9-16-2008

Goodman Oil Co. v. Scotty's Duro-Bilt Generator Clerk's Record v. 2 Dckt. 34797

LAW CLERK Vol. 2 of 4

(VOLUME II)

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
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Boise, ID 83702

Attorneys for Appellant

Susan E. Buxton and Tammy A. Zokan
MOORE SMITH BUXTON &
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Boise, ID 83702

Attorneys for Respondents

34797

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.	)	Supreme Court No. 34797

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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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, v. SCOTTY'S DURO-BILT GENERATOR, INC.; and DOES I through V. Defendants.	Case No. CV 05-9800 **ORDER**

Before the Court are:

1. Plaintiff's Motion for Reconsideration of Order Dismissing Bart and Alane McKnight Individually, filed on October 4, 2006;
2. Defendant's Motion for Summary Judgment, filed on June 29, 2006;
3. Plaintiff's Motion for Summary Judgment on Issues of Liability, filed on August 22, 2006;

4. Defendant Bart and Alane McKnight's Memorandum of Costs and Attorney Fees, filed on September 19, 2006;

and, the Court having reviewed the relevant pleadings, briefs and memoranda, and having considered oral argument, and good cause appearing therefore:

It is hereby ORDERED as follows:

1. Plaintiff's Motion for Reconsideration is denied;
2. Defendant's Motion for Summary Judgment is granted as to Plaintiff's Complaint and Demand for Jury Trial:
    a. Count Two – Tortious Interference with Purchase and Sale Agreement;
    b. Count Three – Negligent Interference with Prospective Economic Advantage;
    c. Count Four – Intentional Interference with Prospective Economic Advantage;
3. Defendant's Motion for Summary Judgment is denied as to Plaintiff's Complaint and Demand for Jury Trial: Count One – Breach of Contract;
4. Plaintiff's Motion for Summary Judgment is denied;
5. Defendant McKnights' Memorandum of Costs and Attorney Fees is stayed until the final conclusion and decision in this case;
6. The filing of all further requests for attorney fees and costs shall also be stayed until the final conclusion and decision in this case; and

It is further ORDERED that Counts Two, Three, and Four of Plaintiff's Complaint and Demand for a Jury Trial against Defendant, are hereby dismissed with prejudice, with costs and attorneys fees to be addressed separately at the final conclusion of this case.

DATED this __ day of November, 2006.

NOV - 7 2006

By: _____
Judge Renae J. Hoff
District Judge, Third Judicial District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7 day of November, 2006, I caused a true and correct copy of the foregoing ORDER by the method indicated below, and addressed to the following:

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Attorneys for Defendant Scotty's Duro-Bilt Generator, Inc.

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, v. SCOTTY'S DURO-BILT GENERATOR, INC., and Idaho corporation; and DOES I through V. Defendants.	Case No. CV 05-9800 **AFFIDAVIT OF TAMMY A. ZOKAN IN SUPPORT OF DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT**

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 Memorandum Decision on Judicial Review and Order by the Honorable James C. Morfitt, District Judge, in *Goodman Oil Company v. City of Nampa*, Case No. CV-04-10007 (November 7, 2006), that I received from

Plaintiff's counsel via fax on November 29, 2006.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

By _____
Tammy A. Zokan, Of the Firm
Attorneys for Defendant

SUBSCRIBED AND SWORN TO before me this 8th day of December, 2006.

CATHRYN S. KORTH NOTARY PUBLIC STATE OF IDAHO

_____
NOTARY PUBLIC FOR IDAHO
Residing at: Kamiah Id
My Commission Expires: 3-6-2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of December, 2006, I caused a true and correct copy of the foregoing **AFFIDAVIT OF TAMMY A. ZOKAN** by the method indicated below, and addressed to the following:

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Tammy A. Zokan

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mlmeans@runftlaw.com

TO: Tammy Zokan FAX NUMBER: 331-1202

FROM: Karissa Armbrust, Paralegal

DATE 11-29-06

SUBJECT: Goodman v. City of Nampa

NO. PAGES:

IF YOU DO NOT RECEIVE ALL OF THE PAGES, PLEASE CALL BACK AS SOON AS POSSIBLE AT THE FOLLOWING NUMBER (208) 333-8506

Dear Tammy:

Per our conversation this morning, attached is a copy of the Memorandum Decision on Judicial Review and Order in the above case.

Sincerely,

Karissa Armbrust, Paralegal

IN THE DISTRICT 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; and DIANA LAMBING, in her Capacity as City Clerk; Respondents.	Case No. CV 2004-10007*C MEMORANDUM DECISION ON JUDICIAL REVIEW AND ORDER

Petitioner Goodman Oil Company ("Goodman Oil") seeks judicial review of the easement reserved in City of Nampa Ordinance No. 3374, which vacates 1st Avenue South between 2nd Street South and 3rd Street South in the City of Nampa. The ordinance reserves "the westerly fifty feet (50') for an Ingress/Egress and utility easement."

The matter came on regularly before the Court for oral argument on September 1, 2006. Petitioner Goodman Oil Company appeared through its attorney of record, Mr. Jon M. Steele. Respondent City of Nampa ("City") appeared through its attorney of record, Mr. John R. Kormanik.

BACKGROUND AND PROCEDURAL HISTORY

Goodman Oil first petitioned the City of Nampa to vacate the relevant portion of 1st Avenue South on or about August 3, 1995. By letter dated September 6, 1995, Norman L. Holm the Planning Director for the City of Nampa advised Goodman Oil that the street vacation would be complete so long as the Nampa Fire Department approved fire apparatus access. Subsequently, the first reading of the ordinance occurred September 18, 1995. The second reading occurred on October 2, 1995. On October 16, 1995, the Ordinance was tabled because "approval of the fire access by the Fire Department...was never provided."

In August, 2004, Goodman Oil sought to complete the street vacation. On or about August 4, 2004, Fire Prevention Officer Brent Hoskins sent a letter to the Planning and Community Development Department advising that

> Nampa Fire Department will agree to the vacation of 1st AVE S, provided a dedicated 20' wide apparatus access road is maintained between 2nd ST S and 3rd ST S. The apparatus access road shall be built within the confines of the vacated right of way lines. All affected parcel owners shall respond in writing to the Nampa Fire Department that they understand the requirements of this letter. Any deviations from the requirements above shall first be approved by the Nampa Fire Department. (Emphasis added).

On August 16, 2004, the City Council took up the street vacation. There was a motion for suspension of the rules requiring three readings. The motion carried and Ordinance No. 3374 vacating the relevant portion of 1st Avenue South was passed. After it was passed, approved by the

Mayor and released for publication, but prior to publication, the City recalled the Ordinance and the Mayor vetoed it.

Petitioner Goodman Oil Company brought this action on October 5, 2004, as an Application for Writ of Mandate and a Petition for Judicial Review. Goodman Oil sought 1) a writ of mandate to require the City of Nampa to publish an Ordinance vacating a portion of 1st Avenue South passed by the City Council, approved by and thereafter vetoed by the Mayor of the City of Nampa; and, 2) judicial review of the Nampa City Council's decision to reserve a fifty (50') foot ingress/egress and utility easement over the westerly portion of the vacated portion of 1st Avenue South.

On August 8, 2005, this Court granted Goodman Oil's Writ of Mandamus and directed the Respondent, City of Nampa, to publish Ordinance No. 3374, which, in relevant part, reads:[1]

> 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. (Emphasis added).

Exhibit A, describing the reserved easement, states the following:

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

On September 23, 2005, the City of Nampa filed a notice of compliance with the preemptory writ of mandate.

Pursuant to the Court's Order Requiring Preparation of Record and Transcripts and Appellate Scheduling Order, dated October 27, 2004, the Agency Record and Transcripts were filed on November 7, 2005. The Petitioner's brief was due within thirty-five (35) days of the date

[1] A copy of Ordinance No. 3374 is attached hereto as Exhibit "A".

of notice that the transcripts and the agency record have been filed. Goodman Oil's appellate brief was due December 12, 2005.

Instead of filing an appellate brief, Petitioner Goodman Oil, on December 1, 2005, moved for summary judgment on the judicial review. The City of Nampa opposed the motion. Both Goodman Oil and the City of Nampa moved to augment the record. On April 3, 2006, the Court entered its *Memorandum Decision and Order on Petitioner's Renewed Motion to Augment Record* denying both parties motions to augment the record. Additionally, the Court granted the City of Nampa extended time in which to respond to Goodman Oil's motion for summary judgment. The Court ordered the parties to "proceed to file briefing in this matter in accord with the Court's prior scheduling order." *See Order Granting Respondents' Motion for Extension of Time and Motion to Shorten Time*, dated March 31, 2006 and filed April 3, 2006. On April 11, 2006, The City of Nampa filed its Motion to Dismiss Appellate Proceeding.

On May 8, 2006, Petitioner Goodman Oil filed Petitioner's Opening Appellant Brief. On June 5, 2006, the City filed its Response Brief. On June 22, 2006, the Petitioner filed its Reply Brief. Respondent's Petition for Judicial Review was thereafter noticed for oral arguments. Following oral argument, the Court denied the City's Motion to Dismiss Appellate Proceeding.

ISSUES PRESENTED ON JUDICIAL REVIEW

> Whether the City of Nampa exceeded its statutory authority in granting an application to vacate a street by reserving a fifty foot (50') ingress/egress and utility easement.

STANDARD OF REVIEW

This Court has previously held that the Idaho Administrative Procedure Act ("IAPA") does not govern this action as stated in the Court's *Memorandum Decision and Order on Petitioner's Renewed Motion to Augment Record*, filed April 3, 2006. In its briefing and at oral argument, the

City requested that this Court revisit that issue. Both parties presented argument and authority on the applicability of the IAPA.

The IAPA and its judicial review standards apply to agency actions.

> "Agency" means each state board, commission, department or officer authorized by law to make rules or to determine contested cases, but does not include the legislative or judicial branches, executive officers listed in section 1, article IV, of the constitution of the state of Idaho in the exercise of powers derived directly and exclusively from the constitution, the state militia or the state board of correction.

IDAHO CODE § 67-5201 (2006).

The Supreme Court of Idaho has held that "[t]he language of the IAPA indicates that it is intended to govern the judicial review of decisions made by *state* administrative agencies, and not local governing bodies." *Idaho Historic Preservation Council v. City Council of Boise*, 134 Idaho 651, 653 (2000) (Italics in original) (Underlining added); *see Gibson v. Ada County Sheriff's Department*, 139 Idaho 5 (2003). Counties and city governments are considered local governing bodies rather than agencies for purposes of the IAPA. *Gibson* at 7. Absent a statute invoking the IAPA's judicial review provisions, local government actions may not be reviewed under the IAPA. *Id.* at 7-8.

Statutes may authorize judicial review without invoking the provisions of the IAPA. *Id.* Idaho Rule of Civil Procedure 84(a)(1) provides:

> The procedures and standards of review applicable to judicial review of state agency and local government actions shall be as provided by statute. When judicial review of an action of a state agency or local government is expressly provided by statute but no stated procedure or standard of review is provided in that statute, then Rule 84 provides the procedure for the district Court's judicial review. Actions of state agencies or officers or actions of a local government, its officers or its units are not subject to judicial review unless expressly authorized by statute. (Emphasis added).

In this case, judicial review of an order granting or denying an application to vacate a street is expressly provided by statute.

> Whenever the governing body shall grant the application, or refuse the application of any person or persons, made as provided for the vacation of any... street... an appeal may be taken from any act, order or proceeding of the board made or had pursuant to by any person aggrieved thereby within twenty (20) days after the first publication or posting of the statement as required by section 31-819, Idaho Code. Procedure upon such appeal shall be in all respects the same as prescribed in sections 31-1510, 31-1511 and 31-1515, Idaho Code. (Emphasis added).

IDAHO CODE § 50-1322 (2006).

Idaho Code Section 50-1322, which provides for an appeal from an order granting or denying an application to vacate a street, is a provision of chapter 13 (Plats and Vacations), title 50 (Municipal Corporations), Idaho Code. Idaho Code Section 50-1322 facially provides a procedure for the judicial review of street vacation decisions. However, Idaho Code Sections 31-1510 and 31-1511 were repealed in 1993 and Idaho Code Section 31-1515 was repealed in 1995. All three of the repealed Idaho Code Sections referenced in I.C. § 50-1322 were found in title 31, Counties and County Law. Idaho Code Section 31-1510, prior to its repeal in 1993, provided for notice of the appeal, the time for the hearing of the appeal and the requirements for a bond. Idaho Section 31-1511, prior to its repeal in 1993, provided for the transmission of papers relating to the appeal to the district judge. Idaho Code Section 31-1515 required that no member of the board of commissioners could have any interest in property sold or purchased by the county or in any contract of the county. For the current law on that subject, see I. C. § 31-807A.

All three of the repealed statutes cited in I.C. § 50-1322 predated the enactment of either the IAPA in 1967 or the adoption of the Idaho Rules of Civil Procedure. None of these referenced statutes invoke the IAPA's judicial review provisions. Neither do any of the

referenced statutes set forth a standard of review applicable to the review of street vacation decisions by a city.

The conclusion that the three repealed statutes referenced in I.C. § 50-1322 did not invoke the IAPA's judicial review provisions is further buttressed by the Statement of Purpose for the bill which repealed those code sections, which stated:

> The purpose of this bill is to provide for the appeal of county commission decisions in the same manner as judicial review of actions under the Administrative Procedure Act (APA), chapter 52, title 67, Idaho Code.
>
> The current process for appeals is archaic and inconsistent with other sections of county law. The planning and zoning and medical indigency appeals are conducted as appeals under the APA.
>
> The current process of appellate procedure makes the district judge the fourth or "super" commissioner with the ability to overrule the factual determinations and judgments of three individuals.
>
> The types of decisions that are appealed are administrative or executive in nature and the more appropriate method would be to use the APA. This method of appeal will protect the rights of those affected by county commission decisions while giving consideration to county commission judgments.

Statement of Purpose, RS 02035, 1993 House Bill 120.

The 1993 House Bill also added a new section to Title 31, Idaho Code. Section 31-1509 was added to provide the manner of judicial review of actions by boards of county commissioners. The new section 31-1509 provided:

> (1) Unless otherwise provided by law, judicial review of any act, order or proceeding of the board shall be initiated by any person aggrieved thereby within the same time and in the same manner as provided in chapter 52, title 67, Idaho Code, for judicial review of actions.
>
> (2) Venue for judicial review of board actions shall be in the district court of the county governed by the board.

1993 Idaho Sess. Laws ch. 103. In 1995, Idaho Code section 31-1509 was redesignated Idaho Code section 31-1506. 1995 Idaho Sess. Laws ch. 61 § 11.

Therefore, the Court finds and concludes that I.C. § 50-1322 does not invoke IAPA's judicial review provisions.

The Court further finds and concludes, as previously announced, that the judicial review provisions of the IAPA are not applicable to these proceedings.

The Court recognizes that the 1993 Idaho legislature created an anomaly by also enacting Idaho Code Section 40-208 governing the judicial review of final decisions of a board of county or highway district commissioners relating to abandonment or vacation of a highway. Although I.C. § 40-208 does not specifically invoke the judicial review provisions of the IAPA, the statute does adopt standards of review similar to those of the IAPA.

Idaho Rule of Civil Procedure 84, which governs judicial review of local governing bodies, does not provide a specific standard of review. Therefore, the Court applies the general standards of review for cases in which the district court reviews appeals from the magistrate court. *See Idaho Historical Preservation Council,* at 654.

The Court finds and concludes that judicial review of a decision of a local governing body, in the absence of a statutory standard of review, is as provided for when the district court reviews a decision of a magistrate judge as an appellate proceeding not involving a trial de novo. The district court shall review the case upon the record and determine the appeal upon the same standards of review as an appeal from the district court to the Supreme Court under the statutes and laws of this state, and the appellate rules of the Supreme Court. *See* I.R.C.P. 83(u)(1).

Factual findings will not be set aside on judicial review unless they are clearly erroneous. *Kornfield v. Kornfield,* 134 Idaho 383, 385 (Ct. App. 2000). Findings of fact supported by

substantial and competent evidence are not clearly erroneous. *Whiteley v. State*, 131 Idaho 323, 326 (1998).

Statutory interpretation is a question of law over which this Court exercises free review. *Herman ex rel. Herman v. Herman*, 136 Idaho 685, 688 (2002).

ANALYSIS

In its Petition for Judicial Review, Goodman Oil argues that the easement reservation exceeds the City of Nampa's statutory authority, that it is not supported by any evidence found in the record, that the reservation violates due process, and that the reservation is arbitrary and capricious. The City of Nampa argues that the easement contained in Ordinance 3374 is wholly proper and within the City of Nampa's authority. The City further asserts that Goodman Oil is judicially estopped from challenging the easement.

Vacated First Avenue South is eighty (80') feet in width and three hundred (300') feet in length. The easement reserved by the City covers the westerly fifty (50') feet of the vacated property thus encumbering all of Goodman Oil's property located on the west side of the vacated street.

Cities are empowered to vacate any street by statute.

> ...Provided further that whenever any street ... shall be vacated, the same shall revert to the owner of the adjacent real estate, one-half (1/2) on each side thereof, or as the city council deems in the best interests of the adjoining properties, but the right of way, easements and franchise rights of any lot owner or public utility shall not be impaired thereby.... (Emphasis added).

IDAHO CODE § 50-311 (2006).

The statute does not provide for the imposition conditions on the vacation. Rather, the statute explicitly provides that a street vacation may not impair "right of way, easements and franchise rights of any lot owner or public utility." *Id.*

The Idaho Supreme has held that Idaho Code Section 50-311, which applies to all municipal corporations in the state of Idaho and is an act of the state legislature is a state law of general application. *Black v. Young*, 122 Idaho 302, 308 (1992). In *Black*, the City of Ketchum conditioned the vacation of the alley upon the issuance of a building permit and the funding of a construction loan *Id.* at 305. In addition, the vacation ordinance provided the City of Ketchum a right of reversion if a certificate of occupancy was not issued for a proposed motel. *Id.* The Supreme Court held:

> The two conditions that the City of Ketchum imposed upon vacation of the alley, as well as the right of reversion should a certificate of occupancy not be issued, are not expressly granted powers, fairly implied powers from the clear language of I.C. § 50-311, nor are they powers essential to the vacation of the alley. The *only* condition that I.C. § 50-311 allows upon a finding of expedience for the public good is that the vacation cannot impair "the right of way, easements and franchise rights of any lot owner or public utility." I.C. § 50-311. Thus, the two above-listed conditions, as well as the right of reversion, are *ultra vires* acts by the City of Ketchum because they conflict with I.C. § 50-311. (Italics in original) (Underling added).

Id. at 308.

The Court thus finds and concludes, as a matter of law, that the City's reservation of a 50 foot ingress/egress and utility easement is in violation of the provisions of I.C. § 50-311.

The Court further finds and concludes that the City's reservation of a 50 foot ingress/egress and utility easement is an *ultra vires* act by the City because the reservation of the easement is in conflict with I. C. § 50-311.

Judicial estoppel is a doctrine which prevents a party from assuming a position in one proceeding and then taking an inconsistent position in a subsequent proceeding. Although the issue of judicial estoppel was not directly addressed by the Idaho Supreme Court in *Black*, in that case, Blacks had signed an estoppel affidavit which provided that the conditions of the ordinance

were acceptable to them and would not be challenged by them. *Id.* at 305. In defense of the Blacks' complaint, the City of Ketchum asserted the affirmative defense of estoppel. *Id.* The trial court subsequently granted the City of Ketchum's motion for summary judgment finding that Ketchum was within its statutory authority to impose the conditions and the right of reversion upon its vacation of the alley in question. The Idaho Supreme Court reversed the judgment of the district court and remanded the case to the trial court to determine if other factors existed or were considered regarding the public expediency requirement of I. C. § 50-311.

This Court finds and concludes that Goodman Oil is not judicially estopped from challenging the statutory authority of the City to impose conditions upon the vacation of the portion of First Avenue South at issue in this case.

The Court further finds and concludes that, in light of the above-findings, it is not necessary to address Goodman Oil's remaining arguments.

The Court still further finds and concludes that the findings set forth in Ordinace No. 3374 relate only to the procedural history of the request to vacate and the adequacy of the access and utility easement. The ordinance contains no findings "of expedience for the public good" required by I. C. § 50-311.

Therefore,

ORDER

IT IS HEREBY ORDERED, and this does ORDER, that the reservation of a 50 food ingress/egress and utility easement in Ordinance No. 3374 be, and is hereby, SET ASIDE.

IT IS FURTHER ORDERED, and this does ORDER, that Ordinance No. 3374 be, and is hereby, REMANDED to the City of Nampa for its determination as to whether other factors existed or regarding the public good requirement of I. C. § 50-311.

DATED: NOV 7 2006

James C. Morfitt
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum Decision on Judicial Review and Order was mailed to the following persons on this 7 day of November, 2006.

Thomas Guy Hallam
John R. Kormanik
WHITE PETERSON, P.A.
5700 E. Franklin Road, Suite 200
Nampa, ID 83687-7901

Jon M. Steele
RUNFT & STEEL LAW OFFICES, PLLC
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Theresa Randall
Appellate Clerk
Canyon County Courthouse
1115 Albany Street
Caldwell, ID 83605

G. Noel Hales
Clerk of the District Court

By: _____
Deputy Clerk

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.

000171

EXHIBIT "A"

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 DALE and DANA LAMBERT 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

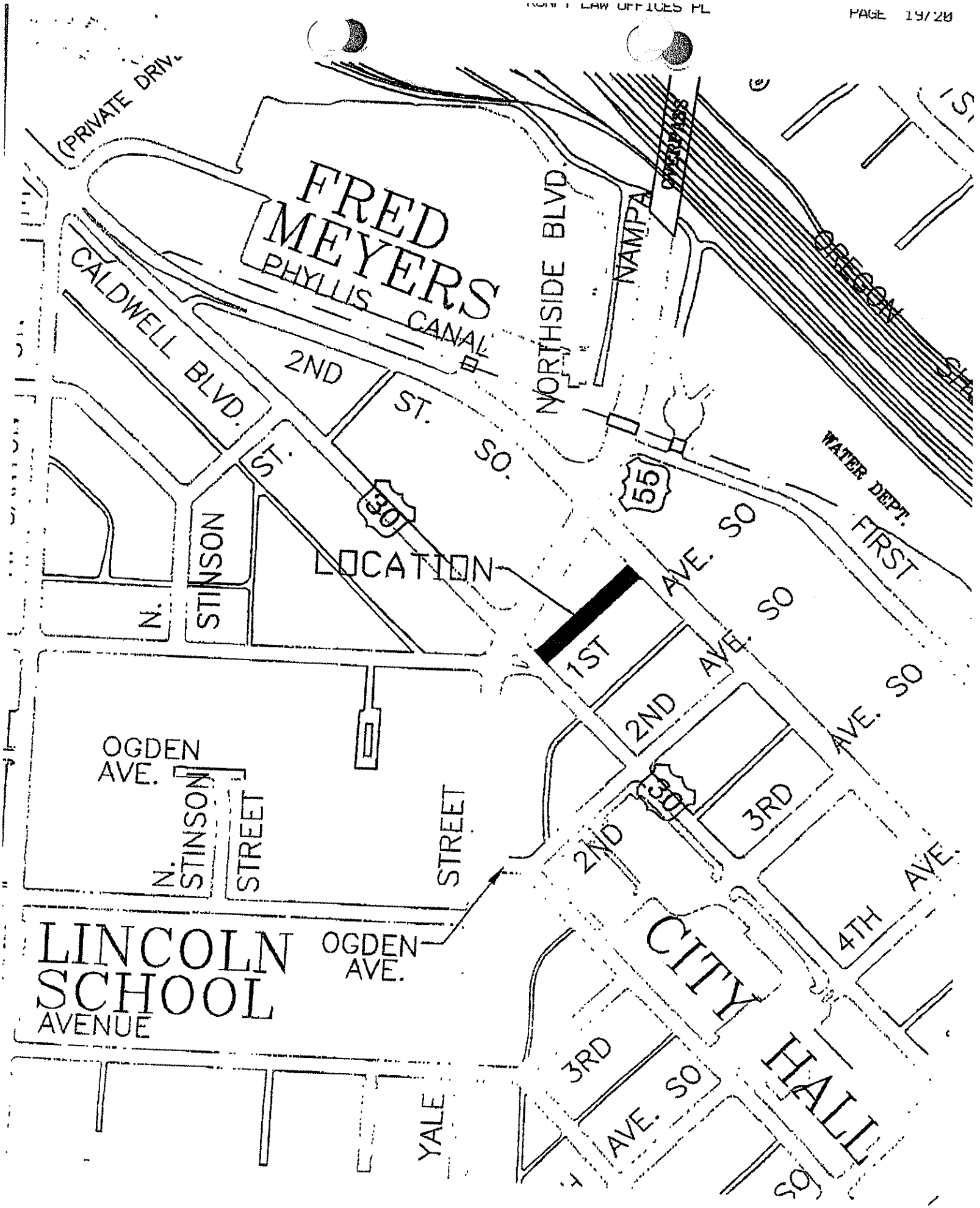
Criselda C. Luna
Residing at: Nampa, Canyon County, Idaho
My Commission Expires: 10/02/07

CRISELDA C. LUNA NOTARY PUBLIC STATE OF IDAHO

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 DRIV
FRED MEYERS
PHYLLIS CANAL
CALDWELL BLVD.
2ND ST. SO.
NORTHSIDE BLVD
NAMPA
OVERPASS
OREGON
WATER DEPT.
55
30
LOCATION
N. STINSON
1ST AVE. SO
2ND AVE. SO
3RD AVE. SO
FIRST
OGDEN AVE.
N. STINSON STREET
STREET
LINCOLN SCHOOL
AVENUE
OGDEN AVE.
CITY HALL
4TH AVE.
3RD AVE. SO
YALE

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

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TAMMY A. ZOKAN # 5450
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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, v. SCOTTY'S DURO-BILT GENERATOR, INC., and Idaho corporation; and DOES I through V. Defendants.	Case No. CV 05-9800 **MEMORANDUM IN SUPPORT OF DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT**

COMES NOW, Defendant Scotty's Duro-Bilt Generator, Inc. ("Duro-Bilt" or "Defendant"), by an through its attorneys of record, Moore, Smith, Buxton & Turcke, Chartered, and submits its Memorandum in Support of Defendant's Second Motion for Summary Judgment filed on December 26, 2006, on the remaining issue in this case: Count 1 of Plaintiff's Complaint – Breach of Contract.

I. STATEMENT OF 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 "1995 Agreement" or "Vacation Agreement"), whereby the parties to the 1995 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 granting a perpetual easement on the vacated property among themselves for access to and from each party's property, which access is to be at the discretion of property owners;

3. The parties executing 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.

No ordinance related to the vacation was adopted in 1995 or anytime thereafter prior to 2004. The vacation 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 agreement 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 refusal to agree to the limited 20' access proposed by the Fire Department, 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. 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 actual 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 1. 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 object to the vacation on the basis that 20' would not provide adequate access to

Defendant's property. . . . To restrict this street would cripple [Duro-Bilt's] business, frustrate customers and become a traffic hazard." Complaint, Ex. D.[1] Duro-Bilt's concerns were based on the 20' easement.

After the City vetoed the vacation ordinance, the parties began having discussions, with Duro-Bilt explaining that it needed no less than a forty feet (40') easement for access to its proprerty. *See* Yorgason Aff. at ¶ 2. Plaintiff refused to agree to anything more than a twenty-five foot (25') access easement along the vacated portion of First Avenue South and the prospective purchaser was only willing to give a twenty foot (20') access easement. *Id.; see also* Exhibits D, E, F & G to the Yorgason Affidavit.

II. PROCEDURAL HISTORY

A. Plaintiff's 2004 Writ of Mandamus/Petition for Judicial Review (before Judge Morfitt)

On October 5, 2004, Plaintiff sued the City and Duro-Bilt seeking a writ of mandamus for publication of Ordinance No. 3374 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

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

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. Ordinance No. 3374 as adopted and subsequently published in accordance with Court Order, provides for a 50' emergency and utility access easement. Plf 000011. Judge Morfitt then issued his Memorandum Decision on Judicial Review on November 7, 2006, remanding Ordinance No. 3374 to the City for "its determination of as to whether other factors existed or regarding the public good requirement of I.C. §50-311." Zokan Aff., Ex. A at p. 12. The referenced factors include a determination of whether the rights-of-way, easements and franchise rights of any property owner or public utility would be impaired by the vacation. *Id.* at 9; Idaho Code § 50-311.

B. Plaintiff's 2005 Complaint (before Judge Hoff)

On September 19, 2005, Plaintiff filed a Complaint and Demand for Jury Trial against Duro-Bilt and Bart and Alane McKnight individually, alleging breach of contract and various torts. *Goodman Oil Company v. Scotty's Duro-Bilt Generator, Inc. et al*, Case No. CV 05-9800. Defendants moved to dismiss Plaintiff's Complaint against the McKnights individually, which the Court granted by Order entered September 20, 2006. (Plaintiff filed a Motion for Reconsideration of the dismissal, which the Court denied by Order entered November 7, 2006.) The parties filed cross motions for summary judgment, which were resolved by the Court Order entered on November 7, 2006: Plaintiff's Motion for Summary Judgment on Issues of Liability was denied; Duro-Bilt's Motion for Summary Judgment was denied as to Plaintiff's Complaint – Count 1 (Breach of Contract) and granted as to Plaintiff's Complaint – Counts 2, 3 and 4 (Tortious, Negligent and Intentional Interference of Agreement/Economic Advantage). The remaining issue in this case is Count 1 of Plaintiff's Complaint – Breach of Contract.

III. LEGAL STANDARDS

A. Idaho Rule of Civil Procedure 56(c)

"Summary Judgment is appropriate when '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 judgment as a matter of law.' " *Jenkins v. Boise Cascade Corporation,* 141 Idaho 233, 238, 108 P.3d 380, 385 (2005). The Court must "construe the record in the light most favorable to the party opposing the motion [for summary judgment], drawing all reasonable inferences in that party's favor." *Id.* "[A] trial court is not limited to a consideration of the pleadings in determining whether a genuine issue of material fact exists." *Petricevich v. Salmon River Canal Co.,* 92 Idaho 865, 868, 452 P.2d 362 (1969). Other materials "can be used to pierce the formal allegations of the pleadings and to show that what appears on the face of the pleadings alone to be a genuine issue of fact is in reality not a genuine issue at all." *Id.*

> Flimsy or transparent contentions, theoretical questions of fact which are not genuine, or disputes as to matters of form do not create genuine issues which will preclude summary judgment. Neither is a mere pleading allegation sufficient to create a genuine issue as against such affidavits and other evidentiary materials which show the allegation to be false. A mere scintilla of evidence is not enough to create an issue; there must be evidence on which a jury might rely. A popular formula is that summary judgment should be granted on the same kind of showing as would permit direction of a verdict were the case to be tried.

Id. at 871 (quoting 3 Barron & Holtzoff, Federal Practice and Procedure, § 1234, p. 133 (Rules ed. 1958); *Jenkins v. Boise Cascade Corporation,* 141 Idaho at 238.

B. Breach of Contract

> A breach of contract is non-performance of any contractual duty of immediate performance. It is a failure without legal excuse, to perform any promise, which forms the whole or part of a contract. 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.

Idaho Power Company v. Cogeneration, Inc., 134 Idaho 738, 746, 9 P.3d 1204 (2000) (internal citations omitted). "Interpretations and legal effect of an unambiguous contract are questions of law over which [the] Court exercises free review." *Id.* at 748.

C. Adequacy of Consideration

"A written instrument is presumptive evidence of a consideration." Idaho Code § 29-103. "This presumption may be rebutted by the party seeking to assert the defense of lack of consideration." *Dennett v. Kuenzli,* 130 Idaho 21, 936 P.2d 219 (Ct. App. 1997); Idaho Code § 29-104.

D. Covenant of Good Faith and Fair Dealing

The covenant of good faith and fair dealing "requires that the parties perform, in good faith, the obligations imposed by their agreement, and a violation of the covenant occurs only when either party violates, nullifies or significantly impairs any benefit of the contract." *Idaho Power Company v. Cogeneration, Inc.*, 134 Idaho at 750. The covenant of good faith and fair dealing "is an objective determination of whether the parties have acted in good faith in terms of enforcing the contractual provisions." *Jenkins v. Boise Cascade Corporation*, 141 Idaho at 243. "No covenant will be implied which is contrary to the terms of the contract negotiated and executed by the parties." *Idaho Power Company v. Cogeneration, Inc.,* 134 Idaho at 750.

E. Idaho Code § 50-311

A city may vacate a public street however, a public street cannot be vacated unless all property owners consent to the vacation. Idaho Code § 50-311; Dale Tr. p. 63, ll. 1-12; p. 86, ll. 22-

25, p. 87, p. 88, ll. 1-1-3. Furthermore, in vacating a public street, "the right of way, easements and franchise rights of any lot owner or public utility shall not be impaired thereby...." Idaho Code § 50-311. Vacated streets "shall revert to the owner of adjacent real estate, one-half (1/2) on each side thereof, or as the city council deems in the best interest of adjoining properties..." *Id.*

IV. ARGUMENT

A. Defendant has not Failed to Perform a Contractual Duty

The 1995 Agreement is not ambiguous therefore the interpretation of the Agreement is a matter of law. *Idaho Power Company v. Cogeneration, Inc.,* 134 Idaho at 748. 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. *Id.* at ¶ 3. The parties would then be responsible for maintenance in proportion to the amount of property they own. *Id.*

In rendering its Order entered on November 7, 2006, the Court determined that it could not resolve the contract claim on summary judgment because it found a genuine issue of fact regarding whether the 1995 Agreement was in effect in 2004. According to the Court's verbal pronouncement of its Decision, if the 1995 Agreement was still in effect in 2004, when Duro-Bilt refused to agree to the Fire Department's limited 20' access easement, Duro-Bilt breached the 1995 Agreement; but if the 1995 Agreement was not in effect in 2004, there was no breach of the 1995 Agreement. However, this Court does not need to resolve the validity of the 1995 Agreement to dispose of Plaintiff's contract claim.

1. Duro-Bilt was not Obligated to Relinquish Access to its Property Under the 1995 Agreement or Enter into a New Agreement in 2004.

According to Plaintiff, Duro-Bilt breached the 1995 Agreement by refusing to cooperate and consent in 2004. Plf's Brf. in Objection to Def's Motion for Summary Judgment and in Support of Plf's Motion for Summary Judgment at p. 23 (August 22, 2006). The only thing Defendant failed to consent to in 2004 was, (1) a brand new agreement limiting the access easement to 20'; and, (2) the vacation of the property with only a 20' access agreement. The 20' access easement came up for the first time in 2004 when the Nampa Fire Department issued a letter stating its terms of agreement regarding the vacation. Plf 000046. The Fire Department 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, therefore the Fire Department's required evidence of each owner's approval of the new condition. *See id.*, Plf 000046. Duro-Bilt refused; however, Duro-Bilt's refusal was not aimed at a condition of the 1995 Agreement. Duro-Bilt refused to enter into the *entirely new agreement, which was outside the scope of the 1995 Agreement*, proposed 9 years after the original Agreement. Because the issue raised by Plaintiff is Duro-Bilt's refusal to agree to a condition that was not part of the 1995 Agreement, the Court need not resolve the issue regarding the validity of the 1995 Agreement in 2004.

Moreover, the condition and agreement proposed in 2004 conflicts with the express terms of the 1995 Agreement. The 1995 Agreement expressly provides for each of the parties to the Agreement to have perpetual access to their individual properties from Second and Third Streets via the vacated property. *Id.* at ¶ 3. The 1995 Agreement contains no mention or any reference to any

limitation on the width of each party's access easement or the parties' consent to any such limitation. Indeed, the express contractual provision provides that the parties will have

> 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. 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.

Id.

There is no written instrument obligating Duro-Bilt to agree to a limited 20' access easement. *See Dennett v. Kuenzli*, 130 Idaho 21; Idaho Code § 29-104. First, the 1995 Agreement clearly provides an easement on the vacated property for access to each owner's property located at their discretion -- the purpose for such easement being to provide the parties adequate access to and from their property from both Second and Third Streets. The 1995 Agreement imposes no limits on the size of each party's access easement. Indeed, no size limit was proposed until 2004, when Mr. Wylie circulated a proposed *new agreement* limiting access to only 20'. Limiting the access easement to 20' imposes an obligation *outside the scope of the 1995 Agreement.* Duro-Bilt did not contract for such limited access by way of the 1995 Agreement.

Second, Duro-Bilt did not enter into a new agreement in 2004. The proposed 2004 agreement is an entirely new agreement to which Duro-Bilt had no contractual duty to consent. Defendant could not agree to the new 2004 contract because doing would cause it to relinquish much needed access; and, therefore Duro-Bilt did not execute the 2004 agreement. (The 2004 proposed contract also failed to provide consideration for its terms.) If access were limited to 20', Duro-Bilt would not receive the access bargained for under the 1995 Agreement and its property and business interests would be substantially harmed. Duro-Bilt's refusal to relinquish needed access is also

consistent with Idaho law governing the vacation of public streets. Section 50-331, Idaho Code, prohibits vacations that would impair rights-of-ways and easements of any lot owner.

Even if we assume the parties were still bound by the 1995 Agreement in 2004, Defendant did not breach the 1995 Agreement when it refused to agree to the limited 20' access proposed by the City Fire Department and Mr. Wylie in 2004. In refusing to agree to the 2004 condition, Duro-Bilt acted in accordance with the terms of the 1995 Agreement and Idaho law.

2. Duro-Bilt did not Breach the Implied Covenant of Good Faith and Fair Dealing.

Duro-Bilt's refusal to agree to a condition outside the scope of the 1995 Agreement and enter into a new agreement in 2004 was fair and reasonable under the terms of the 1995 Agreement. The 1995 Agreement expressly provides for access to each owner's property at each owner's discretion. Defendant's refusal to relinquish access did not violate, nullify or significantly impair any benefit of the 1995 Agreement. *Idaho Power Company v. Cogeneration, Inc.*, 134 Idaho at 750. What is contrary to the terms of the 1995 Agreement is Plaintiff's allegation that Defendant must agree to inadequate access. *Id.* If Duro-Bilt did so, its rights and benefits under the 1995 Agreement would be impaired. Therefore, in refusing to agree to the 2004 condition, Duro-Bilt acted fairly and in good faith under the terms of the 1995 Agreement. McKnight Tr., p. 71, l. 25, p. 72, ll. 1-9; *Jenkins v. Boise Cascade Corporation*, 141 Idaho 233, 243, 108 P.3d 380 (2005).

3. Performance of the Remaining Conditions of the 1995 Agreement is not Due.

Likewise, for the reasons stated above, Duro-Bilt has not breached the remaining conditions of the Agreement. Additionally, Duro-Bilt has not breached the remaining conditions because:

a. Performance of subsequent conditions is not due;

b. The vacation has been tied up in litigation and was recently remanded back to the City for reconsideration in accordance with Judge Morfitt's Order. Until the scope and conditions of vacation are finally established by the City Council, the matter is not ripe for grant of a perpetual easement;

c. 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;

d. 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.

The status of the perpetual easement and remaining conditions is no surprise given that they cannot occur until the property is vacated. That is why there is no evidence that Defendant has breached the 1995 Agreement. 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 City Council in accordance with Judge Morfitt's Order. Until then, the remaining conditions cannot be completed.

V. CONCLUSION

There is no genuine issue of material fact that Defendant, by refusing to agree to the limited 20' access easement proposed in 2004, did not breach the 1995 Agreement, and Defendant is entitled to judgment as a matter of law on Count 1 of Plaintiff's Complaint. Even construing the record in Plaintiff's favor, the undisputed facts show that even if the 1995 Agreement is valid, Defendant is

not in breach of the 1995 Agreement. There is no disputed evidence to preclude the grant of summary judgment in Defendant's favor. Defendant requests attorney fees and costs pursuant to Idaho Code §§ 12-120 and 12-121.

DATED this 26th day of December, 2006.

MOORE SMITH BUXTON & TURCKE, CHTD.

By: _____
Tammy A. Zokan
Attorneys for Defendant Duro-Bilt

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of December, 2006, I caused a true and correct copy of the foregoing MEMORANDUM by the method indicated below, and addressed to the following:

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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 SECOND MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff Goodman Oil Company ("Goodman") and responds to Defendant's Second Motion for Summary Judgment. For the reasons set forth below, Defendant's Motion should be summarily denied.

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.

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. On November 7, 2006, Judge Morfitt set aside this fifty (50') foot wide easement. He also remanded the case to the City for further consideration.

The vacated street is now owned by the adjoining property owners. The reserved easement in Ordinance No. 3374 has been struck.

This litigation is the result of Defendant's breach of contract and Defendant's role as the instigator of an illegal veto by Nampa's Mayor. On September 20, 2006, this Court dismissed Bart and Alane McKnight. On November 7, 2006, this Court granted Defendant's Motion for Summary

Judgment as to Counts 2, 3, and 4 of Plaintiff's Complaint. Plaintiff's breach of contract claim has not been set for trial.

This 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").

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. Bart McKnight is the president and owner of Duro-Bilt.

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.

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.

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.

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.

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.

In August of 2004, Goodman and Wylie informed Defendant 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. It is now Duro-Bilt's contention that it had and has no obligation to agree to a twenty (20') foot wide easement.

Prior to entering into the Purchase and Sale Agreement with Wylie, Goodman through Mr. Conley, its president (hereafter "Conley",) offered to sell the Goodman property to Duro-Bilt 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 Defendant had knowledge of the Goodman/Wylie Purchase and Sale Agreement and that Defendant 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 Duro-Bilt. Duro-Bilt then refused its consent. *See,* Bates Nos. 000178-000179.

On August 16, 2004, the vacation ordinance ("Ordinance No. 3374") was approved by the Council and 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 Defendant.

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. 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.

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, was filed on September 19, 2005. The case has not been set for trial.

The damages incurred by Goodman are dependent upon the result of the judicial review

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

Planning Director Holm stated in his deposition, that all that was required from the adjoining

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 SECOND MOTION FOR SUMMARY JUDGMENT FAILS

Earlier in this litigation, Duro-Bilt contended (a) that there was no valid contract between the parties (page 12, Defendant's' 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 was invalid for lack of consideration (page 15, Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment); (e) that even if the Vacation Agreement was 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). All of these contentions were found by this Court to be without merit.

Having failed in its first Summary Judgment Motion, Duro-Bilt now contends that . . . "this Court does not need to resolve the validity of the 1995 Agreement to dispose of Plaintiff's contract claim." Page 8, Memorandum in Support of Defendant's Second Motion for Summary Judgment. Duro-Bilt conveniently ignores the multiple breach of contract issues and directs the Court's attention to the request of the Fire Department for a twenty (20') foot wide access easement.

As this Court is aware, the Nampa Fire Department is merely a consulting agency and has no power to require anything in regards to a street vacation. Goodman's claim for breach of the Vacation Agreement is not limited to Duro-Bilt's refusal to sign the consent circulated by Mr. Wylie. This refusal is but one event in Defendant's course of conduct refuting the Vacation Agreement agreed to in 1995.

a. The Vacation Agreement is a Valid Contract.

Defendant's 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 previously contented that without a street vacation, there is no contract. *See,* page 12, Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment. This contention ignores the fact that First Avenue South is 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, Duro-Bilt, nor anyone else 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 Defendant 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.

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

Defendant still contends that no easement exists. *See,* Defendant's Memorandum in Support of Defendant's Second Motion for Summary Judgment, page 12. Defendant's 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."

Defendant's contention that the perpetual easement does not exist is contradicted by the record.

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 previous contention that the Vacation Agreement fails for lack of consideration is based upon Duro-Bilt's expectation of a development incentive. *See,* page 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....").

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

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 Defendant's 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.

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

Defendant's contention that it has acted fairly and in good faith finds no support in the facts of this case.

V.

DURO-BILT'S BREACH OF THE VACATION AGREEMENT

Duro-Bilt breached the Vacation Agreement's covenants by withdrawing its consent and instigating the veto (a breach of para. 1 of the Vacation Agreement); by continually 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 and Duro-Bilt's breach are established beyond dispute. It is an undisputed fact that Defendant 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. Defendant still denies the existence of the perpetual easement. *See,* Memorandum in Support of Defendant's Second Motion for Summary Judgment, page 12.

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, including the perpetual easement.
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. He obtained the veto by withdrawing his consent.
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 perpetual easement and 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 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. Duro-Bilt's Second Motion for Summary Judgment should be summarily denied.

VI.

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 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 and to a perpetual easement, broke its promises. The result is the one Defendant intended and had hoped to achieve. Defendant is directly responsible for torpedoing a development that would have enhanced the gateway to Nampa by deliberately breaching the Vacation Agreement.

Defendant now must bear responsibility for its ill conceived choices and conduct. Defendant's motion should be summarily denied and this case set for trial.

DATED this _____ day of January 2007.

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
JON M. STEELE
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of January 2007, a true and correct copy of the foregoing BRIEF IN RESPONSE TO DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT was served upon opposing counsel as follows:

Christopher Yorgason
Moore Smith Buxton & Turke, Chtd.
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✓ US Mail
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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, v. SCOTTY'S DURO-BILT GENERATOR, INC., and Idaho corporation; and DOES I through V. Defendants.	Case No. CV 05-9800 **DEFENDANT'S REPLY BRIEF IN SUPPORT OF DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT**

COMES NOW, Defendant Scotty's Duro-Bilt Generator, Inc. ("Duro-Bilt" or "Defendant"), by and through its attorneys of record, Moore, Smith, Buxton & Turcke, Chartered, and submits its Reply in Support of Defendant's Second Motion for Summary Judgment filed on December 26, 2006, on the remaining issue in this case: Count 1 of Plaintiff's Complaint – Breach of Contract. Defendant received Plaintiff's Response Brief on January 11, 2007.

I. STATEMENT OF FACTS

Duro-Bilt and Plaintiff have, on numerous occasions, summarized the facts for the Court; and, therefore, Duro-Bilt will do its best to avoid unnecessarily repeating facts here. However, because Plaintiff has misstated the undisputed evidence in the record, some reiteration is necessary.

Plaintiff's case concerns the alleged breach of a 1995 Property Owner Street Vacation Agreement (the "1995 Agreement" or "Vacation Agreement"), whereby the parties to the 1995 Agreement agreed to the City of Nampa's vacation of First Avenue South between Blocks 16 and 19 of Pleasants Addition on the following terms and conditions:

1. City action approving the vacation of 1st Avenue South;

2. The parties granting a perpetual easement on the vacated property among themselves for access to and from each party's property, which access is to be at the discretion of property owners;

3. The parties executing 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.

The vacation is *still* held up by paragraph 1 of the 1995 Agreement; and, therefore, the subsequent conditions and obligations of the Agreement are not ripe for performance. There is no vacated street because: (1) there was no final vacation in 1995, because the City did not act on the vacation; (2) or, in 2004, because Plaintiffs filed suit against the City regarding the vacation; (3) or,

at present, because Judge Morfitt has remanded the vacation ordinance back to the City for a determination of public interest and impairment of rights.

Starting with current events first, Judge Morfitt recently entered his decision (1) setting aside the 50' easement in Ordinance No. 3374; and (2) *remanding* Ordinance No. 3374 to the City Council for a determination of whether the Ordinance is in the best interest of adjoining property owners, is not an impairment of easement and franchise rights belonging to any lot owner or public utility, and "a finding of expedience for the public good." Memorandum Decision and Order, *Goodman Oil Company v. City of Nampa, et al and Scotty's Duro-Bilt Generator, Inc.*, Case No. CV 04-10007 (Nov. 7, 2006), Zokan Aff., Ex. A, pp. 9-12. Consequently, despite Plaintiff's representations to the contrary, the street is not vacated. *Id.* at p. 2; see Plf's Brf. at p. 2 (Jan. 11, 2007).

Plaintiff further misrepresents the vacation as approved in 1995, 1999, and 2001. Pltf's Brf. at p. 4 (Jan. 11. 2007). The vacation could not be approved until the City Council took action to approve the vacation and the undisputed evidence of record shows that the City did not take action approving the proposed vacation until 2004. Zokan Aff., Ex. A (Morfitt Decision), p. 2; Plf 000117, 251. No ordinance related to the vacation was adopted in 1995 or anytime thereafter prior to 2004. *Id.* The City *tabled* the proposed vacation on October 16, 1995. Plf 000117. The Ordinance was tabled because the City Fire Department never approved the vacation. Zokan Aff., Ex. A (Morfitt Decision), p. 2.

Additional undisputed facts that deserve repeating are that Duro-Bilt *consented* to the Vacation Agreement in 1995, Yorgason Aff. Ex. A (McKnight Tr.), p. 71 ll. 1-4, and the 1995 Agreement protected each party's access to their property. Affidavit of Chris E. Yorgason in

Support of Defendant's Motions filed on June 16, 2006 (hereinafter "Yorgason Aff."), Ex. B (Conley Tr.), p. 72 ll. 1-4; Complaint, Ex. A ¶ 2. The 1995 Agreement did not assign a width to each party's access but left the location of such access to the discretion of each property owner. Yorgason Aff., Ex. B (Conley Tr.), p. 72 ll. 1-4, p. 75 ll. 24-25, p. 76 ll. 1-4; Complaint, Ex. A ¶ 2. Duro-Bilt consented to the Vacation Agreement in 1995. Yorgason Aff., Ex. A, (McKnight Tr.) p. 71 ll. 1-4. Duro-Bilt did not mind vacating 1st Avenue South so long as it had an easement for sufficient access. Yorgason Aff., Ex. A (McKnight Tr.), p. 62 ll. 11-16. And adequate access is exactly what the 1995 Agreement provides all the parties to the 1995 Agreement. Complaint, Ex. A ¶ 2.

Then, nine years later a *new* condition of vacation, which proposed to limit the width of each party's access to 20' was presented to the parties to the 1995 Agreement. On August 4, 2004, *before* the matter was raised again before the City Council, the Nampa Fire Department issued a letter stating its terms of agreement regarding the vacation. Zokan Aff., Ex. A (Morfitt Decision), p. 2; 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. This is the condition to which Defendant refused consent. Yorgason Aff., Ex. A (McKnight Tr.) p. 88 ll. 21-25, p. 89 ll. 1-7, p. 90 ll. 4-10, p. 96, p. 99 ll. 14-25, p. 100 ll. 1-5.

In 2004, Mr. Wylie approached Duro-Bilt and asked that it sign a new agreement signifying its agreement to the Nampa Fire Department's August 4, 2004, 20' access requirement. See Plf 000233, 000250; Yorgason Aff., Ex. B (Conley Tr.), pp. 47-51, Ex. 6. Mr. Wylie told Duro-Bilt that

Duro-Bilt's agreement to the 20' access easement was required for the vacation of 1st Avenue South to be finalized by the City Council. Yorgason Aff., Ex. A (McKnight Tr.), p. 90 ll. 4-9. Understanding that access would be limited to a mere 20' if the vacation were approved by the City, 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. 88, ll. 21-25, p. 89, ll. 1-7.

Defendant disagreed with the proposed 20' access and contacted the City to voice its lack of consent thereto and the Mayor attempted to veto the ordinance. Plaintiffs on the other hand wanted the vacation approved but disagreed with the vacation ordinance, as adopted, because it contained a 50' access easement, and filed a complaint against the City and Duro-Bilt.

II. SUMMARY OF ARGUMENT

Plaintiff alleges Duro-Bilt breached the 1995 Agreement in its entirety. Complaint ¶¶ 46-48. Such breach is not possible because (1) Duro-Bilt consented to the Agreement in 1995, and (2) 1st Avenue South has not been vacated. Duro-Bilt consented to the Vacation Agreement in 1995, therefore paragraph 1 of the Vacation Agreement has been satisfied and there has been no breach. Complaint, Ex. A ¶ 1; Complaint ¶ 48(a); Yorgason Aff., Ex. A (McKnight Tr.), p. 71 ll. 1-4. And since consenting to vacation under the terms of the 1995 Agreement, Duro-Bilt has cooperated to the extent due under the 1995 Agreement. Yorgason Aff., Ex. A (McKnight Tr.), pp. 82-85.

Until the street is vacated performance of the other terms and conditions of the 1995 Agreement is not due. Complaint ¶¶ 48(b)-(g); Yorgason Aff., Ex. B (Conley Tr.), p 64 ll. 12-23, p. 68 ll. 1-8; Yorgason Aff., Ex. A (McKnight Tr.), pp. 82-85. (As illustration, since the street has not

been vacated, there is no vacated property on which the parties can designate access and grant perpetual easements among themselves to the same.) Plaintiff admits that the other conditions of the 1995 Agreement are not due and that Plaintiff has not attempted to fulfill the other conditions of the Agreement. Yorgason Aff., Ex. B (Conley Tr.), p 64 ll. 12-23, p. 68 ll. 1-8.

The only consent required of Duro-Bilt by the 1995 Agreement has been met by Duro-Bilt's consent to the vacation of 1st Avenue South under the terms and conditions of the 1995 Agreement. Yorgason Aff., Ex. A (McKnight Tr.), p. 71 ll. 1-4. Duro-Bilt has only refused to consent to a street vacation that does not provide adequate access to and from Duro-Bilt's property, which Duro-Bilt is expressly entitled to under the 1995 Agreement. Complaint, Ex. A, ¶¶ 1-2. Indeed, Plaintiff readily admits that Duro-Bilt and the other parties to the 1995 Agreement are entitled to adequate access under the 1995 Agreement. Yorgason Aff., Ex. B (Conley Tr.), p. 72 ll. 1-4. Duro-Bilt is also entitled to insure that its easement and right of way is not impaired under Idaho Code §50-311.

In 2004, Plaintiff advised Duro-Bilt the access easement would be limited to 20' if the vacation was approved by the City Council and asked Duro-Bilt to agree to the 20' easement. Yorgason Aff., Ex. A (McKnight Tr.) p. 90 ll. 4-9. Duro-Bilt refused because 20' access was not adequate and the 1995 Agreement provides each party to the 1995 Agreement access, without limits on width, to and from their property at each party's discretion. Yorgason Aff., Ex. A (McKnight Tr.), p. 88 ll. 1-21, p. 89 ll. 1-7; Complaint, Ex. A ¶ 2. Consequently, even assuming the 1995 Agreement is a valid legal contract today and taking Plaintiff's groundless accusations and misstatements of fact as true for the purposes of summary judgment, Defendant has not breached the 1995 Agreement and is entitled to judgment as a matter of law.

III. ARGUMENT

Duro-Bilt did not breach any obligation due under the 1995 Agreement or breach the covenant of good faith and fair dealing. 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. First, the parties executing the 1995 Agreement consented to the vacation of 1st Avenue South in accordance with the terms of the 1995 Agreement; and, therefore the first condition of the Vacation Agreement has been met. *Id.*; Yorgason Aff., Ex. A (McKnight Tr.), p. 71 ll. 1-4. It has not been breached. The remaining conditions are contingent on the vacation of 1st Avenue South. Yorgason Aff., Ex. B (Conley Tr.), p. 64 ll. 12-22, p. 68 ll. 1-8; Complaint, Ex. A.

Once vacated, the parties were to grant themselves a perpetual easement on the vacated property for access to and from each party's 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. *Id.* at ¶ 3. The parties would then be responsible for maintenance in proportion to the amount of property they own. *Id.* There is no dispute that 1st Avenue South has not been vacated; and, therefore, there is no dispute that the subsequent conditions and obligations under the 1995 Agreement were not due in 2004 (and still are not due today). Since the contract conditions were not due at the time of the alleged breach, Duro-Bilt cannot be held in breach. *Idaho Power Company v. Cogeneration, Inc.*, 134 Idaho at 746.

Plaintiff alleges that Duro-Bilt breached the 1995 Agreement by refusing to cooperate and consent in 2004. Plf's Brf. in Objection to Def's Motion for Summary Judgment and in Support of Plf's Motion for Summary Judgment at p. 23 (August 22, 2006). The only thing Defendant failed to

consent to in 2004 was, (1) a brand new agreement limiting the access easement to 20'; and, (2) the vacation of the property with only a 20' access easement. The 20' access easement came up for the first time in 2004 when the Nampa Fire Department issued a letter stating its terms of agreement regarding the vacation. Plf 000046. Mr. Wylie told Duro-Bilt that it must agree to the new 20' condition for the vacation to be approved by the City. Yorgason Aff., Ex. A (McKnight Tr.), p. 90 ll. 4-9. Duro-Bilt refused; however, Duro-Bilt's refusal was not aimed at a condition of the 1995 Agreement. Duro-Bilt refused to enter into the *entirely new agreement, which was outside the scope of the 1995 Agreement*, proposed 9 years after the 1995 Agreement.

Moreover, the condition and agreement proposed in 2004 conflicts with the express terms of the 1995 Agreement. The 1995 Agreement expressly provides for each of the parties to the 1995 Agreement to have perpetual access to their individual properties from Second and Third Streets via the vacated property. *Id.* at ¶ 3. Plaintiff admits the 1995 Agreement protects each party's need for access. Yorgason Aff., Ex. B (Conley Tr.), p. 72 ll. 1-4. The 1995 Agreement contains no mention of or any reference to any limitation on the width of each party's access easement or the parties' consent to any such limitation. *Id.* at p. 75 ll. 24-25, p. 76 ll. 1-2; Complaint Ex. A. Indeed, the express contractual provision provides that the parties will have

> 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. 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.

Id.

The parties agree that there is no written instrument obligating Duro-Bilt to agree to a limited 20' access easement. First, the 1995 Agreement clearly provides an easement on the vacated property

for access to each owner's property located at their discretion -- the purpose for such easement being to provide the parties adequate access to and from their property from both Second and Third Streets. The 1995 Agreement imposes no limits on the size of each party's access easement. Indeed, no size limit was proposed until 2004, when Mr. Wylie circulated a proposed *new agreement* limiting access to only 20'. Limiting the access easement to 20' imposes an obligation *outside the scope of the 1995 Agreement*. Duro-Bilt did not contract for such limited access by way of the 1995 Agreement. Duro-Bilt's refusal to relinquish needed access is consistent with the 1995 Agreement and Idaho law governing the vacation of public streets. Section 50-331, Idaho Code, prohibits vacations that would impair rights-of-ways and easements of any lot owner. Vacating 1st Avenue South with only 20' for access, would impair Duro-Bilt's access.

Even if we assume the parties were still bound by the 1995 Agreement in 2004, Defendant did not breach the 1995 Agreement when it refused to agree to the limited 20' access proposed by the City Fire Department and Mr. Wylie in 2004. In refusing to agree to the 2004 condition, Duro-Bilt acted in accordance with the terms of the 1995 Agreement and Idaho law.

For the reasons stated herein, Duro-Bilt's refusal to agree to a condition outside the scope of the 1995 Agreement and enter into a new agreement in 2004 was fair and reasonable under the terms of the 1995 Agreement. Defendant's refusal to relinquish access did not violate, nullify or significantly impair any benefit of the 1995 Agreement. *Idaho Power Company v. Cogeneration, Inc.*, 134 Idaho at 750. To the contrary, even Plaintiff admits that Duro-Bilt's right to access is in fact protected under the 1995 Agreement without any width restriction. Yorgason Aff., Ex. B (Conley Tr.), p. 72 ll. 1-4, p. 75 ll. 24-25, p. 76 ll. 1-2. If Duro-Bilt had agreed to the vacation being

approved with only a 20' access easement, its clearly expressed right to access under the 1995 Agreement would be impaired. Therefore, in refusing to agree to the 2004 condition, Duro-Bilt acted fairly and in good faith under the terms of the 1995 Agreement. Yorgason Aff., Ex. A (McKnight Tr.), p. 71, l. 25, p. 72, ll.. 1-9; Yorgason Aff., Ex. B (Conley Tr.), p. 72 ll. 1-4; *Jenkins v. Boise Cascade Corporation*, 141 Idaho 233, 243, 108 P.3d 380 (2005).

IV. CONCLUSION

For the reasons described in Defendant's Memorandum in Support of its Second Motion for Summary Judgment and herein, there is no genuine issue of material fact that Defendant, by refusing to agree to the vacation of 1st Avenue South with the limited 20' access easement in 2004, did not breach the 1995 Agreement, and Defendant is entitled to judgment as a matter of law on Count 1 of Plaintiff's Complaint. Even construing the record entirely in Plaintiff's favor, the undisputed facts show that even if the 1995 Agreement is valid, Defendant is not in breach of the 1995 Agreement. There is no disputed evidence to preclude the grant of summary judgment in Defendant's favor. Defendant requests attorney fees and costs pursuant to Idaho Code §§ 12-120 and 12-121.

DATED this 18th day of January, 2007.

MOORE SMITH BUXTON & TURCKE, CHTD.

By: _____
Tammy A. Zokan
Attorneys for Defendant Scotty's Duro-Bilt, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of January, 2007, I caused a true and correct copy of the foregoing REPLY by the method indicated below, and addressed to the following:

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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, v. SCOTTY'S DURO-BILT GENERATOR, INC.; and DOES I through V. Defendants.	Case No. CV 05-9800 **ORDER**

Before the Court is Defendant's Second Motion for Summary Judgment, filed on December 26, 2006;

and, the Court having reviewed the relevant pleadings, briefs and memoranda, and having considered oral argument, and good cause appearing therefore:

It is hereby ORDERED as follows:

Defendant's Second Motion for Summary Judgment is granted as to the last remaining

count of Plaintiff's Complaint and Demand for Jury Trial, Count One – Breach of Contract.

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

DATED this ____ day of _____, 2007. FEB - 6 2007

By: _____
Judge Renae J. Hoff
District Judge, Third Judicial District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9 day of Feb, 2007, I caused a true and correct copy of the foregoing ORDER by the method indicated below, and addressed to the following:

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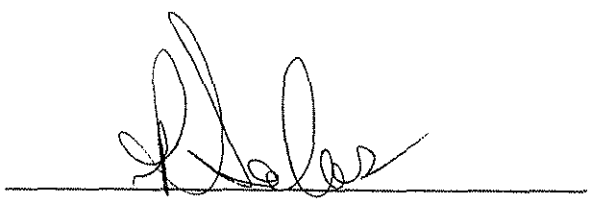

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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 GRANTING DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT**

Goodman respectfully requests this Court to reconsider its Order granting Defendant's Second Motion for Summary Judgment.

Goodman's Complaint alleges breach of the Property Owner's Vacation Agreement by Duro-Bilt. Other counts alleging 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 were previously dismissed by this Court.

The Court's previous 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 Court at that same time declined to enter Summary Judgment for Goodman as the Court announced that there remained a factual issue as to whether the Property Owner's Vacation Agreement remained in effect. The Court also denied Defendant's Summary Judgment Motion based upon their contention that the Property Owner's Vacation Agreement was void.

In Defendant's Second Summary Judgment Motion Defendant changed legal theories. In its Second Summary Judgment Motion they no longer contend the Property Owner's Vacation Agreement is void. They now contend that it simply was not ripe for enforcement. The Court agreed and in granting Summary Judgment announced that the vacation of First Avenue had not been finalized and hence Defendants performance under the Vacation Agreement was not ripe.

In litigation over the past two and one-half (2 ½) years, in this case and the companion case before Judge Morfitt, Defendants have contended that the Property Owner's Vacation Agreement was void and unenforceable.

In its first Summary Judgment motion, Duro-Bilt contended (a) that there is no valid contract between the parties (p. 12 Defendants' 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); and (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).

However, by switching horses in the middle of the stream, Defendants have now convinced this Court to grant Summary Judgment.

In their first Summary Judgment Motion when Defendants contended the vacation was void and unenforceable, this Court ruled that an issue of material fact remained to be determined by a jury. That issue was whether the Vacation Agreement was still in effect.

It is and has been Goodman's contention that not only is the Vacation Agreement still in effect, but also that the vacation of First Avenue South is over and final. In granting Defendant's Second Motion for Summary Judgment, this Court announced that the vacation of First Avenue South had not been completed which completely ignores Judge Morfitt's ruling in the companion case.

The granting of Summary Judgment has no basis in the record. In fact, the exact opposite is true. Defendants flip-flopping between legal theories creates more issues of

material fact. First Avenue South has been vacated. This Court has reviewed Judge Morfitt's decisions in the companion case of *Goodman v. the City of Nampa*, Case No. CV 04-10007. In the past thirty (30) days, Judge Morfitt has awarded Goodman $40,000 in attorney's fees as a result of the Judicial Review portion of its case and has entered a Preliminary Injunction against Nampa prohibiting it from proceeding with obtaining consents, proceeding or scheduling any public hearing or proceeding in any other manner which is consistent with previously obtained consents to vacation and completed vacation of First Avenue South between Second and Third Streets South in the City of Nampa. *See,* Affidavit of Jon M. Steele in Support of Goodman's Motion for Reconsideration of Defendants Second Motion for Summary Judgment.

The Court has been led astray by Defendants. The time for performance under the Vacation Agreement was August of 2004. Defendants' were asked to meet their contractual obligations by cooperating and consenting to the vacation of First Avenue South. Instead, they refused to cooperate, instigated an illegal veto of Ordinance No. 3374 and have held the development of this downtown Nampa parcel hostage.

The exhibits to the Affidavit of Jon M. Steele in Support of Goodman's Motion for Reconsideration of Order Granting Defendant's Second Motion for Summary Judgment consist of pleadings from the companion case before Judge Morfitt: Goodman's proposed Findings of Fact, Conclusions of Law and Order concerning the award of fees and costs; Goodman's proposed Judgment as to the Nampa Respondents; Goodman's proposed Preliminary Injunction against Nampa Respondents and Goodman's Supplemental Brief concerning additional issues Judge Morfitt will be

addressing. Even though Defendant contends otherwise, the vacation of First Avenue South is final. This Court's ruling that Defendant's time for performance under the Vacation Agreement is not ripe is wholly erroneous and not supported by anything in the record.

This litigation is the result of Defendant Duro-Bilt's breach of contract in which it consented to the vacation of First Avenue South. 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.

McKnight 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. Mayor Dale taught McKnight's children at a charter school and McKnight is a member of the Board of Directors of that school. *See*, Affidavit of Jon M. Steele in Support of Goodman's Motion for Reconsideration of Order Granting Defendant's Second Motion for Summary Judgment, Bates No. Plf 000285 - Plf 000286.

Defendants admit that they contacted the City and attempted to verbally withdraw Duro-Bilt's consent to the Vacation Agreement. *See,* Complaint para 29 and Answer para. 29. Defendants also admit sending a letter to the City attempting to withdraw

Defendant's consent to the vacation of First Avenue South. Complaint para. 37 and Answer para. 37.

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.

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 led to the interference with the Goodman/ Wylie Purchase and Sale Agreement. McKnight's undisputed role as instigator of Duro-Bilt's refusal to cooperate, the withdrawal of consent and of an illegal veto by the Nampa Mayor are more than sufficient to withstand Defendant's Motion for Summary Judgment.

Goodman respectfully requests the Court to reconsider its Order.

DATED this 23rd day of February, 2007.

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
JON M. STEELE
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of February 2007, a true and correct copy of the foregoing **BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT** was served upon opposing counsel as follows:

Tammy Zokan
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RUNFT & STEELE LAW OFFICES, PLLC

By: _____
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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 **GOODMAN'S MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT**

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 Order granting Defendant's Second Motion for Summary Judgment.

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

Oral argument is requested.

DATED this 25th day of February 2007.

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
JON M. STEELE
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of February 2007, a true and correct copy of the foregoing **GOODMAN'S MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT** was served upon opposing counsel as follows:

Tammy Zokan
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RUNFT & STEELE LAW OFFICES, PLLC

By: Karissa Ambrose for
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Attorney for Plaintiff

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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 GRANTING DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT**

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 personal knowledge, 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 Granting Defendant's Second Motion for Summary Judgment.
3. That attached is a true and correct copy of the proposed Findings of Fact, Conclusions of Law and Order, in the case *Goodman v. City of Nampa*, Canyon County Case No. CV 04-10007, Bates Nos. Plf 000261 – Plf 000265.
4. That attached is a true and correct copy of the proposed Judgment as to the Nampa Respondents, in the case *Goodman v. City of Nampa*, Canyon County Case No. CV 04-10007, Bates Nos. Plf 000266 – Plf 000268.
5. That attached is a true and correct copy of the Preliminary Injunction Against Nampa Respondents, in the case *Goodman v. City of Nampa*, Canyon County Case No. CV 04-10007, Bates Nos. Plf 000269 – Plf 000271.
6. That attached is a true and correct copy of the Goodman's Supplemental Brief, in the case *Goodman v. City of Nampa*, Canyon County Case No. CV 04-10007, Bates Nos. Plf 000272 – Plf 000284.
7. That attached is a true and correct copy of an excerpt from the deposition of Mayor Tom Date taken April 22, 2005, Bates Nos. Plf 000285 – Plf 000286.

Further, your affiant sayeth naught.

DATED this 23rd day of February 2007.

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
JON M. STEELE
Attorney for Plaintiff

STATE OF IDAHO)
:ss
County of Ada)

SUBSCRIBED AND SWORN unto before me this 23rd day of February 2007

KARISSA R. ARMBRUST NOTARY PUBLIC STATE OF IDAHO

_____
Notary Public for the State of Idaho
Residing at: Nampa
My Commission Expires: 3-16-07

CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 23rd day of February 2007, a true and correct copy of the **AFFIDAVIT OF JON M. STEELE IN SUPPORT OF GOODMAN'S MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT** was served upon opposing counsel as follows:

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RUNFT & STEELE LAW OFFICES, PLLC

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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, 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 **FINDINGS AND FACT, CONCLUSIONS OF LAW AND ORDER**

Pending before the Court is the Nampa Respondents Objection to Petitioner Goodman Oil Company's Memorandum of Attorney Fees and Costs. The Nampa Respondents have appeared by and through its attorney of record, Christopher Gabbert, and Petitioner appeared by and through its attorneys of record, Jon M. Steele and Karl J. F. Runft, and Petitioner having submitted supporting affidavits as required by IRCP 54,

the Court having fully reviewed the record and having considered the argument of counsel finds the following:

Findings of Fact

1. In this matter Petitioner brought two separate and distinct actions, the Writ of Mandamus Proceeding and the Judicial Review Proceeding.
2. Considering the final results of these actions in relation to the relief sought it is clear that Petitioner is the prevailing party in both the Mandamus Proceeding and the Judicial Review Proceeding.
3. The Court also finds that Petitioner's attorneys aggressively pursued this matter and that both parties' attorneys skillfully and appropriately represented their client.
4. The Court also finds that the Petitioner sought leave to perform discovery in the Mandamus Proceeding and received this Court's approval.

Conclusions of Law

1. It is the American Rule that each party bear their own attorney fees and costs unless a contractual or statutory provision provides otherwise.
2. The Court concludes that Idaho Code § 12-117 is the exclusive basis for the award of attorney fees against the Nampa Respondents in this case. *See*, *Westway Construction Inc. v. Idaho Transportation Department*, 139 Idaho 107, 73 P.3d 721 (2003).
3. Idaho Code § 12-117 provides that the Court shall award attorney fees when the Court finds the Respondent acted "without a reasonable basis in law or fact."

4. The Court cannot find that the Nampa Respondents acted without a reasonable basis in law or fact in regard to the Mandamus Proceeding.

5. The Court concludes in regards to the Mandamus Proceeding, that simply being wrong does not give rise to acting without a reasonable basis in law or fact as required by Idaho Code § 12-117.

6. In regards to the Judicial Review Proceeding, the Court found in Petitioners favor that the IAPA does not apply and found in Petitioners favor on the substantive issue of the reservation of the easement, as being a violation of law and an *ultra vires* act. *Black v. Young*, 122 Idaho 302, 834 P.2d 304 (1992).

7. The Court concludes that the Nampa Respondents acted without a reasonable basis in law or fact as to the Judicial Review Proceeding as there exists no basis for the reservation of the 50 foot wide easement reserved in Ordinance No. 3374 in either law or fact.

8. Pursuant to Idaho Code § 12-117 Petitioner is entitled to an award of attorney fees for only the Judicial Review Proceeding in this case and not for the Mandamus Proceeding in this case.

9. In regards to the question as to what amount is a necessary and proper award, the Court has considered the factors of I.R.C.P. 54(c)3.

10. The amount of an award of attorney fees is committed to the sound discretion of this Court. *E. Idaho Agric. Credit Ass'n v. Neibaur*, 130 Idaho 623, 944 P.2d 1386 (1997).

11. The Court concludes that Petitioner is the prevailing party on both the Mandamus Proceeding and Judicial Review Proceeding, but that it is appropriate to award attorney fees on only the Judicial Review Proceeding.

12. The Court determines that after considering the above, the briefings, the affidavits in support and the argument of counsel that it is appropriate to award the Petitioner $40,000 as attorney fees for the Judicial Review Proceeding of this matter.

13. The Court also concludes that Petitioner is entitled to $2,966.29 in costs claimed as a matter of right pursuant to I.R.C.P. 54(d)(1)(c).

Order

Based upon the foregoing, Petitioner is awarded attorney fees of $40,000 and costs of $2,966.29. Judgment against the Nampa Respondents will be entered appropriately.

DATED this _____ day of _____ 2007.

_____
JUDGE JAMES C. MORFITT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of February 2007, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** 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
Chris D. Gabbert White Peterson, P.A. 5700 East Franklin Road, Ste 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

JON M. STEELE (ISB # 1911)
KARL J. F. RUNFT (ISB # 6640)
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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, 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 **JUDGMENT AS TO THE NAMPA RESPONDENTS**

This matter having come before the Court and the Petitioner being represented by Jon M. Steele and Karl J. F. Runft and the Nampa Respondents being represented by Christopher Gabbert. The Court having previously entered it's Order Granting Writ of Mandamus, it's Peremptory Writ of Mandamus and having issued it's 54(b) Certificate, all on August 8, 2005. The Ordinance #3374 having been published by the Nampa

Respondents on or about September 5, 2005, and the time to appeal pursuant to Idaho Code § 50-1322 having expired with no appeal taken, the vacation of First Avenue South between 2nd Street South and 3rd Street South in the City of Nampa is final.

The Court having entered it's Memorandum Decision on Judicial Review and Order on November 7, 2006, and issued its Findings and Fact and Conclusion of Law Concerning Attorney Fees and Costs on _____, 2007, now enters judgment in accordance therewith.

Now, IT IS HEREBY ORDERED, ADJUDGED and DECREED:

1. That the 50 foot wide ingress/egress and utility easement reserved by Ordinance #3374 which vacated First Avenue South between 2nd Street South and 3rd Street South in the City of Nampa is set aside and of no further force or effect.

2. That Ordinance #3374 be and is hereby, Remanded to the City of Nampa for it's determination as to whether other factors existed or regarding the public good requirement of Idaho Code § 50-311.

3. Pursuant to Idaho Code § 12-117, Petitioner is awarded attorney fees of $40,000.00 and costs as a matter of right of $2,966.29.

DATED this _____ day of _____ 2007.

_____
JUDGE JAMES C. MORFITT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of February 2007, a true and correct copy of the foregoing JUDGMENT AS TO THE NAMPA RESPONDENTS was served upon opposing counsel as follows:

Tammy Zokan
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Clerk of Court

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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, 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 **PRELIMINARY INJUNCTION AGAINST NAMPA RESPONDENTS**

This Court, on February 2, 2007, having heard the Petitioner's Motion for Preliminary Injunction and Petitioner Goodman being represented by Jon M. Steele and the Nampa Respondents being represented by Chris Gabbert and the Court having heard and considered oral argument of counsel and good cause appearing for the issuance of a Preliminary Injunction against

the Nampa Respondents, the Court finds as follows:

The Nampa Respondents have solicited consents to vacation from adjoining property owners of First Avenue South and have scheduled and noticed a public hearing concerning the vacation of First Avenue South;

Such action is inconsistent with and done in violation of Petitioner's rights respecting the subject of this litigation, which is the vacation of First Avenue South, and would render this Court's judgment ineffectual (*see,* I.R.C.P. 65(e)3) as valid consents to the vacation of First Avenue South have previously been obtained from adjoining property owners and the vacation of First Avenue South is completed and is final.

Now therefore it is ORDERED, ADJUDGED AND DECREED that a preliminary injunction is issued enjoining and restraining the Nampa Respondents, its offices, agents, employees and attorneys and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise during the pending of this action from obtaining any consents, proceeding or scheduling any public hearing, or proceeding in any other manner which is inconsistent with previously obtained consents to vacation and completed vacation of First Avenue South between 2nd and 3rd Streets South in the City of Nampa.

Petitioner shall post a $500 check payable to the Clerk of this Court as security pursuant to I.R.C.P. 65(c).

IT IS SO ORDERED

DATED this _____ day of February 2007.

_____

JUDGE JAMES C. MORFITT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of February 2007, a true and correct copy of the foregoing PRELIMINARY INJUNCTION was served upon opposing counsel as follows:

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By:_____
JON M. STEELE
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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, 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. Respondents.	CASE NO. CV 04-10007 **SUPPLEMENTAL BRIEF**

I.

INTRODUCTION

Petitioner Goodman Oil ("Goodman") has submitted a detailed summary of the factual and procedural posture of this case in Goodman's Memorandum in Support of

Petitioner's Motion for Reconsideration filed on January 29, 2007, and will rely, in part, on that summary for this Supplemental Brief.

Goodman is submitting this Supplemental Brief in response to the February 2, 2007, hearing during which this Court heard Goodman's Motion for Preliminary Injunction and Motion for Reconsideration and Clarification regarding the Court's ruling that Ordinance No. 3374 was to be remanded to the Respondent, the City of Nampa ("Nampa"). The Court granted the Preliminary Injunction and ordered supplemental briefing on the following issues:

1. Is Goodman's Motion for Reconsideration and/or Clarification timely?
2. The propriety of the Court's remand. Was the remand ever raised as an issue on appeal? Was the issue properly before the Court? Did the Court act within it's authority in making the remand order? If not, is it still proper?
3. If remand is appropriate, what is the scope of the remand order? What is the scope of the "public good"? What evidence may be considered by the City in making that determination?
4. If the Court's remand is set aside, does the Ordinance survive with the easement struck?
5. What effect is the Peremptory Writ of Mandamus in August of 2005 with the I.R.C.P. 54(b) Certificate and the effect of no appeal having been taken in accordance with Idaho Code § 50-1322?

II.

GOODMAN'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION WAS TIMELY

Goodman's Motion for Reconsideration and/or Clarification was timely because under I.R.C.P. 11(a)(2)(B), such a motion may be made at any time during the progress of the case until final judgment is entered. In *Elliott v. Darwin Neibaur Farms*, 138 Idaho 774, 785, 69 P.3d 1035, 1046 (2003), the Idaho Supreme Court stated:

> Rule 11(a)(2)(B) of the Idaho Rules of Civil Procedure specifically provides that a motion for reconsideration of any interlocutory order of the trial court may be made at any time before entry of final judgment but not later than fourteen (14) days after the entry of final judgment. This Court has repeatedly held that I.R.C.P. 11(a)(2)(B) provides a district court with authority to reconsider and vacate interlocutory orders so long as final judgment has not been entered. *Telford v. Neibaur,* 130 Idaho 932, 950 P.2d 1271 (1998); *Sammis v. Magnetek Inc.,* 130 Idaho 342, 346, 941 P.2d 314, 318 (1997); *Farmers Nat'*l Bank v. Shirey, 126 Idaho 63, 878 P.2d 762 (1994).

Final judgment has not been entered in the Judicial Review portion of the case. This Court has not entered its Findings of Fact and Conclusions of Law and Judgment as to Nampa, both of which were submitted to this Court by Goodman on January 26, 2007.

Goodman's Motion for Reconsideration and for Preliminary Injunction was the result of Nampa's unilateral action in setting a public hearing without notifying Goodman's attorney.

The Notice and Hearing were in violation of this Court's Peremptory Writ of Mandamus which resulted in the vacation of First Avenue South in September of 2005. The Notice states that the purpose of the hearing would be to determine whether First Avenue South **should** be vacated. *See*, Exhibit D to the Affidavit of Jon M. Steele in

Support of Goodman's Motion for Preliminary Injunction and for Reconsideration and Clarification filed on January 29, 2007. That was not the issue this Court ordered Nampa to consider in this Court's remand. This Court directed Nampa to only consider whether there were further issues concerning the "public good" regarding the vacation. The Notice contemplates a hearing over issues which were not remanded to Nampa, such as whether proper consent had been secured among the adjoining property owners.

Second, the Notice and Hearing are a violation of this Court's Preemptory Writ of Mandamus. Under this Court's Preemptory Writ of Mandamus, First Avenue South has already been vacated. Nampa is in violation of this Court's Preemptory Writ of Mandamus by asserting, via its Notice, that First Avenue South is not vacated and that the Preemptory Writ of Mandamus has somehow become void. This Court's Preemptory Writ of Mandamus has not become void. It has full force and effect and Nampa threatens to violate it.

Third, the public hearing on this issue has been closed for years. Nampa cannot open up the fact finding process again.

Goodman's Motion for Reconsideration and for Preliminary Injunction was the result of Nampa's absurd interpretation of this Court's remand order. The Motion was brought within days of Goodman receiving notice of the ill conceived procedure from Nampa. Despite repeated requests, Nampa provided no notice of this procedure to Goodman's attorney.

Goodman's motion is timely.

III.

THE COURT'S REMAND IS NOT APPROPRIATE

This Court ordered in the Judicial Review proceeding that the fifty (50') foot wide ingress/egress and utility easement reserved by Ordinance No. 3374 was to be set aside and of no further force or effect. However, the Court further ordered that Ordinance No. 3374 was to be remanded to Nampa for a determination as to whether other factors existed regarding the "public good" requirement of I. C. § 50-311. This is inappropriate as it would serve no purpose than to undermine the prior decision of this Court.

First, the Court has already ruled in its Memorandum and Decision on Judicial Review and Order that:

> The Court finds and concludes, as a matter of law, that the City's reservation of a 50 foot ingress/egress utility easement is in violation of the provisions of I.C. § 50-311.
>
> The Court further finds and concludes that the City's reservation of a 50 foot ingress/egress utility easement is an *ultra vires* act by the City because the reservation of the easement is in conflict with I.C. § 50-311.

See, Memorandum and Decision on Judicial Review and Order, p. 10.

Nampa has no authority to reserve any easement by way of considering the "public good" as Nampa is prohibited from doing so by law and this Court's Order. The issue of the "public good" is a prerequisite to vacating a street. *See*, I.C. § 50-311. As this Court knows, by granting Goodman's Preemptory Writ of Mandamus directing Nampa to publish Ordinance No. 3374, Ordinance No. 3374 became law. First Avenue South was and has been vacated since the issuance of the Preemptory Writ of Mandamus and publication of the Ordinance. The underlying property has reverted to its respective owners. *See*, I.C. § 50-311. As a result of the Court's remand Nampa has unilaterally

decided that it is entitled to start the vacation process over again. Goodman is confident that this was never intended by this Court. The remand was not intended to allow Nampa a chance to nullify the past two and one-half years of litigation and this Court's own Preemptory Writ of Mandamus.

Further, the Court should observe that the issues Goodman raised on review were whether the decision to require a twenty (20') foot wide fire access road and the fifty (50') foot wide easement were legitimate. *See*, Petition for Writ of Mandate and Petition for Judicial Review, p. 9. Neither Goodman nor Nampa asked this Court to review whether Nampa had failed to consider if the vacation was "expedient for the public good" in passing Ordinance No. 3374. Indeed, it has always been Goodman's contention that when Ordinance No. 3374 was passed Nampa had fulfilled its obligation to consider the "public good" pursuant to I.C. § 50-311, but that Nampa had no authority to reserve the fifty (50') foot easement as such. Nampa never raised any issue concerning whether it had failed to consider what was "expedient for the public good". *See*, Response to Petition for Writ of Mandate and Petition for Judicial Review.

The issue of whether passage of the Ordinance was done with sufficient consideration of the "public good" is and was simply not before this Court. *See*, I.R.C.P. 84(d)(5)(statement of issues for judicial review). In an I.R.C.P 84 review, this Court sits as an appellate court according to the cannons of appellate procedure. *See*, I.R.C.P. 84(r). It is a long standing cannon that issues that "have not been raised on appeal... are not before us." *Roe v. Doe (In re Termination of the Parental Rights of Doe),* 142 Idaho 174, 125 P.3d 530 (2005). The Court has no authority to remand the Ordinance on the unasserted issue of whether Ordinance No. 3374 is "expedient for the public good."

IV.

THE SCOPE OF THE REMAND ORDER IS AMBIGUOUS

A dedication of a public street does not convey fee simple title to the public. The Idaho Supreme Court has construed a statutory dedication to convey to the public only a "defeasible fee", subject to a right of reversion in the owners of the adjacent lots fronting upon the vacated street. In the case of *Mochel v. Cleveland*, 51 Idaho 468, 5 P.2d 549 (1930), the Idaho Supreme Court was called upon to assess the nature of the reversionary interest possessed by the owners of adjacent lots. In that case, the Supreme Court considered whether or not a city had authority to convey a fee simple interest in a dedicated street to another non-adjoining property owner, or whether the city's ownership rights were subject to a right of reversion in the owners of the property fronting upon the street. In upholding such right of reversion, the Idaho Supreme Court defined the nature of the interest as follows:

> C.S. § 3963. provides that, when any street, alley, avenue or lane shall be vacated, the same shall "revert" to the owner of the adjacent real estate . . . The city had title to the lands for public use only. When that use was abandoned, what did the legislators have in mind other than that the land should "go back" to the dedicator or his successors? If the city could deed it to anyone else, there could in such instance never be a going back; nothing would "revert".

See *Mochel v. Cleveland*, 5 P.2d at 553. The court further went on to explain that the "fee" interest referred to in the statute is merely a fee interest in the surface of the property, or a mere right to use the street for public purposes, and that upon abandonment or vacation of the street, the "fee interest" reverts to the owner of the adjoining property fronting upon the street:

> While the word "fee" is used in this section, it is clear from what follows that it was not intended that the fee of the corpus or land itself should pass, but only the fee to the surface, and this only for public use for all purposes of a street or highway. The fee mentioned in the statute was thus what is known as a limited or determinable fee, and was created for a special purpose or purposes only, and hence was subject to abandonment.

Mochel v. Cleveland, *supra*, 5 P.2d 553.

Thus when an owner of property dedicates a street for public use, the public entity, as recipient of such dedication, acquires a limited "fee" interest in the surface of the property embraced within the dedication, which limited or "defeasible" fee then reverts to the owner of the adjacent property upon abandonment of the use of the street by the public entity.

As stated, this Court ordered that Ordinance No. 3374 was to be remanded to Nampa for a determination as to whether other factors existed regarding the "public good" requirement of I. C. § 50-311. I. C. § 50-311 lists no factors of what a city should considerer when determining if a street vacation is "deemed expedient for the public good." *See*, I. C. § 50-311. However, in light of the *Mochel* case it is apparent that once the purpose of the street right of way no longer exists the public entity has the power to abandon the street for the "public good".

In the case of *Tott v. Sioux City*, 261 Iowa 677, 680, 155 N.W.2d 502, 505 (1968), the Supreme Court of Iowa stated:

> a wide discretion is vested in cities and towns in the opening, control and vacation of streets and alleys. While the exercise of this power is not unlimited, yet where it is exercised in good faith, and for what it believes to be the public good, the courts will not interfere in the action of the municipality. Such interference is justified only in a clear case of arbitrary and unjust exercise of the power.

In abandoning a street for the "public good" a city may not be arbitrary or unjust. Goodman would like to note this Court has already ruled that Nampa acted arbitrarily in reserving the fifty (50') foot easement in Ordinance No. 3374.

Finally, as stated above, consideration of the "public good" is a prerequisite for vacating a street. Any issue of whether vacating First Avenue South is "expedient for the public good" was determined when Ordinance No. 3374 was passed by the Nampa City Council and signed by the Mayor.

V.

ORDINANCE NO. 3374 SURVIVES WITH THE EASEMENT STRUCK IF THE COURT'S REMAND IS SET ASIDE

Under *Black v. Young*, 122 Idaho 302, 834 P.2d 304 (1992), this Court is well within its power to strike the easement and allow Ordinance No. 3374 to stand. As this Court may recall, in *Black*, builders were granted a vacation of an alley upon the condition that the builders get a building permit and proper funding to build a hotel; the builders objected to the conditions. *Id.* at 304-305, 834 P.2d at 306-307. The Supreme Court struck the conditions but then remanded the ordinance because:

> Section 1 of Ordinance Number 471 states that "it is found by the Ketchum City Council to be in the best interest of the City of Ketchum and for the public good and convenience, *provided that the motel . . . is built*, that said portion of said alley hereinafter be vacated." (Emphasis added.) The only "public good" found by the City of Ketchum in Ordinance Number 471 was the construction of the motel.
>
> So, the City of Ketchum found that it was expedient for the public good to vacate the alley *if* the motel was built. Additionally, the parties do not dispute that the public good requirement would be satisfied by construction of the motel. In fact, in the estoppel

> affidavit, the Blacks acknowledged that "[w]e understand the City of Ketchum has determined that, provided the motel is constructed, the alley is not needed as a public thoroughfare." The problem, then, with striking only the two conditions and the right of reversion from the ordinance is that the statutorily mandated finding of "expedient for the public good" would be defeated. However, we are unable to discern, from this record, whether there was some other independent basis for the public good requirement. For this reason, we reverse the judgment of the district court and remand the case to the trial court to determine if other factors existed or were considered regarding the public good requirement of I.C. § 50-311.

Id. at 309, 834 P.2d at 311(footnote omitted).

In this case, unlike in *Black*, the reservation of the fifty (50') foot easement in Ordinance No. 3374 was nowhere explicitly stated to have been reserved out of concern for the "public good." It is obvious from the record that this easement was reserved arbitrarily and out of an erroneous interpretation of I. C. § 50-311. Thus, the easement was not reserved as a prerequisite to vacation like the condition to build the hotel in *Black* was. Additionally, the statute itself reserves an easement for any lot owner or public utility as does the Property Vacation Agreement between the adjacent property owners. Therefore, the Court may strike the easement without compromising the affect of Ordinance No. 3374.

VI.

NAMPA FAILED TO TIMELY APPEAL THE PREEMPTORY WRIT OF MANDATE

This Court attached an I.R.C.P. 54(b) certificate to the Preemptory Writ of Mandamus. Additionally, no appeal was taken pursuant to I.C. § 50-1322, which allows any aggrieved person to appeal within twenty (20) days of publication of an ordinance

vacating a right of way. As no timely appeal was taken from this Court's issuance of the Writ of Mandamus, it is conclusive that First Avenue South has been vacated and title has vested in the respective adjoining owners. Those owners include Goodman, Duro-Bilt, T.J. Forest, Inc. and Blamires.

A peremptory writ of mandate is a final appealable judgment. See, I.A.R. 11(a)1. Any order issued with a I.R.C.P. 54(b) certificate is a final appealable order. See, I.A.R. 11(a)3. The vacation of First Avenue South is final. Nampa is bound by that determination. *Res judicata* or claim preclusion (*see, Lohman v. Flynn*, 139 Idaho 312, 78 P.3d 379 (2003) and the law of the case (*see, Swanson v. Swanson,* 134 Idaho 512, 5 P.3d 973 (2000) are additional reasons Nampa is bound to this result.

This Court cannot reverse that fact by remanding the case to Nampa.

VII.

CONCLUSION

In a street vacation proceeding, a city cannot place conditions on the vacation of a street but may decide not to vacate a street if it is not "expedient for the public good." The reservation of the fifty (50') foot easement was not done by Nampa out of consideration of the "public good" but out of an arbitrary and erroneous interpretation of I.C. § 50-311. This Court was correct in striking the reserved easement and must let Ordinance No. 3374 stand in full effect as vacating First Avenue South. No timely appeal was made from this Court's issuance of the Preemptory Writ of Mandamus. And thus any additional consideration of the "public good" would contradict this Court's Preemptory Writ.

DATED this 23rd day of February 2007.

RUNFT & STEELE LAWOFFICES, PLLC

By: _____
JON M. STEELE
Attorney for Petitioner

By: _____
KARL J. F. RUNFT
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of February 2007, a true and correct copy of the foregoing **SUPPLEMENTAL BRIEF** was served upon opposing counsel as follows:

Chris D. Gabbert
White Peterson, P.A.
5700 East Franklin Road, Ste 200
Nampa, ID 83687-7901

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RUNFT & STEELE LAW OFFICES, PLLC

By: _____
KARL J. F. RUNFT
Attorney 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.	)	
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.	)	

DEPOSITION OF Mayor Tom Dale

April 22, 2005

VOLUME I

Pages 1 - 93

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Q. Can you tell me what you did that weekend?
A. Skied.
Q. There wasn't any meeting or any convention or no seminars going on?
A. No.
Q. Simply pleasure?
A. Right.
Q. Is that the only time you've skied with Mr. McKnight?
A. That's the only time I skied with Mr. McKnight.
Q. Did you instruct Mr. McKnight's children when you were a band instructor at Liberty Charter?
A. I think I had -- I think his son played drums or something like that, I think.
Q. So you had his son in your class?
A. I think so, yeah.
Q. Do you know his wife Alane McKnight?
A. I don't know her.
Q. Mr. McKnight was on the board of directors of the Liberty Charter School, do you recall that?
A. Yeah, I know he's on the board.
Q. Was he on the board while you were

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employed there?
A. I assume so.
Q. Were you ever on the board of the Liberty Charter School?
A. No.
Q. Did you ever participate in any board of directors' meetings at Liberty Charter?
A. No.
Q. Do you recall who signed your paycheck at Liberty Charter?
A. I assume it was the superintendent, Becky Stallcop. I never really looked at it.
Q. Okay. I think Mr. McKnight mentioned one or two other instances where he may have encountered you during the past 20-some years. Do you recall any other times?
A. Well, I'm sure I have run into him around town, but there was -- that's about it.
Q. I think he mentioned Parade America and the Stampede?
A. I am sure we ran into each other during those events. he's civic minded and I'm civic minded.
Q. Mr. McKnight also mentioned a charter school organization that he's the vice-president

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in. Do you know what that would be?
A. I'm not aware of that, what that would be.
Q. Do you know anything about there is an investigation into the finances of Liberty Charter School? Do you know anything what's going on there?
MR. HALLAM: Object to the form.
MR. STEELE: You can answer the question.
THE WITNESS: Only what I have read in the newspaper.
Q. BY MR. STEELE: What is that?
A. That there is an investigation, some people have questioned. That's all I know. I don't pay a whole lot of attention to that.
Q. Do you go to the same church as Mr. McKnight?
A. No.
Q. Do you go the same church as Mr. Holm, the planning director?
A. No.
Q. If I recall, Mr. McKnight said that Mr. Holm and he went to the same church. Does that sound right to you?
A. I'm not aware of that at all.

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Q. Prior to being elected mayor, you were a city councilman?
A. uh-huh.
Q. How long were you a city councilman?
A. Six years.
Q. You're civic minded. Have you served on boards or committees here locally or other places?
A. No.
Q. So your election to the city council was your first civic involvement?
A. Yes.
Q. During your time on the city council and mayor, do you have any idea how many street vacation issues have come before you?
MR. HALLAM: Object to the form. Overbroad.
THE WITNESS: No.
Q. BY MR. STEELE: We know at least one. Would it be more than ten?
A. I don't have a good enough memory to recall that.
Q. When the city council handles street vacations, planning and zoning matters, usually the matter has been reviewed by your staff; is that right?
MR. HALLAM: Are you talking about his

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TAMMY A. ZOKAN, ISB # 5450
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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, v. SCOTTY'S DURO-BILT GENERATOR, INC., and Idaho corporation; and DOES I through V. Defendant.	Case No. CV 05-9800 **DEFENDANTS' RESPONSE IN OBJECTION TO PLAINTIFF'S FEBRUARY 23, 2007 MOTION FOR RECONSIDERATION**

COME NOW, Defendants Scotty's Duro-Bilt Generator, Inc. ("Duro-Bilt" or "Defendants"), by and through their attorneys of record, Moore, Smith, Buxton & Turcke, Chartered, and submit their Response in Objection to Plaintiff's Motion for Reconsideration of this Court's February 9, 2007, Order. Defendants' Response is supported by this Response and the pleadings and supporting documents filed by Defendants in this matter.

I. SUMMARY

Plaintiff's Complaint alleges Defendants breached the 1995 Agreement by failing to (1) consent to the Agreement; (2) grant and convey a perpetual easement on the vacated street; (3) cooperate to meet purpose of Agreement; (4) execute a formal agreement recognizing the parties' rights and obligations related to the vacated street; (5) share in the maintenance of the vacated street; bind itself and successors; (6) act in good faith. Complaint ¶ 48. According to Plaintiff's Complaint, Defendants breached the 1995 Agreement in its entirety. *Id.*

Defendants moved for Summary Judgment on the grounds that the 1995 Agreement was not valid in 2004 and even if it was valid in 2004, Defendants had not breached any duty of immediate performance under the 1995 Agreement. *See* Defs' Memo in Support of Summary Judgment (filed June 16, 2006) at pp. 7, 17. The Court determined that there was a factual question regarding the validity of the 1995 Agreement in 2004 and denied Defendants' Motion for Summary Judgment.

Defendants then filed a Second Motion for Summary Judgment on the grounds that even if the 1995 Agreement was valid in 2004, Defendants had not breached any duty due under the 1995 Agreement. See Defs' Memorandum in Support of Defs' Second Motion for Summary Judgment (filed December 26, 2006). The Court determined that if the 1995 Agreement was valid in 2004, Defendants did not fail to perform any contractual obligation ripe for performance at the time of the alleged breach; and, therefore Defendants did not breach the 1995 Agreement as alleged by Plaintiff.

The Court entered its Order granting Defendants' Second Motion for Summary Judgment on February 9, 2007. Plaintiff served its Motion for Reconsideration of that Order on February 23, 2007.

Plaintiff's Motion for Reconsideration does not assert newly discovered facts or any change in the law as a basis for Plaintiff's request that this Court reconsider its Order dismissing Plaintiff's contract claim. Plaintiff has provided no factual or legal basis for reconsideration of the Court's Order and Plaintiff's Motion should be denied.

II. ARGUMENT

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 entered in this case.

There is no basis to reconsider the Court's Order dismissing Plaintiff's contract claim. 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 812, 821, 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 facts relevant to this case. Mr. Steele's Affidavit merely submits Goodman's proposed Findings and Judgment and Order in its litigation against the City of Nampa. Affidavit at ¶¶ 3-4. The documents are not relevant to this case and should be ignored. Moreover, the documents are not law. They are not signed by the Judge or file-stamped by the Court. Judge Morfitt's November 7, 2006, Order in Plaintiff's case against the City of Nampa speaks for itself and it has not been appealed. See Zokan Aff., Ex. A (filed Dec. 26, 2006). (Goodman has served Defendants with untimely Motions for Reconsideration in the City of Nampa case pending before Judge Morfitt.)

All Plaintiff has done is restate its allegations against Defendants and attempt to muddy the waters with draft documents from another case that are not relevant to this case. Plaintiff still has not presented any facts showing breach of contractual duty ripe for performance at the time of the alleged breach. Plaintiff has once again failed to meet the basic requirements for reconsideration of a court decision and Plaintiff's Motion should be denied.

III. CONCLUSION

Plaintiff's Motion for Reconsideration should be denied, the Court's Order dismissing Plaintiff's contract claim affirmed, and Defendants should be awarded attorney fees and costs incurred in responding to Plaintiff's Motion in accordance with Code §§ 12-120 and 12-121.

DATED this 2nd day of March, 2007.

MOORE SMITH BUXTON & TURCKE, CHTD.

By _____
Tammy A. Zokan
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of March, 2007, 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
__X__ Hand Delivery
____ Overnight Mail
____ Facsimile

Tammy A. Zokan

JON M. STEELE (ISB # 1911)
KARL J. RUNFT (ISB # 6640)
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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 **OBJECTION TO MOTION TO STRIKE AND REPLY MEMORANDUM TO DEFENDANT'S RESPONSE MEMORANDUM IN SUPPORT OF MEMORANDUM OF ATTORNEYS FEES AND COSTS AND REPLYS TO DEFENDANT'S RESPONSE IN OBJECTION TO PLAINTIFF'S FEBRUARY 23, 2007 MOTION FOR RECONSIDERATION**

COMES NOW, Plaintiff Goodman Oil Company by and through its counsel of record, Runft & Steele Law Offices, PLLC, and objects to Defendant's Motion to Strike and Replys to Defendant's Response Memorandum in Support of Defendant's Memorandum of Attorneys Fees and Costs and

Replys to Defendant's Response in Objection to Plaintiff's February 23, 2007 Motion for Reconsideration:

BACKGROUND

Although Defendant's Certificate of Service lists February 7th as the date of hand delivery to Goodman of McKnight's Amended Memorandum of Costs and Attorneys Fees, Affidavit of Zokan in Support of Amended Memorandum of Attorneys Fees and Costs, and McKnight's Brief in Support of Amended Memorandum of Costs and Attorneys Fees, these pleadings are stamped as received by Goodman on February 8, 2007.

On February 9, 2007, this Court's Order Granting Summary Judgment to Duro-Bilt was filed. The Order was received by Goodman on February 12, 2007.

On February 23, 2007, Goodman filed the following:

1. Goodman's Renewed Objection to Defendant Bart and Alane McKnight's Memorandum of Costs and Attorneys Fees Dated September 19, 2006; and Objection to Defendant McKnights' Amended Memorandum of Costs and Attorney Fees Dated February 7, 2007, and Objection to Duro-Bilt's Memorandum of Costs and Attorneys Fees Dated February 7, 2007;
2. Brief in Support of Goodman's Objection to Defendant's Memorandum of Costs and Attorneys Fees;
3. Goodman's Motion for Reconsideration of Order Granting Defendant's Second Motion for Summary Judgment;

4. Brief in Support of Goodman's Motion for Reconsideration of Order Granting Defendant's Second Motion for Summary Judgment;

5. Affidavit of Jon M. Steele in Support of Goodman's Motion for Reconsideration of Order Granting Defendant's Second Motion for Summary Judgment..

Defendants contend that Goodman's Objection to their Memorandum of Attorneys Fees and Costs is tardy. Goodman contends that its objections are timely. Goodman also contends that their exists no basis for an award of attorneys fees and costs to Defendants and that, additionally, this Court should grant Goodman's Motion for Reconsideration of its grant of Summary Judgment to Defendants.

ARGUMENT

In the typical situation where the judgment awards costs and the prevailing party files a memorandum of costs seeking attorney fees, the losing party will file an objection. The court must then follow the procedure outlined in Rule 54(d)(6), determine which of the items claimed will be allowed, and decide the amount of the award. After making this decision, the court can enter a supplemental order stating the precise amount awarded. *See, e.g., St. John v. O'Reilly*, 80 Idaho 429, 333 P.2d 467 (1958).

In this case, Defendants served their Memorandum of Attorneys Fees and Costs on February 7th according to the Certificate of Service, or on February 8th according to Goodman's received stamp.

However, the Order of February 9th, which was received by Goodman on February 12th,

states that costs and attorneys fees will be addressed separately.

Pursuant to the Court's Order, Goodman had fourteen (14) days from February 12th to file its Objection to Attorneys Fees and Costs and its Motion for Reconsideration, or February 26th. Goodman's Objection and Motion were filed on February 23rd.

As noted above, typically a judgment awarding costs and fees is entered prior to a party filing its Memorandum of Attorneys Fees and Costs. And in this case, Duro-Bilt forwarded such a Judgment to the Court. Yet, Duro-Bilt did not wait until the Court had executed and filed the Judgment, but prematurely filed its claim for attorneys fees and costs.

Goodman's objection to Duro-Bilt's claim for fees and costs consists of a renewed objection which was originally filed September 19, 2006. There can be no question as to the timeliness of this objection.

Goodman's fourteen (14) day period to object did not begin until it had received the decision of this Court, February 12th, as a claim for attorneys fees and costs is premature until "a decision of the court..." as provided by I.R.C.P. 54(d)5 is entered.

As there is no basis for an award of attorneys fees or costs to Defendants, this Court should deny Defendant's claim. *See*, Goodman's Renewed Objection to Defendant's Memorandum of Attorneys Fees, filed February 23, 2007. Goodman also respectfully requests this Court to reconsider its award of Summary Judgment to Defendant Duro-Bilt.

In it's ruling at the hearing on Defendant's Second Motion for Summary Judgment, the Court reasoned that the time for performance under the Vacation Agreement was not "ripe". Clearly, the Court's reasoning is in error. The time for Defendant's performance was August of

2004, prior to the vacation of First Avenue South.

This Court is also in error to believe that First Avenue South has yet to be vacated. The Court reached this conclusion at the urging of Defendant. However, First Avenue South has been vacated. *See*, Affidavit of Jon M. Steele in Support filed herewith.

There simply is no basis in law or fact for this Court's granting of Defendant's Second Summary Judgment Motion nor for an award of any attorneys fees or costs to Defendants.

Goodman requests the Court withdraw its granting of Summary Judgment to Defendants and schedule this case for trial.

DATED this 12th day of March 2007.

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
JON M. STEELE
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of March 2007, a true and correct copy of the foregoing OBJECTION TO MOTION TO STRIKE AND REPLY MEMORANDUM TO DEFENDANT'S RESPONSE MEMORANDUM IN SUPPORT OF MEMORANDUM OF ATTORNEYS FEES AND COSTS AND REPLYS TO DEFENDANT'S RESPONSE IN OBJECTION TO PLAINTIFF'S FEBRUARY 23, 2007 MOTION FOR RECONSIDERATION was served upon opposing counsel as follows:

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

X US Mail
___ Personal Delivery
X Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: JM Steele
JON M. STEELE
Attorney for Petitioner

JON M. STEELE (ISB # 1911)
KARL J. RUNFT (ISB # 6640)
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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 OBJECTION TO MOTION TO STRIKE AND REPLY MEMORANDUM TO DEFENDANT'S RESPONSE MEMORANDUM IN SUPPORT OF MEMORANDUM OF ATTORNEYS FEES AND COSTS AND REPLYS TO DEFENDANT'S RESPONSE IN OBJECTION TO PLAINTIFF'S FEBRUARY 23, 2007 MOTION FOR RECONSIDERATION**

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 personal knowledge, 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 Plaintiff's Objection to Motion to Strike and Reply Memorandum to Defendant's Response Memorandum in Support Of Memorandum of Attorneys Fees and Costs and Replys to Defendant's Response in Objection to Plaintiff's February 23, 2007 Motion for Reconsideration.
3. That attached as Exhibit A is a true and correct copy of Goodman's Memorandum Response to Nampa's Motion for Reconsideration Regarding this Court's award of Attorney's Fees to Goodman and in Reply to Nampa's Opposition to Goodman's Motion for Reconsideration Regarding This Court's Denial of Attorney Fees in the Mandamus Proceeding in *Goodman Oil Company v. City of Nampa*, Case No. CV-04-10007, filed March 12, 2007.

Further, your affiant sayeth naught.

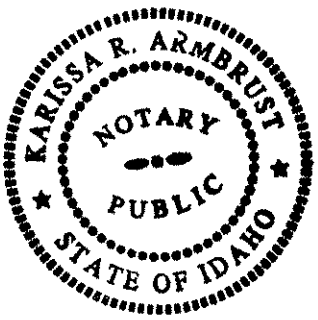
DATED this 12th day of March 2007

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
JON M. STEELE
Attorney for Plaintiff

STATE OF IDAHO)
:ss
County of Ada)

SUBSCRIBED and SWORN to before me this 12th day of March 2007.



Notary Public for the State of Idaho
Residing at: Nampa
My Commission Expires: 3-16-07

CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 12th day of March 2007, a true and correct copy of the **AFFIDAVIT OF JON M. STEELE IN SUPPORT OF OBJECTION TO MOTION TO STRIKE AND REPLY MEMORANDUM TO DEFENDANT'S RESPONSE MEMORANDUM IN SUPPORT OF MEMORANDUM OF ATTORNEYS FEES AND COSTS AND REPLYS TO DEFENDANT'S RESPONSE IN OBJECTION TO PLAINTIFF'S FEBRUARY 23, 2007 MOTION FOR RECONSIDERATION** was served upon opposing counsel as follows:

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

_X_ US Mail
____ Personal Delivery
_X_ Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
JON M. STEELE
Attorney for Plaintiff

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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, 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 **GOODMAN'S MEMORANDUM RESPONSE TO NAMPA'S MOTION FOR RECONSIDERATION REGARDING THIS COURT'S AWARD OF ATTORNEY'S FEES TO GOODMAN AND IN REPLY TO NAMPA'S OPPOSITION TO GOODMAN'S MOTION FOR RECONSIDERATION REGARDING THIS COURT'S DENIAL OF ATTORNEY FEES IN THE MANDAMUS PROCEEDING**

COMES NOW the Petitioner Goodman Oil, by and through its attorneys of record Jon M. Steele and Karl J. F. Runft, in response to Nampa's Motion for Reconsideration regarding this Court's

EXHIBIT A

award of attorney's fees to Goodman in regards to the Judicial Review Proceeding and also in reply to Nampa's Opposition to Goodman's Motion for Reconsideration of this Court's denial of attorney fees as to the Mandamus Proceedings, submits the following:

I.

BACKGROUND

This Court has presided over two and one-half (2 ½) years of litigation in this case. The Court has several motions and issues before it. They include the following:

1. Goodman's Motion for Reconsideration and Clarification of the Court's Order of November 7, 2006, filed January 29, 2007.
2. Goodman's Motion for Reconsideration of the Court's Order that Goodman is not entitled to attorney's fees for prevailing in the Mandamus portion of this case and the Court's Order that the parties enter into mediation, filed February 20, 2007.
3. Additional issues addressed in the Supplemental Briefing ordered by this Court, filed February 23, 2007.
4. Goodman's Motion for Entry of Proposed Findings of Fact and Conclusions of Law, Proposed Judgment and Proposed Preliminary Injunction, filed February 28, 2007, and Nampa's Objections, filed March 7, 2007.
5. Nampa's Motion for Reconsideration Regarding the Court's Award of Attorney's Fees in the amount of $40,000 to Goodman, filed March 7, 2007.

This Memorandum is in response to Nampa's Motion for Reconsideration of this Court's award of $40,000 in attorney fees to Goodman and in reply to Nampa's Opposition to Goodman's Motion for Reconsideration of this Court's Order denying Goodman its attorney fees in the Mandamus Proceeding.

As the Court recalls, Goodman prevailed in the Mandamus Proceeding and on August 22, 2005, filed its Memorandum of Attorney's Fees and Costs. Goodman claimed attorney fees of $71,760 and costs as a matter of right of $2,687.24, a total of $74,447.24.

At the hearing on January 18, 2007, the Court awarded Goodman $40,000 as attorney fees and $2,966.29 in costs for the Judicial Review portion of this litigation and denied Goodman's claim for attorney fees and costs in the Mandamus Proceeding.

Goodman has respectfully requested the Court to reconsider its Order denying fees in the Mandamus Proceeding. Goodman contends that Nampa had no reasonable basis in law or fact to veto Ordinance No. 3374 and that no basis in law or fact existed to reserve a fifty (50') foot wide easement and that fees and costs should be awarded pursuant to I.C. § 12-117. This Court should award Goodman attorney fees and costs pursuant to I.C. § 12-121, as Nampa's defense has been and continues to be frivolous, unreasonable and without foundation. Additionally, this Court should award fees pursuant to I.C. § 7-312 and I.R.C.P. 74(d).

II.

ARGUMENT

This Court should not get caught up in the morass of issues which Nampa continues to bring

before this Court. This case is over. Ordinance No. 3374 is law. First Avenue South is vacated. The easement is struck. Final judgment should be entered. Nampa has lost. Nampa continues to assert issues which have already been resolved. Nampa's defense in this case has been based upon volume. There has been no substance to the issues or defenses asserted by Nampa from the very beginning of this case. As a government agency, Nampa has the luxury of unlimited public funds to oppose Goodman.

Nampa's contentions, from the very beginning of this case, have been frivolous, unreasonable and without foundation, and as the Court recalls, the record is replete with legal and factual contentions made by Nampa that have no basis in fact or law. They include the following:

a. Nampa's pre-litigation conduct with no reasonable basis in law or fact:

1. Ordinance No. 3374 in its original form (as proposed and read twice in 1995) had no reserved easement. With no advance notice to adjoining property owners, Ordinance No. 3374, when passed, reserved a fifty (50') foot wide easement.
2. The Nampa Fire Department's request of a twenty (20') foot wide access was treated as a condition of approval despite the fact that the Fire Department has no such authority.
3. The Nampa Fire Department's request of a twenty (20') foot wide access was not necessary as Idaho Code § 50-311 reserves existing easements and accesses and the Vacation Agreement among the adjoining property owners provides for cross-easements.

4. Once Ordinance No. 3374 passed, the Mayor's *ex parte* contact with Bart McKnight, an adjoining property owner, was a violation of due process as the fact finding process had been closed.

5. After, and despite the fact that the vacation was approved by the adjoining property owners, the Nampa Planning Department, the Nampa City Council, the Mayor and delivered to the City Clerk for publication, Mayor Dale volunteered to veto Ordinance No. 3374 when Bart McKnight contacted him.

6. The Mayor did not disclose to anyone, until deposed, that Bart McKnight was his friend, that they had been on a ski trip together to Sun Valley, and that the Mayor had been McKnight's children's teacher.

7. Mayor Dale both approved and vetoed Ordinance No. 3374, a violation of Idaho Code §§ 50-611, 50-311 and due process.

8. The Mayor's veto, which had no factual or legal basis, is the only veto in at least the past 27 years.

9. The Mayor made no attempt to explain or justify his veto to the City Council or to Goodman.

10. Goodman's attempts to resolve Nampa's errors in the vacation process without litigation were rebuffed.

11. Nampa made no findings of fact or conclusions of law.

12. *See also*, 1-12, at pages 8 & 9, of this Memorandum, Section a, Judicial

development plans, Nampa contended that the Fire Department had authority to require an easement.

6. Despite Idaho Code § 50-311 which does not allow any conditions to be imposed upon a street vacation, Nampa contended otherwise.
7. Despite Idaho Code § 50-611 which provides a mayor may approve or veto an Ordinance (not both), Nampa still contends that the Mayor's veto was proper.
8. Despite the fact that Goodman's president was deposed for over 5 hours, neither the deposition nor the documents required to be produced by Goodman have ever been cited by Nampa.
9. Nampa's contention that Goodman was estopped was totally without merit.
10. Nampa repeatedly contended that the Administrative Procedure Act applied despite this Court's ruling to the contrary, twice.
11. Nampa continues to assert issues which have already been resolved.
    a) Nampa now contends that Idaho Code § 50-311 is archaic.
    b) Nampa now contends that Idaho case law had not decided the issue of whether a mayor could veto an ordinance after it was approved, despite the clear language of Idaho Code § 50-611 and due process.
    c) Nampa now contends that the Nampa City Code trumps Idaho

Code § 50-611.

c. Judicial Review Proceeding Conduct that was Frivolous, Unreasonable and Without Foundation:

1. Despite the fact that Idaho Code § 50-311 reserves a statutory easement, Nampa reserved an easement in Ordinance No. 3374.
2. Despite the fact that the Vacation Agreement provides for cross easements among adjoining property owners, Nampa reserved an easement in Ordinance No. 3374.
3. Despite the fact that Nampa's own building review process provides Nampa the opportunity to review development plans and at that time require, if necessary, an appropriate easement, Nampa reserved an easement in Ordinance No. 3374.
4. Despite the fact that the power to reserve an easement can neither be implied from the language of Idaho Code § 50-311 nor is a reserved easement essential to the vacation, Nampa contended otherwise.
5. Despite the fact that the record, consisting of hundreds of pages, contains no reference to the reservation of any easement, Nampa contended otherwise.
6. The fifty (50') foot wide easement was added to Ordinance No. 3374 after the public hearings were closed. This was never addressed by Nampa.

7. The reserved easement arbitrarily burdened property owners on the west side of First Avenue South in that it is over the westerly fifty (50') feet of the vacated property. This was never addressed by Nampa.
8. Treating owners on the west side of the vacated street different than owners on the east side of the street is a violation of due process and equal protection. This was never addressed by Nampa.
9. The reserved fifty (50') foot wide easement is ten (10') feet wider than the actual constructed street which is forty (40') feet. This was never addressed by Nampa.
10. The practical effect of the reserved easement was to render over seventeen thousand, five hundred (17,500) square feet unbuildable. This was never addressed by Nampa.
11. The easement reserved by Nampa was an *ultra vires* act.
12. The reserved easement was not essential to the purpose and completeness of Ordinance No. 3374.
13. The striking of the reserved easement does not undermine any finding of the "public good".
14. Nampa has never contended that there existed an issue concerning the "public good".
15. Nampa now contends that Idaho Code § 40-1324(1) governs vacation

procedure.

16. Nampa now contends that Ordinance No. 3374 is void.

17. Nampa now contends that the last 2 ½ years of litigation was just practice or a warm up for the real vacation process.

Idaho Code § 12-117 provides: "In any administrative or civil judicial proceeding involving as adverse parties ... a city... and a person, the court shall award the person reasonable attorney fees, witness fees and reasonable expenses, if the court finds in favor of the person and also finds that the ... city... acted without a reasonable basis in fact or law." The statute is not discretionary but provides that the court must award attorney fees where a state agency did not act with a reasonable basis in fact or law in a proceeding involving a person who prevails in the action. *See, Dep't of Finance v. Resource Service Co., Inc.*, 134 Idaho 282, 284, 1 P.3d 783, 785 (2000). As previously explained by the Supreme Court, one of the purposes of this section is to provide a remedy for persons who have borne unfair and unjustified financial burden attempting to correct mistakes agencies should never have made. *Bogner v. State Dep't of Revenue & Taxation*, 107 Idaho 854, 859, 693 P.2d 1056, 1061 (1984). The appellate court exercises free review over the decision of a district court applying I.C. § 12-117. *See, Id.*

This Court is presented the same circumstances as found in *Fischer v. City of Ketchum*, 141 Idaho 349, 109 P.3d 1091 (2005). In *Fischer* the city ignored the plain language of its own ordinance. The Idaho Supreme Court stated that "[t]he City had no authority to enact an ordinance inconsistent with I.C. § 67-6512" and awarded Fischer fees pursuant to I.C. § 12-117.

Likewise in this case Nampa had no authority to veto Ordinance No. 3374 or to include the

reserved easement. Under these circumstances this Court is required to award Goodman its attorney fees and costs for both the Mandamus and Judicial Review Proceedings. *See, Musser v. Higginson: The Standards for Awarding Attorney Fees Against a State Agency*, 32 Idaho 437 at 453-454 (1996).

This Court, as an alternative, may also base its award upon Nampa's frivolous, unreasonable and unfounded defense. Nampa's latest contentions show no understanding or respect for the work of this Court in resolving this litigation. The Court should also award attorney fees and costs to Goodman pursuant to I.C. § 7-312 and I.R.C.P. 75(d).

Lastly Nampa, in complete disregard of this Court's ruling in the Mandamus Proceeding, scheduled, with no notice to Goodman's attorneys, a public hearing on the vacation of First Avenue South. That conduct required this Court to enter its Preliminary Injunction on February 2, 2007.

This Court may recall Nampa's comments in the last attorney fee hearing that Goodman "may have won the battle, but lost the war." It is this arrogance that requires this Court to award attorney fees pursuant to Idaho Code §§ 12-117, 12-121, I.C. § 7-312 and I.R.C.P. 75(d).

CONCLUSION

This Court should affirm its earlier award of attorney fees and costs and award an additional $71,760 as attorney fees and costs of $2,687.24. This Court should bring this litigation to a conclusion.

Review Proceeding.

b. Mandamus Proceeding Conduct that was Frivolous, Unreasonable and Without Foundation:

1. Despite the fact that all adjoining property owners had entered into a Vacation Agreement, the original of which is in the Nampa Planning Department's file, Nampa contended that consent had not been obtained.
2. Despite the fact that Norm Holm, Nampa's Planning Director of 27 years, testified that the street vacation application had not lapsed, Nampa contended that it had.
3. Despite the fact that Mr. Holm, Nampa's Planning Director of 27 years, testified that the Vacation Agreement was far more thorough and detailed than he required, Nampa contended that the Vacation Agreement was void.
4. Despite the fact that the Nampa Planning Department, the City Council and the Mayor approved Ordinance No. 3374 and Ordinance No. 3374 has been published, Nampa still contends First Avenue South has not been vacated.
5. Despite Idaho Code § 50-311 which reserves existing easements and despite the Vacation Agreement which provides for consent and cross easements among the adjoining property owners, and despite Nampa's own planning process which provides for review and approval of all

DATED this 12th day of March 2007.

RUNFT & STEELE LAW OFFICES, PLLC

By:_____
JON M. STEELE
Attorney for Petitioner

By:_____
KARL J. F. RUNFT
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of March 2007, a true and correct copy of the foregoing **GOODMAN'S MEMORANDUM RESPONSE TO NAMPA'S MOTION FOR RECONSIDERATION REGARDING THIS COURT'S AWARD OF ATTORNEY'S FEES TO GOODMAN AND IN REPLY TO NAMPA'S OPPOSITION TO GOODMAN'S MOTION FOR RECONSIDERATION REGARDING THIS COURT'S DENIAL OF ATTORNEY FEES IN THE MANDAMUS PROCEEDING** was served upon opposing counsel as follows:

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By: _____
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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, v. SCOTTY'S DURO-BILT GENERATOR, INC.; and DOES I through V. Defendants.	Case No. CV 05-9800 **ORDER**

Before the Court are:

1. Plaintiff's Motion for Reconsideration of Order granting Defendant Duro-Bilt's Second Motion for Summary Judgment, filed by Plaintiff on February 23, 2007, including Defendant Duro-Bilt's objection and request for costs and fees related thereto, filed by Duro-Bilt on March 2, 2007;
2. Plaintiff's Motion to Deem Goodman's Amended Renewed Objection to McKnights'

Memorandum of Costs and Attorney Fees and Objection to McKnights' Amended Memorandum of Costa and Attorney Fees and Objection to Duro-Bilt's Memorandum of Costs and Attorney Fees to be filed as of February 23, 2007.

3. Defendant McKnights' Amended Memorandum of Costs and Attorney Fees, filed on February 7, 2007;
4. Defendant Duro-Bilt's Memorandum of Costs and Attorney Fees, filed on February 7, 2007;
5. Defendants' Motion to Strike Plaintiff's Objections to Defendant McKnights' and Duro-Bilt's Memorandums for Costs and Attorney Fees, filed by Plaintiff on February 23, 2007, and refiled as Amended Objections on March 20, 2007, including Defendants' request for costs and fees related thereto, filed by Defendants on March 2, 2007;

and, the Court having reviewed the relevant pleadings, briefs and memoranda, and having considered oral argument, and good cause appearing therefore:

It is hereby ORDERED as follows:

1. Plaintiff's Motion for Reconsideration is denied with costs and fees to be awarded to Defendant Duro-Bilt;
    a. Duro-Bilt shall file and serve an Affidavit showing costs and fees incurred in defending against Plaintiff's Motion for Reconsideration within ten (10) days of entry of this Order and any objections thereto shall be filed within fourteen (14) days of the filing and service of Duro-Bilt's Affidavit;
2. Plaintiff's Motion to Deem its Objections as filed as of February 23, 2007, is granted.

3. Defendants' Motion to Strike is granted with costs and fees to be awarded to Defendants;

    a. Defendants shall file and serve an Affidavit showing costs and fees incurred in prosecuting Defendants' Motion to Strike within ten (10) days of entry of this Order and any objections thereto shall be filed within fourteen (14) days of the filing and service of Defendants' Affidavit;

4. Defendant McKnights' Amended Memorandum of Costs and Attorney Fees is granted under Idaho Code § 12-121 and Idaho Rule of Civil Procedure 54(d)(1) in the amounts requested, including costs incurred by McKnights in defending against Plaintiff's Motion for Reconsideration and, in preparing and presenting McKnights' Memorandums of Cost and Attorney Fees except that McKnights' discretionary costs are only awarded for photocopy costs;

    a. McKnights shall file and serve an Affidavit updating its Amended Memorandum showing costs and fees incurred in presenting their requests for costs and fees within ten (10) days of entry of this Order and any objections thereto shall be filed within fourteen (14) days of the filing and service of McKnights' Affidavit;

5. Defendant Duro-Bilt's Memorandum of Costs and Attorney Fees is granted under Idaho Code § 12-121 and Idaho Rule of Civil Procedure 54(d)(1) as follows:

    a. Defendant Duro-Bilt is awarded costs and attorney fees incurred by Duro-Bilt in defending against Plaintiff's Complaint Counts Two, Three and Four and Plaintiff's Motion for Reconsideration and, in preparing and presenting Duro-

Bilt's Memorandum of Cost and Attorney Fees;

b. Defendant Duro-Bilt is only awarded its photocopy costs as discretionary costs;

c. Defendant Duro-Bilt shall file an amended Memorandum of Costs and Fees in accordance with this Order and any objections thereto shall be filed within fourteen (14) days of the filing and service thereof.

6. Defendant Duro-Bilt's Memorandum of Costs and Attorney Fees for costs and attorney fees incurred in preparing Duro-Bilt's Second Motion for Summary Judgment on Plaintiff's Complaint Count One is denied.

The Court's findings and conclusions were made on the record. A written transcript of the findings and conclusions is available at the request of either party.

DATED this 24th day of April, 2007.

By: _____
Judge Renae J. Hoff
District Judge, Third Judicial District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2 day of April, 2007, I caused a true and correct copy of the foregoing ORDER by the method indicated below, and addressed to the following:

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