinto in its entirety.

LEGAL DESCRIPTION FOR VACATION OF FIRST AVENUE SOUTH

That portion of First Avenue South between 2nd Street South and 3rd Street South within the Northwest 1/4 of Section 2, Township 21 North, Range 2 West, Boise Meridian, City of Nampa, Canyon County, Idaho, as shown on the map of PLEASANT ADDITION on file with Canyon County, Book 4, Page 102.

Maintaining the width of the street to 50 feet for an ingress/egress and utility easement.

Section 2. That the City Engineer is hereby instructed and directed to alter the Use and Area Map in accordance with the above Ordinance.

Passed by the Council and approved by the Mayor this 16th day of Aug 2005.

Tom Dale, Mayor
Alicia Chapman, City Clerk

September 5, 2005 0000274686