10-14-2011

Buckskin Properties, Inc. v. Valley County Clerk's Record v. 1 Dckt. 38830

Vol. 1 of 6

SUPREME COURT NO. 38830-2011 VOL. 1

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

LAW CLERK

COPY

BUCKSKIN PROPERTIES, INC., an Idaho Corporation; TIMBERLINE DEVELOPMENT, LLC, an Idaho Limited Liability Corporation,

PLAINTIFFS/APPELLANTS and

CROSS-RESPONDENTS

VS.

VALLEY COUNTY, A Political Subdivision of the State of Idaho

DEFENDANT/RESPONDENT and

CROSS-APPELLANT

Appealed from the District Court of the Fourth Judicial District of the State of Idaho, in and for Valley County.

Honorable Michael R. McLaughlin, District Judge, Presiding

Victor Villegas

Attorney for *Appellants/Cross-Respondents*

Matthew C. Williams, Christopher Meyer & Martin Hendrickson

Attorney for Respondent/Cross-Appellant

Filed this _____ *day of* _____ *,20* _____

FILED - COPY

OCT 14 2011

_____ *Clerk*

Supreme Court _____ Court of Appeals _____

Entered on ATS by: _____

By: _____ *Deputy*

38830

IN THE SUPREME COURT OF THE STATE OF IDAHO

BUCKSKIN PROPERTIES, INC., an Idaho Corporation; TIMBERLINE DEVELOPMENT LLC, an Idaho Limited Liability Company, Plaintiffs/Appellants, -vs- VALLEY COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, Defendant/Respondent.	Case No. CV-2009-554*C Supreme Court No. 38830-2011

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Valley.

Honorable Michael R. McLaughlin, District Judge
Presiding

ATTORNEY FOR APPELLATE
VICTOR VILLEGAS
EVANS KEANE
P. O. BOX 959
BOISE, ID 83701-0959

ATTORNEYS FOR RESPONDENT
MATTHEW C. WILLIAMS
VALLEY COUNTY PROSECUTOR
P. O. BOX 1350
CASCADE, ID 83611

CHRISTOPHER MEYER
MARTIN HENDRICKSON
GIVENS PURSLEY
P. O. BOX 2720
BOISE, ID 83701-2720

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

INDEX

INDEX

INDEX

Jed Manwaring ISB #3040
Victor Villegas ISB# 5860
EVANS KEANE LLP
1405 West Main
P. O. Box 959
Boise, Idaho 83701-0959
Telephone: (208) 384-1800
Facsimile: (208) 345-3514
e-mail: jmanwaring@evanskeane.com
Vvillegas@evanskeane.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

BUCKSKIN PROPERTIES, INC. an Idaho Corporation, and TIMBERLINE DEVELOPMENT, LLC, an Idaho Limited Liability Company,

Plaintiff,

vs.

VALLEY COUNTY, a political subdivision of the State of Idaho.

Defendant.

Case No. CV 2009-554C

COMPLAINT

Assigned Judge
Michael McLaughlin

The above named Plaintiffs, Buckskin Properties, Inc., an Idaho corporation, and Timberline Development, LLC, an Idaho limited liability company, by and through their attorneys of record Evans Keane LLP, and for causes of action against Valley County, complain and allege as follow:

NATURE OF ACTION

1. Plaintiffs seek a declaration from the Court that Valley County's requirement that Plaintiffs must enter into a contractual agreement (i.e. Capital Contribution Agreement and Road Development Agreement) as a condition to approval of their subdivision, was done solely to collect an impact fee without the authority of an impact fee ordinance, which is unlawful and in violation of State law and State and Federal Constitutions.

2. Plaintiffs also seek a declaration that Valley County cannot collect monies through the use of a contractual agreement or development agreement to collect impact fees on the remaining phases of Plaintiffs' subdivision.

3. Plaintiffs also seek reimbursement for monies taken by Valley County by virtue of requiring Plaintiffs to pay an impact fee to help fund roadway improvements that benefitted the public.

JURISDICTION AND VENUE

4. Jurisdiction and Venue before this Court is proper under the Uniform Declaratory Judgment Act, Idaho Code § 10-1201 *et seq.*

5. This matter is properly brought before the District Court pursuant to Idaho Code § 1-705. Damages due and owing to Plaintiff are in excess of $10,000.00, the Magistrate Court's jurisdictional amount under Idaho Civil Rule of Procedure 82(c)(2)(A).

THE PARTIES

6. Plaintiff Buckskin Properties, Inc. ("Buckskin") is an Idaho corporation and was the initial applicant for a residential subdivision named The Meadows at West Mountain ("The Meadows"), which is located in Valley County, Idaho.

7. Plaintiff Timberline Development LLC ("Timberline") is an Idaho limited liability company of which Buckskin is one of two members. Timberline Development, LLC is the assignee/successor in interest of the final phases for The Meadows.

8. The Defendant Valley County is a political subdivision of the State of Idaho.

FACTS

(Alleged as to all Claims)

9. On or about July 12, 2004, Buckskin was granted approval for a conditional use permit titled Conditional Use Permit For Planned Unit Development No. 04-01 ("PUD"). The conditional use permit was for the project named The Meadows at West Mountain.

10. As a condition of approval of its PUD, Buckskin was required by Defendant to enter into a written agreement with the Valley County Board of County Commissioners to mitigate traffic impacts on roadways attributable to The Meadows.

11. On or about July 26, 2004, Buckskin entered, under protest, into a Capital Contribution Agreement with the Valley County Board of Commissioners, which required Buckskin Properties to pay money for its proportionate share of the road improvement costs attributable to traffic generated The Meadows. According to the terms of the Capital Contribution Agreement, Buckskin was required to contribute money to road impact mitigation as established by Valley County at the time the final plat for each phase of The Meadows was recorded.

12. For Phase 1, the Capital Contribution Agreement required Buckskin to convey real property in lieu of paying a monetary fee. In addition, any monetary amounts in excess of the property conveyed to Valley County would be credited toward future fee payments that Buckskin would have to pay upon recording final plat for later phases.

13. For Phase 2, Buckskin was again required by Defendant to enter into a written agreement for the mitigation of traffic attributable to its project.

14. On or about September 26, 2005, Buckskin entered, under protest, into a written agreement titled Road Development Agreement. Pursuant to the terms of the Road Development Agreement, Buckskin was required to pay $232,160.00 to pay for mitigation of the project's road impact, which was due prior to recordation of the final plat for Phase 2.

15. On or about December 15, 2005, Timberline issued a check to Valley County for $232,160.00 for payment under the Road Development Agreement.

16. Timberline is currently in the process of completing final plat for the remaining phases of The Meadows. Valley County has once again sought the payment of monies for the proportionate share of road improvement costs attributable to traffic generated by the remaining phases of The Meadows.

17. Timberline has sought and obtained approval for an extension to its deadline for filing a final plat for the remaining phases of The Meadows.

FIRST CLAIM FOR RELIEF

(Declaratory Relief – Violation of State Law and State and Federal Constitutions)

18. Valley County's practice of requiring developers to enter into a Capital Contribution Agreement and Road Development Agreement solely for the purpose of forcing developers to pay money for its proportionate share of road improvement costs attributable to traffic generated by their development is a disguised impact fee and is therefore illegal.

19. Valley County has not followed the requirements of the Idaho Development Impact Fee Act, Idaho Code § 67-8201 *et seq.*, to enact an impact fee ordinance to charge road impact fees. Therefore the collection of monies from developers to pay for road improvement

costs attributable to traffic generated by their developments is illegal and amounts to an unauthorized tax.

20. The monies collected for roadway improvements by Valley County are for the benefit of the public as a whole, are a revenue raising measure and, therefore, constitute an unauthorized tax.

21. Having failed to follow the requirements of the Idaho Development Impact Fee Act, Idaho Code § 67-8201 *et seq.*, for creating an impact fee ordinance for the collection of road impact fees, Valley County cannot circumvent Idaho law by forcing developers to pay monies under the guise of a Road Development Agreement and/or Capital Contribution Agreement.

SECOND CLAIM FOR RELIEF

(Inverse Condemnation- Violation of State and Federal Constitution)

22. Valley County illegally required Buckskin to enter into a Capital Contribution Agreement and Road Development Agreement solely for the purpose of collecting an impact fee.

23. The taking of Buckskin's and Timberline's money without a validly enacted impact fee ordinance was a taking of property without just compensation and in violation of the Idaho and Federal Constitutions.

24. As a result of the taking, Timberline Development has been damaged in an amount to be determined at trial, but not less than $232,160.00.

WHEREFORE, Plaintiffs Buckskin Properties, Inc. and Timberline Development LLC pray that this Court:

A. Enter a declaratory judgment declaring that Valley County failed to enact a valid impact fee ordinance as required by the Idaho Development Impact Fee Act, Idaho Code § 67-8201 *et seq.*;

B. Enter a declaratory judgment declaring that Valley County's use of the Capital Contribution Agreement and Road Development Agreement as a condition to approval to collect monies from Plaintiffs for their proportionate share of road improvement costs attributable to traffic generated by their development is a disguised impact fee and is therefore illegal;

C. Enter a declaratory judgment declaring that Timberline Development LLC cannot be required to pay monies for a supposed proportionate share of road improvement costs attributable to traffic generated by the remaining phases of The Meadows at West Mountain.

D. Award Timberline Development LLC just compensation for a taking of its property in an amount to be proven at trial, but not less that $232,160.00;

E. Award Timberline Development LLC its costs and attorney fees incurred in this action as permitted by law; and

F. For such other and further relief as the Court may deem just and proper.

DATED this 1 day of December, 2009.

EVANS KEANE LLP

By: Victor Villegas
Victor Villegas, Of the Firm
Attorneys for Plaintiff

Jed Manwaring ISB #3040
Victor Villegas ISB# 5860
EVANS KEANE LLP
1405 West Main
P. O. Box 959
Boise, Idaho 83701-0959
Telephone: (208) 384-1800
Facsimile: (208) 345-3514
e-mail: jmanwaring@evanskeane.com
Vvillegas@evanskeane.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

BUCKSKIN PROPERTIES, INC. an Idaho Corporation, and TIMBERLINE DEVELOPMENT, LLC, an Idaho Limited Liability Company, **Plaintiff,** **vs.** **VALLEY COUNTY, a political subdivision of the State of Idaho.** **Defendant.**	**Case No.** **AFFIDAVIT OF SERVICE**

STATE OF IDAHO)
) ss.
County of Valley)

Christie L. Moore, being first duly sworn upon oath, deposes and says:

That she is a citizen of the United States of America over the age of eighteen years and a resident of the State of Idaho; that she is neither a party to the above-entitled action, nor is she in any way interested therein; that on the 1st day of December, 2009, she received a copy of the hereunto annexed Summons and Complaint and that she personally served the same on _____

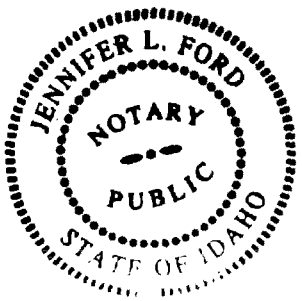
ORIGINAL

Katie Durfee, on the 1st day of December, 2009, in the County of Valley, State of Idaho, by delivering to and leaving with the said Valley County Recorders Office personally and in person, a copy of said Summons and Complaint in the above-entitled action.

Christie L. Moore

SUBSCRIBED AND SWORN to before me, a notary public, this 1st day of December, 2009.

(Seal)



NOTARY PUBLIC FOR IDAHO
Residing at Cascade, ID
My Commission Expires: 1/21/11

ORIGINAL

MATTHEW C. WILLIAMS
Valley County Prosecuting Attorney
Valley County Prosecuting Attorney's Office

P.O. Box 1350
Cascade, ID 83611
Phone (208) 382-7120
Facsimile (208) 382-7124
Idaho State Bar #6271
mwilliams@co.valley.id.us

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

BUCKSKIN PROPERTIES, INC. an Idaho Corporation, and TIMBERLINE DEVELOPMENT, LLC, an Idaho Limited Liability Company, Plaintiff vs. VALLEY COUNTY, a political subdivision of the State of Idaho. Defendant.	**CASE NO.** CV-2009-554-C **ANSWER**

COMES NOW, The above-named Defendant, by and through the Valley County Prosecuting Attorney, Matthew C. Williams, submits the following answer to the complaint filed in the above action. Valley County hereby denies any allegation not specifically admitted in the answer set forth herein.

1. Valley County denies requiring Plaintiffs enter in to a contractual agreement with Valley County. The conditions of approval from the Valley County Planning and Zoning

Commission included a condition that the Capital Contribution and Road Development Agreements be approved by the Valley County Board of County Commissioners. However, such proposed agreements were included by Buckskin in the original subdivision application. Buckskin entered in to negotiations with Valley County. Plaintiffs did not appeal any conditions of approval the Valley County Planning and Zoning Commission and willingly entered in to negotiations with the Valley County Board of County Commissioners (hereafter "Board"). Valley County's Land Use and Development Ordinance (hereafter "LUDO") specifically allows the Board to enter in to negotiations with a developer.

2. Valley County denies requiring impact fees from the Plaintiffs.

3. Valley County entered in to a contract with the Plaintiffs and relied to its detriment based on the agreement of the contract.

4. Jurisdiction and Venue appear proper.

5. The matter appears proper before the District Court.

6. Valley County admits paragraph 6.

7. Valley County believes paragraph 7 to be accurate.

8. Valley County is a political subdivision of the State of Idaho.

9. Valley County believes allegation 9 to be accurate and factual and admits such.

10. Valley County denies Buckskin was required to enter in to a written agreement with Valley County, but admits a required condition of the subdivision approval by the Valley County Planning and Zoning Commission was the Development Agreement and the Capital Contribution Agreement must be approved by the Board. The application for the subdivision as submitted by Buckskin in March 2004, includes a proposed Capital Contribution agreement in Appendix C. Appendix D submitted in the original application by Buckskin recognizes impacts

by this and other developments in the area and anticipates their portion to be a certain amount, including the possibility that there will be more impacts. This was proposed by the developer in the application for the subdivision.

11. Valley County denies anyone entered in to an agreement on behalf of Buckskin under protest. Buckskin entered in to an agreement which provided for increased access to the proposed subdivision, well above the level of access that was in place prior to the approval of the subdivision. Buckskin proposed such agreements in the application.

12. Valley County believes paragraph 12 is accurate, though the requirement in the document itself was simply the formal writing of the agreement between the parties.

13. Valley County denies paragraph 13, as Buckskin proposed both agreements in the application to the Planning and Zoning Commission. Buckskin never appealed any decision by the Board or the Valley County Planning and Zoning Commission.

14. Valley County denies anyone representing Buckskin entered in to any agreement under protest. Valley County admits under the terms of agreement Buckskin was required to make a payment prior to the recordation of the final plat for Phase 2.

15. Valley County believes paragraph 15 to be accurate and therefore admits the allegation in paragraph 15.

16. Valley County believes Timberline is currently in the process of completing final plat for the remaining phases of The Meadows. Valley County is seeking to enforce the agreement in the Capital Contribution agreement signed July 14, 2004, by Jack Charters, Buckskin's authorized representative.

17. Valley County believes paragraph 17 to be accurate and therefore admits the allegation contained in paragraph 17.

FIRST CLAIM FOR RELIEF

(Declaratory Relief-- Violation of State Law and State and Federal Constitutions)

Valley County denies any allegation not specifically admitted to in the answer to Plaintiffs' First Claim of Relief.

18. Valley County denies requiring developers to enter in to agreements. Valley County does require developers to enter in to negotiations for an agreement. Plaintiffs had the opportunity to appeal any condition and failed to do so. Buckskin willingly entered in to an agreement with Valley County for improved road access and in fact proposed such an agreement in the subdivision application.

19. Valley County has not imposed an impact fee for development. Valley County has entered in to agreements with developers who have wished to enter in to agreements. Valley County has never denied an application for refusal to enter in to an agreement.

20. Valley County denies the allegations in paragraph 20 but admits the moneys were used on the enhancement of a public access to the Plaintiffs' property. Valley County asserts that such enhancement would not have been performed absent an agreement. The improved access has added value to the Plaintiffs' property by increasing the public access to said property.

21. Valley County denies allegations in paragraph 21 and asserts that Plaintiffs have not been forced to enter in to an agreement. Plaintiffs now, after receiving the benefit of increased and much improved access to their properties designed in the agreement, want to go back and seek reimbursement for the agreement which Plaintiff Buckskin proposed in the original subdivision application.

SECOND CLAIM FOR RELIEF

(Inverse Condemnation-- Violation of State and Federal Constitution)

Valley County denies any allegation not specifically admitted to in this answer to the Plaintiffs' Second Claim for Relief.

22. Valley County denies the allegation contained in paragraph 22. Specifically, Valley County did not require Buckskin to enter in to an agreement. Buckskin voluntarily entered in to the agreement and actually proposed such agreement in the application for the subdivision. As a result of the agreement, Buckskin received an increase and improvement to the access of the development.

23. Valley County denies the allegation contained in paragraph 23. Buckskin proposed and then entered in to a valid agreement and for four to five years sat back and allowed Valley County to make improvements as contemplated in the agreement.

24. Valley County denies Plaintiffs have been damaged at all as a result of Buckskin entering in to a contract with Valley County. It is believed Buckskin received exactly what was contemplated.

AFFIRMATIVE DEFENSES

I.

FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The Plaintiff fails to state a claim upon which relief can be granted under I.R.C.P. 12(b)(6).

II.

SOVEREIGN IMMUNITY

The Plaintiff 's action is barred against a political subdivision of the State of Idaho by the

Eleventh Amendment to the United States Constitution.

III.

STATUTE OF LIMITATIONS

The Plaintiff brings this disguised tort claim suit more than four years after the alleged violations of law. The Plaintiff failed to comply with state law tort claim requirements, including the two year statute of limitations.

IV.

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

The Plaintiff failed to exhaust, or even exercise, the required administrative remedies. Of specific note, Plaintiff proposed the agreement and never appealed the requirement that the agreement get approval from the Board.

V.

UNJUST ENRICHMENT

Should the Plaintiff be allowed to recover the $232,160 paid to Valley County, Plaintiffs will be allowed to unjustly exercise the right granted to it by contract while not paying the negotiated amount Plaintiffs agreed to pay for that right, as well as the value of the work Valley County has performed following the execution of contract.

VI.

EQUITABLE DEFENSES

The Plaintiffs' course of conduct in this case under which they should be estopped; made promises; have waived; have contracted; or sat on their rights to contest the agreement Buckskin voluntarily made and is not entitled to relief from this Court on the equitable defenses of waiver, promissory estoppel, estoppel, detrimental reliance, and laches.

ATTORNEY FEES AND COSTS

Defendant is entitled to seek and award of attorney fees and cost under state law pursuant to I.C. §§ 10-1210, 12-120, 12-121, 12-117 and rule 54 on the Idaho rules of civil procedure.

PRAYER FOR RELIEF

WHEREFORE, the Defendant, Valley County, requests that the Court enter judgment as follows:

1. Dismissing Plaintiffs' Complaint;
2. Awarding the Defendant its Costs and attorney fees incurred herein; and
3. For such other and further relief as the Court deems appropriate under the circumstances of the case.

DATED this 21st day of December, 2009.

Matthew C. Williams
Valley County Prosecuting Attorney

ANNIE N. BANBURY, CLERK
BY [signature] DEPUTY
APR 19 2010

Case No._____ Inst. No._____
Filed_____ A.M. 1:04 P.M

MATTHEW C. WILLIAMS
Valley County Prosecuting Attorney
Valley County Prosecuting Attorney's Office

P.O. Box 1350
Cascade, ID 83611
Phone (208) 382-7120
Facsimile (208) 382-7124
Idaho State Bar #6271
mwilliams@co.valley.id.us

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

BUCKSKIN PROPERTIES, INC. an Idaho Corporation, and TIMBERLINE DEVELOPMENT, LLC, an Idaho Limited Liability Company, Plaintiff vs. VALLEY COUNTY, a political subdivision of the State of Idaho. Defendant.	**CASE NO.** CV-2009-554-C **AFFIDAVIT OF CYNDA HERRICK**

STATE OF IDAHO)
} ss.
County of Valley)

I, Cynda Herrick, being first duly sworn upon oath deposes and says as follows:

1. I am the Valley County Planning and Zoning administrator and have been for the entire time the Buckskin Properties, Inc., application for The Meadows at West Mountain subdivision has been processed through Valley County.

2. Valley County has a Land Use and Development Ordinance (LUDO).

3. Valley County's LUDO allows for an applicant to apply for an extension.

4. The developers have previously applied for and received two prior extensions on the fourth and subsequent phases of the Meadows at West Mountain.

5. The project is currently enjoying the second extended status which will expire on July12, 2010.

6. No application for extension beyond July 12, 2010, has been received by the Valley County Planning and Zoning Department for consideration of extension on any phase of The Meadows at West Mountain subdivision.

7. An application for extension must be filed before an extension can be granted or denied.

8. Valley County will consider any application for an extension just as it would any other application, regardless of the current lawsuit against Valley County.

9. The potential bias complained of by Mike Mailhot is unfounded and is contrary to the Valley County Planning and Zoning Commission's actions regarding the subject project. On April 8, 2010, the Valley County Planning and Zoning Commission approved a modification to the PUD of the subject project, allowing for fencing in back yards that was not previously included in the prior approved PUD permit.

10. I am unaware of Valley County denying any extension regarding a subdivision based on anything other than the merits of the application and the number of extensions previously granted on the specific phase of the project for which an extension is being requested.

11. Valley County will continue to work with the Plaintiffs in the above entitled case on issues that come before the Valley County Planning and Zoning Commission regardless

of the pending lawsuit, as long as the issue being worked on and discussed with the Planning and Zoning Commission is not the subject of the lawsuit currently pending.

Further your affiant sayeth not.

Cynda Herrick
Valley County Planning and Zoning Administrator

Subscribed and sworn before me this 15th date of April, 2010.

Notary for the State of Idaho
Residing at: Cascade ID

My Commission Expires: 1·15·16

Jed Manwaring ISB #3040
Victor Villegas ISB# 5860
EVANS KEANE LLP
1405 West Main
P. O. Box 959
Boise, Idaho 83701-0959
Telephone: (208) 384-1800
Facsimile: (208) 345-3514
e-mail: jmanwaring@evanskeane.com
Vvillegas@evanskeane.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

BUCKSKIN PROPERTIES, INC. an Idaho Corporation, and TIMBERLINE DEVELOPMENT, LLC, an Idaho Limited Liability Company, Plaintiffs, vs. VALLEY COUNTY, a political subdivision of the State of Idaho. Defendant.	Case No. CV-2009-554-C PRELIMINARY INJUNCTIVE ORDER

Plaintiffs Buckskin Properties, Inc., and Timberline Development, LLC, having moved for a preliminary injunction and the Court having considered the pleadings, memoranda, affidavits, exhibits, and oral argument of counsel, hereby grants Plaintiffs' Application for Preliminary Injunction, pursuant to Rule 65 of the Idaho Rules of Civil Procedure.

NOW THEREFORE, IT IS HEREBY ORDERED that:

1. The one year extension, issued by Valley County on July 9, 2009, to record the final plat for the remaining phases of the Meadows at West Mountain Subdivision is hereby

stayed from December 1, 2009 until final judgment on the above-referenced matter is issued by this Court.

DATED this 5 day of ~~April~~ May, 2010.

MICHAEL McLAUGHLIN,
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of ~~April~~ May, 2010, a true and correct copy of the foregoing document was served by first-class mail, postage prepaid, and addressed to: by fax transmission to; by overnight delivery to; or by personally delivering to or leaving with a person in charge of the office as indicated below:

Jed W. Manwaring
Victor Villegas
EVANS KEANE LLP
1405 W. Main Street
P.O. Box 959
Boise, ID 83701-0959
Telephone: (208) 384-1800
Facsimile: (208) 345-3514

[ ] U.S. Mail
[ ] Fax
[ ] Overnight Delivery
[X] Hand Delivery

Matthew C. Williams
VALLEY COUNTY PROSECUTOR
P.O. Box 1350
Cascade, ID 83611
Telephone: (208) 382-7120
Facsimile: (208) 382-7124

[ ] U.S. Mail
[ ] Fax
[ ] Overnight Delivery
[X] Hand Delivery

Deputy Clerk

CHRISTOPHER H MEYER
GIVENS PURSLEY, LLP
P.O. BOX 2720
BOISE, ID 83701-2720
US MAIL

Matthew C. Williams, ISB #6271
Valley County Prosecuting Attorney
P.O. Box 1350
Cascade, ID 83611
Telephone: (208) 382-7120
Facsimile: (208) 382-7124
mwilliams@co.valley.id.us

Christopher H. Meyer, ISB #4461
Martin C. Hendrickson, ISB #5876
GIVENS PURSLEY LLP
601 W. Bannock St.
P.O. Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1200
Facsimile: 208-388-1300
chrismeyer@givenspursley.com
mch@givenspursley.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

BUCKSKIN PROPERTIES, INC., an Idaho Corporation, and TIMBERLINE DEVELOPMENT, LLC, an Idaho Limited Liability Company, Plaintiffs, v. VALLEY COUNTY, a political subdivision of the State of Idaho, Defendant.	Case No. CV 2009-554 **VALLEY COUNTY'S STATEMENT OF MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Defendant, Valley County ("County"), by and through its attorneys of record, and submits this statement of all material facts that the Defendant contends are not in

dispute. This statement is offered to assist the Court in its consideration of *Valley County's Motion for Summary Judgment.*

1. This case concerns a residential subdivision in Valley County known as The Meadows at West Mountain ("The Meadows").

2. According to Plaintiffs' Complaint at paragraph 6, Plaintiff Buckskin Properties, Inc. ("Buckskin") was the initial developer of The Meadows. The Complaint further states at paragraph 7 that Plaintiff Timberline Development, LLC ("Timberline") is the assignee/successor in interest of Buckskin. The County has no independent knowledge of the corporate or ownership status of these entities, but, at this point, has no reason to dispute these facts. Buckskin and Timberline are referred to collectively as "Plaintiffs" or "Developers."

3. The Meadows is located on approximately 122 acres of private property formerly known as the Eld Ranch and is located in an unincorporated portion of the County southwest of the intersection of Roseberry Road and Norwood Road roughly 2.5 miles southwest of Donnelly, Idaho. Affidavit of Cynda Herrick, ¶ 3.

4. During the course of the development, the Developers entered into two contractual agreements with the County governing The Meadows: a Capital Contribution Agreement governing Phase 1 that was recorded on August 4, 2004 (Herrick Aff., Ex. 1) and a Road Development Agreement governing Phase 2 that was recorded on September 27, 2005 (Herrick Aff., Ex. 2). The Capital Contribution Agreement and Road Development Agreement are referred to collectively as the "Mitigation Agreements."

5. The Mitigation Agreements were preceded by two draft agreements proposed by the Developers in their applications to the County: a Preliminary Development Agreement and a Proposed Capital Contribution Agreement (Herrick Aff., Exh. 3, Appendix C to the application).

6. The Preliminary Development Agreement was a comprehensive agreement addressing a broad range of issues affecting The Meadows. The Preliminary Development Agreement was never finalized or executed. The Proposed Capital Contribution Agreement was focused on the mitigation of road costs, and it became the model for the two Mitigation Agreements.

7. The Preliminary Development Agreement, the Proposed Capital Contribution Agreement, and the Mitigation Agreements are all discussed extensively below.

8. On April 1, 2004,[1] Buckskin filed an application with the Valley County Planning and Zoning Commission ("P&Z") for a Planned Unit Development, Conditional Use Permit, and Preliminary Plat (collectively "Application") for The Meadows. Herrick Aff., Exh. 3.

9. On or about May 21, 2004, the Applicant submitted an updated version of the Application ("Updated Application") (Herrick Aff., Exh. 4). The Updated Application was filed after the recommendation for approval by the P&Z on May 17, 2004 (see paragraph 28) but before the final approval by the Board of County Commissioners on July 12, 2004 (see paragraph 34).

10. The Application and the Updated Application are referred to collectively hereinafter as the "Applications." In its records, the P&Z refers to the Applications by the number "PUD 04-01."

11. The Applications contemplated that The Meadows would consist of 221 residential lots, 12 (latter changed to 17) multi-family lots for condominiums containing 96 (later

[1] The Application is signed and dated March 29, 2004. The transmittal letter for the Application is dated March 24, 2004, but presumably should be March 29, 2004 or April 1, 2004. According to the Staff Report for the hearing on May 17, 2004, the Application was filed on April 1, 2004.

changed to 160) units, two commercial lots, and open space. The Meadows was envisioned to be built in six phases. Herrick Aff., Exhs. 3 and 4.

12. Prior to its development, The Meadows was located within a rural area served by unpaved roads not intended for urban-type residential development.[2]

13. According to the Applicant's "Impact Report" included as Appendix D to the Application (at page7), the total cost of the project was expected to be $7,149,965.[3]

14. At page 22 of the Application and page 23 of the Updated Application, under the heading "I. Development Agreement," the Applications recite a provision from LUDO and then reference a Preliminary Development Agreement, which was included as Appendix C to the Applications.

15. The Preliminary Development Agreement (as drafted and proposed by the Applicant) states at ¶ 2.11 at page 3:[4] "Also as a condition of designating the Property as a Planned Unit Development and approving its development consistent with this Development Agreement the County has required Developer to execute a separate Capital Contribution Agreement specifying the funding mechanism and processes to provide the payment of monies to certain providers of public services . . . ."

16. The Preliminary Development Agreement (as drafted and proposed by the Applicant) states at ¶ 2.15 at page 4: "The County acknowledges that Developer is relying upon the execution and continuing validity of this Development Agreement. . . ."

---

[2] "Roseberry south of Norwood is dirt, built on dirt, and unless it is totally paved will lead to an incredible amount of dust pollution to Valley County as the roads are eroded through increased traffic." Comment letter submitted to the P&Z by Betty L. Chatburn dated May 10, 2004. See also the Transportation Impact Study dated January 26, 2001 that is included as "Supplement A" to the Applications (Herrick Aff., Exhs. 3 and 4.)

[3] This is number is stated also in the Application at page 19.

[4] The versions of the Preliminary Development Agreement attached to the Application and the Updated Application appear to be identical.

17. The Preliminary Development Agreement (as drafted and proposed by the Applicant) states at ¶ 2.18 at page 4: "Development of the Property pursuant to this Development Agreement will also result in significant benefits to Developer . . . ."

18. The Preliminary Development Agreement (as drafted and proposed by the Applicant) states at ¶ 2.19 at page 4: "Developer and the County have cooperated in the preparation of this Development Agreement . . . ."

19. The Preliminary Development Agreement (as drafted and proposed by the Applicant) states at ¶ 8.8 at page 15: "In the event of the default by any party to this Development Agreement, the non-defaulting party shall be entitled to collect from the defaulting party its provable damages, including, but not limited to, its reasonable attorneys' fees and expenses. . . ."

20. The Preliminary Development Agreement (as drafted and proposed by the Applicant) states at ¶ 2.20 at page 4: "The parties desire to enter into this Development Agreement . . . ."

21. The Preliminary Development Agreement (as drafted and proposed by the Applicant) references and incorporates a Proposed Capital Contribution Agreement, which is set out as Exhibit A to the Development Agreement.

22. The Proposed Capital Contribution Agreement (as drafted and proposed by the Applicant) states a ¶ II(A) at page 1: "Developer agrees to pay a road impact fee as established by Valley County. Currently this fee has been set by the Valley County Engineer at $1,870.00 per equivalent single-family residential unit. . . ."

23. At page 22 of the Application, under the heading "J. Impact Fees," the Application recited a provision from LUDO and then stated:[5]

> The impact fees for the various improvements to The Meadows is as follows:
>
> - Road Improvements - $1870/unit
> - Sewer Service Connections - $2500/unit
> - Water Service Connections – TBD

24. The Application contains an "Impact Report" set out as Appendix D to the Application. The Impact Report (as drafted and proposed by the Applicant) states on page 1: A professional traffic study was prepared by Dobie Engineering, Inc. as part of the Tamarack Resort project. . . . The original estimated cost to complete this [sic] roadway improvements was $6,000,000.00. The development is proposing in the Development Agreement to [sic] a road impact fee as established by Valley County. Currently this fee has been set by the Valley County Engineer at $1,870.00 per equivalent single-family residential unit. . . ."

25. A public hearing on the Application was held May 17, 2004.

26. Joe Pachner, Project Manager for Toothman-Orton Engineering Company, represented the Applicant at the May 17, 2004 hearing.

27. The minutes of the May 17, 2004 hearing (at page 8) recite that Mr. Pachner stated as follows: "The traffic report completed by the Tamarack Resort has been incorporated into the design of this project. The impact of this project using this roadway is incorporated and they will pay their proportional impact fees." Herrick Aff., Exh. 6.

28. At the conclusion of the May 17, 2004 hearing, the P&Z voted three to two to recommend approval of the Application, subject to conditions set out in the Staff Report for the hearing.

---

[5] This provision is restated at page 23 of the Updated Application.

29. The Staff Report for the May 17, 2004 hearing contains the following proposed condition number 12: "The Development Agreement and Capital Contribution Agreement must receive approval from the Board of County Commissioners." Herrick Aff., Exh. 5.

30. On or about June 10, 2004, the P&Z issued its Findings and Conclusions with respect to the Application. The Findings and Conclusions contain the following condition number 12: "The Development Agreement and Capital Contribution Agreement must receive approval from the Board of County Commissioners." Herrick Aff., Exh. 7.

31. On June 28, 2004, the Board of County Commissioners held a hearing on the Updated Application. No action was taken at the hearing.

32. The Staff Report for the June 28, 2004 hearing contains the following proposed condition number 12: "The Development Agreement and Capital Contribution Agreement must receive approval from the Board of County Commissioners." Herrick Aff., Exh. 8.

33. The minutes of the June 28, 2004 hearing recite that the Applicant's representative, Joe Pachner, stated: "Have been talking to County Engineer to co-ordinate road requirements." Herrick Aff., Exh. 9. This was the Applicant's only statement with respect to obligations under its proposed Development Agreement and Capital Contribution Agreement. There was no suggestion that Buckskin had any concern or objection to the contributions they had offered by way of their Preliminary Development Agreement or Proposed Capital Contribution Agreement.

34. On July 12, 2004, the Board of County Commissioners held a second hearing on the Updated Application. At the conclusion of the hearing, the Board voted to approve the Updated Application and to enter into the Development Agreement and the Capital Contribution Agreement as corrected and amended. Herrick Aff., Exh. 10.

35. Nothing in the minutes of either the June 28, 2004 hearing or the July 12, 2004 hearing suggests that the Applicant had any concerns or objections with the respect to the contribution that the Applicant itself proposed in it Applications.

36. On July 14, 2004, the Board of County Commissioners issued a Conditional Use Permit for Planned Unit Development No. 04-01 ("CUP"). The CUP contains the following condition number 12: "The Development Agreement and Capital Contribution Agreement must receive approval from the Board of County Commissioners." Herrick Aff., Exh. 11.

37. On the same day that the CUP was issued, July 14, 2004, Jack A. Charters of Buckskin Properties, Inc. signed the Capital Contribution Agreement. The Capital Contribution Agreement was signed by the Board of County Commissioners on July 26, 2004, and it was recorded on August 4, 2004. The Capital Contribution Agreement recites that the date of the agreement is July 12, 2004. Herrick Aff., Exh. 1.

38. The Capital Contribution Agreement differed in some details from the earlier Proposed Capital Contribution Agreement contained in the Applications. Notably, the new Capital Contribution Agreement contemplated conveyance of property in lieu of payment of some of the fees. The basic concept of payment of proportionate costs associated with the development, however, was unchanged from the original proposal of the Applicant.

39. On August 26, 2004, Joe Pachner, acting on behalf of Buckskin, wrote a letter to the P&Z Administrator addressing each of the conditions in the CUP for PUD 04-01. With respect to condition number 12, he simply stated, "Please see attached approvals, dated August 16, 2004" (referring to a certified copy of the Capital Contribution Agreement). Herrick Aff., Exh. 12. A similar letter dated May 22, 2008 simply states "Noted" with respect to the same point. Herrick Aff., Exh. 13. Neither letter contains any suggestion that Buckskin had any

concern or objection to the contributions required under the CUP or any agreement with the County.

40. On September 9, 2004, the P&Z voted three to two to recommend approval of the final plat for Phase 1 of the Meadows. Herrick Aff., Exh. 14. The minutes of the hearing reflect Jack Charters was present. The minutes reflect no expression of any concern with or objection to the obligations imposed under the CUP, the Development Agreement, or the Capital Contribution Agreement.

41. On October 25, 2004, the Board of County Commissioners met and voted to approve the final plat for Phase 1 of the Meadows. Herrick Aff., Exh. 15. The minutes of the October 25, 2004 meeting specifically reflect the County's acknowledgement that the conditions of the Capital Contribution Agreement had been met with respect to Phase 1. Nothing in the minutes of the October 25, 2004 meeting reflects any expression of concern or objection by Buckskin with respect to the obligations imposed under the CUP, the Development Agreement, or the Capital Contribution Agreement.

42. On December 6, 2004, a representative of Buckskin appeared at a public meeting of the Board of County Commissioners to discuss concerns respecting certain Idaho Department of Environmental Quality requirements applicable to The Meadows. Herrick Aff., Exh. 16. Nothing in the minutes of the December 6, 2004 meeting reflects any expression of concern or objection by Buckskin with respect to the obligations imposed under the CUP, the Development Agreement, or the Capital Contribution Agreement.

43. On September 8, 2005, the P&Z met and voted to recommend approval of the final plats for Phases 2 and 3 of The Meadows. Herrick Aff., Exh. 17. Nothing in the minutes of the September 8, 2005 meeting reflects any expression of concern or objection by Buckskin with

respect to the obligations imposed under the CUP, the Development Agreement, or the Capital Contribution Agreement.

44. On September 26, 2005, the Board of County Commissioners met and voted to approve the final plats for Phases 2 and 3 of The Meadows. The minutes of the September 5, 2005 meeting reflect the Board's agreement to enter into a new Road Development Agreement with Buckskin which included payment of $232,160.00 for these phases. Herrick Aff., Exh. 18. Nothing in the minutes of the September 5, 2005 meeting reflects any expression of concern or objection by Buckskin with respect to the obligations imposed under the CUP, the Development Agreement, the Capital Contribution Agreement, or the Road Development Agreement.

45. On the same day, September 26, 2005, the Board of County Commissioners and Buckskin entered into the Road Development Agreement described in the preceding paragraph. The Road Development Agreement states: "Developer has agreed to participate in the cost of mitigating these impacts by contributing its proportionate share of the cost of the needed improvements identified in the Agreement and listed in the attached Exhibit A."

46. On December 15, 2005, Timberline Development issued a check to the County in the amount of $232,160 (reflecting a prior credit) in fulfillment of Buckskin's obligations under the Road Development Agreement. The payment was not made under protest. Herrick Aff., ¶ 23.

47. On June 3, 2009, Joe Pachner, on behalf of The Meadows, requested an extension of the deadline for final plat on phases 4-6. In his letter (Herrick Aff., Exh. 19), Mr. Pachner identified items that the developer was working on, including "Finalize the Road Development Agreement." The letter stated, "The reorganized partnership is committed to diligently work towards submitting the plans for review and completing the project." The letter contained no

indication of any objection or concern with respect to obligations under the CUP, the Development Agreement, or with respect to any Road Development Agreement.

48. On July 9, 2009, the P&Z met and granted the requested extension of the deadline for final plat on phases 4-6. The minutes of the meeting (Herrick Aff., Exh. 20) recited: "Staff explained that the applicant was requesting an extension in order to finalize the road development agreement . . . ." The minutes reflect no expression of concern by the developer with respect to obligations under the CUP, the Development Agreement, or any Road Development Agreement.

49. Plaintiffs have in their possession or have had access to each of the staff reports, letters, and minutes quoted above. On no occasion have the Plaintiffs or anyone acting on their behalf questioned the accuracy or completeness of any statement from those documents quoted in this Statement of Material Facts. Herrick Aff., ¶ 26.

50. On or about December 1, 2009, Plaintiffs filed their Complaint in this action. The Complaint states in paragraph 11 and 14 that the Capital Contribution Agreement and Road Development Agreement entered into by Buckskin and/or Timberline were entered into "under protest." The record documented above demonstrates that they were not entered into under protest.

51. The Developers did not appeal, contest, or seek judicial review of the CUP (at either the recommendation or final action stage). Herrick Aff., ¶ 27.

52. A judicial review of the CUP pursuant to the Local Land Use Planning Act ("LLUPA") would have been the appropriate and timely means of initiating an inverse condemnation action.

53. Prior to this litigation, the Developers took no other action to protest or otherwise object to the CUP, the Mitigation Agreements, or payments made pursuant to any of them. Herrick Aff., ¶ 28.

54. The County accepted the money from the Developers in good faith and relied on those payments and the terms of the Mitigation Agreements. Herrick Aff., ¶ 29.

55. At no time did the Developers advise the County that any of them might seek a refund of the money paid pursuant to the Mitigation Agreements or that the County could not safely rely on that money being available to the County for purposes of the Mitigation Agreements. Herrick Aff., ¶ 30.

56. Using money received from the Developers pursuant to the Mitigation Agreements, the County undertook capital investments for roads in the vicinity of The Meadows development. Herrick Aff., ¶ 31.

57. All such monies spent by the County were spent in accordance with and in fulfillment of obligations on the County spelled out in the Mitigation Agreements. Herrick Aff., ¶ 32.

58. But for the Mitigation Agreements and other similar voluntary development agreements, the County would not have undertaken the road improvements and expenditures described above. Herrick Aff., ¶ 33.

59. Those capital improvements are now in place. Herrick Aff., ¶ 34.

60. Those capital investments have improved transportation access to The Meadows and have thereby benefited the Developers of The Meadows and the current residents of The Meadows. Herrick Aff., ¶ 35.

61. To date, the County has not adopted an ordinance implementing the Idaho Development Impact Fee Act. Herrick Aff., ¶ 36.

62. The County has retained counsel to assist in drafting such an ordinance. Herrick Aff., ¶ 37

63. A final decision on such an ordinance would be made only in accordance with public hearings and other appropriate procedures. Herrick Aff., ¶ 38.

DATED this day of October, 2010.

MATTHEW C. WILLIAMS
Valley County Prosecuting Attorney

GIVENS PURSLEY, LLP

By:
Christopher H. Meyer

By:
Martin C. Hendrickson

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October, 2010, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

Jed Manwaring
Victor Villegas
Evans Keane LLP
1405 West Main
P.O. Box 959
Boise, ID 83701-0959
jmanwaring@evanskeane.com
vvillegas@evanskeane.com

- [x] U.S. Mail, postage prepaid
- [ ] Express Mail
- [ ] Hand Delivery
- [ ] Facsimile
- [ ] E-Mail

Mark C. Williams

~~Martin C. Hendrickson~~
Matthew C. Williams

Matthew C. Williams, ISB #6271
Valley County Prosecuting Attorney
P.O. Box 1350
Cascade, ID 83611
Telephone: (208) 382-7120
Facsimile: (208) 382-7124
mwilliams@co.valley.id.us

Christopher H. Meyer, ISB #4461
Martin C. Hendrickson, ISB #5876
GIVENS PURSLEY LLP
601 W. Bannock St.
P.O. Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1200
Facsimile: 208-388-1300
chrismeyer@givenspursley.com
mch@givenspursley.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

BUCKSKIN PROPERTIES, INC., an Idaho Corporation, and TIMBERLINE DEVELOPMENT, LLC, an Idaho Limited Liability Company, Plaintiffs, v. VALLEY COUNTY, a political subdivision of the State of Idaho, Defendant.	Case No. CV 2009-554 **VALLEY COUNTY'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Defendant, Valley County (the "County"), by and through its attorneys of record, and moves the Court for summary judgment pursuant to Idaho. R. Civ. P. 56.

This motion is accompanied by *Valley County's Opening Brief in Support of Motion for Summary Judgment*, *Valley County's Statement of Material Facts in Support of Motion for Summary Judgment*, and *Affidavit of Cynda Herrick* filed herewith.

DATED this _____ day of October, 2010.

MATTHEW C. WILLIAMS
Valley County Prosecuting Attorney

By: _____
Matthew C. Williams

GIVENS PURSLEY, LLP

By: _____
Christopher H. Meyer

By: _____
Martin C. Hendrickson

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October, 2010, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

Jed Manwaring
Victor Villegas
Evans Keane LLP
1405 West Main
P.O. Box 959
Boise, ID 83701-0959
jmanwaring@evanskeane.com
vvillegas@evanskeane.com

- [x] U.S. Mail, postage prepaid
- [ ] Express Mail
- [ ] Hand Delivery
- [ ] Facsimile
- [ ] E-Mail

Martin C. Hendrickson
Matthew C. Williams

Matthew C. Williams, ISB #6271
Valley County Prosecuting Attorney
P.O. Box 1350
Cascade, ID 83611
Telephone: (208) 382-7120
Facsimile: (208) 382-7124
mwilliams@co.valley.id.us

Christopher H. Meyer, ISB #4461
Martin C. Hendrickson, ISB #5876
GIVENS PURSLEY LLP
601 W. Bannock St.
Post Office Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1200
Facsimile: 208-388-1300
chrismeyer@givenspursley.com
mch@givenspursley.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

BUCKSKIN PROPERTIES, INC., an Idaho Corporation, and TIMBERLINE DEVELOPMENT, LLC, an Idaho Limited Liability Company, Plaintiffs, v. VALLEY COUNTY, a political subdivision of the State of Idaho, Defendant.	Case No. CV 2009-554 **VALLEY COUNTY'S OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTION

This is Defendant Valley County's ("County") opening brief in support of *Valley County's Motion for Summary Judgment* filed on this day. This brief in supported by *Valley County's Statement of Material Facts in Support of Motion for Summary Judgment*, and the *Affidavit of Cynda Herrick* filed herewith.

Plaintiffs seek the return of money paid years ago by the developers of a project pursuant to a development agreement, claiming that the money paid was an illegal tax under Idaho law and, therefore, was a *per se* taking under state and federal law.[1] Plaintiffs seek this relief despite the fact that they voluntarily executed the agreement and have received the benefit of their bargain through road improvements funded thereby and constructed by the County. The County seeks dismissal of the action for a variety of jurisdictional and procedural reasons. Plaintiffs' lawsuit also fails on the merits.

Plaintiff Buckskin Properties, Inc. ("Buckskin") was the initial developer of a residential subdivision in Valley County known as The Meadows at West Mountain ("The Meadows"). Plaintiff Timberline Development, LLC ("Timberline") is the assignee/successor in interest of Buckskin. Buckskin and Timberline are referred to collectively as "Plaintiffs" or "Developers."

The Developers contemplated that The Meadows would consist of 221 residential lots, 12 (later changed to 17) multi-family lots for condominiums containing 96 (later changed to 160)

---

[1] U.S. Const. amend. V (applicable to the states via the Fourteenth Amendment, U.S. Const. amend. XIV). In paragraph 19 of their *Second Amended Complaint*, Plaintiffs also allege the County failed to comply with state law and thereby violated due process. Although the *Second Amended Complaint* is not clear on this point, it appears that Plaintiffs have in mind procedural due process. In any event, their due process claim is indistinguishable from their taking claim, both of which are premised solely on the same alleged state law violation. Plaintiffs also seek declaratory and injunctive relief to the same effect.

units, two commercial lots, and open space. The Meadows was envisioned to be built in six phases.[2]

All land within the County's jurisdiction is zoned multiple use, pursuant to the County's Land Use Development Ordinance ("LUDO"). Within this single district, various uses are listed as "allowed" while others are listed as "conditional" necessitating a conditional use permit ("CUP"). On or about April 1, 2004, Buckskin filed an application with the Valley County Planning and Zoning Commission ("P&Z") for a Planned Unit Development, Conditional Use Permit, and Preliminary Plat (collectively "Application") for The Meadows.

On or about May 21, 2004, the Applicant submitted an updated version of the Application ("Updated Application"). The Updated Application was filed after the recommendation for approval by the P&Z on May 17, 2004 but before the final approval by the Board of County Commissioners on July 12, 2004. The Application and the Updated Application are referred to collectively hereinafter as the "Applications." The P&Z refers to the Applications by the number "PUD 04-01."

The proposed development was located within a rural area served by unpaved roads not intended for urban-type residential development. The County could have denied the Applications outright on the basis of inadequate transportation infrastructure. Idaho Code § 67-6512(a). Alternatively, P&Z could have approved the Applications with the expectation that roads serving The Meadows eventually would be improved as funds became available to the County. The County developed a capital improvement program to give developers in fast-

[2] The undisputed facts upon which *Valley County's Motion for Summary Judgment* is based are set forth in detail in *Valley County's Statement of Material Facts in Support of Motion for Summary Judgment*, which is filed contemporaneously herewith.

growing, rural portions of the County the option of contributing their fair share to fund accelerated construction of road improvements serving their developments.

At page 22 of the Application and page 23 of the Updated Application, under the heading "I. Development Agreement," the Applications recite a provision from LUDO and then reference a Preliminary Development Agreement, which was included as Appendix C to the Applications.

The Preliminary Development Agreement (as drafted and proposed by the Applicant) states at ¶ 2.11 at page 3: "Also as a condition of designating the Property as a Planned Unit Development and approving its development consistent with this Development Agreement the County has required Developer to execute a separate Capital Contribution Agreement specifying the funding mechanism and processes to provide the payment of monies to certain providers of public services . . . ."

The Preliminary Development Agreement (as drafted and proposed by the Applicant) states at ¶ 2.15 at page 4: "The County acknowledges that Developer is relying upon the execution and continuing validity of this Development Agreement. . . ."

The Preliminary Development Agreement (as drafted and proposed by the Applicant) states at ¶ 2.18 at page 4: "Development of the Property pursuant to this Development Agreement will also result in significant benefits to Developer . . . ."

The Preliminary Development Agreement (as drafted and proposed by the Applicant) states at ¶ 2.19 at page 4: "Developer and the County have cooperated in the preparation of this Development Agreement . . . ."

The Preliminary Development Agreement (as drafted and proposed by the Applicant) states at ¶ 8.8 at page 15: "In the event of the default by any party to this Development

Agreement, the non-defaulting party shall be entitled to collect from the defaulting party its provable damages, including, but not limited to, its reasonable attorneys' fees and expenses. . . ."

The Preliminary Development Agreement (as drafted and proposed by the Applicant) states at ¶ 2.20 at page 4: "The parties desire to enter into this Development Agreement . . . ."

The Preliminary Development Agreement (as drafted and proposed by the Applicant) references and incorporates a Proposed Capital Contribution Agreement, which is set out as Exhibit A to the Development Agreement.

The Proposed Capital Contribution Agreement (as drafted and proposed by the Applicant) states a ¶ II(A) at page 1: "Developer agrees to pay a road impact fee as established by Valley County. Currently this fee has been set by the Valley County Engineer at $1,870.00 per equivalent single-family residential unit. . . ."

At page 22 of the Application, under the heading "J. Impact Fees," the Application recited a provision from LUDO and then stated:[3]

> The impact fees for the various improvements to The Meadows is as follows:
>
> - Road Improvements - $1870/unit
> - Sewer Service Connections - $2500/unit
> - Water Service Connections – TBD

The Application contains an "Impact Report" set out as Appendix D to the Application. The Impact Report (as drafted and proposed by the Applicant) states on page 1:

A professional traffic study was prepared by Dobie Engineering, Inc. as part of the Tamarack Resort project. . . . The original estimated cost to complete this [sic] roadway improvements was $6,000,000.00. The development is proposing in the Development Agreement to [sic] a road

[3] This provision is restated at page 23 of the Updated Application.

impact fee as established by Valley County. Currently this fee has been set by the Valley County Engineer at $1,870.00 per equivalent single-family residential unit. . . ."

A public hearing on the Application was held May 17, 2004. Joe Pachner, Project Manager for Toothman-Orton Engineering Company, represented the Applicant at the May 17, 2004 hearing. The minutes of the May 17, 2004 hearing (at page 8) recite that Mr. Pachner stated as follows: "The traffic report completed by the Tamarack Resort has been incorporated into the design of this project. The impact of this project using this roadway is incorporated and they will pay their proportional impact fees." At the conclusion of the May 17, 2004 hearing, the P&Z voted three to two to recommend approval of the Application, subject to conditions set out in the Staff Report for the hearing.

The Staff Report for the May 17, 2004 hearing contains the following proposed condition number 12: "The Development Agreement and Capital Contribution Agreement must receive approval from the Board of County Commissioners." On or about June 10, 2004, the P&Z issued its Findings and Conclusions with respect to the Application. The Findings and Conclusions contain the following condition number 12: "The Development Agreement and Capital Contribution Agreement must receive approval from the Board of County Commissioners."

On June 28, 2004, the Board of County Commissioners held a hearing on the Updated Application. The Staff Report for the June 28, 2004 hearing contains the following proposed condition number 12: "The Development Agreement and Capital Contribution Agreement must receive approval from the Board of County Commissioners." The minutes of the June 28, 2004 hearing recite that the Applicant's representative, Joe Pachner, stated: "Have been talking to County Engineer to co-ordinate road requirements." This was the Applicants only statement

with respect to obligations under its proposed Development Agreement and Capital Contribution Agreement. There was no suggestion that Buckskin had any concern or objection to the contributions they had offered by way of their Preliminary Development Agreement or Proposed Capital Contribution Agreement.

On July 12, 2004, the Board of County Commissioners held a second hearing on the Updated Application. At the conclusion of the hearing, the Board voted to approve the Updated Application and to enter into the Development Agreement and the Capital Contribution Agreement as corrected and amended.

Nothing in the minutes of either the June 28, 2004 hearing or the July 12, 2004 hearing suggests that the Applicant had any concerns or objections with the respect to the contribution that the Applicant itself proposed in it Applications.

On July 14, 2004, the Board of County Commissioners issued a Conditional Use Permit for Planned Unit Development No. 04-01 ("CUP"). The CUP contains the following condition number 12: "The Development Agreement and Capital Contribution Agreement must receive approval from the Board of County Commissioners."

On the same day that the CUP was issued, July 14, 2004, Jack A. Charters of Buckskin Properties, Inc. signed the Capital Contribution Agreement. The Capital Contribution Agreement was signed by the Board of County Commissioners on July 26, 2004, and it was recorded on August 4, 2004. The Capital Contribution Agreement recites that the date of the agreement is July 12, 2004.

The Capital Contribution Agreement differed in some details from the earlier Proposed Capital Contribution Agreement contained in the Applications. Notably, the new Capital Contribution Agreement contemplated conveyance of property in lieu of payment of some of the

fees. The basic concept of payment of proportionate costs associated with the development, however, was unchanged from the original proposal of the Applicant.

On August 26, 2004, Joe Pachner, acting on behalf of Buckskin, wrote a letter to the P&Z Administrator addressing each of the conditions in the CUP for PUD 04-01. With respect to condition number 12, he simply stated, "Please see attached approvals, dated August 16, 2004" (referring to the date of that the Board signed the Capital Contribution Agreement). A similar letter dated May 22, 2008 simply states "Noted" with respect to the same point. Neither letter contains any suggestion that Buckskin had any concern or objection to the contributions required under the CUP or any agreement with the County.

On September 9, 2004, the P&Z voted three to two to recommend approval of the final plat for Phase 1 of the Meadows. The minutes of the hearing reflect Jack Charters was present. The minutes reflect no expression of any concern with or objection to the obligations imposed under the CUP, the Development Agreement, or the Capital Contribution Agreement.

On October 25, 2004, the Board of County Commissioners met and voted to approve the final plat for Phase 1 of the Meadows. The minutes of the October 25, 2004 meeting specifically reflect the County's acknowledgement that the conditions of the Capital Contribution Agreement had been met with respect to Phase 1. Nothing in the minutes of the October 25, 2004 meeting reflects any expression of concern or objection by Buckskin with respect to the obligations imposed under the CUP, the Development Agreement, or the Capital Contribution Agreement.

On December 6, 2004, a representative of Buckskin appeared at a public meeting of the Board of County Commissioners to discuss concerns respecting certain Idaho Department of Environmental Quality requirements applicable to The Meadows. Nothing in the minutes of the December 6, 2004 meeting reflects any expression of concern or objection by Buckskin with

respect to the obligations imposed under the CUP, the Development Agreement, or the Capital Contribution Agreement.

On September 5, 2005, the P&Z met and voted to recommend approval of the final plats for Phases 2 and 3 of The Meadows. Nothing in the minutes of the September 5, 2005 meeting reflects any expression of concern or objection by Buckskin with respect to the obligations imposed under the CUP, the Development Agreement, or the Capital Contribution Agreement.

On September 26, 2005, the Board of County Commissioners met and voted to approve the final plats for Phases 2 and 3 of The Meadows. The minutes of the September 5, 2005 meeting reflect the Board's agreement to enter into a new Road Development Agreement with Buckskin which included a payment of $232,160.00 for these phases. Nothing in the minutes of the September 5, 2005 meeting reflects any expression of concern or objection by Buckskin with respect to the obligations imposed under the CUP, the Development Agreement, the Capital Contribution Agreement, or the Road Development Agreement.

On the same day, September 26, 2005, the Board of County Commissioners and Buckskin entered into the Road Development Agreement described in the preceding paragraph. The Road Development Agreement states: "Developer has agreed to participate in the cost of mitigating these impacts by contributing its proportionate share of the cost of the needed improvements identified in the Agreement and listed in the attached Exhibit A."

On December 15, 2005, Timberline Development issued a check to the County in the amount of $232,160 (reflecting a prior credit) in fulfillment of Buckskin's obligations under the Road Development Agreement. The payment was not made under protest.

On June 3, 2009, Joe Pachner, on behalf of The Meadows, requested an extension of the deadline for final plat on phases 4-6. In his letter, Mr. Pachner identified items that the

developer was working on, including "Finalize the Road Development Agreement." The letter stated, "The reorganized partnership is committed to diligently work towards submitting the plans for review and completing the project." The letter contained no indication of any objection or concern with respect to obligations under the CUP, the Development Agreement, or with respect to any Road Development Agreement.

On July 9, 2009, the P&Z met and granted the requested extension of the deadline for final plat on phases 4-6. The minutes of the meeting recited: "Staff explained that the applicant was requesting an extension in order to finalize the road development agreement . . . ." The minutes reflect no expression of concern by the Developers with respect to obligations under the CUP, the Development Agreement, or any Road Development Agreement.

Plaintiffs have in their possession or have had access to each of the staff reports, letters, and minutes quoted above. On no occasion have the Plaintiffs or anyone acting on their behalf questioned the accuracy or completeness of any statement from any of those documents.

On or about December 1, 2009, Plaintiffs filed their Complaint in this action. The Complaint states in paragraph 11 and 14 that the Capital Contribution Agreement and Road Development Agreement entered into by Buckskin and/or Timberline were entered into "under protest." The record documented above demonstrates that they were not entered into under protest.

The Developers did not appeal, contest, or seek judicial review of the CUP (at either the recommendation or final action stage). A judicial review of the CUP pursuant to the Local Land Use Planning Act ("LLUPA") would have been the appropriate and timely means of initiating an inverse condemnation action. Prior to this litigation, the Developers took no other action to

protest or otherwise object to the CUP, the Mitigation Agreements, or payments made pursuant to any of them.

The County accepted the money from the Developers in good faith and relied on those payments and the terms of the Mitigation Agreements. At no time did the Developers advise the County that any of them might seek a refund of the money paid pursuant to the Mitigation Agreements or that the County could not safely rely on that money being available to the County for purposes of the Mitigation Agreements. Using money received from the Developers pursuant to the Mitigation Agreements, the County undertook capital investments for roads in the vicinity of The Meadows development. All such monies spent by the County were spent in accordance with and in fulfillment of obligations on the County spelled out in the Mitigation Agreements. But for the Mitigation Agreements and other similar voluntary development agreements, the County would not have undertaken the road improvements and expenditures described above.

Those capital improvements are now in place. Those capital investments have improved transportation access to The Meadows and have thereby benefited the Developers of The Meadows and the current residents of The Meadows.

Having paid the money per their own Agreement, and having received the benefit of their bargain, the Developers now want their money back. They brought this lawsuit claiming that the County could not accept money under the Agreement because such money would be an illegal tax under Idaho law. This, they allege in turn, results in a *per se* taking under Idaho and federal law. Plaintiffs failed to plead this as a § 1983 action.[4] The County, however, has treated it as a § 1983 action, because that is the only cause of action available to Plaintiffs.

---

[4] Section 1983 refers to the Civil Rights Act of 1871, also known as the Ku Klux Klan Act, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983). It provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Plaintiffs' claim fails on the merits. Whatever money the Developers have paid or will pay under the Agreement is paid voluntarily. Therefore, as a matter of Idaho law, it is not an actionable taking. Moreover, the Developers should have raised their objection at the time. It is too late to raise the issue now. In any event, for a variety of reasons discussed below, the Court lacks jurisdiction over this case.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO PLEAD A RIGHT OF ACTION FOR THE ALLEGED FEDERAL CONSTITUTIONAL VIOLATIONS.

Plaintiffs have identified no private right of action for their federal constitutional claims against the County.

Where the Congress has created an explicit cause of action for federal constitutional deprivation, that remedy is exclusive and a so-called "*Bivens*"[5] action is not available. The Ninth Circuit has so held:

> Plaintiff has no cause of action directly under the United States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983. Section 1983 was available to Azul, but plaintiff failed to file its complaint within the applicable limitations period.

Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

[5] An implied cause of action was necessary in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971), because that case involved a constitutional violation by federal agents making § 1983 unavailable.

Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704, 705 (9th Cir. 1992), *cert. denied*, 506 U.S. 1081 (1993). If Plaintiffs have any cause of action for their federal claims, it must be under § 1983.

Plaintiffs' failure to plead a cause of action is a sufficient basis to dismiss their federal claims. In the event the Court overlooks this pleading failure or allows the Plaintiffs to amend their complaint, this brief assumes that Plaintiffs' case is premised on § 1983.

As will be shown below, Plaintiffs' § 1983 action is unavailing.

II. THIS LAWSUIT IS BARRED BY STATUTE OF LIMITATIONS.

Plaintiffs' claims are barred by their failure to bring their action within two years as required by Idaho's statute of limitations for personal injury torts, Idaho Code § 5-219(4). This lawsuit was filed on December 1, 2009. All of the actions described in the Complaints occurred more than two years before that.

It is, admittedly, counter-intuitive that Idaho's statute of limitations for personal torts would apply. But the law is well settled. All § 1983 actions, regardless of their nature, are subject to the state statute of limitations for personal injury (torts). *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985); *Owens v. Okure*, 488 U.S. 235, 249-50 (1985); *Wallace v. Kato*, 549 U.S. 384, 387 (2007).

> Finally, in 1985 the Supreme Court seized the opportunity to put an end to the "uncertainty and time-consuming litigation that is foreign to the central purposes of section 1983." In *Wilson v. Garcia*, the Court, affirming a decision of the Court of Appeals for the Tenth Circuit, decided that henceforth all section 1983 claims are to be characterized as personal injury actions for statute of limitations purposes, regardless of the underlying cause of action.

Robert M. Jarvis, *The Continuing Problem of Statutes of Limitations in Section 1983 Cases: Is the Answer Out at Sea?*, 22 J. Marshall L. Rev. 285, 287 (1988).

Wilson held that this one-size-fits-all approach applies even where the State's highest court has ruled that some other statute of limitations should apply to the particular type of § 1983 action.

Idaho courts have followed *Wilson*, applying Idaho's two-year statute of limitations (Idaho Code § 5-219(4)), regardless of the nature of the § 1983 action. *McCabe v. Craven*, 145 Idaho 954, 957, 188 P.3d 896, 899 (2008); *Osborn v. Salinas*, 131 Idaho 456, 458, 958 P.2d 1142, 1144 (1998); *Idaho State Bar v. Tway*, 128 Idaho 794, 798, 919 P.2d 323, 327 (1996); *Mason v. Tucker and Assoc.*, 125 Idaho 429, 436, 871 P.2d 846, 853 (1994); *Herrera v. Conner*, 111 Idaho 1012, 1016, 729 P.2d 1075, 1079 (Idaho Ct. App. 1987); *Henderson v. State*, 110 Idaho 308, 310-11, 715 P.2d 978, 980-81 (1986).[6] The Ninth Circuit also has followed this rule with respect to inverse condemnation actions under § 1983. *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003).

Plaintiffs may contend that this is not a § 1983 case. Indeed, as previously noted, they have not pled it as a § 1983 case. That is their error. If it is not a § 1983 case, the federal law claims must be thrown out because, as discussed above, there is no other cause of action available to them. If the Court forgives their pleading error, then the case must be thrown out under the statute of limitations.

As for the state constitutional claims, other statutes of limitations may apply. (These would also apply to both state and federal claims should the Court determine, for some reason, that the rule in *Wilson* is not applicable here.) To the extent the Developers' Complaint (or any

[6] On only one occasion has the Idaho Supreme Court has strayed from this clear line of precedent. In 2006, the Idaho Supreme Court applied the four-year "residual" statute of limitations in an inverse condemnation case raised by way of § 1983. *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 846-47, 136 P.3d 310, 317-18 (2006). This decision cannot be reconciled with prior precedent, which was not discussed, much less overruled, in the *Simpson* case. Most likely, the *Wilson* rule was not briefed.

further amendment thereof) sounds in tort, it is barred by the Developers' failure to meet procedural requirements and deadlines established in Idaho's Tort Claim Act, Idaho Code §§ 6-906 and 6-911. This, too, is a two-year rule.

Plaintiffs' inverse condemnation under the Idaho Constitution are subject to Idaho's residual four-year statute of limitations. Idaho Code § 5-224; *Wadsworth v. Idaho Department of Transportation*, 128 Idaho 439, 442, 915 P.2d 1, 4 (1996). Plaintiffs have blown that statute too. It first proposed the mitigation fees in its own application filed on April 1, 2004, over six years ago. The P&Z recommended approval of a CUP including those mitigation provisions on May 17, 2004. The CUP was finally approved on July 12, 2004 and was issued on July 14, 2004. The Capital Contribution Agreement was signed by Buckskin on July 26, 2004. The Road Development Agreement was executed on September 26, 2005. Each of these occurred more than four years before the suit was filed on December 1, 2009. The fact that some actions occurred in less than four years (such as the issuance of a check for phase 2 of the development), does not cure the violation of the four-year statute of limitations. The actions of the County giving rise to this lawsuit all occurred earlier.

In addition, the *Complaint* violates the three-year statute of limitations set out in Idaho Code § 5-218(3) for a taking of personal property. The money paid to the County by Developers pursuant to the Road Development Agreement is personal property. (In contrast, payment made pursuant to the earlier Capital Contribution Agreement was a donation of real property and would not be subject to this statute of limitations.)

The *Complaint* also violates the six-month statute of limitations set out in Idaho Code § 5-221 for claims rejected by a board of county commissioners. Exhaustion and ripeness principles discussed below require Developers to have sought relief from the County before

bringing this lawsuit. Had they done so in a timely fashion, this would have occurred well over six months ago. Developers should not be able to avoid this statute of limitations by failing to take mandatory procedural actions.

III. THIS LAWSUIT DOES NOT SATISFY THE TWO RIPENESS REQUIREMENTS OF *WILLIAMSON COUNTY*.

A. Overview

In *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Supreme Court established two tests for plaintiffs alleging an uncompensated taking in federal court.[7] First, the claim must be ripe in the sense that the would-be plaintiff has availed itself of all opportunities to obtain relief at the administrative level. Second, before seeking federal court jurisdiction, the plaintiff must utilize state judicial procedures for inverse condemnation and be denied such compensation. The Plaintiffs fail both tests.

In *Williamson County*, a developer sought zoning approval for a residential subdivision. The developer obtained preliminary plat approval. Before the final plat was submitted, however, the County amended and toughened the zoning ordinance resulting in a substantial reduction in the number of lots allowed. The County then disapproved the final plat based on noncompliance with the revised ordinance.

Plaintiff brought a § 1983 action in federal court alleging, among other things, a taking of its property. The focus of the argument at trial and on appeal was on whether temporary takings

[7] *Williamson County* has been recognized and followed by the Idaho Supreme Court, as well. *KMST, LLC v. County of Ada*, 138 Idaho 577, 581-82, 67 P.3d 56, 60-61 (2003); *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 845-46, 136 P.3d 310, 316-17 (2006).

are compensable.[8] The U.S. Supreme Court, however, changed course and threw the case out on two procedural grounds. Both were described as ripeness tests. This is not ripeness in the ordinary sense, however. This is a special variety of ripeness applicable only to federal takings claims. As noted in footnote 7, however, this law is equally applicable to federal constitutional claims raised in state court.

B. Test 1: The "final decision" requirement

First, the *Williamson County* Court held that in order to be ripe for judicial review, the decision appealed from must have been a "final decision":

> As this Court has made clear in several recent decisions, a claim that the application of governmental regulations effects a taking of property is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding application of the regulations to the property at issue."

Williamson County at 186. Although the local planning commission had squarely and repeatedly rejected the preliminary plat, that was not final enough, said the Court, because the developer had failed to seek a variance.

> As in *Hodel*, *Agins*, and *Penn Central*, then, respondent has not yet obtained a final decision regarding how it will be allowed to develop its property. Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. . . . Those factors [which determine whether there has been a taking] simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will

[8] The trial court rejected the jury's award of $350,000 for a temporary taking, but issued an injunction ordering the Commission to apply the 1973 ordinance. The Commission did not appeal the ruling that it must apply the 1973 ordinance. Instead, the plaintiff appealed the judgment notwithstanding the verdict as to the temporary taking. On appeal, the Sixth Circuit reinstated the award for a temporary taking. On certiorari to the U.S. Supreme Court, the Commission contended that even if it should have applied the 1973 ordinance, its failure to do so constituted at most a temporary regulatory interference that, even if it is a taking, does not give rise to a claim for money damages. The Supreme Court did not reach the Commission's argument, instead finding that the plaintiff's claim was not ripe.

apply the regulations at issue to the particular land in question.

Williamson County at 190-91 (citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)). The message of these four Supreme Court cases is that developers must take full advantage of opportunities for securing relief from the local governing body. Until that happens, the finality requirement is not met and the case is not ripe.

While *Williamson County* dealt with the failure to seek a variance, the holding is equally applicable to Plaintiffs' failure to oppose the recommendation made by the P&Z.[9] The "factors" at issue in *Williamson County* were the traditional federal regulatory takings tests, *e.g.*, "the effect [of the decision] on the value of respondent's property and investment-backed profit expectations." *Williamson County* at 200. The factors at issue here are state law considerations involving, notably, whether the payment is voluntary. In either case, the federal court is not in a position to evaluate the factors when the plaintiff has not even bothered to ask the local government for relief. In other words, Plaintiffs must raise and press their objections with the local government in a timely and meaningful way in order to set up their claim that the exaction is involuntary. The Developers here did just the opposite. Not only did the Developers fail to oppose the mitigation requirements included by the P&Z, they actually proposed these

[9] In discussing the difference between ripeness and exhaustion, the Court noted: "Similarly, respondent would not be required to appeal the Commission's rejection of the preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decisionmaking." *Williamson County* at 193. This example, however, is limited to Tennessee's peculiar appeal mechanism in which the Board sits in the nature of an appellate body. In Idaho, where cities and counties have the authority to not only reverse the planning and zoning commission but to modify that decision, such an appeal presumably would be necessary in order to satisfy *Williamson County*'s "final decision" requirement.

conditions in their own Applications. Accordingly, there is no "final decision" in the sense of *Williamson County*.

C. Test 2: The requirement to employ state inverse condemnation procedures.

The second holding in the case, also framed in terms of ripeness, is even more restrictive. As a practical matter, it bars federal court litigation involving regulatory takings claims aimed at state or local governments (at least in jurisdictions, like Idaho, that allow inverse condemnation actions). The *Williamson County* Court held that when a regulatory taking is alleged against a state or local government agency, the property owner must first "seek compensation through the procedures the State has provided for doing so" before litigating in federal court. *Williamson County* at 194.

> Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Williamson County at 195 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-20 (1984)).

In other words, where state courts will entertain inverse compensation actions, the landowner must avail itself of that remedy (and be denied) before initiating federal litigation. This is necessary, the Court explained, because the Just Compensation Clause does not prohibit takings. It simply prohibits takings without just compensation. Thus, it is necessary to turn first to the state to see if compensation will be granted. *Williamson County* at 194-95.

In Idaho, an allegation of inverse condemnation based on a denial or restrictive approval of a land use application may be pursued by seeking judicial review of the decision or, in some

circumstances, by way of complaint.[10] Under *Williamson County*, this is a prerequisite to a federal claim alleging a taking. Having failed to employ this procedure, Developers are barred from pursuing the matter by way of a takings claim under the Constitution.

D. The same rules apply to due process claims.

Reframing the question as a due process violation does not change the outcome. In *Williamson County*, the Commission urged that the developer's takings claim should be analyzed instead as a due process claim. (The Commission hoped that by reframing it as a due process question, it would not give rise to damages for the temporary taking.) The Court said it does not matter whether you call it a taking or a due process violation; these specialized ripeness tests are a requirement in any event. "In sum, respondent [developer]'s claim is premature, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment." *Williamson County* at 200; 13B Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1238 (3rd ed. 2004).

E. Exceptions are inapplicable

Subsequent federal cases have carved out a few exceptions to the strict ripeness rules set out in *Williamson County* (*e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 618-26 (2001) (futility exception); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 730 (1997) (exception for

[10] Idaho first recognized a cause of action for inverse condemnation in *Boise Valley Const. Co. v. Kroeger*, 17 Idaho 384, 105 P. 1070 (1909). It continues to recognize the action. "A property owner who believes that his or her property, or some interest therein, has been invaded or appropriated to the extent of a taking, but without due process of law and the payment of compensation, may bring an action for inverse condemnation." *KMST, LLC v. County of Ada*, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003). To support a claim for inverse condemnation, "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).

artificially created finality requirements)).[11] None are applicable here.[12] Accordingly, the black letter rule in *Williamson County* applies, and Developers have not met it.

IV. THE DEVELOPERS' CLAIMS ALSO FAIL TWO TESTS ESTABLISHED UNDER *KMST* AND *WHITE*.

A. Overview

If the Developers' constitutional claims survive the hurdles described above, they nonetheless fail as a matter of state procedural and substantive law.

Developers' lawsuit follows on the heels of three recent "illegal tax" cases which struck down impact fees imposed by local governments.[13] Plaintiffs' suit is a copycat. But it is a flawed copycat. Plaintiffs fail to recognize that their situation is fundamentally different in two ways. First, they failed to exhaust. The Developers paid the money without objection and without administrative or judicial appeal, accepted the benefits of roads constructed on their behalf, and then, years later, brought a lawsuit. Second, their payment was voluntary. In the case at bar, fees were not imposed by the governing body pursuant to ordinance (as they were in *Sun Valley*, *McCall*, and *Blaine County*). Instead, they were proposed by the Developers and

[11] These exceptions have been recognized in Idaho as well. *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 845-46, 136 P.3d 310, 316-17 (2006).

[12] The first of the *Williamson County* ripeness requirements (final decision) does not apply to physical takings, while the second one (utilization of inverse condemnation) does. Plaintiffs contend at page 7 of *Plaintiffs' Reply to County's Response to Application for Preliminary Injunction* (Document 25) that the County's action constitutes a physical taking. As the County explained at pages 3-5 of *County's Surreply to Application for Preliminary Injunction* (Document 30), Plaintiffs' allegation is of a regulatory taking. There is no foundation for even an allegation of a physical taking.

[13] *Cove Springs Development, Inc. v. Blaine County*, Case No. CV2008-22 (Idaho, Fifth Judicial Dist., June 3, 2008) (declaring unlawful and unconstitutional various exaction and comprehensive plan ordinance provisions); *Schaefer v. City of Sun Valley*, Case No. CV-06-882 (Idaho, Fifth Judicial Dist. July 3, 2007) (declaring unconstitutional Sun Valley's impact fee for affordable housing); *Mountain Central Bd. of Realtors, Inc. v. City of McCall*, Case No. CV 2006-490-C (Idaho, Fourth Judicial Dist., Feb. 19, 2008) (invalidated two ordinances imposing impact fees for affordable housing).

reflected in written agreements entered into in good faith by the parties. In other words, they were contract payments, not impact fees.

Both of these flaws were present also in *KMST, LLC v. County of Ada*, 138 Idaho 577, 583, 67 P.3d 56, 62 (2003), a case that is controlling here. In *KMST*, a developer brought two claims against the Ada County Highway District ("ACHD"), one in connection with ACHD's road dedication requirement and another in connection with ACHD's impact fees. (Despite the case name, the claims against Ada County were not pursued on appeal.) The Idaho Supreme Court dismissed both ACHD claims on technical grounds—*Williamson County* ripeness (as to the dedication) and exhaustion (as to the impact fees). We have already addressed *Williamson County*. The exhaustion requirement, however, is an additional state law requirement. The *KMST* Court went on to opine as to the merits of the takings claim on the road dedication saying that this was not a taking because it was voluntarily offered. In essence, it was a not a "taking" but a "giving" (our words, not the Court's). This holding, too, is on point and is a fatal flaw going to the merits of Plaintiffs' claim.

B. The Developers failed to exhaust

In *KMST*, the plaintiff failed to exhaust because it paid the fees rather than appealing them.

> [KMST] simply paid the impact fees in the amount initially calculated. Having done so, it cannot now claim that the amount of the impact fees constituted an unconstitutional taking of its property.
>
> As a general rule, a party must exhaust administrative remedies before resorting to court to challenge the validity of administrative acts. . . . KMST had the opportunity to challenge the calculation of the impact fees administratively, and it chose not to do so.

KMST, 137 Idaho at 583, 67 P.3d at 62.[14]

The Developers are in the same position. They could have withdrawn the offer they made in their own Applications to provide mitigation. They could have raised their concerns in any of the hearings before the P&Z. Likewise, they could have objected to the P&Z's recommendation when the matter was taken up by the Board of County Commissioners. They did none of these. Accordingly, they have failed to exhaust, as required by *KMST*.

KMST recognizes limited exceptions to the exhaustion requirement, notably "when the agency acted outside its authority." *KMST*, 138 Idaho at 582, 67 P.3d at 61. Those exceptions were not applicable in *KMST*, nor are they applicable here.[15] And for good reason. The policy

---

[14] ACHD's impact fees were imposed pursuant to the Idaho Development Impact Fee Act ("IDIFA"), Idaho Code §§ 67-8201 to 67-8216. Valley County has not yet adopted an IDIFA-compliant impact fee ordinance (although it is in the process of doing so). But *KMST* remains on point. The exhaustion requirement is not a function of IDIFA. It is based on general principles of administrative law. "As a general rule, a party must exhaust administrative remedies before resorting to the courts to challenge the validity of administrative acts. *KMST*, 137 Idaho at 583, 67 P.3d at 62.

[15] A review of the cases shows that this exception applies only to facial challenges to ordinances and statutes. The clearest statement that exhaustion is required in as applied constitutional challenges is found in *White v. Bannock County Comm'rs*, 139 Idaho 396, 80 P.3d 332 (2003). In *White*, the Court rejected an end run around the judicial review requirements in the Local Land Use Planning Act by a neighbor challenging zoning approval for an asphalt plant. Rather than pursuing an administrative appeal, Mr. White filed suit raising various "as applied" due process challenges to the zoning approval. The County sought dismissal for failure to exhaust. The Court recognized that there are exceptions to the exhaustion requirement but said they did not apply. "We also conclude that the recognized exceptions to the exhaustion doctrine do not apply to the present case where the question of a conditional use permit 'is one within the zoning authority's specialization and when the administrative remedy is as likely as the judicial remedy to provide the wanted relief.'" *White*, 139 Idaho at 402, 80 P.3d at 338 (citing *Fairway Development Co. v. Bannock County*, 119 Idaho 121, 124, 804 P.2d 294, 297 (1990)). The obvious conclusion is that when parties to a zoning matter wish to challenge the constitutional adequacy of administrative proceedings (as opposed to the ordinance itself), they must first present their objections to the local governmental officials and give them an opportunity to consider and, if necessary, address the alleged violations. "As we have previously recognized, important policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative processes established by the Legislature and the administrative

considerations articulated by the Court in *White* are poignantly applicable here. Had the Developers timely opposed the mitigation proposal, objected to the Mitigation Agreements, or stated that they were acting under protest, the County would have been on notice as to the situation. Because the Developers did not take such action, there is no way of knowing how events might have unfolded. The Developers might have proceeded with their Applications without any mitigation proposal, but it would have been much harder to sell the lots if the project was accessed by unimproved roads.[16] Instead, the Developers pursued their offer of mitigation and entered into the Mitigation Agreements. The County also complied with the terms of the Mitigation Agreements, spending road development money on road improvements that directly benefited the Developers. The message from *KMST* and *White* is that developers cannot play it both ways. There is a reason the Legislature created an administrative appeal process. It is to avoid lawsuits like this one.

C. Developers' actions were voluntary.

The *KMST* case also applied *Williamson County* in ruling that KMST's action could not be challenged under § 1983 because its decision was not a "final decision." The Court then went on to say that even if ACHD's recommendation had been a final decision, it would not have constituted a taking because the dedication was voluntary.[17] In a pre-application meeting with

---

body, and the sense of comity for the quasi-judicial functions of the administrative body." *White*, 139 Idaho at 337-38, 80 P.3d at 401-02. Thus, although the Court did not say so in so many words, it is inescapable from *White* that the exhaustion exception does not apply to "as applied" constitutional challenges.

[16] Had the Developers withdrawn their offer to provide road mitigation set out in their own Applications, the County would have been entitled to withhold approval of the project or to condition timing of the development upon finding other funding for the necessary road construction. The County certainly has that authority. Idaho Code § 67-6512(a).

[17] Technically one might argue that this was dictum, but Justice Eismann's language made it clear that the Court intended it as a ruling.

ACHD staff, KMST was advised that staff would recommend a requirement of a road dedication. In order to move things along, KMST agreed to the dedication and included it in its application. This proved fatal to KMST's taking claim.

> KMST representatives included the construction and dedication of Bird Street in the application because they were concerned that failing to do so would delay closing on the property and development of the property. KMST's property was not taken. It voluntarily decided to dedicate the road to the public in order to speed approval of its development. Having done so, it cannot now claim that its property was "taken."

KMST, 138 Idaho at 582, 67 P.3d at 61 (emphasis supplied) (internal quotations identifying district court's language omitted). This language is significant because it shows that it makes no difference that the developer was motivated by a desire to speed the processing of its application; the developer's action is still voluntary.

The Developers' situation here is indistinguishable. Perhaps they were not pleased with the idea of paying their fair share of transportation costs, but they did not say so and they certainly did not challenge the County's authority to accept such mitigation. One way or another, the Developers needed to assure the County that adequate infrastructure would be in place to support the new development. The Developers could have simply waited until the County was able to raise the funds to build that infrastructure. Instead, in order to speed their project forward, the Developers elected to make payments to the County reflecting the project's proportionate share of transportation impact costs.

Having so elected, the Developers cannot now be heard to complain that the payments they agreed to make were illegal taxes. This was the holding of the Idaho Supreme Court in *KMST*.[18]

V. IF PLAINTIFFS' INVERSE CONDEMNATION ACTION IS DISMISSED, ITS REQUEST FOR DECLARATORY RELIEF IS MOOT.

The core of Plaintiffs' claim, of course, is its desire to get its money back—*i.e.*, their inverse condemnation claim. As shown above, that claim is procedurally and substantively flawed. If the County is under no obligation to return the money, Plaintiffs' ancillary request for declaratory relief is meaningless and moot. It would be of academic interest only and is not a proper subject for judicial action.

VI. PLAINTIFFS' REQUEST FOR RELIEF WITH RESPECT TO FUTURE ACTIONS IS NOT RIPE.

This lawsuit is focused primarily on past actions—notably the Mitigation Agreements. Plaintiffs, however, have also included requests for injunctive and declaratory relief with respect to actions that might be taken by the County in the future.

Obviously, the Court has no jurisdiction to entertain a lawsuit respecting things the Plaintiffs think the County might do in the future. What actions the Plaintiffs and the County might take in the future regarding yet-to-be negotiated future road development agreements is plainly speculative. Indeed, the County is now undergoing a complete review of its policies regarding permitting of new developments and is exploring the enactment of a new IDIFA-compliant ordinance that would moot any claims with respect to future development agreements.

---

[18] Developers may contend that their action was not voluntary, but no evidence supports this. *Valley County's Statement of Material Facts Not in Dispute* fully documents the voluntary nature of the Developers' actions.

The Court cannot entertain lawsuits over such patently unripe allegations. Equitable principles prevent the Developers from obtaining the remedies they seek here.

VII. EQUITABLE PRINCIPLES PREVENT THE DEVELOPERS FROM OBTAINING THE REMEDIES THEY SEEK HERE.

The Developers benefited substantially from their arrangement with the County. As a result of the Agreement, the Developers did not have to wait for the County to find the money to build roads, and the approved portions of their project were completed before the economic crash. Those roads are now in place, and the property continues to benefit from an improved regional road network. Despite those benefits, Plaintiffs want their money back.

The law of common law of equity, however, prevents the Developers from having their cake and eating it, too. Settled equitable principles demand that the Developers not prevail in their attempt to profit from what amounts to nothing more than reneging on an explicit agreement regarding the most appropriate way to finance necessary road improvements.

First, the law abhors the unjust enrichment of one party at the expense of another, and it is a general principle of law that one should be required to make restitution of benefits received, retained, or appropriated from another. 66 Am. Jur. 2d *Restitution and Implied Contracts* § 8 (2001). Allowing the Developers to recover the negotiated transportation payments from the County would result in an unjust enrichment for the Developers at the expense of the County. Equity does not permit the Developers to profit from the County's expenditure of public funds without providing anything in return. *See Barry v. Pacific West Construction, Inc.*, 140 Idaho 827, 103 P.3d 440 (2004) (general contractor was unjustly enriched by uncompensated work of subcontractor).

Second, someone who performs substantial services for another without an express agreement for compensation ordinarily becomes entitled to the reasonable value of those

services. 66 Am. Jur. 2d *Restitution and Implied Contracts* § 37 (2001). Again, even if there were no valid agreement between the parties, the fact remains that the County performed the substantial service of designing, financing, and building the road network to serve the Developers' property. Under this theory of *quantum meruit*, the County is entitled to the reasonable value of the work and material provided to the Developers. The negotiated transportation-related cost in the Agreement represents the reasonable value and should not be returned to Developers.

Third, courts in equity can use "promissory estoppel" to enforce a promise made without consideration when the following elements are present: (i) the detriment suffered in reliance on the promise was substantial in an economic sense; (ii) the substantial loss to the promisee acting in reliance was, or should have been, foreseen by the promisor; and (iii) the promisee must have acted reasonably in justifiable reliance on the promise made. *Rule Sales and Service, Inc. v. U.S. Bank National Association*, 133 Idaho 669, 674, 991 P.2d 857, 862 (Idaho Ct. App. 2000). Put another way, "the doctrine requires only that it be foreseeable to the promisor that the promisee would take some action or forbearance in reliance upon the promise and would thereby suffer substantial loss if the promise were to be dishonored." *Id.* at 675, 991 P.2d at 863. In this action, by trying to get its money back, the Developers are essentially claiming a right to take back their promise to pay. But the County already relied on that promise and, reasonably and justifiably, suffered a substantial economic detriment in response. To allow the Developers to dishonor their promise now would be a great injustice.

Fourth, the equitable principle of laches provides that a plaintiff is estopped from asserting the alleged invasion of his rights when: (i) the plaintiff delayed in asserting these rights; (ii) the plaintiff had notice and an opportunity to institute a suit; (iii) the defendant did not know

that the plaintiff would assert such rights; and (iv) the delayed suit would injure or prejudice the defendant. *Finucane v. Village of Hayden*, 86 Idaho 199, 205, 384 P.2d 236, 240 (1963). All those tests are met here. Allowing the Developers to recover the negotiated transportation-related costs now will require the County to burden its citizens to raise money to pay the Developers for expenditures already made on behalf of the Developers. This financial burden would result in a windfall to the Developers and severely injure and prejudice the County. Equity should prevent such a result. The undisputed facts in the record show that Plaintiffs did not raise any objection to any action of the County. Plaintiffs may claim that they did not object because they assumed the County's actions were lawful. That is, in effect, an admission that they did not question the County's actions, and, in any event, it is insufficient to overcome the equities favoring the County.

Finally, the equitable concept of "waiver" applies in an action for breach of contract and states that "a party who accepts the other's performance without objection is assumed to have received the performance contemplated by the agreement." 17A Am. Jur. 2d *Contracts* § 640 (2001). "A waiver is a voluntary, intentional relinquishment of a known right or advantage [and the] party asserting the waiver must show that he has acted in reliance upon such a waiver and reasonably altered his position to his detriment." *Dennett v. Kuenzli*, 130 Idaho 21, 26, 936 P.2d 219, 224 (Idaho Ct. App. 1997). Here, the Developers are not claiming breach of contract against the County, but the principles behind the concept of waiver instruct that the Developers cannot now complain that the road construction under the terms of the Mitigation Agreements was anything but acceptable. Until this suit was filed, Developers did not characterize the negotiated transportation-related payment as an illegal impact fee or assert its purported rights to be free from illegal impact fees. Had the Developers done so, the County could have responded

accordingly then. However, nothing of the sort took place and the County acted in reliance on the Developers' acceptance of the County's performance of its duties under the Agreement. Waiver principles should prevent the Developers from asserting that the County did anything wrong now.

CONCLUSION

In short, payments made by Plaintiffs were not illegal taxes but were voluntarily negotiated payments that benefited them by funding road construction on an expedited basis. Even if those payments had been illegal taxes, however, it is too late to challenge them now. Plaintiffs were obligated to challenge them at the time. Doing so now violates the statute of limitations as well as well-settled exhaustion and ripeness principles. For these and all of the other legal and equitable reasons discussed above, judgment should be entered dismissing Plaintiffs' lawsuit.

DATED this day of October, 2010.

VALLEY COUNTY PROSECUTING ATTORNEY

By: _____
Matthew C. Williams

GIVENS PURSLEY, LLP

By: _____
Christopher H. Meyer

By: _____
Martin C. Hendrickson

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October, 2010, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

Jed Manwaring
Victor Villegas
Evans Keane LLP
1405 West Main
P.O. Box 959
Boise, ID 83701-0959
jmanwaring@evanskeane.com
vvillegas@evanskeane.com

- [x] U.S. Mail, postage prepaid
- [ ] Express Mail
- [ ] Hand Delivery
- [ ] Facsimile
- [ ] E-Mail

~~Martin C. Hendrickson.~~
Matthew C. Williams

LIST OF EXHIBITS

Exhibit A – Conditional Use Permit (May 24, 2005)
Exhibit B – Road Development Agreement (June 26, 2006 – effective date)
Exhibit C – Plaintiffs' discovery responses (July 26, 2010)

Jed Manwaring ISB #3040
Victor Villegas ISB# 5860
EVANS KEANE LLP
1405 West Main
P. O. Box 959
Boise, Idaho 83701-0959
Telephone: (208) 384-1800
Facsimile: (208) 345-3514
e-mail: jmanwaring@evanskeane.com
Vvillegas@evanskeane.com

Attorneys for Plaintiffs

ARCHIE N. BANBURY, CLERK
By _____ Deputy
OCT 15 2010
Case No. _____ Inst. No. _____
Filed _____ A.M. _____ P.M.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

BUCKSKIN PROPERTIES, INC. an Idaho Corporation, and TIMBERLINE DEVELOPMENT, LLC, an Idaho Limited Liability Company,

Plaintiff,

vs.

VALLEY COUNTY, a political subdivision of the State of Idaho.

Defendant.

Case No. CV-2009-554-C

PLAINTIFFS' MOTION TO FILE BRIEF EXCEEDING TWENTY-FIVE (25) PAGES

Plaintiffs, Buckskin Properties, Inc. and Timberline Development, LLC (hereinafter "Plaintiffs"), by and through their attorneys of record, the law firm of Evans Keane LLP, hereby moves for permission to file a brief exceeding the 25-page limit of Fourth District Court Local Rule 8.1. The Brief that is the subject of this motion is the Plaintiff's Memorandum in Opposition Valley County's Motion for Summary Judgment filed October 14, 2010.

Plaintiffs move to file a brief exceeding 25 pages for the following reasons:

1. Pursuant to the Local Rule 8.1 of the Local Rules of the District Court and Magistrate Division for the Fourth Judicial District, a memorandum may not exceed twenty-five (25) pages.

2. Defendant Valley County has filed a Statement of Material Facts in Support of Motion for Summary Judgment totaling thirteen (13) pages and an Opening Brief in Support of Motion for Summary Judgment totaling twenty-nine (29) pages. Both documents, together, total forty-two (42) pages.

3. Plaintiffs request that they be allowed to file their opposing memorandum, which will contain facts, points and authorities of equal length and not be limited to the twenty-five (25) page limit prescribed by Local Rule 8.1.

For these reasons, Plaintiffs move this Court to allow the filing of their Memorandum in Opposition to Valley County's Motion for Summary Judgment in excess of 25 pages, but not to exceed 42 pages.

DATED this 15th day of October, 2010.

EVANS KEANE LLP

By Victor Villegas
Victor Villegas, Of the Firm
Attorneys for Plaintiff

It is so ordered
10/29/2010

ARCHIE N. BANBURY, CLERK
BY [illegible] DEPUTY
OCT 29 2010
Case No. Inst. No.
Filed A.M. P.M

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of October, 2010, a true and correct copy of the foregoing document was served by first-class mail, postage prepaid, and addressed to; by fax transmission to; by overnight delivery to; or by personally delivering to or leaving with a person in charge of the office as indicated below:

Matthew C. Williams
Valley County Prosecutor
P.O. Box 1350
Cascade, ID 83611
Telephone: (208) 382-7120
Facsimile: (208) 382-7124

[ ] U.S. Mail
[X] Fax
[ ] Overnight Delivery
[ ] Hand Delivery

Christopher H. Meyer
Martin C. Hendrickson
Givens Pursley LLP
P.O. Box 2720
Boise, ID 83701-2720
Telephone: (208) 388-1200
Facsimile: (208) 388-1300

[ ] U.S. Mail
[X] Fax
[ ] Overnight Delivery
[ ] Hand Delivery

Victor Villegas

Victor Villegas

CERTIFICATE OF MAILING

I hereby certify that today, a true and correct copy of the foregoing order was served by placing the same in the respective courthouse mail boxes or by regular postal service to the following:

Plaintiff's Counsel:
Victor S. Villegas
Evans, Keane Llp
P. O. Box 959
Boise, ID 83701-0959
U.S. Mail

Defendant's Counsel:
Matthew Williams
Valley County Prosecutor
PO Box 1350
Cascade, ID 83611
Interdepartmental Box

Defendant's Counsel:
Christopher H. Meyer
Givens Pursley LLC
P. O. Box 2720
Boise, ID 83701
U.S. Mail

Dated: November 2nd, 2010
Archie N. Banbury
Clerk Of The District Court

By: Deborah M. Perry
Deputy Clerk

ORIGINAL

Jed Manwaring ISB #3040
Victor Villegas ISB# 5860
EVANS KEANE LLP
1405 West Main
P. O. Box 959
Boise, Idaho 83701-0959
Telephone: (208) 384-1800
Facsimile: (208) 345-3514
e-mail: jmanwaring@evanskeane.com
Vvillegas@evanskeane.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

BUCKSKIN PROPERTIES, INC. an Idaho Corporation, and TIMBERLINE DEVELOPMENT, LLC, an Idaho Limited Liability Company,

Plaintiff,

vs.

VALLEY COUNTY, a political subdivision of the State of Idaho.

Defendant.

Case No. CV-2009-554-C

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by and through their attorneys of record, Evans Keane, LLP, submit this Memorandum in Opposition to Defendant Valley County's Motion for Summary Judgment:

INTRODUCTION

Buckskin Properties, Inc. ("Buckskin") and Timberline Development, LLC ("Timberline") (collectively "Plaintiffs") undertook a multi-phase Planned Unit Development in Valley County, Idaho called The Meadows at West Mountain (the "Meadows"). Valley County imposed the payment of impact fees as a condition to approve Plaintiffs' final plat for the various

phases of the Meadows. Valley County's impact fee is illegal. To require the payment of an impact fee, Idaho law requires that a governmental entity first enact an impact fee ordinance in compliance with the Idaho Development Impact Fee Act ("IDIFA"), Idaho Code Section 67-8201 *et. seq.* IDIFA sets forth the appropriate procedures and mechanisms necessary to collect impact fees under Idaho law. Valley County failed to comply with IDIFA and the procedures under IDIFA, but required developers to pay impact fees nonetheless.

Plaintiffs filed this lawsuit seeking a declaration that the contracts under which Valley County required the payment of illegal impact fees are invalid and seeking a judgment that Valley County violated their rights in conditioning approval of their project based on the payment of the illegal impact fees. Valley County now files a motion for summary judgment seeking dismissal of Plaintiffs' lawsuit on grounds that Plaintiffs entered into the agreements and paid the fees voluntarily. Plaintiffs did not enter the agreements or pay any of Valley County's illegal impact fees voluntarily. As set forth herein, there are significant disputes regarding material facts and Valley County is not entitled to summary judgment as a matter of law.

STATEMENT OF DISPUTED AND UNDISPUTED FACTS.

In its Statement of Material Facts Valley County provides the initial history of Plaintiffs' land-use application for the development project at issue in this case. The facts regarding Plaintiffs' application, the dates filed, and the actual contents of the application are largely undisputed. In presenting its version of the facts, however, Valley County focuses almost exclusively on a proposed Development Agreement, which was attached to Plaintiffs' application, but ultimately was not signed or used, in an effort to establish that Plaintiffs' payment of the illegal impact fee at issue in this case was "voluntary." In doing so, Valley County purposely ignores significant material facts regarding why Plaintiffs attached the

proposed Development Agreement to their original application and why that proposed agreement addressed the payment of illegal impact fees.

Buckskin originally submitted an application on or about March 29, 2004, for a Planned Unit Development ("PUD"), Conditional Use Permit ("CUP"), Preliminary Plat and final plat for Phase 1 for The Meadows located in Valley County, Idaho. (Affidavit of Joseph Pachner in Support of Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment ("Pachner Affidavit"), ¶ 9.) The application was signed by Jack A. Charters, who is deceased, and was submitted by the engineer for the project, Joseph Pachner. (*Id.*) Buckskin is a member of defendant Timberline. (Affidavit of Michael Mailhot in Support of Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment ("Mailhot Affidavit"), ¶ 3.)

As part of the application, Buckskin attached two proposed agreements, a Development Agreement and a Capital Contribution Agreement. (Pachner Affidavit, ¶¶ 3-8.) Buckskin submitted these proposed agreements with its application because Valley County's Land Use and Development Ordinance ("LUDO") required that Plaintiffs, as applicants for a PUD, enter into a Development Agreement. (*Id.*) The LUDO states, in relevant part:

> **I. DEVELOPMENT AGREEMENT**
>
> Because of the uniqueness of each proposal a PUD may impact county services and/or property which may be mitigated through a Development Agreement. Compensation for these impacts ***shall be*** negotiated in work sessions with appropriate county entities and ***a Development Agreement shall be entered into between the applicant and the county*** through the Board as additional conditions considered for approval of a PUD.
>
> **J. IMPACT FEES**
>
> The Commission may recommend to the Board impact fees as authorized by Idaho Code Section 31-870 for any PUD proposal. The Board may implement the impact fees as recommended by the Commission or as it deems necessary for the proposal.

(emphasis added). The idea to enter into a Development Agreement or pay an impact fee was not Plaintiffs, but rather it was required by Valley County's ordinances and policies.

Additional history of Valley County's impact fee program is also necessary for the Court to understand how and why Plaintiffs entered into these agreements with Valley County. When Valley County began to experience an increase in development during the past decade, it initiated what it called a Capital Improvements Program ("CIP"). (*See* Deposition of Gordon Cruickshank ("Cruickshank Depo."), p. 36, l. 17 – p. 37, l. 8, attached to the Affidavit of Victor S. Villegas in Support of Plaintiff's Opposition to Motion for Summary Judgment (Villegas Affidavit), Ex. A.). A description of Valley County's CIP can be found in the public records such as Valley County's March, 2008 Master Transportation Plan. The Transportation Plan describes the CIP as:

> **E. Capital Improvement Program Process and Purpose**
>
> Valley County has developed and adopted a Capital Improvement Program (CIP). The following description of the CIP is provided by Valley County:
>
> "In 2005, the Valley County Commissioners initiated a Road Development Agreement (RDA) process **to require new developments to pay a fee to mitigate the impacts** of their developments on the roads and bridges in Valley County. The RDA process replaced the Capital Contribution Agreements that were used by Valley County for larger developments that needed infrastructure improvements. **The RDA requires all developers to pay a fee** based on the number of trips their developments generate. **Developers are, in effect, required to pay for the roadway capacity their developments use. The fee must be paid at the time of final plat.** Credit is given for ROW required from the development and any in-lieu-of contributions, such as construction materials or developer sponsored construction of portions of roads and bridges.

(Cruickshank Depo., Ex. 1.)(emphasis added).

Under that program, the County identified different areas throughout the county to determine the level of road improvements necessary for the roads in that area to handle the increases in traffic as a result of the development. (*Id.*) Valley County identified approximately 15 to 20 CIP areas throughout the county. (*Id.* at p. 39, l. 2-11.)

The CIP required that developers pay a fee, construct in-kind improvements on existing roadways or dedicate rights-of-way in an amount calculated by the County's engineer to deal with impacts on county roads. (*Id.* at p. 41, l. 7 – p. 42, l. 18.) The CIP, and calculations as to road impacts allegedly caused by new development, was completed by Valley County and its engineer sometime between 2000 and 2005. (*Id.* at p. 43, l. 6 – p. 45, l. 11.) Valley County did not bother to follow IDIFA and the process required under IDIFA to charge developers impact fees for their development. This is true even though Valley County officials understood that they were requiring developers to pay to mitigate the impacts of development. (Deposition of F. Phillip Davis ("Davis Depo."), p. 59, ll. 16-24, attached to the Villegas Affidavit, Ex. B.) Planning and Zoning officials just assumed that the Road Development Agreements were lawful under the Local Land Use Planning Act ("LLUPA"), which allows for development agreements for zoning changes. (Deposition of Cynda M. Herrick ("Herrick Depo."), p 112, l. 22 - p. 113, l. 5, p. 121, ll. 12-17, attached to the Villegas Affidavit, Ex. C.)

The CIP was implemented, after due discussion between the Valley County Commissioners, Valley County Planning and Zoning Commission and Gordon Cruickshank, who was the Valley County Road Department Supervisor at the time. (Cruickshank Depo. p. 45, l. 12 – p. 48, l. 15.) The Valley County Commissioners directed the Valley County Planning and Zoning Commission to begin conditioning final approval of developments by requiring developers to enter into an agreement with the county to pay for impacts on county roads based on the CIP and calculations arrived by the County and its engineers. (Cruickshank Depo., at p. 45, l. 18 – p. 50, l. 5; Davis Depo., at p. 110, l. 1 – p. 111, l. 25.; Affidavit of DeMar Burnett ("Burnett Affidavit", ¶ 3.) As a result, the Planning and Zoning Department began conditioning final plat approval on developers entering into an agreement with the county to pay for road impacts. (Cruickshank Depo., at p. 49, ll. 12-17; Herrick Depo., Ex. C; Burnett Affidavit, ¶ 3.)

The CIP area for The Meadows is the West Roseberry Area. (Pachner Affidavit, ¶ 14, Ex. G.) For Phase 1 of The Meadows the impact fee was calculated by Pat Dobie, the Valley County engineer, pursuant to a traffic impact study he conducted related to the development of the Tamarack Resort. (Pachner Affidavit, ¶ 5; Burnett Affidavit, ¶¶ 4-5, Exs. A, B.) According to Dobie's traffic impact study and his calculations, an impact fee of approximately $1,800.00 per residential unit was necessary to account for impacts of new development on the roadways. (Pachner Affidavit, ¶¶ 5-7; Burnett Affidavit, ¶¶ 4-5, Exs. A, B.) This amount and the fact that Valley County planned to require that all developers enter into an agreement with Valley County to pay the impact fee as a condition to approval of a land use application was determined before Buckskin filed its application. (Burnett Affidavit, ¶¶ 4-5, Exs. A, B.)

As Buckskin prepared to submit its application, it was made clear by Dobie and/or Planning and Zoning Administrator Cynda Herrick that Buckskin would be required to enter into an agreement with Valley County and pay the impact fee predetermined by Valley County in order get approval for final plat. (Pachner Affidavit, ¶ 6, Ex. C.) This was re-confirmed at the Planning and Zoning Commission public hearing to consider Buckskin's PUD application on May 17, 2004. (Pachner Affidavit, ¶¶ 9-10; Burnett Affidavit, ¶¶ 4-5, Exs. A, B.) Based on Dobie's calculation and the LUDO, Buckskin provided a proposed Capital Contribution Agreement and a proposed Development Agreement identifying the payment of an impact fee. (Pachner Affidavit, ¶¶ 6-8.) Plaintiffs and Valley County never entered into the proposed Development Agreement.

Ultimately, Buckskin entered into a different Capital Contribution Agreement for Phase 1 of The Meadows, which Valley County prepared. (*Id.*, ¶ 11, Ex. E.) The Capital Contribution Agreement was Valley County's precursor to the Road Development Agreement. (Cruickshank Depo., p. 50, l. – p. 51, l. 10.) The County Commissioners later changed the name of the

agreement from Capital Contribution Agreement to Road Development Agreement to avoid confusion. (*Id.*) Nonetheless, the terms and conditions of the Capital Contribution Agreement were not negotiated or discussed prior to Valley County conditioning final plat approval on entering into the agreement. (Pachner Affidavit, ¶¶ 10-13.) Likewise, Valley County's Capital Contribution Agreement and the contents of the agreement differed from the proposed Capital Contribution Agreement submitted by Buckskin with its application.

Plaintiffs' proposed agreements included the amount of the road impact fee only because Valley County had predetermined and dictated the amount of the impact fee. (*Id.*, at ¶¶ 5-7.) Buckskin never entered into a "Development Agreement" with Valley County, but was forced to enter into a Road Development Agreement for Phases 2 and 3 of The Meadows. (*Id.*, at ¶¶ 12-13.) The Road Development Agreement for Phases 2 and 3 also was not negotiated or discussed prior to Valley County conditioning final plat approval on entering into the agreement. (*Id.*)

This was the typical experience for developers in Valley County. As the projects neared the point where approval of a final plat was necessary, developers generally paid a visit to the Valley County Road Department to discuss the Road Development Agreement and how it would be implemented. (Cruickshank Depo., at p. 49, l. 12 – p. 50, l. 5.) The actual Road Development Agreement was prepared by Valley County and its engineer; when the agreement was finalized, it was sent to the County Commissioners for approval. (*Id.* at p. 50, l. 6 – p. 52, l. 6.) The key component of the Road Development Agreement was the payment obligation based on Valley County's calculation of a monetary fee, or whether the developer would dedicate a right-of-way or undertake in-kind roadway construction in lieu of paying a fee. (*Id.* at p. 53, l. 11 – p. 54, l. 17.) Approval of the Road Development Agreement occurred when the developer sought approval of the final plat and after all conditions of the preliminary plat were satisfied. (*Id.* at p. 56, ll. 3-20.)

Plaintiffs prepared to get final plat approval to develop Phases 4 through 6 of The Meadows on or around August 2007. Based on Valley County's impact fee, as calculated by Parametrix (Valley County's current engineer) under the West Roseberry Area 2007 Roadway Capital Improvement Program, the fee increased from $1,844.00 to $3,968.00. (Pachner Affidavit, ¶ 14, Ex. G.) This increase was both startling and unanticipated. As a result of the increase, Buckskin representatives scheduled a meeting with Jerry Robinson the current Valley County Road Superintendent to discuss the Road Development Agreement and the increase in the fee. (Affidavit of Larry Mangum ("Mangum Affidavit"), ¶¶ 4-5; Mailhot Affidavit, ¶ 6-7; Pachner Affidavit, ¶¶ 15-16.)

A primary purpose for this meeting was to request that Buckskin be allowed to post a bond for payment of the impact fee rather than payment of the entire fee up front. (Mailhot Affidavit, ¶ 6.) At this meeting Mr. Robinson informed the Buckskin representatives that they had to enter into a Road Development Agreement and that they had to pay the fee in full to get final plat. (Mailhot Affidavit, ¶¶ 6-7; Mangum Affidavit, ¶¶ 4-5; Pachner Affidavit, ¶¶ 15-16.) When questioned about the impact fee and why it more than doubled from Phases 2 and 3, Mr. Robinson told the Buckskin representatives that he hoped someone would take Valley County to court to figure out if the Road Development Agreements and the impact fees required under the agreements were legal. (Mangum Affidavit, ¶¶ 4-5; Mailhot Affidavit, ¶¶ 6-7; Pachner Affidavit, ¶¶ 15-16.)

Plaintiffs' experience was the same as all other developers. Valley County required developers to enter into a Road Development Agreement regardless of the size of the development, including a one-lot subdivision. (Cruickshank Depo., at p. 70, l. 25 – p. 71, l. 5.) The amount of the fee a developer was required to pay for road impacts under the Road Development Agreement depended on the CIP area and the traffic impact that Valley County and

its engineers determined the development would place on the roads in the area of the development. (*Id.* at p. 71, ll. 6-25.) The Road Development Agreement also had to be signed by the developer and the fee paid before the developer could get on the agenda for the Board of County Commissioners to consider the developer's final plat. (*Id.* at p. 106, l. 23 – p. 109, l. 9.) This process of finalizing the Road Development Agreement and identifying the fee the developer was required to pay under the agreement usually happened well after the initial approval of the application for a CUP. (*Id.* at p. 117, l. 8 – p. 119, l. 24.)

Other than the amount of the fee paid under the Road Development Agreement, the wording of the agreements generally did not vary from developer to developer. (*Id.* at p. 125, ll. 2-7.) Developers, however, did not know the contents of or the terms and conditions of a Road Development Agreement when their CUP was approved with the condition that they enter into a Road Development Agreement. (Herrick Depo., at p. 83, l. 24 – p. 84, l. 16.) Unquestionably, signing the Road Development Agreement and paying the required fee under the agreement, however, was a required condition to obtaining final plat and authorization to begin construction. (Cruickshank Depo. at p. 137, l. 6 – p. 138, l. 21; Herrick Depo., at p. 101, l. 23 – p. 102, l. 3, p. 107, l. 10 – p. 109, l. 9; Davis Depo., p. 65, l. 16 – p. 68, l. 2.)

Signing a Road Development Agreement was not voluntary; if one wanted final plat signing, the Road Development Agreement and paying the fee was required. (Herrick Depo., at p. 104, l. 2-18.) Gordon Cruickshank testified that signing the Road Development Agreement and payment of the fee were "required" and "not voluntary". (Cruickshank Depo., p. 137, l. 6 – p. 138, l. 21.)

Valley County approved Plaintiffs' application for a PUD, CUP and preliminary plat for The Meadows on July 12, 2004, and CUP No. 04-01 was issued effective July 13, 2004. (Pachner Affidavit, ¶¶ 9-10, Ex. D.) Condition No. 12 of the CUP states that a Capital

Contribution Agreement must receive approval from the County Commissioners and Condition No. 17 states that the final plat must dedicate a right-of-way to the County along West Roseberry Road. (*Id.*)

Valley County's Planning and Zoning staff never informed Plaintiffs that its CIP included "voluntary contributions" from developers to pay for the developer's proportionate share of impacts created by developments. (Mangum Affidavit, ¶ 3; Mailhot Affidavit, ¶ 8.) Plaintiffs understood that the agreements were required under the LUDO and Valley County's CIP. (Pachner Affidavit, ¶¶ 8, 11-12, 15; Mailhot Affidavit, ¶ 8; Mangum Affidavit, ¶ 3.) Valley County' engineer, planning and zoning representatives and road department consistently informed Plaintiffs that they would be required to enter into a contract with Valley County and pay a fee as a condition to final plat approval. (Pachner Affidavit, ¶¶ 4-6, 16; Mailhot Affidavit, ¶¶ 6-7). There were no negotiations regarding the form or content of the initial Capital Contribution Agreement or subsequent Road Development Agreements. (Pachner Affidavit, ¶¶ 7, 10-11, 13; Mangum Affidavit, ¶ 3; Mailhot Affidavit, ¶ 8.) Valley County dictated all terms of the agreements and the amount of the fees.

Under the Capital Contribution Agreement for Phase 1, which Valley County prepared, Plaintiffs dedicated a right-of-way with a total value of $91,142.00. (Mangum Affidavit, ¶ 3; Pachner Affidavit, ¶ 11, Ex. E.) Under the Road Development Agreement for Phases 2 and 3, which Valley County also prepared, Plaintiffs paid a total impact fee of $232,160.00 after offsets for right-of-way dedication. (Pachner Affidavit, ¶ 12, Ex. F.) This amount was calculated by Dobie and had to be paid before final plat was granted and recorded. (*Id.*, at ¶¶ 5-7, 12-13) As Buckskin has progressed toward obtaining final plat for the subsequent phases of The Meadows, it is faced with paying an impact fee of $3,968.00 per lot based on Valley County's West Roseberry Area 2007 Roadway Capital Improvement Program.

Despite the fact that Valley County has never enacted an impact fee ordinance pursuant to Idaho law under IDIFA, it has imposed on all developers as a condition to final plat approval, at least since the inception of the CIP, that they enter into a Road Development Agreement and pay an impact fee. (*See* Affidavit of Henry Rudolph ("Rudolph Affidavit"), ¶¶ 2-3, Exs. A-B; Affidavit of Matt Wolff ("Wolff Affidavit"), ¶¶ 2-3, Exs. A-B; Affidavit of Dan Brumwell ("Brumwell Affidavit"), ¶¶ 2-3, Exs. A-B; Burnett Affidavit, ¶¶ 6-7, Exs. A-C; Affidavit of Robert Fodrea ("Fodrea Affidavit"), ¶¶ 2-3, Ex. A; Affidavit of Rodney A. Higgins ("Higgins Affidavit"), ¶¶ 2-3, Ex. A; Affidavit of Anne Seastrom ("Seastrom Affidavit"), ¶¶ 2-3, Ex. A).

As with Plaintiffs, Valley County has never advised any other developer that the Road Development Agreement and the fee under the CIP is voluntary, that developers may negotiate the terms of the Road Development Agreement or the fee under the Road Development Agreement, or that developers had an option not to pay the fee. (*See* Rudolph Affidavit, ¶¶ 4-6; Wolff Affidavit, ¶¶ 4-6; Brumwell Affidavit, ¶¶ 4-7; Burnett Affidavit, ¶ 7; Fodrea Affidavit, ¶¶ 4-6; Higgins Affidavit, ¶ 3; Affidavit of Steve Loomis ("Loomis Affidavit"), ¶¶ 2-7; Seastrom Affidavit, ¶4; Affidavit of John Millington ("Millington Affidavit"), ¶ 8). Since Valley County imposed the Road Development Agreements on developers, most believed Valley County had the legal right to require the agreement and fee or they would have protested or elected not to enter the agreement or pay the fee. (*See* Rudolph Affidavit, ¶ 7; Wolff Affidavit, ¶ 7; Brumwell Affidavit, ¶¶ 6-7; Burnett Affidavit, ¶ 3; Fodrea Affidavit, ¶ 6; Higgins Affidavit, ¶ 5; Millington Affidavit, ¶ 8).

One developer, Mr. DeMar Burnett, is a former and long time Valley County Planning and Zoning Commissioner who opposed Valley County's fee program. (*See* Burnett Affidavit, ¶ 3). Nonetheless, Valley County took the position that the Road Development Agreements and the impact fees imposed under the agreements were legally permissible, a position Mr. Burnett

acquiesced to as a Planning and Zoning Commissioner, and, as a result, his own development was subject to the agreement and fees. (*Id.*, ¶¶ 3-4). Mr. Burnett did not do so voluntarily, however, and based on his experience as a Planning and Zoning Commissioner, believed that the agreement and the fee were a required condition to final plat. (*Id.* ¶¶ 7-9).

Prior to Plaintiffs filing this lawsuit, at least one sitting Valley County Commissioner, during a public hearing on September 28, 2009, expressed serious doubts about the legality of Valley County's CIP/Road Development Agreements by stating:

> ... we have been working under an understanding which has been proven to be incorrect, legally incorrect, on our road development agreements. And we need to make a change. We need to make a change if we're going to continue those and we need to be in compliance with Idaho state law if we're going to continue road agreements, road fees, whatever you want to call them, we need to be in compliance with Idaho state law.
>
> And in order to be there, under today's Idaho state law we have to adopt impact fees at least....

(Deposition of Frank W. Eld ("Eld Depo."), p. 55, l. 25 – p. 56, l. 12, attached to the Villegas Affidavit, Ex. D.) Mr. Eld also testified that Valley County has two legal opinions that the Road Development Agreement method of raising funds violated Idaho law. (Eld Depo., p. 62, l. 23 – p. 63, l. 25.)

Regardless of these concerns, all developers were required to pay a fee, construct in-kind roadway improvements or dedicate a right-of-way and with the exception of the specific fee paid, in-kind construction undertaken, or right-of-way dedicated, the terms and conditions of the Road Development Agreements were not-negotiated and were largely the same from developer to developer. (*See* Rudolph Affidavit, ¶ 8, Ex. C; Wolff Affidavit, ¶ 8, Ex. C; Brumwell Affidavit, ¶ 8, Ex. B; Burnett Affidavit, ¶ 5, Exs. B-D; Fodrea Affidavit, ¶ 7, Ex. B; Higgins Affidavit, ¶ 4, Ex. B; Seastrom Affidavit, ¶ 6, Ex. B; Millington Affidavit, ¶ 7, Ex. F.)

The fact that Valley County imposed the Road Development Agreements as a mandatory condition on all developers seeking a CUP is especially illustrated by the Brewster Mills Subdivision. Brewster Mills came about as a result of an application by property owners to undertake a one lot split of a rural piece of property in Valley County. (Millington Affidavit, ¶ 2.) The application for CUP did not contemplate the construction of any new structures or residences. (*Id.*) Final plat, as with all other development applications, was conditioned on entering into a Road Development Agreement. (*Id.* at ¶ 3, Ex. A.) The applicants had heard of the County's practice of forcing developers to pay impact fees and approached the Valley County Road Department prior to filing an application. (*Id.* at ¶ 3.) The applicants were told that because their development entailed only a one lot split, a Road Development Agreement and fee was not required. (*Id.*) Valley County Road Department engineer Jeff Schroeder sent a letter to Valley County Planning and Zoning confirming this position. (*Id.* at ¶ 3, Ex. B.)

Despite this letter, the County Commissioners required the applicants to enter into a Road Development Agreement and pay a fee as a condition to final plat for Brewster Mill. (*Id.* at ¶ 4.) Cynda Herrick, Planning and Zoning Administrator, lobbied the Commissioners to condition final plat on the payment of the fee on Brewster Mill. (*Id.* at ¶ 4, Ex. C.) After conditioning final plat on entering into a Road Development Agreement and payment of a fee, the applicant e-mailed Ms. Herrick for an extension of the CUP because he and his fellow property owners needed time to raise funds to pay the unanticipated fee. (*Id.* at ¶ 5, Exs. D, E.) The owners of Brewster Mill did not volunteer to pay the impact fee, but were forced to pay it under Valley County's CIP. (*Id.* at ¶ 6.) The property owners signed the Road Development Agreement and paid the fee, despite the fact that they did not construct any new residences and did not create any new or additional impacts to the roadways. (*Id.* at ¶ 7, Ex. F.) The property owners signed the Road Development Agreement and paid the fee only because they believed that Valley

County had the legal authority to require them to do so, they did not do so voluntarily. (*Id.* at ¶ 8.)

At least one developer attempted to prepare or draft a development agreement of her own and indicate in her own agreement that she was dedicating a right-of-way under protest, which Valley County rejected and told her that only Valley County's form Road Development Agreement was acceptable. (Seastrom Affidavit, ¶ 5). In all cases, developers, including Buckskin, were told that entering into a Road Development Agreement was not voluntary and that Valley County would not set a hearing for their final plat before the County Commissioners until the Road Development Agreement was signed and the fee paid. (Mangum Affidavit, ¶¶ 3-4; Rudolph Affidavit, ¶ 9; Wolff Affidavit, ¶ 9; Brumwell Affidavit, ¶ 9; Burnett Affidavit, ¶ 9; Fodrea Affidavit, ¶ 8; Higgins Affidavit, ¶ 5; Loomis Affidavit, ¶ 6; Seastrom Affidavit, ¶6). In certain cases, a developer's ability to begin business operations was conditioned on entering the Road Development Agreement and paying the required fee within a specified time period. (*See* Fodrea Affidavit, ¶¶ 9-10, Exs. C-D).

STANDARD OF REVIEW

Summary judgment is appropriate only when all of the pleadings, affidavits and other relevant documents before the court indicate that there are no genuine issues of material fact for a jury to decide and the moving party is entitled to a judgment under the applicable law. I.R.C.P. 56(c). In each instance, the moving party bears the burden of establishing a lack of genuine issues of material fact. *Id.* All reasonable inferences and conclusions are drawn in favor of the non-moving party. *Id.* The non-moving party, however, may not rest on mere allegations or denials, but must set forth genuine issues of material fact by affidavit or otherwise. I.R.C.P. 56(e).

ARGUMENT

I. Plaintiffs Have Pled A Right Of Action For Violations Of The Federal Constitution.

Valley County argues that Plaintiffs' allegations of violations of the federal constitution must be dismissed because Plaintiffs' failed to bring this action under 42 U.S.C. § 1983. Plaintiffs have not sought relief under 42 U.S.C. § 1983, nor were they required to do so. Valley County fails to recognize that an action for inverse condemnation for violations of the Fifth Amendment can be brought independent of a §1983 action.

The takings clause of the Fifth Amendment of the United States Constitution protects *private property* from being taken for public use without just compensation. *Gammoh v. City of La Habra*, 395 F.3d 1114, 1122 (9th Cir. 2005). The United States Supreme Court as well as the Idaho Supreme Court has treated money as private property subject to Fifth Amendment's protection against taking without just compensation. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (holding that interest accruing on an interpleader fund deposited in the registry of a county court was subject to payment of just compensation when county took the accrued interest); *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 108 P.3d 315 (2004) (*citing Brown v. Legal Fund of Wash.*, 538 U.S. 216 (2003)).

The United States Supreme Court has held that a party is entitled to bring an inverse condemnation action seeking the payment of just compensation under the Fifth Amendment because of the self-executing character of that constitutional provision. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.* 482 U.S. 304, 314-315 (1987). Thus, contrary to Valley County's assertion, an action for inverse condemnation is an appropriate cause of action for violations of Fifth Amendment of the United States Constitution that may be maintained independent of filing a §1983 claim.

Plaintiffs were also entitled to procedural due process protections under both the Federal and Idaho Constitutions. Valley County's assertion that no *Bivens* type remedy is available to Plaintiffs is in error. "The Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law. Protected interests in property are normally not created by the Constitution. Rather, they are created and their dimensions are defined by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss v. Lopez*, 419 U.S. 565, 572-573, 95 S.Ct. 729, 735 (1975) (underlining added). "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 983 (1990).

The United States Supreme Court has recognized that a cause of action for the protection of procedural due process rights under the Fourteenth Amendment may be maintained absent a specific federal statute. In *Davis v. Passman*, 442 U.S. 228, 242-243, (1979), the United States Supreme Court recognized that it is a well established practice to sustain the jurisdiction of federal courts to issue injunctions to safeguard constitutional rights and enjoin state officers "from doing what the 14th Amendment forbids the State to do." *Id.* (*quoting Bell v. Hood* 327 U.S. 678, 684 (1946)).

One of Plaintiffs' requests for declaratory relief from this Court is a declaration that Valley County's policy/practice of placing a condition of approval to enter into a contract to mitigate for road impacts is in fact an impact fee. The Idaho statute creating the protected interest and the procedural process required to collect impact fees is the Idaho Development Impact Fee Act. ("IDIFA"), I.C. § 67-8201 *et seq.* The IDIFA requires that "Governmental entities which comply with the requirements of this chapter may impose by ordinance

development impact fees as a condition of development approval on all developments." I.C. § 67-8204 (underlining added). IDIFA also requires that an impact fee ordinance contain a provision for an individualized assessment of the proportionate share (I.C. § 67-8204), a development impact fee advisory council must be established before fees are collected (I.C. § 67-8205), and the governmental entity must provide in its ordinance for administrative appeals and mediation (I.C. § 67-812).

Had Valley County complied with IDIFA and passed an impact fee ordinance, the ordinance would have contained the procedural protections spelled out throughout various provisions of the Act. Plaintiffs seek among other things, injunctive relief enjoining Valley County from depriving them of those safeguards before having to pay another impact fee for their final phases.

II. Plaintiffs' Lawsuit Is Timely And Is Not Barred By Any Applicable Statute Of Limitations.

Plaintiffs timely filed their lawsuit against Valley County and have satisfied all applicable statutes of limitation. On this issue Valley County argues that Plaintiffs failed to timely file this action within: (a) the four years for an inverse condemnation action; (b) the two-year limitations for claims for a 42 U.S.C. § 1983 action; (c) the three-year statute of limitation for the taking of personal property; and (d) the six-month statute of limitations for claims against a county. Valley County's arguments with regard to statutes of limitation should be rejected for the reasons discussed below.

A. Plaintiffs Inverse Condemnation Claim Was Filed Within Four Years.

Plaintiffs are not barred by the four-year statute of limitations for bringing an inverse condemnation action. Inverse condemnation claims against a governmental entity are subject to a four year statute of limitations under Idaho Code Section 5-224. *C&G, Inc. v. Canyon Hwy Dist.*, 139 Idaho 140, 143, 75 P.3d 194, 197 (2003). The determination of when a cause of action

for inverse condemnation accrues is well settled in Idaho. The Idaho Supreme Court has held that a cause of action for a taking of this nature accrues at the time of the taking. *McCuskey v. Canyon Cnty Comm'rs*, 128 Idaho 213, 217, 912 P.2d 100, 104 (1996) (underlining added). In other words, "[t]he time of taking occurs, and hence the cause of action accrues, as of the time that the full extent of the plaintiff's loss of use and enjoyment of the property becomes apparent." *Id.* The Idaho Supreme Court has also held that a property owner cannot maintain an inverse condemnation action 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) (*citing Covington v. Jefferson County*, 137 Idaho 777, 53 P.3d 828 (2002)).

In this case, Plaintiffs' inverse condemnation action seeks just compensation for the money taken under the Road Development Agreement executed on September 26, 2005. Valley County's reliance on the date of issuance of the Conditional Use Permit or the dates of execution for the Capital Contribution Agreement and/or Road Development Agreement are not the proper analysis for determining when Plaintiffs' inverse condemnation cause of action accrued. On those three dates no property was taken and therefore there can be no violation of the Idaho or Federal constitution until that has occurred. *See e.g. Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985) ("the Constitution does not require pretaking compensation").

As indicated in *McCuskey* the cause of action accrues when Plaintiffs' loss and enjoyment of the property becomes apparent. Plaintiffs drew the cashier's check in the amount of $236,160 on December 15, 2005. *See* Mailhot Affidavit, ¶ 4, Ex. A. On or shortly after that check was issued, it was given to Valley County as payment under the Road Development Agreement. Therefore, at the very earliest, the limitations period for filing an inverse condemnation claim seeking just compensation for the $236,160 that had been taken would have

been December 15, 2009. It was at that point that Plaintiffs were deprived of their money (i.e property) and their claim accrued. The record reflects that the Complaint was filed December 9, 2009 which is within the four year statute of limitations.

B. Plaintiffs' Invalidation of Contract Theories Are Timely Filed.

It is important to note in this case that the mechanism for enforcing the collection of money, dedication of right-of-way or providing in-kind construction was through a Capital Contribution Agreement and/or a Road Development Agreement, which are both contracts. The Capital Contribution Agreement was Valley County's precursor to the use of Road Development Agreements. (Cruickshank Depo., p. 50, l. – p. 51, l. 10.). Like a Capital Contribution Agreement, the Road Development Agreement is aimed at having developers pay to mitigate for impacts placed on county roads by their projects. The limitations period for an action founded upon a written instrument is five (5) years. I.C. § 5-216.

Plaintiffs' have requested in their Complaint declaratory relief declaring that the Road Development Agreement executed on September 26, 2004, is *void ab initio*. Plaintiffs' theories for declaring the Road Development Agreement void is two-fold. First, the Road Development Agreement is void because Valley County cannot circumvent the requirements of IDIFA by forcing developers to enter into a contract to pay an impact fee. There was no legal basis to require Plaintiffs to enter into the agreements. Second, the Road Development Agreement is void because Plaintiffs entered into the contract under duress.

Idaho Courts recognize that a contract for the transfer of property, even where it has been fully performed can be rescinded by judicial decree for, among other reasons, duress. "Executed contracts 'under which the chose is vested ordinarily can be rescinded only by mutual consent or judicial decree." *Lowe v. Lym*, 103 Idaho 259, 261-262, 646 P.2d 1030, 1032 - 1033 (Ct. App. 1982). Likewise, Idaho law recognizes rescission as an equitable remedy that totally abrogates

the contract and seeks to restore the parties to their original position prior to the contract. *Primary Health Network, Inc. v. State, Dept. of Admin.* 137 Idaho 663, 668, 52 P.3d 307, 312 (2002). The basis for obtaining a judicial decree rescinding a contract may arise from duress. Courts have determined that duress exists where: (1) one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party. *Lomas & Nettleton Co. v. Tiger Enterprises, Inc.*, 99 Idaho 539, 542-543, 585 P.2d 949, 952 - 953 (1978).

Plaintiffs' causes of action to declare the Road Development Agreement void are "actions founded upon a written instrument." Plaintiffs' Road Development Agreement was executed on September 26, 2005. Since the limitations period for an action founded upon a written instrument is five (5) years (I.C. § 5-216), the filing of Plaintiffs' Complaint on December 9, 2009 is timely.

C. All Remaining Statute of Limitations Cited By Valley County Are Inapplicable.

Valley County argues Plaintiffs' claims should be dismissed because the two-year limitations for claims for a 42 U.S.C. § 1983 action, the three-year statute of limitation for the taking of personal property; and the six-month statute of limitations for claims against a county are applicable. Valley County is incorrect.

First, as explained above, Plaintiffs have not sought relief under 42 U.S.C. § 1983, nor were they required to do so to maintain an inverse condemnation action for a violation of the Fifth Amendment. The two-year statute of limitations under Idaho Code § 5-219(4) is simply not applicable. The same conclusion is also applicable to Plaintiffs' state based inverse condemnation action for violations of Article 1, § 14 of the Idaho Constitution. There are no decisions from the Idaho appellate courts holding that an action for a state based inverse condemnation must be brought under 42 U.S.C. § 1983 or that the statute of limitations for

inverse condemnation is two years. The Idaho Supreme Court has held that I.C. § 5-224 contains the statute of limitations for an inverse condemnation claim. *See Wadsworth v. Dep't. of Transp.*, 128 Idaho 439, 441-42, 915 P.2d 1, 3-4 (1996) (*citing McCuskey v. Canyon County Comm'rs*, 128 Idaho 213, 912 P.2d 100 (1996) (I.C. § 5-224 states: "[a]n action for ... [inverse condemnation] ... must be commenced within four (4) years after the cause of action shall have accrued")).

The three year statute of limitations under Idaho Code Section 5-218 also does not apply to Plaintiffs' claims. Section 5-218 applies to, among other things, claims for trespass, replevin, trover, fraud, mistake or actions involving the taking or detaining of goods or chattels, or for specific recovery of personal property. As to the taking of personal property, Section 5-218 applies to the tortious taking, detaining or injuring of personal property. *Common School Dist. No. 18, In Twin Falls Cnty v. Twin Falls Bank & Trust*, 52 Idaho 200, 207, 12 P.2d 774 (1932). Valley County attempts to argue that because money is personal property, Plaintiffs' claims are subject to this three-year limitation. Plaintiffs' claims are not based on a tortious taking, detaining or injuring of personal property as contemplated by Section 5-218. Further, Valley County cannot point to any Idaho case where this statute of limitations applied to actions by a governmental entity for the taking of property because there is no such case. This limitation of action simply does not apply to such claims and does not apply to any of the claims brought by Plaintiffs in this action.

The six-month limitations period under Idaho Code Section 5-221 is also inapplicable. Section 5-221 provides that "claims against a county which have been rejected by the board of commissioners must be commenced within six (6) months after the first rejection thereof by such board." There have been no rejections in this case. Additionally, Idaho Code Section 5-221 is a

general statute of limitations and will not apply when a specific statute controls the limitations period. *Walker v. Shoshone Cnty*, 112 Idaho 991, 994, 739 P.2d 290, 294 (1987).

III. Plaintiffs Had No Obligation To Exhaust Administrative Remedies.

Valley County argues that summary judgment should be granted because Plaintiffs could have objected or otherwise filed an appeal to the conditions of approval, but did not do so.

A. Exceptions to exhaustion of administrative remedies apply in this case.

Plaintiffs had no obligation to exhaust any administrative remedies. As a general rule, a party must exhaust administrative remedies before resorting to the courts to challenge the validity of administrative acts. *Arnzen v. State*, 123 Idaho 899, 906, 854 P.2d 242, 249 (1993). The Idaho Supreme Court has recognized exceptions to that rule in two instances: (a) when the interests of justice so require, and (b) when the agency acted outside its authority. *Regan v. Kootenai County*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004).

Plaintiffs' claims meet both exceptions to the general rule of exhaustion. First, Valley County acted outside its authority by conditioning approval of Plaintiffs' development upon the payment of impact fees without first meeting the requirements of IDIFA. Second, the interests of justice also compel application of the exhaustion exception – the public has an interest in local governments adhering to the laws and processes enacted by the Idaho Legislature before exacting impact fees. Thus, the exception to the exhaustion of administrative remedies requirement applies in this case.

The Local Land Use Planning Act also specifically exempts an affected party from exhausting administrative remedies if that party's claim involves a claim for inverse condemnation. Generally, Idaho Code § 67-6521(1)(d) permits an aggrieved party, after exhausting administrative remedies, to petition a court for judicial review. However, subsection

(2)(b) of that statute exempts a party from exhausting administrative remedies for claims for just compensation. Subsection (2)(b) states in pertinent part:

> (2)(b) An affected person claiming "just compensation" for a perceived "taking," the basis of the claim being that a final action restricting private property development is actually a regulatory action by local government deemed "necessary to complete the development of the material resources of the state," or necessary for other public uses, may seek a judicial determination of whether the claim comes within defined provisions of section 14, article I, of the constitution of the state of Idaho relating to eminent domain. Under these circumstances, the affected person is exempt from the provisions of subsection (1) of this section and may seek judicial review through an inverse condemnation action specifying neglect by local government to provide "just compensation" under the provisions of section 14, article I, of the constitution of the state of Idaho and chapter 7, title 7, Idaho Code.

I..C. § 67-6521(2)(b). Plaintiffs have followed the guidance of that statute and have filed an action for inverse condemnation. The requirement that Plaintiffs exhaust administrative remedies is not applicable when its claims are for inverse condemnation.

Valley County argues that under *KMST, LLC v. County of Ada*, 138 Idaho 557, 67 P.3d 56 (2003), the exceptions to the exhaustion requirement do not apply to this case because the exceptions only apply to facial challenges of ordinances and statutes. This position is incorrect. Foremost, no Idaho case stands for the proposition asserted by Valley County. Valley County attempts to manipulate the holding in the *White v. Bannock County Commissioners*, 139 Idaho 396, 80 P.3d 332 (2003) to stand for the proposition that the exhaustion exceptions only apply to "facial" challenges, but admits in footnote 15 of its brief that: "... although the Court did not say so in so many words, it is inescapable from *White* that the exhaustion exception does not apply to 'as applied' constitutional challenges." (underlining added). *White* does not lead to any such inescapable conclusion. The decision does not even use the terms "as applied" or "facial", or analyze the exceptions to the exhaustion requirement other than to summarily state at the conclusion of the decision that the exceptions did not apply to the case. Neither White nor any

other Idaho case holds that the exhaustion exceptions apply only to "facial" challenges. *See Also, American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 870-73, 154 P.3d 433, 441-43 (2007) (stating that in an "as applied" challenge, administrative remedies must first be exhausted for purposes of establishing a factual record when the traditional exceptions to the exhaustion requirement do not apply).

B. Plaintiffs' claims involve a facial challenge to the County's policies and ordinances.

Even if Valley County's argument that the exhaustion exceptions only apply to facial challenges, this case involves a facial challenge to Valley County's Capital Improvements Program and related ordinances. Joseph Pachner, the project manager for The Meadows testified in his affidavit that he is familiar with Valley County's Land Use Development Ordinance ("LUDO") and that he reviewed the LUDO so he would know what was required to have a complete application. *See* Pachner Affidavit, ¶¶ 4-8, Ex. A. Mr. Pachner reviewed the LUDO provision applicable to PUD projects which states in relevant part:

> **I. DEVELOPMENT AGREEMENT**
>
> Because of the uniqueness of each proposal a PUD may impact county services and/or property which may be mitigated through a Development Agreement. Compensation for these impacts ***shall be*** negotiated in work sessions with appropriate county entities and ***a Development Agreement shall be entered into between the applicant and the county*** through the Board as additional conditions considered for approval of a PUD.
>
> **J. IMPACT FEES**
>
> The Commission may recommend to the Board impact fees as authorized by Idaho Code Section 31-870 for any PUD proposal. The Board may implement the impact fees as recommended by the Commission or as it deems necessary for the proposal.

(emphasis added). According to Mr. Pachner, based on the LUDO provisions and discussions with Valley County engineer Pat Dobie and Planning Administrator Cynda Herrick, he submitted

the proposed development agreement and proposed capital contribution agreement ("Proposed Agreements") because it was required by Valley County. *See Id.*

Sections "I" and "J" of the LUDO relating to the collection of impact fees cannot be implemented by Valley County unless it follows the requirements of IDIFA. Plaintiffs have sought in their Complaint a declaration that the practice or policy be declared illegal and therefore this action involves a facial challenge.

C. Administrative Remedies Do Not Provide Relief Plaintiffs Seek.

The administrative appeal process would not provide Plaintiffs the proper remedy as the County suggests. The Idaho Supreme Court has distinguished the difference between an administrative appeal and a civil action. The court in *Euclid Avenue Trust v. City of Boise*, 146 Idaho 306, 193 P.3d 853 (2008) held that an administrative appeal and a civil action may not be combined in one proceeding. The *Euclid* court reasoned:

> The separation of civil actions and administrative appeals is supported by good policy underpinnings. After all, one proceeding is appellate in nature and the other is an original action. They are processed differently by our courts. Discovery is rarely available in a judicial review proceeding. The review is to be conducted on the record, absent specific authorization. I.C. § 67-5276. The standards for determining an outcome are specified by statute (I.C. § 67-5279), whereas this is not the case with actions seeking declaratory or monetary relief.

Id. at 308.

Here, Plaintiffs have pleaded inverse condemnation for its money that was taken, requested declaratory relief declaring that the Road Development Agreement is void and a declaration enjoining Valley County from enforcing its ordinances and policies to require Plaintiffs to enter into yet another contract for the payment of impact fees for its final phases. All of Plaintiffs' requests are civil actions that cannot be properly addressed by a court sitting in an appellate capacity on judicial review.

D. Plaintiffs Were Not Required To Object To Valley County.

Valley County argues that Plaintiffs should have raised and pressed their objections with the local government in a timely manner in order to set up their claim that their payment was involuntary. *See* Opening Brief In Support of Summary Judgment pg. 17. Although that statement was made in the context to analyzing the "finality test' in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), it is appropriate to include Valley County's argument under this exhaustion of remedies analysis. Valley County basically asks this Court to find that Plaintiffs should be precluded from maintaining this action because it did not object during the public hearings on its previous approvals for Phases 1 through 3. Valley County's arguments should be disregarded by this Court for two reasons.

First, there is no Idaho law requiring a party to object or otherwise pay under protest an illegal fee before it can be recovered. This was the Idaho Supreme Court's holding in *BHA Investments v. City Boise*, 141 Idaho 168, 108 P.3d 315 (2004), which involved a claim by a fee payer challenging the City of Boise's liquor transfer fee. The City of Boise argued that since the fee payer did not pay the fee under protest, the fee payer could not recover its money. The *BHA* court held "We have not held, however, that when a city imposes a fee that it has no authority to impose at all, such fee must be paid under protest before it can be recovered. If it has no authority to impose any fee at all, it does not matter whether the fee imposed bears a reasonable relationship to the services provided. It is illegal regardless of the amount of the fee." *Id.* at 176. Valley County failed to enact an impact fee ordinance pursuant to IDIFA and by failing to do so, it had no authority to impose an impact fee. Plaintiffs were not required to raise their objections prior to paying the impact fee.

Second, Plaintiffs had no reason to question Valley County's LUDO at the time of the public hearings on its CUP/PUD application. The Idaho Supreme Court has recognized that a

county's ordinance is presumed valid until the contrary is shown. *State v. Clark*, 88 Idaho 365, 377, 399 P.2d 955, 962 (1965). The party attacking an ordinance bears the burden of proving it is illegal. *Id.* Just as the courts presume ordinances are valid, the general public must have some confidence in local government and likewise presume that laws local governments pass are legal. Plaintiffs read Valley County's LUDO provisions that required mitigation of impacts through a development agreement, the LUDO states that impact fees can be charged, and Valley County representatives told Plaintiffs' project manager that Plaintiffs had to mitigate for traffic impacts. As members of the general public, Plaintiffs would have had no reason to doubt Valley County's actions especially in light of the fact that there is in fact a state statute (the IDIFA) that authorizes local government to collect impact fees. Based on these facts it would be unconscionable to place a heightened burden on Plaintiffs to examine every detail of Valley County's ordinances to ensure that they were properly promulgated pursuant to state statute before paying a fee that Valley County required.

III. Material Issues of Fact Regarding Plaintiffs' Alleged Voluntary Acts Precludes Summary Judgment.

Valley County argues that summary judgment should be granted because Plaintiffs' payments were made voluntarily by submitting the proposed Capital Contribution Agreement and proposed Development Agreement ("Proposed Agreements"). Valley County argues that the act of including the Proposed Agreements is analogous to the facts in *KMST, LLC v. County of Ada*, 138 Idaho 557, 67 P.3d 56 (2003) and therefore no taking had occurred. Valley County is incorrect.

"On a motion for summary judgment, a court liberally construes all disputed facts in favor of the non-moving party, and draws all reasonable inferences and conclusions supported by the record in favor of the non-moving party." *Herman ex rel. Herman v. Herman*, 136 Idaho

781, 783-784, 41 P.3d 209, 211 - 212 (2002). "If reasonable people could reach different conclusions or draw conflicting inferences from the evidence, the motion must be denied. *Id.*

In this case, the affidavit of Joseph Pachner sets forth in detail the nature and history of why the Proposed Agreements were included in Plaintiffs' application for The Meadows. As discussed above, Mr. Pachner testified that he reviewed the LUDO provisions which required a development agreement to mitigate impacts. *See* Pachner Affidavit, ¶¶ 4-8, Ex. A. Mr. Pachner testified that he also met with Valley County engineer Pat Dobie and Planning Administrator Cynda Herrick that informed him that a road fee would be assessed for mitigation of traffic. Pachner Affidavit, ¶ 6. Contrary to Valley County's assertions, the Proposed Agreements were submitted because they were required, not because Plaintiffs offered up the idea of wanting to pay to mitigate for traffic impacts. Mr. Pachner's affidavit creates genuine issues of material fact that preclude summary judgment.

The affidavit of DeMar Burnett, a sitting Valley County Planning and Zoning Commissioner at the time The Meadows application was heard, corroborates Mr. Pachner's statements and demonstrates that Valley County required developers to enter into a contract for the payment of impact fees. Mr. Burnett testified that on February 14, 2004, the Valley County engineer at that time, Pat Dobie met with Valley County's Planning and Zoning Commission to discuss traffic impacts in the "Donnelly to Tamarack-Road Improvement Plan," which included West Roseberry Road. *See* Burnett Affidavit, ¶¶ 4-5, Exs. A, B. The meeting minutes on that day and Mr. Burnett's Affidavit reveal that Pat Dobie asked that the Planning and Zoning Commissioners make a condition of approval that developers pay $1,844.00 per lot. *Id.*

Mr. Burnett testifies that based on that transportation meeting, the issue was raised during the public hearing on Plaintiffs' application for its CUP/PUD on May 17, 2004. *Id.* The meeting minutes and Mr. Burnett's testimony show that a Planning and Zoning Commissioner asked Pat

Dobie whether developers in that area would be required to pay the impact fee addressed by Mr. Dobie during the February 12, 2004 Transportation Meeting. *Id.* Mr. Dobie responded that the Plaintiffs would be required to pay a fee of approximately $1,800. *Id.* The affidavit of Mr. Burnett and the meeting minutes of the February 12, 2004 and May 17, 2004 of the Planning and Zoning meetings establish genuine issues of material fact that Plaintiffs' payments were not voluntary.

Current Valley County Commissioner and former Valley County Road Superintendant, Gordon Cruickshank's deposition testimony demonstrates that Valley County required developers regardless of whether is was an application for a residential subdivision or a PUD to pay to mitigate for traffic impacts. Mr. Cruickshank openly admitted that the road development agreement and payment of monetary fees or an in-kind equivalent[1] to mitigate for road impacts was "required." *See* Cruickshank Depo., p. 59, l. 24 – p. 60, l. 14; p. 88, l. 12 – p. 90, l. 16; p. 136, l. 18 – p. 138, l. 21. Mr. Cruickshank also testified that during his meetings with developers he never told anyone that the fees were only voluntary. *See* Cruickshank Depo., p. 77, l. 11 – p. 82, l. 2; pp. 140-153, l. 6. Mr. Cruickshank also couldn't point to a single document published by the County prior to filing of this lawsuit that said the Capital Improvement Program/Road Development Agreement was voluntary. *Id.*

The requirement that a developer enter into a Road Development Agreement became a standard condition of approval on all development applications. *See.* Herrick Depo., pp. 65-68. Moreover, Valley County's Planning and Zoning Commission was instructed by the Valley County Commissioners to place a condition of approval on all development applications that the applicants enter into a Road Development Agreement. *See* Davis Depo., p. 110-111; Burnett

[1] Mr. Cruickshank testified that mitigation payment under the Capital Improvements Program and associated Road Development Agreement could be mitigated through payment of fees, in-kind construction or giving right-of way. Gordon Cruickshank Deposition. pg. 40, L. 11 thru pg. 42, L. 18; pg. 88 L. 12 thru pg. 90, L. 16.

Affidavit, ¶ 2. The Road Development Agreement language itself was a standardized form contract with only the variation being the amounts required for mitigating impacts. *See*, Cruickshank Depo., p. 125, ll. 2-7; Herrick Depo., p. 101-104.

At least one land use applicant attempted to submit her own version of a Road Development Agreement saying that she was dedicating right-of-way under protest, but that version was rejected. *See* Seastrom Affidavit, ¶ 5. Even when a fully built road did exist to serve a development, a Road Development Agreement was still required. *See* Loomis Affidavit, ¶ 5. Valley County's alleged voluntary program even forced one land use applicant to request an extension on their application for a single lot split because they did not have the money to pay the impact fees being assessed under the Road Development Agreement despite the fact that the lot split did not create any new or additional road impacts. *See* Millington Affidavit, ¶¶ 2-8.

The requirement that developers enter into a Road Development Agreement with the County resulted in the payment of something of value as mitigation for impacts on county roads. On this point the depositions of Gordon Cruickshank and Phillip Davis illustrate that there was no "negotiation." It was not a "negotiation" to require developers, as a condition of approval, to pay money, dedicate right-of-way or provide in-kind construction. *See* Cruickshank Depo., p. 40, l. 11 – p. 42, l. 18, p. 88 l. 12 – p. 90, l. 16; Davis Depo., p. 93, l. 3 – p. 96, l. 12. This requirement fits squarely within IDIFA's definition of a 'development requirement' which is defined as:

> ...a requirement attached to a developmental approval or other governmental action approving or authorizing a particular development project including, but not limited to, a rezoning, which requirement compels the payment, dedication or contribution of goods, services, land, or money as a condition of approval.

I.C. § 67-8203(10) (underlining added).

The affidavit of Joseph Pachner, affidavit of DeMar Burnett, affidavits of other nonparty witnesses, and the deposition testimony of current and former Valley County officials all

establish genuine issues of material facts. The payment of impact fees was not voluntary, but rather it was a formal County policy that required payment as a condition to approval of an application.

Valley County's reliance on the facts and holding of *KMST, LLC v. County of Ada*, 138 Idaho 557, 67 P.3d 56 (2003) as being indistinguishable to the facts of this case is in error. In *KMST* the property owner, prior to submitting its land use application, met twice with the supervisor of ACHD's Development Services Division in order to determine what the ACHD staff recommendations regarding its development were going to be. *KMST*, at 579-580. The ACHD supervisor informed the property owner that "he would recommend that KMST be required to construct a street...and dedicate that street to the public." *KMST*, at 580. Based on that conversation, the property owner submitted, along with its application, a statement that it would construct a public street and that such street would be the primary access for the development. *Id.*

The *KMST* court held that no taking had occurred because ACHD had no final authority to approve or reject the property owners' proposed development. *KMST*, at 582. Moreover, the court, in *dicta*, stated that even if ACHD did have final authority to approve some aspect of the development, there was no taking because the property owner had voluntarily included the dedication of the street based on the conversation it had with the ACHD supervisor. *Id.*

In the present case and contrary to the facts in *KMST*, voluntariness on the part of Plaintiffs to pay money and dedicate right-of-way to mitigate for traffic impacts is clearly lacking. This case does not deal with a simple pre-application meeting between a developer and a county staff member regarding what will be recommended to the governing board. Rather, the affidavits of Joseph Pachner, DeMar Burnett, and other nonparty witness affidavits coupled with the deposition testimony of Gordon Cruickshank, Phillip Davis, Cynda Herrick and Frank Eld

demonstrate that Valley County's Capital Improvement Program and ordinances was a predetermined policy reviewed and implemented by the Valley County Commissioners to make all development applications pay to mitigate for traffic impacts allegedly caused by their proposed development.

Plaintiffs' CUP/PUD contained a standard condition of approval that was placed on all development applications that required the Plaintiffs to enter into a Capital Contribution Agreement and later a Road Development Agreement to mitigate for traffic impacts. Plaintiffs and their project engineer Mr. Pachner were fooled by Valley County's PUD ordinance and statements from Valley County representatives into believing that Valley County can require the payment of impact fees as a condition of approval. Those material facts do not make Plaintiffs' action "voluntary" as contemplated by the *KMST* holding.

Valley County's uniform practice of requiring developments to mitigate for traffic impacts is further corroborated by the affidavits submitted by nonparty witnesses Robert Fodrea, Ann Seastrom, DeMar Burnett, Henry Rudolph, Matt Wolf, Steve Millington, Steve Loomis, Rodney Higgins and Dan Brumwell. All these witnesses testified that they applied for CUPs and were required to enter into a Road Development Agreement to mitigate impacts on county roads generated by their developments. This Court need merely review the Road Development Agreements attached to these witnesses' affidavits and compare them to Plaintiffs' Road Development Agreement to see that all read materially the same and all require the payment of money, dedication of right-of-way and/or in-kind construction as means of mitigating traffic impacts. All of the nonparty witnesses testify that they were never advised that the Road Development Agreement and the fees under the Capital Improvements Program were voluntary, that they may negotiate the terms of the Road Development Agreement or the fee, or that they had an option not to pay the fee. Valley County's Capital Improvements Program and its Capital

Contribution Agreement/Road Development Agreement is not, and never was, a voluntary program.

Viewing the evidence in the light most favorable to the non-moving party, Plaintiffs have demonstrated that genuine issues of fact exist contradicting Valley County's alleged voluntary act argument. In fact, based on the documents and testimony submitted, Plaintiffs believe they have conclusively proven that they were required to pay an illegal impact fee.

IV. The *Williamson County* Ripeness Tests Do Not Apply.

Valley County argues that Plaintiffs' lawsuit does not satisfy the two-part ripeness test established in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). The two-part test requires that: (1) the governmental entity reach a final decision; *Id.* at 186 and (2) in federal court litigation involving regulatory takings, the property owner must "seek compensation through the procedures the State has provided for doing so" *Id.* at 194.

A. *Williamson County's* First Ripeness Test Is Distinguishable And Even If Applicable In This Case Has Been Met.

Valley County attempts to roll its exhaustion of administrative remedies arguments into its analysis of *Williamson County's* first ripeness stating that Plaintiffs "should have raised and pressed their objections with the local government in a timely and meaningful way in order to set up their claim that the exaction is involuntary." *See* Valley County's Opening Brief In Support of Summary Judgment, p. 17. Valley County misconstrues the *Williamson County* holding.

In *Williamson County* a land owner sued Williamson County alleging that the county's zoning ordinance amounted to a taking in violation of the Fifth Amendment. *Williamson County* at 105 U.S. 175. The developer's arguments centered on a regulatory taking claim. Citing to cases such as *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, (1978), the *Williamson County* court recognized that a regulation that goes 'too far' can be a 'taking' but for the claim to

be ripe, the government entity charged with implementing the regulation has to reach a final decision. *Williamson County*, at 186. The *Williamson County* court held that the land owner's claim in that case was not ripe because the land owner could have sought a variance from the decision maker by holding "As the Court has made clear in several recent decisions, a claim that the application of a government regulation effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County* at 191.

Plaintiffs' claim is distinguishable from the facts in *Williamson County* because their claim does not involve a regulatory taking, but rather an actual physical taking of its property. Specifically, Plaintiffs were required, and did in fact pay money and dedicate right-of-way to be used for public roadway improvements as mitigation for traffic impacts. The *Williamson County* holding has no analysis of whether the first prong (the "finality test") applies when an actual takings has occurred.

Even assuming that the test applies, the Ninth Circuit has held that the *Williamson County* "finality" test is met where a physical taking has already occurred. In *Daniel v. County of Santa Barbara*, 288 F.3d 375, 382 (9th Cir.2002), the court held "[t]he first *Williamson County* requirement is automatically satisfied at the time of the physical taking. *See also Hall v. City of Santa Barbara*, 833 F.2d 1270, 1281 n. 28 (9th Cir.1986) (stating that "Where there has been a physical invasion, the taking occurs at once, and nothing the city can do or say after that point will change that fact."), *overruled on other grounds by Yee v. City of Escondido*, 503 U.S. 519 (1992))." Since Valley County has already taken Plaintiffs' money and property, the finality test has been met in this case.

B. *Williamson County's* Second Ripeness Test Is Inapplicable.

Valley County argues that Plaintiffs' inverse condemnation claim fails to meet this test because it should have sought judicial review of the County's actions. Valley County misinterprets the *Willimason County*'s second test. The second prong of the *Williamson County* test requires that the property owner must first seek just compensation through state inverse condemnation and be denied before litigating in federal court. *Williamson County* at 194. The Plaintiffs have filed this action before this state court seeking among other things, inverse comdemnation and therefore the second ripeness test is inapplicable.

C. Plaintiffs Due Process Claims are distinguishable from the Williamson County Ripeness Tests.

In *Williamson County* the court dismissed the landowner's procedural due process claims as unripe by holding "respondent's claim is premature, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment." *Williamson County* at 200. Valley County relies on that particular quote, without anymore analysis to argue that Plaintiffs' due process claims is just a reframing of the taking issue and therefore does not change the outcome. Valley County fails to recognize the important factual distinctions between *Williamson County* and this present case.

The ripeness issues relative to due process claims discussed by the *Williamson County* court dealt with the first ripeness test of 'finality' in the context of a regulatory taking and are therefore inapplicable in this case. In addressing the land owner's due process arguments, the Court held that the due process claim was not ripe for review because it could not determine whether the regulation went 'too far':

> Viewing a regulation that 'goes too far' as an invalid exercise of the police power, rather than as a 'taking' for which just compensation must be paid, does not resolve the difficult problem of how to define 'too far,' that is, how to distinguish

> the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. As we have noted, resolution of that question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property.

Williamson County at 199-200.

The law and facts in this case do not present the same ripeness concerns faced by the *Williamson County* court. Valley County has already imposed as condition of approval for final plat that Plaintiffs enter into a contract to pay to mitigate for traffic impacts. The issue of whether Valley County can condition approval of a land use application upon the payment of an impact fee is expressly answered by the Idaho legislature through its enactment of the IDIFA. For example, IDIFA requires that an impact fee ordinance be enacted prior to a governmental entity collecting impact fees and that a public hearing with notice of the time, place and purpose be stated (I.C. §§ 67-8204 and 67-8206), the ordinance must contain a provision allowing a developer to submit an individualized assessment of the proportionate share (I.C. § 67-8204), a development impact fee advisory council must be established before fees are collected (I.C. § 67-8205), and the governmental entity must provide in its ordinance for administrative appeals and mediation (I.C. § 67-812).

Based on the analysis above, this Court can readily determine whether Valley County's Capital Improvement Program and Road Development Agreement have gone 'too far' by analyzing whether the County's ordinances and policies meet the requirements of the IDIFA.

V. An Actual Case or Controversy Exists Appropriate For Declaratory Relief.

Valley County argues that Plaintiffs' claims as to future action is not ripe for a declaratory action. The test of whether a declaratory action may be maintained is not whether a claim is ripe in the sense of bringing a coercive action. Rather, to support a declaratory

judgment there must be an actual case or controversy among the parties. "A declaratory judgment action must raise issues that are definite and concrete, and must involve a real and substantial controversy as opposed to an advisory opinion based upon hypothetical facts. Ripeness asks whether there is any need for court action at the present time." *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 642 778 P.2d 757, 764 (1989). The criteria for determining whether to grant a declaratory judgment is whether it will clarify and settle the legal relations at issue, and whether such declaration will afford relief from uncertainty and controversy giving rise to the proceeding. *Schneider v. Howe*, 142 Idaho 767, 773, 133 P.3d 1232, 1238 (2006) *Schneider* at 142 Idaho 674. The *Schneider* Court continued by holding:

> If deferring the adjudication 'would add nothing material to the legal issues presented' so that a court will be in no better position in the future and if a declaration of the rights of parties will 'certainly afford a relief from uncertainty and controversy in the future' the case may be presently ripe for adjudication.

Id. quoting Miles v. Idaho Power Co., 116 Idaho 635, 641, 642 778 P.2d 757, 764 (1989).

In this case, an actual case or controversy exists between the parties. Plaintiffs seek a declaration that the Road Development Agreement that Valley County required it to sign and the resultant impact fees it had to pay violate Idaho's IDIFA because Valley County did not enact an impact fee ordinance. Therefore, the contract must be declared void and the money returned to Plaintiffs. An actual case or controversy also exists with respect to the final plat for Plaintiffs' remaining phases of The Meadows. A declaration will remove the uncertainty whether Valley County can legally require Plaintiffs to enter into a contract again for the payment of impact fees as a condition for receiving final plat approval on its remaining phases.

VI. Valley County Cannot Rely On Equitable Principles To Justify Its Illegal Conduct.

Valley County argues that principles of equity namely, unjust enrichment, laches promissory estoppel and waiver should bar Plaintiffs' causes of action. Valley County cannot, however, hide behind equitable theories to justify its own illegal conduct. The doctrine of

unclean hands allows "a court to deny equitable relief to a litigant on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue." *Sword v. Sweet*, 140 Idaho 242, 251, 92 P.3d 492, 501 (2004).

In this case documentary evidence, deposition testimony and affidavits from Plaintiffs and nonparty witness developers establish that Valley County conditioned approval of land use development applications upon the payment of money, dedication of right-of-way or in-kind construction to mitigate traffic impacts. Despite Valley County's strained use of the word "voluntary," it cannot escape the fact that it required Plaintiffs and other land use applicant to pay an impact fee. The use of a contract (i.e. the Road Development Agreement) to circumvent very specific state law requirements is inequitable, unfair and is dishonest conduct which prevents equitable relief the County seeks.

CONCLUSION

For the reasons stated above Plaintiffs request that this Court deny Valley County's Motion for Summary Judgment.

DATED this 2nd day of November, 2010.

EVANS KEANE LLP

By _____
Victor Villegas, Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of November, 2010, a true and correct copy of the foregoing document was served by first-class mail, postage prepaid, and addressed to; by fax transmission to; by overnight delivery to; or by personally delivering to or leaving with a person in charge of the office as indicated below:

Matthew C. Williams Valley County Prosecutor P.O. Box 1350 Cascade, ID 83611 Telephone: (208) 382-7120 Facsimile: (208) 382-7124	[X] U.S. Mail [ ] Fax [ ] Overnight Delivery [ ] Hand Delivery
Christopher H. Meyer Martin C. Hendrickson Givens Pursley LLP P.O. Box 2720 Boise, ID 83701-2720 Telephone: (208) 388-1200 Facsimile: (208) 388-1300	[ ] U.S. Mail [ ] Fax [ ] Overnight Delivery [X] Hand Delivery

Victor Villegas

ORIGINAL

Jed Manwaring ISB #3040
Victor Villegas ISB# 5860
EVANS KEANE LLP
1405 West Main
P. O. Box 959
Boise, Idaho 83701-0959
Telephone: (208) 384-1800
Facsimile: (208) 345-3514
e-mail: jmanwaring@evanskeane.com
Vvillegas@evanskeane.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

BUCKSKIN PROPERTIES, INC. an Idaho Corporation, and TIMBERLINE DEVELOPMENT, LLC, an Idaho Limited Liability Company, **Plaintiff,** **vs.** **VALLEY COUNTY, a political subdivision of the State of Idaho.** **Defendant.**	**Case No. CV-2009-554-C** **AFFIDAVIT OF DAN R. BRUMWELL**

STATE OF WASHINGTON)
) ss.
County of Spokane)

DAN R. BRUMWELL, being duly sworn upon oath deposes and says as follows:

1. That I am an adult over the age of eighteen (18) years, that I am a resident of Liberty Lake, Washington, and that I have personal knowledge of the facts set forth in this Affidavit.

2. My wife and I applied to Valley County for a conditional use permit ("CUP") to construct the Little Pearsol Estates Subdivision located in Valley County. My application was approved by the Valley County Planning and Zoning Commission on September 1, 2005, and CUP No. 05-42 was issued to me, effective August 30, 2005. A true and correct copy of the CUP is attached to this Affidavit as Exhibit A.

3. Condition No. 6 of the CUP states that I shall enter into a Development Agreement with Valley County. In fulfilling the conditions of the CUP and in order to obtain approval of the final plat for Little Pearsol Estates Subdivision, I was required to enter into a Road Development Agreement with Valley County and either pay the fee calculated by Valley County Engineer for the Little Pearsol 2006 Capital Improvement Area where Little Pearsol Estates Subdivision is located, or dedicate right-of-way and construct in-kind roadway improvements to Little Pearsol Road in lieu of paying the fee.

4. I did not offer to pay a fee, dedicate a right-of-way or construct in-kind improvements to mitigate for any impacts on county roadways attributable to traffic generated by Little Pearsol Estates Subdivision. Rather, Valley County required me to enter into the Road Development Agreement pursuant to the conditions placed on its CUP.

5. At no time in my meetings and interactions with any Valley County representative with regard to my CUP was I told or advised that the Road Development Agreement and payment of the fee was voluntary, or that I had an option not to enter into the Road Development Agreement. At no time in my meetings or interactions with Valley County representatives with regard to my CUP was I told or advised that the fee paid under the Road Development Agreement was negotiable or that I could elect not to pay a fee or not to construct in-kind improvements. At no time in my meetings or interactions with Valley County representatives

with regard to my CUP was I told or advised that the contents of the Road Development Agreement were negotiable or that I could strike certain parts or provisions of the Road Development Agreement.

6. Since Valley County imposed the Road Development Agreement and the associated fee, dedication of right-of-way or in-kind construction as a condition to receive a final plat, I believed that Valley County had legal authority to do so. Had I been advised by Valley County that payment of the fee, dedication of right-of-way or in-kind construction under the Road Development Agreement was negotiable or that I had an option not to pay the fee, dedicate a right-of-way or construct in-kind roadway improvements, I would not have signed the Road Development Agreement nor pay a fee, dedicate a right-of-way or construct roadway improvements on Little Pearsol Road.

7. I and my engineer Joe Pachner met with representatives of Valley County's Road Department and Planning and Zoning to explain that the fees being assessed as mitigation for impacts on county roads should not apply to my project because its main access was primarily state highway. During those meetings we were never informed that this Capital Improvements Program and the resulting Road Development Agreement was voluntary or otherwise not required. Simply put, I was required to give something of value whether it be money, property or in-kind construction to mitigate for impacts that my development placed on county roads.

8. I signed the Road Development Agreement on May 22, 2006. A true and correct copy of the Road Development Agreement is attached to this Affidavit as Exhibit B. Under the Road Development Agreement I had to pay Thirty Thousand Seven Hundred Twenty and no/100 Dollars ($30,720.00). In lieu of paying money directly to Valley County, I could dedicate right of way along Little Pearsol Road and provide in-kind construction to a portion of Little Pearsol

Road as a means of meeting the $30,720.00 fee. I opted to dedicate the right-of-way and pay for and undertake the construction of in-kind improvements to Little Pearsol Road instead of paying the fee directly to Valley County. I was not given an option to proceed with the development of Little Pearsol Estates without improvements to Little Pearsol Road.

9. I did not voluntarily enter into the Road Development Agreement with Valley County or voluntarily incur the costs of the in-kind construction under the agreement. I did so only because Valley County required it as a condition to approval of the final plat for Little Pearsol Estates.

DAN R. BRUMWELL

SUBSCRIBED and SWORN to before me this 28 day of October, 2010.

KIMBERLY A ANGLIN NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES JANUARY 12, 2011

Notary Public for ~~Idaho~~ WA
Residing in Spokane
My Commission Expires: Jan 12, 2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2 day of November, 2010, a true and correct copy of the foregoing document was served by first-class mail, postage prepaid, and addressed to; by fax transmission to; by overnight delivery to; or by personally delivering to or leaving with a person in charge of the office as indicated below:

Matthew C. Williams Valley County Prosecutor P.O. Box 1350 Cascade, ID 83611 Telephone: (208) 382-7120 Facsimile: (208) 382-7124	[X] U.S. Mail [ ] Fax [ ] Overnight Delivery [ ] Hand Delivery
Christopher H. Meyer Martin C. Hendrickson Givens Pursley LLP P.O. Box 2720 Boise, ID 83701-2720 Telephone: (208) 388-1200 Facsimile: (208) 388-1300	[ ] U.S. Mail [ ] Fax [ ] Overnight Delivery [X] Hand Delivery

Victor Villegas

Planning and Zoning Commission
VALLEY COUNTY
IDAHO

Instrument # 9640
VALLEY COUNTY, CASCADE, IDAHO
2005-09-01 02:28:18 No. of Pages: 2
Recorded for : P & Z COMMISSION
LELAND G. HEINRICH
Ex-Officio Recorder Deputy
Index to: COUNTY MISC
Fee: 0.00

P.O. Box 1350/219 North Main Street/Cascade, Idaho 83611-1350

Phone: 208.382.7114
FAX: 208.382.7119

Date September 1, 2005

Approved by Gade Davis

CONDITIONAL USE PERMIT
NO. 05-42
Little Pearsol Estates

Issued to: Dan R. Brumwell and Susan Ashley-Brumwell
23507 E. 2nd Ave.
Liberty Lake, WA 99019

Property Location: Located in Section 28, T. 14N, R. 4E, B.M., Valley County, Idaho. The site is approximately 31.5 acres.

There have been no appeals of the Valley County Planning and Zoning Commission's decision of August 18, 2005. The Commission's decision stands and you are hereby issued Conditional Use Permit No. 05-42 with Conditions for establishing a single family subdivision as described in the application, staff report, and minutes.

The effective date of this permit is August 30, 2005. The plat must be recorded within one year or a permit extension in compliance with the Valley County Land Use and Development Ordinance will be required.

Conditions of Approval:

1. The application, the staff report, and the provisions of the Land Use and Development Ordinance are all made a part of this permit as if written in full herein.

2. Any change in the nature or scope of land use activities shall require an additional Conditional Use Permit.

3. The final plat shall be recorded within 90 days or this permit shall be null and void.

EXHIBIT A

4. The issuance of this permit and these conditions will not relieve the applicant from complying with applicable County, State, or Federal laws or regulations or be construed as permission to operate in violation of any statute or regulations. Violation of these laws, regulations or rules may be grounds for revocation of the Conditional Use Permit or grounds for suspension of the Conditional Use Permit.

5. The CCRs shall address wood burning devices, bear proof garbage containers, and lighting requirements.

6. A Development Agreement shall be required to be negotiated with the Board of County Commissioners. The Development Agreement may address road impacts and/or affordable housing requirements. The Planning and Zoning Commission recommends 10% of the lots be dedicated to the future housing authority as deed restricted lots.

7. Must comply with requirements of the Cascade Rural Fire District.

8. A final site grading plan and storm water drainage plan shall be approved by the Valley County Engineer.

9. Must provide an engineer certified determination of whether there is high ground water; and, if so, must determine top of foundation elevations for each building and identify them on the plat. A bench mark must be provided.

10. No lot splits.

11. Change proposed road name.

12. Applicant will negotiate with the Board of County Commissioner regarding placing money into a trust instead of dedicating 10% to the housing authority

END CONDITIONAL USE PERMIT

Instrument # 310036
VALLEY COUNTY, CASCADE, IDAHO
2006-06-21 08:51:18 No. of Pages: 7
Recorded for : VALLEY COUNTY COMMISSIONERS
LELAND G. HEINRICH Fee: 0.00
Ex-Officio Recorder Deputy
Index to: MISCELLANEOUS RECORD

Little Pearsol Estates

ROAD DEVELOPMENT AGREEMENT

THIS AGREEMENT is made this 22nd day of May, 2006, by and between Dan Brumwell, whose address is P.O. Box 1595, McCall, Id 83638, the **Developer** of that certain Project in Valley County, Idaho, known as Little Pearsol Estates, and **Valley County**, a political subdivision of the State of Idaho, (hereinafter referred to as "Valley County").

RECITALS

Developer has submitted a subdivision application to Valley County for approval of an 8 lot residential development known as Little Pearsol Estates.

Through the development review of this application, Valley County identified certain unmitigated impacts on public services and infrastructure reasonably attributable to the Project.

Developer has agreed to participate in the cost of mitigating these impacts by contributing its proportionate fair share of the cost of the needed improvements identified in the Agreement and listed on the attached Exhibit A.

Valley County and the Developer desire to memorialize the terms of their agreement regarding the Developer's participation in the funding of certain of the aforesaid improvements.

AGREEMENT

Therefore, it is agreed as follows:

1. *Capital Improvement Program*: A listing and cost estimate of the Little Pearsol Area 2006 Roadway Capital Improvement Program, incorporating construction and right-of-way needs for the project area (see map, Exhibit B) is attached as Exhibit A.
2. *Proportionate share*: Developer agrees to a proportionate share of the road improvement costs attributable to traffic generated by the Little Pearsol Estates subdivision as established by Valley County. Currently this amount has been calculated by the Valley County Engineer to be $480 per average daily vehicle trip generated by the Project. Refer to Exhibit A for details of the Little Pearsol Area 2006 Capital Improvement Program Cost Estimate. Road impact mitigation may be provided by Developer contribution of money or other capital offsets such as right-of-way, or in-kind construction. Such an offset to the road improvements is addressed in paragraph 3 of this Agreement.
3. *Capital contribution*: Developer agrees to pay a sum equal to $3,840 per lot (an average of 8 trips per single family residential lot times $480 per trip). The Developer's proportionate share of the road improvements identified in Exhibit A

EXHIBIT B

for the 8 lots shown on the subdivision application is $30,720 less the following offsets:

1) Dedicated roadway right-of-way (ROW) as shown on the Final Plat and more specifically described as: 20 feet of dedicated ROW along 100 feet of Little Pearsol Road and a 70 square foot remnant of ROW immediately east of Little Pearsol Road where Valley County already owns 100 feet of ROW. The total area of ROW donated is 2070 SF, or 0.05 Acres. The total value of the dedicated ROW is $700.

2) Design and construction by Developer of a portion of Little Pearsol Road from Warm Lake Road south approximately 410' to Samantha Drive (Little Pearsol Estates). The road shall be designed and constructed to a local road standard per Valley County's current Minimum Standards for Public Road Design and Construction.

Valley County and the Developer agree that the combined value of the dedicated ROW and the road design and construction is likely to exceed the Developer's proportionate share of the CIP roadway improvements ($30,720). The developer agrees to design and construct the portion of Little Pearson Road described above without additional compensation if costs exceed $30,720.

Prior to recordation of the Final Plat, the Developer herein agrees to bond or provide a letter a credit for 110% of their proportionate share of the CIP roadway improvements ($30,720) less the offsets for dedicated right-of-way ($700), for a total amount of $33,022.

4. The contributions made by Developer to Valley County pursuant to the terms of this Agreement shall be segregated by Valley County and earmarked and applied only to the project costs of the road improvement projects specified in Exhibit A or to such other projects as are mutually agreeable to the parties.

5. The sale by Developer of part or all of the Project prior to the platting thereof shall not trigger any payment or contribution responsibility. However, in such case, the purchaser of such property, and the successors and assigns thereof, shall be bound by the terms of this Agreement in the same respect as Developer, regarding the property purchased.

6. *Recordation*: It is intended that Valley County will record this Agreement. The intent of the recordation will be to document the official aspect of the contractual obligation set forth in this Agreement. This Agreement will not in any way establish a lien or other interests in favor of Valley County as to any real property owned by the Developer at the time of recording, or any real property that may be acquired by the Developer on any date after the recording of this Agreement.

Dan Brumwell, Developer

By: _____ Date: 5-22-06

VALLEY COUNTY BOARD OF COMMISSIONERS:

By: _____ Date: 6/12/06

Commissioner/Chairman F. Phillip Davis

By: _____ Date: 6-12-2006

Commissioner Thomas W. Kerr

By: _____ Date: 6-12-06

Commissioner F. W. Eld

ATTEST:

VALLEY COUNTY CLERK:

_____ Date: 6-12-06

Leland G. Heinrich

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 22nd day of May 2006, before me, Michael Jared Burgess, the undersigned, a Notary Public in and for said State, personally appeared Don Brumwell and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Notary Public for Idaho

Residing at: Boise

My Commission Expires: 6/12/09

MICHAEL JARED BURGESS NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 12 day of June 2006, before me, Joyce Mowry the undersigned, a Notary Public in and for said State, personally appeared Charles F. (Phillip) Davis, Thomas W. Kuss, E.W. Elder and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Notary Public for Idaho

Residing at: Cascade Idaho

My Commission Expires: 11-02-08

JOYCE A. MOWRY NOTARY PUBLIC STATE OF IDAHO

LITTLE PEARSOL AREA
2006 ROADWAY CAPITAL IMPROVEMENT PROGRAM COST ESTIMATE

ADOPTED BY VALLEY COUNTY BOARD OF COUNTY COMMISSIONERS

February 27, 2006

Exhibit A

LITTLE PEARSOL AREA
2006 ROADWAY CAPITAL IMPROVEMENT PROGRAM
COST ESTIMATE

Location: Little Pearsol Area

Study Boundary:

- North: Warm Lake Road
- South: Gold Dust Road and South Section Line of Sections 1, 2, 3 and 4, T13N, R4E
- West: SH-55
- East: East Section Line of Sections 23, 26, and 35, T14N, R4E; and East Section Line of Section 1, T13N, R4E

Roadway Engineering/Construction Costs

Classification	Length	Cost/Mile	Total
Local[1]	6.2 Miles	$500,000	$3,100,000
Minor Collector[2]	1.2 Miles	$300,000	$360,000
Additional Drainage Costs & Creek Crossings		$250,000	$250,000
		Sub Total	$3,710,000

[1]Full Reconstruction
[2]Cost adjusted for 1/2 split with Corral Creek Area CIP

Intersection Improvement Costs (unsignalized)

Location	Cost
Gold Dust @ SH-55[2]	$100,000
Thunder City @ Warm Lake[3]	$100,000
Little Pearsol @ Warm Lake[3]	$100,000
Cut Off @ SH-55	$100,000
Thunder City @ SH-55	$100,000
Sub Total	$500,000

Right of Way Costs

Right of Way acquisition: 16.48 acres @ $14,000/acre	$230,720

Capital Improvement Cost Total $4,440,720

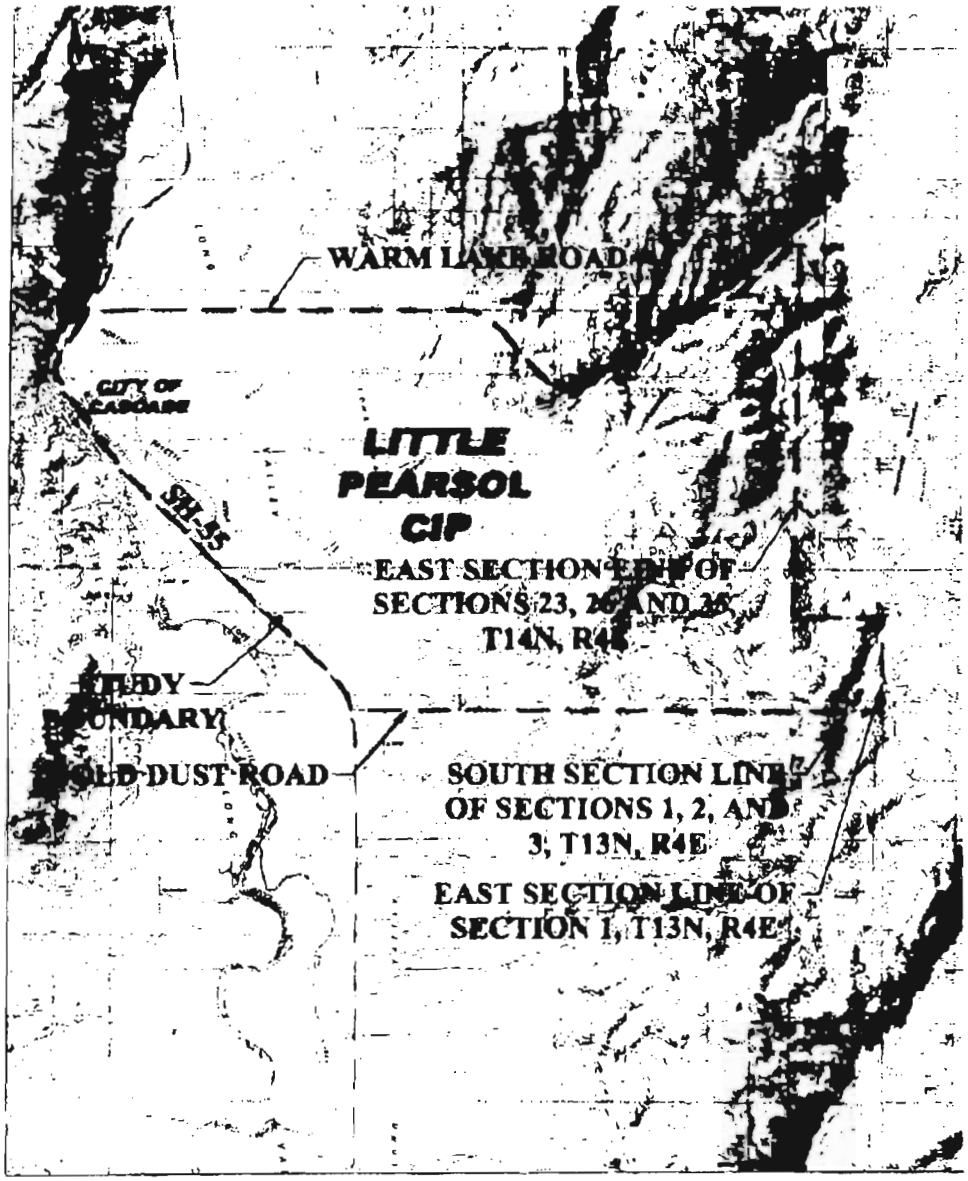
Based on a combined capacity of 9,250[3] vpd level of service threshold, cost per vehicle trip = $480.

For a typical single family residential development (8 trips/lot), cost per lot = $3,840. Costs will vary based on type of development and expected number/type of vehicle trips.

[3]Assumes 3 local outlets (Little Pearsol Road, and the north and south end of Thunder City Road) at 2,000 vpd, and 1 minor collector outlet (Gold Dust Road) at 3,250 vpd (the other 1/2 of the full capacity (6,500) for Gold Dust Road will be accounted for in the Corral Creek CIP area.

Exhibit B

LITTLE PEARSOL AREA
2006 ROADWAY CAPITAL IMPROVEMENT PROGRAM
MAP OF CIP AREA



ORIGINAL

ARCHIE N. BANBURY, CLERK
BY _____ DEPUTY
NOV 02 2010
Case No._____ Inst. No._____
Filed 10:45 A.M._____ P.M

Jed Manwaring ISB #3040
Victor Villegas ISB# 5860
EVANS KEANE LLP
1405 West Main
P. O. Box 959
Boise, Idaho 83701-0959
Telephone: (208) 384-1800
Facsimile: (208) 345-3514
e-mail: jmanwaring@evanskeane.com
Vvillegas@evanskeane.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

BUCKSKIN PROPERTIES, INC. an Idaho Corporation, and TIMBERLINE DEVELOPMENT, LLC, an Idaho Limited Liability Company, **Plaintiff,** **vs.** **VALLEY COUNTY, a political subdivision of the State of Idaho.** **Defendant.**	**Case No. CV-2009-554-C** **AFFIDAVIT OF DEMAR BURNETT**

STATE OF IDAHO)
) ss.
County of Valley)

DeMAR BURNETT, being duly sworn upon oath deposes and says as follows:

1. That I am an adult over the age of eighteen (18) years, that I am a resident of Valley County, Idaho, and that I have personal knowledge of the facts set forth in this Affidavit.

2. I served as a member of the Valley County Planning and Zoning Commission from 1998 until approximately February 2007. During this time, the Planning and Zoning Commission was directed by the Valley County Commissioners to place a condition of approval on all developers to enter into agreements with Valley County to mitigate traffic impacts that the developer's project placed on county roads.

3. I voiced my opinion and belief that the Road Development Agreements that Valley County required of developers as a condition for approval of final plat was illegal under Idaho law, and that final plat approval should not be conditioned on the Road Development Agreement. The Valley County Planning and Zoning Commission, the Valley County Engineer and the Valley County Board of Commissioners disagreed with my opinion regarding Road Development Agreements. Valley County took the position that the Road Development Agreement was a legitimate condition for final plat approval and was legal under Idaho law. As a result, in my capacity as a Planning and Zoning Commissioner, I continued to vote to approve conditional use permits that required that all developers enter into an agreement to mitigate the impact of their projects on county roads as a condition to final approval.

4. As a member of the Valley County Planning and Zoning Commission, I participated in Transportation Planning meetings held by the Planning and Zoning Commission in conjunction with planning and zoning meetings. During a planning and zoning meeting held on February 12, 2004, Valley County Engineer, Pat Dobie, addressed the Planning and Zoning Commission on Transportation Planning issues, including the "Donnelly to Tamarack – Road Improvement Plan." During the Transportation Planning presentation, Mr. Dobie discussed road issues related to the development of Tamarack Resort and new residential developments in the area of the Tamarack Resort. One of the areas of concern included West Roseberry Road. This

is the road that fronts The Meadows at West Mountain, the project at issue in the above-captioned case. Mr. Dobie calculated that new development in the area would result in approximately 2,700 vehicles per day on the road, which, when calculated out, resulted in a development impact fee of $1,844.00 per lot. As reflected in the minutes of this meeting, Mr. Dobie conveyed that: "this figure is being given to all developers. They are recommending that this is a condition of approval for the developments and any new developments in the area." A true and correct copy of the February 12, 2004, Valley County Planning and Zoning Meeting Minutes is attached as Exhibit A. Mr. Dobie's comments are found under Agenda Item No. 5 on pages 10-12. Several months later, on May 17, 2004, I attended a meeting of the Planning and Zoning Commissioners in my official capacity as a Planning and Zoning Commissioner when The Meadows at West Mountain application was under consideration. During that meeting a Planning and Zoning Commissioner asked Mr. Dobie whether the developers in that area, including the developers of The Meadows at West Mountain, would be required to pay the impact fee addressed by Mr. Dobie during the February 12, 2004 Transportation Meeting. Mr. Dobie responded that the developers would be required to pay the impact fee for road construction, which, based on his calculations, was approximately $1,800.00. A true and correct copy of the May 17, 2004, Valley County Planning and Zoning Meeting Minutes is attached as Exhibit B. Mr. Dobie's comments are found on page 13.

5. As a result of Mr. Dobie's calculations and with input from other Valley County authorities, including the Road Department, the Valley County Planning and Zoning Commission included as a condition of final plat approval that all developers within the vicinity of Tamarack Resort, and based on the "Donnelly to Tamarack – Road Improvement Plan"

presented by Mr. Dobie, pay a road impact fee of approximately $1,800.00 per lot for each new development project.

6. These same conditions were placed on my own development projects in Valley County. I am a member of KDB LLC, an Idaho limited liability company ("KDB"). KDB's predecessor, PV LLC, applied for a conditional use permit ("CUP") to develop Phase 1 of a three-phase subdivision in Valley County known as Whispering Pines Subdivision ("Whispering Pines"). The Valley County Planning and Zoning Commission issued CUP 03-07 for Phase 1 of Whispering Pines on June 27, 2003, effective as of June 23, 2003. A true and correct copy of the CUP for Phase 1 is attached to this Affidavit as Exhibit C. Condition No. 16 of the CUP requires the developer to "[s]ubmit a Development Agreement on improvements to Gold Dust Road" with Valley County as a condition to obtaining a final plat approval. KDB purchased from PV LLC all of the real property and the rights and obligations related to developing Whispering Pines, including Phase 1 and the subsequent phases.

7. As a result of Condition No. 16 in the CUP, I entered into a Road Development Agreement with Valley County for all three phases of Whispering Pines. I signed the Road Development Agreement – Phase 1 on behalf of KDB, dated effective August 18, 2005. Pursuant to the Road Development Agreement – Phase 1, KDB was required to pay a road development fee and dedicate a right-of-way along Warner Drive. A true and correct copy of the Road Development Agreement – Phase 1 is attached to this affidavit as Exhibit D. I signed a Road Development Agreement – Phase 2 with Valley County on behalf of KDB, dated effective September 25, 2006. Pursuant to the Road Development Agreement, KDB was required to pay a road development fee and dedicate a right-of-way along Warner Drive. A true and correct copy of the Road Development Agreement – Phase 2 is attached to this affidavit as Exhibit E. I

signed a Road Development Agreement – Phase 3 with Valley County on behalf of KDB, dated effective January 15, 2008. Pursuant to the Road Development Agreement, KDB was required to pay a road development fee. A true and correct copy of the Road Development Agreement – Phase 3 is attached to this affidavit as Exhibit F. For each of these Road Development Agreements, I was not made aware of the amount of the road development fee to be charged or the value of the right-of-way dedication until Valley County presented me with its Road Development Agreements as KDB prepared to seek final plat approval on each phase.

8. In fulfilling the conditions of the CUP for all three phases of Whispering Pines and in order to obtain approval of the final plat for each phase, KDB was required to enter into a Road Development Agreement with Valley County and pay the fee calculated by Valley County Engineer for the Gold Dust Road Area 2005 and Little Pearsol 2006 Capital Improvement Area where Whispering Pines is located. In the case of Phases 1 and 2, KDB was also required to dedicate a right-of-way.

9. KDB did not offer to pay to mitigate for any impacts on county roadways attributable to traffic generated by Whispering Pines Subdivision. Rather, KDB was required to enter into the Road Development Agreement pursuant to the conditions placed on its CUP for all three phases. At no time in my meetings and interactions with any Valley County representative with regard to KDB's CUP was I told or advised that the Road Development Agreement and payment of the fee was voluntary, or that KDB had an option not to enter into the Road Development Agreement. At no time in my meetings or interactions with Valley County representatives with regard to KDB's CUP was I told or advised that the fee paid under the Road Development Agreement was negotiable or that KDB could elect not to pay a fee. At no time in my meetings or interactions with Valley County representatives with regard to KDB's CUP was

I told or advised that the contents of the Road Development Agreement were negotiable or that I could strike certain parts or provisions of the Road Development Agreement.

10. Based on my service on the Valley County Planning and Zoning Commission, I knew that unless KDB entered into the Road Development Agreements imposed by Valley County, KDB would not receive a hearing for approval of final plat on any phase of Whispering Pines nor final plat approval itself. As a result, KDB entered into the Road Development Agreements.

11. KDB did not voluntarily enter into the Road Development Agreements with Valley County or voluntarily pay the fees or dedicate the rights-of-way under the agreements. KDB did so only because Valley County required it as a condition to approval of the final plat and as a condition for scheduling a hearing before the County Commissioners to approve final plat for all three phases of KDB's project. KDB was never given an option of proceeding with the development of Whispering Pines Subdivision without road improvements.

DeMAR BURNETT

SUBSCRIBED and SWORN to before me this 28th day of October, 2010.

JULIE HARRISON NOTARY PUBLIC STATE OF IDAHO

Julie Harrison
Notary Public for Idaho
Residing in Boise, Id
My Commission Expires: 03/08/2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2 day of November, 2010, a true and correct copy of the foregoing document was served by first-class mail, postage prepaid, and addressed to; by fax transmission to; by overnight delivery to; or by personally delivering to or leaving with a person in charge of the office as indicated below:

Matthew C. Williams
Valley County Prosecutor
P.O. Box 1350
Cascade, ID 83611
Telephone: (208) 382-7120
Facsimile: (208) 382-7124

[X] U.S. Mail
[ ] Fax
[ ] Overnight Delivery
[ ] Hand Delivery

Christopher H. Meyer
Martin C. Hendrickson
Givens Pursley LLP
P.O. Box 2720
Boise, ID 83701-2720
Telephone: (208) 388-1200
Facsimile: (208) 388-1300

[ ] U.S. Mail
[ ] Fax
[ ] Overnight Delivery
[X] Hand Delivery

Victor Villegas
Victor Villegas

VALLEY COUNTY PLANNING AND ZONING MEETING MINUTES

DATE: February 12, 2004

TIME: 6:03 P.M. to 9:00 P.M.

LOCATION: Valley County Courthouse

Chairman Somerton introduced and welcomed Todd Hatfield as the new P & Z Commissioner replacing Commissioner Allen Campbell.

ATTENDENCE: Commissioners Ed Allen, Todd Hatfield, Jerry Winkle, DeMar Burnett and Chairman Hugh Somerton were present. Staff members present: Cynda Herrick, AICP, Planning and Zoning Administrator; and, Denise Snyder, Planning and Zoning Secretary.

The meeting was called to order by Chairman Somerton at 6:03 p.m.

MINUTES: Chairman Somerton asked if there were any changes or corrections to the January 8, 2004, meeting minutes. There were none. Commissioner Winkle moved to approve the minutes as presented. Commissioner Burnett seconded the motion. The motion carried.

MC CALL BUSINESS:

1. ROS-04-4 Payette Lake Club, Group C, Lots 9, 10 & 11: The applicants were Marcia and Mac Page. They were being represented by LeGrand Bennett as their architect agent. They were requesting approval to split Lot 10 to increase Lots 9 & 11 which will reduce the overall density of the remaining lots. The lots are being redefined as to allow the building of a new residence by the end of 2005. The site is located in the Payette Lake Club, Group C, Lots 9, 10 & 11, in the McCall Area of Impact, McCall, Idaho.

Lindley Kirkpatrick, McCall Community Development Director, came forward and stated the following:

- This application is to split one lot equally in half then merge that lot with the remaining two lots.
- This will allow the two remaining larger lots to be suitable building sites.

EXHIBIT A

- Meets requirements, therefore, Staff recommends approval.
- There are no Conditions of Approval.

Chairman Somerton asked if there were any questions of Staff. There were none.

Commissioner Winkle moved to approve ROS-04-4 Payette Lake Club, Group C, Lots 9, 10 & 11 as presented. Commissioner Allen seconded the motion. The motion carried.

2. SR-04-2 Payette Lake Club, Group C, Lots 9, 10 & 11: The applicants were Marcia and Mac Page. They were being represented by LeGrand Bennett as their architect agent. They were requesting approval to remove the existing tree and top soil on the lots. Then place 3' to 4' of structural fill on the entire site. Also 1' of top soil will be placed on top of the fill. The lots will be redefined as to allow the building of a new residence by the end of 2005. The site is located in the Payette Lake Club, Group C, Lots 9, 10 & 11, in the McCall Area of Impact, McCall, Idaho.

Chairman Somerton asked for the Staff Report.

Lindley Kirkpatrick, McCall Community Development Director, came forward and stated the following:

- This is the same property and owners as presented above.
- Two homes will be built. One on each of the now approved two lots.
- The homes will be accessed from Warren Wagon Road.
- A common driveway with an easement across the second lot will access both lots.
- The applicant is present if the Commission has questions regarding the building designs.
- The homes are in the scenic overlay district.
- Typical development for the area.
- Buildings will be compatible with the neighborhood.
- Staff recommends approval.
- There are no Conditions of Approval.

Commissioner Burnett asked if all the items listed in the application are required to receive scenic route approval. Staff responded, yes. Commissioner Burnett then asked if the applicant needs approval to cut a tree. Staff responded, yes in the scenic overlay district. If the applicant is land clearing, filling, and/or tree cutting in anticipation for future development, scenic route approval is required.

LeGrand Bennett, Bennett Architect, representing the applicants, came forward and stated the following:

- There is only one 12" diameter lodge pole pine on the existing three lots.
- Once the tree is removed, they will bring site up to grade.
- It is necessary to add the fill in order bring it up to grade to eliminate the low areas on the lots.

- The new residence is scheduled to be built in 2005.

Chairman Somerton asked if there were any further questions of Staff or applicant. There were none.

Commissioner Burnett moved to approve SR-04-2 Payette Lake Club, Group C, Lots 9, 10 & 11 as presented. Commissioner Winkle seconded the motion. The motion carried.

NEW BUSINESS:

1. C.U.P. 03-30 Guest Chalets: The applicants were Samuel and Katharine Sullins. They were requesting approval to build 13 rental chalets in four phases. The existing residence and two existing outbuildings will remain on the property. The remaining outbuildings will be demolished. The 13 rental properties will consist of four 1,100 square foot chalets and nine 750 square foot chalets. The project will be serviced by a community well, storage and pressure system that is designed to meet the demands for potable water and fire protection. North Lake Recreational Sewer and Water District will provide sewer service. The site is located at 1734 West Roseberry Road and consists of 2.5 acres located on parcel RP16N03E096485A in Section 9, T. 16N, R. 3E, B.M., Valley County, Idaho.

Chairman Somerton announced the item and opened the public hearing.

Chairman Somerton asked the Commission if there were any conflicts of interest or *ex parte* contact. Chairman Somerton excused himself from the proceedings as he does have a conflict of interest. Vice-Chairman Burnett continued with the public hearing.

Vice-Chairman Burnett asked for the Staff Report. Staff presented the Staff Report. Staff stated that each unit is a duplex; therefore, there are actually eighteen 750 square foot units and eight 1,100 square foot units. Staff stated that since the Staff Report was completed a Supplemental Staff Report **(exhibit 1)** was also completed. Staff presented the Supplemental Staff Report. Staff stated that since the applicant stated his intention was that this application be reviewed as a P.U.D. (not a C.U.P.), that the Commission should review the information presented tonight and, if the Commission determines this is a P.U.D., then the Commission must determine if this item should be re-notified as a P.U.D. Staff also recommended the Commission thoroughly review the Supplemental Staff Report before making a decision.

Staff stated that since both the Staff Report and Supplemental Staff Report were completed, the following has been received: **(exhibit 2)** a letter from Donnelly Fire Protection District, dated February 11, 2004, listing the standards applicant must comply with regarding water flow; **(exhibit 3)** a letter from Department of Environmental Quality, faxed February 12, 2004, addressing air quality, drinking water, wastewater system and storm water disposal system; **(exhibit 4)** a letter from David Nordberg, received February 12, 2004; **(exhibit 5)** a letter from John and Delores Hubbard, received

February 12, 2004; **(exhibit 6)** a memorandum from Pat Dobie, Valley County Engineer, received February 12, 2004; and, **(exhibit 7)** a letter from Christina Nordberg received February 12, 2004.

Vice-Chairman Burnett asked if there were any questions of Staff.

Commissioner Winkle asked Staff how the determination was made on the total number of units. Staff reviewed the application with the Commission. Staff stated the applicant will clarify this determination.

Commissioner Allen asked how does the Commission resolve the issue whether this is a C.U.P. or P.U.D? Vice-Chairman Burnett stated that the application states both. Commissioner Winkle stated that this is a lot of information to digest and that the applicant should also clarify this issue.

Vice-Chairman Burnett asked for the presentation from the applicant.

Sam Sullins, 10555 Horseshoe Bend Road, Boise, came forward and stated the following:

- The intent was this application is for a P.U.D.
- He thought he completed the proper paper work.
- The documents he included with the application do apply to a P.U.D.
- The Sullins plan to live at the site once they retire.
- They want to leave as many trees on the site as possible.
- Setbacks are 20' side and 30' rear.
- Units may be single, double or triplex – will determine which when placed on site – total of 26 units.
- There will be additional landscaping and fencing.
- There will be underground utilities.
- The main house will be remodeled.
- Mr. Sullins showed the Commission examples of chalets **(exhibit 8)**.
- The mixed chalets will make the area more attractive and will be situated so there will be less potential for noise.
- Mr. Sullins notified as many neighbors as possible around this area – had little response.
- Snow storage will be in the setback area.
- The fence will be a 3 to 4 rail fence.
- Any trailers brought into the site will be a maximum of 16'. No RVs or 5-wheels will be allowed.
- At least one-half the units will accommodate a recreation trailer.
- Wells will draw water out of a deeper aquifer; therefore, should not impact existing wells.

Commissioner Winkle asked Mr. Sullins how these units are going to be situated – especially if Mr. Sullins is now planning to use triplexes. The Commission will need a

final site plan with dimensions before they can make a decision.

Vice-Chairman Burnett asked Mr. Sullins about the Donnelly Fire Protection District letter. Mr. Sullins stated that he just received the letter this afternoon. He will be in contact with Mr. deJong to address the fire district's concerns. This application's first phase will have one well. This project will take four years to complete; therefore, will tie into the Norwood Road system once that system is completed.

Commissioner Allen asked about the location of Gestrin Road. Mr. Sullins stated that it runs along the right side of the next lot over, which is about 80'. They do have a utility easement across that lot. Mr. Sullins also stated that this project's sewer system will tie into the church camp's system.

Mr. Sullins further stated that they will comply with whatever road requirements are needed regarding the approach on Roseberry Road. Roseberry Road will be a major access road now and in the future because of the Tamarack Resort. The ingress and egress will be addressed.

Mr. Sullins stated they are looking for conceptual approval tonight before they spend thousands of dollars to give the Commission the needed hard answers.

Commissioner Winkle asked if Mr. Sullins has reviewed the letter from the road department. Mr. Sullins stated he had not. Mr. Sullins stated the existing house will be 20' from the road once they remove the added outbuilding which is now on the front of house. Mr. Sullins will get firm answers regarding the proposed road improvements on Roseberry Road regarding the added lanes, etc.

Vice-Chairman Burnett asked if there were any proponents or undecided that would like to speak. There were none.

Vice-Chairman Burnett asked if there were any opponents that would like to speak.

Dave Coski, 239 East Roseberry Road, came forward and stated that he feels commercial development outside the city limits will jeopardize the livelihood of the established communities.

Dave Nordberg, 1821 Rand Street, Boise, came forward and stated the following:

- His family owns the property just west of this project at 1736 West Roseberry.
- When the snow melts from the snow storage area on the chalet project – will it flood his property?
- He also feels 13 chalets (26 units) are too many for this narrow 2.5 acre parcel.
- Should be downsized if the Commission does approve the project.
- Short and long term disturbances will affect the surrounding properties.
- The project may cause a large influx of people.
- Can the applicant be required to hire an accredited outside agency to do

engineering and surveying regarding impacts; environmental impacts, safety concerns, privacy concerns, etc.

- He realizes growth is inevitable in this area because of the Tamarack Resort, but he feels this project is irresponsible.
- Wants to keep Donnelly a beautiful place to live.
- Would like to keep commercial development off of Roseberry Road.
- Mr. Nordberg also read his wife's letter to the Commission listing her concerns **(exhibit 7)**.

John Hubbard, 13152 Gail-Alan Road, Donnelly, came forward and stated the following:

- Would like clarification on what a C.U.P. and a P.U.D. are?
- The water situation – how deep will the well be?
- His property is 200' from this proposed project - Fran Dot Subdivision No. 2.
- The density for this project is too much.
- He has traffic and setback concerns on this project when West Roseberry Road is widened.
- Some of the proponents to this project don't actually live in this area – they are just considering their investment potential on the property they own.
- Would like to see this application postponed until some answers can be given by the applicant and some of the neighbors to this project can be contacted.

George Dorris, 163 Eld Lane, Donnelly, came forward and stated the following:

- He also believes Tamarack is going to be developed in the future.
- He feels that commercial development outside the Donnelly area, and the other existing communities, should not be allowed at this time.
- He stated that there is plenty of acreage to be developed in those communities or close proximity to the communities and those areas should be developed first.
- He is concerned with the potential impact that these developments will have on the North Lake Recreational Sewer and Water District.
- The NLRS&WD has 1,500 part-time hookups. How will they be impacted by these new developments?
- The City of Donnelly has 110 full-time hookups. They share the same storage ponds with the part-time hookups. Nobody is excited about the potential of building more storage ponds near Donnelly.
- 30%-50% occupancy throughout the year for this project would mean an additional 10 full-time residents to the sewer system.
- He feels NSRS&WD is reaching their maximum hookups.
- Please keep the commercial growth in existing commercial areas.

Vice-Chairman Burnett asked if there were any other opponents that would like to speak tonight. There were none.

Vice-Chairman Burnett asked for a presentation from Pat Dobie, Valley County Engineer.

Pat Dobie, Valley County Engineer, came forward and stated the following:

- His letter **(exhibit 6)** addresses much of his concerns which were also addressed by other agencies.
- The application being proposed is very dense.
- Concerned that site plan will not fit in the proposed area.
- The access road would need to be wider then 18' – should be a minimum of 40'.
- Requires an area on the site for storm water.
- A minimum 60,000 gallon water tank for fire protection – which is the size of one of the units.
- The cul-de-sac should be a 40' radius.
- An analysis should be done showing how many units could be placed on this site.
- What is the long term land use? Kitchens would be required if long term.
- Could be a high traffic generator.
- Also concerned with the water usage requirements. A water tank or extension from the water system on Norwood Road would be required.
- A stub for future connection from Gestrin Road should be required.
- This development may be required to participate in the road improvement system connecting Tamarack to Donnelly.

Vice-Chairman Burnett asked Mr. Dobie what is the current right of way on Roseberry Road. Mr. Dobie responded, 50'. Mr. Dobie further explained that Roseberry Road, in reference to the proposed right of way, was originally not mapped out properly; therefore, the right of way may be further away from Roseberry Road. Since the applicant has agreed to tear down the addition on the front of the residence, it will bring the property back into conformity.

Vice-Chairman Burnett asked Mr. Sullins for his rebuttal presentation.

Sam Sullins, 10555 Horseshoe Bend Road, Boise, came forward and stated the following:

- He disagrees with about 80% of what was presented by Mr. Dobie.
- He had Network Engineers look at this closely. A fully engineered site plan will be presented that will meet all that is required.
- The site plan is drawn to scale.
- The drainage off the site will drain naturally toward Roseberry Road and perk into the ground.
- This will not be short term rental for transients.
- He is going to live on-site; therefore, this will be a chalet type environment with quality residents.
- 80% of the units will not have kitchens – so can't be long term rentals.
- They are trying to achieve a motel type project that will look like homes.
- They are investing about 1.5 million into this project.
- A water tank will not be required – they will hook into the municipal water.
- The expense of putting in a well is cost prohibitive.
- The fire hydrants will benefit all the surrounding properties.

- This project will improve the surrounding property values.
- Roseberry Road will be developed whether or not this project is approved.
- The density meets the County requirements for a P.U.D.
- This design is not intrusive.
- They are looking for conceptual approval tonight before more money is put into this project.
- They will meet all requirements recommended by the Commission.
- They want to be good neighbors – are still willing to meet with the neighbors.
- The 13 duplexes will be 26 units, plus the residence, which works out to 6 units per acre.

Commissioner Winkle asked if there will be settling ponds. Mr. Sullins responded, yes if needed. Vice-Chairman Burnett asked what is the type of soil and if they hired an engineering firm. Mr. Sullins responded, medium perk and Network Architects has been retained. Commissioner Allen asked Mr. Sullins about the setback. Mr. Sullins responded, the sides will be 20' and the front and rear will be 30'.

The Commission and Mr. Sullins discussed that there will be 60% open space, no CCRs will be required, will meet the setback for the proposed road right of way, project will be privately owned, project is a commercial use, determined this can be a P.U.D. project, there will be rules for guests, will determine which and where the trees will remain on the site, units will not have fuel burning fireplaces but may have remote controlled propane fireplaces, and the heat will be propane or electric.

Commissioner Hatfield asked Staff to explain the difference between a private road and a driveway. Staff stated that roads access lots and buildings under different ownerships and driveways access structures under the same ownership. The driveway width will be based upon the engineering, fire codes, parking, and snow removal. The trees will make it difficult for snow storage in the setbacks.

Vice-Chairman Burnett closed the public hearing and brought it back to the Commission for discussion.

The Commission decided that this will need to be re-advertised as a P.U.D. development. Numerous agencies still need to respond; applicant must work out the density, water and sewer problems; the difficulty in snow removal must be addressed; and the possible future link to Gestrin Road should be considered by the applicant. The Commission would like to review a workable site plan, and approval tonight would only be conceptual. Staff and Mr. Sullins should meet to work out these issues.

Staff stated that the applicant is seeking confirmation that once these issues are resolved, this project will be a compatible use with the surrounding land uses. The Commission responded, yes.

Staff asked the Commission for a determination whether this is a C.U.P. or P.U.D. The

Commission agreed that this application is for a P.U.D. Staff summarized the definition of a P.U.D.: The purpose of a P.U.D. is that it is expected it will provide certain amenities such as recreational facilities, landscaping and natural open spaces, which will be for the enjoyment of the owners, employees, etc., and will demonstrate a better than average quality of development. Staff stated that the compatibility rating will change since this is for 26 units and not for 13 units, but Staff still feels it will be compatible to the area. Staff stressed Planned Unit Developments are for flexibility of diverse uses in a single comprehensive plan and not meant to just avoid standards.

Vice-Chairman Burnett re-opened the public hearing.

Sam Sullins, 10555 Horseshoe Bend Road, Boise, came forward for clarification on the difference between a residential and commercial P.U.D. The open spaces are for owners, such as town houses, etc. This is a commercial P.U.D and there is no other ownership. The applicant wants the users to leave the area to play and only sleep here. They don't want parties, etc. held here. They do not plan on putting in hot tubs, outside fireplaces, etc. The open spaces would not be applicable since this is a commercial P.U.D. If this is given conceptual approval, it will allow the applicant to go forward, spend money and get this project engineered.

Vice-Chairman Burnett again closed the public hearing.

Commissioner Winkle moved to table C.U.P. 03-30 Guest Chalets. Commissioner Allen seconded the motion. The motion carried. (No decision was made on concept approval.)

Staff will re-notice this application as a P.U.D. once the applicant submits the revised application. There will be an approximate 45 day timeframe for notification and scheduling.

Chairman Somerton returned to preside over the rest of the items on tonight's agenda.

OTHER ITEMS:

1. Extension of C.U.P. 03-04 Pointe at Gold Fork Subdivision: Staff provided copies to the Commission of a letter **(exhibit 1)** received February 4, 2004, from the applicant. They are requesting the extension of this C.U.P. for one year. Commissioner Burnett moved to approve the extension, along with the original conditions of approval, for this C.U.P. as requested. Commissioner Allen seconded the motion. The motion carried. The extension is until May 1, 2005.

2. Robertson Supply – Do they need a C.U.P.?: Robertson Supply is leasing the Baum Shelter building in Lake Fork. Staff stated that this is a wholesale plumbing business, which is a change in the nature and scope of the original C.U.P. 88-4 and 92-4. Staff stated the concern is the grandfathered sign. Staff explained that the Commission must decide if Robertson Supply will need a C.U.P. - and if they need a C.U.P. then they

must take down the grandfathered sign as it does not comply with the current sign standards. The panels in the grandfathered sign have been changed. Staff stated that if the Commission decides that Robertson Supply does not need a C.U.P., the Commission may request they decrease the wattage in the sign.

Byron Morgan, 19634 Pride Lane, Caldwell, came forward and stated the following:

- Robertson Supply discussed the sign issue with Larry Baum.
- Larry Baum recommended that when they put in their new panels, that they decrease the wattage.
- The lowest wattage bulb was put in the sign.
- Robertson Supply wishes to be good residents of Valley County.
- This is a temporary facility and is only leased.
- This is a wholesale business, the sign isn't necessary.
- If necessary they will turn off the sign.
- It is recommended by the manufacturer, because of the weather changes in Valley County, the bulbs should be left on continuously.
- Will work with the Commission with whatever they decide.

The Commission discussed the issue and decided that a new C.U.P. is not required since there is mostly storage and very little traffic impact.

Commissioner Burnett moved that this is an Administrative C.U.P. and the Conditions of Approval are that Robertson Supply will either dim the sign or turn it off completely. Also if the business expands, a new C.U.P. will be required. Commissioner Winkle seconded the motion. Staff will send a letter to Larry Baum letting him know that in the future if he leases this business, the new owners may need a C.U.P. The motion carried.

Robertson Supply will try to dim the lights. Mr. Morgan will contact the Commission to drive by and see if they are acceptable. If not acceptable, they will turn off the sign.

3. Findings of Facts and Conclusions: Commissioner Winkle moved to approve the Facts and Conclusions for C.U.P. 03-27 Ernsberger – Multiple Residences, and combined C.U.P. 03-39 and V-3-03 Donnelly Snowmobile Club, as presented and authorized the Chairman to sign. Commissioner Allen seconded the motion. The motion carried.

4. Reschedule P & Z Meeting of November 11, 2004 - County Holiday: Commissioner Burnett moved to change the Thursday, November 11, 2004, meeting to Wednesday, November 10, 2004, at 6:00 p.m. Commissioner Winkle seconded the motion. The motion carried.

Chairman Somerton adjourned the P & Z meeting and opened the Transportation Planning meeting.

5. Transportation Planning: Pat Dobie, Valley County Engineer, presented to

the Commission the agenda for the Valley County Transportation Advisory Committee. The agenda was as follows:

1. Valley County Road Standards and Specifications – 2004
2. Federal Aid Grant Application – Lake Cascade Causeway
3. Donnelly to Tamarack – Road Improvement Plan
4. Recommended Road Name

Also present for tonight's planning meeting were Dave Coski and George Dorris, both from Donnelly.

Pat Dobie, Valley County Engineer, went over the agenda with the Commission. The existing road standards were adopted in 1966 and are considerably out of date.

The definitions of roads and right of ways, etc. will need to be changed in the LUDO. These changes are taken from Idaho Code.

They are adopting the Idaho Standards for Public Works Construction. This is generally accepted as the standard document.

Policy changes, which have been reviewed and conceptually accepted by the Board of Commissioners, are being recommended. These will be changed after the public hearings, etc. These recommended changes include, but are not limited to: adopt specific water quality mitigation standards; recommend that all roads carrying 200 vehicles per day be paved; recommend the Road Acceptance Policy state that the County not accept any roads for maintenance with less then 50 vehicles per day – and roads with more than 50 vehicles per day be paved before the County accepts them for maintenance; recommending that any new driveways accessing major collector roads be paved for the first 20'; and, specific recommendations for Development Agreements and Development Agreement Fees.

The Commission and Mr. Dobie discussed the Road Acceptance Policy regarding the development of the County's paved and unpaved roads. Commissioner Burnett stated that this policy may increase the number of private roads being requested by developers. Mr. Dobie responded that this may be true in the short term but this should help tighten up the language in the Private Road Declarations. Commissioner Burnett is also concerned with the type of gravel required for roads. Mr. Dobie stated they exempted the gravel because the local gravel does not meet the requirements.

The Commission then discussed the grant application (Surface Transportation Act) to recreate the Lake Cascade Causeway. This grant is being requested to improve the alignment, width, and sidewalks. The planned improvements will include a bicycle path.

Commissioner Burnett moved to approve that Pat Dobie will continue to go forward with this grant application. Commissioner Winkle seconded the motion. The motion carried.

Mr. Dobie then discussed with the Commission the Donnelly to Tamarack Road Improvement Plan. Mr. Dobie went over the spreadsheet which outlines the preliminary improvement plan to accommodate Phase 1 of development traffic from Tamarack: 1) The Norwood Road to Tamarack Falls Road alignment, minor widening of the road, some shifting in alignment on West Mountain Road and the widening of the shoulders; 2) Improvements to the West Roseberry Road extension from the intersection of Norwood Road and Roseberry Road, then continuing into some of the new subdivisions being developed; 3) Preliminary engineering on the Causeway; 4) The new bridge across Mud Creek; 5) Cost of enlarging culverts on West Mountain Road; 6) Right of way acquisition; 7) Reconstructing the Roseberry and Norwood Road intersection; 8) Corridor study; and, 9) & 10) Replace culverts across Rock Creek and Poison Creek with small bridges.

The bottom line of this 4.15 million dollar allocation proposal is that it will buy a road with the traffic carrying capacity of 9,000 cars per day. Tamarack offered to pay 30% of the cost and receive 30% of the capacity. Their share is 1.2 million and their capacity allocation is about 2,700 vehicles per day. The changes in traffic are being monitored in this area and it seems Tamarack is generating more traffic then the 30%. The County is funding 3,600 vehicles per day. The remaining 2,700 vehicles per day equates to the new developments expected in this area. The development fee is $1,844 per lot. This figure is being given to all the developers. They are recommending that this is a condition of approval for the developments and any new developments in the area. This will be figured on a case by case basis.

Mr. Dobie asked the Commission to consider a road name for the West Roseberry Road extension. Before a road name is finalized, a public hearing is required.

ADJOURN: 9:00 p.m.

VALLEY COUNTY PLANNING AND ZONING MEETING MINUTES

DATE: May 17, 2004

TIME: 6:02 P.M. to 9:40 P.M.

LOCATION: Valley County Courthouse

ATTENDENCE: Commissioners Ed Allen, DeMar Burnett, Todd Hatfield, Jerry Winkle and Chairman Hugh Somerton were present. Staff members present: Cynda Herrick, AICP, Planning and Zoning Administrator; and, Denise Snyder, Planning and Zoning Secretary.

The meeting was called to order by Chairman Somerton at 6:02 p.m.

This is a continuation of the May 13, 2004, meeting. The last two items on the May 13, 2004, meeting were rescheduled to May 17, 2004. The applicants and neighbors of these two applications were notified of the change as required.

NEW BUSINESS:

1. C.U.P. 04-12 Tamarack – Plant Nursery, Pre-Construction Yard & Short-term RV Site: The applicant was Tamarack Resort, LLC. They were requesting approval to develop a 6.5 acre nursery, a 2.5 acre pre-construction yard and 10 space RV park. The site will be accessed from Norwood Road. The nursery will provide landscaping materials for Tamarack Resort during the construction phase. The screened pre-construction yard will be behind the nursery and will provide a site for the cottage and chalet contractors to pre-construct panels and wall systems. The purpose of the RV sites is to provide short-term contractor housing if needed. The site is located in the SE4 of Section 8, T. 16N, R. 3E, B.M., Valley County, Idaho.

Chairman Somerton announced the item and opened the public hearing.

Chairman Somerton asked the Commission if there were any conflicts of interest or *ex parte* contact. There were none.

Chairman Somerton asked for the presentation of the Staff Report. Staff presented the report. Staff stated that since the Staff Report was completed the following was received: **(exhibit 1)** a letter from the Donnelly Fire District, faxed May 17, 2004, stating that the

EXHIBIT B

fire district approves of the plant nursery, pre-construction yard, and short term RV site as presented. The fire district verbally told Staff that if the parking sites increase to 60, then they will need to take another look at it; **(exhibit 2)** a letter from Valley Soil and Water Conservation District, dated May 6, 2004, recommending reseeding all disturbed areas such as equipment staging areas, etc. to a perennial grass/forb mixture to decrease noxious weed infestations. Also, this area is close proximity to elk calving habitat and if contractors have dogs on site they should be controlled and not allowed to roam freely; **(exhibit 3)** a letter from Sharon Sharp and Melissa Sharp, received May 17, 2004, stating as owners of the property adjacent to the proposed project, they would like to express their thoughts and concerns. They do not have any issues with the project as a whole, but they would like to see it moved to a different site because their house is very close to the adjoining property line. They have spoken with their attorney as well as their insurance agent and when taking their past experiences into consideration, they advised them to contact the Commission regarding their concerns regarding the threat of theft, vandalism and trespass that could increase significantly with this project.

Chairman Somerton asked if there were any questions of Staff. There were none.

Chairman Somerton asked for the presentation from the applicant.

Chris Kirk, representing Tamarack, came forward and stated the following:

- Will work with Pat Dobie in getting his approval of the final site grading plan.
- In meeting with Pat Dobie last week regarding the traffic report – they estimate 80 average trips per day.
- Hours of operation will be 7:00 a.m. to dusk.
- There will be no outdoor lighting.
- Excess waste material will be hauled off-site.
- Will have electrical hookup for pre-construction site. They are considering electrical hookups for RV sites.
- Will provide fire extinguishers that will meet County requirements.
- Employees will park at the pre-construction area or RV sites.
- The nursery will provide plant material for Tamarack. Will transplant existing plants and trees to other areas of the Tamarack when possible.
- They request that no restrictions be placed on the amount of years for this use. They anticipate using these sites until build-out is complete.
- The site will be restored to its original condition upon completion of Tamarack.
- They chose this location because there is an existing well on site. They will use this well for irrigation of the nursery.
- Don Weilmunster is aware of this application. Will get a letter from him if it is made a condition of approval. They feel there is no problem getting that letter.
- There is not an appropriate location on the Tamarack site to store plant material.
- Employees of Tamarack will be using outside rental sites. The RV sites they are requesting on this application will be used only as needed.

Commissioner Burnett asked Mr. Kirk how the pre-construction site will be used as far as hauling of materials, noise, fencing, and the access location for nearest neighbor. Mr. Kirk discussed the map with the Commission. Mr. Kirk agreed to move the RV site so it would be about 2,000-2,500' away from the neighbor.

Commissioner Burnett asked about the RV park. Mr. Kirk stated they were planning on making this a dry park – no water, dump station or electricity. It will used by employees of Tamarack or the contractors. Mr. Kirk stated that Jeff Lappin suggested that they install a storage tank on site for a dump station – they agree.

Commissioner Burnett asked if Mr. Kirk had contacted the surrounding RV parks regarding Tamarack employees needed housing. Mr. Kirk stated that it is a work in progress. Commissioner Burnett asked Mr. Kirk who has the answers to these questions.

Staff stated that Tamarack had been notified that there were 708 RV sites in Valley County. They were to disseminate this information to their contractors and subcontractors – so that everyone would know where the available RV sites were along with the motels and hotels. That is what was approved with the P.U.D.

Commissioner Winkle asked Mr. Kirk how many employees Tamarack will have during the winter. Mr. Kirk responded that he didn't have those numbers. Tamarack currently employees approximately 70 employees – this number includes Boise. Commissioner Winkle stated, even though this project is separate from Tamarack Resort, his concern is that Tamarack has not addressed employee housing as of yet. Brundage and Bogus Basin hire 175 or more employees each winter.

Commissioner Winkle asked Mr. Kirk if they are charging for the use of the RV spaces on this application. Mr. Kirk stated, no.

Commissioner Hatfield asked how much material will be stored on site in the pre-construction yard. Mr. Kirk stated that this site will not have a lot of material stored because of the weather – basically will be on an as needed basis. Commissioner Hatfield stated that the dust would need to be mitigated at the RV park and also the surrounding roads. Commissioner Hatfield asked that Mr. Dobie address this applicant's participation in the road impact fees in this area and whether there is a drainage plan.

Commissioner Allen asked Mr. Kirk about the hours of operation. Does the 7:00 a.m. to dusk include weekends and holidays? Mr. Kirk responded that they would like to be able to work on weekends because of the short work season. Mr. Kirk also stated that the RV park would not be operated during the winter months. Commissioner Allen asked about the power and water to the RV sites. Mr. Kirk stated that they are considering putting in the power. The well is only permitted for agricultural uses.

Pat Dobie, Valley County Engineer, came forward and stated:

- This application is in the area of the road improvements. They will be

participating by contributing fees for those road improvements.

- The drainage plan will need to be finalized.
- There are light industrial activities as part of this application.
- The Commission might consider, as a condition of approval, that this application be required to meet the performance standards of light industrial; such as, noise, dust, hours of operation, etc.

Staff had stated to Amy Pemberton, attorney for Tamarack, that it is questionable whether it was necessary to have the nursery and RV site as part of this C.U.P.

Chairman Somerton asked if there were any proponents that would like to speak.

Amy Pemberton, attorney for Tamarack, came forward and stated the following:

- The original P.U.D. approval states that there are 700 RV sites.
- Tamarack is working on the employee housing issues.
- She feels it is necessary for a C.U.P. in the pre-construction staging area.
- She also stated that since there is no fee charged for the RV spaces, and no selling of the nursery items – these will probably fall under a permitted use.

Commissioner Burnett asked what the timeframe is for getting the housing issues answered. Ms. Pemberton stated that Tamarack is helping the workers find housing, and they are also working on the possibility of a housing addition. She further stated that the RV site that is part of this application will address the housing for the workers at the pre-construction yard and will not add to the problem of the employee housing load.

Chairman Somerton stated the RV sites are being used as an employee fringe benefit. If the use continues for an extended period of time – then a C.U.P. would be required. Ms. Pemberton stated that if this is the case, Tamarack would like to request an extension beyond the two year period. Chairman Somerton stated that the Commission could review this in two years. Ms. Pemberton stated that the application for the RV park was an open ended request.

Commissioner Burnett stated that if this is going to be permanent, it will need amenities on it. If it is only going to be for two years, then the Commission can't expect the applicant to spend thousands of dollars for each site for a temporary use.

The Commission, Ms. Pemberton and Mr. Kirk discussed the RV sites, the use of generators for the RVs, and power being put in. The applicant would like to have the RV park for at least two years. Mr. Kirk stated that the intent was to use facility on a temporary basis. The water will have to be hauled in and out. The existing well is for irrigation purposes only. These units can be used for specific jobs and timeframes; they would be perfect for short time use.

Chairman Somerton asked if there were any undecided or opponents that would like to speak. There were none.

Chairman Somerton closed the public hearing and brought it back to the Commission for discussion.

The Commission decided the nursery would not need a C.U.P. They discussed that the power and dump station be installed and these should be conditions of approval. No outdoor lighting unless it is motion sensor lights. They also discussed the hours of operation. They decided that the hours should be 7:00 a.m. through 7:00 p.m. on Monday through Friday, 8:00 a.m. to 5:00 p.m. Saturday, no Sundays.

Staff listed the conditions of approval as follows:

- Will restore site to original condition.
- Will receive a letter from Don Weilmunster giving approval to use the site before the start of operations.
- Will move pre-construction yard to northwest of the nursery.
- No RVs in the winter.
- Will need to water yard for dust mitigation.
- Will enter into the development agreement with the Board of County Commissioners.
- Will provide power to the RVs.
- There will not be outdoor lighting unless it meets the LUDO requirements.
- The hours of operation will be 7:00 a.m.-7:00 p.m. Monday through Friday and 8:00 a.m. - 5:00 p.m. on Saturday – closed Sundays.
- A dump station will be onsite.

Commissioner Allen moved to approve C.U.P. 04-12 Parks Ranch - Pre-construction Yard and Short-term RV sites (removed the plant nursery from the C.U.P.) as presented with the conditions of approval in the Staff Report and with the 10 additional COAs listed above. Commissioner Winkle seconded the motion. The motion carried.

Chairman Somerton explained the 10-day appeal period.

2. P.U.D. 04-01 The Meadows at West Mountain, a Planned Unit Development: The applicant was Jack Charters, Buckskin Properties, Inc. He was requesting conceptual, planned unit development, conditional use permit, and preliminary plat approval in six phases that will include the following uses: 221 single-family residential lots, 17 common lots, 2 commercial lots totaling 11 acres, and 12 multi-family lots with 96 units. The lot sizes will range from: .18 to .34 acres residential; 5.61 to 5.62 acres commercial; and, .44 to .71 acres multi-family. All lots will be provided with or have direct access to utility services including central water and sewer. The site contains 122 acres and will be accessed from Norwood Road and a new proposed road that will be an extension of West Roseberry Road. Interior streets will be private. The site is located in the NE4 of Section 17, T. 16N, R. 3E, B.M., Valley County, Idaho.

Chairman Somerton announced the item and opened the public hearing.

Chairman Somerton asked the Commission if there were any conflicts of interest or *ex parte* contact. There were none.

Chairman Somerton asked for the presentation of the Staff Report. Staff presented the report. Staff stated that since the Staff Report was completed the following was received: **(exhibit 1)** a letter from the Donnelly Fire District, received May 17, 2004, stating the fire district will require that the subdivision be supplied with fire hydrants. The fire hydrants shall be supplied by a six-inch water main. Fire hydrants shall be inspected and tested by the fire district before any residential building permits are issued within their respective phase of their development. A written agreement will be in place with North Recreational Lake Sewer and Water District regarding future maintenance and development of the water system, if the developers plan on turning over control of the water system to North Lake Recreational Sewer and Water District. The fire district will also require that all access roads in The Meadows at West Mountain shall comply with the Valley County Road Standards. Also, all dead timber and slash shall be cleaned up throughout the area. Will require that all of these provisions to the preliminary plat be met and approved before any construction begins; **(exhibit 2)** a letter from Valley Soil and Water Conservation District, dated May 6, 2004, stating drainage flows and water rights through this property to adjoining property owners need to be ensured and water delivery according to their water rights should not be impeded. Mitigation to be considered could include irrigation water being piped through the property to adjacent property owner's to ensure their water rights. Any livestock such as horses should be kept away from riparian areas with appropriate setbacks. Drainage culverts installed need adequate sizing to handle at least a 25-year rain-on-snow event. Placement and storage of snow regarding runoff should be addressed for water quality treatment before runoff enters Mud Creek and then on to Cascade Reservoir. Recommend following Valley County Storm Water Management Handbook and recommend reseeding all disturbed areas such as road bar ditches, equipment staging areas, etc. to a perennial grass/forbs mixture to decrease noxious weed infestations; **(exhibit 3)** a fax received May 17, 2004, from Ken Everett stating that he is a resident of the Lake Cascade Forest #2 Subdivision. He has been involved in the construction and development business for over twenty-five years. He is pro-growth and pro-common sense – he states that growth is a good thing as long as there is good sense involved in the process. He strongly believes this proposed P.U.D., in its present form, does not make sense for this valley. His biggest complaint is that the lot sizes are way too small: .18 acre is ridiculous – this calculates out to be about 1/8 of an acre, the approximate average lot size in McCall. He is not interested in seeing the entire valley floor the density of McCall. He believes the County has a 1/3 acre minimum for residential construction. Please, maintain this standard at the very least. In fact, he would strongly encourage the Commission to increase the minimum lot size to 1/2 acre. Many of the adjacent subdivisions around this P.U.D. already appear to meet this criteria. This unique valley is not going to suffer from lack of development. Let us not be too quick to give it away. There is time to be wise. He understands Mr. Charters' reason for smaller lot sizes is to help pay for the development's infrastructure and maintenance. Well, he doesn't agree. Value of land has increased dramatically and if

Mr. Charters can't make money off 1/3 or 1/2 acre parcels in his plan then he should reconsider. Most of us live here because we can't stand the city life - 1/8 acre lot is the city. He doesn't oppose growth. He opposes urban density in the rural setting.

The Commission and Staff discussed the map that was part of the application that shows the layout of the irrigation ditch.

Chairman Somerton asked if there were any questions of Staff. There were none.

Chairman Somerton asked for the presentation from the applicant.

Joe Pachner, Toothman-Orton Engineering, representing Jack Charters of Buckskin Properties who is the president and developer, came forward and stated the following:

- He presented to the Commission a map **(exhibit 4)** showing the contours of the irrigation ditch.
- He also presented to the Commission a map **(exhibit 5)** which shows the area of the proposed application and the surrounding roads and subdivisions.
- This is a planned unit development with three mixed land uses – they include single family, multi-family and commercial.
- Jack Charters has been in the housing industry since 1967 – the last twelve years in St. George, Utah, developing planned unit developments that cluster these second homes.
- The open spaces of this development can be used for amenities, such as; recreation and gathering areas.
- This development incorporates the need for medium to low-income housing in the multi-family units.
- Mr. Pachner presented to the Commission a layout **(exhibit 6)** of the typical housing sites that they will incorporate into this project.
- These will be natural earth tones that fit into the natural settings. They will be using rock features when possible because of the high cost of lumber.
- The homeowners association will be taking care of these lots so they will be well maintained and will allow ease in accessing the open areas.
- The building sites will be 8,000 square foot minimum and will range up to 12,000 square foot.
- Building envelopes have been incorporated into the plat to ensure separation between lots to meet snow storage requirements.
- They have decreased the density of the original proposal slightly by changing the minimum lot sizes to 8,000 square feet. This has decreased the open spaces but it is a good mix.

Mr. Pachner showed the Commission **(exhibit 4)** seventeen open areas located on the map. The open areas will promote ease of maintenance and allow the use of the gathering places.

Mr. Pachner continued his presentation by stating the following:

- Regarding the impact to the schools - they feel that there may be a 30% permanent occupancy – with 25% of those with school age children. At full build-out, that would be approximately 18 students to the school district.
- The cost that they received from the school district is about $7,400 per student.
- The taxes that would be generated from this project, along with the Tamarack Resort, will reduce the impact to the school district.
- The commercial development will front the new roadway that will be part of this development. The commercial areas will be buffered by storage units and surrounding landscaping placed between the commercial and residential developments.
- They will also have buffering in the commercial areas office / retail centers.
- They are proposing a central water system and central sewage collection facility.
- They have an agreement with North Lake Recreational Sewer and Water District to facilitate the sewer.
- The sewer will meet North Lake Recreational Sewer and Water District's master plan requirements which include development of future properties in this area.
- The central water system was designed to meet the Donnelly Fire District's fire flow requirements for not only the residential, but also the commercial fire flow requirements.
- They have applied for the water rights, drilling permit and have negotiated with the adjacent subdivisions for their potential use of this central water system.
- The main irrigation ditch will be used to irrigate the open areas; therefore, this will be using this natural resource.
- The traffic report completed by the Tamarack Resort has been incorporated into the design of this project. The impact of this project using this roadway is incorporated and they will pay their proportional impact fees.
- The internal roads will be paved and will be constructed to county standards.
- They will be in compliance with the County's BMPs in handling the stormwater runoff; including retaining the rain-on-snow events and allowing the natural drainage to continue through this area.
- The on-site investigation has begun to identify wetlands. The report will be compiled and submitted to the Corps of Engineers.
- They have joined the Edwards Mosquito Abatement District. The drainage facilities will reduce the mosquito problem.
- The Idaho Fish and Game have identified some birds of prey in the area, but nothing site specific.
- They feel this project will best suit what the County needs for development in this area – multi-family for potential employees of Tamarack, single family for second homes and small commercial areas to facilitate the needs of this development.
- The private roads, central water system and central sewer system will be owned and maintained by the homeowner's association; therefore, because it is being funded by private funds it will not impact the public monies.

Commissioner Winkle asked Mr. Pachner who will maintain the ditch. Mr. Pachner

responded, the homeowner's association. They will not reduce the flow from the irrigation ditch to the neighbors to the south. Commissioner Winkle asked Mr. Pachner if he has spoken to the owner of the ditch. Mr. Pachner responded, no. The ditch will be re-aligned. The Commission and Mr. Pachner discussed the proposed changes to the irrigation district on the map.

Commissioner Allen stated he would like further explanation of the commercial areas. Mr. Pachner showed the Commission on the map **(exhibit 7)** how this area will be developed, where it will set along the highway, landscaping berms, storage units with paved access, and another landscape berm that will separate the storage units from the retail space / office areas with the proposed parking.

Commissioner Burnett asked Mr. Pachner if the developer will be building the homes. Mr. Pachner stated, yes and that Mr. Charters will be able to answer that question during his presentation.

Mr. Pachner further discussed the map **(exhibit 7)** with the Commission – showing the layout of the development.

Commissioner Allen asked Mr. Pachner about the affordable homes. Mr. Pachner explained that the affordable homes will be the multi-family units. Commissioner Allen asked if this would include rentals. Mr. Pachner responded, yes.

Commissioner Burnett asked if the whole complex will be fenced. Mr. Pachner responded, not the whole complex - but will allow some fencing around the single family units, central water system, water reservoir, and maintenance yard.

Commissioner Burnett asked Mr. Pachner about the grazing in the area. Mr. Pachner showed Commissioner Burnett on the map where the grazing areas are located.

Commissioner Winkle asked Mr. Pachner if they would be using wood burning devices in the homes. Mr. Pachner responded, propane stoves with propane tanks would be allowed as the burning devices.

Chairman Somerton asked Mr. Pachner the size of units proposed for multi-family. Mr. Pachner responded, they will be 1,100 square foot.

Commissioner Allen asked Mr. Pachner about the open spaces. The Commission and Mr. Pachner discussed the minimum requirements for open spaces in a planned unit development. 50% is required - which includes the interior roads and right-of-ways. This project meets those requirements at 60%. They also discussed the building envelopes, storage facilities, snow storage areas with 20' setbacks (includes drainage, storage ponds, natural drainage, and capturing pre-development flows).

Commissioner Hatfield asked Mr. Pachner how the homeowner's association will be

maintaining the lots. Jack Charters will respond to that question. Commissioner Hatfield asked about the fencing. Mr. Pachner responded that a portion of them may fence with a maximum of height 6'. Commissioner Hatfield asked Mr. Pachner who would be maintaining the lots. Mr. Pachner responded, they will be using the local employee force.

Jack Charters, Buckskins Properties, came forward and stated the following:

- The homeowner's association will charge $12 per home per month.
- He will put in $3,000-$4,000 at the beginning to help establish the fund.
- They hire local employees to maintain the property.

Commissioner Burnett asked Mr. Charters about the proposed number of 18 children impacting the school district. Commissioner Burnett and Commissioner Winkle stated that number is too low. Commissioner Burnett asked Mr. Charters if he would be willing to help out the schools if the numbers run 30-40. Mr. Charters responded, yes – why wouldn't you want to help the schools.

Commissioner Burnett asked if they have anything planned for the commercial area. Mr. Charters stated that they have had people approach them – but nothing finalized. He expects there to be a convenience store and nice shops.

Commissioner Burnett stated to Mr. Charters that the $7+ million estimated cost of development is too low.

Commissioner Winkle stated that these lots are too dense. He asked Mr. Charters if there was any reason, other then monetary, why these lots are so dense. Mr. Charters responded, yes. They want to make better use of the ground. The 92 acres reflects 2.4 houses per acre. The people who buy these units don't want to maintain their second homes – they want to come up and play. Because these are well maintained, the property values will increase.

Staff asked Mr. Charters if he considered his employees using the multi-family units. Mr. Charters responded he will have 5 to 10 employees. He showed the Commission and Staff the map **(exhibit 4)** of the planned development site – wells, water, power, RV spots with hookups for the workers while this is being developed, and fire hydrants. Until North Lake Recreational Sewer and Water District actually buys the central water system – Mr. Charters will be operating it. Staff asked Mr. Charters how many RV sites he is proposing. Mr. Charters stated he would like to start out with 20 – and then maybe ask for 10 more later if needed. This will be added to the P.U.D. and these will be temporary.

Chairman Somerton asked if there were any proponents that would like to speak.

Larry Eld, 783 South Trunnel Avenue, Meridian, came forward and stated the following:

- He was born and raised in Valley County south of Donnelly.
- He wanted to make sure he would be proud of whatever development is done to

the land.

- He wanted to make sure the developer had the money to do what he proposed.
- Mr. Charters has established that he has the financial backing.
- They called the Southern Utah Building Association and they had nothing but positive feedback regarding Mr. Charters – no complaints.
- He feels this will be a great development.
- He requests that the Commission approve this application.
- The trees will need to be replaced because they are diseased.
- Mr. Eld stated that the change to this irrigation system will solve the problem of flooding in this area because of his past method of irrigating the land. The wetlands in the area are manmade.
- Mr. Charters knows that he has to send water downstream.

Penny Leavitt, 480 South Cotterell Drive, Boise, ID, 83709, came forward and stated the following:

- She is a realtor and has known Jack Charters for thirty-five years.
- She also visited Mr. Charter's project in St. George.
- She is confident that this is a good project.
- She is requesting the Commission approve this application.

Chairman Somerton asked if there were any undecided that would like to speak.

Krystal Kangas-Hanes, 157 West State Street, Donnelly, came forward and stated the following:

- She is a proponent of growth and development within the Donnelly city limits.
- She is requesting that the Commission consider this regarding the density issue - People move here because of the open spaces and wildlife.
- The fences will deter wildlife from being allowed to roam through the project.
- Commercial areas should be encouraged within cities.

Chairman Somerton asked if there were any opponents that would like to speak.

Sherman Button, Mtn. Meadows Subdivision, came forward and stated the following:

- He lives on the corner of Roseberry and Cameron.
- One of the concerns they have is speeding traffic.
- They moved here in 1985 and built their retirement home.
- The proposed development is too close to his house.
- People are making money from these developments. They are paving paradise with a parking lot.
- This will impact their livelihood
- The impact of the number of people and density of the 121 homes scares them to death.
- The beautiful field will now be housing units.
- He asked the Commission to please consider these issues.

Nancy Button, PO Box 442, Donnelly, came forward and stated the following:

- She agrees with her husband.
- The lot sizes should be bigger – 2 homes per acre instead of 2.5 homes per acre.
- Not allow fencing so the wildlife can roam through the area.
- Questions the quality of the homes – by allowing low-income housing.
- The commercial area should be disclosed before being allowed to be part of the application. She also believes the commercial areas should be within the cities.
- Questions the effectiveness of the snow removal.

Tom Steinberg, 13161 Cameron Drive, Donnelly, came forward and stated the following:

- Also believes the density is an issue that needs to be addressed.
- The location of this commercial area is inappropriate.
- The estimated number of students is too low.
- Where did they come up with the number of 30% of homes will be permanent homes?
- How do they know how many homes will be second homes?
- The homes blending into the setting will not happen on a .18 acre lot. A half acre is more reasonable.
- Snow storage is an issue. This is one of the biggest snow drift areas in the valley.
- Promoting gatherings – what does that mean?
- If the wells are dug deep – how will that effect water quality?
- He agrees that they should know what kind of businesses will be proposed before it is allowed to be part of the application.
- He is a firm advocate that the City of Donnelly should be viable before developing commercial areas two miles outside the city.
- The traffic in this area will be adversely affected.
- Mosquito abatement is a concern because of the issue of spraying toxins in the area.
- Eight-plexes in this proposal is questionable. There are not even eight-plexes in the City of Donnelly yet.
- What is the heat source for the homes?
- Natural drainage is an issue.
- Timber issues need to be re-addressed.
- The 20 RV sites is a whole new issue.
- Proper notice wasn't given – area of the placement of the sign, and the time and date weren't noted.

Ken Everett, Forest Place, came forward and stated the following:

- His home is at the south access of this proposal.
- He has been in the building business for twenty-five years.
- He is for development – he knew Tamarack would eventually happen.
- The issue of the small lots is setting a bad precedence for the valley.
- The whole section in this area is being developed into subdivisions - but the .18

acres is a real concern if allowed in this development and future developments.

- We may have 20-40 subdivisions in the next twenty years. Density issues will become an even bigger issue.
- Maybe Mr. Charters would sacrifice a little money by increasing the lot sizes.
- He appreciates the work of the Commission – but please consider making these lots the standard (1/3 of an acre).

Chairman Somerton asked if there were any other proponents, undecided or opponents that would like to speak. There were none.

Pat Dobie, Valley County Engineer, came forward and stated the following:

- He has visited the site.
- Staff has put a lot of time and work in these developments trying to coordinate all the issues – utilities, road issues, and access.
- The drainage plan is not complete.
- A development fee program is being completed.
- Based upon the cost of the capital improvement plan to upgrade the roads, and the estimate of new units in the area, a fee of approximately $1,800 per residential unit will be required to construct the roads.

Commissioner Winkle asked Mr. Dobie about the snow storage. Mr. Dobie stated that he doesn't feel this will be a problem. As far as design standards and objectives for this project, a plan needs to be worked up showing the ability to provide storm water capacity for a 100-year event, the infrastructure on the roads to accommodate at least a twenty-five year frequency event, the developer be required to detain the stormwater on site so the discharge from the site doesn't exceed the pre-development conditions, and the developer retain the water quality event on site. Mr. Dobie feels the drainage will work.

Chairman Somerton asked for the rebuttal from the applicant.

Jack Charters, Buckskin Properties, came forward and stated the following:

- He agrees and sympathizes with the concerns of the people living in the area.
- He understands the emotions of this development near their homes.
- They will have parks for children and grandchildren; swing sets, fire pits with grates and with concrete areas to put chairs.
- There will not be fences – except around the water.
- 10,000 square foot commercial space.

Commissioner Burnett asked if he could make the lots bigger then 8,000 square feet. Mr. Charters responded that he had already increased the size from 7,000 to 8,000. Your ordinance stated I could have 6 per acre with a planned unit development. If the snow becomes a problem – he will pay to have it removed. This will be made a condition of approval. Mr. Charters stated that this will also be put in the HOAs guidelines.

Mr. Charters stated that he received the studies from Tamarack and Jug Mountain and

applied them to this project. He has pre-sold 42 of these units – and not one will be spending the winter here with their children. Mr. Charters agreed that if he impacts the schools more then the agreed 30% he will contribute proportionally to the school district. This could also be put in as a condition of approval.

Mr. Charters further stated that he will be building this in 6 phases in 6 years. The average home will be 1,500 square feet with a maximum of 3,000 square feet. The eight-plexes will be used as rentals with 1,384 square feet units – each with 3 bedrooms / 2 baths. Mr. Charters showed the Commission on the map **(exhibit 7)** the layout of the homes.

Chairman Somerton closed the public hearing and brought it back to the Commission for discussion.

Commissioner Winkle stated now that Tamarack is going – the door is open. There is no way to stop it.

Commissioner Allen asked how does this development meet Valley County housing needs. Is this affordable housing or retirement housing. He feels this is retirement housing at this point, unless they move the rental housing portion of this development to one of the first phases.

The Commission discussed the other subdivisions that have been approved lately that could be considered economy housing. They need to meet all the needs of the County, so they need to have a balance.

Commissioner Burnett stated that this could meet both needs - because of the sizes of the homes and lots.

Commissioner Winkle asked why would a family from Boise come up to Valley County to spend the weekend in a tract? Couldn't the developer make more money if he put one home on a five acre lot?

Commissioner Burnett responded that they come here for the atmosphere, the area, the recreation, and for what they can afford. He also stated that land is so expensive; reality is that average person can't afford that. Everyone has different lifestyles and we can't judge those lifestyles.

Commissioner Hatfield stated the layout is nice – but the reason he moved up here is to get away from crowds. He feels the density is too high. Commissioner Hatfield then read a few excerpts from the Valley County Comprehensive Plan that addresses open spaces, recreation and preserving the quality of life in Valley County.

Commissioner Burnett stated that in our ordinances, they allow a developer to do a project like this – we can't pick and choose – we have to look at the whole LUDO. Plus

we have private property rights that have to be considered.

The Commissioners agreed that they need to again revisit the comprehensive plan, subdivision ordinance, and LUDO to address these issues.

Commissioner Allen stated that the prior P.U.D. applications had thousands of acres of land. This is a small section that is extremely densely developed. This does meet the ordinance standards, but this is not the same as the prior P.U.D.'s that have been considered. It will need to stand on its own merits. How open-ended do we allow these phases to be? Can a condition of approval be that there will be non-slide roofs?

The Commission further discussed density, snow removal and affordable housing. Can the phasing be changed so that the multi-family housing is moved up to the first phase?

Staff stated that the Commission will need a specific phasing plan – every two years.

Chairman Somerton reopened the public hearing.

The Commission asked Mr. Pachner if they could move the multi-family units to the first phase? Mr. Pachner reviewed the map **(exhibit 7)** and the current phasing.

Jack Charters, Buckskin Properties, came forward and stated that he could switch half of the multi-family units to be started this next spring.

Commissioner Hatfield asked what the multi-family units would look like. Mr. Pachner stated they didn't bring the drawings with them tonight, but they will also be natural tones.

Commissioner Burnett asked how much would these units rent for. Mr. Charters stated probably $500 to $600 each.

Chairman Somerton stated that if they would change the phasing portion, we could give this concept approval and then they would come in with a more detailed plan before they can go any further.

Chairman Somerton asked if any proponents or opponents would like to speak.

Tom Steinberg, 13161 Cameron Drive, came forward and stated the following:

- The site did not have proper notice.
- He doesn't feel the pictures **(exhibit 6)** show what the subdivision would look like – just what the houses would look like.
- Why does the multi-family units need to be included in this project. Is it necessary?
- He hopes that with as many questions that are still left unanswered, that this not be approved.

- The numbers don't add up to show that the developer will be making money on this if he rents the multi-family units for $600 per month – that means they would sell for $60,000? It would cost him more then that to build each unit. There is no economic feasibility to this.

Chairman Somerton again closed the public hearing and brought it back to the Commission for discussion.

Staff and the Commission went over Page 40 of the Land Use and Development Ordinance and reviewed all questions of the compatibility rating (including #6, #8 and #9). They came up from a +13 to a +19.

The Commission discussed the proposal. Commissioner Hatfield asked that the Commission ask the developer to be put all the larger lots all along the outer edge of the proposed development.

The Commission and Staff then went over the Board's concept approval list together:

Question -	**1**	**2**	**3**	**4**	**5**
Commissioner Allen -	Y	Y	Y	Y	Y
Commissioner Burnett -	Y	Y	Y	Y	Y
Commissioner Hatfield -	Y	N	Y	Y	N
Commissioner Winkle -	Y	N	Y	Y	Y
Chairman Somerton -	Y	Y	Y	Y	Y

Staff went over the additional Conditions of Approval:

- The multi-family portion of the development is moved to Phase II.
- Homeowner's Association will take care of snow removal.
- There will be no fencing between single family structures.
- They will not discharge more water in the drainage then pre-development flows.
- A phase must be developed every two years.

The Commission made a recommendation that they negotiate with the developer to have less density along the East side of this project, even though the developer already meets the density requirements of a planned unit development.

Commissioner Hatfield stated he still has a problem with the Commission setting precedence, that if everyone who comes along is compatible, there could be planned unit developments all up and down the highway.

Commissioner Allen stated the Commission has planning input and flexibility in the development phase. What is the highway going to look like? The new units that butt up to each other should have similarities. The Commission can make recommendations.

Staff stated that this developer has changed this application from his original plan. He

has decreased his density.

Commissioner Burnett moved to recommend approval of the following to the Valley County Board of Commissioners: 1) Concept Approval and the Planned Unit Development; 2) Conditional Use Permit; 3) Preliminary Plat; and 4) Recommend that they negotiate lesser density along the East side - for P.U.D. 04-01 Meadows at West Mountain with the Conditions of Approval in the Staff Report and with the five additional COAs listed above. Commissioner Allen seconded the motion. Commissioner Hatfield and Commissioner Winkle voted nay. The motion carried.

Chairman Somerton explained the 10-day appeal period.

OTHER ITEMS:

1. Ken McPhail – Burial Crypt: Staff had given each of the Commission members a copy of the appeal letter and backup received from Mr. Ken McPhail on May 13, 2004. Staff stated that Mr. McPhail's appeal is regarding her administrative decision to not give approval of his building permit. The Commission discussed the issue and agreed that Mr. McPhail will need to apply for a Conditional Use Permit.

2. Excavation Permits: Staff stated that a Conditional Use Permit is required before any excavation is done for gravel ponds. The Valley County Engineer would like something to be put in the ordinance that requires an excavation permit which has time limits. The Commission discussed the issue. Staff will add this under Chapter Two of the permitted uses in the ordinance. This item will be in front of the P & Z Commission at next month's meeting.

ADJOURN: 9:40 p.m.

Valley County Planning and Zoning Commission

P.O. Box 1350
Courthouse Building Annex

Cascade, Idaho 83611
Phone (208) 382-7114

Date June 27, 2003

Approved by Cynde Heinrich

Instrument # 273231
VALLEY COUNTY, CASCADE, IDAHO
2003-06-30 09:27:24 No. of Pages: 3
Recorded for : V C PLANNING & ZONING
LELAND G. HEINRICH Fee: 0.00
Ex-Officio Recorder Deputy
Index to: COUNTY MISC

CONDITIONAL USE PERMIT
NO. 03-07

Whispering Pines Subdivision
Preliminary Plat

Issued to: P.V. LLC
3628 Hillcrest Drive
Boise, ID 83701

Property Location: Located on RP13N04E032405 in the E1/2 of Section 3, T. 13N, R. 4E, and RP14N04E337205 in the E1/2 SE1/4 SW1/4 SE1/4 of Section 33, T. 13N, R. 3E, B.M., Valley County, Idaho. The property is approximately 435 acres.

There have been no appeals of the Valley County Planning and Zoning Commission's decision of June 12, 2003. The Commission's decision stands and you are hereby issued Conditional Use Permit No. 03-07 with Conditions for establishing a 24 lot single family subdivision as described in the application, staff report, and minutes.

The effective date of this permit is June 24, 2003. All provisions of the conditional use permit must be established and a final plat recorded within one year or a new permit or a permit extension in compliance with the Valley County Land Use and Development Ordinance will be required.

Conditions of Approval:

1. The portion of the application regarding Phase I, the staff report, and the provisions of the Land Use and Development Ordinance and Subdivision Regulations are all made a part of this permit as if written in full herein.

EXHIBIT C

2. Any change in the nature or scope of land use activities shall require an additional Conditional Use Permit.

3. The final plat for Phase I shall be recorded within one year of the date of approval of the conditional use permit or this permit shall be null and void.

4. The issuance of this permit and these conditions will not relieve the applicant from complying with applicable County, State, or Federal laws or regulations or be construed as permission to operate in violation of any statute or regulations. Violation of these laws, regulations or rules may be grounds for revocation of the Conditional Use Permit or grounds for suspension of the Conditional Use Permit.

5. A Private Road Declaration must be submitted prior to recording the final plat.

6. A final site grading plan with BMP's should be reviewed by DEQ and will need to be approved by the Valley County Engineer.

7. Purchasers of lots will be provided with the necessary information in order to comply with site grading requirements, lighting standards, landscaping requirements, any building envelope requirements, and other requirements as provided in the CCRs.

8. The applicant will obtain a wetland determination from the Army Corps of Engineers.

9. Those portions of the CCRs that are presented as part of the application to fulfill requirements of the LUDO are enforceable by Valley County.

10. All provisions for the ditch must be finalized prior to recording the final plat.

11. The applicant shall comply with the requirements listed in the Valley County Engineer's letter.

12. A four-strand barbwire fence shall be extended around the boundaries of the subdivision. There shall be no gates within the fence until an agreement has been negotiated with the adjoining property owners. This shall be included in the CCR's.

13. Main access roads to adjacent lands will be public right of way.

14. CCRs will be provided prior to final platting and will address lighting, fencing, household pets, architecture and disposal of trash

15. Project will provide for a homeowners association.

16. Submit a Development Agreement on improvements to Gold Dust Road.

17. Project will comply with the requirements of the Cascade Rural Fire Department.

END CONDITIONAL USE PERMIT

Instrument # 307525
VALLEY COUNTY, CASCADE, IDAHO
2008-04-04 08:01:51 No. of Pages: 6
Recorded for : VALLEY COUNTY
LELAND G. HEINRICH Fee: 0.00
Ex-Officio Recorder Deputy
Index to: MISCELLANEOUS RECORD

Whispering Pines Subdivision

ROAD DEVELOPMENT AGREEMENT

THIS AGREEMENT is made this 18 day of August, 2005, by and between **Kristy Burnett,** whose address is P.O. Box 1250 Cascade, Idaho, the **Developer** of that certain Project in Valley County, Idaho 83611 known as Whispering Pines Subdivision, and **Valley County**, a political subdivision of the State of Idaho, (hereinafter referred to as "Valley County").

RECITALS

Developer has submitted a subdivision application to Valley County for approval of a 51 lot residential development known as Whispering Pines Subdivision.

Through the development review of this application, Valley County identified certain unmitigated impacts on public services and infrastructure reasonably attributable to the Project.

Developer has agreed to participate in the cost of mitigating these impacts by contributing its proportionate fair share of the cost of the needed improvements identified in the Agreement and listed on the attached Exhibit A.

Valley County and the Developer desire to memorialize the terms of their agreement regarding the Developer's participation in the funding of certain of the aforesaid improvements.

AGREEMENT

Therefore, it is agreed as follows:

1. *Capital Improvement Program*: A listing and cost estimate of the Gold Dust Road Area 2005 Roadway Capital Improvement Program, incorporating construction and right-of-way needs for the project area (see map, Exhibit B) is attached as Exhibit A.

2. *Proportionate share*: Developer agrees to a proportionate share of the road improvement costs attributable to traffic generated by Whispering Pines Subdivision as established by Valley County. Currently this amount has been calculated by the Valley County Engineer to be $192 per average daily vehicle trip generated by the Project. Refer to Exhibit A for details of the Gold Dust Road Area 2005 Capital Improvement Program Cost Estimate. Road impact mitigation may be provided by Developer contribution of money or other capital offsets such as right-of-way, engineering or in-kind construction. Such an offset to the road improvements is addressed in paragraph 3 of this Agreement.

3. *Capital contribution*: Developer agrees to pay a sum equal to $1,536 per lot (an average of 8 trips per single family residential lot times $192 per trip). The

EXHIBIT D

Developer's proportionate share of the road improvements identified in Exhibit A for the 51 lots shown on the subdivision application is $78,336 less the following offsets:

> Dedicated roadway right-of-way as shown on the Final Plat and more specifically described as: 35 feet of ROW north and south of centerline of Warner Drive (an additional 20 feet of ROW). The total value of the dedicated ROW is $43,614.

The developer agrees to pay Valley County the difference between their proportionate share of roadway costs ($78,336) less the offsets for dedicated right-of-way ($43,614) for a total cash payment of $34,722 due prior to recordation of the Final Plat.

4. The contributions made by Developer to Valley County pursuant to the terms of this Agreement shall be segregated by Valley County and earmarked and applied only to the project costs of the road improvement projects specified in Exhibit A or to such other projects as are mutually agreeable to the parties.

5. The sale by Developer of part or all of the Project prior to the platting thereof shall not trigger any payment or contribution responsibility. However, in such case, the purchaser of such property, and the successors and assigns thereof, shall be bound by the terms of this Agreement in the same respect as Developer, regarding the property purchased.

6. *Recordation*: It is intended that Valley County will record this Agreement. The intent of the recordation will be to document the official aspect of the contractual obligation set forth in this Agreement. This Agreement will not in any way establish a lien or other interests in favor of Valley County as to any real property owned by the Developer at the time of recording, or any real property that may be acquired by the Developer on any date after the recording of this Agreement.

_____, Developer

By: _____ Date: 8/8/05

VALLEY COUNTY BOARD OF COMMISSIONERS:

By: _____ Date: 8/22/05

Commissioner/Chairman F. Phillip Davis

By: _____ Date: 8-22-05

Commissioner Thomas W. Kerr

By: _____ Date: 8-22-05

Commissioner F. W. Eld

ATTEST:

VALLEY COUNTY CLERK:

_____ Date: 8/22/05

Leland G. Heinrich

STATE OF IDAHO)

) ss.

COUNTY OF VALLEY)

On this 18 day of August 2005, before me, Karen L. Thurston the undersigned, a Notary Public in and for said State, personally appeared Duncan Barnett + Kristy Barnett and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Karen L. Thurston

Notary Public for Idaho

Residing at: Cascade, Id

My Commission Expires: 2-10-09

KAREN L. THURSTON NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)

) ss.

COUNTY OF VALLEY)

On this 22 day of August 2005, before me, Joyce Mowry the undersigned, a Notary Public in and for said State, personally appeared F. Phillip Davis, Thomas W Kerr, F. M. Edis and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Joyce Mowry

Notary Public for Idaho

Residing at: Cascade, Idaho

My Commission Expires: 11-02-18

JOYCE MOWRY NOTARY PUBLIC STATE OF IDAHO

Exhibit A
GOLD DUST ROAD AREA
2005 ROADWAY CAPITAL IMPROVEMENT PROGRAM
COST ESTIMATE

Location: Gold Dust Road Area

Study Boundary:

- North: ½ Mile North of Gold Dust Road
- South: ½ Mile South of Gold Dust Road
- West: SH 55
- East: Foothills west of Gold Dust Road

Roadway Engineering/Construction Costs

Classification	Length	Cost/Mile	Total
Minor Collector (Gold Dust Road)	1.2 miles	$600,000	$720,000

Intersection Improvement Costs (unsignalized)

Location	Cost
Gold Dust Rd/SH-55	$200,000

Right-of-Way Costs

Right-of-Way Acquisition for 1.2 miles of roadway $41,000

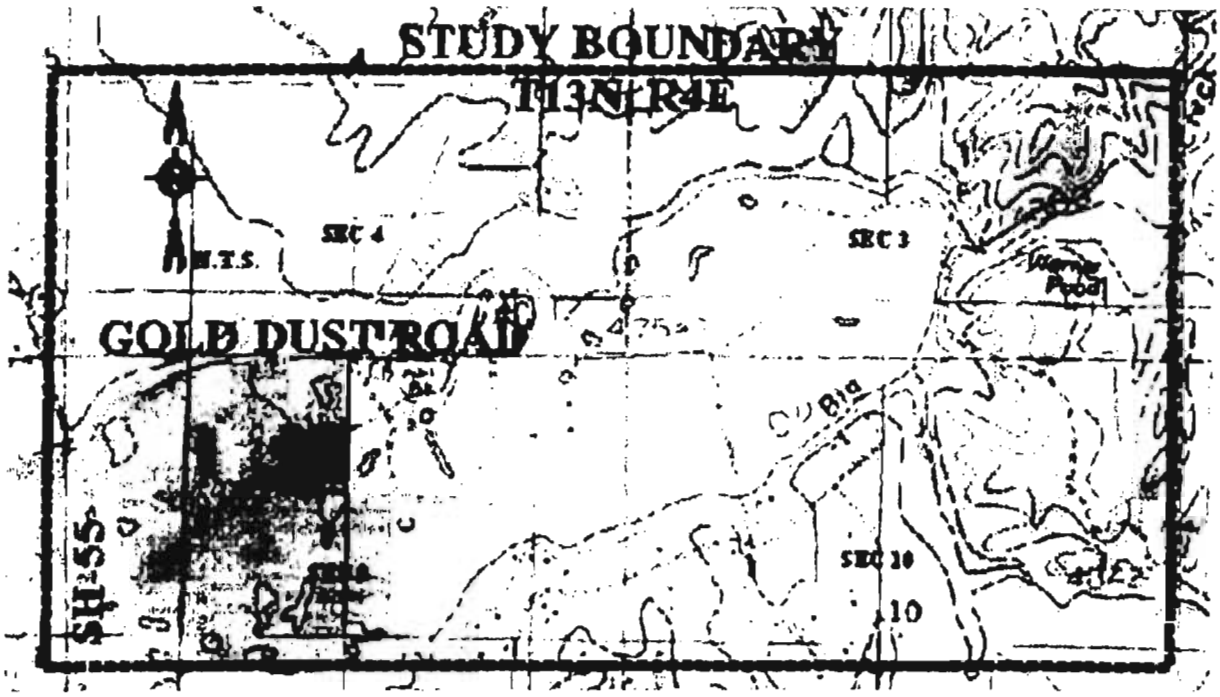
Capital Improvement Cost Total $961,000

Based on a 5,000 vpd level of service threshold, cost per vehicle trip = $192

For a typical single family residential development (8 trips/lot), cost per lot = $1,536. Costs will vary based on type of development and expected number/type of vehicle trips.

Exhibit B

GOLD DUST ROAD AREA
2005 ROADWAY CAPITAL IMPROVEMENT PROGRAM
LOCATION MAP



STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 25 day of Sept 2006, before me, Jennifer L. Ford the undersigned, a Notary Public in and for said State, personally appeared Kristy Burnett and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Jennifer L. Ford
Notary Public for Idaho

Residing at: Cascade, ID

My Commission Expires: 4/21/11

JENNIFER L. FORD NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 25 day of September 2006, before me, Joyce Mowry, the undersigned, a Notary Public in and for said State, personally appeared Thomas W. Kell & F. W. Phillips Jr. and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Joyce Mowry
Notary Public for Idaho

Residing at: Cascade Id

My Commission Expires: 11-02-18

JOYCE [illegible] NOTARY PUBLIC STATE OF IDAHO

_____, Developer

By: _____ Date: 8/8/05

VALLEY COUNTY BOARD OF COMMISSIONERS:

By: _____ Date: 8/22/05

Commissioner/Chairman F. Phillip Davis

By: _____ Date: 8-22-05

Commissioner Thomas W. Kerr

By: _____ Date: 8-22-05

Commissioner F. W. Eld

ATTEST:

VALLEY COUNTY CLERK:

_____ Date: 8/22/05

Leland G. Heinrich

Developer's proportionate share of the road improvements identified in Exhibit A for the 28 lots shown on the subdivision application is $43,008. The developer agrees to pay Valley County their proportionate share of roadway costs less the following offsets:

> Dedicated roadway right-of-way as shown on the Final Plat and more specifically described as: an additional 20 feet of ROW on Warner Drive to bring the total ROW to 70 feet (35 feet of ROW north and south of the centerline of Warner Drive) for a length of approximately 1,050 feet. The total value of the dedicated ROW is $6,749.

The developer agrees to pay Valley County the difference between their proportionate share of roadway costs $43,008) less the offsets for dedicated right-of-way ($6,749) for a total cash payment of $36,259 due at the time of the Final Plat approval.

4. The contributions made by Developer to Valley County pursuant to the terms of this Agreement shall be segregated by Valley County and earmarked and applied only to the project costs of the road improvement projects specified in Exhibit A or to such other projects as are mutually agreeable to the parties.

5. The sale by Developer of part or all of the Project prior to the platting thereof shall not trigger any payment or contribution responsibility. However, in such case, the purchaser of such property, and the successors and assigns thereof, shall be bound by the terms of this Agreement in the same respect as Developer, regarding the property purchased.

6. *Recordation*: It is intended that Valley County will record this Agreement. The intent of the recordation will be to document the official aspect of the contractual obligation set forth in this Agreement. This Agreement will not in any way establish a lien or other interests in favor of Valley County as to any real property owned by the Developer at the time of recording, or any real property that may be acquired by the Developer on any date after the recording of this Agreement.

Instrument # 314157
VALLEY COUNTY, CASCADE, IDAHO
2006-10-10 09:13:00 No. of Pages: 6
Recorded for : VALLEY COUNTY COMMISSIONERS
LINDA G. HENRICH Fee: 0.00
Ex-Officio Recorder Deputy

Whispering Pines Subdivision – Phase 2

ROAD DEVELOPMENT AGREEMENT

THIS AGREEMENT is made this 25th day of September, 2006, by and between **KDB, LLC**, whose address is 1657 N. Gold Falls Place, Meridian, Idaho, 83642, the **Developer** of that certain Project in Valley County, Idaho, known as Whispering Pines Subdivision – Phase 2, and **Valley County**, a political subdivision of the State of Idaho, (hereinafter referred to as "Valley County").

RECITALS

Developer has submitted a subdivision application to Valley County for approval of a 28 lot residential development known as Whispering Pines Subdivision – Phase 2.

Through the development review of this application, Valley County identified certain unmitigated impacts on public services and infrastructure reasonably attributable to the Project.

Developer has agreed to participate in the cost of mitigating these impacts by contributing its proportionate fair share of the cost of the needed improvements identified in this Agreement and listed on the attached Exhibit A.

Valley County and the Developer desire to memorialize the terms of their agreement regarding the Developer's participation in the funding of certain of the aforesaid improvements.

AGREEMENT

Therefore, it is agreed as follows:

1. *Capital Improvement Program*: A listing and cost estimate of the Gold Dust Road Area 2005 Roadway Capital Improvement Program, incorporating construction and right-of-way needs for the project area (see map, Exhibit B) is attached as Exhibit A.

2. *Proportionate share*: Developer agrees to a proportionate share of the road improvement costs attributable to traffic generated by Whispering Pines Subdivision – Phase 2 as established by Valley County. Currently this amount has been calculated by the Valley County Engineer to be $192 per average daily vehicle trip generated by the Project. Refer to Exhibit A for details of the Gold Dust Road Area 2005 Capital Improvement Program Cost Estimate. Road impact mitigation may be provided by Developer either through the contribution of money or capital offsets such as right-of-way or in-kind construction. Such an offset to the road improvements is addressed in paragraph 3 of this Agreement.

3. *Capital contribution*: Developer agrees to pay a sum equal to $1,536 per lot (an average of 8 trips per single family residential lot times $192 per trip). The

EXHIBIT E

Exhibit A
GOLD DUST ROAD AREA
2005 ROADWAY CAPITAL IMPROVEMENT PROGRAM
COST ESTIMATE

Location: Gold Dust Road Area

Study Boundary:

- North: ½ Mile North of Gold Dust Road
- South: ½ Mile South of Gold Dust Road
- West: SH 55
- East: Foothills west of Gold Dust Road

Roadway Engineering/Construction Costs

Classification	Length	Cost/Mile	Total
Minor Collector (Gold Dust Road)	1.2 miles	$600,000	$720,000

Intersection Improvement Costs (unsignalized)

Location	Cost
Gold Dust Rd/SH-55	$200,000

Right-of-Way Costs

Right-of-Way Acquisition for 1.2 miles of roadway $41,000

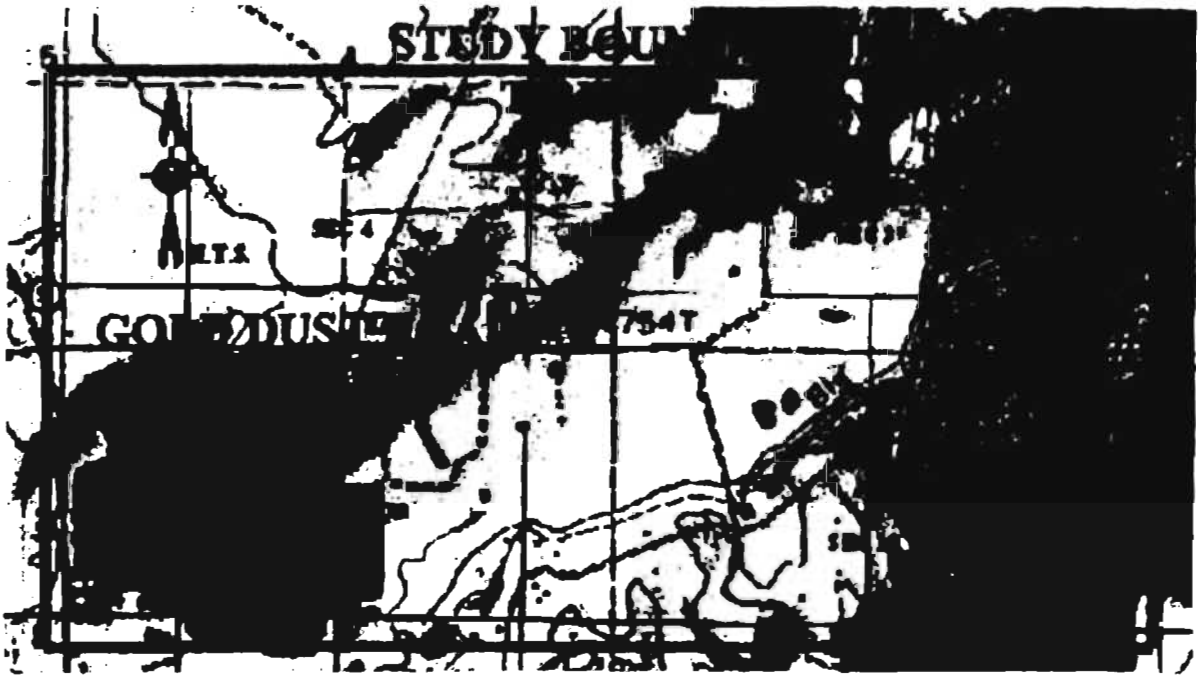
Capital Improvement Cost Total $961,000

Based on a 5,000 vpd level of service threshold, cost per vehicle trip = $192

For a typical single family residential development (8 trips/lot), cost per lot = $1,536. Costs will vary based on type of development and expected number/type of vehicle trips.

Exhibit B

GOLD DUST ROAD AREA
2005 ROADWAY CAPITAL IMPROVEMENT PROGRAM
LOCATION MAP



Instrument # 328444
VALLEY COUNTY, CASCADE, IDAHO
2008-01-15 08:51:14 No. of Pages: 4
Recorded for : WHISPERING PINES
ARCHIE N. BANBURY Fee: 12.00
Ex-Officio Recorder Deputy
re: ROAD DEVELOPMENT AGREEMENT

Whispering Pines Subdivision (Phase III)

ROAD DEVELOPMENT AGREEMENT

THIS AGREEMENT is made this 15 day of January, 2008, by and between KDB, LLC whose address is 1657 N. Gold Falls Place, Meridian, Idaho, the **Developer** of that certain Project in Valley County, Idaho, known as **Whispering Pines Subdivision (Phase III)**, and **Valley County**, a political subdivision of the State of Idaho, (hereinafter referred to as "Valley County").

RECITALS

Developer has submitted a subdivision application to Valley County for approval of an 18 lot residential development known as **Whispering Pines Subdivision (Phase III)**.

Through the development review of this application, Valley County identified certain unmitigated impacts on public services and infrastructure reasonably attributable to the Project.

Developer has agreed to participate in the cost of mitigating these impacts by contributing its proportionate fair share of the cost of the needed improvements identified in the Agreement and listed on the attached Exhibit A.

Valley County and the Developer desire to memorialize the terms of their agreement regarding the Developer's participation in the funding of certain of the aforesaid improvements.

AGREEMENT

Therefore, it is agreed as follows:

1. *Capital Improvement Program*: A listing and cost estimate of the Gold Dust Road Area 2005 Roadway Capital Improvement Program, incorporating construction and right-of-way needs for the project area (see Exhibit B) is attached as Exhibit A.

2. *Proportionate share*: Developer agrees to a proportionate share of the road improvement costs attributable to traffic generated by the Whispering Pines Subdivision (Phase III) as established by Valley County. Currently this amount has been calculated by the Valley County Engineer to be $192 per average daily vehicle trip generated by the Project. Refer to Exhibit A for details of the Gold Dust Road Area 2005 Capital Improvement Program Cost Estimate. Road impact mitigation may be provided by Developer contribution of money or other capital offsets such as right-of-way or in-kind construction. Such an offset to the road improvements is addressed in paragraph 3 of this Agreement.

EXHIBIT F

3. *Capital contribution*: Developer agrees to pay a sum equal to $1,536 per lot (an average of 8 trips per single family residential lot at a cost of $192 per trip). The Developer's proportionate share of the road improvements identified in Exhibit A for the 18 lots shown on the subdivision application is $27,648 less the following offsets:

   The Developer agrees to pay Valley County a total cash payment of **$27,648** due at the time of Final Plat approval.

4. The contributions made by Developer to Valley County pursuant to the terms of this Agreement shall be segregated by Valley County and earmarked and applied only to the project costs of the road improvement projects specified in Exhibit A or to such other projects as are mutually agreeable to the parties.

5. The sale by Developer of part or all of the Project prior to the platting thereof shall not trigger any payment or contribution responsibility. However, in such case, the purchaser of such property, and the successors and assigns thereof, shall be bound by the terms of this Agreement in the same respect as Developer, regarding the property purchased.

6. *Recordation*: It is intended that Valley County will record this Agreement. The intent of the recordation will be to document the official aspect of the contractual obligation set forth in this Agreement. This Agreement will not in any way establish a lien or other interests in favor of Valley County as to any real property owned by the Developer at the time of recording, or any real property that may be acquired by the Developer on any date after the recording of this Agreement.

KDB, LLC, Developer

By: _____ Date: 11-7-07

VALLEY COUNTY BOARD OF COMMISSIONERS:

By: _____ Date: 1-14-08

Commissioner/Chairman Gerald Winkle

By: _____ Date: JAN. 14, 2008

Commissioner Gordon Cruickshank

By: _____ Date: 1-14-08

Commissioner Frank Eld

ATTEST:

VALLEY COUNTY CLERK:

_____ Date: 1-14-08

Archie N. Banbury

STATE OF IDAHO, COUNTY OF VALLEY
ON THIS 14 DAY OF Jan
20 08 BEFORE ME, A NOTARY PUBLIC IN & FOR
SAID STATE PERSONALLY APPEARED,
Commissioner Gerald Winkle
Commissioner Gordon Cruickshank
Commissioner Frank Eld
KNOWN TO BE THE PERSON WHOSE NAME
SUBSCRIBED TO THE WITHIN INSTRUMENT, AND
ACKNOWLEDGED TO ME THAT HE, SHE, THEY
EXECUTED THE SAME.

_____
NOTARY PUBLIC, RESIDING AT CASCADE, ID.
COMM EXP. 11-01-09

JOYCE NOVOTNY NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)
)ss
COUNTY OF Valley)

On this 7th day of November 2007,before me, Pamela L. Holdenthe undersigned, a Notary Public in and for said State, personally appeared **Kristy Burnett Dickerson**, as Manager of KDB, LLC, a Limited Liability Company, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same in such capacity.

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

Pamela L Holden

Notary Public for
Residing at: Cascade, ID
Commission Expires: 1/17/08

PAMELA L. HOLDEN NOTARY PUBLIC STATE OF IDAHO

ORIGINAL

Jed Manwaring ISB #3040
Victor Villegas ISB# 5860
EVANS KEANE LLP
1405 West Main
P. O. Box 959
Boise, Idaho 83701-0959
Telephone: (208) 384-1800
Facsimile: (208) 345-3514
e-mail: jmanwaring@evanskeane.com
Vvillegas@evanskeane.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

BUCKSKIN PROPERTIES, INC. an Idaho Corporation, and TIMBERLINE DEVELOPMENT, LLC, an Idaho Limited Liability Company,

Plaintiff,

vs.

VALLEY COUNTY, a political subdivision of the State of Idaho.

Defendant.

Case No. CV-2009-554-C

AFFIDAVIT OF ROBERT W. FODREA

STATE OF IDAHO)
) ss.
County of Valley)

ROBERT W. FODREA, being duly sworn upon oath deposes and says as follows:

1. That I am an adult over the age of eighteen (18) years, that I am a resident of Cascade, Valley County, Idaho, and that I have personal knowledge of the facts set forth in this Affidavit.

2. I applied to Valley County for a conditional use permit ("CUP") on behalf of JAF Enterprises, LLC ("JAF") to construct the Murray Creek Subdivision located in Valley County. The application was approved by the Valley County Planning and Zoning Commission on October 14, 2004 and CUP No. 04-24 was issued to JAF, effective October 26, 2004. A true and correct copy of the CUP is attached to this Affidavit as Exhibit A.

3. Condition No. 8 of the CUP states that a Development Agreement with Valley County will be in place with the Board of County Commissioners. In fulfilling the conditions of the CUP and in order to obtain approval of the final plat for Murray Creek Subdivision, I was required to enter into a Road Development Agreement with Valley County and either pay the fee calculated by Valley County Engineer for the Smith's Ferry 2006 Capital Improvement Area where Murray Creek Subdivision is located, dedicate a right-of-way in lieu of paying the fee, or constructing in-kind roadway improvements to Packer John Road.

4. I did not offer to pay a fee, dedicate a right-of-way or construct in-kind improvements to mitigate for any impacts on county roadways attributable to traffic generated by Murray Creek Subdivision prior to issuance of my CUP. Rather, Valley County required me to enter into the Road Development Agreement pursuant to the conditions placed on its CUP.

5. At no time in my meetings and interactions with any Valley County representative with regard to my CUP was I told or advised that the Development Agreement and payment of the fee was voluntary, or that I had an option not to enter into the Road Development Agreement. At no time in my meetings or interactions with Valley County representatives with regard to my CUP was I told or advised that the fee paid under the Road Development Agreement was negotiable or that I could elect not to pay a fee or not to construct in-kind improvements. At no time in my meetings or interactions with Valley County representatives with regard to my CUP

was I told or advised that the contents of the Road Development Agreement were negotiable or that I could strike certain parts or provisions of the Road Development Agreement.

6. Valley County imposed the Road Development Agreement and the associated fee or in-kind construction as a condition to receive a final plat. Had I been advised by Valley County that payment of the fee or in-kind construction under the Road Development Agreement was negotiable or that I had an option not to pay the fee or construct in-kind roadway improvements, I would not have paid a fee or constructed the in-kind roadway improvements on Packer John Road.

7. I signed the Road Development Agreement on October 6, 2006. A true and correct copy of the Road Development Agreement is attached to this Affidavit as Exhibit B. Under the Road Development Agreement Valley County gave me the option of paying a road development fee in the amount of One Hundred Forty Four Thousand Nine Hundred Seventy Six and no/100 Dollars ($144,976.00), or constructing 2,384 feet of Packer John Road as an in-kind construction improvement of Packer John Road. I opted to pay for and undertake the construction in-kind improvements to Packer John Road instead of paying the fee directly to Valley County.

8. I did not voluntarily enter into the Road Development Agreement with Valley County or voluntarily incur the costs of the in-kind construction under the agreement. I did so only because Valley County required it as a condition to approval of the final plat for Murray Creek and as a condition for scheduling a hearing before the County Commissioners to approve final plat for my project. I was not given the option of proceeding with the development of Murray Creek without improving Packer John Road, either through the payment of a fee or in-kind construction.

9. I also applied to Valley County for a conditional use permit ("CUP") on behalf of Gold Fork River Ranch, LLC to establish Gold Fork River Ranch Sand & Gravel Sales for sand and gravel sales on property previously approved for establishing a 48 lot single-family subdivision located in Valley County. The Gold Fork River Ranch Sand & Gravel Sales CUP application was approved by the Valley County Planning and Zoning Commission on June 19, 2008, and CUP No. 08-08 was issued to Gold Fork River Ranch, LLC, effective June 30, 2008. A true and correct copy of CUP No. 08-08 is attached to this Affidavit as Exhibit C.

10. Condition No. 8 of CUP 08-08 states that: "A Road Development Agreement is required and will be entered into within three months of C.U.P. approval or sale of product will not be allowed." In fulfilling the conditions of the CUP and in order to obtain approval for the sale of sand and gravel, I was required to enter into a Road Development Agreement with Valley County and pay the fee as calculated by Valley County for the Koskella 2007 Capital Improvement Area where Gold Fork River Ranch is located. Valley County imposed the Road Development Agreement and the associated fee as a condition to sell sand or gravel. Gold Fork River Ranch, LLC had no choice but to pay the fee imposed by Valley County under its Road Development Agreement in order to begin business operations. I did not enter the agreement or make arrangements to pay the fee under the agreement voluntarily. I signed Road Development Agreement on September 23, 2009. A true and correct copy of the Road Development Agreement is attached to this affidavit as Exhibit D.

ROBERT W. FODREA

SUBSCRIBED and SWORN to before me this 26th day of Oct., 2010.

NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing in Cascade
My Commission Expires: 10/30/2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2 day of November, 2010, a true and correct copy of the foregoing document was served by first-class mail, postage prepaid, and addressed to; by fax transmission to; by overnight delivery to; or by personally delivering to or leaving with a person in charge of the office as indicated below:

Matthew C. Williams Valley County Prosecutor P.O. Box 1350 Cascade, ID 83611 Telephone: (208) 382-7120 Facsimile: (208) 382-7124	[X] U.S. Mail [ ] Fax [ ] Overnight Delivery [ ] Hand Delivery
Christopher H. Meyer Martin C. Hendrickson Givens Pursley LLP P.O. Box 2720 Boise, ID 83701-2720 Telephone: (208) 388-1200 Facsimile: (208) 388-1300	[ ] U.S. Mail [ ] Fax [ ] Overnight Delivery [X] Hand Delivery

Victor Villegas
Victor Villegas

Valley County Planning and Zoning Commission

P.O. Box 1350
Courthouse Building Annex

Cascade, Idaho 83611
Phone (208) 382-7114

Date October 27, 2004

Approved by Lynda Heinrich

Instrument # 288864
VALLEY COUNTY, CASCADE, IDAHO
2004-10-27 04:11:21 No. of Pages: 2
Recorded for : V C PLANNING & ZONING
LELAND G. HEINRICH
Ex-Officio Recorder Deputy
Fee: 0.00
Index to: COUNTY MISC

CONDITIONAL USE PERMIT
NO. 04-24
Murray Creek Subdivision

Issued to: JAF Enterprises, LLC
PO Box 188
Cascade, ID 83611

Property Location: Located on RP11N03E232365A in Section 23, T. 11N, R. 3E, B.M., Valley County, Idaho. The property is approximately 198.15 acres.

There have been no appeals of the Valley County Planning and Zoning Commission's decision of October 14, 2004. The Commission's decision stands and you are hereby issued Conditional Use Permit No. 04-24 with Conditions for establishing a 21 lot single family subdivision as described in the application, staff report, and minutes.

The effective date of this permit is October 26, 2004. All provisions of the conditional use permit must be established within one year or a permit extension in compliance with the Valley County Land Use and Development Ordinance will be required.

Conditions of Approval:

1. The application, the staff report, and the provisions of the Land Use and Development Ordinance and Subdivision Regulations are all made a part of this permit as if written in full herein.

2. Any change in the nature or scope of land use activities shall require an additional Conditional Use Permit.

EXHIBIT A

3. The final plat shall be recorded within one year of the date of approval or this permit shall be null and void.

4. The issuance of this permit and these conditions will not relieve the applicant from complying with applicable County, State, or Federal laws or regulations or be construed as permission to operate in violation of any statute or regulations. Violation of these laws, regulations or rules may be grounds for revocation of the Conditional Use Permit or grounds for suspension of the Conditional Use Permit.

5. The CCRs will address asset protection in regards to fire.

6. Roads and utilities will be installed prior to final plat recordation or a bond shall be posted or financial guarantees will be in place for both the installation of utilities and road construction.

7. A Private Road Declaration and Declaration of Utilities is required.

8. A Development Agreement will be in place with the Board of County Commissioners

9. Public access will be needed through this subdivision if there are other private properties beyond the current property, as determined by the Board of County Commissioners. The Board of County Commissioners will review connectivity through the subdivision to the next private property owner.

10. Roads will be constructed to Uniform Fire Code standards.

11. A site grading and storm water drainage plan is required and must be approved by the Valley County Engineer.

12. A letter from the Southern Idaho Timber Protection Association addressing wildfire response is required.

13. The applicant will obtain a wetland delineation or determination for the Army Corp of Engineers.

14. The CCRs will state, if a fire district is created, homeowners will participate in the fire district.

15. The CCRs and a note will be placed on the face of the plat will state that the well and power will be installed prior to building permits being issued.

16. The Valley County Engineer will assess the adequacy of the bridge.

17. A note stating no lot splits will be placed on the face of the plat.

END CONDITIONAL USE PERMIT

Instrument # 314984
VALLEY COUNTY, CASCADE, IDAHO
2006-10-31 08:52:53 No. of Pages: 8
Recorded for : VALLEY COUNTY COMMISSIONERS
LELAND G. HEINRICH Fee: 0.00
Ex-Officio Recorder Deputy
Index to: MISCELLANEOUS RECORD

Murray Creek Subdivision

ROAD DEVELOPMENT AGREEMENT

THIS AGREEMENT is made this 10th day of October, 2006, by and between Robert W. Fodrea, JAF Enterprises, LLC, whose address is P.O. Box 188, Cascade Idaho 83611, the **Developer** of that certain Project in Valley County, Idaho, known as Murray Creek Subdivision, and **Valley County**, a political subdivision of the State of Idaho, (hereinafter referred to as "Valley County").

RECITALS

Developer has submitted a subdivision application to Valley County for approval of a 26 lot residential development known as Murray Creek Subdivision.

Through the development review of this application, Valley County identified certain unmitigated impacts on public services and infrastructure reasonably attributable to the Project.

Developer has agreed to participate in the cost of mitigating these impacts by contributing its proportionate fair share of the cost of the needed improvements identified in this Agreement and listed on the attached Exhibit A.

Valley County and the Developer desire to memorialize the terms of their agreement regarding the Developer's participation in the funding of certain of the aforesaid improvements.

AGREEMENT

Therefore, it is agreed as follows:

1. *Capital Improvement Program*: A listing and cost estimate of the Smith's Ferry Area 2006 Roadway Capital Improvement Program Revision 2, incorporating construction and right-of-way needs for the project area (see map, Exhibit B) is attached as Exhibit A.

2. *Proportionate share*: Developer agrees to a proportionate share of the road improvement costs attributable to traffic generated by the Murray Creek Subdivision as established by Valley County. Currently this amount has been calculated by the Valley County Engineer to be $697 per average daily vehicle trip generated by the Project. Refer to Exhibit A for details of the Smith's Ferry Area 2006 Capital Improvement Program Revision 2 Cost Estimate. Road impact mitigation may be provided by Developer either through the contribution of money or capital offsets such as right-of-way or in-kind construction. Agreement.

3. *Capital contribution*: Developer agrees to pay a sum equal to $5,576 per lot (an average of 8 trips per single family residential lot times $697 per trip). The

EXHIBIT B

Developer's proportionate share of the road improvements identified in Exhibit A for the 26 lots shown on the subdivision application is $144,976.

The Developer agrees to make a total cash payment of $144,976 due at the execution of the Road Development Agreement.

The Developer also has the following option in lieu of making the cash payment: the developer shall construct 2,384 feet of Packer John Road to a 28 foot width and as specified in Exhibit C. At the execution of the Road Development Agreement, the Developer shall provide an acceptable surety of 110% of the cost of all improvements not yet completed.

4. The contributions made by Developer to Valley County pursuant to the terms of this Agreement shall be segregated by Valley County and earmarked and applied only to the project costs of the road improvement projects specified in Exhibit A or to such other projects as are mutually agreeable to the parties.

5. The sale by Developer of part or all of the Project prior to the platting thereof shall not trigger any payment or contribution responsibility. However, in such case, the purchaser of such property, and the successors and assigns thereof, shall be bound by the terms of this Agreement in the same respect as Developer, regarding the property purchased.

6. *Recordation*: It is intended that Valley County will record this Agreement. The intent of the recordation will be to document the official aspect of the contractual obligation set forth in this Agreement. This Agreement will not in any way establish a lien or other interests in favor of Valley County as to any real property owned by the Developer at the time of recording, or any real property that may be acquired by the Developer on any date after the recording of this Agreement.

Robert W. Fodrea, Developer

By: _____ Date: 10/6/06

VALLEY COUNTY BOARD OF COMMISSIONERS:

By: _____ Date: _____

Commissioner/Chairman F. Phillip Davis

By: _____ Date: 10-10-2006

Commissioner Thomas W. Kerr

By: _____ Date: 10-10-06

Commissioner F. W. Eld

ATTEST:

VALLEY COUNTY CLERK:

_____ Date: 10/10/06

Leland G. Heinrich

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 6 day of October 2006, before me, Jennifer L. Ford the undersigned, a Notary Public in and for said State, personally appeared Robert W. Fosbender and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Jennifer L. Ford
Notary Public for Idaho

Residing at: Cascade, ID

My Commission Expires: 1/21/11

JENNIFER L. FORD NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 10 day of October 2006, before me, Joyce Mowry the undersigned, a Notary Public in and for said State, personally appeared F. Phillip Davis Thomas W. Kell, F. W. Eld and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Joyce Mowry
Notary Public for Idaho

Residing at: Cascade, Id.

My Commission Expires: 11-02-08

JOYCE NOTARY PUBLIC STATE OF IDAHO

Exhibit A
SMITH'S FERRY AREA
2006 ROADWAY CAPITAL IMPROVEMENT PROGRAM
COST ESTIMATE

Location: Smith's Ferry Dr/Packer John Rd Area

Study Boundary:

- North: North section line of Sections 10 and 11, T 11N, R 3E
- South: South section line of Section 23, T 11N, R 3E
- East: East section line of Sections 11, 14, and 23, T 11N, R 3E
- West: SH-55/Payette River

Roadway Engineering/Construction Costs

Classification	Length	Cost/Mile	Total
Local Rd (Flat Terrain w/geotextile)[1]	2.35 miles	$380,000	$893,000
Local Rd (Mountainous Terrain)[1]	0.64 miles	$465,000	$297,600
Additional Roadway Drainage Costs			$45,000
		Sub Total.....	$1,235,600

[1] 28' Top Width Gravel Road. Pavement not required due to heavy logging truck traffic and remote location of the road section.

Intersection Improvement Costs (unsignalized)

Location	Cost
Smith's Ferry Rd/SH-55 (East ½ of Intersection)	$100,000
Smith's Ferry Rd/RR Crossing	$50,000
Sub Total.....	$150,000

Right-of-Way Costs

Right-of-Way Acquisition for 1.554 Acres of Roadway..... $7,770

CAPITAL IMPROVEMENT COST TOTAL..... $1,393,370

Based on a 2,000 vpd level of service threshold, cost per vehicle trip = $697

For a typical single family residential development (8 trips/lot), cost per lot = $5,576. Costs will vary based on type of development and expected number/type of vehicle trips.

Exhibit B

SMITH'S FERRY AREA
2005 ROADWAY CAPITAL IMPROVEMENT PROGRAM
COST ESTIMATE

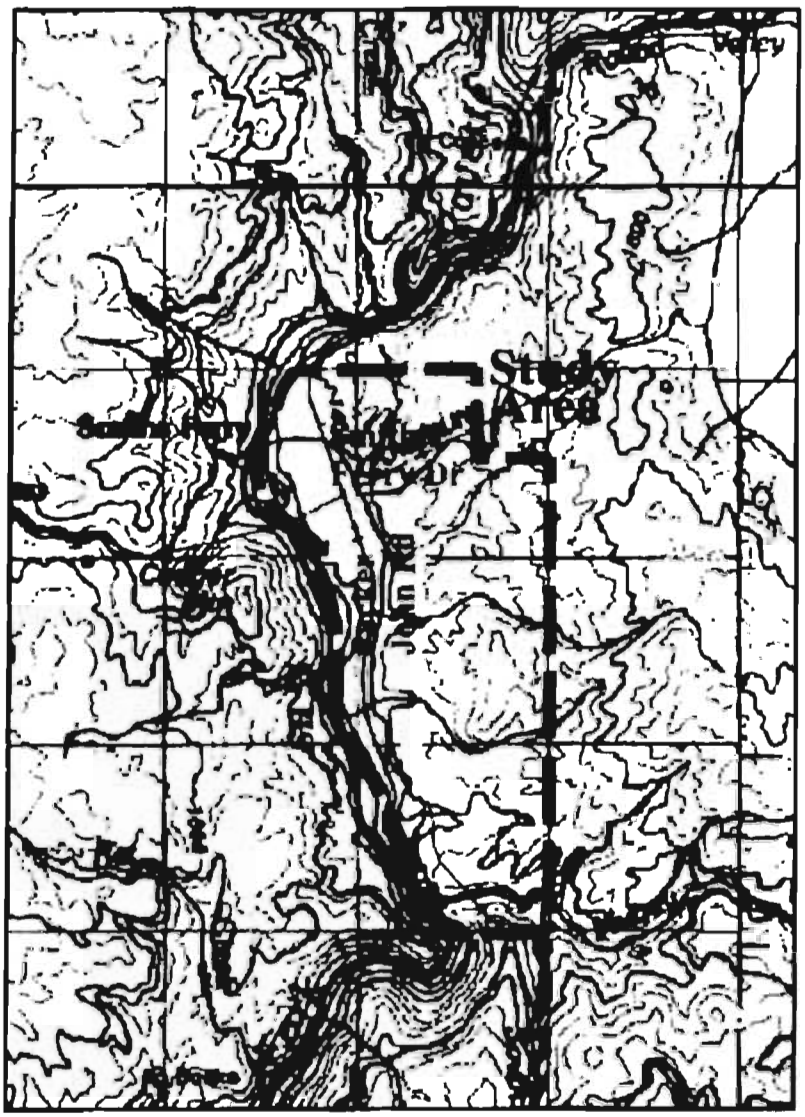


Exhibit C
VALLEY COUNTY ROAD DEPARTMENT
ROAD CONSTRUCTION PERMIT

Issue Date: **October 2, 2006**

Issued to: **Robert Fodrea**
JAF Enterprises
P.O. Box 188
Cascade, Idaho 83611

Location: **Packer John Road, from the intersection of Smith's Ferry Drive south for 2,384 feet.**

Work to be Performed: Reconstruction of roadway to a 28 foot width.

JAF Enterprises shall provide all necessary improvements to reconstruct 2,384 feet of Packer John Road to a 28 foot drivable width.

Work will include:

1. Place 12 inches of sub base material
2. Excavation/Embankment
3. Placement of Geotextile Fabric
4. Drainage Calculations and Installation of Culverts
5. Storm Water Prevention Plan (SWPP) and Implementation of SWPP
6. Clearing and Grubbing
7. Traffic Control
8. Engineering/Surveying

Valley County Road Department shall provide:

1. Geotextile Fabric located at Lake Fork Pit
2. Culverts and Bands located at Lake Fork Pit
3. Dredge Gravel located at Gold Dust Pit

Note: JAF Enterprises or their contractor will need to pick up items at Lake Fork Pit and gravel from Gold Dust Pit. Notify the Road Department prior to picking up materials.

Conditions of Permit:

1. Reconstruction of Packer John Road shall conform to the 2005 Minimum Standards for Public Road Design and Construction for a Standard Local Road with the requirement for crushed gravel base and asphalt surfacing removed.
2. Packer John Road will remain open to one lane of traffic at all times. Entire roadway shall be open at night. Roadway may not be limited to one lane of traffic without flaggers.

3. Traffic control devices and a traffic control plan conforming to the latest edition of the MUTCD shall be in place at all times to warn traffic of hazards, construction equipment, and construction conditions.
4. Mitigate dust by watering or chemical process 7 days a week during construction.
5. For a period of two years after completion of road reconstruction, **JAF Enterprises** will be responsible for repairing damage at their cost to **Packer John Road** due to construction defects.
6. It is the contractor's responsibility to locate all utilities before construction.
7. The contractor shall notify the Valley County Road Department (208-382-7195) when the project will begin at least two business days prior to beginning construction.
8. This permit will **expire on November 1, 2007,** with no actual construction without approval by the Valley County Road Superintendent.
9. Failure to comply with the above conditions will terminate this project.

If you have any questions please call Gordon Cruickshank at (208-382-7195).

Gordon L. Cruickshank
Valley County Road Superintendent

Please sign and return to Valley County Road Department at PO Box 672, Cascade, Idaho, 83611.

Accepted By:

Robert W. Fodrea
Name

P.O. Box 188
Address

Cascade ID 83611

382-4902
Phone

Robert W. Fodrea
Signature

10/6/06
Date

Alternate Contact:

Gary Johnson
Name

2677 8th St.
Address

Cumberland, WI 54829

715-822-8603
Phone

Planning and Zoning Commission
VALLEY COUNTY
IDAHO

P.O. Box 1350/219 North Main Street/Cascade, Idaho 83611-1350

Phone: 208.382.7115
FAX: 208.382.7119

Date June 30, 2008

Approved by Cynthia Herrod

Instrument # 332867
VALLEY COUNTY, CASCADE, IDAHO
7-1-2008 08:58:14 No. of Pages: 2
Recorded for : VALLEY COUNTY P & Z
ARCHIE N. BANBURY Fee: 0.00
Ex-Officio Recorder Deputy Cindy Engum
Index to: COUNTY MISC

CONDITIONAL USE PERMIT
NO. 08-08
Gold Fork River Ranch Sand & Gravel Sales

Issued to: Gold Fork River Ranch, LLC
PO Box 188
Cascade, ID 83611

Property Location: Located in SW ¼ Sec. 25, T.16N, R .3E, B.M., Valley County, Idaho. The property is approximately 162.32 acres.

There have been no appeals of the Valley County Planning and Zoning Commission's decision of June 19, 2008. The Commission's decision stands and you are hereby issued Conditional Use Permit No. 08-08 with Conditions for establishing sand and gravel sales as described in the application, staff report, and minutes.

The effective date of this permit is June 30, 2008. The use must be established according to the phasing plan or a permit extension in compliance with the Valley County Land Use and Development Ordinance will be required.

This permit will expire on June 19, 2009. Any extensions must be approved by the Commission prior to that date.

Conditions of Approval:

1. The application, the staff report, and the provisions of the Land Use and Development Ordinance and Subdivision Regulations are all made a part of this permit as if written in full herein.

EXHIBIT C

2. Any change in the nature or scope of land use activities shall require an additional Conditional Use Permit.

3. The approval will terminate in December of 2010.

4. The issuance of this permit and these conditions will not relieve the applicant from complying with applicable County, State, or Federal laws or regulations or be construed as permission to operate in violation of any statute or regulations. Violation of these laws, regulations or rules may be grounds for revocation of the Conditional Use Permit or grounds for suspension of the Conditional Use Permit.

5. Must comply with requirements of the Donnelly Rural Fire District.

6. A final site grading plan and storm water drainage plan shall be approved by the Valley County Engineer.

7. Dust shall be mitigated on-site and off-site.

8. A Road Development Agreement is required and will be entered into within three months of C.U.P. approval or sale of product will not be allowed.

9. Trucks will be unable to access site when there are load limits.

10. Hours of operation will be from 7 a.m. to 7 p.m. Monday thru Friday and 8 a.m. to 5 p.m. on Saturday. There shall be no operations on Sunday.

END CONDITIONAL USE PERMIT

GOLD FORK RIVER RANCH (SAND AND GRAVEL SALES)

ROAD DEVELOPMENT AGREEMENT

THIS AGREEMENT is made on this 28th day of September, 2009, by and between Gold Fork River Ranch, LLC, whose address is PO Box 188, Cascade, Idaho, 83611, the **Developer** of that certain Project in Valley County, Idaho, known as Gold Fork River Ranch, LLC, and **Valley County**, a political subdivision of the State of Idaho, (hereinafter referred to as "Valley County").

RECITALS

Developer has submitted an application to Valley County for approval of the sales of up to 100,000 cubic yards of surplus sand and gravel resulting from site development of the Gold Fork River Ranch (Conditional Use Permit 07-11).

Valley County has issued Conditional Use Permit (CUP 08-08) with conditions for establishing sales as described in the application, staff report, and minutes.

Through the development review of this application, Valley County identified certain unmitigated impacts on public services and infrastructure reasonably attributable to the sales. The County also identified the need to protect its roads from extraordinary wear due to the use of its road by heavy truck traffic associated with the sand and gravel sales.

Developer has agreed to participate in the cost of mitigating these impacts by contributing its proportionate share of the cost of the needed improvements identified in this Agreement and listed on the attached Exhibit A, Koskella Area 2007 Roadway Capital Improvement Program Cost Estimate. In addition, the Developer will also make efforts to limit the use of Davis Creek Lane between Koskella Lane and SH 55 to reduce extraordinary wear of this segment of road.

The Developer has accrued certain Road Development Credits in the amount of $65,000 under the names of Robert W. Fodrea and John E. Rennison through Road Development Credit Transfer Agreements #3 and #4 (Valley County Instruments #343694 and #343695). The Developer desires to use and the County agrees to accept these credits as payment for the Developer's *Capital Contribution* under this agreement.

Valley County and the Developer desire to memorialize the terms of their agreement regarding the Developer's participation in the funding of certain improvements in Exhibit A.

Instrument # 345764
VALLEY COUNTY, CASCADE, IDAHO
9-28-2009 03:36:17 No. of Pages: 10
Recorded for : VALLEY COUNTY ROAD DEPT
ARCHIE N. BANBURY Fee: 0.00
Ex-Officio Recorder Deputy
Index to ROAD DEVELOPMENT AGREEMENT

EXHIBIT D

AGREEMENT

Therefore, it is agreed as follows:

1. *Capital Improvement Program:* A listing and cost estimate of the Koskella Area 2007 Roadway Capital Improvement Program (Koskella CIP), incorporating construction and right-of-way needs for the project area (see map, Exhibit B) is attached as Exhibit A.

2. *Proportionate Share:* Developer agrees to a proportionate share of the road improvement costs attributable to traffic generated by Gold Fork River Ranch sand and gravel sales as established in Valley County. Currently this amount has been calculated by the Valley County Engineer to be $367 per average daily passenger car equivalent trip generated by the sales (refer to Exhibit A). Road impact mitigation will be provided by Developer either through the contribution of transferred Roadway Development credits.

3. *Capital Contribution:* Developer agrees to use acquired Roadway Development credits in the amount of $2,789 to satisfy their proportionate share of roadway costs. Refer to Exhibit C for the calculation of the cost based on the number of daily passenger car equivalent trips for the sale and transport of 100,000 cubic yards of material.

4. *Effect of use of transferred Roadway Development credits.* The Developer has a current Roadway Development credit balance of $65,000 under the names of Robert W. Fodrea and John E. Rennison. Under this agreement that balance will be reduced by $2,789, leaving an allowed transferable balance of $62,211 (sixty two thousand two hundred eleven and no/100 dollars).

5. *Limitation on Use of Davis Creek Lane..* The County is concerned that the increase of heavy truck traffic from this project may cause extraordinary wear to existing County roads. The new extension of Davis Creek Lane from Koskella Road to SH 55 is of particular concern. The Developer agrees to direct buyers of project material to not drive loaded trucks on the segment of Davis Creek Lane between Koskella Road and SH 55. .Koskella Road, Plant Lane, and Davis Creek Lane east of Koskella Road have withstood several years of heavy truck traffic and will not require limitations beyond existing County load limits.

6. *Recordation.* It is intended that Valley County will record this Agreement. The intent of the recordation will be to document the official aspect of the contractual obligation set forth in this Agreement. This Agreement will not in any way establish a lien or other interests in favor of Valley County as to any real property owned or acquired by the Developer at or after the recording of this Agreement.

Gold Fork River Ranch, LLC, Developer

By: _____ Date: 9/23/09
Robert W. Fodrea

By: _____ Date: 9/23/09
John E. Rennison

VALLEY COUNTY COMMISSIONERS

By: _____ Date: 09-28-09
Commissioner/Chairman Jerry Winkle

By: _____ Date: SEPT. 28, 2009
Commissioner Gordon L. Cruickshank

By: _____ Date: 9-28-09
Commissioner F. W. Eld

ATTEST

VALLEY COUNTY CLERK

_____ Date: _____
Archie N. Banbury

STATE OF IDAHO

)ss

COUNTY OF VALLEY

On this 23 day of September 2009, before me, Kirsti Allphin, The undersigned, a Notary Public in and for said State, personally appeared Robert W. Fodrea and acknowledged to me that they executed the same.

In witness whereof, I have set unto my hand and affixed my official seal the day and year first above written,

Notary Public for Idaho

Residing at: Star, ID

exp. 6-15-10

KIRSTI ALLPHIN NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO

)ss

COUNTY OF VALLEY

On this 23 day of September 2009, before me, Kirsti Allphin, The undersigned, a Notary Public in and for said State, personally appeared John Rennison and acknowledged to me that they executed the same.

In witness whereof, I have set unto my hand and affixed my official seal the day and year first above written,

Notary Public for Idaho

Residing at: Star, ID

exp. 6-15-10

KIRSTI ALLPHIN NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO

)ss

COUNTY OF VALLEY

On this 28th day of September 2009, before me, Nancy H Stathis
The undersigned, a Notary Public in and for said State, personally appeared
JERRY WINKLE and acknowledged to me that they executed the same.

In witness whereof, I have set unto my hand and affixed my official seal the day and year first above written,

Nancy H Stathis
Notary Public for Idaho

Residing at: Cascade, Idaho

Commissim Exp. 6/5/2014

NANCY H. STATHIS NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO

)ss

COUNTY OF VALLEY

On this 28th day of September 2009, before me, Nancy H Stathis
The undersigned, a Notary Public in and for said State, personally appeared
Gordon L Cruickshank and acknowledged to me that they executed the same.

In witness whereof, I have set unto my hand and affixed my official seal the day and year first above written,

Nancy H Stathis
Notary Public for Idaho

Residing at: Cascade

Comm. Exp 6/5/2014

NANCY H. STATHIS NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO

)ss

COUNTY OF VALLEY

On this 28th day of September 2009, before me, Nancy H Stathis,
The undersigned, a Notary Public in and for said State, personally appeared
F W Eld and acknowledged to me that they executed the same.

In witness whereof, I have set unto my hand and affixed my official seal the day and year first above written,

Nancy H Stathis
Notary Public for Idaho

Residing at: Boscade
Comm Exp 6/5/2014

NANCY H. STATHIS NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO

)ss

COUNTY OF VALLEY

On this 28th day of September 2009, before me, Nancy H Stathis
The undersigned, a Notary Public in and for said State, personally appeared
Archie N Barbury and acknowledged to me that they executed the same.

In witness whereof, I have set unto my hand and affixed my official seal the day and year first above written,

Nancy H Stathis
Notary Public for Idaho

Residing at: Cascade
Comm Exp. 6/5/2014

NANCY H. STATHIS NOTARY PUBLIC STATE OF IDAHO

Exhibit A

KOSKELLA AREA
2007 ROADWAY CAPITAL IMPROVEMENT PROGRAM
COST ESTIMATE

Location: Koskella Area

Study Boundary:

- North: Gold Fork River; and N. Section Line of Sections 10, 11,12,28, & 29, T16N, R4E
- South: S. Section Line of Sections 20, 21,22,23,24, & 30, T15N, R4E
- West: SH-55
- East: E. Section Line of Sections 12,13, 24, 25, & 36, T16N, R4E; and E. Section Line of Sections 1,12,13, & 24, T15N, R4E

Roadway Engineering/Construction Costs (Tier 1)

Classification	Length	Cost/Mile	Total
Local Roads	4.6 miles	$650,000	$2,990,000
Local Roads - Partial	0.4 miles	$430,000	$172,000
Local Roads - Mountainous	2.9 miles	$820,000	$2,378,000
Minor Collector	0.5 miles	$750,000	$375,000
Minor Collector - Partial	2.9 miles	$490,000	$1,421,000
		Sub Total	$7,336,000

Intersection Improvement Costs (unsignalized)

Location	Cost
Plant Lane and SH 55	$250,000
Davis Creek Lane and SH 55	$250,000
East 4 Lane and SH 55[1]	$125,000
Goode Lane and SH 55[1]	$125,000
[1] Cost adjusted for 1/2 split with Kantola Area CIP **Sub Total**	$750,000

Right of Way Costs

Right of Way Acquisition: 27.2 acres @ $20,000/acre	$544,000
Capital Improvement Total Cost	**$8,630,000**

Based on a combined capacity of 23,500[3] vpd level of service threshold, cost per vehicle trip= $367.

For a typical single family residential development (8 trips/lot), cost per lot = $2,936. Costs will vary based on type of development and expected number/type of vehicle trips.

[3]Assumes 2 local outlets (Plant Lane and Gold Fork Road) at 2,000 vpd, and 3 minor collector outlets (Davis Creek Lane, East 4 Lane, and Goode Lane) at 6,500 vpd .

Exhibit B

KOSKELLA AREA
2007 ROADWAY CAPITAL IMPROVEMENT PROGRAM
MAP OF CIP AREA

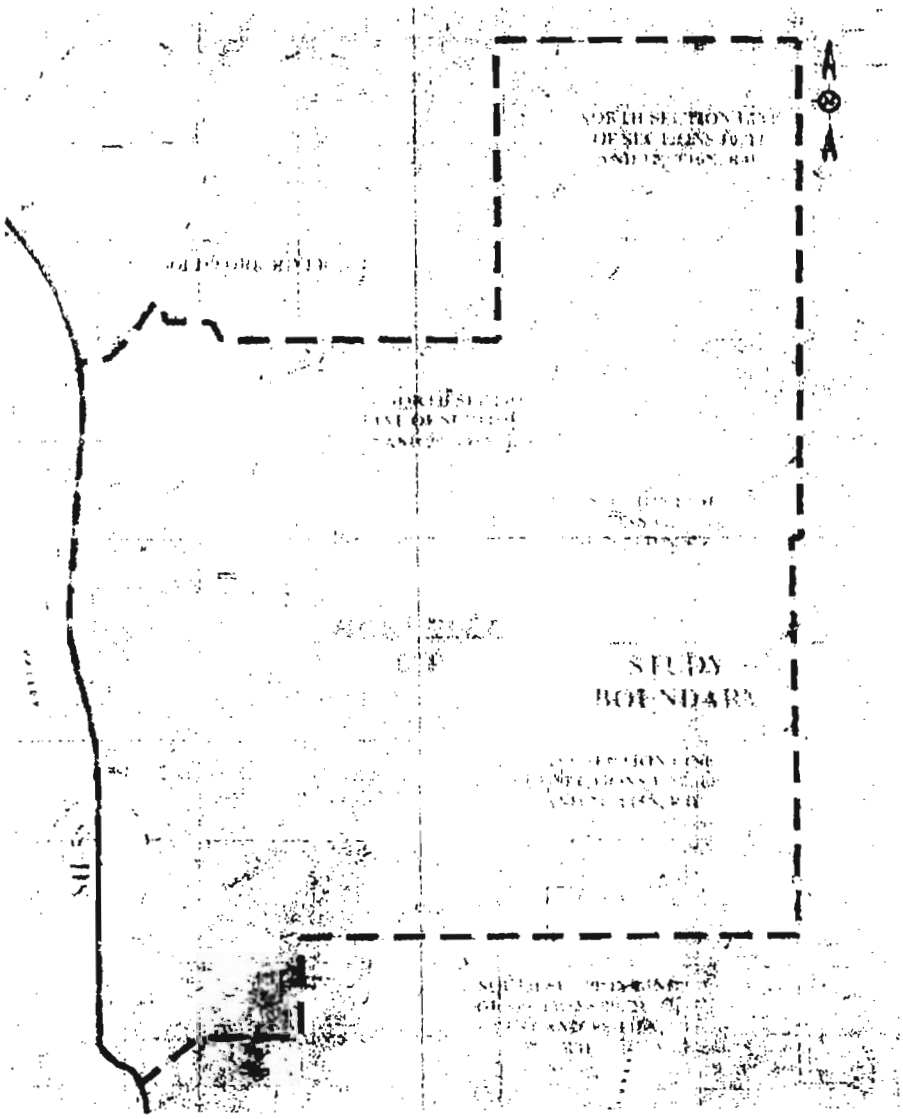


EXHIBIT C

Gold Fork River Ranch Sand and Gravel Sales
Road Development Agreement

Material to be hauled (yd^3) = 100,000

Amount/year (yd^3) = 33,333
(100,000 yd^3/3 years)

CUP Time Period (years) = 3
CIP Time Period (years) = 30

Hauling time frame = 5 months per year
= 22 days per month
Hauling Days per year = 110
(22 days)(5 months)

Assumed load per trip (yd^3) = 16

Trips per year = 2,083
(33,333 yd^3/16 yd^3 per trip)

Trips per day = 38 (19 in empty, 19 out full)
(2,083 trips/110 days)(2)

Assumed Passenger Car Equivalent/Haul Truck = 2
(Assume PCE = 1.5 for trips in, 2.5 trips out, 2.0 average)

Factored trips per day = 76
(Trips per day)(2 PCE)

Koskella Area CIP Cost/Vehicle Trip = $367

CIP Time Period Cost = $27,892
(76 PCE trips per day)($367)

Adjust for CUP Time Period
($27,892)(3 year CUP/30 year CIP)

Total Cost = $2,789

ORIGINAL

Jed Manwaring ISB #3040
Victor Villegas ISB# 5860
EVANS KEANE LLP
1405 West Main
P. O. Box 959
Boise, Idaho 83701-0959
Telephone: (208) 384-1800
Facsimile: (208) 345-3514
e-mail: jmanwaring@evanskeane.com
Vvillegas@evanskeane.com

Attorneys for Plaintiffs

ARCHIE N. BANBURY, CLERK
BY _____ DEPUTY
NOV 0 2 2010

Case No._____ Inst. No._____
Filed 10:16 A.M._____ P.M

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

BUCKSKIN PROPERTIES, INC. an Idaho Corporation, and TIMBERLINE DEVELOPMENT, LLC, an Idaho Limited Liability Company,

Plaintiff,

vs.

VALLEY COUNTY, a political subdivision of the State of Idaho.

Defendant.

Case No. CV-2009-554-C

AFFIDAVIT OF RODNEY A. HIGGINS

STATE OF IDAHO)
) ss.
County of Ada)

RODNEY A. HIGGINS, being duly sworn upon oath deposes and says as follows:

1. That I am an adult over the age of eighteen (18) years, that I am a resident of Ada County, Idaho, and that I have personal knowledge of the facts set forth in this Affidavit.

2. My wife and I retained Steve Loomis to represent our interests before Valley County in developing Wild Wings Subdivision located in Valley County. On our behalf, Mr.

Loomis submitted an application to Valley County for a conditional use permit ("CUP") to construct Wild Wings Subdivision. Our application was originally approved by Valley County on October 13, 2005, and CUP No. 05-48 with an effective date of October 25, 2005, was issued to us. A true and correct copy of the CUP is attached to this Affidavit as Exhibit A.

3. Condition No. 10 of the CUP states that we shall enter into a Development Agreement with Valley County. We, personally or through our representative, Steve Loomis, did not offer to pay a fee to mitigate for any impacts on county roadways attributable to traffic generated by Wild Wings Subdivision. Rather, Valley County required us to enter into the Road Development Agreement pursuant to the conditions placed on its CUP. We did not enter into the agreement voluntarily. In fulfilling the conditions of the CUP and in order to obtain approval of Final Plat for Wild Wings Subdivision, Valley County required that we enter into a Road Development Agreement and pay the fee calculated by Valley County Engineer for the Kantola/Day Star Capital Improvement Area where Wild Wings Subdivision is located. We were never given the option of proceeding with our development without improving or paying to improve the roadways.

4. My wife and I signed the Road Development Agreement on May 3, 2010. A true and correct copy of the Road Development Agreement is attached to this Affidavit as Exhibit B. Under the Road Development Agreement Valley County imposed a road development fee in the amount of One Hundred Twenty Four Thousand Seven Hundred Fifty Two and no/100 Dollars ($124,752.00). In lieu of paying the full amount, we dedicated a portion of a seventy foot (70') right-of-way along Day Star Lane at a value of Twelve Thousand Eight Hundred and no/100 Dollars ($12,800.00). This amount was credited to the fee required under the agreement. Additionally, we acquired "Road Development Credits" in the amount of One Hundred Sixteen

Thousand Twenty and no/100 Dollars ($116,020.00) from Ken Roberts, who had previously dedicated a right-of-way and constructed road improvements, and received a road development fee credit from Valley County as a result. In order to obtain the "Road Development Credits" from Mr. Roberts, we were required to meet with the Valley County Commissioners and enter into a Road Development Credit Transfer Agreement. A true and correct copy of the Road Development Credit Transfer Agreement is attached to this affidavit as Exhibit C. We were required to relinquish the "Road Development Credits" at the time of Final Plat approval at a value of One Hundred Eleven Thousand Nine Hundred Fifty Two and no/100 Dollars ($111,952.00), in order to pay for roadway costs. As a result, we were left with a balance of Four Thousand Sixty Eight and no/100 Dollars ($4,068.00) in "Road Development Credits".

5. Since Valley County imposed the Road Development Agreement and the associated fee or dedication of right-of-way as a condition to receive a final plat, we believed that Valley County had legal authority to do so. Had we or Mr. Loomis been advised by Valley County that payment of the fee or dedication of right-of-way under the Road Development Agreement was negotiable or that we had an option not to pay the fee or dedicate a right-of-way, we would not have paid a fee or dedicated a right-of-way. We did not voluntarily enter into the Road Development Agreement with Valley County or voluntarily dedicate a right-of-way and pay the road development fee. We did so only because Valley County required it as a condition to approval of Final Plat for Wild Wings Subdivision and as a condition for scheduling a hearing before the County Commissioners to approve Final Plat for our project.

RODNEY A. HIGGINS

SUBSCRIBED and SWORN to before me this 20th day of October, 2010.

Julie Harrison
Notary Public for Idaho
Residing in Boise
My Commission Expires: 03/08/2017

JULIE HARRISON
NOTARY
PUBLIC
STATE OF IDAHO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2 day of November, 2010, a true and correct copy of the foregoing document was served by first-class mail, postage prepaid, and addressed to; by fax transmission to; by overnight delivery to; or by personally delivering to or leaving with a person in charge of the office as indicated below:

Matthew C. Williams
Valley County Prosecutor
P.O. Box 1350
Cascade, ID 83611
Telephone: (208) 382-7120
Facsimile: (208) 382-7124

[X] U.S. Mail
[ ] Fax
[ ] Overnight Delivery
[ ] Hand Delivery

Christopher H. Meyer
Martin C. Hendrickson
Givens Pursley LLP
P.O. Box 2720
Boise, ID 83701-2720
Telephone: (208) 388-1200
Facsimile: (208) 388-1300

[ ] U.S. Mail
[ ] Fax
[ ] Overnight Delivery
[X] Hand Delivery

Victor Villegas
Victor Villegas

Planning and Zoning Commission
VALLEY COUNTY
IDAHO

P.O. Box 1350/219 North Main Street/Cascade, Idaho 83611-1350

Phone: 208.382.7114
FAX: 208.382.7119

Date October 27, 2005

Approved by Cynthia Herrick

Instrument # 302165
VALLEY COUNTY, CASCADE, IDAHO
2005-10-27 04:44:35 No. of Pages: 2
Recorded for : P & Z
LELAND G. HEINRICH
Ex-Officio Recorder Deputy
Index to: COUNTY MISC
Fee: 0.00

CONDITIONAL USE PERMIT
NO. 05-48
Wild Wings Subdivision

Issued to: Evelyn Ruth Higgins (owner)
2216 Brumback
Boise, ID 83702

Loomis Homes Inc. (applicant)
PMB 187, 7154 W. State St.
Boise, ID 83703

Property Location: Located in the NW4 of Section 4, T. 15N, R. 3E, B.M., Valley County, Idaho.

There have been no appeals of the Valley County Planning and Zoning Commission's decision of October 13, 2005. The Commission's decision stands and you are hereby issued Conditional Use Permit No. 05-48 with Conditions for establishing a 45 lot single family subdivision as described in the application, staff report, and minutes.

The effective date of this permit is October 25, 2005. The use must be established within one year or a permit extension in compliance with the Valley County Land Use and Development Ordinance will be required.

Conditions of Approval:

1. The application, the staff report, and the provisions of the Land Use and Development Ordinance and Subdivision Regulations are all made a part of this permit as if written in full herein.

EXHIBIT A

2. Any change in the nature or scope of land use activities shall require an additional Conditional Use Permit.

3. The final plat shall be recorded within one year of the date of approval or this permit shall be null and void.

4. The issuance of this permit and these conditions will not relieve the applicant from complying with applicable County, State, or Federal laws or regulations or be construed as permission to operate in violation of any statute or regulations. Violation of these laws, regulations or rules may be grounds for revocation of the Conditional Use Permit or grounds for suspension of the Conditional Use Permit.

5. The CCRs shall address wood burning devices, bear proof garbage containers, and lighting requirements.

6. Must comply with requirements of the Donnelly Rural Fire District.

7. Must have a will serve letter from the North Lake Recreational Sewer and Water District guaranteeing that sewer capacity and public water is available for immediate service prior to recordation of the final plat.

8. Lots will comply with minimum lot size standards.

9. Must provide an engineer certified determination of whether there is high ground water; and if so, must determine top of foundation elevations for each building and identify them on the plat. A bench mark must be provided.

10. Shall have a Development Agreement with Valley County that is negotiated with the Board that addresses the following:
    - Off-site Road Improvements
    - McCall School District
    - Planning & Zoning Commission recommends that 10% of the lots be given to a housing authority in order to provide for affordable community/workforce housing with deed restrictions.

11. Applicant will reduce number of lots by two for use as open space (common area).

12. Shared driveways on Day Star Lane must be shown on the plat.

13. Must have an approved storm water pollution prevention plan and site grading plan prior to construction.

14. Applicant will have provisions for maintenance of the common area.

END CONDITIONAL USE PERMIT

INSTRUMENT # 301377
VALLEY COU. , CASCADE, IDAHO
5-5-2010 03:11:10 No. of Pages: 4
Recorded for : VALLEY COUNTY PLANNING & ZONING
ARCHIE N. BANBURY Fee: 0.00
Ex-Officio Recorder Deputy
Index to: ROAD DEVELOPMENT AGREEMENT

Wild Wings Subdivision

ROAD DEVELOPMENT AGREEMENT

THIS AGREEMENT is made this 3rd day of May, 2010, by and between Rodney A. Higgins and Christine Higgins (Husband and Wife) whose address is P.O. Box 8567, Boise, Idaho 83707, the **Developer** of that certain Project in Valley County, Idaho, known as Wild Wings Subdivision and **Valley County**, a political subdivision of the State of Idaho, (hereinafter referred to as "Valley County").

RECITALS

Developer has submitted a subdivision application to Valley County for approval of a 46 lot residential development known as Wild Wings Subdivision.

Through the development review of this application, Valley County identified certain unmitigated impacts on public services and infrastructure reasonably attributable to the Project.

Developer has agreed to participate in the cost of mitigating these impacts by contributing its proportionate fair share of the cost of the needed improvements identified in this Agreement and listed on the attached Exhibit A.

Valley County and the Developer desire to memorialize the terms of their agreement regarding the Developer's participation in the funding of certain of the aforesaid improvements.

AGREEMENT

Therefore, it is agreed as follows:

1. *Capital Improvement Program*: A listing and cost estimate of the Kantola/Day Star Area 2007 Roadway Capital Improvement Program, incorporating construction and right-of-way needs for the project area (see map, Exhibit B) is attached as Exhibit A.

2. *Proportionate share*: Developer agrees to a proportionate share of the road improvement costs attributable to traffic generated by the Wild Wings Subdivision as established by Valley County. Currently this amount has been calculated by the Valley County Engineer to be $339.00 per average daily vehicle trip generated by the Project. Refer to Exhibit A for details of the Kantola/Day Star Area 2007 Capital Improvement Program Cost Estimate. Road impact mitigation may be provided by Developer either through the contribution of money or capital offsets such as right-of-way or in-kind construction. Such an offset to the road improvements is addressed in paragraph 3 of this Agreement.

EXHIBIT B

3. *Capital contribution*: Valley County and the Developer hereby agree that the addition of Wild Wings Subdivision will generate an additional 368 vehicle trips per day. The Developer agrees to pay the sum of $339.00 per vehicle trip. The Developer's proportionate share of road improvement identified in Exhibit A for the generated 368 vehicle trips per day is $124,752.00 less the following offsets:

   Seventy (70') feet of dedicated road right-of-way (ROW) along Day Star Lane, throughout the project boundary, shall be depicted on the Final Plat and more specifically described as: ROW (width varies) east and west of the centerline of Day Star Lane within the project boundary. At $20,000.00 per acre, the total value of the 0.64 acres (provided by applicant) of dedicated ROW to the project is $12,800.00.

   The Developer has acquired Road Development Credits in the amount of $116,020.00 from Higgins Family Real Estate, LP (HFR) (see Exhibit C Attached). The Developer agrees to relinquish the Road Development Credits in the amount of $111,952.00 at the time of Final Plat Approval.

   The Developer agrees that the Road Development Credits ($111,952.00) and the value of the dedicated Road Right-of-Way ($12,800.00) a total of $124,752.00 is to pay the Developers proportional share of roadway costs. The Developer will have a remaining balance of $4,068.00 of Road Development Credits after Final Plat of Wild Wings Subdivision.

4. The contributions made by Developer to Valley County pursuant to the terms of this Agreement shall be segregated by Valley County and earmarked and applied only to the project costs of the road improvement projects specified in Exhibit A or to such other projects as are mutually agreeable to the parties.

5. The sale by Developer of part or all of the Project prior to the platting thereof shall not trigger any payment or contribution responsibility. However, in such case, the purchaser of such property, and the successors and assigns thereof, shall be bound by the terms of this Agreement in the same respect as Developer, regarding the property purchased.

6. *Recordation*: It is intended that Valley County will record this Agreement. The intent of the recordation will be to document the official aspect of the contractual obligation set forth in this Agreement. This Agreement will not in any way establish a lien or other interests in favor of Valley County as to any real property owned by the Developer at the time of recording, or any real property that may be acquired by the Developer on any date after the recording of this Agreement.

Rodney A. Higgins and Christine Higgins (husband and Wife)

By: _____ Date: 4/30/10

By: _____ Date: 4/30/10

STATE OF IDAHO)
) **ss.**
COUNTY OF Ada)

On this 30th day of APRIL 2010, before me TERESA A AUSTIN the undersigned, a Notary Public in and for said State, personally appeared Rodney A Higgins, Christine Higgins and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

_____
Notary Public for Idaho

Residing at: 1834 S. Labrador Pl
Meridian ID

My Commission Expires: 3/7/2011

VALLEY COUNTY BOARD OF COMMISSIONERS:

By: _____ Date: 5-3-10

Commissioner/Chairman Gerald "Jerry" Winkle

By: _____ Date: 5-3-10

Commissioner Gordon L. Cruickshank

By: _____ Date: 5-3-10

Commissioner F. W. Eld

ATTEST:

VALLEY COUNTY CLERK:

_____ Date: 5/3/2010

Archie N. Banbury

STATE OF IDAHO)

) ss.

COUNTY OF VALLEY)

On this 5th day of May 2010, before me, Nancy H Stathis, the undersigned, a Notary Public in and for said State, personally appeared Gerald "Jerry" Winkle, Gordon Cruickshank, FW-Eld, Archie N. Banbury and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

_____

Notary Public for Idaho

Residing at: McCall Id

_____

My Commission Expires: 6/5/2014

NANCY H. STATHIS NOTARY PUBLIC STATE OF IDAHO

351376

Instrument # 351376
VALLEY COUNTY, CASCADE, IDAHO
5-5-2010 03:08:58 No. of Pages: 2
Recorded for : FODREA LAND GROUP INC
ARCHIE N. BANBURY Fee: 6.00
Ex-Officio Recorder Deputy
Index to: DEEDS

DAY STAR LANE
DEDICATION DEED
FOR ROAD, STREET AND UTILITY PURPOSES

This DEDICATION is made this 18 day of March, 2010, by RODNEY A. HIGGINS AND W. CHRISTINE HIGGINS, the owners of certain lands located in Valley County, Idaho, which are platted as Wild Wings Subdivision.

WHEREAS, Rodney A. Higgins and W. Christine Higgins did on the 4th day of May, 2010, file of record with the Office of Recorder of Valley County, Idaho, as Instrument No. 351369 in Plat Book 12, on Page 45, the Final Plat for Wild Wings Subdivision.

WHEREAS, RODNEY A. HIGGINS AND W. CHRISTINE HIGGINS, Owners of the Wild Wings Subdivision do hereby dedicate to the public a perpetual right-of-way for street, road and utility purposes on, over, across, under, along and within Day Star Lane in portions of the Wild Wings Subdivision in Valley County, Idaho.

This dedication of right-of-way consists of 0.64 acres to increase the Day Star Lane public right-of-way from 50 feet of width to 70 feet of width within the boundary of Wild Wings Subdivision.

To have and to hold the above-described and dedicated rights to the public forever for the purposes stated above.

The grantors hereby attest that they are the owner in fee simple and the property is free of all liens and encumbrances, and they have good and legal right to grant the above-described rights.

IN WITNESS WHEREOF, the undersigned Owners of the real property which is the subject of the Final Plat, have executed this Dedication the day and year first above noted.

RODNEY A. HIGGINS

W. CHRISTINE HIGGINS

STATE OF IDAHO)
)SS:
COUNTY OF Ada)

On this 18th day of Feb, 2010 before me appeared, Rodney A. Higgins, who acknowledged to me that he executed the within instrument as an owner of the Wild Wings Subdivision.

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

Stacy Jayo

NOTARY PUBLIC FOR IDAHO
Residing at: Emmett Id

My Commission Expires: 10/29/2010

STATE OF IDAHO)
)SS:
COUNTY OF Ada)

On this 18th day of Feb, 2010 before me appeared W. Christine Higgins, who acknowledged to me that she executed the within instrument as an owner of the Wild Wings Subdivision.

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

Stacy Jayo

NOTARY PUBLIC FOR IDAHO
Residing at: Emmett Id

My Commission Expires: 10/29/2010

ROAD DEVELOPMENT CREDIT TRANSFER AGREEMENT # 1

Clover Valley Properties, LLC, to Higgins Family Real Estate, LP

THIS AGREEMENT is made this 20 day of March, 2009, by and between Clover Valley Properties, LLC **(Clover Valley)**, whose address is 12765 State Highway 55, Donnelly, Idaho, 83615, and Higgins Family Real Estate, LP **(HFR)**, whose address is P.O. Box 8567, Boise, Idaho, 83707, and **Valley County**, a political subdivision of the State of Idaho.

RECITALS

Clover Valley has accrued certain roadway development credits with Valley County under the Davis Creek Lane Extension Road Development Agreement (Valley County Instrument No. 331200). Those credits are transferable to other entities per the terms of the aforementioned Road Development Agreement.

Clover Valley has offered to transfer road development credits to HFR and HFR has agreed to purchase these credits. HFR has agreed to purchase $107,616 of development credits from Clover Valley.

Clover Valley, HFR, and Valley County desire to memorialize the terms of this transfer.

AGREEMENT

Therefore, it is agreed as follows:

1. *Transfer*: Clover Valley agrees to transfer $107,616 of credits to HFR as agreed upon between Clover Valley and HFR. The transfer will become effective upon recordation of this agreement.

2. *Effect of transfer*:

   a. The current value of Clover Valley's allowed transferrable credits is $127,564.41. Under this Agreement Clover Valley's credits will be reduced from the current value by $107,616, leaving an allowed transferrable credit balance of $19,948.41.

   b. A credit of $107,616 is established for HFR with the understanding that the credited dollar amount will be used to mitigate future Road Development Agreement costs as determined by and payable to Valley County. The most current adopted Capital Improvement Plan (CIP) shall be utilized to value transferred credits. The credits may not be re-transferred to a third-party without the written consent of Valley County.

EXHIBIT C

Instrument # 338911
VALLEY COUNTY, CASCADE, IDAHO
3-23-2009 03:37:23 No. of Pages: 5
Recorded for : VALLEY COUNTY ROAD DEPARTMENT
ARCHIE N. BANBURY Fee: 0.00
Ex-Officio Recorder Deputy Tawny Gilgreen
Index to: COUNTY MISC

3. *Expiration*: HFR and Valley County agree that all unused credits shall expire on April 28, 2018, ten (10) years from the recorded date for the Davis Creek Lane Extension Road Development Agreement. Expired credits shall have no cash value.

4. *Retention of Credits*: In the event that Valley County amends, terminates, or otherwise modifies the nature and use of Road Development Agreements and their credits, these credits transferred to HFR will retain their dollar value and may be applied towards other development costs as determined by and payable to Valley County.

5. *Recordation*: It is intended that Valley County will record this Agreement. The intent of the recordation will be to document the official aspect of the contractual obligation set forth in this Agreement. This Agreement will not in any way establish a lien or other interests in favor of Valley County as to any real property owned by HFR at the time of recording, or any real property that may be acquired by HFR on any date after the recording of this Agreement.

Ken Roberts (Clover Valley), Owner

By: _____ Date: 3/20/09

Higgins Family Real Estate, LP, Owner

By: _____ Date: 3/20/09

VALLEY COUNTY BOARD OF COMMISSIONERS:

By: _____ Date: 03-23-09

Commissioner/Chairman Jerry Winkle

By: _____ Date: 3-23-09

Commissioner F. W. Eld

By: _____ Date: March 23, 2009

Commissioner Gordon L. Cruickshank

ATTEST:

VALLEY COUNTY CLERK:

_____ Date: 3/23/09

Archie N. Banbury

STATE OF IDAHO)
) ss.
COUNTY OF ~~VALLEY~~ Ada)

On this 20th day of March 2009, before me, Staci L Jayo the undersigned, a Notary Public in and for said State, personally appeared Rodney A Hoffner and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Staci L Jayo
Notary Public for Idaho

Residing at: Emmett, Id

My Commission Expires: 10/29/2010

STACI L. JAYO NOTARY PUBLIC STATE OF IDAHO

STACI L. JAYO NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)
) ss.
COUNTY OF ~~VALLEY~~ Ada)

On this 20th day of March 2009, before me Staci L Jayo, the undersigned, a Notary Public in and for said State, personally appeared Ken Roberts and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Staci L Jayo
Notary Public for Idaho

Residing at: Emmett, Id

My Commission Expires: 10/29/2010

STACI L. JAYO NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 23rd day of March 2009, before me, Nancy H Stathis, the undersigned, a Notary Public in and for said State, personally appeared Jerry Winkle and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Nancy H Stathis
Notary Public for Idaho

Residing at: McCall ID

My Commission Expires: 6-5-2014

NANCY H. STATHIS NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 23rd day of March 2009, before me, Nancy H Stathis, the undersigned, a Notary Public in and for said State, personally appeared F W Eld and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Nancy H Stathis
Notary Public for Idaho

Residing at: McCall ID

My Commission Expires: 6-5-2014

NANCY H. STATHIS NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 23rd day of March 2009, before me, Nancy H Stathis the undersigned, a Notary Public in and for said State, personally appeared Gordon L Cruickshank and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Nancy H Stathis
Notary Public for Idaho

Residing at: McCall ID

My Commission Expires: 6-5-2014

NANCY H. STATHIS NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 23rd day of March 2009, before me, Nancy H Stathis, the undersigned, a Notary Public in and for said State, personally appeared Archie N Banbury and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Nancy H Stathis
Notary Public for Idaho

Residing at: M Call ID

My Commission Expires: 6-5-2014

NANCY H. STATHIS NOTARY PUBLIC STATE OF IDAHO

ROAD DEVELOPMENT CREDIT TRANSFER AGREEMENT # 2

Clover Valley Properties, LLC, to Higgins Family Real Estate, LP

THIS AGREEMENT is made this 20 day of March, 2009, by and between Clover Valley Properties, LLC (**Clover Valley**), whose address is 12765 State Highway 55, Donnelly, Idaho, 83615, and Higgins Family Real Estate, LP (**HFR**), whose address is P.O. Box 8567, Boise, Idaho, 83707, and **Valley County**, a political subdivision of the State of Idaho.

RECITALS

Clover Valley has accrued certain roadway development credits with Valley County under the Davis Creek Lane Extension Road Development Agreement (Valley County Instrument No. 331200). Those credits are transferable to other entities per the terms of the aforementioned Road Development Agreement.

Clover Valley has offered to transfer road development credits to HFR and HFR has agreed to purchase these credits. HFR has agreed to purchase $8,404 of development credits from Clover Valley.

Clover Valley, HFR, and Valley County desire to memorialize the terms of this transfer.

AGREEMENT

Therefore, it is agreed as follows:

1. *Transfer*: Clover Valley agrees to transfer $8,404 of credits to HFR as agreed upon between Clover Valley and HFR. The transfer will become effective upon recordation of this agreement.

2. *Effect of transfer*:

   a. The current value of Clover Valley's allowed transferrable credits is $19,948.41. Under this agreement Clover Valley's credits will be reduced from the current value by $8,404, leaving an allowed transferrable credit balance of $11,544.41.

   b. A credit of $8,404 is established for HFR with the understanding that the credited dollar amount will be used to mitigate future Road Development Agreement costs as determined by and payable to Valley County. The most current adopted Capital Improvement Plan (CIP) shall be utilized to value transferred credits. The credits may not be re-transferred to a third-party without the written consent of Valley County.

Instrument # 339010
VALLEY COUNTY, CASCADE, IDAHO
3-23-2009 03:23:35 No. of Pages: 8
Recorded for : VALLEY COUNTY ROAD DEPARTMENT
ARCHIE N. BANBURY Fee: 0.00
Ex-Officio Recorder Deputy Trudy Elguren
Index to: COUNTY MISC

3. *Expiration*: HFR and Valley County agree that all unused credits shall expire on April 28, 2018, ten (10) years from the recorded date for the Davis Creek Lane Extension Road Development Agreement. Expired credits shall have no cash value.

4. *Retention of Credits:* In the event that Valley County amends, terminates, or otherwise modifies the nature and use of Road Development Agreements and their credits, these credits transferred to HFR will retain their dollar value and may be applied towards other development costs as determined by and payable to Valley County.

5. *Recordation*: It is intended that Valley County will record this Agreement. The intent of the recordation will be to document the official aspect of the contractual obligation set forth in this Agreement. This Agreement will not in any way establish a lien or other interests in favor of Valley County as to any real property owned by HFR at the time of recording, or any real property that may be acquired by HFR on any date after the recording of this Agreement.

Ken Roberts (Clover Valley), Owner

By: _____ Date: 3/20/09

Higgins Family Real Estate, LP, Owner

By: _____ Date: 3/20/09

VALLEY COUNTY BOARD OF COMMISSIONERS:

By: _____ Date: 03-23-09

Commissioner/Chairman Jerry Winkle

By: _____ Date: 3-23-09

Commissioner F. W. Eld

By: _____ Date: MARCH 23, 2009

Commissioner Gordon L. Cruickshank

ATTEST:

VALLEY COUNTY CLERK:

_____ Date: 3/23/09

Archie N. Banbury

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 23rd day of March 2009, before me, Nancy H Stathis, the undersigned, a Notary Public in and for said State, personally appeared Ken Roberts and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Nancy H Stathis
Notary Public for Idaho

Residing at: McCall ID

My Commission Expires: 6-5-2014

NANCY H. STATHIS NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 20th day of March 2009, before me, Nancy H Stathis the undersigned, a Notary Public in and for said State, personally appeared Rodney A Higgins and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Nancy H. Stathis
Notary Public for Idaho

Residing at: McCall ID

My Commission Expires: 6-5-2014

NANCY H. STATHIS NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 23rd day of March 2009, before me, Nancy H Stathis, the undersigned, a Notary Public in and for said State, personally appeared Jerry Winkle and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Nancy H. Stathis
Notary Public for Idaho

Residing at: McCall ID

My Commission Expires: 6-5-2014

NANCY H. STATHIS NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 23rd day of March 2009, before me, Nancy H Stathis, the undersigned, a Notary Public in and for said State, personally appeared F-W Eld and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Nancy H Stathis
Notary Public for Idaho

Residing at: McCall ID

My Commission Expires: 6-5-2014

NANCY H. STATHIS NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 23rd day of March 2009, before me, Nancy H Stathis the undersigned, a Notary Public in and for said State, personally appeared Gordon L Cruickshank and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Nancy H Stathis
Notary Public for Idaho

Residing at: McCall ID

My Commission Expires: 6-5-2014

NANCY H. STATHIS NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 23rd day of March 2009, before me, Nancy H Stathis, the undersigned, a Notary Public in and for said State, personally appeared Archie N Bankemy and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Nancy H Stathis
Notary Public for Idaho

Residing at: M'Call ID

My Commission Expires: 6-5-2014

NANCY H. STATHIS NOTARY PUBLIC STATE OF IDAHO

Instrument # 343694
VALLEY COUNTY, CASCADE, IDAHO
7-27-2009 02:07:24 No. of Pages: 6
Recorded for : VALLEY COUNTY
ARCHIE N. BANBURY Fee: 0.00
Ex-Officio Recorder Deputy
Index to: COUNTY MISC

ROAD DEVELOPMENT CREDIT TRANSFER AGREEMENT #3

Clover Valley Properties, LLC, to Robert W. Fodrea and John E. Rennison

THIS AGREEMENT is made this 27th day of July, 2009, by and between Clover Valley Properties, LLC (**Clover Valley**), whose address is 12765 State Highway 55, Donnelly, Idaho 83615; and Robert W. Fodrea, whose address is P.O. Box 188, Cascade, Idaho 83611; and John E. Rennison, whose address is P.O. Box 100, Horseshoe Bend, Idaho 83629 (collectively).

RECITALS

Clover Valley has accrued certain roadway development credits with Valley County under the Davis Creek Extension Road Development Agreement (Valley County Instrument No. 331200). Those credits are transferable to other entities per the terms of the aforementioned Road Development Agreement.

Clover Valley has offered to transfer Road Development Credits to Robert W. Fodrea and John E. Rennison (collectively). Robert W. Fodrea and John E. Rennison have agreed to purchase $11,544.41 of these Development Credits from Clover Valley.

Clover Valley, Robert W. Fodrea and John E. Rennison (collectively), and Valley County desire to memorialize the terms of this transfer.

AGREEMENT

Therefore, it is agreed as follows:

1. *Transfer*: Clover Valley agrees to transfer $11,544.41 of credits to Robert W. Fodrea and John E. Rennison (collectively), as agreed upon between Clover Valley and Robert W. Fodrea and John E. Rennison (collectively). The transfer will become effective upon recordation of this agreement.

2. *Effect of transfer:*

   a. The current value of Clover Valley's allowed transferable credits are $11,544.41. Under this Agreement, Clover Valley's credits will be reduced from the current value by $11,544.41, leaving an allowed transferable credit balance of $0.00 (zero).

   b. A credit of $11, 544.41 is established for Robert W. Fodrea and John E. Rennison (collectively), with the understanding that the credited dollar

amount will be used to mitigate future Road Development Agreement costs as determined by and payable to Valley County. The most current adopted Capital Improvement Plan (CIP) shall be utilized to value transferred credits. The credits may not be retransferred to a third-party without the written consent of Valley County.

3. *Expiration:* Robert W. Fodrea and John E. Rennison(collectively) and Valley County agree that all unused credits shall expire on April 28, 2018, ten (10) years from the recorded date for the Davis Creek Lane Extension Road Development Agreement. Expired credits shall have no cash value.

4. *Retention of Credits*: In the event that Valley County amends, terminates, or otherwise modifies the nature and use of Road Development Agreements and their credits, these credits transferred to Robert W. Fodrea and John E. Rennison (collectively) will retain their dollar value and may be applied towards other development costs as determined by and payable to Valley County.

5. *Recordation:* It is intended that Valley County will record this Agreement. The intent of the recordation will be to document the official aspect of the contractual obligation set forth in this Agreement. This Agreement will not in any way establish a lien or other interests in favor of Valley County as to any real property owned by Robert W. Fodrea and John E. Rennison (collectively) at the time of recording, or any real property that may be acquired by Robert W. Fodrea and John E. Rennison (collectively) on any date after the recording of this agreement.

Ken Roberts (Clover Valley), Owner

By: _____ Date: 7-24-09

Robert W. Fodrea

By: _____ Date: 7-16-09

John E. Rennison

By: _____ Date: 7/16/09

VALLEY COUNTY BOARD OF COMMISSIONERS:

By: _____ Date: 7-27-09

Commissioner/Chairman Gerald "Jerry" Winkle

By: _____ Date: _____

Commissioner F. W. Eld

By: _____ Date: July 27, 2009

Commissioner Gordon L. Cruickshank

ATTEST:

VALLEY COUNTY CLERK:

_____ Date: 7/27/09

Archie N. Banbury

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 16 day of July 2009 ~~2008~~, before me, Jennifer L. Ford the undersigned, a Notary Public in and for said State, personally appeared Robert W. Fodrea and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Jennifer L. Ford
Notary Public for Idaho

Residing at: Cascade, Id

My Commission Expires: 1/21/11

JENNIFER L. FORD NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 16 day of July 2009 ~~2008~~, before me, Jennifer L. Ford the undersigned, a Notary Public in and for said State, personally appeared John E. Rennison and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Jennifer L. Ford
Notary Public for Idaho

Residing at: Cascade, Id

My Commission Expires: 1/21/11

JENNIFER L. FORD NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)

) ss.

COUNTY OF VALLEY)

On this 27th day of July 2009 ~~2008~~, before me, Debra Gaither, the undersigned, a Notary Public in and for said State, personally appeared Ken Roberts and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Debra Gaither
Notary Public for Idaho

Residing at: Cascade ID

My Commission Expires: 1-15-10

DEBRA GAITHER NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)

) ss.

COUNTY OF VALLEY)

On this 27th day of July 2009, before me, Nancy H Stathis the undersigned, a Notary Public in and for said State, personally appeared Gerald Winkle and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Nancy H Stathis
Notary Public for Idaho

Residing at: McCall, IDAHO

My Commission Expires: 6-5-2014

NANCY H. STATHIS NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 27th day of July 2008, before me, Nancy H Stathis the undersigned, a Notary Public in and for said State, personally appeared Gordon L Cruickshank and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Nancy H Stathis
Notary Public for Idaho

Residing at: McCall, Id.

My Commission Expires: 6-5-2014

NANCY H. STATHIS NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 27th day of July 2008, before me, Nancy H Stathis the undersigned, a Notary Public in and for said State, personally appeared Archie N. Banbury and acknowledged to me that they executed the same.

In witness whereof, I have unto set my hand and affixed my official seal the day and year first above written.

Nancy H Stathis
Notary Public for Idaho

Residing at: McCall Id.

My Commission Expires: 6-5-2014

NANCY H STATHIS NOTARY PUBLIC STATE OF IDAHO