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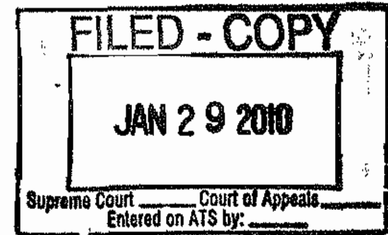
IN THE SUPREME COURT OF THE

STATE OF IDAHO

CURTIS-KLURE, PLLC, dba MAPLE GROVE DENTISTRY, and JACK D. KLURE, D.D.S.,	)	
Plaintiffs-Appellants,	)	Docket No. 36647-2009
vs.	)	
ADA COUNTY HIGHWAY DISTRICT,	)	
Defendant-Respondent.	)	



RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT FOR ADA COUNTY

Honorable Deborah A. Bail, District Judge, Presiding

Martin C. Hendrickson
GIVENS PURSLEY, LLP
6O1 W. Bannock Street
P.O. Box 2720
Boise, Idaho 83701

Attorneys for Appellants

Mary V. York
Steven C. Bowman
HOLLAND & HART LLP
101 S. Capitol Boulevard, Suite 1400
Boise, Idaho 83702

Attorneys for Respondent

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Respondent Ada County Highway District ("ACHD") hereby files its brief in the appeal of this matter.

I. STATEMENT OF THE CASE

A. Nature Of Case And Course Of Proceedings.

In this case, Plaintiff-Appellant Jack B. Klure, D.D.S. brought a claim for alleged business damages under Idaho's eminent domain statutes despite the fact that no taking occurred and he had no property interest at the time of the alleged taking. The lower court dismissed Klure's claim in response to a summary judgment motion filed by Klure, wherein he acknowledged that no issues of fact prevented the court from ruling. The District Court's decision is amply supported by the facts, fully complies with Idaho law, and should be affirmed.

Dr. Klure practiced dentistry with Dr. Thomas Curtis in a two-person partnership doing business as Maple Grove Dentistry for just over ten years. Dr. Klure leased space in an office building owned by Dr. Curtis near the corner of Maple Grove and Ustick Roads in Boise. Dr. Curtis owned both the building and the underlying land, hereinafter referred to as the "Dentist Office Property."

The lease applied only to the Dentist Office Property. Dr. Curtis also owned and had partial ownership interests in other parcels of land not covered by the lease near and adjacent to the Dentist Office Property. Dr. Klure owned no real property.

The lease on the Dentist Office Property expired by its own terms on December 31, 2006. Dr. Klure remained as a holdover tenant on a month-to-month basis for just over three months until April 2007. Both the lease and the partnership ended in April of 2007 when Dr. Klure left

to practice at another location. Because Dr. Klure is the real party in interest in this appeal, Plaintiffs-Appellants will be referred to as "Klure."

In constructing a project to widen and improve Ustick Road, ACHD sought to acquire a 13-foot wide strip of property along Ustick Road that was part of a parcel owned by Dr. Curtis. Although adjacent to the Dental Office Property, none of the 13-foot wide strip included any part of the Dentist Office Property. After having the strip of property appraised, ACHD made an offer to Dr. Curtis to purchase the property. Dr. Curtis counter-offered with a request that ACHD purchase all of the parcels of property he owned at the corner of Ustick and Maple Grove. Dr. Curtis and ACHD then successfully negotiated a contract for the sale of the property owned by Dr. Curtis at fair market value. Dr. Curtis and ACHD executed the contract on June 22, 2007.

When Dr. Curtis and ACHD executed the contract of sale on June 22, 2007, Klure's leasehold interest had already expired and terminated. Klure vacated the premises in April of 2007, ending the partnership and his month-to-month holdover tenancy under the expired lease.

Despite the plain language of the purchase contract and the circumstances surrounding the sale by Dr. Curtis, Klure contends that ACHD condemned the property owned by Dr. Curtis. Klure has filed this action to recover business damages under Idaho Code § 7-711(2). Klure first filed his claim as a request for declaratory judgment combined with an unnamed cause of action for damages. Klure later amended his complaint to frame his claim under § 7-711(2) as a claim for inverse condemnation.

Klure filed a motion for summary judgment, asking the District Court to rule as a matter of law that he is entitled to business damages under § 7-711(2). The District Court denied his motion and later entered judgment in favor of ACHD. Klure now appeals the decision of the District Court.

B. Summary of Argument.

The District Court did not err, and this appeal should be denied for the following reasons.

Section 7-711(2) does not create a cause of action for business damages outside of a condemnation proceeding, whether a direct or inverse condemnation. In the absence of a taking and a direct or inverse condemnation proceeding, § 7-711(2) does not apply.

Klure cannot sustain a claim for inverse condemnation because he had no property interest taken by ACHD. His only interest in the property had been a leasehold interest which ended no later than the date when Klure voluntarily left the property in April of 2007. The leasehold interest was extinguished well before the date of the alleged taking.

Furthermore, Klure cannot sustain a claim for business damages based on his argument that ACHD condemned adjoining property owned by Dr. Curtis. ACHD did not condemn any property owned by Dr. Curtis. Rather, Dr. Curtis and ACHD negotiated a contract for the sale and purchase of property owned by Dr. Curtis at fair market value. The sale of property by Dr. Curtis did not occur under threat of condemnation and was not a taking. The transaction was a negotiated, arms-length agreement, freely entered into by both sides at the request of Dr. Curtis.

Idaho law bars recovery of business damages in condemnation cases if the damages can be avoided or mitigated by relocation of the business. It is undisputed that Klure can and did relocate, thus barring his claim.

Klure cannot recover relocation costs under § 7-711(2) because he had no property interest that was condemned and ACHD did not condemn any adjoining property owned by Dr. Curtis. Klure also cannot recover relocation costs under § 7-711(2) because relocation costs are governed by a separate statute, Idaho Code § 40-2001 *et seq.* This statute sets the requirements and procedures for recovery of relocation costs. As found by the District Court, Klure did not exhaust his administrative remedies and did not file a petition for judicial review upon denial of his request for relocation costs. Klure has conceded in his opening brief that he has not appealed the District Court's dismissal of his claim for relocation costs. App. Br. at 3, n.2. Therefore, any attempt by Klure to resurrect his claim for relocation costs in this appeal should be denied.

C. Statement of Facts.

1. The District Court's Findings of Fact.

The District Court made detailed findings of fact. *See Decision and Order*, dated Jan. 26, 2009, CR at 100-103 and the citations to the record therein.[1] The following is a summary of the District Court's findings of fact.

[1] The Clerk's Record in this brief will be abbreviated as CR, and citations to District Court decisions, briefing, and affidavits filed in the court below will be to the page numbers within the Clerk's Record.

Klure and Curtis were equal partners in Maple Grove Dentistry. They practiced at the Dentist Office Property under a ten-year lease that expired December 31, 2006. Dr. Curtis was the sole owner and lessor of the Dentist Office Property. Klure did not own any property. After expiration of the lease, Klure was a month-to-month holdover tenant. Dr. Curtis also owned other property near and adjacent to the Dentist Office Property.

In late 2005, ACHD began planning a project to widen and improve Ustick Road to enhance traffic flow, relieve congestion, and improve safety (the "Ustick Project" or "Project"). To complete the Project, ACHD needed to acquire a strip of land approximately thirteen feet wide running parallel to Ustick road for approximately 1,000 feet. The narrow strip of land crossed numerous properties, including parcels owned by Dr. Curtis. However, the narrow strip of land did not include any part of the Dentist Office Property, and no part of the Dentist Office Property was needed for the Project. The 13-foot wide strip ran between existing Ustick Road and the Dentist Office Property, on a different and separate parcel of property owned by Dr. Curtis.

ACHD, as required by law, contacted Dr. Curtis to negotiate a purchase of his property needed for the Ustick project. ACHD's established practice is to purchase real property needed for its purposes by negotiating in good faith to purchase property at fair market value to avoid litigation and the exercise of the power of eminent domain. The law requires ACHD to negotiate in good faith to purchase property *before* it can exercise its power of eminent domain.

It is undisputed that, had it been necessary to condemn property, the only property ACHD would have condemned from Dr. Curtis was the 13-foot wide strip of land. This strip of land

was separate and apart from the Dentist Office Property where the dental practice operated. No condemnation action was ever necessary or brought.

ACHD contacted Dr. Curtis in January 2006 to negotiate terms for the purchase of the 13-foot wide strip of property needed for the Project. In May 2006, Dr. Curtis countered with a request that ACHD purchase all of the property he owned, not just the strip of land that ACHD needed for the Ustick Project. It is undisputed that ACHD did not need or require the additional property which Dr. Curtis wished to sell. By law, ACHD could not have acquired the additional property through its power of eminent domain because the additional property was not necessary for the Ustick Project. "Necessity" is a mandatory prerequisite and requirement for the exercise of the power of eminent domain. *See* I.C. § 7-704(2). After the request by Dr. Curtis, ACHD had the property appraised and offered the fair market value for all of the parcels of property owned by Dr. Curtis. Dr. Curtis was represented by counsel in the negotiations.

Prior to final sale terms being agreed upon, Dr. Curtis entered into a Right-Of-Entry Agreement to give ACHD access to the strip of land needed for the Ustick Project. The Right-Of-Entry Agreement expressly required ACHD to "prevent disruption of the business operations on the Property . . . ." CR Ex. 7 (Price Aff. at Ex. I, "Right-of-Entry Agreement"). The Right-Of-Entry Agreement acknowledged that negotiations for the purchase of all of Dr. Curtis's interests in all of the parcels were ongoing.

On June 22, 2007, Dr. Curtis and ACHD executed the agreement by which ACHD purchased all of Dr. Curtis's property interests in the parcels he owned, including the Dentist Office Property. CR Ex. 7 (Price Aff. at Ex. J, "Settlement Agreement"). Prior to that date,

Klure had decided to terminate his partnership with Dr. Curtis and relocate his practice. He relocated his practice in April, 2007.

Klure has never contended that he owned the real property which had been leased by Dr. Curtis to Maple Grove Dentistry. Klure decided to relocate his dental practice because he was skeptical about interference of the Ustick Project with access and "ACHD's poor reputation for showing no concern for the interests of businesses in the pathway of construction."

After the lease expired on December 31, 2006, the tenancy converted to a month-to-month tenancy unless notice was given to exercise the option to renew as provided for in the Agreement. No evidence is in the record that Klure exercised the option to renew.

2. Additional Relevant Facts.

The 13-foot wide strip needed for the Project ran through landscaping on the perimeter of property owned by Dr. Curtis that was separate and apart from the Dentist Office Property. CR Ex. 7 (Price Aff. at ¶¶ 32-33 and Ex. D). The size and location of the strip of land was such that Klure and Dr. Curtis could have continued to practice dentistry on the Dentist Office Property during and after the Project. *Id.* at ¶ 33 and Ex. D.

ACHD and Dr. Curtis negotiated and entered into a Right-Of-Entry Agreement on November 10, 2006, whereby ACHD could enter upon the strip of land necessary for the Project so that construction could commence pending an agreement for the purchase of Dr. Curtis's property. CR Ex. 7 (Price Aff. at ¶¶ 42-43 and Ex. I, "Right-of-Entry Agreement"). The Right-of-Entry Agreement specifically stated that construction activities were not to cause any

disruption or interference with the dental practice of Dr. Curtis and Dr. Klure. *Id.* at ¶ 45, and Ex. I, Section 2.

No actions by ACHD—either through its negotiations or its construction of the Project—interfered with Dr. Curtis's or Dr. Klure's use of the Dentist Office Property or their business operations on that property. Dr. Curtis and Klure remained on the property and continued to operate their dental practices after ACHD had begun its work on the Project. *Id.* at ¶¶ 62, 63, 70. Their use of the property and their ability to continue their business operations were not impaired by the construction of the Project or by ACHD's negotiations for the purchase of property owned by Dr. Curtis. *Id.*

Dr. Curtis and ACHD entered into the agreement, entitled "Settlement Agreement," for the sale and purchase of Dr. Curtis's property to ACHD on June 22, 2007. CR Ex. 7 (Price Aff. at Ex. J, "Settlement Agreement"). Klure had vacated the Dentist Office Property in April of 2007, ending his partnership with Dr. Curtis and ending his holdover tenancy of the lease on the Dentist Office Property that expired December 31, 2006. CR Ex. 7 (Price Aff. at ¶ 62). In the contract between Dr. Curtis and ACHD, Dr. Curtis represented and warranted that Klure no longer had any interest in the property and that the lease agreement had terminated. *Id.* at ¶¶ 59-60, and Ex. J, Section H. Klure also signed the agreement, and thereby approved and acknowledged the terms and provisions, including the provisions in Section H stating that he no longer had any interest in the property and his leasehold interest had terminated. *Id.* at ¶ 61, Ex. J, Section H.

II. ADDITIONAL ISSUES ON APPEAL

1. If no taking has occurred, can a business recover business damages under Idaho Code § 7-711(2)?

2. If a business has no interest in real property at the time of an alleged taking, can that business recover business damages under Idaho Code § 7-711(2)?

3. If a business is not in existence at the time of an alleged taking, can that business recover business damages under Idaho Code § 7-711(2)?

III. ATTORNEY FEES AND COSTS ON APPEAL

In accordance with Idaho Appellate Rule 41, ACHD seeks to recover its attorney fees and costs as provided under Idaho Code § 12-121 and Rule 54 of the Idaho Rules of Civil Procedure. ACHD is entitled to attorney fees and costs on appeal because the District Court's ruling was based on undisputed facts, and Idaho law is clear on the issues presented.

IV. STANDARD OF REVIEW

As held by the District Court, in inverse condemnation cases, the issues of whether there has been a taking for which just compensation is required, when the taking occurred, and the nature of the property interest taken are issues for the court. *Moon v. North Idaho Farmers Ass'n*, 140 Idaho 536, 542, 96 P.3d 637, 643 (2004); *Covington v. Jefferson County*, 137 Idaho 777, 780, 53 P.3d 828, 831 (2002); *Tibbs v. City of Sandpoint*, 100 Idaho 667, 670, 603 P.2d 1001, 1004 (1979); *Ada County Highway Dist. v. Sharp*, 135 Idaho 888, 892, 26 P.3d 1225, 1229 (Ct. App. 2001). In Idaho, a party cannot sustain a claim for inverse condemnation "unless there

has actually been a taking of his or her property." *KMST, LLC v. County of Ada*, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003).

Because all issues in a condemnation case, other than the amount of any compensation, are to be determined by the court, they are proper for resolution on a motion for summary judgment. *Brown v. City of Twin Falls*, 124 Idaho 39, 855 P.2d 876 (1993); *Reisenauer v. State*, 120 Idaho 36, 41, 813 P.2d 375, 380 (Ct. App. 1991). In this case, Klure filed a motion for summary judgment on the issues and claims presented, thus conceding that no questions of fact precluded the District Court from ruling on the issues presented.

The determination of whether a taking has occurred is a question of law. Therefore, the Idaho Supreme Court exercises free review over the District Court's decision. *KMST* at 581, 67 P.3d at 60. However, the District Court's factual findings in a condemnation case are generally not disturbed on appeal. "Although we are free to draw our own conclusions from the facts, we will not disturb the trial court's findings of fact that are supported by substantial and competent evidence." *Id. See also Rueth v. State*, 103 Idaho 74, 77, 644 P.2d 1333, 1336-37 (1982) (in appellate review of district court decisions in inverse condemnation case, the findings of fact of the district court will be accepted if they are supported by substantial, competent though conflicting evidence, however meager).

V. ARGUMENT

A. Idaho Code § 7-711(2) Does Not Provide An Independent Cause Of Action For Recovery Of Business Damages. A Condemnation Or Taking Must Occur Before A Claim Under § 7-711(2) May Be Brought.

Klure initially filed his action as a request for declaratory judgment. In short, Klure sought to recover business damages under Idaho Code § 7-711 in the absence of a condemnation proceeding—either a direct condemnation filed by ACHD or an inverse condemnation by Klure. Klure argued that Idaho Code § 7-711 creates its own independent cause of action—separate and apart from any eminent domain proceeding.

Klure's argument is contrary to the plain language of § 7-711(2). To begin with, Idaho Code § 7-711 is in the heart of the code provisions governing eminent domain proceedings, and is the operative provision governing the assessment of damages in a condemnation case. Section 7-711(2), wherein the business damage provision is found, begins with the phrase: "*If the property sought to be condemned* . . . ." I.C. § 7-711(2) (emphasis added). The portion of the statute addressing business damages repeatedly refers to the condemnation and taking of property. The first prong of the test for whether a business may recover business damages as a result of a taking states, in relevant part: "the damages to any business qualifying under this subsection having more than five (5) years' standing *which the taking of a portion of the property* and the construction of the improvement in the manner proposed *by the plaintiff* may reasonably cause." *Id.* (emphasis added). The second prong of the test states that the "business must be owned by the party *whose lands are being condemned* or be located upon adjoining lands owned or held by such party." *Id.* (emphasis added). Thus, the language of the statute

repeatedly makes clear that the business damages provided under the statute only arise in the context of a condemnation.

Idaho courts have recognized two types of eminent domain proceedings: a direct condemnation action initiated by the condemning authority, and an inverse condemnation action initiated by a property owner who claims his property has been taken without payment of compensation. *Sharp*, 135 Idaho at 892, 26 P.3d at 1229; *Reisenauer*, 120 Idaho at 39, 813 P.2d at 378 (Ct. App. 1991) ("In general, when the state wishes to acquire private property for a public use, it will initiate a condemnation proceeding. When the state appropriates property without going through the procedure of a condemnation, the property owner may initiate a suit and request compensation."). Thus, only two types of eminent domain proceedings exist to recover damages for a governmental taking of private property for public purposes.

ACHD provided extensive briefing on this issue in its *Response to Klure's Post-Hearing Communication with Court Re: Motion to Dismiss*, CR at 16 *et seq*. (filed Jan. 15, 2008). To avoid unnecessary redundancies, ACHD will not repeat that discussion here, but will instead summarize those arguments.[2] Klure's suggestion that he need only establish two elements to recover business damages under Idaho's eminent domain statutes has no merit for the following reasons:

> (1) Idaho's business damages statute (Idaho Code § 7-711(2)) is part of the statutory framework for eminent domain proceedings. It only affords damages within the context of eminent domain proceedings;

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[2] ACHD incorporates by reference its prior arguments and authority cited in its *Response to Klure's Post-Hearing Communication with Court Re: Motion to Dismiss*, CR 16-30.

(2) the plain language of Idaho Code § 7-711(2) expressly provides that the damages are only recoverable in eminent domain proceedings;

(3) the legislative history of the amendments that added the "business damage" provision to Idaho Code § 7-711(2) makes clear that such damages are only available "in eminent domain proceedings;"

(4) the entire statutory framework for the award of damages under Idaho Code Title 7, Chapter 7 clearly contemplates that such damages are recoverable only within an eminent domain proceeding;

(5) the entire body of Idaho eminent domain case law provides for the award of damages for a taking of private property within an eminent domain proceeding; and

(6) the single case cited by Klure on this issue, *City of McCall v. Seubert*, 142 Idaho 580, 130 P.3d 1118 (2006), directly contradicts his position.

In sum, no case law and no statutory authority exists to support a conclusion that a business may recover business damages under the eminent domain statute § 7-711(2) without a taking of private property and in the absence of either a direct or an inverse condemnation action. Any such contention made or implied in this appeal should be rejected.

B. Klure Cannot Sustain A Claim For Inverse Condemnation And Cannot Recover Business Damages Under § 7-711(2) Because On The Date Of The Alleged Taking He Had No Property Interest And Owned No Business On The Subject Property.

1. Elements And Burden Of Proving A Claim For Inverse Condemnation.

The elements required to sustain a claim of inverse condemnation are as follows:

> The action must be: (1) instituted by a property owner who (2) asserts that his property, or some interest therein, has been invaded or appropriated (3) to the extent of a taking, (4) but without due process of law, and (5) without payment of just compensation.

Covington v. Jefferson County, 137 Idaho 777, 780, 53 P.3d 828, 831 (2002); *City of Lewiston v. Lindsey,* 123 Idaho 851, 856, 853 P.2d 596, 601 (Ct. App. 1993).

In an inverse condemnation, the landowner has the burden of proving the elements of the condemnation claim. Specifically, the landowner has the burden of proving that he has a valid property right and that his property right has been taken. *Rueth*, 100 Idaho at 218, 596 P.2d at 90. The Idaho Supreme Court has made clear that "[t]he property owner *cannot* maintain an inverse condemnation action *unless* there has *actually been a taking* of his or her property." *KMST*, 138 Idaho at 581, 67 P.3d at 60 (emphasis added). The issues of the nature of the property interest alleged to have been taken and whether a taking has occurred are questions of law for the trial court. *Moon*, 140 Idaho at 542, 96 P.3d at 643; *Tibbs*, 100 Idaho at 670, 603 P.2d at 1004.

2. Klure Cannot Meet His Burden of Proving An Inverse Condemnation Claim or a Right to Recover Business Damages.

In an attempt to satisfy his burden of establishing the existence of a compensable property right, Klure points to his leasehold interest in the Dentist Office Property. No part of the Dentist Office Property was required for the Project, and no part of the 13-foot wide strip of land needed for the Project included any portion of the Dentist Office Property. CR Ex. 7 (Price Aff. at ¶¶ 32, 33, 55, 57). Thus, no taking occurred of any property in which Klure had an interest.

Klure's lease of the Dentist Office Property expired on December 31, 2006. After expiration of the lease, Klure became a holdover tenant on a month-to-month tenancy basis. Klure's holdover tenancy terminated when he voluntarily vacated the property and relocated his dental practice to a new location in April, 2007. This terminated his lease and ended his

partnership with Dr. Curtis. Klure acknowledged these facts in his Complaint when he stated that he voluntarily decided to terminate his partnership with Dr. Curtis and relocate his business. *Complaint,* CR at 7 *et seq.*, ¶ 11 ("Klure's decision to relocate required that Klure and Curtis sever their long-term business relationship at Maple Grove."); *see also* CR Ex. 6 (Klure Aff. at ¶ 7).

Klure also acknowledged these facts when he signed the purchase agreement between Dr. Curtis and ACHD. Dr. Curtis and ACHD executed the agreement for the sale and purchase of Dr. Curtis's property on June 22, 2007. The agreement, also signed by Klure, specifically affirmed that Klure no longer had any interest in the Dental Office Property and the lease had terminated. CR Ex. 7 (Price Aff. at ¶¶ 58-61, and Ex. J, Section H). Thus, by Klure's own admission, he no longer had any interest in the Dental Office Property, voluntarily vacated the property, terminated his partnership with Dr. Curtis, and relocated his business—all prior to June 22, 2007, the date of the alleged taking.

Since Klure had no interest in the Dental Office Property or in any adjoining property on the date of the alleged taking, Klure cannot sustain a claim for inverse condemnation and, under the plain language of the statute, Klure cannot recover business damages under Idaho Code § 7-711(2). *KMST*, 138 Idaho at 580-81, 67 P.3d at 59-60; *Brown*, 124 Idaho at 41, 855 P.2d at 878 (affirming dismissal of inverse condemnation claim based upon absence of existing, compensable property right); *Wyatt v. United States*, 271 F.3d 1090 (Fed. Cir. 2001) (mining company could not recover compensation after giving up leasehold interest).

3. Klure's Concerns About Potential Damage to the Dentist Office Property Will Not Sustain An Inverse Condemnation Claim.

In his brief, Klure makes statements regarding the proximity of Ustick Road to the Dentist Office Property after the Project. In Idaho, for a property owner to be entitled to compensation under Article I, Section 14 of Idaho's Constitution, his property must be "taken" and not merely "damaged." *Moon*, 140 Idaho at 541, 96 P.3d 637 at 642; *Covington*, 137 Idaho at 781, 53 P.3d at 832. It is undisputed that no portion of the Dentist Office Property was needed for the Project, and Klure does not contend that any taking of the Dentist Office Property occurred. No allegation has been made or substantiated that the dental practice could not have continued after the Project. In fact, the only evidence is that both Klure and Dr. Curtis continued their practices for some months during construction of the Project and while ACHD physically occupied the strip of land needed for the Project. CR Ex. 7 (Price Aff. at ¶¶ 62, 63, 70). No allegation has been made and no evidence exists that the Project disrupted business operations on the Dentist Office Property.

4. The District Court Held That Klure Could Not Sustain An Inverse Condemnation Claim.

The District Court held that Klure could not sustain an inverse condemnation claim. The court based its ruling on the fact that ACHD did not condemn any property; rather Dr. Curtis sold the property to ACHD. The court further held that, by law, ACHD could not have condemned the Dentist Office Property because it was not needed for the Project. The court concluded as follows:

> The right to recover in an inverse condemnation action arises from a governmental "taking". If a person with an interest in property

> loses that interest as a result of a private person's action, their right of action is against that private person who deprived them of their interest. The right to receive just compensation from the government for a taking, requires that the government actually take the property. ACHD purchased the property from its owner. The reason ACHD acquired the Maple Grove Dentistry building is because of the voluntary, arms-length sale of it by the property owner, Dr. Curtis. ACHD never sought to utilize the building for the Ustick project and it would never have been able to condemn the building since the building was not required for the construction.

CR 106-07. The District Court's ruling correctly follows Idaho law, is supported by undisputed facts, and should be affirmed. *See KMST* at 581, 67 P.3d at 60 (appellate court will not disturb trial court's findings of fact in inverse condemnation case that are supported by substantial and competent evidence); *Rueth* at 77, 644 P.2d at 336-37 (1982) (appellate court will accept district court findings of fact in inverse condemnation cases if supported by substantial, competent though conflicting evidence, however meager).

C. No "Taking" Occurred That Would Entitle Klure To An Award Of Business Damages.

The question of whether a taking has occurred is "a threshold issue that must be established before an inverse condemnation action can be maintained." *KMST*, 138 Idaho at 582, 67 P.3d at 61; *Covington*, 137 Idaho at 780, 53 P.3d at 831.

1. No Taking Occurred Of Any Property In Which Klure Had An Interest.

Klure's only property interest was a leasehold interest in the Dentist Office Property. No part of the Dentist Office Property was needed for the Ustick Project. Therefore, by law, ACHD could not have condemned any portion of the Dentist Office Property. *See* I.C. § 7-704.

Because ACHD could not and did not condemn any portion of the Dentist Office Property, ACHD did not take or condemn any property interest held by Klure.

In addition, as shown above, Klure no longer had any interest in the Dentist Office Property on the date of the alleged taking on June 22, 2007.

2. No Taking Occurred Of Any Property Adjoining Property In Which Klure Once Had An Interest.

Klure next contends that a taking occurred on June 22, 2007 when ACHD purchased adjoining property owned by Dr. Curtis. Klure's argument fails for several reasons.

a. By Law, ACHD Cannot Exercise Its Power of Eminent Domain Until After Negotiating in Good Faith to Purchase the Property.

Idaho Code § 7-707 sets forth the legal requirements and prerequisites that must be satisfied *before* any governmental entity may exercise the power of eminent domain. One of the key requirements is that the condemnor must *first* negotiate in good faith to purchase the property from the landowner. *See* I.C. § 7-707(7). The District Court specifically noted this legal requirement: "ACHD, as required by law, contacted Dr. Curtis to work out a purchase of his property that was needed for the Ustick project." CR 101.

By law, ACHD is required to attempt to negotiate for the purchase of property before it may exercise any power of eminent domain. If the negotiations are successful, which they were in this case, an agreement is reached for the purchase of the property, no taking and no exercise of the power of eminent domain occurs, and no property is condemned. No law in Idaho supports any contention that the negotiation for the purchase of property is a taking or an exercise of the power of eminent domain.

b. No Order of Condemnation Was Requested From Or Issued by the ACHD Board of Commissioners.

The law also requires that, *before* the power of eminent domain may be exercised, the governing body of the governmental entity must pass a Condemnation Resolution or an Order of Condemnation, authorizing the use of the power of eminent domain. *See* I.C. § 7-707(6). In the absence of an Order of Condemnation from its governing board, ACHD has no authority to exercise the power of eminent domain.

In this case, it is undisputed that ACHD's Commissioners were never asked to issue and never issued an Order of Condemnation as to any property owned by Dr. Curtis. CR Ex. 7 (Price Aff. at ¶ 68). Therefore ACHD did not have the authority to condemn or initiate a condemnation of any property owned by Dr. Curtis. Absent that authority, no condemnation could have occurred.

c. No Taking Occurred as a Result of ACHD's Purchase of Property From Dr. Curtis.

The agreement between ACHD and Dr. Curtis was a negotiated, arms-length transaction for the purchase of the Dentist Office Property and did not amount to a taking. *See City of Lewiston v. Lindsey*, 123 Idaho 851, 858, 853 P.2d 596, 603 (Ct. App. 1993). ACHD never sought or obtained an Order of Condemnation from its Board of Commissioners, and never filed or pursued a condemnation action.

In *City of Lewiston v. Lindsey*, the Idaho Supreme Court noted that no taking occurs as a result of planning for construction of road project or from negotiating with property owners for the purchase of their property. *Id.* at 858, 853 P.2d at 603. Consistent with the Court's decision

in *Lindsey*, numerous other jurisdictions have similarly concluded that negotiations by a governmental entity to purchase property or planning for the acquisition of property do not amount to a taking:

- *Stahelin v. Forest Preserve Dist. of Du Page County*, 877 N.E.2d 1121, 1131 (Ill. 2007) ("the '*taking of land by eminent domain' is not accomplished* by passing resolutions or ordinances or *by negotiating with the owners for the purchase of it* or by serving notice to the owner that land may be required for public purposes.") (quoting *Eckhoff v. Forest Preserve Dist. of Cook County*, 36 N.E.2d 245, 248 (Ill. 1941)) (emphasis added);
- *Ferrari v. United States*, 73 Fed. Cl. 219, 225 (2006) (*negotiations* between the government and a landowner, including a failed negotiation "*is not enough to constitute a taking*) (emphasis added);
- *B.W. Parkway Assoc. Ltd. P'ship v. United States*, 29 Fed. Cl. 669, 680 (1993) *aff'd*, 36 F.3d 1116 (Fed. Cir. 1994) ("[g]ood faith *negotiations* to purchase property *do not constitute a taking*.") (citation omitted).

Additionally, since ACHD is required to negotiate in good faith with a landowner to *purchase* property, it cannot initiate or successfully maintain a condemnation action *until* it satisfies this requirement. I.C. § 7-707(7); CR Ex. 7 (Price Aff. at ¶ 69). Because the negotiation for the purchase of property from Dr. Curtis was successful, no condemnation action was ever initiated at either the agency level or by any judicial proceeding. All discussions and negotiations with Dr. Curtis were for the *purchase* of his property and had nothing to do with an exercise of ACHD's power of eminent domain.

Accordingly, no taking by ACHD occurred in this matter, and Klure's claim of inverse condemnation fails.

d. The District Court Likewise Held That No Taking Occurred When ACHD Purchased Property From Dr. Curtis.

The District Court held that, by law, ACHD could only have condemned the 13-foot wide strip of property needed for the Project. CR at 105. That strip did not include any part of the Dentist Office Property. The court found that, when approached by ACHD to purchase this strip of property, Dr. Curtis countered with his own proposal that ACHD buy his interests in each of the parcels he owned. CR at 104. The court then ruled that the sale of the property was not a taking:

> When the agreement closed on June 22, 2007, Klure had already relocated his practice and the lease had been terminated. Under the circumstances of this case, there was no "taking" since the sale was an arms-length transaction of the sale of all of Dr. Curtis' property. Klure had no interest in the property.
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> * * *
>
> The sale of the building came as a result of the owner's counter-offer, not as a result of condemnation proceedings by ACHD . . . The loss of the building came through the sale by the property owner, not governmental action. The threat of possible condemnation in the future from ACHD's original proposal to purchase the strip of land needed for the Ustick project does not constitute a taking. *City of Lewiston v. Lindsey*, 123 Idaho 851, 853 P. 2d 596 (Ct. App. 1993). In this case, condemnation proceedings were never brought and a voluntary sale of the property was accomplished after the lease was terminated.

CR at 104-05. The District Court's ruling correctly applies the law to the undisputed facts in this case and is properly affirmed.

e. ACHD Did Not Affirmatively Exercise Its Powers of Eminent Domain to "Take" the Subject Property So As to Trigger the Condemnation Clause of Klure's Lease Agreement.

The triggering events for the condemnation clause of the Curtis-Klure lease never occurred, and Klure cannot recover against ACHD under the lease. The condemnation clause in the Lease Agreement provides that:

> 14.1 Entire or Substantial Taking. If the entire Premises or so much thereof as to make the balance not reasonably adequate for the conduct of Tenant's business notwithstanding restoration by Landlord hereinafter provided, *shall be taken under the power of eminent domain*, this Lease shall automatically terminate as of the date on which condemning authority takes title or possession, whichever first occurs.

CR Ex. 7 (Price Aff. at Ex. G, ¶ 14.1) (emphasis added). The condemnation clause addresses what happens between Dr. Curtis and Klure in the event of a taking of the Dentist Office Property by power of eminent domain. *Id.* By law, ACHD did not and could not exercise its power of eminent domain to acquire the Dentist Office Property because it was not needed for the Ustick Project. Thus, no taking by eminent domain occurred. Absent a "taking" of the Dentist Office Property, the condemnation clause is not triggered and does not support Klure's claim for business damages against ACHD.

Klure's lease expired on December 31, 2006. His holdover tenancy terminated when he voluntarily vacated the Dentist Office Property in April of 2007. Even if ACHD's purchase of Dr. Curtis's property could be considered a taking, that taking did not occur until June 22, 2007, *after* Klure's lease had already terminated. Therefore, the lease provision is irrelevant and does not apply.

D. No "Sale Under Threat Of Condemnation" Occurred That Amounted To A Taking.

Klure argues that the sale of Dr. Curtis's property to ACHD was made under threat of condemnation. However, Klure made no argument nor did he present any evidence that there was ever any threat of condemnation during the negotiations between ACHD and Dr. Curtis. Therefore, Klure has failed to meet his burden on this issue. Accordingly, the District Court ruled as follows:

> While the Lease Agreement treats the sale of the premises "under threat of condemnation or while condemnation proceedings are pending" as a "taking," there was never a threat of condemnation for the building used by Maple Grove Dentistry nor were any condemnation proceedings pending. Affidavit of Steven B. Price, Affidavit of Jack D. Klure, D.D.S.. Exh. 1. Dr. Curtis sold the property after the lease was terminated and after Klure had relocated his practice. As ACHD has pointed out, because it did not need the portion of the property on which the building for Maple Grove Dentistry was located, it could not have used its power of eminent domain to acquire it.

CR at 105.

In addition to having failed to satisfy his burden, Klure's argument fails on the merits because ACHD's negotiations for the purchase of the Dentist Office Property were not made under "threat of condemnation." No such threat was ever made during any discussions or negotiations with ACHD. CR Ex. 7 (Price Aff. at ¶ 65). Additionally, no "threat of condemnation" could be made because ACHD can *only* condemn property if it is needed for a public project (I.C. § 7-704(2)), and *only* if ACHD has obtained an Order of Condemnation from its Commissioners. I.C. § 7-707(6). ACHD's Commissioners never issued any Order of Condemnation for the strip of property needed for the Project. CR Ex. 7 (Price Aff. at ¶¶ 67-68).

In addition, by law, ACHD could not threaten to condemn property it did not need and did not have authority to condemn.

1. The Case Law from Outside Idaho Cited by Klure Provides No Support for His Position.

Klure "concedes that no taking took place with regard to any of the purchased property that was not actually used in connection with the Project." App. Br. at 12. Thus, Klure's argument that a taking occurred is limited to the 13-foot wide strip of land "along Ustick Road that was actually used for the Project." *Id.*

To support his argument that the sale of the 13-foot wide strip of land owned by Dr. Curtis occurred under threat of condemnation, Klure relies on *P.C. Management, Inc. v. Page Two, Inc.*, 573 N.E.2d 434, 437 (Ind. App. 1991). This reliance is misplaced. Klure seizes on a statement by the Indiana Court of Appeals that it was "persuaded by out-of-state authority that a conveyance in lieu of actual condemnation of real property constitutes a condemnation proceeding because it indicates an intention to acquire the property by condemnation and is tantamount to a taking under the power of eminent domain." *Id.* at 437. However, this statement is taken out of context from the remainder of the case, where the court in fact held that the state condemnation statute did "not apply to the facts of this case" because "[u]nder the express terms of the sublease" the plaintiff's rights and interest in the property had *already terminated*. *Id.* at 439.

The court noted that the plaintiff "had no property interest which was taken by the City." *Id.* The court concluded that "under the circumstances of this case the City had no obligation to

purchase the *plaintiff's sublease interest* because any interest "*had terminated already by operation of law.*" *Id.* (emphasis added).

As in *P.C. Management*, Klure's lease of the Dentist Office Property had already terminated *before* ACHD purchased the property. Because Klure had no interest, no interest was either taken or sold. Furthermore, it is undisputed that no part of the Dentist Office Property was required for the Project and the Project did not encroach upon or otherwise physically touch any portion of that property. *See also* App. Br. at 17 (conceding that "the Project did not include the actual building occupied by Maple Grove [Dentistry]")).

Klure's reliance on *Fuddy Duddy's v. State Dept. of Transp.*, 950 P.2d 773 (Nev. 1997), is also misplaced. In *Fuddy Duddy's*, the owners of a parcel of property leased the property to a third party. *Id.* at 774. The lease contained a clause terminating the lease upon any condemnation action. *Id.* Several years later, the Nevada Department of Transportation (NDOT) sought to expand the roadway adjacent to the parcel and expressly adopted a "Condemnation Resolution" authorizing and directing NDOT to acquire the property as necessary for the road project. *Id.* The owners notified the plaintiff-leaseholder of the condemnation resolution and the fact that the lease had terminated pursuant to the condemnation clause. The owners then entered into a voluntary purchase agreement with NDOT. *Id.*

The plaintiff-leaseholder filed a lawsuit against NDOT and the owners seeking an award of damages because it argued that NDOT's purchase of the owners' property *did not trigger the condemnation clause* in his lease because NDOT did not comply with the state's condemnation statute. *Id.* at 774-75 (emphasis added). In response, NDOT argued that it purchased the

property "under the threat of condemnation" and was "the equivalent of a condemnation." *Id.* at 775. The court agreed with NDOT and held "that a purchase made under the threat of condemnation is the same as a judicial condemnation" and that the lease termination language was appropriately triggered. *Id.*

Fuddy Duddy's offers no support for Klure's position in this case. Here, "[i]t is not contradicted that *ACHD did not need or require the additional property* which Dr. Curtis wished to sell." CR at 101-102 (emphasis added). It is also undisputed that the ACHD Commission never passed any condemnation resolution, as had the NDOT in *Fuddy Duddy's*. Moreover, even if ACHD had wanted to, it "*could not* have acquired the additional property through its eminent domain powers because the additional property" was not necessary for the Project. CR at 102 (District Court *Decision and Order*) (emphasis added).

Klure also cites *Lanning v. City of Monterey*, 226 Cal. Rptr. 258, 262 (Cal. Ct. App. 1986), for the proposition that the "sale of property to the city was the essential equivalent of its exercise of eminent domain power." App. Br. at 13. However, *Lanning* is distinguishable because the court in that case based its holding on the "evidence that the City and the railroad *expressly agreed in their sales agreement*" that the sale was equivalent to a condemnation. 226 Cal. Rptr. at 262. The court also relied on testimony by the seller that in fact the "land was not for sale" and "was really taken away from us: we did not want to sell it." *Id.* No similar language is found in the agreement between Dr. Curtis and ACHD and no such testimony exists in this case. On the contrary, the undisputed evidence is that the idea of purchasing all of Dr. Curtis's property was *proposed by Dr. Curtis.*

The *Lanning* Court further held as follows:

> The *mere fact that respondent has the power of eminent domain,* when in fact such power is neither exercised nor remotely threatened, *is insufficient to render it liable in an inverse condemnation action every time it deals in an open market transaction* which results in leases or licenses being broken. The 'power to condemn' cannot in and of itself constitute proximate cause where there is an intervening force or factor. In an open market transaction the 'power to condemn' is not enough – there must be evidence of implied or actual threat of condemnation, so that the ultimate result is a foregone conclusion.

Lanning v. City of Monterey, 226 Cal. Rptr. 258, 262 (Cal. Ct. App. 1986) (quoting *Pacific Outdoor Advertising Co. v. City of Burbank*, 149 Cal. Rptr. 906, 910 (Cal. Ct. App. 1978) (emphasis added)).

Klure argues that because the property was not available on the "open market," the sale is somehow transformed into a condemnation. This argument is negated by the fact that ACHD had the property appraised and purchased it at *fair market value*. CR at 102. *See also Lanning v. City of Monterey*, 226 Cal. Rptr. at 262 (citing *Pacific Outdoor Advertising Co. v. City of Burbank*, 149 Cal. Rptr. at 907-08 (classifying an "open market transaction" as a business contract in which the "City had never threatened to institute condemnation proceedings to acquire the property.")).

Klure next cites *Vincent v. Redev. Auth., Etc.*, 487 A.2d 1024, 1025 (Pa. Commw. Ct. 1985). *Vincent* is readily distinguishable. In *Vincent*, the court gave great weight to the fact that "*the parties themselves have stipulated* that the deed entered into between the [the parties] was in lieu of this intended condemnation." *Id.* (emphasis added). Also, as in *Fuddy Duddy's*, the

Vincent Court noted that the governmental authority "*passed a resolution* indicating its intention to acquire the subject property by condemnation." *Id.* Ultimately, the court concluded that these "events" in their totality constituted a condemnation. *Id.*

Here, ACHD and Dr. Curtis never stipulated that the purchase agreement amounted to a condemnation. ACHD never threatened to institute condemnation proceedings to acquire the Dentist Office Property and could not have done so by law. The ACHD Board of Commissioners never passed an Order of Condemnation or similar resolution. Because the Curtis-Klure Lease Agreement was terminated *before* ACHD entered the purchase agreement with Dr. Curtis, any interest that Klure previously had was already gone. Thus, Klure could not recover business damages even if the purchase of property by ACHD were considered to be a taking or condemnation.

Lastly, Klure cites *Winn-Dixie Stores, Inc. v. Dept. of Transp.* 839 So.2d 727 (Fla. Dist. Ct. App. 2003), in support of his contention that the subdivision covenants gave him a right of use of common areas that was compensable. In *Winn-Dixie*, the Department of Transportation (DOT) condemned a portion of a shopping center, including a large amount of the shopping center's parking spaces. *Id.* at 728. Winn-Dixie leased commercial space in the shopping center. *Id.* Winn-Dixie brought an action against DOT and the shopping center owner to recover a share of the condemnation proceeds because it had a leasehold interest in the parking area. *Id.* at 729.

The Florida Court of Appeals concluded that Winn-Dixie was entitled to a share of the condemnation proceeds, as well as severance and business damages. *Id.* The court reasoned that "[t]he lease, taken as a whole, contemplate[d] a leasehold interest in the common areas of the

shopping center," evidenced by a monthly fee for "general repair and maintenance of all paved surfaces." *Id.* at 730. Thus, the lease demonstrated that Winn-Dixie had in fact "bargained for an interest in the parking area of the shopping center" and was entitled to compensation. *Id.*

Winn-Dixie has no bearing on this case because *Winn-Dixie* involved an *actual condemnation and taking*, whereas this case involves a *purchase.* Also, in *Winn-Dixie* the lease was still in place and ongoing. Here, the Curtis-Klure partnership had ended and the lease had terminated *before* ACHD purchased the property from Dr. Curtis. Furthermore, the lease in *Winn-Dixie* encompassed the parking lot, whereas Klure concedes that "the Maple Grove Lease *does not explicitly refer to the parking area.*" App. Br. at 19. Nevertheless, Klure attempts to argue that the by-laws of the Fairbank Subdivision association somehow "entitled" him to "an easement for parking and access." App. Br. at 17.

Specifically, Klure cites the Code of By-Laws of Maple Grove Professional Owners Association, Inc. which provided that Lot 16 was "reserved for open area...driveways and parking areas" and that all owners of Fairbanks Subdivision, including Lot 19 (the Dentist Office Property) had a "permanent nonexclusive easement for the use of the Office Building Common Area." App. Br. at 17-18. Accordingly, Klure asserts that, like the tenant in *Winn-Dixie*, he is entitled to a portion of the "taking" proceeds because he had an interest in the parking area.

Winn-Dixie is distinguishable on this point as well. Specifically, the *Winn-Dixie* Court placed great significance on the fact that Winn-Dixie paid a *periodic monthly payment* for maintenance of the parking area and the lease provided a corresponding interest in the parking lot. 839 So.2d at 730. Here, Klure did not "bargain for" an interest in the parking area, he did

not pay monthly fees for its upkeep, and the lease did not encompass or refer to any parking areas. Rather, Klure enjoyed a gratuitous benefit to his business operations on the Dentist Office Property.

Even assuming *arguendo* that the interest in the parking area amounted to a "bargained for" interest, unlike the unexpired lease at issue in *Winn-Dixie*, Klure is not entitled to compensation or business damages because he *no longer had a leasehold interest in any property* at the time of the alleged taking. Rather, the lease had expired, then had terminated, and the partnership had dissolved before the alleged taking. CR at 102 (noting that the Curtis-Klure partnership dissolved in the late Winter of 2006 or early Spring of 2007; that Klure relocated his practice in April 2007; and that Dr. Curtis and ACHD entered a purchase agreement on June 22, 2007).

2. Case Law on Point Makes Clear that No Taking Occurred.

When a governmental entity purchases property by contract, it does not condemn the property. In such circumstances, it acts merely as a purchaser without an exercise of sovereign powers. *See City of Lewiston v. Lindsey*, 123 Idaho at 858, 853 P.2d at 603 (no condemnation occurs as a result of planning for construction of a road project or negotiating with landowners for the purchase of their property).

In *General Services Comm'n. v. Little-Tex Insulation*, Co. 39 S.W.3d 591, 599 (Tex. 2001), the Supreme Court of Texas held as follows:

> [The] State wears two hats: the State as a party to the contract and the State as sovereign. The State, in acting within a color of right to take or withhold property in a contractual situation, is acting

> akin to a private citizen and not under any sovereign powers. In this situation, the State does not have the intent to take under its eminent domain powers; the State only has an intent to act within the scope of the contract.

Little Tex, 39 S.W.3d at 599 (rejecting inverse condemnation by general contractor against state university where university exercised only its contractual powers, not eminent domain, and "only ha[d] an intent to act within the scope of the contract.").

In *State v. Holland*, 221 S.W.3d 639 (Tex. 2007), the Texas Supreme Court held that a third party patent holder did not have a viable condemnation claim against the State because the State was "acting under color of contract" and was not "invoking its eminent-domain powers" when it entered into a contract with two private companies for the design, construction and use of three water storage facilities. *Id.* at 641-43. The court concluded that because the contract reflected only the State's intent to exercise its contractual rights and it lacked the "requisite intent to take . . . under its eminent-domain powers, the State is not subject to [inverse condemnation] liability." *Id.* at 644.

Here, ACHD acted with its "power to contract" in purchasing Dr. Curtis's property. ACHD only needed the 13-foot wide strip that ran along side of Ustick Road, and it was Dr. Curtis who approached ACHD in May 2006 to negotiate a sale of all of his property. CR at 100-02. ACHD acted only in the exercise of contractual rights—which it is statutorily empowered to do. *See* I.C. § 40-1309. ACHD was not invoking its eminent domain powers when it entered into the contract for sale with Dr. Curtis.

ACHD's mere adoption and plan for the Ustick project, which includes the power to condemn, falls "several leagues short of a firm declaration" of ACHD's intent to condemn Dr. Curtis's property. *Langer v. Redevelopment Agency*, 84 Cal. Rptr. 2d 19, 21, 26 (Cal. App. Ct. 1999). "The fact that a leasehold interest is a property interest which *may* be condemned does not mean . . . as a matter of law that a de facto taking *has* occurred." *Millcreek Township v. N.E.A. Cross Co.*, 620 A.2d 558, 562 (Pa. Commw. Ct. 1993) (emphasis added). "Stated differently, acquiring property under a threat of condemnation is not the same as acquiring property under an actual eminent domain proceeding." *Knop v. Gardner Sch. Dist.*, 205 P.3d 755, 766 (Kan. 2009) (holding there was no compensable inverse condemnation claim because there was no "taking" in the absence of a final condemnation judgment entered and where evidence showed the school voluntarily "purchased the plaintiffs' land under written contract" separate and apart from eminent domain statutes). It "suffices to say that a threat of condemnation is not a taking." *Hempstead Warehouse Corp. v. United States*, 98 F. Supp. 572, 573 (Fed. Ct. Cl. 1951) (citing *United States v. Sponenbarger*, 208 U.S. 256, 267 (1939); *Danforth v. United States*, 308 U.S. 271, 283-286 (1939)).

In *Pacific Outdoor Advertising Co. v. City of Burbank,* 149 Cal. Rptr. 906, 911 (Cal. App. Ct. 1978), the court found that a city's acquisition of property from a railroad was an open market transaction, and that any leases or licenses that were terminated because of the transaction would not support a claim of inverse condemnation. *Id.* Pacific Outdoor Advertising had a licensing agreement with the railroad to erect and maintain several billboards on the railroad's right-of-way. *Id.* at 908. Nevertheless, the city and the railroad entered into a lease

agreement for property owned by the railroad including the right-of-way where Pacific's signs were located. *Id.* The lease agreement included a provision that the railroad could terminate the agreements with Pacific, and the railroad terminated Pacific's licenses. *Id.*

Pacific sought damages in inverse condemnation against the city, on the basis that the city had essentially "caused" the railroad to terminate Pacific's licenses. *Id.* In particular, Pacific argued that *even though the city had not exercised its condemnation authority*, the fact that it *could have* condemned the property in question was sufficient to support an action in inverse condemnation. *Id.*

The California Court of Appeals rejected Pacific's argument. *Id.* Instead, the court found that the railroad and the city had engaged in an open market transaction and that "the power to condemn is not enough, there must be evidence of implied or actual threat of condemnation, so that the ultimate result is a foregone conclusion." *Id.* at 911. The *Pacific* Court emphasized that the "power to condemn" itself is not the proximate cause giving rise to inverse condemnation liability where there is an intervening force or factor. *Id.* at 911-12. The court concluded that the license with Pacific had been properly terminated and the city and railroad had *acted freely* in their own financial interests to terminate the license. *Id.* This voluntary act between the parties constituted an intervening force or factor that severed any casual link between the "power to condemn" and the termination of the plaintiff's license. *Id.* at 911. Thus, "absent an unequivocal act or intent to condemn if necessary,[] the 'power to condemn,' does not in and of itself constitute proximate cause." *Id.*

In *Langer v. Redevelopment Agency*, 84 Cal. Rptr. 2d 19 (Cal. App. Ct. 1999), the California Court of Appeals rejected an inverse condemnation action brought by two commercial tenants against a state redevelopment agency where the underlying owner had given the tenants notice of his intent to sell the property to the agency and had voluntarily entered an agreement to sell his property "free and clear" of those interests. *Id.* at 21, 24. The plaintiffs argued that although the agency did not resort to its condemnation powers, the seller had entered into the sale agreement under threat of condemnation that amounted to a taking. *Id.* at 20-21.

The court held that to "have inverse condemnation, you have to have a *taking* or at the very least a definite and unequivocal manifestation that the public entity in question was ready to use its power to condemn, and in fact would clearly do so if necessary, to acquire the property at issue." *Langer*, 84 Cal. Rptr. 2d at 25 (emphasis added and internal citations omitted). The court held that there was no evidence that the "Agency was prepared to use its power to condemn" the land at issue or that the landowner "was acting under the threat of condemnation when he gave his tenants notice." *Id.* Rather, the agreement between the parties was an open market transaction where the owner voluntarily entered into a sale with the redevelopment joint-venture. *Id.*

The *Langer* Court reaffirmed the principle outlined in *Pacific* over twenty years earlier, namely that "[t]he power to condemn, in and of itself, does not constitute proximate cause where there are intervening factors." *Langer*, 84 Cal. Rpt. 2d at 25-26. The court explained that "the owner of the properties terminated the tenancies on his properties" under voluntary agreement, which by its terms included his promise to "deliver his properties free of tenancies." *Id.*

Accordingly, the court concluded that this voluntary act constituted "an intervening force or factor sufficient to negate inverse condemnation liability on the part of the Agency." *Id.* (internal quotations omitted).

Additionally, the court held that "the fact that the Agency had the authority to condemn property in the redevelopment area and *indeed used its condemning authority to acquire other parcels* in the Gateway Project" did "*not give rise to a triable issue* regarding the Agency's eminent domain liability" as to the specific parcels at issue. *Id.* at 26 (emphasis added). The court explained that the mere adoption of a redevelopment plan or project which includes the power to condemn falls "several leagues short of a firm declaration of an intention to condemn real property." *Id.* (citation omitted).

Here, ACHD approached Curtis in January 2006 to negotiate the purchase of the 13-foot wide strip needed for the Ustick Project. CR at 101. No condemnation proceedings were ever threatened or initiated. CR at 101. Curtis approached ACHD in May 2006 and made a counter-proposal for the sale of all of his property. CR at 101.

By its own terms, the lease held by the Curtis/Klure partnership expired on December 31, 2006. CR at 102. On June 22, 2007, after the Curtis/Klure lease had expired and Klure had relocated his practice, Curtis entered into a *voluntary agreement* with ACHD for the sale of all of his property at fair market value. CR at 102. No condemnation of any property was threatened and no condemnation occurred. Accordingly, Klure cannot recover business damages under § 7-711(2) because no taking occurred.

3. **Klure's Reliance on a Statement in Nichols Is Misplaced.**

Klure cites to 7 Nichols on Eminent Domain § G6.02[1] for the proposition that "[p]roperty acquired amicably in lieu of condemnation is treated as though it were taken through an eminent domain proceeding, entitling the affected party to relocation benefits." The Nichol's treatise cites only one case in support of this proposition: *Redevelopment Auth. v. Property Located In West Milton,* 517 A.2d 210 (Pa. Commw. Ct. 1986). However, this case does not support the statement in Nichols.

In *West Milton*, the lessee brought an action against the redevelopment authority alleging a de facto taking after the landowners had entered into a settlement agreement in lieu of condemnation and notified that lessee that by its agreement, it was terminating the lease. *West Milton*, 517 A.2d at 211. The court explained that "[t]o be entitled to compensation for a taking, one must be the owner of a property interest taken." *Id.* The court affirmed the trial court's finding that the lessee had no valid condemnation claim because "[a]t the time of actual purchase by deed" the lessee "had no compensable property interest in the lease" because the lease had expired, the lessee had waived its right to renewal, and had "agreed to an early termination of the lease." *Id.* at 211-12. The court concluded that under the facts of the case the "tenant whose lease has expired [wa]s not a condemnee under the Code." *Id.* In dicta, the court noted that "even if [the lessee] did have a right of annual renewal" because it had neither been waived nor expired, the agency's actions would still have "been insufficient to establish a de facto taking" because "mere negotiations and even appraisals and a flood control plan were insufficient to establish a de facto taking." *Id.*

In short, *West Milton* provides no support for the statement in Nichols cited by Klure or Klure's position in this case. In addition, other Pennsylvania case law further refutes Klure's contention. In *Koschak v. Redevelopment Auth.*, 758 A.2d 291 (Pa. Commw. Ct. 2000), a podiatrist (lessor) owned real property and shared office space with a second podiatrist (lessee) pursuant to "office sharing and right of first refusal agreement." *Id.* at 292. Under the terms of the agreement, the lessor/podiatrist had the authority to terminate the agreement if he elected to sell the property. *Id.* After the lessor notified the lessee that he had decided to sell the property to the redevelopment authority, the lessee brought an action alleging that he was entitled to condemnation damages. *Id.* at 292-93.

On appeal, the court concluded that the lessee's argument of a de facto taking in lieu of condemnation was barred on procedural grounds. *Id.* at 293-94 & n.2. Nevertheless, the court explained that "[w]ere the argument to be considered, it would fail" because the mere negotiation for sale did not amount to "closing" under the terms of the lease—the date before which the lessor had to declare the rights of the lessee to be terminated. *Id.* Because the lessor gave notice of his intent to terminate the lease—in this instance a mere day's notice—the court found that the lessee no longer had any legal right to occupy the premises on the date of the sale. *Id.* Accordingly, the lessee had no compensable interest—under either a theory of de facto condemnation or statute—because the authority's "purchase of the subject property was through private negotiations and sale rather than through its powers" of eminent domain. *Id.* *See also* *Carr v. City of Pittsburg*, 837 A.2d 655, 661 (Pa. Commw. Ct. 2003) (applying *Koschak* and finding no compensable interest where sale was "arms-length transaction" and "acquiring agency

acquired the property through private negotiations rather than through its power" of condemnation).

Here, Klure no longer had a compensable interest in any property. His lease expired December 31, 2006. CR at 102. He vacated the premises in April of 2007. CR at 102. On June 22, 2007, after the lease had terminated and Klure had relocated his practice, Dr. Curtis entered into a *voluntary agreement* with ACHD for the sale of his property at fair market value. CR at 102.

No condemnation proceedings were ever threatened or initiated. CR at 101. No de facto condemnation occurred because negotiations pursuant to a planned government project are insufficient to establish a de facto taking where the evidence clearly shows the sale was the product of an arms-length transaction rather than ACHD's condemning authority. *See West Milton*, 517 A.2d at 212.

E. Klure Cannot Recover Business Damages Under § 7-711(2) Because His Business Can And Has Been Relocated.

Even if the Court were to find that Klure did in fact have a compensable property interest and that a taking occurred, Klure is still barred from recovering business damages. Section 7-711(2) only permits an award of business damages if the losses cannot be reasonably prevented by the relocation of the business. It is undisputed that Klure has relocated his business and thereby prevented any business losses that might have occurred as the result of ACHD's actions.

The District Court correctly held that "[b]usiness damages are not awarded if the loss can be reasonably prevented by the relocation of the business nor can they be awarded for temporary interruptions due to construction." CR at 107. The court further held that

> Klure relocated his practice because of his fear of disruption during construction which is not a compensable harm . . . Klure's concern outlined in his Affidavit was not that the project as originally proposed would damage Maple Grove Dentistry but rather the construction of the entire project would cause disruption to the business. Temporary business interruption due to construction is not compensable under I.C. § 7-711(2). There is no right to any business damages under I.C. § 7-711(2).

CR at 107.

Because Klure can and did relocate his dental practice, he cannot recover business damages under § 7-711(2). This conclusion is stated in the plain language of the statute. The conclusion is bolstered by the fact that Klure relocated not because the practice of dentistry could not continue at that location, but only because he was concerned about temporary disruption during the construction phase of the Project. Therefore, Klure is not entitled to any award of business damages under § 7-711(2).

F. Klure Cannot Recover Relocation Costs Under § 7-711(2) Because Relocation Costs Are Governed By Idaho Code § 40-2001 *et seq.* Klure Failed To Exhaust His Administrative Remedies, Failed to Seek Judicial Review, And Has Not Appealed Dismissal Of His Claim For Relocation Costs.

Klure cites *City of McCall v. Seubert*, 142 Idaho 580, 130 P.3d 1118 (2006) for the proposition that relocation costs can be recovered under § 7-711(2). Under the express language of § 7-711(2), business damages cannot be recovered if the damages can be mitigated by relocation. However, relocation costs can be recovered by statute. *See* Idaho Highway

Relocation Assistance Act, I.C. § 40-2001, *et seq.* Idaho's statute also provides for relocation benefits under the federal Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970. *See* I.C. § 40-2012; 42 U.S.C. § 4601, *et seq.*; and 49 C.F.R. Part 24.

In this case, Klure applied for and was denied relocation costs by ACHD because ACHD did not take or condemn any property and because Klure had no interest in the property to be acquired for the Project. When Klure sought to recover relocation costs in this case, the District Court found that Klure had not pursued or exhausted his administrative remedies. CR at 37. The District Court further found that Klure had not brought his claim as a request for judicial review, as mandated by statute. CR at 37-38. Accordingly, the District Court dismissed the claim. CR at 37-38. Klure has not appealed the dismissal of his claim for relocation costs, as acknowledged in his brief. App. Br. at 3, n.2.

Because Klure is barred by law from recovering business damages, and because he did not properly pursue or appeal his claim for relocation costs, Klure's claim for recovery of relocation costs should be denied on appeal.

G. Klure Is Not Entitled To Attorney Fees.

Klure argues that if the case is remanded he is entitled to recover his attorney fees under *Ada County Highway District v. Acarrequi*, 105 Idaho 873, 673 P.3d 1067 (1983). Based on *Acarrequi*, Klure contends that he is entitled to fees "if the condemnor does not reasonably make a timely offer of settlement of at least ninety percent of the ultimate jury verdict." App. Br. at 21. The Court in *Acarrequi* did not define what it meant by a "timely offer." However, it

concluded that an offer made on the courthouse steps an hour before trial is not timely. *Id.* at 878, 673 P.2d at 1072.

Subsequent Idaho Supreme Court cases have given additional direction as to what constitutes a "timely offer," most notably *State of Idaho v. Jardine*, 130 Idaho 318, 940 P.2d 1137 (1997). In *Jardine*, the Court approved the district court's refusal to consider settlement offers made within less than 90 days prior to trial. *Id.* at 322, 940 P.2d at 1141.

In this case, ACHD is clearly entitled to a judicial determination of whether a taking occurred as a matter of law and whether Klure has the legal right to recover business damages *before* being required to make a settlement offer of within 90% of what a jury might ultimately award. The question of whether a taking has occurred is "a threshold issue that must be established before an inverse condemnation action can be maintained." *KMST*, 138 Idaho at 582, 67 P.3d at 61; *Covington*, 137 Idaho at 780, 53 P.3d at 831.

Absent these legal rulings, ACHD could be forced to make a settlement offer and pay public funds when in fact it had no legal obligation to pay any amount and Klure had no legal right to recover. Such a result was never contemplated by *Acarrequi* or its progeny, and Klure's request should be denied.

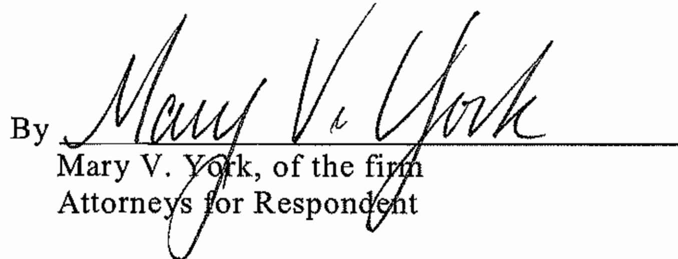
VI. CONCLUSION

Klure's appeal in this case should be denied and the decision of the District Court affirmed. Klure had no property interest at the time of the alleged taking and ACHD did not take or condemn any property. Dr. Curtis sold his property to ACHD at his own request, and after arms-length negotiations resulting in a sale at fair market value. Dr. Curtis sold the property

after Klure's lease had expired, after Klure's holdover tenancy had ended with his voluntary departure from the property, after Klure's business had been relocated, and after the partnership had dissolved. Based on the undisputed facts and the authority cited, Klure's appeal in this matter should be denied, and the decision of the District Court affirmed.

RESPECTFULLY SUBMITTED this 29th day of January, 2010.

HOLLAND & HART LLP



By ______________________
Mary V. York, of the firm
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2010, I caused to be served two true and correct copies of the foregoing by the method indicated below, and addressed to the following:

Martin Hendrickson GIVENS PURSLEY LLP 601 West Bannock Street P.O. Box 2720 Boise, ID 83701-2720 Phone: (208) 388-1200 Facsimile: (208) 388-1300	☐ ☒ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (Fax)

for HOLLAND & HART LLP

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